

# Australian laws violate children's rights

Cheryl McDermid  
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The Carr Labor Party government in New South Wales has introduced legislation over the past five years that violates basic democratic and human rights, particularly those of children and young people. The violations include curtailing the right to free assembly, discriminating against youth who have committed no crime, increasing the time of detention before being charged and strengthening the rights of police to strip search.

A report entitled *Youth Street Rights—A Policy and Legislation Review* has found that a number of the laws also breach Articles contained in the United Nations Convention on the Rights of the Child (CROC). The report, authored by Tim Anderson, Steve Campbell and Sheree Turner, was sponsored jointly by the University of Technology Sydney's Community Law and Legal Research Centre and the Youth Justice Coalition.

The Australian government signed CROC in December 1991 and it has been signed by every other nation except the USA and Somalia. However, international laws are not binding or enforceable in Australia unless they are enacted into state or federal legislation—a process that has been resisted by Liberal and Labor governments alike.

The report notes that in the 1995 case of *Teoh*—a deportation case—the High Court read into administrative law the CROC requirements that: “In all actions concerning the children... the best interest of the child shall be a primary consideration.” The court affirmed that: “Australia's ratification of the Convention can give rise to a legitimate expectation that the decision-maker will exercise that discretion in conformity with the terms of the convention.” Yet, far from that expectation becoming law, two successive federal governments, Labor and Liberal, declared their intention to legislate against this common law recognition of rights derived from international law.

A Senate inquiry in 1997 produced bipartisan support for the *Administrative Decisions (Effect of International Instruments) Bill*, which seeks to block all common law recognition of Australia's human rights obligations.

Before examining the Carr government's legislation, the report explains that human rights must be universal and inalienable. “They cannot be diminished by a person's individual misconduct, or an individual's failure to respect the rights of others...Attempts to ‘link’ individual rights with individual responsibilities must be fundamentally corrosive to the fabric of universal human rights.”

The report also probes the perception presented in the media that juvenile crime is escalating. It shows that young people are generally not over-represented in reported offending groups. In fact, juveniles (aged between 10 and 17 years) make up 11 percent of the population and constitute 12 percent of the offending population.

Only 2 percent of juveniles come into contact with the criminal justice system. Moreover, 70 percent of young offenders do not reappear after the first appearance. Serious violence offences constitute less than 1 percent of all charges finalised, with theft offences making up the largest proportion. Half the assaults are committed against other juveniles of the same age bracket. Group assaults are rare.

Yet youth are significantly over-represented in groups targeted by

police, with Aboriginal and some immigrant youth faring the worst. “Indigenous children and young people are extremely over-represented at all levels of the juvenile justice system. Many law and order policies in recent times, including substantial police powers, have been directed at indigenous children and young people...”

Aboriginal youth are 129 percent more likely to have bail refused than white children. Aboriginal juveniles suffer a 25.8 percent incarceration rate and are 13 times over-represented in the criminal system. Also over-represented are Indo-Chinese, Lebanese, Pacific Islander and Maori youth. And they are more likely to be searched, arrested and injured in their contact with police. Increased police harassment saw the tripling of written complaints by youth to the Ombudsman in 1996-7.

The report commented that the impact of the criminal legal system on young people may contribute to juvenile crime. In effect, the police decide which young people enter the criminal justice system and on what terms. Many charges laid against young people are “good order” charges that arise out of the interaction with police, rather than any criminal behaviour prior to that interaction.

This is also the case with security guards in shopping centres, railway stations and parks. The security industry has proliferated, creating a private police force that mainly targets young people. Large shopping malls allow public access but are owned and controlled by private enterprise. “Private property rights are thus protected and enforced, often aggressively, by security guards...Generally, the powers of arrest possessed by security guards are no different to those of ordinary citizens. Security guards have no additional powers to search or question individuals and individuals detained by security guards don't have to answer any questions (Morey 1991). Yet security guards, acting on behalf of property owners, do assume such powers.” They are able to exclude “wrongdoers” from their premises without resorting to the legal system.

The report reviews four pieces of legislation enacted in 1997-98.

*The Children (Protection and Parental Responsibility) Act 1997* establishes that parents or guardians are deemed to have committed an offence if they allow a child to offend. This contravenes the maxim of natural justice that only the person who commits an offence can be held accountable for it. To hold parents criminally liable for unsupervised children is a violation of the parents' rights.

The Act also gives police additional powers to detain young people. Police can remove children under the age of 16 from a public place if they reasonably believe that the child is not being supervised by a responsible adult or is “at risk” of injury or harmful behaviour or is likely to commit an offence.

The report states that this law violates human rights by discriminating against young people for whom public space is a normal environment. It contravenes the first principle of criminal law that police should only be empowered to arrest or detain those reasonably suspected of having committed or having attempted to commit an offence. This law denies freedom of association and freedom of peaceful assembly. In addition, it enables police to monitor youth behaviour that is not criminal.

*The Crimes Amendment (Detention After Arrest) Act 1997* was the outcome of police demands on the government to legitimise the practice

of holding suspects for questioning before charges are laid. The Act allowed police to detain a person for four hours, not including "time outs" for "travelling time, waiting for the arrival of police officers, time at the bathroom, and time for the suspect to communicate with a lawyer or friend. These time-outs can double the detention time. A detention warrant can be issued by a magistrate, to extend the four hours by 'up to eight hours'."

The legal profession's association, the Law Society of NSW, criticised the *Detention After Arrest Act* for granting police "far greater powers than those they currently have". The Society unsuccessfully sought a reduction of the four-hour maximum to two hours. The Council for Civil Liberties also condemned the Act, saying that the Bill extended police powers with no substantial rights for suspects. This was critical because "the potential for unreliable 'confessions' (the prime objective of detention) increases with time in police custody. Videotaping has not solved this problem, because of (i) threats, inducements and alleged 'confessions' outside the videotaped period, and (ii) lack of access to independent legal advice."

The rights of the suspect depend on lawyers being available for legal advice and support 24 hours a day. However, cuts to Legal Aid mean there is no 24-hour duty solicitor available. Yet most people arrested are poor and cannot afford a private solicitor. The right to remain silent has been under attack by police and prosecutors alike, with the Director of Public Prosecutions Nicholas Cowdrey on record saying: "There is no right to silence."

The NSW police routinely strip-search both children and adults, and this power remains intact in the Act. The report states that the Act breaches human rights as outlined in CROC and the International Covenant on Civil and Political Rights, which prohibits arbitrary and unlawful detention of children and interference with their privacy by routine strip searches.

The purported aim of *The Young Offenders Act 1997* was to stop young people becoming caught up in the justice system, by substituting police warnings and cautions and conferencing for court appearances. The opposite has been the result—the arrest rate of juveniles has doubled.

One provision of the Act involves the offender facing his victim. However, a child must admit guilt before being cautioned. If they do, they give up their right to due process. Persuading a child to admit guilt when in the presence of an authority figure is not difficult. The child simply wants to get out of the police station. And, again, lack of access to affordable and immediate legal advice renders any so-called "rights of the accused" baseless.

*The Crimes Legislation Amendment (Police and Public Safety Act) 1998* arose from the "anti-gang" policy of the Labor Party leading up to the 1995 state elections.

This Act enables police to force young people to move from a public place when no crime has been committed. If the police feel that a third party is in fear or likely to be in fear of the actions of the youth, the police can force the children to move. This "move-on" law is based on the alleged subjective feelings of a third party, not the actions of the persons being moved on. The third party does not even have to be present for the police to decide they would feel fear.

The Act amends the *Summary Offences Act 1997* and creates a range of new offences, including custody of a knife in a public place or a school, without a reasonable excuse, the sale of a knife to someone under 16, refusing a body search and refusing to supply identification. It also allows police to search for "knives and other dangerous implements" in public places and schools, including school lockers, and empowers police to demand ID from young people suspected of possessing alcohol.

The Act states that "the fact that a person is present in a location with a high incidence of violent crimes may be taken into account in determining whether there are reasonable grounds to suspect that the person has a dangerous implement in his or her custody."

This legislation breaches democratic and human rights when it seeks to proscribe public gatherings where there is no actual threat produced by those present. It interferes with a person's liberty and privacy when location is the only grounds for suspicion. It also extends the right of police to "stop and search".

According to the report: "Labor's 'anti-gang' strategy, part of its broader law and order strategy, argued the need to fight youth gang activity. The aim of the strategy was said to 'ensure that people can go about their business without being impeded, threatened or intimidated by gang behaviour'."

This perception, created by the Labor Party with the help of the media, is refuted by many studies into gang behaviour and crime. Even consultants to the NSW Police Service stated:

"The hot spots [of gang activity] do not correlate well with incidents of assault, robbery, breaking and enter, stealing, malicious damage or offensive behaviour... the lack of correlation is overwhelming. This lack of correlation between gang location and crimes supports the premise that most gangs are not great contributors to crimes. (Pulse Consultants 1994: 7&13)"

*Youth Street Rights—A Policy and Legislation Review* calls for the repeal of sections of the legislation and amendment of others to meet the standards of the Convention of the Rights of the Child. It also advocates the appointment of human rights monitors to educate police and other state forces on the rights of children.

To the extent that the report analyses why such laws have been enacted, it attributes them to ignorance and confusion—to the personal failings of particular authorities. But this cannot explain why the same process is underway in virtually every country. Deteriorating living standards for millions of people are being met with increasingly repressive laws by governments of all political persuasions. Why against society's youngest? To ensure that from the earliest age, they become accustomed to the interference of the state in virtually every aspect of life, in order to suppress any possibility of critical thought or dissent, to which the young are especially prone.

The introduction of these laws, and the associated breaches of democratic and human rights, constitute a damning indictment of the present social order. That the United Nations, in the last decade of the 20th century, is obliged to compile a human rights charter for children is itself testament to the diminishing rights of children globally. The re-emergence of child labour, child prostitution, ill-health and illiteracy has forced the UN to document rights that in any progressive society would be taken for granted.



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