Are we there yet?
Do the Victorian, NSW and ACT youth conferencing programs comply with the United Nations Convention on the Rights of the Child?

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A thesis submitted for the degree of *Doctor of Philosophy* at
Monash University in 2022
Faculty of Law

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Abtsract

This thesis investigates whether the youth justice conferencing programs in New South Wales, Victoria and the ACT are compliant with the UN Convention on the Rights of the Child (CRC). It examines youth conferencing programs within the field of restorative justice, and the place of restorative justice within youth justice more generally. Although the entire CRC applies to youth conferencing, this thesis assesses the conferencing programs against three of the four core principles of the Convention, namely the right to non-discrimination (Article 2), the best interests of the Child (Article 3) and the right to respect for the views of the child (Article 12) together with the child justice rights contained in Article 40.

The evolution of restorative justice and youth conferencing has been contemporaneous with the evolution of children's rights, but this has not meant that the conferencing programs respect, protect and fulfil the rights of child offenders. This research explores whether existing conferencing programs ensure equal access and equal benefit/outcomes to all children, including more vulnerable children, such as, Indigenous youth.

This research identifies that there is an inherent tension in any model of conferencing between the Article 3 CRC best interests of the child and the interests of victims and the community that form a core foundational pillar of restorative justice. This thesis considers whether youth conferencing can be adapted to protect the best interests of the child, without losing focus on the interests of the victim and community.

Youth conferencing requires the involvement of the child offender throughout the conference process, which can include meeting directly with others affected by the child's conduct, including victims. This research analyses whether current programs in the three jurisdictions are sufficiently attuned to recognise a child's individual level of maturity and development, and the child's right to express their views and participate in accordance with their wider child justice rights.

After finding that existing youth conferencing programs do not comply with the standards set out in the CRC, this thesis proposes reforms that would allow youth conferencing to achieve

its restorative justice aims whilst also recognising and respecting the rights of the child offender. The Children's Rights Informed Conferencing (CRIC) Model enables conferencing to be undertaken in a manner that ensures a substantive application of children's rights. The CRIC Model is built around the practical application of core principles of the CRC to the four stages of a youth conference. It adopts positive features from each of the programs. Ultimately, the thesis concludes that with appropriate adaptions, it is possible to harmonise youth conferencing programs with the CRC.

Declaration

This thesis contains no material which has been accepted for the award of any other degree or diploma at any university or equivalent institution and that, to the best of my knowledge and belief, this thesis contains no material previously published or written by another person, except where due reference is made in the text of the thesis.

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Date: 11 April 2022

Acknowledgements

This thesis would not have been possible without the support of a number of people.

First, I wish to express my deep gratitude and respect for my supervisor, Professor Paula Gerber for her wise counsel, patience, motivation, knowledge and friendship during the research and writing of this thesis. Her unconditional understanding, support and guidance, including during very difficult personal times cannot be underestimated. I could not have had a better advisor and mentor.

I also wish to thank my second supervisor, Dr Stephen Gray, not only for sound guidance and advice, but also for being a supportive and collegial teaching colleague during my lecturing years at Monash. In this respect, I also thank the many students whom I have taught – your questions and comments in lectures and tutorials would occasionally trigger new thoughts and ideas about how to approach different aspects of my research.

I would like to thank Emeritus Professor Arie Freiburg AM for early guidance on my topic, structure and approach.

I thank my good friends Karen and Haydn Hamilton for opening your home to my mother and I in my early years in Melbourne, and for your ongoing friendship through the years. I thank Elaine Vignoli whose care and support from afar cannot go unmentioned – it is hard to believe that it is 15 years since we met as baby barristers at Middle Temple in London. May your potatoes be forever buttered! I thank my good coffee friends, Kevin Pierce and John Cross for becoming my second adopted Melbourne family. I thank Pierre Harcourt for time away from Melbourne, whether in East Gippsland or along the Great Ocean Road. I thank Prudence Stone for your eagle eyes in proof reading and for being a wonderful colleague and friend at the College of Law.

I now turn to my family. I thank my sisters, Mérie, Phillippa and Fiona for your support and love. Fiona, I thank you especially for your wizardry with Microsoft Word. Nanny (Rose

Phyllis Jobson, 9 November 1911 – 5 February 2005), thank you for your love and care when I was growing up, especially in the years following the loss of my father.

Tinkerbell, your wagging tail, little cold black wet nose and pink tongue provided uncritical encouragement whenever I went home to the UK.

Terrance, like Tinkerbell, your wagging tail, little cold black wet nose and pink tongue provided much needed support over the difficult last 24 months of Covid.

My mother. My best friend. You set me on this journey to make a new life in Australia. You are part of this PhD too, and it breaks my heart that you passed away before it was finished. I know you are with me still.

Finally, I dedicate my PhD to my father and mother:

Alan Malcolm Davis (17 March 1943 – 10 November 1996).

Maureen Phyllis Davis (13 March 1940 – 19 June 2019).

I love you both and miss you terribly. I wish wholeheartedly that you could have been with me for the entirety of this journey.

With love.

Our youth now love luxury. They have bad manners, contempt for authority; they show disrespect for their elders and love chatter in place of exercise; they no longer rise when elders enter the room; they contradict their parents, chatter before company; gobble up their food and tyrannize their teachers.

– Aristophanes (Clouds, approx. 423 BCE)

Children are not the people of tomorrow, but are the people of today. They are entitled to be taken seriously. They have a right to be treated by adults with respect as equals. They should be allowed to grow into whoever they were meant to be – the unknown person inside each of them is the hope for the future.

– Janusz Korczak (Murdered in Treblinka, August 1942)

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CHAPTER 1

Youth Conferences and Children's Rights: Can they work together?

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1.1 Introduction

Since first being developed in New Zealand in the late 1980s, there has been a significant increase in the number of restorative justice conferencing programs around the world.[1] Indeed, every state and territory in Australia has developed a conferencing program as one response to youth offending, albeit under a variety of different names and models. Each program now operates on a legislative basis under the broader umbrella of the respective state or territory youth justice regime.[2] Some of the programs operate only with the imprimatur of a court as a dispositional outcome to criminal proceedings, while others operate as an alternative to a young person being charged and processed through the courts. Although the legislative and operational framework for each Australian conferencing program is unique to each jurisdiction, they are all expressly founded on principles of restorative justice.[3] Each Australian youth conferencing program reflects the following four general features:

1. a formalised process for the referral of a child offender to the program;

2. an out-of-court mediated process facilitated by a convenor who prepares and brings together the people directly involved in, or affected by, an offence. The purpose of this bringing together is to develop an outcome plan for reparation and integration;

3. targeted reparation ("creative restitution") by the child that is agreeable to the conference participants, aimed primarily at some direct reparation that involves the victim (where applicable) or the performance of a task by the offender, such as an apology or the child committing to completing a course of education or doing something to "make up" for the harm caused by their offending behaviour; and

[1] Lynch, N 'Restorative Justice through a Children's Rights Lens (2010) 18 *International Journal of Children's Rights* 161. See also UN Committee on the Rights of the Child *General Comment No. 24 (2019) Children's rights in the child justice system* CRC/C/GC/24, para 1, 17 74.

[2] For the relevant provisions, see *Crimes (Restorative Justice)* Act 2004 (ACT) ss37-60; *Young Offenders Act* 1997 (NSW) Part 5; *Children, Youth and Families Act 2005* (Vic) s415, and ss362(3), 362(4), 409F(2)(g), 414(1)(c); *Youth Justice Act* (NT) ss39(2)(c), 39(7), 64, 84; *Youth Justice Act* 1992 (Qld) Part 2 Div 3, Part 3; *Young Offenders Act* 1993 (SA) Part 2 Div 3, and ss7(1)(b), 7(4)(b), 8(7); *Youth Justice Act* 1997 (Tas) Part 2 Div 3, Part 4 Div 4.The *Young Offenders Act* 1994 (WA) does not refer to conferencing, instead providing that family 'meetings' can be held by Juvenile Justice Teams (Part 5 Div 2 and 3).

[3] See Chapter Two of this thesis for an overview of Restorative Justice and Chapter Three of this thesis for an overview of the legislative regime in each jurisdiction.

4. the opportunity for the (re)integration of the child into the community through their direct participation in the process and fulfilment of the agreed reparative outcome; a concept that has been described as reintegrative shaming.[4]

This thesis takes these four features to be the core markers of a restorative justice conference response to offending behaviour, as opposed to 'traditional' welfare or justice models of child justice.[5] These features are also consistent with the definition of restorative justice articulated by the United Nations Committee on the Rights of the Child (CRC Committee) in General Comment 24, published in September 2019:

> Restorative justice [is] any process in which the victim, the offender and/or any other individual or community member affected by a crime actively participates together in the resolution of matters arising from the crime, often with the help of a fair and impartial third party.[6]

Much of the literature surrounding conferencing programs, both within Australia and overseas, has focused on four main issues. The first is whether conferencing improves recidivism rates compared with non-restorative responses to child offending. The second considers the efficacy of these conferencing programs in terms of their compliance with the core principles of restorative justice including 'creative restitution' and 'reintegrative shaming'[7] (steps 3 and 4 above). The third commonly addressed issue is the cost/benefit analysis of the programs compared with other child justice processes, which includes considerations of restorative justice as an alternative to traditional models of 'justice' or 'welfare' models of youth criminal justice. The fourth area of scholarship considers victim satisfaction with restorative justice programs compared with mainstream processes. On each of these measures, the various Australian child justice conferencing programs have been assessed to perform generally as well

[4] Braithwaite, J *Crime, Shame, and Reintegration*. Cambridge: Cambridge University Press, 1989. See also Section 6 *Crimes (Restorative Justice) Act* 2004 (ACT) and *A Strategic Review of the New South Wales Juvenile Justice System Report for the Minister for Juvenile Justice* Noetic Solutions Sydney 2010; Darby, C 'The Young Offenders Act 1993 (SA) and the Rights of a Child' (1994) 16 *Adelaide Law Review* 285, 290.
[5] Australian Law Reform Commission, *Seen and heard: priority for children in the legal process* ALRC Report 84, 1997 para 18.33 -18.34 and Recommendation 198 at <www.alrc.gov.au/wp-content/uploads/2019/08/ALRC84.pdf>. See also Wundersitz, J 'Juvenile Justice', Hazlehurst, K (ed) *Crime and Justice: An Australian Textbook in Criminology* LBC Information Services Sydney 1996, 118–123; I O'Connor, I 'Models of juvenile justice', Borowski, A & O'Connor, I (eds) *Juvenile Crime, Justice and Corrections* Longman Sydney 1997; Wolthuis, A *Thematic Brief on Restorative Justice and Child Justice* European Forum for Restorative Justice Leuven, Belgium 2020. See also Chapter Two of this thesis.
[6] General Comment 24, para 8.
[7] See Chapter Two of this thesis for explanation of these terms.

as, and in some cases better than, their 'mainstream' non-restorative counterparts.[8] This reflects international experience in countries such as New Zealand, the UK and Canada.[9] In addition to these four issues, there is emerging fifth theme of research that considers the relationship between conferencing and other forms and practices of 'innovative justice', such as, Indigenous Justice and therapeutic jurisprudence.[10]

However, while there has been some country specific analysis of children's rights in youth conferencing programs,[11] and some assessment of the rights of child victims in restorative justice processes,[12] there has been limited contemporary research that focuses specifically on the framework and operation of conferencing from the perspective of the rights of a child offender. Indeed, it has been observed that,

> [d]espite the considerable treatment which restorative justice schemes have received in the literature, there has been little comment … on how they relate to international standards for children's rights in youth justice.[13]

This is surprising given the emergence and operation of conferencing programs in the child justice space during a parallel period of evolution in the importance of children's rights discourse in academic writing as well as the greater importance given to children's rights in policy initiatives relating to child justice. It is therefore timely to test thoroughly whether youth conferencing in Australia is 'at odds with a children's rights model of child justice as required by international standards.'[14] In other words, there is a significant gap in contemporary

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[8] Latimer J, Dowden C, Muise D 'The Effectiveness of Restorative Justice Practices: A Meta-Analysis' (2005) 85(2) *The Prison Journal* 127.

[9] Llewellyn J and Howse R, *Restorative Justice – A Conceptual Framework* Law Commission of Canada Ottawa 1999.

[10] Gelb K, Stobbs N, and Hogg, R *Community-based sentencing orders and parole: A review of literature and evaluations across jurisdictions* Queensland Sentencing Advisory Council, Australia 2019, 173; Daly, K and Marchetti, E 'Innovative Justice Processes: Restorative Justice, Indigenous Justice, and Therapeutic Jurisprudence' in Marmo M, de Lint W and Palmer D (eds), *Crime and Justice: A Guide to Criminology* (4th ed) Thomson Reuters 2012, 455; Stobbs, N 'Therapeutic jurisprudence in international and comparative perspective' in *Oxford Research Encyclopedia of Criminology and Criminal Justice.* Oxford University Press, United Kingdom 2020, 1-30.

[11] Lynch, N 'Youth Justice in New Zealand: A Children's Rights Perspective' (2008) 8 *Youth Justice* 215; Lynch 2010 (Op.cit.) 161; Moore, S *Rights-Based Restorative Practice Evaluation ToolKit* Human Rights Center, University of Minnesota 2008 at <www1.umn.edu/humanrts/links/RBRJ%20toolkit.pdf>; Moore S and Mitchell R 'Rights-based Restorative Justice: Evaluating Compliance with International Standards' (2009) 9:1 *Youth Justice* 27-43.

[12] Gal T and Moyal S 'Juvenile Victims in Restorative Justice: Findings from the Reintegrative Shaming Experiments' (2011) 51(6) *Br J Criminol* 1014-1034; Gal, T *Child Victims and Restorative Justice: A Needs-Rights Model* OUP Oxford 2011.

[13] Lynch 2010 (Op.cit.), 162.

[14] Ibid. 161; see also Maxwell G and Morris A *Family, Victims and Culture: Youth Justice in New Zealand* Victoria University of Wellington, Wellington 1993.

literature in relation to a children's rights analysis of child justice conferencing programs – as examples of restorative justice practice – in Australia.[15]

This thesis seeks to make a modest contribution to filling this gap by analysing the legislated child justice conferencing programs in three Australian jurisdictions namely Victoria, New South Wales ("NSW") and the Australian Capital Territory ("ACT") through the lens of core children's rights principles set out in the United Nations Convention on the Rights of the Child (CRC).[16] These jurisdictions have been chosen because they offer different legislated models of conferencing and restorative justice. Victoria operates a solely dispositional model in which a conference can only be ordered by a court. New South Wales, which has the longest experience with conferences in Australia, operates a hybrid model of diversionary and dispositional conferences, while the ACT has comprehensive legislation devoted more generally to restorative justice.

1.2 Research Questions

In 1996, when many Australian programs were non-legislated or operating only as pilots, it was noted that while,

> … some schemes pay at least lip service to the idea of children's rights, a concern with the rights of children has not been *the* or even *a* paramount consideration in the minds of many of those responsible for introducing others.[17]

This thesis considers whether much has changed. In particular, it seeks to answer the following two research questions:

[15] Walsh, T 'From Child Protection to Youth Justice: Legal Responses to the plight of 'Crossover Kids'" (2019) 46 *University of Western Australia Law Review* 90, 107; cf Bargen, J 'Kids, Cops, Courts, Conferencing and Children's Rights - A Note on Perspectives' (1996) 2(2) *Australian Journal of Human Rights* 209.
[16] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3. The Convention on the Rights of the Child was adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. It entered into force on 2 September 1990, in accordance with Article 49.
[17] Bargen, J 1996 (Op.cit.) 209.

1. **Do the legislated youth conferencing programs in Victoria, NSW and the ACT respect, protect and fulfil children's rights in accordance with the core principles of the UN Convention on the Rights of the Child?**

2. **If not, what reforms would be needed to make youth conferencing compliant with the CRC?**

While acknowledging that child *victims* may be involved in a youth conference,[18] the focus of this research is on child *offenders* because the fundamental purpose of conferencing in each jurisdiction is to operate as a response to child offending under the respective jurisdictional child justice regime.

1.3 Parameters of research

This thesis adopts a doctrinal analysis of the formal legislative and policy frameworks that underpin each of the three youth conferencing programs under review to answer the central research questions. In doing so, the thesis also considers operational guidelines, program reviews and jurisdictional data on issues such as participation rates in regional locations and the use of youth conferencing by Indigenous and culturally and linguistically diverse children.

This doctrinal approach has been adopted because it allows a clear assessment of the programs under review from a children's rights perspective. This is important because there has not been any significant recent analysis into whether Australian conferencing programs respect, protect and fulfil children's rights.[19] Further, a legal analysis of legislation and policy is the better way to find answers to the research questions.

In addition, there are challenges associated with undertaking empirical studies. These challenges include the practical difficulty of obtaining adequate funding to undertake sufficient fieldwork. In addition, it is difficult to obtain ethics approval for research that involves children, which, in this case, is complicated further by additional considerations with respect to research that would involve Indigenous children, a vulnerable minority. It is further complicated when

[18] Gal, T and Moyal, S 2011 (Op.cit.) 1014-1034; see also Gal, T 2011 (Op.cit).
[19] Walsh, T 2019 (Op.cit), 107. But see Bargen, J 1996 (Op.cit), 209. See also See also Strang, H *Restorative Justice Programs in Australia: Report to the Criminology Council*, Australian Institute of Criminology, 2001; Hayes, H and Daly, K 'Youth justice conferencing and reoffending' (2003) 20(4) *Justice Quarterly* 725; Jourdo Larsen, J *Restorative Justice in the Australian Criminal Justice System*, Australian Institute of Criminology Report No. 127, 2014; Nadine Smith, N and Weatherburn, D 'Youth justice conferences versus Children's Court: A comparison of reoffending' (2012) 160 *Contemporary Issues in Crime and Justice* 1.

required to consider limitations on the research that arises from statutory prohibitions on publication of details with respect to children alleged to have committed offences.[20]

These factors all pointed to a doctrinal thesis rather than empirical research. While some restorative justice scholars have cautioned against empirical analysis of programs on the basis that 'today's conclusions may be out of date tomorrow,' this thesis takes a different view and uses findings from previous empirical studies to help inform the doctrinal analysis of the programs from a children's rights perspective. [21] Ultimately, this thesis recommends further empirical research to evaluate the implementation of the Child Rights Informed Conferencing (CRIC) Model, which is proposed as a reform to youth conferencing in Chapter Eight of this thesis.

1.4 Using the CRC as a benchmark

In addressing the central research question, this thesis uses the CRC as the primary source of children's rights, and the yardstick against which to measure the three youth conferencing programs under review. It is an appropriate evaluation tool because it is generally accepted as the international benchmark when it comes to children's rights. The CRC has been ratified by every state except the United States, which, although heavily involved in the drafting process, has concerns about the impact of the CRC on its sovereignty and federalism.[22] At the same time, although it has not ratified the CRC, the United States has signed it.[23] Thus, every nation has accepted – albeit often with formal reservations – that the CRC is the authoritative standard when it comes to children's rights.[24] Further, the CRC is regularly referenced as the

[20] For example, see, s534 of the *Children, Youth and Families Act 2005* (Victoria).
[21] Walgrave, L 'Investigating the Potentials of Restorative Justice Practice' (2011) 36 *Washington University Journal of Law and Policy* 91, 97; see also Johnstone, G and Van Ness D *Handbook of Restorative Justice* Willan Publishing Collumpton 2007; McCold, P 'Towards a Holistic Vision of Restorative Justice: A Reply to the Maximalist Model' (2000) 3:4 *Contemporary Justice Review* 357; Vanfraechem, I, Aertsen, I and Willemsens, J (eds) *Restorative Justice Realities: Empirical Research in a European Context* International Publishing The Hague 2010.
[22] Davidson, H 'Does the UN Convention on the Rights of the Child Make a Difference?' (2014) 22 *Michigan State International Law Review* 497. See also Rutkow, L and Lozman, J 'Suffer the Children: A Call for United States Ratification of the United Nations Convention on the Rights of the Child' (2006) 19 *Harvard Human Rights Journal* 161. In particular, the United States has concerns about Article 37 of the Convention, which prohibits sentencing children under 18 years old to death or life imprisonment with no opportunity for parole. See *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 567 U.S. 460 (2012); *Montgomery v. Louisiana*, 577 U.S. ___ (2016); *Jones v. Mississippi*, 593 U.S. ___ (2021).
[23] See United Nations Treaty Series <treaties.un.org/Pages/ViewDetails.aspx?src= TREATY& mtdsg_no=IV-11&chapter=4&clang=_en> This link provides the dates on which states signed, ratified, and acceded to the Convention and details regarding state declarations and reservations.
[24] For example, Australia's ratification of the CRC is subject to a reservation to Article 37: "Australia accepts the general principles of article 37. In relation to the second sentence of paragraph (c), the obligation to separate children from adults in prison is accepted only to the extent that such imprisonment is considered by the

fundamental expression of children's rights in international literature on child justice as well as by policy makers and commentators within various Australian jurisdictions in the context of child justice policy.[25]

While recognising the applicability of all rights in the CRC and the interconnectedness between them, this thesis focuses on the rights that form three of the four 'core principles' of the CRC as the basis for analysing whether the youth conferencing programs respect, protect and fulfil children's rights.[26] The four core principles of the CRC are:

1. The right to non-discrimination (Article 2);
2. That right to have the best interests of the child as a primary consideration (Article 3);
3. The right to life, survival, and development (Article 6); and
4. The right to participate and be heard (Article 12). [27]

The Article 6 right to life, survival and development has been excluded from analysis in this thesis because its focus on physical survival, including prevention and safeguards from unnatural and premature death are not directly relevant to youth conferencing programs. As Peleg and Tobin have noted, the normative scope of Article 6 remains 'uncertain' and the inclusion of survival and development is intended to be a 'counterpoint' and 'bulwark' to expand an otherwise narrow right to life that alone would be of limited utility for 'a child in a developing country where he or she was faced with the prospect of living in poverty, constant

responsible authorities to be feasible and consistent with the obligation that children be able to maintain contact with their families, having regard to the geography and demography of Australia. Australia, therefore, ratifies the Convention to the extent that it is unable to comply with the obligation imposed by article 37 (c).".

[25]See for example McArthur M, Suomi A, and Kendall B *Review of the service system and implementation requirements for raising the minimum age of criminal responsibility in the Australian Capital Territory*: *Final Report* Australian National University, 2021; see also *Children and Young Persons (Age Jurisdiction) Act 2004* (Victoria).

[26] Tobin, J (ed.) *The UN Convention on the Rights of the Child: a commentary* Oxford University Press 2019, 49. See also Freeman, M. The Convention on the Rights of the Child and Its Principles. In *A Magna Carta for Children?: Rethinking Children's Rights* (The Hamlyn Lectures, pp. 85-130). Cambridge: Cambridge University Press, 2020; Hanson, K., & Lundy, L. 'Does Exactly What it Says on the Tin?' (2017) 25(2) *The International Journal of Children's Rights* 285-306. See also Office of the Advocate of Children and Young People NSW at <www.acyp.nsw.gov.au/about/the-convention-on-the-rights-of-the-child>; Australian Human Rights Commission 'About Children's Rights' at <humanrights.gov.au/our-work/childrens-rights/about-childrens-rights>.

[27] Tobin 2019 (Op.cit.) 49.

hunger, homelessness, and a lack of access to basic medications.'[28] In this respect, it is also worth noting that unlike the other three core rights, Article 6 is not mentioned at all in *General Comment 24) on children's rights in the child justice system.* [29] Further it was only mentioned once in the previous *General Comment 10*: *Children's Rights in Juvenile Justice*, where it was mentioned in the context of making the point that deprivation of liberty, including arrest, detention and imprisonment, should be used only as a measure of last resort and for the shortest appropriate period of time 'so that the child's right to development is fully respected and ensured.'[30]

At the same time, it is also recognised that the core principles do not operate in isolation from the rest of the CRC.[31] For example, there is a clear relationship between Article 40, which addresses the rights of young people in conflict with the law and a child's right to participate and be heard pursuant to Article 12. Likewise, the overarching obligation on States Parties to undertake all appropriate legislative, administrative, and other measures to give effect to the rights in the CRC (Article 4) is relevant to the operation of the core principles; while the specific rights of children with a disability and culturally and linguistically diverse and Indigenous children under Articles 23 and 30 are particularly relevant to the consideration of the impact of the right to non-discrimination under Article 2 in the assessment of youth conferencing programs.

In answering the two research questions, this thesis recognises that there has been a growing focus on the importance of children's rights in policy, legislation, and academic research since the entry into force of the CRC in 1990. This focus has developed in parallel with the expansion in work on restorative justice and has gained traction at a global level with the CRC providing a reference point and impetus for policy and legislative developments in a number of jurisdictions.[32] This increase in attention accorded to children's rights since 1990, has led scholars such as King and Tobin to suggest that a substantive approach to children's rights has

[28] Tobin J and Peleg N 'Article 6: The Rights to Life, Survival, and Development' in Tobin, J 2019 (Op.cit.) 235.
[29] UN Committee on the Rights of the Child *General comment No. 24 (2019) on children's rights in the child justice system* CRC/C/GC/24.
[30] UN Committee on the Rights of the Child (CRC), *General comment No. 10 (2007): Children's Rights in Juvenile Justice*, 25 April 2007, CRC/C/GC/10, para 11.
[31] Ibid.
[32] See for example McArthur, M Suomi, A and Kendall, B *Review of the service system and implementation requirements for raising the minimum age of criminal responsibility in the Australian Capital Territory*: *Final Report* Australian National University, 2021; see also *Children and Young Persons (Age Jurisdiction) Act 2004* (Victoria).

eclipsed welfare responses as the dominant discourse concerning children within the social and legal system in the post-CRC world.[33]

At the same time, there are arguments that children's rights lack a cogent conceptual position and that a children's rights perspective 'has less substantive content and is less coherent than many would suppose … [and provides] very little by way of a useful analytic tool for resolving knotty social problems'[34] Others have criticised children's rights for being a western-centric idea that reflects western understandings of childhood,[35] or that the idea of children's rights is excessively legalistic,[36] or that children's rights are not appropriate when the subject of children's rights – the child – does not have sufficient capacity to engage with or utilise their rights.[37] However, such criticisms are difficult to sustain given the growing jurisprudence and application of children's rights in many areas, evidenced in particular by the work of the Committee on the Rights of the Child in its assessment of periodic reports submitted by States Parties in accordance with Article 44 of the CRC, and the Concluding Observations of the CRC in response.[38]

In addition, as noted above, the mere fact that the CRC exists – a product of over ten years deliberation and with an even longer pedigree as discussed in Chapter Four – and has almost universal ratification means that its rights need to be taken seriously: it is a 'remarkable instrument.'[39] Further, its obligations need to be applied and interpreted in good faith by States Parties.[40]

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[33] King, M 'The child, childhood and children's rights within sociology' (2004) 15 *King's College Law Journal* 273, 278; King, M 'Children's Rights as Communication: Reflections on Autopoietic Theory and the United Nations Convention' (1994) 57 *Modern Law Review* 385; Tobin, J 'Children's Rights in Australia: Still Confronting the Challenges' in Gerber, P and Castan, M (eds.) *Critical Perspectives on Human Rights Law in Australia (Volume 2)* Thomson Reuters (2022). Other examples are cited in Tobin's article, for example the April 2017 Supreme Court of Victoria *Protocol: Principles for Managing Children in the Custody of the Supreme Court.*

[34] Guggenheim, M *What's wrong with children's rights?* Harvard University Press Harvard 2005, xii.

[35] Pupavac, V 'The Infantilisation of the South and the UN Convention on the Rights of the Child' (1998) 3 *Human Rights Law Review* 3.

[36] King, M 'Children's Rights as Communication: Reflections on Autopoietic Theory and the United Nations Convention' (1994) 57 *Modern Law Review* 385.

[37] Purdy, L M 'Why Children Shouldn't Have Equal Rights' (1994) 2 *International Journal of Children's Rights* 223. Federle, K 'Do Rights Still Flow Downhill?' (2017) 25 *The International Journal of Children's Rights*, 273-284.

[38] United Nations Committee on the Rights of the Child *Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under article 44, paragraph 1 (b), of the Convention on the Rights of the Child* (2015) CRC/C/58/Rev.3.

[39] Tobin, J 2019 (Op.cit.) 19.

[40] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, Article 26 (Pacta sunt servanda) and Article 31 (General Rule of Interpretation).

Within Australia, most states and territories have seen significant amendments to their child justice and child protection legislative regimes since 1989-90 so as to better reflect children's rights as set out in the CRC. These reforms include express reference to the best interests principle, recognition of aspects of child development, consideration to participatory arrangements, changes to age limits to conform to the CRC definition of a child being a person under 18, and express reference to other principles contained in CRC, such as non-discrimination and equality.[41] Children's rights – however conceptualised – are therefore fundamental to any analysis of child justice arrangements in Australia.

In addition, despite limited scholarly attention, formal reviews of conferencing programs in a number of Australian jurisdictions, have made express reference to children's rights in framing aspects of the discussion, particularly in relation to procedural matters.[42] This growing focus on the application of rights derived from the CRC to youth conferencing programs provides a platform on which this thesis builds.

It is evident that an increased focus on children's rights has devolved from international arrangements.[43] While most authors endorse the expansion of children's rights, there are some who question whether the evolution of 'more rights' for children can be said to mean 'better rights' for children when considered in the context of restorative justice initiatives.[44] From the perspective of a substantive children's rights analysis of youth conferencing programs, a key issue is a 'deepening' rather than 'widening' of children's rights and whether non-compliance with children's rights even matters if the recognised positives of the programs from the

[41] See, for example, *Children and Young Persons (Age Jurisdiction) Act 2004 (Victoria)*; op cit. Darby, C 1994 (Op.cit.), 285.
[42] Noetic Solutions 2010 (Op.cit.).
[43] McArthur M, Suomi A, and Kendall B 2019 (Op.cit); Tobin, J 2022 (Op.cit.). See also Eekelaar, J 'The Emergence of Children's Rights' (1986) 6 *Oxford Journal of Legal Studies* 161; Abramovitch, R Higgins-Biss, K and Biss, S 'Young persons' comprehension of waivers in criminal-proceedings' (1993) 35 *Canadian Journal of Criminology* 309–322; Kilkelly, U 'Youth Justice and Children's Rights: Measuring Compliance with International Standards' (2008) 8:3 *Youth Justice* 187-192; Moore, S 2008 (Op.cit.); Goodwin-De Faria, C and Marinos, V 'Youth Understanding & Assertion of Legal Rights: Examining the Roles of Age and Power (2012) 20 *International Journal of Children's Rights* 343-364; Freeman, M 'Why it remains important to take children's rights seriously ' (2007) 15 *International Journal of Children's Rights* 5; Alston, P (ed.) *The Best Interests of the Child: Reconciling Culture and Human Rights* OUP Oxford 1994; and Tobin, J 'Judging the Judges: are they adopting the rights approach in matters involving children? (2009) 33 *Melbourne University Law Review* 579.
[44] Reynaert, D De Bie, MB and Vandevelde S 'Between `believers' and `opponents': Critical discussions on children's rights' (2012) 20 *The International Journal of Children's Rights*, 155-168l; Goodwin-De Faria, C and Marinos, V (Op.cit) 343-364.

perspective of restorative justice theory, namely decreased rates of recidivism, cost effectiveness and victim satisfaction, are achieved?[45]

This thesis asserts that children's rights are a legitimate and valuable yardstick against which to evaluate youth conferencing programs because the measures of success used to evaluate the efficacy of restorative justice programs do not illuminate whether the process and outcomes are, for example, in the best interests of the child offender, or achieved with the full participation of the child offender.

1.5 A note on terminology: Who is a child?

Before answering the research questions, it is important to identify "who" we are talking about. Article 1 of the CRC defines a "child" as 'every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.' Consistent with the CRC Committee's General Comment 24, this thesis extends this definition in the context of child justice to include any person over the age of 18 who remains within the jurisdiction of a state's children's/youth/juvenile criminal system based on their age at the time of the alleged commission of an offence.[46] For example, the definition of a child for the purposes of criminal law in Victoria is:

> … a person who at the time of the alleged commission of the offence was under the age of 18 years but of or above the age of 10 years but does not include any person who is of or above the age of 19 years when a proceeding for the offence is commenced in the Court.[47]

While this definition – or equivalent definitions in other states – is broad enough to allow a for the exceptional situation in which a person well above the age of 18 is classified as a child if, for example, proceedings were commenced before they turned 19, but they failed to appear at court for decades. The real purpose of the expanded definition is to give full effect to the fundamental purpose of Article 1 CRC, that is, to focus on the rights of persons based on their age at the time of the alleged contravention of the law. This point was expressly made in

[45] Walgrave, L 'Restorative Justice for Juveniles: Just a Technique or a Fully Fledged Alternative*?'* (1995) 34:3 *Howard Journal of Criminal Justice* 228-249 see also <www.restorativejustice.org/articlesdb/authors/1409>
[46] General Comment 24, paras 35 – 36.
[47] Section 3(1) *Children Youth and Families Act 2005* (Vic.).

Victoria in the second reading speech that introduced legislation to increase the jurisdiction of the Children's Court from persons aged 17 to those aged 18:

> Currently, the Children's Court has jurisdiction to hear and determine charges against children and young people aged 10 or above, who are under 17 years at the time of the alleged commission of the offence, and under 18 at the time of being brought before the court. The Children's Court does not, therefore, have jurisdiction to hear and determine charges against young people aged 17 at the time of the alleged commission of an offence. Instead, they must appear before and, if found guilty, be sentenced by - an adult court.
>
> This bill will bring Victoria into line with the United Nations Convention on the Rights of the Child. This convention defines a child as a person under the age of 18 for the purposes of criminal law.[48]

Therefore, when discussing youth conferencing, this thesis takes the position that any offender who falls within the jurisdiction of the applicable child justice system is a child. This expanded definition is similarly consistent the CRC Committee's definition of 'child justice system' in General Comment 24 which is, 'the legislation, norms and standards, procedures, mechanisms and provisions specifically applicable to, and institutions and bodies set up to deal with, *children considered as offenders*' [emphasis added].[49] The definition as a whole, and the last four words in particular, require the focus to be on the age of a person at the time of an alleged offence, and not at the time of being processed through the system. It should be noted that while acknowledging the current debates in Australia about raising the age of criminal responsibility, it is beyond the scope of this thesis to explore this question in any depth, instead accepting the minimum age set in each jurisdiction.[50]

1.6 A note on terminology: juvenile, youth or child?

[48] Second reading speech by Attorney-General Rob Hulls for the *Children and Young Persons (Age Jurisdiction) Bill (2004)*, Hansard, Victoria, 16 September 2004. Similarly, the *Queensland Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act 2016* was expressly introduced to ensure consistency with the CRC, as well as consistency with all other Australian jurisdictions so that young offenders aged 17 in Queensland would be dealt with in the child justice system, with transitional arrangements enacted to ensure 17-year-olds involved in the adult justice system would be transitioned to Youth Justice care. See *Queensland Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act 2016* (Qld) Explanatory Notes, p 1 at <www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2016-125>. See also *Youth Justice (Transitional) Regulation 2018* (Qld).

[49] General Comment 24, para 8.

[50] McArthur M, Suomi A, and Kendall, B 2019 (Op.cit.); General Comment 24, para 20 – 24.

There has been an evolution in terminology over the last 30 years to describe both the persons and systems dealing with persons under 18 who are involved or otherwise subject to legal proceedings or administrative process under the law. This change in terminology remains in a state of flux and is illustrated most clearly at an international level in the shift from the term 'juvenile justice' in the CRC Committee's General Comment No. 10 issued in 2007 – entitled 'Children's Rights in *Juvenile* Justice'[emphasis added] – to the use of the term 'child justice' in General Comment No. 24 entitled 'Children's rights in the *child* justice system'[emphasis added].[51] The rationale for this change was to encourage the use of non-stigmatising language in the context of children who infringe the law on the basis that "juvenile" suggests immaturity, delinquency and lack of development, rather than recognising childhood as a state of being in its own right.[52] The CRC Committee explained the basis for the change in the following terms:

> This revised general comment does not refer to children as 'juveniles.' The Committee acknowledges and encourages the trend towards using terms such as 'youth justice' and 'child justice', which are positive developments as they aim to reinforce the dignity and worth of children in conflict with the law;[53]

Comments received in response to the Draft comment were supportive of this shift in language. For example,

> Part III of the document states that the revised general comment no longer refers to children as 'juveniles', and acknowledges and encourages the trend towards using more child-friendly terms such as 'youth justice' and 'child justice', which promote the dignity and worth of children in conflict with the law. We welcome this change in language and wider recognition... We recommend that the language in the general comment is amended to use child friendly terms such as 'children in conflict with the law', 'child justice', and 'offending behaviour' throughout. This avoids labelling and stigmatising children as far as possible and is supported by desistance theory.[54]

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[51] General Comment 24, para 8, note 1; cf. General Comment 10.
[52] General Comment 24, para 8.
[53] Draft revised General Comment No. 10 (2007) as released for comment at <www.ohchr.org/EN/HRBodies/CRC/Pages/DraftGC10.aspx>
[54] Standing Committee for Youth Justice (United Kingdom) *Response: UN Committee on the Rights of the Child Draft revised General Comment No. 10 (2007) on children's rights in juvenile justice - Call for comments* at <www.ohchr.org/EN/HRBodies/CRC/Pages/DraftGC10.aspx>

Reflecting this global process of change, several terms are used, and are evolving, within Australia. This includes a single jurisdiction using multiple terms. For example, in Victoria, there is a *Children's* Court that is serviced by *Youth* Justice as the lead statutory body providing services to persons within the criminal jurisdiction of the court; in 2019, in NSW, *Juvenile* Justice became known as *Youth* Justice NSW.[55]

While acknowledging that use of the word 'child' is consistent with the CRC and the prevailing view and reasoning of the CRC Committee, this thesis primarily uses the term 'youth' on the basis that 'child' suggests a younger person, perhaps below or close to the age of criminal responsibility and therefore outside the scope of most conferencing programs. Therefore, this thesis, as much as possible, restricts the use of the words 'child' and 'juvenile' to their use in direct quotes or specific contexts, such as when referring to an agency, program, event, or legislative term.

1.7 Thesis Structure

In order to answer the research questions, this thesis is divided into three parts. Part One, "Laying the Foundation", comprises Chapters One – Four. Part Two addresses "Compliance" and consists of Chapters Five – Seven. Finally, Part Three, "Developing a Solution" comprises Chapters Eight and Nine that identifies the Child Rights Informed Conferencing (CRIC) Model and presents the overall findings to answer the research question.

1.7.1 Part I - Laying the Foundation

This introductory chapter sets out the basis for the research questions, why they are important and the parameters of this study. Following this Introductory Chapter, Chapter 2 provides a review of the scholarly literature to identify the origins and core principles associated with restorative justice. Such an analysis is important because this provides the intellectual basis from which youth conferencing programs emerged in each jurisdiction as distinct alternatives to the two traditional models of child justice.

Chapter 2 also considers the literature that examines the evolution and efficacy of conferencing programs more generally. It is clear that conferencing did not initially emerge out of the children's rights movement, despite it emerging contemporaneously with the development of an international treaty on children's rights and subsequently adopted children's rights language

[55] See <www.youthjustice.dcj.nsw.gov.au/>

in its operation. The literature review reveals that rather than being founded on any conception of children's rights, restorative justice conferencing developed as an experimental response to the 'what works' debate that occurred from the 1970s onwards, both in criminal justice generally, and youth justice in particular. This analysis illustrates how conferencing programs were designed with reference to core restorative justice principles. Chapter 2 also considers the place and relationship of conferencing and restorative justice within a wider field focused on innovative and overlapping justice practices, including Indigenous Justice and Therapeutic Jurisprudence.[56]

Chapter 2 reviews the research that analyses the efficacy of restorative justice, particularly from the perspective of the 'what works' debate and its connection with the efficacy of restorative justice. The conclusion reached is that empirical studies, including meta-analytical studies from Australia and overseas, support a finding that youth conferencing can provide a number of positives in the child justice space. These positives are particularly evident in relation to cost and victim satisfaction but are also evident in addressing recidivism; although beyond the scope of this thesis, similar findings have been made for adult offenders.[57] However, these empirical studies do not address the issue of compliance with children's rights, which is an important and appropriate measure for analysis of any program that involves children.

Chapter 3 provides the history, legislative and policy framework of each program being analysed in this thesis, noting that there are important differences between the three programs, in particular with respect to where they sit within the continuum of youth justice procedure as dispositional or diversionary conferences and the complexity of their respective legislative frameworks. The fundamental purpose of Chapter 3 is to provide the domestic legislative foundation – including key operational and legislative differences – against which the contrasting programs can be assessed to determine their respective compliance with children's rights in Part Three of this thesis. This is pivotal to answering the research questions.

Chapter 4 sets out the child rights framework, founded on the four core principles of the CRC, three of which are used to analyse the various programs. Chapter 4 contributes to answering the research questions by identifying the core rights and principles of the CRC that are the

[56] Stobbs, N 'Restorative justice Making amends, repairing relationships and healing' (2013) 116 *Precedent* 45.
[57] Gelb K, Stobbs N, and Hogg, R 2019 (Op.cit.) 173.

appropriate measure to use to determine whether youth conferencing programs respect, protect and fulfil children's rights.[58]

1.7.2 Part II - Compliance

The three chapters that make up Part Two assess the conferencing programs in Victoria, NSW and the ACT to determine the extent to which they are consistent with the specific children's rights analysed in Part One, and especially in Chapter 4.

Chapter 5 addresses the core CRC principle of non-discrimination, starting with an analysis of Article 2 of the CRC. This is particularly relevant to the research questions because of the disproportionate number of young Indigenous people in Australia's child justice systems generally. The chapter also includes a consideration of the problem of jurisdictional variations in the use of conferencing across regions and acknowledges that discrimination can also apply on many other grounds, such as for so-called 'cross-over' children; those who are in both the child justice system and child protection system.[59] Ultimately, this chapter identifies that the youth conferencing programs operating in the three jurisdictions analysed fall short of the non-discrimination requirements of the CRC, particularly in relation to Indigenous children.

Chapter 6 focuses on the extent to which the programs comply with the right of a child to have their best interests be a primary consideration in any matter concerning them (Article 3). How do you determine the best interests of a child alleged to have contravened the law? Does this apply only to the outcome, or to the process as well? This requires a clear understanding of the best interests principle in the context of the CRC. The best interests principle is a core principle of the CRC and is reflected in legislation connected with family law and child protection across Australia.[60] However, its place in youth justice generally is less clear.[61] A further significant challenge to this principle is the extent to which the victim-focused underpinnings of restorative justice cut across the best interests of a child offender in conferencing.

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[58] Lynch, N 2008 (Op.cit.), 215; Lynch, N 2010 (Op.cit), 161; Moore, S 2008 (Op.cit); Moore S and Mitchell R 2009 (Op.cit.) 27-43.
[59] Walsh, T 2019 (Op.cit.) 104.
[60] For example, see s60CA – 60CC *Family Law Act 1975* (Commonwealth) and section 10 *Children, Youth and Families Act 2005* (Victoria).
[61] Coppins V, Casey S and Campbell A 'The Child's Best Interest: A Review of Australian Juvenile Justice Legislation' (2011) 4 *The Open Criminology Journal* 23, 30.

Chapter 7 considers whether the conferencing programs are compliant with a child's participatory and procedural rights, including the right to express their views and have their views taken into account. The two key CRC articles in question in this chapter are Article 12 (right to be heard) and Article 40 (child justice). The chapter concludes that, while challenging, it is possible for youth conferencing programs to give effect to the standards set out in Articles 12 and 40, but that th existing conferencing programs do not do so at a substantive level.

1.7.3 Part III – Developing a Solution

The analysis in Chapters 5, 6 and 7 informs the CRIC Model developed in Chapter 8. The findings from the analysis of youth conferencing in Victoria, NSW and the ACT, measured against the CRC, provides the basis for the development of a model of youth conferencing that respects, protects and fulfils children's rights. The CRIC Model offers a robust model of youth conferencing that is consistent with a substantive application of children's rights. Adapting the 'best' features of the three programs, the CRIC Model consists of four distinct elements, derived from the CRC, that can transform youth conferencing into a practice that promotes and protects the rights of young offenders.

Chapter 9 concludes the thesis by summarising the key findings, clearly articulating the answers to the two research questions, and identifying opportunities for future research that builds on this doctoral research, including empirical research to evaluate the implementation of the CRIC Model.

1.8 Conclusion

There has been relatively limited evaluation of restorative justice youth conferencing programs in Australia generally, and even less from a children's rights perspective.[62] This is despite the contemporaneous emergence of these programs with the adoption of the CRC.

Despite the increasing references to children's rights at a general level in connection with child justice, children's rights standards have not been rigorously applied to evaluate any of the conferencing programs operating in any Australian jurisdiction. Thus, this thesis fills a gap by

[62] Walsh, T 2019 (Op.cit.), 107. See also Strang, H 2001 (Op.cit.); Hayes, H and Daly, K 2003 (Op.cit.); Larsen, J 2014 (Op.cit); Nadine Smith, N and Weatherburn, D 2012 (Op.cit.).

specifically focusing on compliance with children's rights within youth conferencing programs in three legally contrasting jurisdictions: Victoria, NSW and the ACT.

Ultimately, this thesis explores the relationship between children's rights and restorative justice to determine whether the current youth conferencing programs in Victoria, NSW, and the ACT respect, protect and fulfil children's rights by reference to core principles of the UN Convention on the Rights of the Child. The analysis in Part Two of this thesis demonstrates that they do not. In response to this finding, this thesis proposes a model – the CRIC Model – that would see youth conferencing and children's rights align in a substantive and meaningful way.

Having set out the research questions for the thesis, and laid the foundation for the doctrinal research, the next chapter analyses the restorative justice principles on which the current youth conferencing programs in Australia are based.

CHAPTER 2

Restorative justice principles and the efficacy of youth conferencing programs

Table of Contents

2.1 Introduction

What is restorative justice? Why has it emerged? What does it offer? Why has it become so popular in the theory and practice of contemporary children's justice both in Australia, and around the world?

This chapter sets out the history and theory of restorative justice in order to demonstrate how it underpins conferencing programs. It contends that the growth of interest in, and expansion of, initiatives in restorative justice in general, and in conferencing as a restorative justice response to child offending, is about how to address offending – such as a response to the 'what works' debate that emerged in the 1970s onwards – rather than with children's rights.[1] As one scholar noted, restorative justice evolved in this period as a reaction to two 'catalysts', namely 'increased awareness of the marginalisation of victims in the criminal justice system, and concerns over climbing recidivism rates.'[2] In this environment, restorative justice conferencing emerged as 'an infinitely preferable alternative to the adversarial and retributive nature of conventional youth justice', whether viewed from a traditional punitive/justice approach to child justice or from a welfare perspective of child justice.[3]

For the purposes of this thesis, the point is that because restorative justice did not emerge from a children's rights framework, there is a genuine question about whether conferencing programs do, in fact, respect, protect and fulfil children's rights. Is the support for youth conferencing by key advocates of children's rights, including the UN Committee on the Rights of the Child, just an exercise in 'retro-fitting' children's rights onto a relatively novel model of restorative justice?[4] Considering this issue is vital to answering the research questions being explored in this thesis, namely,

1. Do the legislated child conferencing programs in Victoria, NSW and the ACT respect, protect and fulfil children's rights in accordance with the core principles of the *UN Convention on the Rights of the Child?*

[1] Martinson, R 'What Works? Questions and Answers about Prison Reform' (1974) 10 *The Public Interest* 22 – 54; Peachey, D 'The Kitchener Experiment' in Wright, M and Galaway, B (eds), *Mediation and Criminal Justice: Victims, Offenders and Community* Sage Michigan 1989, 14–16.
[2] Stobbs, N 'Restorative justice Making amends, repairing relationships and healing' (2013) 116 *Precedent* 45.
[3] Cunneen, C. and Goldson, B. 'Restorative Justice? A Critical Analysis' in Goldson, B. and Muncie, J. (eds) *Youth, Crime and Justice* (2nd ed), Sage, London 2015, 154.
[4] UN Committee on the Rights of the Child *General Comment No. 24 (2019) Children's rights in the child justice system* CRC/C/GC/24, para 8.

2. If not, what reforms would be needed to make the programs compliant with the CRC?

This chapter also explores the efficacy of youth conferencing programs from the perspective of restorative justice. It concludes that youth conferencing can provide some positive outcomes in the child justice space. These positive outcomes are evident in levels of victim satisfaction, but also in addressing recidivism (albeit with some mixed results) and in a cost/benefit analysis.

These positive outcomes are important because the UN Committee on the Rights of the Child, in both *General Comment No 10,* and the more recent *General Comment 24,* advocate for restorative justice programs while at the same time recognising that the central challenge in a child justice system is to balance two objectives, namely the protection of children and their rights on the one hand, and the protection of the community through the prevention of crime, respect for victims and diminution of repeat offending on the other.[5] While the central question in this thesis relates to protecting children's rights in the specific arena of child justice conferencing programs, it is necessary to also be cognisant of the second objective. This is because there is little point in pursuing programs that do not, to some extent, address recidivism and protect the community, especially given the impetus for the emergence of restorative justice in the first place.

At the same time, the foundational pillars of restorative justice do not address the issue of children's rights, which, as noted in the previous chapter, is an important measure when evaluating child justice programs. This chapter recognises the importance of understanding the rationale for the programs separate from children's rights, in order to appreciate how any dissonance between the programs as they currently operate, and children's rights, can be resolved.

This chapter identifies the underlying restorative justice principles of the programs, while the next chapter examines the legislative and operational frameworks that establish the conferencing regimes in each of the three jurisdictions under review. The starting point for any such analysis is an examination of the origins of restorative justice, as well as defining the key terms. Once this has been done, the key pillars of restorative justice can be considered along with how these pillars relate to youth conferencing. Such a discussion facilitates an

[5] UN Committee on the Rights of the Child (CRC), *General comment No. 10 (2007): Children's Rights in Juvenile Justice*, 25 April 2007, CRC/C/GC/10; General Comment 24, para 3.

understanding of the basis on which the various conferencing programs around Australia have been established.

2.2 Ancient origins? A brief history of restorative justice

A number of scholars have attempted to trace the history of what today comes under the broad heading of 'restorative justice' with some suggesting that 'the roots of the concept of restorative practices are ancient, reaching back into the customs and religions of the most traditional societies.'[6] This argument draws on sources, including the Babylonian Code of Hammurabi, the *Iliad,* tribal codes of *palaver* and even the etymology of the word 'guilt' itself – which is derived from the Anglo-Saxon word 'geldam' meaning payment – to argue that what we now think of as 'new' restorative justice, is in fact derived from ancient principles and long-standing practices.[7] Others have worked through a range of historical sources to suggest that what we now understand to be encompassed under the broad umbrella of restorative justice responses has in fact 'been the dominant model of criminal justice throughout most of human history for all the world's people.'[8]

Likewise, there are scholars who 'assert that restorative justice is essentially a return to practices of pre-state societies involving informal, participatory means of resolving disputes directed at restoring the parties and maintaining community integrity.'[9] These scholars compare this historical approach, which they assert was successful, with what they argue is the reactive and unsuccessful approach of the modern justice system.[10] For example,

> Some of the new… programs are in fact very old… [A]ncient forms of restorative justice have been used… by early forms of humankind. [F]amily group conferences [and]… circle hearings [have been used] by indigenous people such as the Aboriginals,

[6] Weitekamp, E 'The History of Restorative Justice' in Bazemore, G and Walgrave, L (eds), *Restorative Juvenile Justice: Repairing the Harm of Youth Crime* Criminal Justice Press Monsey, NY 1999,75. See also Gavrielides, T 'Restorative Practices: From the Early Societies to the 1970s' (2011) *Internet Journal of Criminology* 1 ISSN 2045-6743 (Online); see also Gavrielides, T *Restorative Justice and the secure estate: Alternatives for young people in custody* Independent Academic Research Studies London 2011.
[7] Gavrielides T 2011 (Op.cit.) 1.
[8] Braithwaite, J 'Conferencing and Plurality' (1997) 37:4 *British Journal of Criminology*, 502-506. Similarly, Weitekamp has asserted that 'humans have used forms of restorative justice for the larger part of their existence' (see Weitekamp 1999 (Op.cit.) and Gade has written that restorative justice has been 'the dominating form of criminal justice for most of human existence' (see Gade, C 'Restorative Justice and the South African Truth and Reconciliation Process' (2013) 32 *South African Journal of Philosophy* 10, 17.
[9] King, M 'Restorative Justice, Therapeutic Jurisprudence and The Rise Of Emotionally Intelligent Justice' (2008) 32 *Melbourne University Law Review* 1096.
[10] See, for example, Weitekamp 1999 (Op.cit.), 75.

> the Inuit, and the native Indians of North and South America… It is kind of ironic that we have … to go back to methods and forms of conflict resolution which were practiced some millennia ago by our ancestors.[11]

While it may be correct that earlier communities used these types of practices, this does not mean that they were not punitive or that they operated as some sort of conflict resolution nirvana. Further, even when these informal methods were used, they were often accompanied by social pressure. As one scholar noted,

> The evidence suggests that while restorative justice has similar elements to these past informal methods, it is a modern development based on contemporary needs and social and governmental structures.[12]

There are at least three other reasons why it is problematic to romanticise a link between the contemporary fascination with restorative justice and pre-state methods of criminal justice. First, such assertions 'are trivialising and patronising'.[13] Second, such an assertion presumes a cultural uniformity of approaches to criminal justice and conflict resolution under a single umbrella – restorative justice – despite being practised in disparate societies across unique cultures and different continents.[14] Third, many of the societies and cultures from which this view of restorative justice draws inspiration, also suffered from the 'complex and corrosive' impacts of imperialism or colonialism, whether by extermination, assimilation, 'civilising' or 'Christianising', forced removal, institutionalisation, denial of legal existence, suppression of culture.[15]

In light of this history, it is better to see the emergence of restorative justice since the 1970s – whatever it might mean and whatever its origins – as 'a paradigm shift in global criminal justice in general and child justice in particular.'[16] Of course, modern restorative justice is not alone; other forms of 'innovative justice' also offer new ways of thinking about criminal justice since

[11] Ibid. 93.
[12] King 2008 (Op. cit.) 1096.
[13] Cunneen and Goldson 2015 (Op. cit.) 142.
[14] Ibid.142. See also Cunneen, C. 'Thinking Critically about Restorative Justice', in E. McLaughlin, R. Fergusson, G. Hughes and L. Westmarland (eds) *Restorative Justice: Critical Issues*. London: Sage 2003; Cunneen, C 'The Limitations of Restorative Justice', in C. Cunneen and C. Hoyle *Debating Restorative Justice*. Oxford: Hart Publishing 2010.
[15] Cunneen and Goldson 2015(Op.cit.) 144.
[16] Ibid. 145.

the 1980s, including Indigenous Justice and therapeutic jurisprudence.[17] These approaches emerged from a different starting point than restorative justice. Rather than being founded specifically on addressing recidivism or victim marginalisation in the existing criminal justice system, these approaches – often benefiting from interdisciplinary insight – started from a more systemic critique of modern criminal justice as an 'inhumane, ineffective process in which professionals impose their preferred outcomes on citizens — rather than arriving at more legitimate, responsive, healing, and constructive conclusions through respectful, inclusive deliberation.'[18] Despite having different starting points (discussed below), there is nonetheless some overlap between these other approaches and restorative justice.

In terms of the phrase itself, the combination of words 'restorative justice' has been in existence since at least 1834, when it was used in *The Christian Examiner and Church of Ireland Magazine* in connection with a positive review of the *Tithe Composition Act*, which was characterised as 'deservedly hailed by all well-thinking men, as beneficial to the clergy, and to the people, as a great act of restorative justice.[19] The meaning here – effectively endorsing what might be described as a 'win-win' outcome under the Act in question – is not so different to the fundamental idealised contemporary understanding of restorative justice as a way to achieve positive outcomes for multiple actors, including the victim, the offender and the community.

However, the first use of the term 'restorative justice' in its modern criminal justice sense can be traced to the 1977 article, *Beyond Restitution: Creative Restitution* by Albert Eglash. Although it has been suggested that the use of the term here was an exercise in recycling of an earlier set of articles published in 1957-59.[20] Regardless, there is widespread acceptance that

[17] Daly, K and Marchetti, E 'Innovative Justice Processes: Restorative Justice, Indigenous Justice, and Therapeutic Jurisprudence' in Marmo M, de Lint W and Palmer D (eds), *Crime and Justice: A Guide to Criminology* (4th ed) Thomson Reuters 2012, 455; Stobbs, N 'Therapeutic jurisprudence in international and comparative perspective' in *Oxford Research Encyclopedia of Criminology and Criminal Justice*. Oxford University Press, United Kingdom 2020, 1-30.

[18] Marder, I and Wexler, S 'Mainstreaming Restorative Justice and Therapeutic Jurisprudence Through Higher Education' (2021) 50 *University of Baltimore Law Review* 399, 401.

[19] Gade 2013 (Op. cit.) 10.

[20] Van Ness, D 'New Wine and Old Wineskins: Four Challenges of Restorative Justice' (1993) 4 *Criminal Law Forum* 251, 258; see also Eglash, A 'Beyond Restitution: Creative Restitution' in Hudson J and Galaway B (eds) *Restitution in Criminal Justice: a critical assessment of sanctions* Lexington Books Lexington 1977; Skelton A, 'Restorative Justice as a Framework for Juvenile Justice Reform: A South African Perspective' (2002) 42 *The British Journal of Criminology* 496.

Albert Eglash coined the term 'restorative justice' in its modern form and that the chief source of the term is his 1977 work.[21]

Eglash's work, together with that of other leading scholars from the 1970s and early 1980s, provides the key themes and principles that have come to form the signature pillars of restorative justice. These signature pillars have informed and are reflected in the youth conferencing programs that currently operate in different forms in each state and territory of Australia – again emphasising that each of these programs is designed as an avowedly restorative response within the respective youth justice systems.

But what is restorative justice?

2.3 What is restorative justice?

Over the last 30 years, restorative justice has emerged as a 'new paradigm', 'third way', 'more constructive', 'better', 'more just' and an 'attractive and promising alternative' to mainstream responses to criminal behaviour, across many jurisdictions.[22] The UN Office on Drugs and Crime published a *Handbook on Restorative Justice Programs* in 2006 (with a second edition in 2020), and restorative justice has been endorsed by the UN Economic and Social Council (ECOSOC)[23] and by the UN Committee on the Rights of the Child.[24] It has also been endorsed by the Council of Europe[25] and the European Union.[26] Notwithstanding this widespread endorsement of restorative justice by multiple international agencies, there is ongoing debate about, (a) the precise definition of restorative justice, (b) the scope of restorative practices, and

[21] Llewellyn J and Howse R *Restorative Justice – A Conceptual Framework* Law Commission of Canada Ottawa 1999; Ammar, N 'Exploring Elements of Restorative Justice in the Islamic Legal System' in Safty, A (ed) *Value Leadership and Capacity Building* Universal Publishers Boca Raton 2003; Chatterjee, J and Elliott L 'Restorative Policing in Canada: The Royal Canadian Mounted Police, Community Justice Forums and the Youth Justice Criminal Justice Act' (2003) 4 *Police Practice and Research: An International Journal* 347; Heath-Thornton, D 'Restorative Justice' in Wilson, J (ed) *The Praeger Handbook of Victimology* ABC-CLIO Santa Barbara 2009; Van Ness D and Strong K *Restoring Justice: An Introduction to Restorative Justice* (4th ed) LexisNexis New Jersey 2010; Daly, K 'Youth sex offending, recidivism and restorative justice: comparing court and conference cases' (2013) 46 *Australian and New Zealand Journal of Criminology* 241.

[22] McCold, P and Wachtel, T '*In Pursuit of Paradigm: A Theory of Restorative Justice*' Restorative Practices eForum, International Institute For Restorative Practices 12 August 2003.

[23] United Nations Economic and Social Council (2002) *ECOSOC Resolution 2002/12: Basic principles on the use of restorative justice programmes in criminal matters.* New York: United Nations paras 6 – 11.

[24] See UN Committee on the Rights of the Child (CRC), *General comment No. 10 (2007): Children's Rights in Juvenile Justice*, 25 April 2007, CRC/C/GC/10 paras 3, 10 and 27; *General comment No. 24 (2019) on children's rights in the child justice system* CRC/C/GC/24, para 1, 8, 17, 74 and 104.

[25] Council of Europe – Recommendation No. R (99) 19 concerning mediation in penal matters (1999); CM/Rec(2018)8 CoE recommendation concerning restorative justice in criminal matters.

[26] Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime.

(c) its appropriateness and place within the criminal justice system generally, as well as within the youth criminal justice system, more particularly.

It has been argued that restorative justice resists 'an easy and agreed-upon definition'[27] and that there is 'no single definition'[28] of the concept. However, at its heart, restorative justice views criminal behaviour as doing harm; and seeks to repair that harm. Allena argues that restorative justice is a way of thinking and behaving,[29] while Zedner refers to it as a form of 'talking therapy.'[30] Thus, a restorative justice response can be characterised as an effort to understand the relationship between all relevant stakeholders (victims, offenders and the community), to define the harm inflicted, and to determine how best to repair the harm.[31] Daly contends that restorative justice should be perceived as a 'response, process, activity, measure, or practice' under a broader umbrella of 'innovative justice'; a broader term that includes a range of alternative responses to criminal conduct – such as therapeutic jurisprudence or first nations justice – that are designed to engage the individuals affected by the crime and move beyond a narrow view of crime being about state retribution for wrongful conduct.[32] With a more child justice focus, the Committee on the Rights of the Child has stated that restorative justice involves,

> … any process in which the victim, the offender and/or any other individual or community member affected by a crime actively participates together in the resolution of matters arising from the crime, often with the help of a fair and impartial third party. Examples of restorative process include mediation, conferencing, conciliation and sentencing circles.[33]

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[27] Daly, K and Proietti-Scifoni, G 'The elders know the white man don't know: offenders' views of the Nowra Circle Court' (2011) 7 *Indigenous Law Bulletin* 17.
[28] Cunneen, C and Goldson, B 'Restorative Justice? A Critical Analysis' in Goldson, B. and Muncie, J. (eds) *Youth, Crime and Justice* (2nd ed), Sage, London. 2015.
[29] Allena, T 'Restorative Conferences: Developing Student Responsibility by Repairing Harm to Victims and Restoring the University Community' in Karp, D and Allena T (eds) *Restorative Justice on the College Campus* CC Thomas Chicago 2004.
[30] Zedner, L 'Punishment and the Plurality of Privacy Interests' in Claes E, Duff A and Gutwirth S (eds) *Privacy and the Criminal Law* Intersentia Antwerpen 2006.
[31] Zehr H. 'Commentary: restorative justice: beyond victim-offender mediation' (2004) 22 *Conflict Resolution Quarterly* 305, 306; Umbreit M and Armour M *Restorative justice dialogue: an essential guide for research and practice* Springer Publishing Company New York 2011, 3; Van Ness D and Strong *Restoring justice: an introduction to restorative justice* (5th ed.) Anderson Publishing Cincinatti 2015, 44.
[32] Daly K 'What is restorative justice? Fresh answers to a vexed question' (2016) 11 *Victims and Offenders* 1, 14, 18, 21. See also King M, 'Restorative Justice, Therapeutic Jurisprudence And The Rise Of Emotionally Intelligent Justice' (2008) 32 *Melbourne University Law Review* 1096.
[33] General comment No. 24, para 3.

A similar definition has been used by the European Forum for Restorative Justice,

> Restorative justice is an approach of addressing harm or the risk of harm through engaging all those affected in coming to a common understanding and agreement on how the harm or wrongdoing can be repaired and justice achieved. Its practices (such as mediation, circles, conferencing) have been offered and delivered to address harm in different conflict areas, such as justice, education, peacebuilding, families, organisations, and communities.[34]

Two broad themes emerge from these definitions. The first is that restorative justice offers a paradigm shift in the way that offending behaviour is responded to, and the second is that restorative justice is a process in and of itself. The relationship between these two themes is reflected in the observation that 'restorative justice is not itself a process, but rather something that may inform or underpin processes.'[35] This thesis argues that both themes can apply simultaneously, insofar as restorative justice offers a new way to think about responding to offending behaviour in place of a crime/punishment dichotomy, as well as offering the process and outcome itself. Indeed, this simultaneous expression is found in child justice conferencing programs that have been established both as alternatives to mainstream processing of offenders, and also as a particular process with common features across jurisdictions: mediated encounters that discuss the offending behaviour, its effects and the reparation the offender is to make in order for the offender to be reintegrated into the community.[36]

2.4 Restorative justice as a new theory or paradigm

In his 1977 work, Eglash identified three forms of criminal justice, namely, retributive justice, distributive justice and restorative justice. He asserted that the first two had three common features. First, they had a central focus on the criminal act; second, they denied victim participation in the justice process; and third, they merely required passive participation by

[34] Wolthuis, A *Thematic Brief on Restorative Justice and Child Justice* European Forum for Restorative Justice, Leuven, Belgium 2020.
[35] Gade 2013 (Op. cit.) 10; see also van Ness D 'An overview of restorative justice around the world' For distribution at Workshop 2: Enhancing Criminal Justice Reform, Including Restorative Justice United Nations 11th Congress on Crime Prevention and Criminal Justice Bangkok, Thailand April 22, 2005; Burkhead, M *A life for a Life The American Debate over the Death Penalty* McFarland and Co North Carolina 2009; Pressler, S Saner J and Wasserfall I *Criminal Justice Structure and Mandates* FET College Series Cape Town 2009; and Stamatakis, N and Beken T 'Myths and Reality in the History of Restorative Justice' in Cools M et al (eds.) *Safety, Societal Problems and Citizen's Perceptions* Maklu Antwerpen 2010.
[36] McCold, P 'Primary Restorative Justice Practices' in Morris, M and Maxwell, G (eds), *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (2001) 41.

offenders in the process. By contrast, Eglash proposed a third form of justice, restorative justice, which provides an avenue to focus on restoring the harmful effects of an offender's actions in a way that actively involves *all* the parties in the criminal process. He described this as,

> … a deliberate opportunity for offender and victim to restore their relationship, along with a chance for the offender to come up with a means to repair the harm done to the victim ...[37]

Eglash also noted that retributive justice has 'its technique of punishment for crime' just as restorative justice has 'its technique of restitution.'[38] Reflecting on Eglash's work almost a decade later, Zehr observed that Eglash's explanation of retributive justice as the existing (western) criminal justice paradigm had only been dominant in recent centuries,

> It is difficult to realize sometimes that the paradigm which we consider so natural, so logical, has in fact governed our understanding of crime and justice only for a few centuries.[39]

Zehr also argued that restorative justice has a long historical pedigree and posited that it offers a viable and satisfactory alternative paradigm to retributive justice. In comparing the two paradigms, he observed that a retributive justice paradigm perceives crime as a conflict between individuals and the state, whereas restorative justice, as an alternative paradigm, considers crime as a conflict between individuals that can be addressed by dialogue insofar as '[i]t encourages victim and offender to see one another as persons, to establish or re-establish a relationship.'[40]

Thus, Zehr proposed that the foundational principle of the restorative justice paradigm was that crime fundamentally involves a violation of people and relationships, rather than merely a violation of law, which he argues is the founding principle of the retributive model of justice.[41] He asserts that the most appropriate response to criminal conduct is to focus on repairing the harm caused by the wrongful act, and therefore the criminal justice system should provide those most closely affected by the crime – namely the victim, the offender, and the community –

[37] Eglash 1977 (Op. cit.).
[38] Ibid.
[39] Zehr, H 'Retributive Justice, Restorative Justice' (1985) *New Perspectives on Crime and Justice* 4
[40] Ibid.
[41] Ibid.

with a safe opportunity to come together to discuss the event and attempt to arrive at some type of understanding about what could be done to provide appropriate reparation.[42] For Zehr, retributive and restorative justice offer competing paradigms for responding to criminal acts.[43] From this theoretical perspective, restorative justice, including child conferencing programs, offers a clear alternative to mainstream approaches.

2.5 Restorative justice as a new paradigm in child justice

Taken to another level, restorative justice offers a 'third way' in child justice. Historically, the two most influential theoretical models of child justice were the welfare model and the justice model, both of which sit within a retributive model of justice.[44] The welfare model emphasised the rehabilitation needs of the offender. The 'welfare model' adopted a positivist approach based on the assumption that wrongdoing is the product of social or environmental factors for which the young person cannot be held individually responsible. Accordingly, the primary goal of the child justice system is to provide appropriate help or treatment for offenders, rather than punishment. In this model, the child offender is characterised as vulnerable or in trouble; as such, they need protection from the potentially harmful and corruptive influences of the adult world, including the adult criminal justice system. Consequently, the primary emphasis of a welfare model of child justice is on the 'needs' and a state-defined 'best interests' of the child rather than the 'deeds' they may have committed.[45]

By contrast, the justice model of child justice emphasises due process and accountability. In contrast to the positivism of the welfare model, the justice model takes a traditional criminal justice approach that says that people, including children, are – with certain limited exceptions, such as mental impairment or age – endowed with free will. On this basis, offending behaviour is a choice and a person is responsible for their actions. Therefore, they should be held accountable in law for what they have done: the primary focus is on the 'deeds' of the child rather than their welfare 'needs'. Accordingly, the principal goal of the justice model of the child justice system is fundamentally the same as the adult justice system: to determine legal guilt and, if convicted, to assess the degree of culpability that they bear. Punishment should

[42] Ibid.
[43] Zehr, H *Changing Lenses: A New Focus for Crime and Justice* Herald Press Scottsdale 1990; Zehr, H *The Little Book of Restorative Justice* Good Books, Intercourse PA 2002.
[44] Australian Law Reform Commission *Seen and heard: priority for children in the legal process* (ALRC Report 84) 1997, Part 18.
[45] Ibid.

then be apportioned in accordance with the seriousness of the offence and the offender's corresponding 'just deserts.'[46]

However, it should be noted that the distinction between these two approaches is not always clear:

> [T]he debates over the welfare versus justice models for juvenile justice have been superseded by a process of simultaneous broadening of welfare concerns, as well as the promulgation of the ideology of the justice model. Young people are seen as being in need of guidance and assistance (the welfare aspect), whilst at the same time offending is seen to be the result of calculated decisions by rational actors (the justice aspect).[47]

In this environment, restorative justice offers a third alternative in which offenders are encouraged to accept responsibility for their criminal behaviour and its consequences for others, primarily through the involvement of victims when dealing with the offence. From this perspective, restorative justice does not overlook rehabilitation and punishment but places them in the context of individuals taking responsibility for their actions:

> [T]he paradigm of restorative justice … argues that criminal behaviour is a conflict between individuals and that when a crime is committed, it is the victim who is harmed rather than the State. Thus, rather than the offender owing a 'debt to society' which must be expunged by experiencing some form of punishment (such as a fine or imprisonment) the offender owes a debt to the victim, which can only be repaid by making good the damage caused to that particular individual.[48]

In effect, a 'restorative justice model' adopts a fundamentally different assumption about the concept of crime itself, the relationship between offenders, victims, citizens and the state, and therefore about the most appropriate ways of responding to crime. Whereas the traditional welfare and justice models of child justice (and indeed adult justice) view crime first and foremost as an offence against the state, restorative justice places particular emphasis on the harm that is done to the victim, in large part because of concern that victims have been

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[46] Ibid.

[47] Palmer D and Walters R 'Crime prevention camps for youth 'at risk': Blurring the boundaries of care and control' in Simpson C and Hill R (eds) *Ways of Resistance: Social Control and Young People in Australia* Hale & Iremonger Sydney 1995, 161.

[48] McElrea F 'Restorative justice — the New Zealand Youth Court: A model for development in other courts?' (1994) 4 *Journal of Judicial Administration* 33.

neglected for many years by both the mainstream criminal justice agencies and policy-makers. Rather than relying on the state, restorative justice shifts the focus on resolution of criminal conduct to those who are most directly affected by a particular offence – victims, offenders and their 'communities of care.'

2.6 Restorative justice as a process

With this change of focus to the actors themselves, Marshall sees restorative justice as a process that has a particular character, namely, that 'all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.'[49] Walgrave criticises this 'purist' definition as too narrow because it emphasises direct face-to-face meetings. He suggests that a meeting might not be necessary or might be only one aspect of a restorative process.[50] Instead, Walgrave calls for a wider 'maximalist' definition of restorative justice as a process involving 'every action that is primarily oriented towards doing justice by repairing the harm that has been caused by crime.'[51] Zehr likewise sees restorative justice as a process, as does Braithwaite. Zehr notes that,

> Restorative justice is a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.[52]

While Braithwaite states that,

> The most general meaning of restorative justice is a process where stakeholders affected by an injustice have an opportunity to communicate about the consequences of the injustice and what is to be done to right the wrong.[53]

Building on Braithwaite's work on shaming (see below), van Wormer describes restorative justice as 'a process designed to bring out the best in the offender – instead of becoming isolated

[49] Marshall, T 'The Evolution of Restorative Justice in Britain' (1996) 4 *European Journal of Criminal Policy and Research* 21; Marshall, T *Restorative Justice: An Overview* Home Office Research Development and Statistics Directorate London 1999.
[50] Walgrave L 'How pure can a maximalist approach to restorative justice remain? Or can a purist model of restorative justice become maximalist?' (2000) 3 *Contemporary Justice Review* 415.
[51] Bazemore G and Walgrave L (eds) *Restorative juvenile justice: Repairing the harm of youth crime* Criminal Justice Press Monsey, NY 1999; see also, Ibid. Walgrave (2000) 415; Walgrave, L 'Investigating the Potentials of Restorative Justice Practice' (2011) 36 *Washington University Journal of Law and Policy* 91.
[52] Zehr 2002 (Op. cit.).
[53] Braithwaite J and Strang H 'Restorative Justice and Family Violence' in Strang H and Braithwaite J (eds) *Restorative Justice and Family Violence* CUP Cambridge 2002.

and embittered, being grateful for fair treatment – and in the victim – instead of seeking revenge, accepting the offender's apology and/or restitution.'[54] Dorpat used similar language in his description: 'Restorative justice is a process of bringing together all the stakeholders (offenders, victims, communities) in pursuit of a justice that heals the hurt of crime, instead of responding to the hurt of the crime by using punishment to hurt the offender.'[55]

In 2006, the UN Office on Drugs and Crime defined restorative justice as 'an approach to problem solving that, in its various forms, involves the victim, the offender, their social networks, justice agencies and the community.'[56] It stated that,

> Restorative justice refers to a process for resolving crime by focusing on redressing the harm done to the victims, holding offenders accountable for their actions and, often also, engaging the community in the resolution of that conflict. Participation of the parties is an essential part of the process that emphasizes relationship building, reconciliation and the development of agreements around a desired outcome between victims and offender.[57]

Looking more closely at these definitions of restorative justice as a process, it becomes apparent that they each specify that parties – that is, the offender, the victim and the community – should be actively involved in a process and that both the process and the outcomes need to be reflective of the values of restorative justice. For victims, the aim is restoration, which encompasses the repairing of the physical, emotional and psychological harm that they may have experienced. For offenders, the primary aims include the promotion of accountability towards those who have been harmed by an offence, and the active reintegration of offenders themselves back into the community. For communities, the goal is one of empowerment and a reinvigoration of civil society founded on a network of constructive, and largely self-repairing, social relationships.

More specifically, the fact that the outcomes required under the UN definition focus on 'redressing the harm done' means that exclusively retributive and rehabilitative responses should be avoided – noting that Levad describes these as failing to make good the actual harm

[54] Van Wormer, K 'Restorative Justice: A model for social work with families' (2003) 84 *Families in Societies: Journal of Contemporary Human Services* 441, 448.
[55] Dorpat, T *Crimes of Punishment: America's Culture of Violence* Algora Publishing New York 2007, 236.
[56] United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes*, Criminal Justice Handbook Series (New York: United Nations, 2006), 6.
[57] Ibid.

done because they respectively tend to either, 'follow the normative guides of balancing the scales of justice or treating the illness of offenders.'[58]

Thus, the signature feature of a pure restorative justice response is the facilitation of a mediated process through which the victim can be involved with the offender, so that the offender gains insight into the impact of their behaviour and are able to make some form of direct or indirect reparation and restoration, in consultation with the victim, or their representative. Through undertaking this process and making reparation to the victim, a restorative justice response provides the offender with an opportunity to restore and repair the relationship that they have with the victim and the community. This general definition is also reflected in the definition adopted in the Geneva Declaration of the 2015 World Congress on Juvenile Justice:

> The Participants in the World Congress defined restorative juvenile justice as a way of treating children in conflict with the law with the aim of repairing the individual, relational and social harm caused by the committed offence and which contributes to the child's rehabilitation and reintegration into society. This entails a process in which the child offender, the victim (only with his or her consent) and, where appropriate, other individuals and members of the community participate actively together in the resolution of matters arising from the offence.[59]

This definition shows that restorative justice for adults and children rests on common principles that are applied regardless of whether the offender is an adult or a child. Thus, the defining characteristics of a restorative justice response are:

(a) a focus on the victim as opposed to the 'wronged' State or the 'problems' of the offender in isolation;

(b) the importance of using a process that gives the victim or their representative an opportunity to be involved in arriving at an outcome;

(c) an outcome that focuses on the specific needs of the victim flowing from the offence in combination with; and

[58] Levad, A *Restorative Justice: Theories and Practices of Moral Imagination* El Paso: LFB Scholarly Publishing LLC, 2012, 105.
[59] *Geneva Declaration 2015 of the World Congress of Juvenile Justice* available at Terre des Hommes website.

(d) an outcome that enables the offender to be reintegrated through the process itself.[60]

As Walgrave notes, a restorative justice response is 'an option for doing justice after the occurrence of an offence that is primarily oriented towards repairing the individual, relational and social harm caused by the offence.'[61] The key word here is 'doing' because restorative justice is a more active form of responding to offending behaviour from the perspective of both the offender and the victim, which can be compared to the more passive court centred processes where the offender and victim are almost reduced to cameo roles, in the shadow of the lawyers and judiciary.

2.7 The pillars of a restorative response

2.7.1 Foundational pillar 1: Creative restitution

A pivotal innovation evident in Eglash's work in relation to restorative justice is the transfer from civil law to criminal justice, of the traditional idea of monetary restitution. For Eglash, restorative justice offers a vehicle to develop an expanded theory of restitution; indeed, well before 1977, he used the term 'creative restitution' to describe the concept that eventually came to be labelled as 'restorative justice'.

In 1957, Eglash first started to explore the idea of 'creative restitution' as a move beyond simple monetary reimbursement – which is the way he claimed most lawyers traditionally understood the term restitution (and arguably still understand it today). In proposing examples of creative restitution, Eglash hypothesised that creative restitution could manifest itself in the situation in which a car thief decides to wash his victim's car every Sunday for a month to make up for taking it in the first place.[62] In 1959, he expounded on this idea as a general principle, in the following terms,

> … in creative restitution, an offender, under appropriate supervision, is helped to find a way to make amends to those he has hurt, making good the damage or harm he has

[60] Braithwaite, J 'Building Legitimacy Through Restorative Justice' in Tyler, T (ed.) *Legitimacy and Criminal Justice: International Perspectives* Russell Sage, NewYork 2007, 146-162; KPMG *Department of Human Services: Review of the Youth Justice Group Conferencing Program Final Report* KPMG Melbourne 2010; Smith N and Weatherburn, D *Youth Justice Conferences versus Children's Court: a comparison of re-offending* NSW Bureau of Crime Statistics and Research, 2012; Haines K and O'Mahony D 'Restorative Approaches, Young People and Youth Justice' in Muncie J and Goldson B (eds) *Youth Crime and Justice* Sage Publications London 2006.
[61] Walgrave, L *Restorative Justice, Self-Interest and Responsible Citizenship* Wilan Portland, OR: Willan 2008.
[62] Eglash, A 'Creative Restitution: A Broader Meaning for an Old Term' (1957) 48 *Journal of Criminal Law, Criminology and Police Science* 619, 620.

> caused, and going a second mile whenever possible, e.g. by going beyond simple repair, by offering restitution despite punishment, or helping others like himself.[63]

Thus, in addition to his ground-breaking use of the term 'restorative justice', Eglash's work is notable for the introduction of the idea of 'creative restitution' to the modern concept of restorative justice. This idea, also identified by other early writers, finds its form in all current Australian youth conferencing programs through the common element of the development of a set of actions or activities that a young person will perform to restore the relationship between the young person, the victim (if there is one), and the community. Common examples include car washing, letters of apology, undertaking some voluntary work (such as chores at home), engaging with school or sport or creating an item to give to the victim or another person.[64] In each instance, the young person agrees to perform actions following input from the victim or community, which actions enable the young person to 'pay' for the harm done by their offending.

2.7.2 Foundational pillar 2: a more inclusive process

Also writing in 1977, Nils Christie used a community court hearing in Arusha, Tanzania as his intellectual launch pad. He focused on the idea that the criminal justice process itself was deficient because it failed to include the active participation of all affected parties.[65] Christie's significant contribution was to identify the singular importance of an *inclusive process* that leads to an acceptable outcome within a system of justice of whatever model.[66] The question of process, participation and procedure remains of vital importance in any children's rights analysis of youth conferencing programs, given the centrality of procedural and participatory rights under the CRC.

In developing this idea, Christie's thesis was that western systems of criminal justice disenfranchised local neighbourhoods from acting as what he considered to be the rightful owners of (criminal) conflicts.[67] Christie argued that in western criminal practice, the State had 'stolen the conflict' between citizens and by doing so, deprived society, victims and offenders

[63] Eglash, A 'Creative Restitution: Its roots in psychiatry, religion and law' (1959) 10 *British Journal of Delinquency* 114.
[64] Barnett, R 'Restitution: A New Paradigm of Criminal Justice' (1977) 87 *Ethics* 279, 281.
[65] Christie, N 'Conflicts as Property' (1977) 17 *The British Journal of Criminology* 1.
[66] Ibid.
[67] Ibid.

of the 'opportunities for norm-classification.'[68] Based on his experience with the community court in Tanzania, Christie's response to this challenge was to propose that mainstream western criminal courts should be superseded by new courts that could bring the offender, the victim and the broader local community together – a concept that links clearly to Eglash's work to what is now understand as a fundamental aspect of restorative justice practice and theory.[69]

In outlining the operation of his new proposed courts, Christie proposed a four-stage process.[70] The first stage involves reaching a determination about whether a particular person had broken the law – essentially, a fact-finding exercise. Moving to the second stage, the court looks at what can be done to assist the victim – both by the offender and the local community – and more broadly, the state. In other words, departing from 'mainstream' models of retributive justice that move to punishment after a finding of fact, Christie suggested that a focus on assistance to the victim should precede and form an antecedent to punishment, rather than as a tangential afterthought. He therefore argued that only after this second phase had been addressed, should a court move to the third phase of imposing a penalty, which Christie argued would need to reflect any restitution action undertaken by the offender in pursuit of their satisfaction of the second stage. Hence restitution forms a condition precedent to punishment, not an ancillary order as in more traditional retributive or rehabilitative approaches to offending behaviour. In the fourth stage the focus shifts to the needs of the offender. This is because this final stage requires the court to look at the services needed by the offender to rectify their own problems. As Gade noted, 'Christie's call for inclusive criminal justice processes that involve direct encounters between victims and offenders has … inspired many contemporary RJ [restorative justice] scholars.'[71]

[68] Ibid.; see also Gavrielides 2011 (Op. cit.) 1. Although not explored in the restorative justice literature, Christie's work – and indeed coupled with that of Barnett and Eglash – provides an interesting counter-example to contemporaneous anthropological and historical research that was being undertaken on the importance to the evolution of centralised power in early-modern states in Europe of secular rulers' assertion of authority away from ecclesiastical and localized authorities over criminal procedure and administration as a tool of state building, in particular in areas such as the prosecution of heresy and witchcraft, for instance as detailed in Michael Kunze's *Highroad to the Stake* (first published in German in 1982, but reprinted in English in 1987 – see Kunze M *Highroad to the Stake: A Tale of Witchcraft* (trans. Yuill W) University of Chicago Press, Chicago 1987). Like Christie's focus on a single community court hearing in Arusha as a tool to critique western criminal process, Kunze focused on a single Bavarian witch trial in 1600 to offer a devastating critique of early modern retributive justice as an emanation of state power (Kunze, 1987). While Kunze used a 1600 witch trial to critique the origins of what Barnett might call the western criminal retribution paradigm, Christie used a court hearing in Arusha to offer a critique from the opposite historical direction.
[69] Christie 1977 (Op. cit.) 1.
[70] Ibid.
[71] Gade 2013 (Op. cit.) 10.

Christie's work can be seen as foundational insofar as it proposed that an inclusive process is one of the major pillars in modern restorative justice practice, including in youth justice conferencing. Nonetheless, Christie himself did not explicitly use the term 'restorative justice' until after 2000, despite that fact that his work on victim and community participation had already been recognised as fundamental to modern notions of restorative justice.[72] Christie's ideas are reflected in the programs under review in three Australian jurisdictions, which each, to a greater or lesser extent, involve a clearly defined set of steps within the conference process. The first step is the referral of the young person to the conference, by police or the courts. Each conference model then moves through phases of hearing each participant's story, developing an outcome plan and then ensuring its implementation – either by agreement or with final approval by a court as part of the final disposition of the matter. For example, in Victoria, compliance with the outcome plan is normally imposed as a special condition on whatever disposition is imposed by the Children's Court of Victoria.[73]

What is less evident in each of the programs under review in this thesis, is Christie's emphasis on the role of the community in restorative justice,. While it is possible to identify each of Christie's four steps in each youth conference program, the importance of the involvement of the wider community in a broader sense, or even the young offender's community in a narrower sense, in the process is less strong and appears to be of less importance within youth conferencing in Australia. Much of the early driving force to establish programs was about getting child offenders to engage with victims and the agencies involved in the conference, such as the police. Thus, a wider role for the community as a whole in restorative justice processes, is not reflected as clearly in the Australian experience.[74] This is not necessarily a bad thing because the concept of community can be problematic in itself, because it rests on the existence of,

> … an imagined consensual and inclusive community and civil society that enables benign, mutually engaged and balanced processes; a coming together of remorseful

[72] Christie, N 'Restorative and Retributive Justice in the Context of War and War Crimes (2005) 8 *Temida* 27. Christie, N 'Victim Movements at a Crossroad' (2010) 12 *Punishment and Society* 115.
[73] Section 415(8) – 416(3)(d) *Children, Youth and Families Act 2005* (Victoria).
[74] Richards, K 'Locating the community in restorative justice for young people in Australia' (2014) 12 *British Journal of Community Justice* 2.

> child 'offenders' and receptive (often adult) 'victims', each keenly engaged in discourses of moral pedagogy and repair.[75]

To place this imaginary supportive and forgiving community at the centre of restorative justice necessitates avoiding serious questions, some of which may be unanswerable in any given case: intergenerational conflict, interpersonal conflict between victims and offenders. It also ignores profound 'traditional' societal divisions, such as class, race, gender and issues that plague the heart of criminal justice (and society) more generally, such as poverty, inequality and social or economic exclusion. To the extent that restorative justice elevates a 'nirvana story'[76] of community it arguably ends up doing the opposite: it evolves into a practice that 'excludes individuals because they are without community or without the *right* community.'[77] From this perspective, the centrality of community in restorative justice is just 'the stuff of fiction' based on an unrealisable existence of an inclusive and consensual community.[78]

However, there is an alternative view. In 1992, Hart noted that ''Communities', in the broadest sense of the word, are constructed. To support children or youth in working together is, by definition, to be engaged in community development.'[79] In this sense, there is an argument that the presence of community exists at each stage of a conferencing process, although, as is discussed in Chapter Five, the extent to which youth conferencing programs adhere to the principles of non-discrimination set out in the CRC, is questionable.

2.7.3 A later third pillar: "reintegrative" shaming

A further key contribution to restorative justice theory comes in the form of Braithwaite's 1989, *Crime, Shame and Reintegration,* in which he introduced the idea of 'reintegrative shaming.'[80] Braithwaite posited that shaming is fundamental to controlling crime, and he drew a distinction between two forms of shaming, namely, 'stigmatising shaming' and 'reintegrative shaming.'

Braithwaite argues that mainstream criminal justice practice – whether for adults or for children – creates a sense of shame that is stigmatising because it destroys the moral bonds between an

[75] Cunneen and Goldson, 2015 (Op. cit.) 148.
[76] Daly, K. 'Restorative justice: The real story'(2002) 4 *Punishment and Society,* 55, 70.
[77] Cunneen and Goldson, 2015 (Op. cit.) 148.
[78] Ibid. 149.
[79] Hart, R *Children's Participation: from Tokenism to Citizenship* UNICEF Innocenti Essays, No. 4, UNICEF/International Child Development Centre Florence, Italy, 1992.
[80] Braithwaite, J *Crime, Shame and Reintegration,* Cambridge University Press, 1989.

offender and the community.[81] Contrasted with stigmatising shame, Braithwaite suggests that restorative justice offers a way to achieve an alternative form of shame, namely reintegrative shame. This form of shame, he argues, achieves the opposite to stigmatising shame, insofar as it strengthens the 'moral bonds' between the offender and the community, so as to reintegrate the offender by acknowledging the shame of wrongdoing, but at the same time offering ways to expiate that shame – hence the label 'restorative'.

Writing about this concept again in 1999, Braithwaite noted that restorative justice is 'about restoring victims, restoring offenders, and restoring communities.'[82] In 2002, he returned to the role of shame, stating that,

> … the discussion of the consequences of the crime for victims (or consequences for the offender's family) structures shame into the [restorative justice] conference; the support of those who enjoy the strongest relationships of love or respect with the offender structures reintegration into the ritual. It is not the shame of police or judges or newspapers that is most able to get through to us; it is shame in the eyes of those we respect and trust.[83]

For Braithwaite therefore, the capacity to manage shame in a positive and constructive way through a restorative justice model is an additional pillar or theme in modern restorative justice. This theoretical contribution to restorative justice can be seen in the outcome phases of most youth conference arrangements in Australia. Following the acknowledgement/fact-finding, preparation and conference phases of each process, each model involves an outcome phase, which is designed to develop a strategy to reintegrate children back into the community.[84]

2.8 Models of restorative justice

Although this thesis focuses on youth conferencing, it is important to recognise that there are three primary models of restorative justice: victim-offender mediation, circle sentencing and

[81] Interestingly, the guiding statutory provision for sentencing in children in Victoria – section 362 of the *Children Youth and Families Act* 2005 (an identical provision appeared in the preceding *Children and Young Persons Act* 1989) – includes an express requirement for the court to have regard to 'the need to minimise the stigma to the child resulting from a court determination' (*Children Youth and Families Act* 2005).
[82] Braithwaite, J 'Restorative justice: assessing optimistic and pessimistic accounts' in Tonry, M (ed) *Crime and Justice: A review of the research vol 25* University of Chicago Press Chicago 1999.
[83] Braithwaite, 'Restorative Justice and Therapeutic Jurisprudence' (2002) 38:2 *Criminal Law Bulletin* 244-262; see also Braithwaite, J and Mugford, S 'Conditions of Successful Reintegration Ceremonies: Dealing with Juvenile Offenders" (1994) 34 *British Journal of Criminology* 139-171.
[84] See, for example, section 416 *Children, Youth and Families Act 2005* (Victoria).

conferencing.[85] As set out in Table 1 below, each operates in Australia, although conferencing is the only legislated model for children and young people, and is the only model of restorative justice being assessed in this thesis because it operates across the three jurisdictions under review. The other models are discussed briefly to explain how they differ from conferencing.

	Youth Conferencing	Victim-Offender mediation	Circle sentencing
NSW	X	X	X
VIC	X		
ACT	X		
QLD	X	X	
WA	X	X	X
SA	X	X	
TAS	X	X	
NT	X	X	

Table 1: Restorative justice programs in Australia

2.8.1 Victim-offender mediation

Early victim-offender mediation programs began in North America, such as the 1974 Kitchener experiment in Ontario that involved victims of vandalism being visited by the offender who offered restitution.[86] This program was a success and inspired similar programs across many countries, including Australia, where it is available in in all jurisdictions except Victoria, South Australia and the ACT.[87] Where it is offered, it is available for both adult and child offenders.[88] Victim-offender mediation involves an independent mediator who facilitates a meeting between the victim and an offender who has accepted responsibility for an offence. Victim-offender mediation is highly confidential and many serious and indictable offences, including sexual assault, are dealt with under the process in most states and territories.[89] However, it is primarily used (where available) as a post-sentence option, and in all cases 'offenders do not

[85] Larsen, J *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology Report No 127, 2014) 1; King 2008 (Op. cit.) 1104 – 1105.
[86] Peachey, E 'The Kitchener Experiment' in Wright, M and Galaway, B (eds.) *Mediation and Criminal Justice: Victims, Offenders and Community* (1989) 14, 14−16.
[87] Larsen 2014 (Op. cit.) 1.
[88] For example, see Government of Western Australia Department of Justice, 'Victim-Offender Mediation', 17 October 2016 at <www.correctiveservices.wa.gov.au/victim-services/victim-offender-mediation/victim offendermediation.aspx?fbclid=IwAR1YWtHu8glrmo5d1ZRTbICiWFFgflXrY2JeEzFMqcAKfIA4qyer6a3i_v8>
[89] Sewak S, Bouchahine M, Liong K, Pan J, Serret C, Saldarriaga A and Farrukh E *Youth Restorative Justice: Lessons From Australia* A Report for HAQ Centre for Child Rights 2019, 26 – 28.

receive a reduction in their sentence.'[90] Victim-offender mediation can be distinguished from conferencing because no other persons are involved.

2.8.2 Circle sentencing

Within Australia, circle sentencing only operates for adult Indigenous offenders in NSW and Western Australia.[91] Although at least one scholar has suggested that other Indigenous courts, including the Victorian Koori Court or the ACT Galambany (adult) and Warrumbul (children) Courts (which calls themselves circle courts)[92] are examples of restorative justice, this is not the case.[93] The distinction is that while these courts may have some 'restorative' elements, they maintain a 'traditional' focus on offender rehabilitation, a more adversarial prosecution-defence division and a non-defined role for the victim in the process. While these courts do seek to provide a more culturally appropriate and relevant process in which it becomes more feasible to dispense sentences that are more appropriate and more likely to reduce reoffending, the distinction for the circle sentencing courts is the additional restorative justice focus on promoting healing for victims and all other affected parties, encouraging the offender to mend the harm they have caused, and promoting community and cultural value. A 2020 study by the NSW Bureau of Crime Statistics and Research (BOCSAR), found that Aboriginal people who participate in Circle Sentencing had lower rates of imprisonment and recidivism than Aboriginal people who were sentenced in the traditional way.[94]

2.8.3 Conferencing

Conferencing is the most widespread form of restorative justice in Australia. It is a formalised process that includes victimless offences as well as offences that involve a victim in which the victim (if there is one) has an opportunity to face an offender to express the harm caused against them, and to give the offender a forum to 'address' and repair the harm they have caused. Conferencing in Australia aims to examine the reasons for the offending behaviour, encourage active participation in the process and explore ways to repair the harm to the victim and/or community. Together, the participants at the conference agree on a suitable outcome that

[90] Larsen 2014 (Op. cit.) 18.
[91] *Criminal Procedure Act 1986* (NSW) s 19.
[92] See www.courts.act.gov.au/magistrates/about-the-courts/areas-in-the-act-magistrates-court/galambany-court and https://www.courts.act.gov.au/magistrates/about-the-courts/areas-in-the-act-magistrates-court/warrumbul-circle-sentencing-court
[93] King 2008 (Op. cit.) 1096, 1105 cf Larsen 2014 (Op. cit.) 15 – 16.
[94] Yeong, S and Moore, E 'Circle Sentencing, incarceration and recidivism' NSW BOCSAR *Crime And Justice Bulletin* 226, April 2020.

normally focuses on making reparation and promoting opportunities for the young person's development.

The modern history of conferencing programs for people under the age of 18 began with the enactment of New Zealand's *Children, Young Persons and Their Families Act 1989* (*CYPFA*) which introduced the term 'family group conferencing' to the youth justice lexicon.[95] This Act was the first in the world to provide a statutory basis for conferencing. Under this legislation, a conference was predicated on a meeting where an offender (who had admitted an offence), the victim and their respective supporters, discuss the offence and its impact and decide on an appropriate penalty (or outcome). A co-ordinator runs the conference, a police officer is typically present, and the conference outcome is legally binding.

Although the specific words 'restorative justice' were not included within the original iteration of conferencing in the New Zealand *CYPFA*, it is clear that family group conferencing incorporated restorative justice principles and reflected each of the foundational pillars identified above. In particular, the restorative justice philosophy is reflected in the inclusion of all those affected by the offending in the family group conference process; the emphasis on collective decision-making in addressing the problems caused by the crime; the objective of ensuring that the offender is held accountable for their wrongdoing; and the acknowledgment that the offender must be reintegrated into their community.

In addition, in line with the restorative justice approach advocated by Christie, the New Zealand Act affirms that the prime site of child crime control should be the community, rather than criminal justice agencies; and therefore conferences do not occur at court. Thus, New Zealand established a restorative justice program that was explicitly designed to:

(a) increase the range of diversionary options under which young offenders could be made accountable for their offending;

(b) facilitate a shift in philosophy from one of unilateral state intervention in the lives of juveniles and their families towards one based on partnership between families and the state;

[95] Maxwell G and Morris A *Family, Victims and Culture: Youth Justice in New Zealand* Victoria University of Wellington, Wellington 1993.

(c) enable the recognition and affirmation of culturally diverse processes and values; and

(d) involve victims in the decisions about the outcomes for the young persons who had offended against them.

These aims clearly reflect the pillars of restorative justice identified above.

Seemingly unaware of the developments leading to the New Zealand legislation, Braithwaite wrote his contemporaneous *Crime, Shame and Reintegration* in 1989, in which, as noted above, he proposed that responses to crime should use reintegrative shaming rather than stigmatising shaming of offenders. In Australia, John MacDonald, an adviser to the then New South Wales Police Service, recognised the link between Braithwaite's 1989 idea of reintegrative shaming and New Zealand's 1989 model of conferencing. This link was the catalyst for him proposing that New South Wales adopt features of the New Zealand conference model, but that the process should be located within the Police Service. On this basis, a pilot scheme of police-run conferencing was introduced in Wagga Wagga in 1991, to provide an 'effective cautioning scheme' for young offenders.[96] This pilot has come to be referred to as the 'Wagga model' of restorative justice and was the first experiment with restorative justice in Australia.

After this initial experiment in Wagga Wagga, police-run conferencing was rolled out in other New South Wales police areas, and later in the Australian Capital Territory, Tasmania, the Northern Territory and Queensland. Western Australia implemented a variant model that involved juvenile justice teams. During this early period, there was debate over the merits of the police-run 'Wagga model' practiced in these jurisdictions compared to the non-police run 'New Zealand model' of conferencing.[97]

One of the main distinctions between the two models is that the New Zealand model included the family of the young offender in the conference hearing and decision-making processes. Under this model, the convenor facilitates the conference, which involves an introduction of parties and processes, a police officer reading the facts, the offender admitting the facts and the victim describing the effects of the offence. This is followed by a general discussion about the effects of the offence and options for making amends. The family of the offender meets

[96] Moore, D and O'Connell T 'Family conferencing in Wagga Wagga: a communication model of justice' in Alder C and Wunderlitz J (eds) *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?* Australian Institute of Criminology Canberra 1994.
[97] Ibid.

privately to discuss making an offer of amends. An agreement may then be reached and the parties may share food together. If the young person does not make an admission, the conference ends and the matter is referred to a court.

By contrast, the Wagga model does not involve a private family meeting. Instead, the discussion of what took place, who was affected and what must be done to make things right, happens in a group comprising the victim, the offender, their supporters and the police, along with a conference convenor. If an agreement is reached, the convenor prepares a formal written agreement while the others take refreshments and talk in an informal way.

In 1993, following the first legislation for a conferencing program in Australia, Braithwaite noted 'a modest shift' in Australia and New Zealand from 'an oppressive criminal justice system to a more republican engagement of citizens in the criminal justice process.'[98] Braithwaite described the pre-existing state of affairs in the following terms,

> Australia and New Zealand have criminal justice systems that are shockingly oppressive in either liberal or republican terms, systems that have been characterised by brutality, racism, patriarchy, contempt for both offenders and victims by professionals within the system, fabrication of evidence, corruption and ineffectiveness.[99]

Braithwaite was then effusive in his praise of the innovations in New Zealand,

> This Act is about citizenship responsibilities as fundamental to the strategy for dealing with juvenile crime, as well as citizenship rights. This republican statute's political motivation comes not from the Roman or Florentine or French or American republics, but from the great Maori republics. It was a reform from below, not a reform from the North. Reform had its roots in the frustration of Maori families with the way the Western state disempowered them through the criminal justice system. … The spirit of the New Zealand juvenile justice reforms is to get offenders and their communities, particularly their families, to take responsibility for offending. Crime victims have their rights as citizens taken more seriously. But they too are asked to shoulder the citizenship responsibility of participating in a constructive way in a deliberative process oriented

[98] Braithwaite, J 'Juvenile Offending: New Theory and Practice' in Atkinson, L and Gerull, S.-A (eds.), *National Conference on Juvenile Justice. Conference Proceedings No. 22*, Canberra, AUS: Australian Institute of Criminology 1993, 35-42.
[99] Ibid.

> to helping the offender to become a law-abiding, rights respecting citizen. Under this model, both the offender and the victim are imputed the status of responsible citizen in a community, whereas under a liberal model their status is as individual subjects of state justice; the status of the victim is simply that of evidentiary cannon fodder, of witness or claimant, not of citizen with participation rights and obligations.[100]

Conferencing was now on the Australian radar and had its champions.

2.9 Distinguishing restorative justice from other forms of innovative justice

At the same time, 'true' restorative justice – such as the policy aim of each of the three youth conferencing programs under review – should be distinguished from what might seem, at first glance, to be similar to the concepts of Indigenous justice and therapeutic jurisprudence, as well as other approaches that likewise aim to 'vest more authority in lay actors and community organisations' such as positive criminology, procedural justice and initiatives designed to engender less adversarial approaches within the criminal justice system.[101] The distinction is that in restorative justice, as outlined by Braithwaite above, the central focus is on the relationship between victims, offenders and communities, whereas for Indigenous justice, the focus tends to be on improving the relationship between Indigenous peoples and 'colonial justice'. For therapeutic jurisprudence, the focus is on the relationship between legal actors, and, especially between judicial officers and offenders.[102]

These important justice innovations do not *ipso facto* fall within the scope of restorative justice because they derive from and address different – but important – shortcomings in the justice system. At the same time, like restorative justice, they form part of a growing family of 'alternative justice' or 'innovative justice' initiatives that are often complementary and can operate together to produce more effective outcomes for offenders, victims and the

[100] Ibid.
[101] Daly K and Marchetti E 'Innovative Justice Processes' in Marmo M, de Lint, W and Palmer D (eds.) *Crime and Justice: A Guide to Criminology* (4th edition) Lawbook Co Sydney 2012; see also Wexler, D 'Therapeutic jurisprudence: It's not just for problem-solving courts and calendars anymore' in Flango, C, Kauder, N, Pankey, K and Campbell C (eds) *Future Trends on State Courts* National Center for State Courts Williamsburg 2004; Braithwaite 2002 (Op. cit.) 244-262; Yazzie, R and Zion, J 'Navajo restorative justice: the law of equality and justice' in Galaway B and Hudson J (eds) *Restorative Justice: International Perspectives* Criminal Justice Press Monsey 1996; Zion, J 'Navajo Therapeutic jurisprudence' (2001-01) 18 *Touro Law Review* 563.
[102] Wexler, D 'Therapeutic Jurisprudence: An Overview' (2000) 17 *Thomas M. Cooley Law Review* 125-134, 2000; Daly and Marchetti 2012 (Op. cit.).

community.[103] Indeed, conferencing can provide an ideal setting to advance therapeutic outcomes and to advance matters at the heart of Indigenous justice challenges.[104]

2.9.1 Restorative justice and Indigenous justice

In Australia, Indigenous justice has a clear and distinct purpose, which can be distilled into four elements. These elements are to (a) improve Aboriginal individual and community experience, access and knowledge of the justice system; (b) acculturate criminal justice institutions with Aboriginal and Torres Strait Islander experience; (c) enhance the rehabilitation of Aboriginal offenders and most importantly, (d) adopt practices, procedures and initiatives (such as an increase in the age of criminal responsibility) that reduce the over-representation of Aboriginal and Torres Strait Islander people in police statistics, before the courts; and above all, in custody.

Much of the impetus for contemporary Indigenous Justice initiatives in Australia derive from the 339 recommendations of the 1991 Royal Commission into Aboriginal Deaths in Custody (RCIADIC), many of which, 30 years later remain unfulfilled.[105] In 1991, the RCIADIC was forthright:

> The conclusions are clear. Aboriginal people die in custody at a rate relative to their proportion of the whole population which is totally unacceptable and which would not be tolerated if it occurred in the non-Aboriginal community.'[106]

Yet in December 2020, the Aboriginal and Torres Strait Islander imprisonment rate was 2,333 persons per 100,000 adult Aboriginal and Torres Strait Islander population, compared to the imprisonment rate of 208 persons per 100,000 adult population generally.[107] Indigenous justice has a legitimate and important role to play in the Australian justice system, but it is not the

[103] Gelb K, Stobbs N, and Hogg, R *Community-based sentencing orders and parole: A review of literature and evaluations across jurisdictions* Queensland Sentencing Advisory Council, Australia 2019, 173; Daly and Marchetti 2012 (Op. cit.) 455; Stobbs 2020 (Op. cit.) 1-30.
[104] Stobbs 2020 (Op. cit.) 1-30. See also Daly, K and Marchetti, E *Innovative Justice Processes: Restorative Justice, Indigenous Justice, and Therapeutic Jurisprudence* (2012) at <www.griffith.edu.au/__data/assets/pdf_file/0019/234325/2012-Daly-and-Marchetti-Innovative-justice-processes-pre-print.pdf>
[105] Marchetti E and Daly K *Indigenous courts and justice practices in Australia* Trends & issues in crime and criminal justice no. 277. Canberra: Australian Institute of Criminology 2004. <www.aic.gov.au/publications/tandi/tandi277>
[106] Royal Commission into Aboriginal Deaths in Custody (1991). Royal Commission into Aboriginal Deaths in Custody: National Report, Volume 2. Canberra: Australian Government Publishing Service.
[107] Law Council of Australia 'Royal Commission into Aboriginal Deaths in Custody requires urgent action 30 years on' 14 April 2021.

same as restorative justice because it is focused on prioritising the fundamental issues concerning an Indigenous offender over and above the wider victim and community focus of restorative justice.

At the same time, there is no reason why the principles of Indigenous justice cannot be harnessed within youth conferencing. Just as the WA and NSW circle sentencing programs demonstrate that it is possible to harmonise restorative justice and Indigenous justice goals, Chapters Five and Nine will address further the need for conferencing to improve Aboriginal experience of restorative justice in order better to achieve both the goals of restorative justice and the principles of Indigenous justice within the framework of Article 2 of the CRC relating to the right to non-discrimination.

2.9.2 Restorative justice and therapeutic jurisprudence

Just as restorative justice entered the criminal justice lexicon from the 1970s onwards, the language, principles and practices of therapeutic jurisprudence have become more important since the late 1980s and early 1990s.[108] With its origins in considering how to respond to mental health challenges in the US justice system, therapeutic jurisprudence is 'a multidisciplinary approach to assessing the impact of the law itself on the emotional and psychological experiences of all those who have contact with the legal system.'[109] Thus, therapeutic jurisprudence examines the law's effect on the wellbeing, including the psychological and emotional wellbeing, of its subjects.[110] It sees the law as 'a social force that can produce therapeutic or antitherapeutic consequences.'[111] This approach 'directs the judge's attention beyond the specific dispute before the court and toward the needs and circumstances of the individuals involved in the dispute.'[112]

Key features of a therapeutic jurisprudence approach include actively using judicial authority to solve problems and change offenders' behaviour, and a more interventionist role for the judicial officer than is the case in a traditional court process.[113] The development of problem-

[108] Marder and Wexler 2021 (Op. cit.) 399.
[109] Stobbs 2020 (Op. cit.).
[110] Wexler D *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* Carolina Academic Press 1990; Wexler D, and Winick B (eds), *Essays in Therapeutic Jurisprudence* Carolina Academic Press 1991
[111] Winick B and Wexler D *Judging in a therapeutic key: Therapeutic jurisprudence and the courts* Durham, NC: Carolina Academic Press 2003, 7.
[112] Rottman D and Casey P (1999) 'Therapeutic jurisprudence and the emergence of problem- solving courts' (1999) 240 *National Institute of Justice Journal* 12, 14.
[113] see generally Bartels, L *Challenges in mainstreaming specialty courts* Trends and Issues in Crime and Criminal Justice 383 Canberra: AIC 2009; Blagg, H *Problem-oriented courts* Perth: Law Reform Commission

oriented courts, such as the Drug Court, the Neighbourhood Justice Centre and the Assessment and Referral Court in Victoria, are classic examples of therapeutic jurisprudential techniques that aim to use the courts' authority and structure to further therapeutic goals.[114] In addition to fuelling the expansion of specialist courts, therapeutic jurisprudence is becoming 'increasingly influential in new approaches to probation and offender treatment models in the United States, Europe, Australia, and New Zealand, and in influencing access to justice policies in India and Pakistan.'[115] Easily overlapping with the core goals of Indigenous justice, therapeutic jurisprudence offers 'some common conceptual principles for the development of First Nations courts, tribunals, and dispute resolution programs seeking to eradicate systemic, monocultural bias in postcolonial criminal justice systems which tend to lead to intractable, carceral overrepresentation.'[116]

Although restorative justice focuses on restoring relationships and direct involvement of victims (where possible), therapeutic approaches can nonetheless be consistent with restorative justice, because both emphasise the use of the legal system to heal criminal behaviour, to address victimisation and to prevent future offending.[117] In many ways, they also have common origins: 'both emerged from analysis of modern criminal justice as an inhumane, ineffective process in which professionals impose their preferred outcomes on citizens — rather than arriving at more legitimate, responsive, healing, and constructive conclusions through respectful, inclusive deliberation.'[118] They also share 'a relational, participatory criminal justice process that departs from mainstream standards by providing citizens with opportunities for empowerment and to have their needs met.'[119] The key difference is the elevated role given to victims and community in restorative justice practices, especially conferencing.

At the same time, the fact that conferencing places its ultimate restorative justice emphasis on reintegration through the completion of outcome plans achieved through the conference

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of Western Australia 2008; King, M *Solution-focused judging benchbook* Melbourne: Australasian Institute of Judicial Administration 2009.

[114] Bartels L and Richards K (2013) 'Talking the talk: Therapeutic jurisprudence and oral competence' (2013) 38 *Alternative Law Journal* 31 Blagg, H *Problem-oriented courts* Perth: Law Reform Commission of Western Australia 2008; King, M *Solution-focused judging benchbook* Melbourne: Australasian Institute of Judicial Administration 2009; Fay-Ramirez, S 'Therapeutic Practice Through Restorative Justice: Managing Stigma In Family Treatment Court' (2016) 16 *QUT Law Review* 50.

[115] Stobbs 2020 (Op. cit.).

[116] Ibid.

[117] Fay-Ramirez 2016 (Op. cit.) 50.

[118] Marder and Wexler 2021 (Op. cit.) 402.

[119] Ibid. 399.

process, means it provides an excellent opportunity to promote 'therapeutic justice'.[120] This can be achieved, for example, by conferences that are planned around, and which prioritise, more sophisticated and holistic outcome plans for young offenders with multiple, complex needs. As discussed in later chapters of this thesis, such an approach is also consistent with the core principles of CRC as applied to the youth conferencing programs under review. In this respect, it can be seen that 'restorative justice and therapeutic jurisprudence both value processes that empower participants and thereby promote restoration — therapeutic jurisprudence would regard the restoration sought by restorative justice as therapeutic.'[121]

Therefore, although distinct in its foundational pillars, conferencing is consistent with other models of innovative justice.

2.10 Conclusions regarding restorative justice

In summary, while some argue with misplaced sentimentality that restorative justice draws on long-standing and pre-modern historical ideas and practices, modern restorative justice owes its jurisprudential heritage to scholars of the 1970s whose work was based on identifying and critiquing flaws within contemporary criminal justice practice. This work was bolstered by subsequent experiments in several jurisdictions, including Canada and New Zealand, where concerns raised by the Maori community that existing youth justice strategies were culturally inappropriate and failed to address underlying issues, led to the first legislated youth conferencing program.[122]

Common across these initiatives are several key pillars that facilitate the determination of whether a process can be characterised as restorative, namely, creative restitution, a more inclusive process with a focus on victims, and positive reintegrative processes. These characteristics distinguish restorative justice programs from other innovative justice responses, such as Indigenous Justice and Therapeutic Jurisprudence, which also emerged from critiques of 'mainstream' criminal justice systems. As discussed in the next chapter, which explores the legislative and operational frameworks of each program, all Australian youth conferencing

[120] Larsen 2014 (Op. cit.).
[121] King 2008 (Op. cit.) 1096, 1115.
[122] McCold, P 'Primary Restorative Justice Practices' in Morris, A and Maxwell, G (eds), *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (2001), 45.

programs meet the general definition of a restorative justice program in terms of reflecting the key pillars identified above.

Having identified the foundational pillars of restorative justice – creative restitution, inclusive process and re-integrative shaming – the next section addresses whether restorative justice conferencing programs provide any benefit to child justice arrangements, regardless of whether they comply with the CRC. This is important because, as noted above and in Chapter One, *General Comment 24*, published by the UN Committee on the Rights of the Child, recognises that the central challenge in a child justice system is to balance two competing objectives, namely the protection of children and their rights on the one hand, and the protection of society, through the prevention of crime and repeat offending, on the other. While this thesis focuses on children's rights, it is also important to understand the second objective, because the question of rights becomes redundant if the process in question – child conferencing – offers no benefit in preventing crime or addressing recidivism.

2.11 The '*what works*' debate and restorative justice

Does restorative justice work? Do youth conferences work? This section examines the link between the 'what works' debate (discussed below) – itself fundamentally concerned with preventing crime and reducing recidivism – and the emergence of restorative justice. The issues that operated as a catalyst for Eglash and other restorative justice foundational writers' critical examination of criminal justice practices, and which lead to the development of the foundational pillars of contemporary restorative justice theory, are by and large the same issues that contributed to the 'what works' debate. Like the debate behind the emergence of each of the foundational pillars of restorative justice outlined above, the emergence of the 'what works' debate was also grounded in dissatisfaction with outcomes in criminal justice systems that were being voiced in the early 1970s. The key difference is that while restorative justice at some level emerged externally as a new paradigm, the 'what works' debate was very much fixated on the existing system, and whether there were strategies that could reduce recidivism and general offending rates.

One of the long running debates in criminal justice policy and research is whether any particular approach 'works' to address offending behaviour and reduce levels of crime.[123] In this respect, the catalysts for the evolution, in the 1970s, of restorative justice research and practical

[123] For example, see the discussion throughout Gelb et al 2019 (Op. cit.).

experimentation in restorative programs from that era onwards were identical to the academic disquiet and tension in public policy that triggered the so-called 'what works' debate, itself eponymously triggered by Martinson's 1974 seminal article with that name.[124] Just as the 1970s work of Eglash, Barnett and Christie followed by that of Zehr and Braithwaite (among others) defined concepts that are central to restorative justice, Martinson's article also resonated, to the point that there is now extensive literature on 'what works', particularly at a global level. This section provides an overview of the 'what works' debate, to consider how it relates to the efficacy of restorative justice programs as a precursor to a children's rights analysis.

Martinson's article is often cited as authority for the idea that 'nothing works' in changing the future behaviour of offenders. Focusing on welfare responses to criminal behaviour, he stated that 'education at its best, or … psychotherapy at its best, cannot overcome, or even appreciably reduce, the powerful tendency for offenders to continue in criminal behaviour.'[125] Given this sentiment, this article is often regarded as a foundation for questioning the merit or worth, whether economic or otherwise, of rehabilitative responses designed to address recidivism rates. Yet to see his work in only this way, provides an incomplete understanding of his research because Martinson's more cautious conclusion was that, 'instances of success . . . have been isolated, producing no clear pattern to indicate the efficacy of any particular method or treatment.'[126] This final equivocal conclusion has led to extensive research into what are appropriate responses to offending.

Mirroring the expanding literature on restorative justice over the last two decades, there has been a significant growth, since the 1990s, in scholarly research that considers Martinson's conclusions and applies his findings in relation to both youth and adult offending, particularly in the UK and the US, but also within Australia.[127] By 1995, McGuire and Priestley noted that the controversy over how to deal with offenders had reached fever pitch. They suggested that

[124] Martinson 1974 (Op. cit.) 22 – 54.
[125] Ibid.
[126] Ibid.
[127] For example, see: Lipsey, M. 'What do we learn from 400 research studies on the effectiveness of treatment with juvenile delinquents?' In McGuire, J. (ed.), *Wiley series in offender - 198 - rehabilitation. What works: Reducing reoffending: Guidelines from research and practice* John Wiley & Sons, Chichester, 1995, 63-78; Trotter, C *The supervision of offenders: what works? Report to the Australian Criminology Research Council* 1995; Vennard, J., Sugg, D. and Hedderman, C. *Changing offenders' attitudes and behaviour: What works?* Home Office Research Study No. 171. London: Home Office 1997; Sherman, L. et al. *Preventing crime: What works, what doesn't, what's promising*. Washington D.C National Institute of Justice 1997; MacKenzie, D 'Evidence-based Corrections: Identifying what works' (2000) 46 *Crime and Delinquency* 457; Miller, M., Drake, E., and Nafziger, M. *What works to reduce recidivism by domestic violence offenders?* State Institute for Public Policy Olympia: Washington 2013.

punitive measures had done little to stop the growth of crime and so the question of 'what works' in deterring offenders from reoffending had become central to debate. Despite some of the research cited by the authors having been flawed, they nonetheless reached the pessimistic view that 'nothing works.'[128]

However, this research has largely taken place since the 1970s against global 'punitive turn', especially in youth justice. This punitive focus stems from a desire to focus more on establishing harsher measures of punishment to satisfy tabloid cries or complaints, regardless of any benefit to any direct or indirect party in the criminal justice system.[129] As was noted in 2019,

> Unfortunately, research to date has been dominated by the question of whether anything at all works in reducing reoffending, with relatively little attention being paid to the study of 'what works best, for whom, under what circumstances, and why'.[130]

Given the amount of research that has been undertaken over the last forty years, one of the principal research techniques that is now being applied to the 'what works' question within criminal justice research, is that of meta-analysis, that is, a statistical analysis of a collection of studies that aggregate the magnitude of a relationship between two or more variables or individual studies.[131] This technique has now been used extensively to analyse whether particular interventions can be shown, on the basis of identified evaluation criteria, to be more or less effective in the prevention and reduction of offending among different types of offender.[132] These meta-analytical studies have been able to capitalise on a growing body of

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[128] McGuire, J and Priestley P 'Reviewing "What Works": Past, Present and Future' in McGuire, J and Priestley P (eds.) *What Works: Reducing Re-Offending. Guidelines from Research and Practice* Wiley and Sons Chichester 1995.

[129] Prior, D and Mason, P 'A different kind of evidence? Looking for 'what works' in engaging young offenders' (2010) 10 *Youth Justice* 211; see also Muncie, J 'The "Punitive Turn" in Juvenile Justice: Cultures of Control and Rights Compliance in Western Europe and the USA' (2008) 8 *Youth Justice* 107-121; Muncie J 'The United Nations, children's rights and juvenile justice' in Taylor, W, Earle, R and Hester R (eds) *Youth Justice Handbook: Theory, policy and practice* Willan Publishing Collumpton 2009; Cavadino, M and Dignan, J *Penal Systems: A Comparative Approach*. London: Sage, 2009.

[130] Gelb et als 2019 (Op. cit.) 163. See also Lipsey, M and Cullen, F 'The effectiveness of correctional rehabilitation: A review of systematic reviews' (2007) *Annual Review of Law and Social Science* 3, 15.

[131] Glass, G, McGaw, B and Smith M *Meta-Analysis in Social Research* Sage London 1981.

[132] Dowden, C and Andrews D 'The Importance of Staff Practice in Delivering Effective Correctional Treatment: A Meta-Analytic Review of Core Correctional Practice' (2004) 48 *International Journal of Offender Therapy and Comparative Criminology* 203; Lipsey, M 'What Do We Learn from 400 Research Studies on the Effectiveness of Treatment with Juvenile Delinquents?' in McGuire, J (ed.) *What Works: Reducing Reoffending*, 63–78; Chichester: Wiley 1995; Lipsey, M 'Can rehabilitative programs reduce the recidivism of young offenders? An inquiry into the effectiveness of practical programs' (1999) 564 (July) *Virginia Journal of Social Policy and the Law 142*; Lipsey M and Wilson D 'Effective Intervention for serious juvenile offenders: a synthesis of research' in Loeber R and Farrington D (eds) *Serious and violent juvenile offenders: Risk factors*

individual program analyses that has emerged over four decades, so that those engaging in both meta-analysis research and systematic research are starting to reach consistent conclusions – and, in fact, to find that certain things do work to reduce offending and re-offending rates. This includes restorative justice conferencing.[133]

In this respect, meta-analyses and systemic research suggest that effectiveness – at least in terms of addressing crime numbers in general and recidivism in particular, which after all, were the critical measures of 'what works' – is more likely when certain common factors are present. These factors include careful assessment of the offender and/or program in question; use of a risk and protective factors framework; a cognitive skills element; a coordinated multi-modal design; an element of reparation, which is a key pillar for restorative justice; consistent program implementation in accordance with design (also known as program integrity); and long-term engagement and contact time, particularly for persistent and more serious offenders.[134] Although not directly explored in these studies, many of these factors are also relevant from the perspective of a substantive application of rights under the CRC, although they are not fully evident in the three jurisdictions under review in this thesis.

There is a growing body of empirical-focused research on these questions that supports an emerging sense of confidence that the foundations for effective practice in working with offenders to prevent further criminality can be identified, and that they have been shown, through rigorous research, to be sound. Research in therapeutic jurisprudence, in particular, looks into these issues.[135] At the same time there are still scholars who highlight an absence of reliable research that tells us anything about '*why* some interventions work better than others; *what* makes a difference when applying interventions in practice; and thus they are unable to tell us about the *techniques* or lessons for *practice* when applying interventions'.[136] (emphasis in original).

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and successful interventions Sage Thousand Oaks 1998; Losel, F 'Increasing consensus in the evaluation of offender rehabilitation? Lessons from recent research syntheses' (1995) 2 *Psychology, Crime and Law* 19; McGuire J (ed) *Offender Rehabilitation and Treatment: Effective Programmes and Policies to Reduce Re-Offending* John Wiley and Sons Chichester 2002.

[133] KPMG *Department of Human Services: Review of the Youth Justice Group Conferencing Program Final Report* KPMG Melbourne 2010.

[134] Farrington D and Loeber R *Child Delinquents: Development, Intervention and Service Needs* Sage 2001; Howell, J 'Diffusing Research into Practice Using the Comprehensive Strategy for Serious, Violent and Chronic Juvenile Offenders' (2003) 1 *Youth Violence and Juvenile Justice* 219; McGuire et al., 2002; McGuire and Priestley, 1995; McLaren 2000; National Audit Office, 2006; Whyte, 2004.

[135] Marder and Wexler 2021 (Op. cit.) 399. See also Daly and Marchetti 2012 (Op. cit.), 455; Stobbs 2020 (Op. cit.) 1-30.

[136] Mason, P and Prior D *Engaging Young People Who Offend* Youth Justice Board of England and Wales

With respect to research on conferencing programs around the world, proponents of restorative justice claim that the process is beneficial to victims and offenders by emphasising recovery of the victim through redress, vindication and healing and by encouraging recompense by the offender through reparation, fair treatment and rehabilitation.[137] For example, the pioneering New Zealand Family Group Conferencing has been assessed as enabling,

> those involved in the life of the young person and the victim(s) to be involved in decisions with the aim of ensuring accountability, repairing harm and enhancing wellbeing. Evaluation has shown that the system is largely successful in reducing reoffending and promoting the wellbeing of young people who have offended.[138]

In 2005, Latimer, Dowden and Muise undertook 'an empirical synthesis of the existing literature on the effectiveness of restorative justice practices using meta-analytic techniques', in Canada.[139] The data they used for their study was aggregated from studies that compared restorative justice programs with traditional non-restorative approaches to criminal behaviour. The authors identified victim and offender satisfaction, restitution compliance and recidivism as appropriate outcomes to measure effectiveness. These criteria have a strong correlation with the foundational pillars of inclusive process, creative restitution and reintegrative shaming identified discussed above. The authors concluded that restorative programs were significantly more effective than non-restorative programs, although they also noted that their positive findings were tempered by an important self-selection bias inherent in restorative justice research. That is, they recognised that the types of cases and offenders that are referred to restorative processes in Canada, and therefore which they were able to include in their research, had an inherent bias to more positive outcomes on the criteria selected for success over and above cases that were not seen as meeting primary eligibility criteria for referral to restorative justice processes.

Thus, cases which were excluded from restorative justice programs are likely to be ones that involve more problematic situations and therefore skew the apparent success of restorative justice outcomes compared to these other mainstream outcomes. This concession is also an

London 2008.
[137] Van Ness and Strong K 2010 (Op. cit.); Llewellyn and Howse 1999 (Op. cit.).
[138] Noetic Solutions *A Strategic Review of the New South Wales Juvenile Justice System Report for the Minister for Juvenile Justice* Noetic Solutions Sydney 2010, 6.
[139] Latimer J, Dowden C, Muise D 'The Effectiveness of Restorative Justice Practices: A Meta-Analysis' by (2005) 85(2) *The Prison Journal* 127.

important consideration in any analysis of restorative justice programs in Australia – not all cases are considered suitable, under the criteria that operates in the various jurisdictions, and therefore, to simply look at restorative justice conferencing effectiveness in terms of recidivism may be unrepresentative, given the pre-selection criteria for matters to be referred to youth conferences. At the same time, there is research in Australia that has clearly highlighted that,

> There is general consensus among researchers in this field that sanctions focused purely on punishment, without providing any treatment component, are ineffective in reducing reoffending. In particular, surveillance, control, deterrence, and discipline-based interventions do not reduce reoffending, while those based upon restorative principles and skills-building interventions are more likely to be effective.[140]

Shapland, Robinson and Sorsby undertook a seven-year study of the UK experience of restorative justice programs.[141] This stands as an important piece of meta-analytical research on contemporary restorative justice. In essence, the researchers challenged the caveat expressed in the Canadian study by using outcomes in the UK to debunk some of the myths around restorative justice including, for example, a finding that 70 percent of victims of serious crimes chose to meet the offender when this was offered to them. [142] This result challenges the view that restorative justice is only appropriate for less serious offences, even in the youth sphere, and indeed that most conferencing programs in Australia place a youth conference at the lower end of the child justice ladder, whether as a diversionary tool, or by limiting the offences that can be referred to a conference. Other research in Australia has determined that the type of offence in a restorative justice process is more significant than the complexity: 'victim offences have a higher success rate and impact on reducing recidivism than non-victim offences.'[143]

In this respect, there were changes in Victoria, in 2014, when the *Children Youth and Families Act* 2005 was amended to widen the seriousness of matters that could be referred to conferencing so that conferences could be available to a young person in custody or facing a sentence of detention. Previously, conferencing was restricted to those facing lower end supervisory orders such as probation or a youth supervision order. There were also initiatives in 2016 and 2017, to expand conferencing, including for adults. For example, restorative justice

[140] Gelb et als 2019 (Op. cit.) 176.
[141] Shapland, J Robinson G and Sorsby, A *Restorative justice in practice: evaluating what works for victims and offenders* Routledge Milton Park and New York 2011.
[142] Ibid. Shapland et als (2011).
[143] Sewak et als 2019 (Op. cit.) 86.

pilot programs were implemented to include adult culpable driving matters and sexual matters in Victoria, a range of more serious offences in the ACT and revisiting sexual offending in South Australia.[144]

The UK research also confirmed earlier findings of victims reporting strong benefits from participating in a restorative justice process and provided new evidence of the impact of restorative justice programs in reducing re-offending, leading to cost-savings across the criminal justice system. Their meta-analysis provided the most comprehensive empirical synthesis of the restorative justice literature. The focus on a single jurisdiction over a long period of time provided much needed in-depth scholarship. Therefore, despite some methodological limitations, the results are valuable evidence of the effectiveness of restorative programs in increasing offender/victim satisfaction and restitution compliance, and decreasing, or at least not increasing, offender recidivism. Thus, Shapland, Robinson and Sorsby's research supports the position that restorative justice, in the form of conferencing, 'works'.

However, the UK study recognised that research on restorative justice is hampered by the problem of self-selection – it can never be shown whether the same outcomes, based on the criteria selected as the measure for success, would apply if cases that went through the traditional criminal justice process had been referred to restorative justice, or indeed the other way round. Shapland, Robinson and Sorsby therefore suggest that the next critical step for research and program development, is to obtain a better understanding of the effect of self-selection bias, which diminishes confidence in these results. In other words, '[t]o more definitively claim restorative justice an effective response to criminal behaviour, we need to be able to address this limitation inherent in restorative justice research methods.'[145]

Nonetheless, the conclusions that come from these meta-studies are consistent, and form a useful framing point for consideration of restorative justice programs in Australia. They are also consistent with the findings from the limited empirical research that has been done in Australia. For example, a 2007 study, reviewed 36 research projects conducted between 1986 and 2005, to measure the effectiveness of restorative justice processes compared to

[144] 'Confronting the nightmare: Face-to-face with the man who destroyed her life, a strange thing happened to Lisa Carter.' *The Weekend Australian Magazine* 8 June 2019; 'Victims face their molester in Victoria's world-first restorative justice program' *The Guardian* 17 June 2015; Centre for Innovative Justice *It's healing to hear another person's story and also to tell your own story: Report on the CIJ's Restorative Justice Conferencing Pilot Program* RMIT Melbourne 2019.
[145] Shapland et als 2011 (Op. cit.).

conventional criminal justice.[146] It found that, on average, young offenders who went through a restorative conference committed fewer repeat crimes than offenders who did not, and that youth conferencing reduces repeat offending more consistently with violent crimes compared to less serious crimes – suggesting that conferencing works well for more serious offences. This raises questions for those jurisdictions that primarily see conferencing as an early intervention diversionary option.

Interestingly, a 2013 study compared court and conferencing outcomes relating to sex offences in South Australia, and showed clearly that conferencing achieved a significantly lower rate of recidivism than court outcomes, although the study noted that other factors might also have contributed to this result, such as greater prior criminal history for the court matters.[147] This study also noted that there are always methodological challenges in trying to design comparative analyses for conferencing versus court (or indeed any other pair of dispositional pathways) solely on the basis of recidivism, given the impossibility of comparing 'like for like' but that overall positive trends for conferencing can be identified.[148]

Another meta-analytical study, which examined four studies on victim-offender mediation, found that participants in the restorative justice program re-offended at a rate of 19 percent compared with 28 percent for non-participants.[149] Similarly, a review of 46 international studies found 'small but significant' reductions in recidivism when restorative programs were compared with mainstream sentencing options, although the data were more mixed for children and young people when compared with adults.[150] A further meta-analysis of 22 studies that examined 35 restorative justice programs, found that restorative justice programs were 'more effective at improving victim/offender satisfaction, increasing compliance with restitution, and decreasing recidivism compared to non-restorative approaches.'[151]

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[146] Sherman, L and Strang, H *Restorative Justice: The Evidence* The Smith Institute, London 2007, 89. See also Cunningham, T *Pre-court diversion in the Northern Territory: impact on juvenile reoffending* Trends & issues in crime and criminal justice no. 339 Australian Institute of Criminology, Canberra 2007.
[147] Daly K et al, 'Youth sex offending, recidivism and restorative justice: Comparing court and conference cases' (2013) 46 *Australian & New Zealand Journal of Criminology* 241-267.
[148] Ibid.
[149] Nugent W, Umbreit M, Wiinamaki, L and Paddock, J 'Participation in Victim-Offender Mediation and Reoffense: Successful Replications?' (2001)11 *Research on Social Work Practice* 5, 16.
[150] Bonta J, Wallace-Capretta S, Rooney J & McAnoy K 'An outcome evaluation of a restorative justice alternative to incarceration' (2002) 5 *Contemporary Justice Review* 319–38. See also Stevens A, Kessler I & Gladstone B *Review of good practices in preventing juvenile crime in the European Union* European Crime Prevention Network 2006.
[151] Latimer, J Dowden C and Muise D *The Effectiveness of Restorative Justice Practices: a meta-Analysis* Research and Statistics Division Canadian Department of Justice Ottawa 2001. See also Przybylski, R *What*

In 2010, a review into the NSW youth justice system considered whether restorative justice offered 'value for money', and found that, from a cost-benefit perspective,

> RJ [restorative justice] produced $2,223 in net benefits to taxpayers per program participant or $3.45 for every marginal dollar spent on the program. Thus, despite conflicting evidence with respect to the effectiveness of RJ on reoffending, restorative justice still offers substantial taxpayer benefits as well as higher satisfaction amongst crime victims.[152]

However, it must be acknowledged that there are also countervailing studies that raise questions about the effectiveness of youth conferencing in terms of victim satisfaction because of low direct participation by victims and recidivism rates. Thus, while the results of studies might be positive, these results are often based on low levels of 'victim' participation in the studies.[153] Concerning the specific question of recidivism, it is clear that 'the evidence for restorative justice remains mixed' and that 'the ability of restorative justice to reduce reoffending is still contested'[154] Perhaps the best answer on recidivism comes from Daly,

> The conference effect everyone asks about is, does it reduce reoffending? Proof (or disproof) of reductions in reoffending from conferences (compared *not only to court*, but to other interventions such as formal caution, other diversion approaches or no legal action at all) will not be available for a long time, if ever. The honest answer to the reoffending question is "we'll probably never know".[155] [emphasis in original].

It therefore appears that when compared to 'traditional' non-restorative justice or rehabilitative approaches to child justice where the predominant focus of assessment is the measure of recidivism or cost, whether achieved through rehabilitation or not, restorative justice

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Works. Effective Recidivism Reduction and Risk-Focused Prevention Programs. A Compendium of Evidence-Based Options for Preventing New and Persistent Criminal Behavior Prepared for Colorado Division of Criminal Justice RKC Group 2008.

[152] Noetic Solutions *A Strategic Review of the New South Wales Juvenile Justice System Report for the Minister for Juvenile Justice* Noetic Solutions Sydney 2010, 39.

[153] Crawford, A and Newburn, T *Youth Offending and Restorative Justice: Implementing Reform in Youth Justice*. Cullompton: Willan 2003.

[154] Larsen J *Restorative justice in the Australian criminal justice system*. AIC Reports Research and Public Policy Series 127. Canberra: Australian Institute of Criminology 2014 viii. See also Sherman, L. and Strang, H *Restorative Justice: The Evidence* The Smith Institute, London 2007, 15; Daly, K 'Restorative justice: The real story'(2002) 4 *Punishment and Society* 55; Smith, N. and Weatherburn, D 'Youth justice conferences verses Children's Court: A comparison of re-offending', *Crime and Justice Bulletin: Contemporary Issues in Crime and Justice*, No. 160, February. Sydney: New South Wales Bureau of Crime Statistics and Research 2012.

[155] Daly 2002 (Op. cit.) 71.

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approaches cautiously seem to ‘work’. In other words, notwithstanding some mixed outcomes, based on the findings of several meta-analytical studies, it can be said that restorative justice programs are more effective than not in improving victim and/or offender satisfaction. They also have the capacity to increase offender compliance with restitution, and while not necessarily offering a marked improvement, do not seem to have a negative impact on the rate of recidivism of offenders when compared to more traditional criminal justice responses such as incarceration or community-based dispositions.

It therefore appears that conferencing programs are positive from a ‘what works’ perspective insofar as there is research that supports conferencing achieving beneficial outcomes in the child justice sphere on the question of reducing crime and increasing community protection. Thus, restorative justice conferencing programs have a place in the child justice system from the perspective of cost efficiency, not increasing recidivism and community protection.

2.12 Conclusion

Restorative justice responses centre on fundamental pillars of creative restitution, (victim) inclusive process and reintegrative shaming. These pillars differentiate restorative justice from mainstream models of retributive and distributive justice, as well as welfare and justice models of child justice. They also differentiate restorative justice programs from other innovative but complementary justice models, such as therapeutic jurisprudence and Indigenous justice.

Despite some debate about their purported ancient longevity, the contemporary evolution of these foundational restorative justice pillars took place during a period of change in thinking about criminal justice matters beginning in the 1970s, from which time more critical attention was paid to the question of what response might be more effective in achieving community protection through reduction in criminal behaviour and recidivism. Different models of restorative justice have emerged, and given the pre-existing tensions in child justice between punitive and rehabilitative approaches, restorative justice principles proved attractive to policy makers as a third alternative. Starting in New Zealand in 1989, conferencing programs that reflected the fundamental pillars of restorative justice began to be established. These programs have proved to be sustainable, and assessment of them – and similar programs – around the world have found that they have criminogenic benefit, but there has been limited research on whether they respect, protect and fulfil children’s rights. This can only be assessed on a program by program basis.

The next chapter builds on the findings of this chapter by analysing the evolution and legislative basis for the NSW, Victorian and ACT youth conferencing programs.

CHAPTER 3

Same, same but different: Conferencing programs in New South Wales, Victoria and the Australian Capital Territory

Table of Contents

3.1 Introduction

Over the last three decades youth conferencing arrangements in Australia have shifted from a patchwork of experiments, pilots and limited statutory schemes to programs that are backed by legislation in all states and territories.[1] Demonstrating their growing role within the youth justice space, these programs have been assessed by the Commonwealth Productivity Commission in its annual reports on government services, for over a decade. Consistent with previous reports, the Productivity Commission's 2022 nation-wide *Report on Government Services* concluded that an increased use of conferencing was a desirable indicator in the overall measurement of youth justice arrangements around Australia. The report stated that '[a] high or increasing rate of young people receiving group conferencing, and for whom an agreement is reached, is desirable.'[2] This conclusion reflects broader research, analysed in the previous chapter, that conferencing is beneficial in a well-functioning youth justice system. Indeed, 'there is a body of evidence suggesting that restorative justice conferencing does have a positive impact in regards to both offender and victim satisfaction with the criminal justice system.'[3]

The focus of this chapter is on the 'architecture' of the NSW, Victorian and ACT conferencing schemes. Understanding these legislative frameworks is essential to answering the research questions in this thesis:

1. Do the legislated child conferencing programs in NSW, Victoria and the ACT respect, protect and fulfil children's rights in accordance with the core principles of the UN Convention on the Rights of the Child?

2. If not, what reforms would be needed to make youth conferencing compliant with the CRC?

[1] *Crimes (Restorative Justice)* Act 2004 (ACT); *Young Offenders Act* 1997 (NSW); *Youth Justice Act* (NT); *Youth Justice Act* 1992 (Qld); *Young Offenders Act* 1993 (SA); *Youth Justice Act* 1997 (Tas); *Children, Youth and Families Act 2005* (Vic). NB the *Young Offenders Act* 1994 (WA) does not refer to conferencing, instead providing that family 'meetings' can be held by Juvenile Justice Teams.
[2] Productivity Commission *Report on Government Services* 2022, vol. F, Part 17 'Youth justice services' Productivity Commission, Canberra.
[3] Sewak S, Bouchahine M, Liong K, Pan J, Serret C, Saldarriaga A and Farrukh E *Youth Restorative Justice: Lessons From Australia* A Report for HAQ Centre for Child Rights 2019, 105. See also Larsen, J *Restorative justice in the Australian criminal justice system* Research and public policy series No. 127. Canberra: Australian Institute of Criminology 2014.

These three jurisdictions present contrasting approaches to youth conferencing. NSW has the longest history of conferencing in Australia. It offers conferencing as an alternative to prosecution as well as an option at court: this is reflected in the intersection between two pieces of legislation, namely the *Young Offenders Act 1997* and the *Children (Criminal Proceedings) Act 1987*. By contrast, Victoria only utilises conferencing as a pre-sentence option and the legislative regime governing this is limited; taking a 'light touch' approach to regulating the program. Finally, the ACT conferencing program sits within comprehensive dedicated restorative justice legislation that applies to adults as well as to children. Unlike Victoria and NSW, conferencing in the ACT does not extend to victimless crimes such as drug offences: in this respect, it offers the closest to 'pure' restorative justice in terms of being built around victim engagement. However, like NSW, the ACT offers conferencing both parallel to, and during criminal proceedings. It also offers conferencing as a post-sentence option, and like Victoria, operates in a jurisdiction supported by broader human rights legislation.

The chapter starts by identifying some common features of each program. It then provides comparative data on the use of conferencing between 2014 and 2021 before analysing each program in turn: NSW, Victoria and ACT. The chapter concludes that there are both important similarities and differences between the programs. While some of these features are beyond the scope of this thesis, there are key also characteristics of each program that relate directly and indirectly to whether they respect, protect and fulfil children's rights.

3.2 Same, same: Some common characteristics

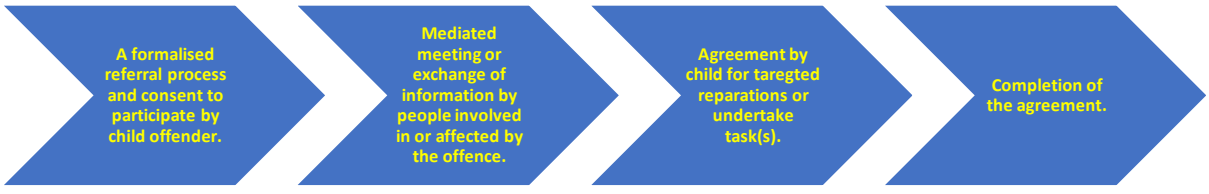
As noted in Chapter 1, different terms are used in each jurisdiction for the respective youth conferencing programs. These terms include 'group conference' (Victoria), 'restorative justice conference' (ACT) and 'youth justice conference' (NSW).[4] However, despite the different names, these terms cover initiatives that have broad common characteristics based on the restorative justice principles set out in Chapter 2. In particular, the defining characteristic of conferencing, in the three jurisdictions, is that the participants in a conference process are not restricted to the victim and the offender as is the case in victim-offender mediation, but can include others, such as victim representatives, family members of the victim or the offender, youth justice officers, police (or other investigating officers) and other persons as nominated

[4] Ss 415 - 416 *Children, Youth and Families Act 2005* (Victoria); ss 34 – 61 *Young Offenders Act 1997* (NSW); ss 37 – 60 *Crimes (Restorative Justice) Act 2004* (ACT).

under legislation.[5] This common defining characteristic also has the effect of extending the potential of each conferencing program to include so-called victimless crimes, such as some road traffic offences and drug offences. That is, a conference can be held even if there is no individual victim to attend. Reflecting these commonalities, the Productivity Commission summarised the characteristics of conferencing in the following terms:

> Group conferences are decision-making forums that aim to minimise the progression of young people into the youth justice system and provide restorative justice. Typically, a group conference involves the young offender(s) and victim(s) and their families, police and a youth justice agency officer, all of whom attempt to agree on a course of action required of the young offender/s to make amends for his or her offence/s.
>
> A youth justice conference, or group conference, is a facilitated meeting resulting in a formal agreement to repair the harm caused by the offence. Participants can include the victim(s), offender(s), a youth justice agency officer, police and other key stakeholders. Referrals may be initiated by the police or the courts.[6]

Broadly there are two categories of conference. The first category comprises conferences that are initiated outside of the court process – often by an investigating official, such as a police officer – while the second category are conferences triggered by a judicial process in a Youth or Children's Court, either before or after a finding of guilt. As noted in the Introduction to this chapter, Victoria only has pre-sentence court-initiated conferences whereas NSW and the ACT offer both types of conference. As Chapters 5, 6 and 7 illustrate, this distinction between conference types is significant from a child rights point of view, particularly when considering non-discrimination and procedural rights. At the same time, while there are different pathways into a conference depending on the jurisdiction, the following four features are common to the three jurisdictions under review:



[5] For example, see s415(7) *Children, Youth and Families Act 2005* (Victoria); s47 *Young Offenders Act 1997* (NSW); ss42 – 45 *Crimes (Restorative Justice) Act 2004* (ACT).
[6] Productivity Commission *Report on Government Services* 2022, vol. F, Part 17 'Youth justice services' Productivity Commission, Canberra.

While there is considerable variation in the way in which a child can be referred to a conference, the person responsible for organising the conference in each jurisdiction – the convenor – normally meets with the child to confirm that they will participate and that a conference is suitable for the offender and offence. The convenor is likely also to speak with the child's parents or carers and to speak with other potential conference participants at this time, including the victim or victim's representative.[7] There is variation between jurisdictions as to who is mandated to participate in a conference process and who is entitled to participate; this again has children's rights implications that are explored in later chapters.

During the face-to-face or information exchange stage of the conference process, the convenor facilitates a discussion or other interaction – such as exchange of videos as one option under the ACT model – in which each participant is given space to talk about what happened, how they were affected and how they feel about it. Often, this discussion proceeds chronologically through the events leading up to the offence, then to the offence itself, to the discovery of the offence, the investigation and the procedure leading up to the conference.[8] A key aspect of this discussion is that the child has the opportunity to explain what they did, why they did it and to understand how their actions affected other people, by hearing from other participants, including the victim, if present. In general, a conference ends with a written agreement that is signed by the child and the victim and other persons present. There is some variation between jurisdictions, including whether any party has the capacity to veto an otherwise agreed outcome.

The written agreement provides the basis for the final stage. In NSW and the ACT, this agreement is often legally binding, in and of itself, in the case of diversionary conferences. At the same time, in jurisdictions where youth conferencing is court ordered, such as in Victoria, outcome plans are not *sui generis* legally binding, given the role of the court in the finalisation of a matter that has gone through a conference. In this situation, courts need to approve the plan and will often require satisfactory completion of an outcome plan as a key component of final sentencing disposition. However, this does not take away from the primary purpose of an

[7] Youth Justice *Youth Justice Group Conferencing program guidelines* DHS Victoria 2010, ch 2; Youth Justice NSW *Youth Justice Conferencing Manual* May 2021 ch 4; ACT Department of Justice and Community Safety *First Phase Review of Restorative Justice*, 2006, 10-11.

[8] Griffiths M *A Policy Discussion Paper on the Development of a Young Adult Restorative Justice Conferencing Program in Victoria* Jesuit Social Services Melbourne 2005, 14. See also Youth Justice *Youth Justice Group Conferencing program guidelines* DHS Victoria 2010, ch 3; Youth Justice NSW *Youth Justice Conferencing Manual* May 2021 ch 5; ACT Department of Justice and Community Safety *First Phase Review of Restorative Justice*, 2006, 11-12.

outcome plan; to document the agreement reached by the conference participants, including the child, as to what the child will do to repair the harm caused by the offending behaviour. Common examples of matters included in agreements are a formal apology; replacing or paying for something that has been damaged or destroyed; an agreement act in a way to help the victim feel more safe and secure, for instance by changing friends or reducing substance use; an agreement to seek other assistance, such as counselling or medical treatment; and an agreement to do voluntary work for the victim or the community.[9] Agreements also often set out who will assist the child to fulfil the agreed actions.

In addition, each jurisdiction provides rules on when a conference can be terminated, for example, if a child no longer consents to taking part in the process. In addition, depending on the jurisdiction, a conference outcome may in some cases be vetoed, by a number of potential participants including the child offender, youth justice services, the police, other prosecution agencies and the courts. This veto can be exercised at various points on the criminal justice continuum, from first contact with the young person, through to the use of a conference as part of a post-sentence process.[10]

3.3 Same, same: conferencing data 2014 - 2021

Before analysing the legislative regime in each jurisdiction, data are available on the use of conferencing in the three jurisdictions from 2014-2015 through to 2020-2021. This data is set out in Table 1 below. As well as setting out the overall number of conferences held in each jurisdiction each year, the data also illustrates the use of conferencing in each jurisdiction by Indigenous and non-Indigenous youth.

[9] Ss 49-55 *Crimes (Restorative Justice) Act* 2004 (ACT); Youth Justice *Youth Justice Group Conferencing program guidelines* DHS Victoria 2010, 19-26; Youth Justice NSW *Youth Justice Conferencing Manual* May 2021.

[10] Larsen, J *Restorative justice in the Australian criminal justice system* Research and public policy series No. 127. Canberra: Australian Institute of Criminology 2014, 6. See also ss415 - 416 *Children, Youth and Families Act 2005* (Victoria); ss 34 – 61 *Young Offenders Act 1997* (NSW); ss 37 – 60 *Crimes (Restorative Justice) Act 2004* (ACT).

Source: **Productivity Commission *Report on Government Services* 2022.**		*NSW*	*Vic*	*ACT*
2020-21				
	Aboriginal and Torres Strait Islander	438	8	6
	Non-Indigenous	571	115	19
	Unknown Indigenous status	228	–	8
	All people	**1237**	**123**	**33**
2019-20				
	Aboriginal and Torres Strait Islander	522	29	4
	Non-Indigenous	386	157	36
	Unknown Indigenous status	179	–	10
	All people	**1087**	**186**	**50**
2018-19				
	Aboriginal and Torres Strait Islander	412	34	2
	Non-Indigenous	553	160	28
	Unknown Indigenous status	217	–	15
	All people	**1182**	**194**	**45**
2017-18				
	Aboriginal and Torres Strait Islander	389	25	4
	Non-Indigenous	529	187	39
	Unknown Indigenous status	212	–	9
	All people	**1130**	**212**	**52**
2016-17				
	Aboriginal and Torres Strait Islander	315	28	7
	Non-Indigenous	442	188	50
	Unknown Indigenous status	253	–	4
	All people	**1010**	**216**	**61**
2015-16				
	Aboriginal and Torres Strait Islander	345	38	14
	Non-Indigenous	534	208	82
	Unknown Indigenous status	319	–	–
	All people	**1198**	**246**	**96**
2014-15				
	Aboriginal and Torres Strait Islander	353	45	30
	Non-Indigenous	528	183	82
	Unknown Indigenous status	282	–	–
	All people	**1163**	**228**	**112**

Table 1: Group conferences by jurisdiction and Indigenous status 2014-2021[11]

[11] Source: Productivity Commission *Report on Government Services* 2022, vol. F, Part 17 'Youth justice services' Productivity Commission, Canberra 2022.

Of course, the number of conferences that takes place in any one jurisdiction or the Indigenous status of conference of the child offender does not *ipso facto* correlate with whether the conferencing program in that jurisdiction respects, protects and fulfils a child's rights under the CRC. However, the divergent numbers in the three jurisdictions warrant consideration.

The numbers for NSW are the most consistent over the data period, reflecting consistent legislation and less impact by Covid-19. This includes an overall increase to over 1,200 conferences in 2020-2021. As will be discussed below and in part 3.4 of this chapter, NSW has multiple pathways into conferencing. In addition, the numbers above also shows that a high proportion of conferences involve indigenous young people.

The data for Victoria for the years 2019-20 and 2020-21 need to be read with caution because of the impact caused by the Pandemic, in particular the numerous extended periods of lockdown and the impact of COVID related delays to non-custodial court proceedings. Prior to 2019-2020, the numbers for Victoria were generally around 200 conferences per year, although there is a slight, but steady, decrease after 2015-2016 both in the overall numbers and the number of Indigenous conference participants. It is unclear why this has occurred especially given amendments to the *Children, Youth and Families Act 2005* in 2014 to increase the scope of offences for which a conference is available.

The most surprising data are the ACT numbers. Despite having the most comprehensive restorative justice legislative regime of the three jurisdictions (the *Crimes (Restorative Justice) Act* 2004), the ACT shows a significant downward trend in the use of youth conferencing over the entire data period. In 2014-2015, the ACT was conferencing at a rate per population at twice that of NSW (population 430,000 in the ACT compared with 8.18 million in NSW) but the most recent data show a rate is now less than half of the rate in NSW. This is especially pronounced for Indigenous young people, where the numbers have reduced from 30 out of 112 conferences in 2014-2015 (almost 25 percent of conferences in that year) to a low of two confirmed Indigenous conferencing participants, out of 45 conferences, in 2018-2019. The corresponding numbers in NSW are between one third and one half of conferences being held are for indigenous young people.

In the absence of data to suggest any significant changes of offending patterns, one reading of low or decreasing numbers of conferences in Victoria and the ACT might be that child offenders are not consenting to participate in conferences. This gives rise to two possibilities.

First, as discussed in Chapter 7, this could be viewed as a positive application of a child's procedural rights under Article 40 CRC and a child's right to express a view and be heard under Article 12. To the extent that such a conclusion can be drawn, it could be that the lower participation rates are lower in Victoria because of the restricted basis on which a conference can proceed, that is, only as a pre-sentence option. Conversely, if, as stated in the Introduction, conferencing is broadly positive for offenders – in their best interests – and an increase in numbers is to be viewed positively, as noted by the Productivity Commission, a different question arises. Namely, whether sufficient or appropriate information is given to a child to in order to make an informed choice to participate. In other words, has there been a failure to provide the necessary information to the young offender for them to make an informed choice whether to take part in a conference? This would potentially amount to a breach of Article 12 CRC and/or Article 40 CRC.

On the other side, do consistently higher – and moderately increasing – numbers in NSW suggest that conferencing is being used without sufficient regard to ensure that there is genuine consent from a young offender to participate? Does this arise because of the role of police in referring young people to conferences, as will be discussed below and in more detail in Chapters 5 – 7? Are young people being referred to conferences inappropriately or in a discriminatory way? Or does it suggest the opposite, that young offenders are choosing to take part in a conference after being provided with helpful information about conferencing that enables them to give informed agreement?

While conclusive answers to all these questions would require empirical research and in-depth qualitative analysis that is beyond the scope of this thesis, some guidance can be obtained by looking at the legislative structure of each jurisdiction in turn and then considering the operation of the programs against the core rights of the CRC.

3.4 But different: New South Wales

In New South Wales, youth justice conferencing has been embedded in legislation – the *Young Offenders Act* 1997 for more than two decades. This legislation sets out 'a scheme that provides an alternative process to court proceedings for dealing with children who commit certain offences through the use of youth justice conferences, cautions and warnings.'[12] The *Young Offenders Act* places conferences at the top of a hierarchy of increasingly intensive diversionary

[12] Section 3(a) *Young Offenders Act 1997 NSW.*

(that is, non-court) options that has warnings at the lowest, followed by cautions and finally youth justice conferences.

Section 34 of the *Young Offenders Act* provides guidance on the overall principles and purposes of conferencing. This section expressly provides guidance for 'persons exercising functions' in connection with conferences, which includes persons involved at the four stages of a conference identified in section 3.2 of this chapter (above).[13] These statutory principles for conferencing in NSW include a focus on promoting the child's acceptance and responsibility for the offending behaviour; the need to hold children accountable for offending behaviour to strengthen the family group of the child concerned; to provide developmental and support services that will enable the child to overcome the offending behaviour; to enhance the rights and place of victims; to provide culturally appropriate responses wherever possible; and to have due regard to the interests of any victim.[14] Section 34 also addresses the need for measures and sanctions to take into account the age and development of the child, the needs of children who are disadvantaged, disconnected from family, the needs of children with disabilities and the gender, race and sexuality of the child. Read in conjunction with the *Youth Justice Conferencing Manual* published in 2021, the principles in section 34 reflect some recognition of a child interests and non-discrimination.[15] At the same time, there is no express recognition in section 34 of the place of a child's best interests or the importance of a child having the right to express their views and have their views taken seriously in accordance with Article 12 CRC.

But when can a conference be held? Pursuant to section 9 of the *Young Offenders Act*, an investigating official – such as a police officer or local council officer – is required to consider whether a matter can be dealt with under one of the three diversionary options available under the Act before commencing criminal proceedings. If an investigating official is not satisfied that the offence can be dealt with by way of warning or caution (the lower level options), the official is required to refer the matter to a Specialist Youth Officer who assesses whether a conference should proceed, proceedings should be commenced, or a lower option be engaged under the *Young Offenders Act*. Section 37(3) provides legislative guidance to specialist youth officers when considering whether a matter is appropriate for a conference. The factors to be considered include the seriousness of the offence, the degree of violence involved in the offence, the harm caused to any victim, the number and nature of offences committed by the

[13] Section 34(1) *Young Offenders Act 1997 (NSW).*
[14] Ibid.
[15] Youth Justice NSW *Youth Justice Conferencing Manual*, Version 1.0 May 2021.

child, the number of times the child has been dealt with under the Act and any other matter the official thinks appropriate in the circumstances.[16] It is noteworthy that none of these matters expressly relate to the rights or interests of the child. Thus, the legislation does not direct the decision-maker to take into account the core principles of the CRC.

In addition to this pathway, prior to commencing proceedings, section 40 of the *Young Offenders Act* empowers the Director of Public Prosecutions (DPP) and the Children's Court to refer matters to a conference. The court can do this at any stage of proceedings, including as part of a sentencing order under section 33(1)(cl) of the *Children (Criminal Proceedings) Act* (NSW)[17] In addition, section 40 of the *Young Offenders Act* allows the DPP to reconsider a decision to commence a prosecution so that a matter can be referred to a conference even if a criminal prosecution has commenced, for instance, where a conference is negotiated on behalf of an accused as part of the resolution of a prosecution. This is a positive option from a child rights perspective because it enhances diversionary options in response to child offending. In making determinations under section 40, the DPP is bound by similar factors as contained in section 37(3) for Specialist Youth Officers, while the court has the discretion to do so if 'it is of the opinion that a conference should be held.'[18] As noted above, these factors do not expressly reflect the core CRC rights such as non-discrimination or a full assessment of a child's best interests.

Section 36 of the *Young Offenders Act* provides that a young person must admit an offence and consent to be dealt with by a conference as a pre-condition for a conference to proceed. A similar rule applies to referrals to conferences by the DPP under section 40, but not to referrals by the court; section 40(1A) does not require that the court obtain a child's consent. Under section 10 of the *Young Offenders Act*, an admission of an offence by a child for the purposes of a warning, caution or conference is not valid unless it takes place in the presence of one or more of a person responsible for the child, an adult present with the consent of a person responsible for the child, an adult chosen by the child if the child is over 14 or a legal practitioner chosen by the child. This clearly does not mandate legal representation, which

[16] Section 37(3) *Young Offenders Act 1997 (NSW).*
[17] Section 41 *Children (Criminal Proceedings) Act 1987 (NSW)*; Sections 56 – 58 *Young Offenders Act 1997 NSW*.
[18] Section 40(1A)(c) *Young Offenders Act 1997 (NSW).*

undermines the ability of a child to experience the youth justice rights as set out in Article 40 CRC. This is discussed further in Chapter 7.

Likewise, section 39 of the *Young Offenders Act* mandates that a Specialist Youth Officer must tell a child about the conference process, and that the child is entitled to obtain legal advice to assist them to make a decision whether or not to consent, but again this does not mandate the involvement of a legal practitioner at this stage. Instead, while not precluding legal practitioners, the legislation provides for other adults – such as parents or guardians or an adult chosen by the child – to be present at the time of the explanation. Under section 40, there is no guidance for child consent for the DPP, and it is not required for the court.

The circumstances of admission of an offence and consent to participate are both problematic from a child rights perspective because they fail to recognise the legal significance of a child admitting to an offence (that it can trigger a sanction), or the significance of a decision to participate (or not to participate) in a conference. From a participatory and procedural child rights perspective, the NSW rules around admissions and consent fundamentally fail to recognise that adults may have a different perspective to a child on whether a conference should proceed and impose their preferences on the child. Similarly, section 50 draws a distinction between the right of a child to be *advised* by a legal practitioner as opposed to be *represented* by a legal practitioner at a conference, with the right to representation left solely to the discretion of the conference convenor.

Once a decision is made to proceed with a conference, NSW Juvenile Justice is responsible for managing the conference process and outcomes. Under section 60 of the *Young Offenders Act*, conferences are facilitated by convenors who are community members that live within the same geographical area as the young offenders and who, following initial training, are employed on a casual basis to conduct this work.[19] From a children's rights perspective, it is worth noting that neither the original training, nor the re-appointment procedure makes any reference to understanding children's rights as a core part of the role of the convenor.[20]

[19] Clancy G, Doran S and Maloney E 'The operation of Warnings, Cautions & Youth Justice Conferences' in Chan J (ed) *Reshaping Juvenile Justice: the NSW Young Offenders Act* Federation Press, Sydney 2005.
[20] NSW Department of Communities and Justice: Youth Justice *Youth Justice Conference Reappointment Procedure* Version 1.2 Date of effect: 11 February 2020 available at https://www.youthjustice.dcj.nsw.gov.au/Documents/yjc/Youth-Justice-Conference-Reappointment-Procedure.pdf.

Victims of crime are invited to participate in the conference, and offenders and victims can bring a support person to the conference, which is facilitated and held in the community. Other persons can be invited at the discretion of the convenor under section 47 of the *Young Offenders Act 1997*. These persons can include support workers, respected community members and, with the consent of the child, persons undertaking research. However, from a child rights point of view, it is concerning that there is no requirement for a child to be legally represented, and that even if a legal practitioner attends, they are permitted only to advise the child unless permitted by the convenor to represent them.[21] This raises real questions about the extent to which a child can exercise their participatory and procedural rights in accordance with Articles 12 and 40 of the CRC.

Conferences follow a loosely-scripted process, whereby the participants discuss what happened and why, and the impact of the offence, before developing together a legally enforceable 'outcome plan' that aims to repair the harm and prevent future offending.[22] Outcome plans typically include verbal and written apologies, restitution and the young person engaging in services that address their areas of need. While touching on children's rights in a general sense, the child's rights are just one factor listed in section 34(3) of the *Young Offenders Act* provides that decisions at a conference need to take into account:

> (a) the need to deal with children in a way that reflects their rights, needs and abilities and provides opportunities for development;
>
> (b) the need to hold children accountable for offending behaviour;
>
> (c) the need to encourage children to accept responsibility for offending behaviour,
>
> (d) the need to empower families and victims in making decisions about a child's offending behaviour, and
>
> (e) the need to make reparation to any victim.

The *Young Offenders Act* requires that an outcome plan must contain outcomes that are realistic and appropriate and cannot be more severe than the outcome that a court could impose. The outcome plan must also set out a timeframe for implementation and cannot impose community

[21] Section 50 *Young Offenders Act 1997* (NSW).
[22] Section 52 *Young Offenders Act 1997* (NSW).

service obligations greater than the maximum amount outlined in the *Children (Community Service Orders) Act 1987*.

Importantly from a child rights perspective, section 44(1) the *Young Offenders Act* provides a child can withdraw their consent to proceed with a conference at any time before a conference is held and elect to have a matter dealt with at court. Subject to the above comments about representation, this gives a child direct agency in the decision to take part in a conference. More troublingly however, Specialist Youth Officers, the DPP and the court can likewise determine that a conference should not proceed if it is no longer in the interests of justice – but without any need to consider the child interests except as provided generally in section 34.[23] Likewise, a victim who attends a conference has the ability to veto an outcome plan, and effectively derail the conference finalisation without any regard to any other factor.[24] While this might be consistent with a 'pure' application of the principles of restorative justice, it is hard to see how this is in any way consistent with the child's rights.

In 2016, the Department of Community Justice in NSW published a fourteen page policy document to assist Juvenile Justice NSW employees, 'to manage conferences in accordance with the *Young Offenders Act* 1997 (YOA) and its regulation.'[25] This policy document mentions rights seven times: the right for a young person or police not to proceed with a conference or withdraw a referral, the obligation on a conference convenor to 'inform participants of their roles, expectations, responsibilities and their legal rights in the conference process' and the importance of conferences being consistent with the *Victim Rights Act 1996* (NSW). [26] The document suggests that 'legal rights' are restricted to basic procedural rights under the *Young Offenders Act* and not any wider conception of child rights as understood under the CRC. In 2021, Youth Justice NSW published a comprehensive Youth Justice Conferencing Manual that outlines the youth justice conference process from referral to completion.[27] The manual is aimed at convenors and is much more comprehensive than the 2016 document, touching on matters that are relevant to assessing children's rights, including consideration of a child's development, disadvantage and indigeneity.[28]

[23] Section 44 *Young Offenders Act 1997* (NSW).
[24] Section 52(4) *Young Offenders Act 1997* (NSW).
[25] NSW Government *Youth Justice Conference Policy*, September 2016.
[26] Ibid.
[27] Youth Justice NSW *Youth Justice Conferencing Manual*, Version 1.0 May 2021.
[28] Ibid., 7-8.

As set out in Table 2, there was a significant increase between 2016 and 2021 in the percentage of conferences in NSW that were referred by the police, from 42 percent to 52 percent of the total number of conference referrals in NSW. Is this net-widening by stealth by choosing not to use lower options under the *Young Offenders Act?* At the same time, there has been an increase in the use of conferencing for so-called victimless offences – a shift away from the original conception of pure restorative justice – as well as a decrease in the number of victims taking part in conferences. This continued an earlier trend that showed a decline in the number of conferences in which a victim is present or otherwise involved. There are two possible reasons for this. First, victims (or their representatives) are choosing not to participate – which raises questions about the integrity of the process from a restorative justice theory point of view. Second, there is an increasing number of "victimless" offences, such as possession of drugs or weapons that now make up a significant proportion of matters being referred to a youth conference.[29]

	2016/17	2017/18	2018/19	2019/20	2020/21
Referrals to a Youth Justice Conference					
Total	1,244	1,422	1,374	1,379	1,392
Police	522 (42%)	644 (45%)	647 (47%)	768 (56%)	726 (52%)
Courts	722 (58%)	788 (55%)	727 (53%)	611 (44%)	666 (48%)
Percentage of referrals to a Youth Justice Conference for 'victimless' offences	7.2%	7.3%	8.2%	8.1%	8.0%
Participation in conferences					
Number of young people participating in Youth Justice Conferences	970	1,040	1,060	1,011	1,055
Total number of participants in Youth Justice Conferences	4,669	5,041	4,845	5,034	4,923
Percentage of victims or representatives in conferences held with identifiable victims	59%	58%	56%	55%	52%

Table 2: Referrals pathways and participant numbers in NSW conferences[30]

[29] Taussig, I *Youth Justice Conferences: Participant profile and conference characteristics* NSW Bureau of Crime Statistics and Research Bureau Brief Issue paper no. 75 February 2012.
[30] Source: NSW Department of Communities and Justice, effective date 3 July 2021 available at https://www.youthjustice.dcj.nsw.gov.au/Pages/youth-justice/about/statistics_yjc.aspx

The NSW conferencing program has been reviewed from a number of perspectives. An early review highlighted uneven use of conferencing on the basis that 28 of the 77 Police Local Area Command Districts in NSW referred five or fewer children to youth justice conferences in 2008-09, while a small number of areas referred well over 70.[31] This was also noted in a major 2010 review into the NSW Youth Justice System, which, from a children's rights perspective raises non-discrimination issues.[32] Despite the lack of more up to date figures, and even allowing for population differences, these early studies suggest that there is inconsistent use of conferencing as a diversionary option across NSW. This will be discussed further in Chapter 5, discrepancies of this magnitude raise questions about equality and non-discrimination from a children's rights perspective.

A 2002 study investigated the reoffending patterns of young offenders referred to youth justice conferences between 1998 and 1999, which were the first years of operation.[33] This study compared 590 first time young offenders dealt with by way of conference with 3,830 juvenile offenders who were processed through the Children's Court. This study concluded that there was a moderate drop of approximately 15-20% in the reoffending rate for conference participants compared with offenders processed through the court, with the additional finding that offenders involved in conferencing took longer to re-appear in the criminal justice system.[34] However, these results need to viewed with some caution because they did not take into account the fact that conferencing offenders (as first time offenders) were disproportionately lower risk compared with the court cohort, and that they did not control for Indigenous status, which is otherwise proven to have a statistically relevant impact on recidivism rates in the longer term.[35]

Another early Bureau of Crime Statistics and Research (BOCSAR) study found that there was a 'moderate reduction' in reoffending among those who participated in a youth justice conference.[36] This 2012 evaluation found no significant difference in reoffending on the basis

[31] Taussig 2012 (Op.cit.), 3 and 9.
[32] Noetic Solutions *A Strategic Review of the New South Wales Juvenile Justice System Report for the Minister for Juvenile Justice* Noetic Solutions Sydney 2010.
[33] Luke G and Lind B Reducing juvenile crime: Conferencing versus court. *Crime and Justice Bulletin: Contemporary Issues in Criminal Justice* no. 69. Sydney: NSW Bureau of Crime Statistics and Research 2002.
[34] Ibid.
[35] Smith, N and Weatherburn, D 'Youth Justice Conferences versus Children's Court: A comparison of reoffending' (2012) 160 *Crime and Justice Bulletin* 1, 3.
[36] Trimboli, F *An Evaluation of the NSW Youth Justice Conferencing Scheme* New South Wales Bureau of Crime Statistics and Research (BOCSAR) 2000; see also Luke G & Lind B Reducing juvenile crime: Conferencing versus court. *Crime and Justice Bulletin: Contemporary Issues in Criminal Justice* no. 69. Sydney: NSW Bureau of Crime Statistics and Research 2002.

of assessment of 918 offenders who went through youth conferencing compared with 918 offenders who went through the court system.[37] However, the study noted that reducing re-offending is not the only aim of the Australian criminal justice system; other aims of the system are to 'do justice' to both the victim and the offender.[38]

A review in 2013, focused on exploring any correlation between prior referral to diversionary options under the *Young Offenders Act* and the likelihood that a young offender would receive a custodial order for a subsequent offence.[39] This review found that all three diversionary options under the *Young Offenders Act*, including conferences, were effective in diverting both Indigenous and non-Indigenous young people from subsequent custodial sentences. This raises non-discrimination issues from a child rights perspective given the different access to conferencing of both the groups and broader geographic discrepancies in the use of youth conferencing.[40]

More recently, a study found that youth justice conferencing was 'overwhelmingly supported by the magistrates' although magistrates also expressed frustration about the role of lawyers in advising clients not to admit to offences under any circumstances (and thereby not be eligible for a conference), as well as frustration about differential police practices in regional areas that resulted in under-utilisation of conferencing, a tendency towards "McDonaldisation" of outcome plans rather than more individualised plans, with the effect that youth conferences had lost some of their original restorative purpose.[41]

The overall position in NSW is that the youth justice conferencing program has challenges from the perspective of children's rights because of questions about state-wide equal access to the program both from the perspective of different groups within the community as well as in relation to geographic spread of youth conferencing. In addition, questions remain regarding access to legal advice and representation and the extent to which a child can properly express their views and participate meaningfully in the process, and questions about the place of a child's best interests at each stage of the conference process. This conclusion is underlined by

[37] Smith N and Weatherburn D 2012 (Op.cit.) 1–23.
[38] Ibid. 16.
[39] Wan WY, Moore E & Moffatt S 'The impact of the NSW Young Offenders Act (1997) on likelihood of custodial order' (2013) 166 *Contemporary Issues in Crime and Justice* Sydney: NSW Bureau of Crime Statistics and Research.
[40] Ibid.
[41] Richards, K, Bartels, L and Bolitho, J 'Children's court magistrates' views of restorative justice and therapeutic jurisprudence measures for young offenders' (2017) 17 *Youth Justice* 22, 32-34.

the information that Youth Justice NSW provides to children about their rights in the conference process. Specifically, in the Youth Justice NSW leaflet informs a child that they have the following rights without reference to any of the core rights of the CRC:

1. You have the right to choose to go to court instead.
2. You have the right to have any adults attend to support you at the conference.
3. You have the right to veto (say no) to any outcome plan task at the conference.
4. You have the right to an interpreter.
5. You have the right to have your legal representative attend the conference.
6. You have the right to ask the Conference Convenor to consider including practices from your culture or invite a respected person from your community to the conference.[42]

3.5 But different: Victoria

As in NSW, restorative justice started in Victoria as an unlegislated program operating in limited locations. It commenced in 1995 and was operated by Anglicare and Jesuit Social Services in consultation with the Department of Human Services; both Jesuit Social Services and Anglicare are non-government organisations (NGOs).[43] Unlike the Wagga Wagga police controlled model that was the genesis of youth conferencing in NSW, the only entry point to the program was as a pre-sentence option in the Children's Court. The original Victorian model focused on offenders at risk of receiving a low-end supervisory order, such as a Probation Order, where satisfactory participation in a group conference could result in a child receiving a bond or accountable undertaking under the then *Children and Young Persons Act 1989* instead of becoming involved with what was then known as Juvenile Justice and is now Youth Justice.[44]

[42] Youth Justice NSW *Factsheet for a young person referred to a Youth Justice Conference* at https://www.youthjustice.dcj.nsw.gov.au/Documents/yjc/YJC%20Factsheet%20for%20Young%20Person.pdf
[43] Griffiths, M *A Policy Discussion Paper on the Development of a Young Adult Restorative Justice Conferencing Program in Victoria* Jesuit Social Services Melbourne 2005; see also Keating C and Barrow D *Report on the juvenile justice group conferencing program* Effective Change Pty Ltd Melbourne 2006; KPMG *Department of Human Services: Review of the Youth Justice Group Conferencing Program Final Report* KPMG Melbourne 2010.
[44] Ibid.

In Victoria youth conferencing is now undertaken pursuant to the *Children, Youth and Families Act 2005*. In its initial statutory form, group conferences were legislated as sitting within the power of the Children's Court as a means of deferring sentence. This remains the case today. That is, group conferences exist solely within the framework of the court as a means of deferring sentence after a plea or finding of guilt. Therefore, a key distinguishing feature of the Victorian system is that Victoria does not have the option for a conference to be used as an alternative to a prosecution, as is the case in NSW, the ACT and indeed, all other jurisdictions in Australia.

In Victoria, it is the Children's Court that is the arbiter of whether a group conference takes place, and this can only happen once an offence has been proved. This is a key difference from other two jurisdictions and, as discussed in the relevant chapter, this element of the process arguably makes the Victorian model more compliant with children's rights, because it ensures that procedural protections can better be accommodated as part of the mainstream court process.

Under the initial statutory scheme, the Children's Court could only order a Group Conference where it was considering placing the child on a Probation Order or a Youth Supervision Order. This was intended to avoid net-widening so that conferencing would not overlap with lower-end offences that could be dealt with by police diversion strategies, such as cautioning or the ROPES diversion program, which has been in operation in Victoria since 2002.[45] It also had the effect of ruling out more serious offending. However, in 2014, the scope of conferencing was amended to make group conferences available where the court was considering any supervisory order or detention order available in the Children's Court: the lower end offending protection against net-widening was retained.[46] From a children's rights perspective, this is a key difference between Victoria and NSW and the ACT, where conferencing operates as an option to consider prior to commencing proceedings, and therefore focuses on lower end

[45] See Judicial College of Victoria *Children's Court Bench Book*, Judicial College of Victoria 2017 at https://www.judicialcollege.vic.edu.au/eManuals/CHCBB/66518.htm. ROPES is a youth diversion program premised around turning negative contacts between youth and police or the courts into positive ones. Ropes requires young offenders to complete a program with police informants at a rock climbing facility. The program requires teamwork, encouragement and trust.

[46] The amendment was introduced by ss. 100 – 103 of the *Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014.* It is now reflected in s.415 *Children Youth and Families Act 2005* (Victoria).

offending with risks that the programs operate to ratchet up sanctions for matters in Victoria that would be dealt with by less interventionist diversionary options, such as ROPES.

Another change in Victoria in 2014, was to open up group conferences to young people being held in custody; previously conferences were only available for young offenders in the community. These amendments were accompanied by changes to the timelines that apply to group conferencing, imposing a much tighter timeline where a young person is in custody – two months instead of four months, which is the timeline for non-custodial conferences. The rationale for these changes was explained in the Statement of Compatibility, issued to ensure alignment of the state legislation with Victoria's *Charter of Rights and Responsibilities Act 2006:*

> The court is empowered to defer sentencing for up to four months. In the meantime, the child may be released either unconditionally or on bail or may be remanded in custody. If the child is remanded in custody, the court may only defer sentencing for up to two months. I consider that these provisions are compatible with the criminal procedure rights in section 25 of the Charter Act. Although it results in some delay in sentencing, that delay is reasonable and necessary to promote the aims of the restorative justice program. I also consider that the power to remand the child in custody is compatible with the right to liberty in section 21 of the Charter Act. That power lies within the discretion of the court and is subject to a range of safeguards including time constraints and a prohibition against refusal of bail on the sole ground that the child does not have any or any adequate accommodation.[47]

The second reading speech, and associated second reading debate, made reference to research and 'evaluation that found the [group conferencing] program was a powerful, cost-effective way to reduce the likelihood of a young person reoffending, and had demonstrated positive outcomes for young people and was positively regarded by victims of crime.'[48]

Under the Victorian regime, a conference can take place if the Court considers that a deferral to participate in a conference is in the interests of the child.[49] The court has the sole discretion to order a group conference during the deferral period, subject only to the court being satisfied

[47] Minister Mary Wooldridge, Hansard Legislative Assembly 7 August 2014.
[48] Ibid; see also KPMG *Department of Human Services: Review of the Youth Justice Group Conferencing Program Final Report* KPMG Melbourne 2010.
[49] Sections 414-415 *Children Youth and Families Act 2005* (Victoria).

that the child is suitable to participate, after consultation with Youth Justice, and that the child agrees to participate in the conference.[50] From a children's rights perspective, there are positives and negatives in this process. The positive is that the language 'the child agree to participate' is rights affirming from the perspective of Article 12 of the CRC because it suggests active involvement by the child in the decision. The negative is that there is no guidance as to what the court needs to consider as 'the interests of the child' or even if this is different to the *best* interests of the child.

This is underlined by the fact that section 9(2) of the *Children, Youth and Families Act* expressly excludes the operation of the 'best interests principle' set out in section 10 of the Act from application in criminal proceedings in the Children's Court; likewise, the matters to be taken into account on sentencing a child under section 362 of the Act do not apply to the decision of the court to refer a child to a group conference. There is therefore no legislative guidance as to what might or might not be the child's interests in the initial decision to refer the child. In addition, section 415(4) moves away from a clear focus on a child's interests – or best interests – because it stipulates that the purpose of a conference is to 'facilitate a meeting between the child and other persons (including, if they wish to participate, the victim or their representative and members of the child's family and other persons of significance to the child)' in order to increase the child's understanding of the effect of their offending on the victim and the community, reduce the likelihood of the child re-offending and to negotiate an outcome plan that is agreed to by the child. So, while the child needs to agree to participate (a good thing from a child rights perspective), the focus of the court's ultimate decision is not the child's wider interests but rather the matters listed above.

In terms of who can participate in a group conference, Victoria again takes a different approach to NSW – and indeed to the ACT. Sections 524 and 525 of the *Children Youth and Families Act* effectively mandate legal representation in the range of criminal matters that would be referred to a conference, meaning that a child has a legal representative at the initial decision to agree to participate in a conference. Unlike the other two jurisdictions, the only people mandated to attend under section 415 of the Victorian Act are the child, the child's legal representative, the convenor of the conference and the informant or another police officer.[51]In Victoria, the attendance and participation of the victim or a victim's representative is not

[50] Section 414(1)(c) *Children Youth and Families Act 2005* (Victoria)
[51] Section 44(3) *Crimes (Restorative Justice) Act 2004* (ACT).

mandatory, with the effect that a victim cannot prevent a conference proceeding where it would otherwise be consistent with a child's rights to do so, and the Act stipulates that the conference is confidential to the participants and cannot be disclosed to others.

Under the Victorian group conferencing program, successful participation in a conference means that the Court is bound not to impose a more severe disposition than the child could have received had they not participated in a conference.[52] The court is also required to take a young person's participation in a group conference into consideration during sentencing. In effect, this means that a young person who has participated in a conference in Victoria could move down the sentencing scale, for example, moving from a supervised Probation Order to a Good Behaviour Bond or receive a shorter sentence than otherwise would have been imposed. It is usual practice in Victoria to include a special condition on the final sentencing order that the young offender is to comply with the Outcome Plan agreed at the group conference. Again, this is contrast with NSW which is silent on the issue and the ACT in which a court expressly does not have to reduce the severity of any sentence by virtue of participation in a conference.[53]

Compared with the NSW youth justice conferencing, the Victorian program is considerably narrower in scope, operating solely as a pre-sentence option at the behest of the court and only for offences where a supervisory order (Probation, Young Supervision Order or Youth Attendance Order) or detention is otherwise a likely outcome. Notwithstanding some question about discrimination and best interests, this different focus in Victoria is better aligned with respecting the rights of the child. The narrower scope is also reflected clearly in the number of conferences conducted between 2014 and 2021 as set out in Table 1 above.

A comparison of the number of conferences held in each jurisdiction needs to be understood against the backdrop discussed previously about the proportion of NSW conferences initiated by the court as opposed to the number that operate as an alternative track to a prosecution. The unavailability of conferences as an alternative to prosecution means that the Victorian group conferencing program can only be used in far more limited circumstances than in NSW. The challenge here is to balance the risk of discrimination and net-widening that arises under the NSW model with the much more limited access to conferencing in Victoria – potentially

[52] Section 509 *Children Youth and Families Act 2005* (Victoria).
[53] Section 20(2) *Crimes (Restorative Justice) Act 2004* (ACT).

limiting access to a program that, if well designed, would otherwise be more consistent with a child's rights under the CRC.

In Victoria, just like in NSW, there is a significant disparity in participation rates for Indigenous and non-Indigenous offenders in youth conferencing. For example, in Victoria, of 253 conferences in 2013-2014, only 25 involved Indigenous young people.[54] This figure is approximately fifty percent below the general level of over-representation of Koori young people in the Victoria youth justice system.[55] As set out in Table 1, this significant discrepancy has continued every year since then, to the point where, in 2020-2021, only eight out of 115 conferences involved an Indigenous young person. This raises concerns about compliance with Article 2 of the CRC and the principle of non-discrimination.

On its face, the Victorian legislation is much simpler and condenses many of the principles and procedures contained in the NSW *Young Offenders Act* into only a few sections of the *Children Youth and Families Act*. The Victorian legislation also uses a language of rights and the requirement for statements of compatibility with the Victorian *Charter of Human Rights and Responsibilities Act 2006* – state-based legislation designed to give domestic effect to the International Covenant on Civil and Political Rights – for amendments to the legislation, helps to keep the language of rights at the forefront of the current legislative framework. This was particularly apparent in the 2014 amendments, where adjustments were made to the remand period to hold an in-custody group conference, having regard to general rights of liberty under the *Charter*. However, the question remains as to whether Victoria's group conferencing regime, even after its expansion in 2014, remains too narrow, because it rests solely within the province of the Children's Court as a pre-sentence option, or whether the Victorian approach better reflects and conforms to international children's rights standards.

3.6 But different: Australian Capital Territory

In January 2005, the *Crimes (Restorative Justice) Act 2004* commenced. This was six months after the commencement of the ACT *Human Rights Act 2004*, which was Australia's first human rights legislation[56] The *Crimes (Restorative Justice) Act 2004* provides a comprehensive scheme of conferencing and applies to both children and adults in the

[54] SCRGSP (Steering Committee for the Review of Government Service Provision) 2015, Report on Government Services 2015, vol. F, *Youth justice services*, Productivity Commission, Canberra.
[55] Ibid.
[56] Section 2 *Human Rights Act 2004* (ACT).

Australian Capital Territory. However, despite the contemporaneous genesis of the two acts, this does not mean that conferencing in the ACT is compliant with the CRC. Nor in fact does the express reference to the CRC in section 94(3) of the *Children and Young People Act 2008* (ACT), mean that the Act respects children's rights.

In fact, even more than the previous two jurisdictions, the ACT legislation exhibits a strong tension between the foundational pillars of restorative justice and children's rights, because it has adopted the 'purest' restorative justice approach of the three jurisdictions. This is most evident in the fact that conferencing in the ACT depends on the consent and involvement of a victim for a conference to proceed. Unlike NSW and Victoria, conferencing is not available in the ACT for victimless crimes, or if the victim chooses not to take part. In the ACT, a conference cannot occur if a victim or victim's representative does not agree to participate. [57] This is the case even though the ACT provides a much wider range of engagement methods for a conference, including video exchanges, written exchanges and face to face meetings.[58] This central focus on the victim's involvement provides a clear example of how a purist restorative justice prioritisation of the involvement of the victim in the ACT program can come at the expense of the child's best interests from the perspective of conferencing being a 'good thing' for young offenders. This does not operate to the same extent in the other two jurisdictions because of the greater flexibility with respect to who is mandated (in the case of Victoria) or entitled (in the case of NSW) to attend a conference.

At the same time, as in NSW but unlike Victoria, a child in the ACT can be referred to a conference at multiple points along the criminal justice continuum by several referring entities, potentially making the program more flexible and available to a wider cohort of children.[59] ACT Police can refer a child to a conference after caution or apprehension but before a referral for prosecution has been made. The ACT DPP can refer a child to a conference after a prosecution referral is made, but prior to the child entering a plea in the Children's Court. The Children's Court – and the ACT Supreme Court – can refer a matter at any point that it remains before them up to sentence, and the Office of Children and Young People or the Restorative Justice Unit can make a referral post-sentence.[60]

[57] Section 42(2) *Crimes (Restorative Justice) Act 2004* (ACT).
[58] Section 46 *Crimes (Restorative Justice) Act 2004* (ACT).
[59] Table 2, section 22 *Crimes (Restorative Justice) Act 2004* (ACT).
[60] Table 2, section 22 *Crimes (Restorative Justice) Act* (ACT).

However, somewhat surprisingly, and despite a comprehensive piece of legislation that has been in operation for 10 years, conferencing is used only sparingly in the ACT. As set out in Table 1 above, the number of conferences has been dropping over a seven-year period to 2020-2021 (even allowing for COVID-19). Therefore, the ACT has experienced something of a 'cooling' response to conferencing as a youth justice option since its legislative regime came into effect. More specifically, Table 3 (below) is striking because it shows that referrals from the Children's Court have plummeted from 39 referrals in September 2009 to only seven referrals in June 2019, whereas police referrals increased from 22 to 35 in the corresponding months. Indeed, police have referred approximately twice as many children to conferencing as the courts over the ten-year period covered by the data. Over the same data period of 2009 – 2019, 475 Indigenous young people were referred to conferencing compared to 1,975 non-Indigenous children and 173 of unknown indigenous status.[61]

But what does this mean for children's rights? As in NSW, a child in the ACT must both admit an offence (or, in the case of the ACT, not deny a less serious offence) and consent to take part as pre-conditions to being eligible to take part in a conference.[62] However, there is no mandatory requirement for a child to be provided with legal advice on either of these issues for diversionary pre-court conferences in the ACT – or in NSW. It would therefore seem that the greater procedural safeguards at court where a child is more likely to obtain legal advice and representation is the cause of the difference in referral rates from the court compared with the police. This suggests from a children's rights perspective that there is a mismatch between a child's ability to effectively exercise their CRC rights pursuant to Article 12 (right to be heard) and Article 40 (procedural rights) in pre-court diversionary conferencing in the absence of mandatory legal representation as opposed to the option of participating in a conference through the court where legal representation is readily available.

This is exacerbated further by section 44(3) of the *Crimes (Restorative Justice) Act 2004* in which the ACT adopts a unique position regarding representation at the conference itself. Section 44(3) states that '[i]f a participant in a restorative justice conference is represented by someone acting for the participant in a professional capacity, the representative may not take

[61] ACT Justice and Community Safety Directorate *Criminal Justice Statistical Profile – June 2019* data tables available at https://justice.act.gov.au/sites/default/files/2020-09/Copy%20of%20Table%20-%2019%2006%20ACT%20Criminal%20Justice%20Statistical%20Profile%20-%20Data%20record.xlsx

[62] Section 20 *Crimes (Restorative Justice) Act* (ACT).

part in the conference in that capacity.'[63] In other words, a young offender cannot be represented by a lawyer at a conference in the ACT. This is a significant difference to Victoria, where a lawyer's attendance is mandatory, and NSW where it is discretionary, but limited to the provision of advice.[64]

	Young offenders								
	ACT Policing	Children's Court	Director of Public Prosecutions	Galambany Circle Sentencing Court	Children and Youth Protection Services	Restorative Justice Unit	Supreme Court	Victim Support ACT	Total young offender referrals
Sep-09	22	39	1	n/a	1	0	0	n/a	63
Dec-09	15	32	3	n/a	0	0	0	n/a	50
Mar-10	22	25	2	n/a	0	0	0	n/a	49
Jun-10	17	35	3	n/a	0	0	0	n/a	55
Sep-14	29	9	0	n/a	0	0	0	n/a	38
Dec-14	38	8	0	n/a	0	0	0	n/a	46
Mar-15	16	3	0	n/a	0	0	0	n/a	19
Jun-15	34	10	0	n/a	0	0	0	n/a	44
Sep-15	24	3	0	n/a	0	0	0	n/a	27
Dec-15	35	4	0	n/a	0	0	0	n/a	39
Mar-16	26	4	0	n/a	0	0	0	n/a	30
Jun-16	22	5	0	n/a	0	0	0	n/a	27
Sep-16	25	6	0	n/a	1	0	0	n/a	32
Dec-16	48	5	1	n/a	0	0	0	n/a	54
Mar-17	27	8	0	n/a	1	0	0	n/a	36
Jun-17	35	12	0	n/a	0	0	0	n/a	47
Sep-17	25	10	0	n/a	1	0	1	n/a	37
Dec-17	24	7	0	n/a	0	0	0	n/a	31
Mar-18	26	10	0	n/a	1	0	1	n/a	38
Jun-18	9	6	0	n/a	0	0	0	n/a	15
Sep-18	21	3	0	n/a	0	0	0	n\a	24
Dec-18	32	6	0	n/a	0	0	0	n/a	38
Mar-19	30	6	0	n/a	0	0	1	n/a	37
Jun-19	35	7	0	n/a	0	0	0	n/a	42
Total since 2005	**1,514**	**783**	**300**	**n/a**	**15**	**7**	**4**	**n/a**	**2,623**

Table 3: Source of ACT restorative justice referrals to June 2019[65]

Another reason why conferencing is becoming less attractive in the ACT, as set out in Table 3, might be that contrary to the express legislative situation in Victoria, successful participation in a conference in the ACT does not lead to a mitigation of sentence.[66] Similarly, participation

[63] Section 44(3) of the *Crimes (Restorative Justice) Act 2004* (ACT).
[64] Section 415(6) *Children Youth and Families Act 2005* (Victoria); s47(1)(f) *Young Offenders Act 1997* (NSW).
[65] Source: ACT Justice and Community Safety Directorate *Criminal Justice Statistical Profile – June 2019* data tables available at https://justice.act.gov.au/sites/default/files/2020-09/Copy%20of%20Table%20-%2019%2006%20ACT%20Criminal%20Justice%20Statistical%20Profile%20-%20Data%20record.xlsx
[66] Section 20(2) *Crimes (Restorative Justice) Act 2004* (ACT).

in a diversionary pre-court conference does not preclude a referring entity from exercising their discretion to prosecute or to continue to prosecute a matter, even though participation in a conference in parallel to a prosecution for the same offence does not preclude a young person from pleading not guilty.[67] Again, these positions are difficult to reconcile with the idea of a child's best interests being to minimise their engagement in the justice system, and indeed to understand why a child would choose to participate in a conference for little discernible procedural benefit.

However, there is continued commitment to conferencing in the ACT as set out in the 2019 Final Report *Blueprint for Youth Justice in the ACT 2012-2022*, notwithstanding the decrease in the use of conferencing demonstrated in Table 1 and Table 3, as well as the apparent tension between the underlying principles of the program and children's rights. The report glosses over the decrease in numbers by referring to the total numbers of referrals since 2005:

> As at 30 September 2018, the unit has engaged with 2,506 young offenders, of which 1,502 have participated in a conference. ACT Policing and the ACT Children's Court have referred the majority of young people, which means young offenders have either been diverted from the justice system or have been referred by an entity focused on the rehabilitation of young people. Restorative justice continues to be an integral and positive part of the response of the ACT youth justice system to young people who have offended.[68]

The report recommended 'further embedding a restorative practice approach across the youth justice system as a key focus of work over the next four years.'[69] The report made no express reference to children's rights, children's best interests or the CRC which raises questions about whether the program is aligned with restorative justice principles in preference to children's rights, although the report did note that there was a need to reduce 'the over-representation of Aboriginal and Torres Strait Islander children and young people in the youth justice system, including the use of diversionary conferencing.'[70] As in NSW, this gives rise to a concern that

[67] Section 20(1) *Crimes (Restorative Justice) Act 2004* (ACT).
[68] ACT Government Community Services *Blueprint for Youth Justice in the ACT 2012-2022: Final Report* May 2019 available at https://www.communityservices.act.gov.au/__data/assets/pdf_file/0007/1361149/Blueprint-for-Youth-Justice-Taskforce-Final-Report-2019.pdf.
[69] Ibid.
[70] Ibid.

diversionary non-court conferencing is being used disproportionately for Indigenous young people where less intensive outcomes are used for non-Indigenous young people.

Again, demonstrating a tension between children's rights and restorative justice principles, section 2 of the *Crimes (Restorative Justice) Act 2004* sets out the objects of the legislation and are strongly victim-centric:

> (a) to enhance the rights of victims of offences by providing restorative justice as a way of empowering victims to make decisions about how to repair the harm done by offences;
>
> (b) to set up a system of restorative justice that brings together victims, offenders and their personal supporters in a carefully managed, safe environment;
>
> (c) to ensure that the interests of victims of offences are given high priority in the administration of restorative justice under this Act.[71]

These objects do not align at all to the core principles of the CRC from the perspective of a child offender. Despite the express reference to the CRC in section 94(3) of the *Children and Young People Act 2008* (ACT), it would seem that there is an uneasy tension between conferencing and children's rights in the ACT despite legislative engagement with both, albeit in separate pieces of legislation.

The ACT conferencing program has been subject to review. In 2006, two years after the legislation entered into force, the ACT Department of Community Safety published its first phase Ministerial review into the operation of the program for young offenders.[72] Key findings from stakeholder groups, including 88 young people who had been involved in a conference, in the review included:

Young People Responsible for Offences

1. 98% of young people responsible for offences said they were able to say what they wanted to say;
2. 98% said they were treated with respect during the process;
3. 99% thought the process was fair or somewhat fair;

[71] Section 2 *Crimes (Restorative Justice) Act 2004* (ACT).
[72] ACT Department of Justice and Community Safety *First Phase Review of Restorative Justice* ACT Department of Justice and Community Safety 2006.

4. 98% said they thought the agreement was fair or somewhat fair;
5. 98% said they would attend a process again;
6. 97% said they would recommend it to someone else; and
7. 98% have complied with their restorative justice agreement. [73]

These are promising findings from a children's rights point of view because they demonstrate the potential of the program to provide an effective way for a child to express their views and be listened to, and that children can perceive the process as procedurally fair and enable them to have the opportunity to reintegrate. At the same time, these predate the decline in the use of conferencing in the ACT, as set out in Table 1 and Table 3, and so needs to be read with some reservations given the experience of the subsequent 15 years.

A more recent 2017 study of 46 ACT restorative justice stakeholders, including judicial officers, found that conferencing 'was a major strength of the Children's Court. RJ was perceived as less formal and more conducive to open communication among young people, their families and the court.'[74] Again, these findings suggest that the ACT program has potential for a young person to engage and be heard. Another review was conducted in 2018 by the Australian National University (ANU) and Australian Institute of Criminology (AIC).[75] This study focused on recidivism rates in the ACT program and found that restorative justice participants were less likely to reoffend both in the short term, over a five year period and over a ten year period, than non-restorative justice participants when adjustments to the data were made through a multivariate model.[76] The study had some interesting findings including that conferencing was less effective on the measure of recidivism for first time property offenders (a target group in NSW and Victoria for conferencing), but more effective for young property offenders with a prior record, and significantly more effective for young people attending conferences for offences of violence.[77] However, neither this study, nor the earlier studies engaged directly with the question of the program's compliance with core children's rights.

[73] Ibid.
[74] Richards, K, Bartels, L and Bolitho, J 'Children's court magistrates' views of restorative justice and therapeutic jurisprudence measures for young offenders' (2017) 17 *Youth Justice* 22, 30.
[75] Australian National University and The Australian Institute of Criminology, *Australian Capital Territory Restorative Justice Evaluation: An Observational Outcome Evaluation* (Report of Findings, July 2018)
[76]Ibid., 3-4.
[77] Ibid. It is worth noting that these findings also matched a similar study in the UK: Sherman, L et al, 'Twelve Experiments in Restorative Justice: The Jerry Lee Program of Randomized Trials of Restorative Justice Conferences' (2015) 11 *Journal of Experimental Criminology* 501.

3.7 Conclusion

This chapter has provided an overview of the conferencing programs in NSW, Victoria and the ACT. While there are some similarities, Table 4 shows that the three jurisdictions have some key differences that are relevant to the intersection between conferencing and children's rights.

	NSW	Victoria	ACT
Referral by police/prosecution instead of criminal proceedings	Yes	No	Yes
Referral by court	Yes (at any stage)	Yes (deferral of sentence only)	Yes (at any stage)
Participation mitigates sentence for court referred matters	Not specified	Yes	No
Available for victimless offences	Yes	Yes	No
Admissions	Child admits offence – no mandatory legal advice regarding admission.	Pleaded guilty or have been found guilty (Legally represented in the Children's Court)	Does not deny sufficient for less serious offence; otherwise, must accept responsibility – no mandatory legal advice for admissions.
Child consent required for referral	Yes	Yes	Yes
Legal advice re consent	May have legal advice before a consenting to a conference.	Legally represented in the Children's Court	May have legal advice before a consenting to a conference.
Child can withdraw consent at any time	Yes	Yes	Yes
Legal representation at conference	May have legal advisor present, but cannot be represented except at discretion of convenor.	Must be represented	Legal practitioner cannot attend conference in professional capacity
Cancel/discontinue	The referrer and the young person have the right to withdraw the referred matter at any time before the conference is held.	The convenor at any time during the pre-conference stage may find the young person unsuitable to participate for a number of reasons, for example the nature of the offence being more serious than first realised, lack of remorse or capacity for victim empathy, and low level of motivation to actively	Convenor can cancel or discontinue if no significant prospect of promoting the objects of the Act. Must cancel or discontinue if suitable victim or has withdrawn agreement Must cancel or discontinue if offender

		engage in the conferencing process.	has withdrawn agreement
Veto outcome plan	Young person Victim (if they attend conference)	No	Must be signed/agreed by all participants
State-based Human Rights legislation	No	Yes	Yes
Rights knowledge or training required for convenors	No	No	Yes (but not necessarily CRC)
Mandatory Participants	None	• Child • Child's legal practitioner • Informant/police officer • Convenor	• Suitable victim • Offender
Optional/invited participants	Yes	Yes	Yes
Meeting options	Face to face	Face to face or can be done by audio link or audio-visual link	• Face-to-face meeting • Exchange of written or emailed statements between participants • Exchange of prerecorded videos between participants • Teleconferencing • Videoconferencing
Post-sentence conferencing	No	No	Yes
Time limit	28 days after referral	During four-month deferral of sentence; ideally within 8 weeks of referral.	Not specified

Table 4: Same, same but different

There are challenges regarding non-discrimination that arise from the differential experience of certain groups of young people in conferencing programs, in particular Indigenous young people but also children in regional areas. In this respect, NSW has a high proportion of Indigenous young people participating in conferences, at between 30 and 55 percent of the total, depending on the year. As discussed in Chapter 5, this is not necessarily a good thing from a non-discrimination point of view. A related concern is the question of whether non-court-initiated conferencing in NSW and the ACT can result in 'net-widening', that is, young offenders may be referred to conferencing programs where previously less intrusive options

would have been used, or indeed where the evidence is weak, but the young person has no legal advice or representation.[78]

Another challenge when it comes to rights is the potential to 'play off' the benefits of conferencing for victims and offenders 'at the expense of the other'.[79] In this respect, there are challenges to children's rights that are raised by the role that victims and offenders and other participants have in conferences, including powers to veto conferences or outcomes, as is the case in the ACT. This has implications in terms of the best interests of the young offender.

This chapter has also highlighted participatory and procedural challenges on questions such as the impact of the right to legal representation. In this respect, there is a key difference between Victoria, NSW and ACT, because the Victorian regime mandates the attendance of the child's legal practitioner at a conference. Such a requirement is intended to protect a young person's rights during the conference itself, as well as to represent the child's interests when the outcome plan is being developed. The requirement for a legal practitioner to be present sets Victoria apart from NSW (where a legal practitioner may attend to advise, but not represent) and the ACT, where a legal practitioner cannot attend in their professional capacity. This difference is explored in greater detail in Chapter 7 which analyses a child's right to participate, express views and be heard.

This chapter has provided an overview of the three programs, and in so doing has laid the foundation for the next chapter which provides an introductory explorations of children's rights, before moving into Part II of the thesis, where the matters raised in this chapter are subjected to in-depth evaluation, using specific provisions of the CRC.

[78] Blagg H *Youth Justice in Western Australia: A Report Prepared for the Commissioner for Children and Young People* WA 2009.
[79] Sherman L and Strang H 'Repairing the Harm: Victims and Restorative Justice' (2003) 1 *Utah Law Review* 15, 36.

CHAPTER 4

A children's rights framework

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4.1 Introduction

Writing in 1973, Hillary Rodham – now Hillary Clinton – observed that 'children's rights' was 'a slogan in search of a definition.'[1] The world has changed significantly since 1973 and the landscape is now one in which 'children's rights are being incrementally expanded in the international and domestic arenas, [and] the very fact that a child can possess legal rights *at all* is not unquestioned.'[2] It is true that there remains some debate about whether children can claim, exercise and secure enjoyment of rights independently of adults.[3] Nonetheless, the remarkable shift from supposed empty slogan to identifiable rights overturns the dominant historical position that children have been socially inferior and legally subordinate, including for the most part lacking any agency or capacity, throughout most of western history.[4]

The shift over the last half century, accelerated by the growing jurisprudence following the entry into force of the CRC in 1990, has reached the point that much of the modern debate on children's rights theory now centres on questions of capacity and capability.[5] In other words, the debate is less about whether children have rights, but rather how a child's rights might be exercised – for the purpose of this thesis, in the context of youth conferencing programs in

[1] Rodham H 'Children under the Law' (1973) 43 *Harvard Educational Review* 487, 487.
[2] Ross H 'Children's Rights and Theories of Rights' (2013) 21 *International Journal of Children's Rights* 679, 680.
[3] Stalford, H and Hollingsworth, K 'Judging Children's Rights: Tendencies, Tensions, Constraints and Opportunities' in Stalford H, Hollingsworth K, and Gilmore S (eds), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* Hart Publishing, (2017), 17. But compare Ferguson, L 'Not Merely Rights for Children but Children's Rights: The Theory Gap and the Assumption of the Importance of Children's Rights' (2013) 21(2) *International Journal of Children's Rights* 177, 180, n5.
[4] Ross H 2013 (Op. cit.) 679. See also Hart HLA *Essays on Bentham: Studies in Jurisprudence and Political Theory* Clarendon Press Oxford 1982; MacCormick N 'Rights in Legislation', in P. M. S. Hacker and J. Raz (eds.), *Law, Morality, and Society: Essays in Honour of H. L. A. Hart* Clarendon Press Oxford 1977; MacCormick N *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* Clarendon Press Oxford (1982). Nussbaum M and Dixon R 'Children's Rights and a Capabilities Approach: The Question of Special Priority' (2013) 97 *Cornell Law Review* 549; 'Decision Making by and for Individuals Under the Age of 18', Part 68 in *For Your Information: Australian Privacy Law and Practice* (ALRC Report 108, 2008).
[5] Fortin J *Children's Rights and the Developing Law* (3rd ed) Cambridge University Press 2009) 17, 22, 321, 739–40; Tobin J 'Justifying Children's Rights' (2013) 21 *International Journal of Children's Rights* 395, 403; Campbell T 'The Rights of the Minor: As Person, As Child, As Juvenile, As Future Adult' in Alston P, Parker S and Seymour J (eds), *Children, Rights and the Law* Clarendon Press, (1993) 1, 5. Nussbaum M and Dixon R 'Children's Rights and a Capabilities: A Question of Special Priority' (2012) Working Paper No. 384 *University of Chicago Public Law & Legal Theory*; Stoecklin D and Bonvin J-M (eds), *Children's Rights and the capability approach: Challenges and Prospects* (Springer, 2014).

three jurisdictions.[6] As Freeman has argued, '[t]he language of rights can make visible what has for too long been suppressed. It can lead to different and new stories being heard in public.'[7]

This chapter considers the evolution of children's rights in order to identify a framework against which to measure the effectiveness of the NSW, Victorian and ACT youth conferencing programs. Such an analysis enables the central research questions of this thesis, to be answered, namely:

1. Do the legislated child conferencing programs in Victoria, NSW and the ACT respect, protect and fulfil children's rights in accordance with the core principles of the *UN Convention on the Rights of the Child?*

2. If not, what reforms would be needed to make the programs compliant with the CRC?

The starting point is to ask the fundamental question: what are children's rights? At its simplest, the concept of children's rights refers to the 'range of civil, political, social, economic and cultural rights' relating to childhood.[8] These rights establish basic standards by which a child as an individual, and children collectively, can 'thrive in the present and develop to their fullest potential in the future.'[9] Recognising the work of other scholars, this thesis adopts an understanding and formulation of children's rights derived from the CRC.[10] Under this approach, the 'conceptual' foundation of children's rights is that children have an evolving capacity for autonomy even if they might be vulnerable in relation to adults: children are distinct rights holder, and are actors in, and shapers of, their own development.[11]

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[6] Varadan, S 'The Principle of Evolving Capacities under the UN Convention on the Rights of the Child' (2019) 27 *International Journal of Children's Rights* 306.
[7] Freeman, M 'Why It Remains Important to Take Children's Rights Seriously' (2007) 15 *International Journal of Children's Rights* 5, 6. See also Ferguson 2013 (Op. cit.) 177, 183; Tobin, J 'Justifying Children's Rights' (2013) 21 *International Journal of Children's Rights* 395.
[8] Stalford and Hollingsworth 2017 (Op. cit.) 17.
[9] Ibid.
[10] For example, Fortin, J 'Accommodating Children's Rights in a Post *Human Rights Act* Era' (2006) 69 *Modern Law Review* 299, 311; Tobin, J 'Judging the Judges: Are They Adopting the Rights Approach in Matters Involving Children?' (2009) 33 *Melbourne University Law Review* 579, 584–92; Stalford and Hollingsworth 2017 (Op. cit.) 18–21; Freeman M 'The Value and Values of Children's Rights' in Invernizzi A and Williams J (eds), *The Human Rights of Children: From Visions to Implementation* Ashgate, (2011) 21, 27–33.
[11] UN Committee on the Rights of the Child. (2003, November 27). *General comment no. 5 (2003) General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6),* CRC/GC/2003/5, para 12; Tobin J 'Introduction' in Tobin J (ed) *The UN Convention on the Rights of the Child: A Commentary* Oxford University Press Oxford (2019) 1–2.

The Committee on the Rights of the Child has repeatedly identified four core rights in the CRC that operate as 'the lens through which the process of implementation should be viewed, and [that] act as a guide for determining the measures needed to guarantee the realization of the rights of children.'[12] These four 'core' rights are:

a) non-discrimination (Article 2);

b) best interests of the child (Article 3);

c) right to life, survival and development (Article 6); and

d) right to be participate (Article 12).[13]

As has been recognised by others, these four rights operate as principles against which to analyse whether children's rights are respected protected and fulfilled.[14] As set out in Chapter One, this thesis adopts three of these four primary rights as the prism against which to analyse the three conferencing programs under review. The Article 6 right to life, survival and development is not included in this analysis because its focus is on physical survival, including prevention and safeguards from unnatural and premature death, and are therefore not directly relevant to youth conferencing programs in Australia. In this respect, it is also worth noting that unlike the other three core rights, Article 6 is not mentioned at all in *General Comment 24 on children's rights in the child justice system.*[15] Further it was only mentioned once in the

[12] UN Committee on the Rights of the Child (CRC), *General comment No. 20 (2016) on the implementation of the rights of the child during adolescence*, 6 December 2016, CRC/C/GC/20, para 14; see also UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC /C/GC/14 para 41-45; UN Committee on the Rights of the Child (CRC), *General comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12, Introduction para 2; UN Committee on the Rights of the Child (CRC), *General comment No. 11 (2009): Indigenous children and their rights under the Convention [on the Rights of the Child]*, 12 February 2009, CRC/C/GC/11 para 14; UN Committee on the Rights of the Child (CRC), General comment no. 5 (2003): *General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5, para 12.

[13] UN Committee on the Rights of the Child. (2003, November 27). *General comment no. 5 (2003) General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)*, CRC/GC/2003/5, para 12.

[14] Freeman M 'Why It Remains Important to Take Children's Rights Seriously' (2007) 15 *International Journal of Children's Rights* 5, 6; Alderson P 'Common Criticisms of Children's Rights and 25 Years of the IJCR' in Freeman M (ed) *Children's Rights: New Issues, New Themes, New Perspectives* Brill Nijhoff, Leiden:Boston (2018) 39; Fortin J *Children's Rights and the Developing Law* (3rd ed) Cambridge University Press Cambridge (2009) 45-6. Reynaert D, Bouverne-De Bie, M and Vandevelde S 'Between "Believers" and "Opponents": Critical Discussions on Children's Rights' (2012) 20 *International Journal of Children's Rights* 155; Tobin J 2013 (Op. cit.) 413–32.

[15] UN Committee on the Rights of the Child *General comment No. 24 (2019) on children's rights in the child justice system* CRC/C/GC/24.

previous *General Comment 10*: *Children's Rights in Juvenile Justice*, in the context of making the point that deprivation of liberty, including arrest, detention and imprisonment, should be used only as a measure of last resort and for the shortest appropriate period of time 'so that the child's right to development is fully respected and ensured.'[16]

This chapter lays the foundation for next three chapters, which assess the youth conferencing programs in New South Wales, the ACT and Victoria against the three core rights of non-discrimination, best interests and participation. This chapter does this through an (i) analysis of the history and evolution of children's rights in western thought; (ii) a comparison with Aboriginal approaches to children; and (iii) a consideration of operation of the CRC and related international instruments that are relevant to youth justice.

4.2 Maltreatment in antiquity and the emergence of *patria potestas*

This section provides an overview of key approaches to the historical status of children as a basis for any consideration of children's rights; for as the old saying goes – we can't know where we are going, unless we understand where we have come from. The fundamental point – as reflected in Rodham's observation – is that any idea of children having rights is of relatively recent origin. In this respect, the western historical record reveals that children were used as political hostages or as security for debts as far back as Babylonian times. It is also known that child sacrifice and infanticide occurred in the ancient world; for example, it is widely believed to have occurred on a large scale at what is now known as the Sanctuary of the Tophet in Carthage (modern day Tunis).[17] Under this ancient approach, unwanted children could be abandoned, sold into slavery or otherwise disposed of. In effect, children were simply chattels with childhood serving as no more than a period of transition between birth and the crystallisation of adult responsibilities at an early age.[18]

Emerging from this history and from a more particular legal perspective, the Roman law doctrine of *patria postestas* – the expression of an almost unlimited paternal power exercised by the (male) head of a family over his wife, children and the rest of his household, including

[16] UN Committee on the Rights of the Child (CRC), *General comment No. 10 (2007): Children's Rights in Juvenile Justice*, 25 April 2007, CRC/C/GC/10, 11.
[17] Oak, E 'Western representations of childhood and the quest for a spiritual social work practice' (2018) 57 *Socialno Delo* 3; Loken, G 'Thrownaway Children and Thrownaway Parenthood' (1995) 68 *Temple Law Review* 1715.
[18] Hodgson, D 'The Rise and Demise if Children's International Human Rights' *Forum on Public Policy* 1; see also McAleese, M *Children's Rights and Obligations in Canon Law: The Christening Contract* Brill Nijhoff Leiden and Boston 2019 part 2.1.

servants and slaves – reflected the dominant legal approach towards children in this era, and indeed in a modified form, remained one of the primary approaches to children in the west until relatively recent times, including under canon law.[19] Under this approach, children were regarded as under the authority of their parents – and in particular, their father.[20] Therefore, legally, for most of western history, parents – and in particular fathers – enjoyed an almost absolute legal right to their children's obedience, services and earnings, and full control over their person and property, even if not necessarily to the absolute extremes of doctrine as set out in Table IV of the *Twelve Tables* of Rome under which a father had the explicit power of life and death over a child together with an obligation under Law III of Table IV 'immediately to put to death a son recently born, who is a monster, or has a form different from that of members of the human race.'[21]

4.3 The *parens patriae* doctrine

In parallel with the early common law providing a strong endorsement of paternal authority over children in form largely equivalent to the doctrine of *patria potestas*, or to its continental equivalent, the doctrine of *puissance paternelle*, which gave a father unchecked authority over a child's person and property until they turned 21 (which was enshrined in the *French Civil Code* until its replacement in 1970 by the less extreme *autorité parentale*),[22] the English Courts of Chancery increasingly came to rely on the *parens patriae* doctrine – which was initially invoked in connection with *non compos mentis* adults – to extend benevolent protection to vulnerable children from the sixteenth century onwards.

The *parens patriae* doctrine described the power of the Crown to act *in loco parentis* to protect the person or property of children – generally in the absence of a parent; in other words, this doctrine legitimised state intervention on behalf of children whose families were unwilling or unable to fulfil basic responsibilities of maintenance and protection. This doctrine can be seen as the origins of the welfarist response to children – an approach that itself gained greater traction from the nineteenth century onwards. A classic example of the *parens patriae* doctrine

[19] Dimopolous, G 'Rethinking Re Kelvin: A Children's Rights Perspective' (2021) 44 *UNSW Law Review* 637, 662. See also McAleese 2019 (Op. cit.) part 2.1 and part 2.4.
[20] McAleese 2019 (Op. cit.) part 2.1; See, for instance, Blackstone's Commentaries on the Laws of England and the 6th and 7th parts of the "Coke Reports" of Sir Edward Coke, *The Selected Writings and Speeches of Sir Edward Coke*, ed. Steve Sheppard (Indianapolis: Liberty Fund, 2003) Vol. 6 and 7.
[21] The Twelve Tables - *Duodecim Tabularum* ratified by the Centuriate Assembly in 449 BCE.
[22] Weisberg, D 'Evolution of the Concept of the Rights of the Child in the Western World' (1978) 21 *International Commission of Jurists Review* 43, 46.

can be seen in *Calvin's case* of 1608, which also endorsed the above-mentioned concept of *patria potestas*.[23] *Calvin's* case was written up in Part Seven of Coke's *Reports* in 1608.[24]

4.4 *Calvin's case:* an early recognition of separate interests of children?

Although Part Six of Coke's *Reports* dealt with a number of *parens patriae* cases from the 1580s onwards, the significance of *Calvin's case* in Part Seven, was its consideration of the doctrine in connection with laws of nationality and birth right. Given the union of the Scottish and English crowns in 1603, the fundamental question was whether the Scottish born Robert Calvin was to be treated as an alien in English law despite the monarch of both countries being the same person at the time of his birth in 1608. The issue was that if Robert Calvin was found to be an alien, he would not be entitled to any property rights in England and the suits brought in his name to preserve property would fail. On the other hand, if he were found not to be an alien, the doctrine of *parens patriae* could be invoked to prevent his dispossession of the two estates. The Court held that Robert Calvin's allegiance was owed to his monarch from birth, and he was entitled therefore to certain rights in any jurisdiction in which the monarch ruled at the time of his birth.

The significance of *Calvin's case* is that the outcome hinged on some form of recognition accorded to Robert Calvin as a child, and from which enforceable legal consequences flowed. In this sense, as well as providing an example of pre-industrial application of *parens patriae*, *Calvin's case* is one of the earliest and most influential articulations by an English court of the fundamental principle of what has come to be the common-law rule that a person's status is vested at birth and based upon place of birth – the principle now known as *jus soli*.[25]

The case therefore links to more modern ideas of children having rights *as children*, in this case to citizenship and nationality based on place of birth: as endorsed in instruments such as Principle 3 of the 1959 *UN Declaration of the Rights of the Child*, under which it is provided that citizenship and nationality are critical to modern concepts of rights – international rights standards gain shape and application by reference to a person's citizenship or non-citizenship

[23] *Calvin's Case* [1572] Eng.R. 64, (1572–1616) 7 Co.Rep. 1a, 77 E.R. 377.
[24] Part Seven of *Coke's Reports* 1608 available at <oll.libertyfund.org/titles/911/106337>; see also Price, P 'Natural law and birthright citizenship in *Calvin's* case (1608)' (1997) 9 *Yale Journal of Law and the Humanities* 73.
[25] Buhler, S 'Babies as Bargaining Chips? In Defence of Birthright Citizenship In Canada' (2002) 17 *Journal of Law and Social Policy* 87, 95.

in a particular jurisdiction.[26] The *parens patriae* exists in Australian law today, seen for example, in section 67ZC of the *Family Law Act 1975* and in the jurisprudence of state Supreme courts and the High Court.[27]

4.5 The 1641 Massachusetts *Body of Liberties* and early children's rights

Notwithstanding *Calvin's case*, the general idea of any conception of rights that could pertain to a child *qua* child was still largely absent. However, there was a further shift in ideas less than 50 years later, in the 1641 Massachusetts *Body of Liberties.* This document provided express 'liberties for children' together with some restrictions on parents – for example, prohibiting 'unnatural severity' in terms of punishment and imposing restrictions on parents being too involved in choosing friends for their children. This document curbed the concept of *patria potestas* by reference to liberties that children could avail themselves of in certain circumstances.[28] Although not couched in the language of rights, this document empowered children 'freely to complain to the Authorities for redress' under certain circumstances, primarily in connection with issues of marriage and property as well as to protest any instances of excessive punishment.[29]

In this way, the 1641 *Body of Liberties* stands as one of the earliest articulations of what we now understand to be enforceable individual rights. It is of particular significance because it offered a far more coherent approach than any contemporaneous or pre-existing English or colonial source. As well as the particular provisions relevant to children noted above, the *Body of Liberties* is noteworthy for its expression of more general procedural and due process rights, including its clear affirmation of a presumptive right to bail.[30] In its initial incarnation, King Charles II revoked the *Body of Liberties* in 1684, only for it to be revived in a modified form in the Massachusetts *Provincial Charter* of 1691, which was in force during the Salem Witch Trials over the subsequent two years – which itself perhaps says something about the Charter's

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[26] Price 1997 (Op. cit.) 73.

[27] Explanatory Memorandum, Family Law Reform Bill 1994 (Cth) 71 [319]. See also *Jacks v Samson* (2008) 221 FLR 307, 353 [220] (Stevenson J) ('[i]t is not in doubt that s 67ZC is regarded, subject to constitutional limitations, as devolving jurisdiction under the Act akin to the parens patriae jurisdiction'); *Re Beth* [2013] VSC 189; *Re Alexis* [2011] NSWSC 1545*; Marion's Case* [1992] HCA 15.

[28] See Articles 81 - 84 of the 1641 *Body of Liberties* available at <history.hanover.edu/texts/masslib.html> The Body of Liberties is an interesting document that also provides protection against animal cruelty and some measure of protection to what might now be termed refugees. See also Freeman M *The Moral Status of Children: Essays on the Rights of the Children* Martinus Nijhoff 1997, 48.

[29] See Articles 81 - 84 of the 1641 Body of Liberties at <history.hanover.edu/texts/masslib.html>

[30] Schwartz, B *The great rights of mankind: a history of the American Bill of Rights*, Rowman and Littlefield, 1992, 51. See article 18 of the Body of Liberties re bail.

limits. Nonetheless, in this latter form, it became one of the sources for the US Bill of Rights (although the Bill of Rights contains no express rights for children) – in particular in connection with procedural rights – which itself has been a source of inspiration for much of the evolution in human rights standards in the subsequent 225 years. A line can be drawn from the 1641 *Body of Liberties* to the landmark 1967 US Supreme Court case of *Gault* in which it was held that children have the full suite of procedural rights available to adults in criminal proceedings, as well as drawing a line to the international movement on children's rights that drew at least some inspiration from the US approach to rights more generally.[31]

However, neither the *Body of Liberties* of 1641, nor the doctrines of *patria potestas* or *parens patriae* provided any sort of comprehensive theory of rights for children and this 'clumsy and inchoate' approach continued to be the case until recent times,[32] notwithstanding for instance, Sir William Blackstone's recognition of maintenance, protection and education as the three parental duties to a child in the mid-eighteenth century.[33] Therefore, the overall historical view is that with very rare exception, such as in *Calvin's* case and the *Body of Liberties*, children had few independent legal rights as children. Put simply, children, as individuals or collectively, were not seen as a special category meriting their own rights.

By contrast, a defining feature of the last century of legal development has been the progressive expansion of rights to 'people once ignored or excluded' by the law.[34] And a major milestone in that process has been the recognition within international human rights law, of the rights of children.

4.6 The nineteenth century, transportation and the treatment of children

The idea that children should be treated differently within criminal justice systems in Australia goes back to experiments in the early to mid-nineteenth century in relation to juvenile convicts. As early as 1818, the co-location of juveniles and adults within British prisons led observers to note that the prisons, far from serving any reformatory function, were instead 'nurseries of

[31] Schwartz 1992 (Op. cit.) 51. In Re *Gault*, 387 U.S. 1; 87 S. Ct. 1428; 18 L. Ed. 2d 527; 1967 U.S. LEXIS 1478; 40 Ohio Op. 2d 378.
[32] Freeman 1997 (Op. cit.) 48.
[33] Blackstone *Commentaries*, Book 1 Chapter 16 'Of parent and child'.
[34] Nussbaum M and Dixon R 'Children's Rights and a Capabilities Approach: The Question of Special Priority' (University of Chicago Public Law & Legal Theory Working Paper No. 384, 2012) also published in (2013) 97 *Cornell Law Review* 549.

crime.'[35] Corresponding to an industrial revolution 'baby boom', concerns arose about the emergence of 'a multitude of young criminals' and so authorities began the separation of adult and juvenile or 'urchin' transportees to the point that certain convict transportation vessels carried only boy convicts to New South Wales and Van Diemen's Land.[36]

Arising out of this policy, and four years before the first specific juvenile detention facility was opened in the UK – Parkhurst on the Isle of Wight – the relevant colonial administrators established a dedicated juvenile facility at Point Puer near Port Arthur in Tasmania. There had been earlier experiments both in New South Wales and in Tasmania, but Point Puer became the first dedicated juvenile facility in the British Empire. Over the next fifteen years, approximately 3,500 boys (some as young as nine) went through Point Puer. The boys were described on at least one occasion as a 'corrupt fraternity of little depraved felons' but were held there in order to be trained to 'maintain themselves honestly'.[37] Other writers focused on the reformatory aim of the settlement, with transportation abolitionist the Reverend John West, indicating that the aim of Point Puer was **'**to reclaim and control, rather than to punish, the unfortunate youth submitted to its discipline.'[38]

This shift away from a focus on punishment in respect of children was part of a growing recognition, throughout the nineteenth century, that children needed to be treated in a different way to adults and that they merited separate treatment – including when they came into conflict with the law. There are a number of legislative examples in the UK from this era, including include the *Poor Law Amendment Act 1*868 (UK), the *Prevention of Cruelty to, and Protection of, Children Act* 1889 (UK) and the *Act to Regulate the Labour of Children and Young Persons in the Mills and Factories of the United Kingdom* 1833 (UK). These examples largely reflect the more traditional *parens patriae* doctrine of paternal assistance by the state (discussed above) to children who were seen as vulnerable and dependant. However, these concerns were transmuted against increasing recognition of the impact of the backdrop of appalling working conditions of the Industrial Revolution era on children. It is however in this era, that the first true ideological underpinnings of a children's rights movement can be found, for instance in

[35] Philanthropic Society London '*Report of the committee of the society for the improvement of prison discipline, and for the reformation of juvenile offenders'* (1818) 24. Interestingly, Australia's only reservation to the UN Convention on the Rights of the Child relates to separation of children from adults in detention.
[36] Newman, T 'Point Puer: Boy convicts' in '*Becoming Tasmania: renaming Van Diemen's Land* Parliament of Tasmania 2005.
[37] Governor Arthur quoted in Newman, T 2005 (Op. cit.).
[38] West J *The History of Tasmania - Volume II* (of 2) 1852, 246 facsimile edition reprinted in 1966 available at <gutenberg.net.au/ebooks/e00115.html>

the work of Jean Valles, who attempted to establish a league for the protection of children's rights in the aftermath of the Paris Commune, and in an 1852 article by Slogvolk, entitled *The Rights of Children*.[39]

4.7 A world turned upside down: children and Aboriginal communities

Aboriginal history provides a contrast to the slow evolution of treating children with respect in the western traditions outlined above. While it is not possible to give a full history of the multiplicity of Aboriginal approaches to children, either before or after the almost total disruption caused by colonisation of Australia, this section provides a general overview of some key characteristics, which are relevant to the Chapter 5 analysis of the right to non-discrimination in Article 2 of the CRC.

Historically and traditionally, Aboriginal and Torres Strait Islander people lived in small family groups and clans that linked into larger language groups, peoples and nations.[40] Both before and after 1788, diversity existed, and still exists, within and across these communities. At the same time, there are also common characteristics. In particular, Aboriginal societies operated with complex kinship systems and rules for social interaction, including with respect to nurturing and treating children; these societies had, to lesser or greater degree, defined roles relating to law, education, spiritual development and resource/land management; they had language, ceremonies, customs and traditions and extensive knowledge of their environment.[41] The child would gradually be introduced to these responsibilities towards land and strict social rules within their groups.

Unlike the emerging 'child-as-different-to-adults' approach of the western nineteenth century, and indeed evolution of children's rights from a 'child(ren)-is-autonomous' perspective throughout the twentieth century, the 'classic' Aboriginal view is to see the child holistically in relation to the family, the community, the tribe, the land and the spiritual beings of the lore and dreaming.[42] Under this model, a child is not seen as a separate agent, capable of being an 'urchin' or 'depraved felon'. Rather, a child is a person in relationship to, and with, others, with

[39] Hodgson, D 'The rise and Demise of Children's International Human Rights' *Forum on Public Policy* 1, 3.
[40] Australian Law Reform Commission *Recognition of Aboriginal Customary Laws (ALRC Report 31)* Australian Law Reform Commission 1986, para 37-38.
[41] Ibid.
[42] Victorian Aboriginal Child Care Agency *Working with Aboriginal Children and Families: A Guide for Child Protection and Child and Family Welfare Workers* Victorian Aboriginal Child Care Agency, Melbourne September 2006.

the effect that their physical, emotional, social, spiritual and cultural needs and well-being are interlinked and cannot be isolated from these others. The Figure below illustrates the key features of a traditional Aboriginal social structure centred on the child.

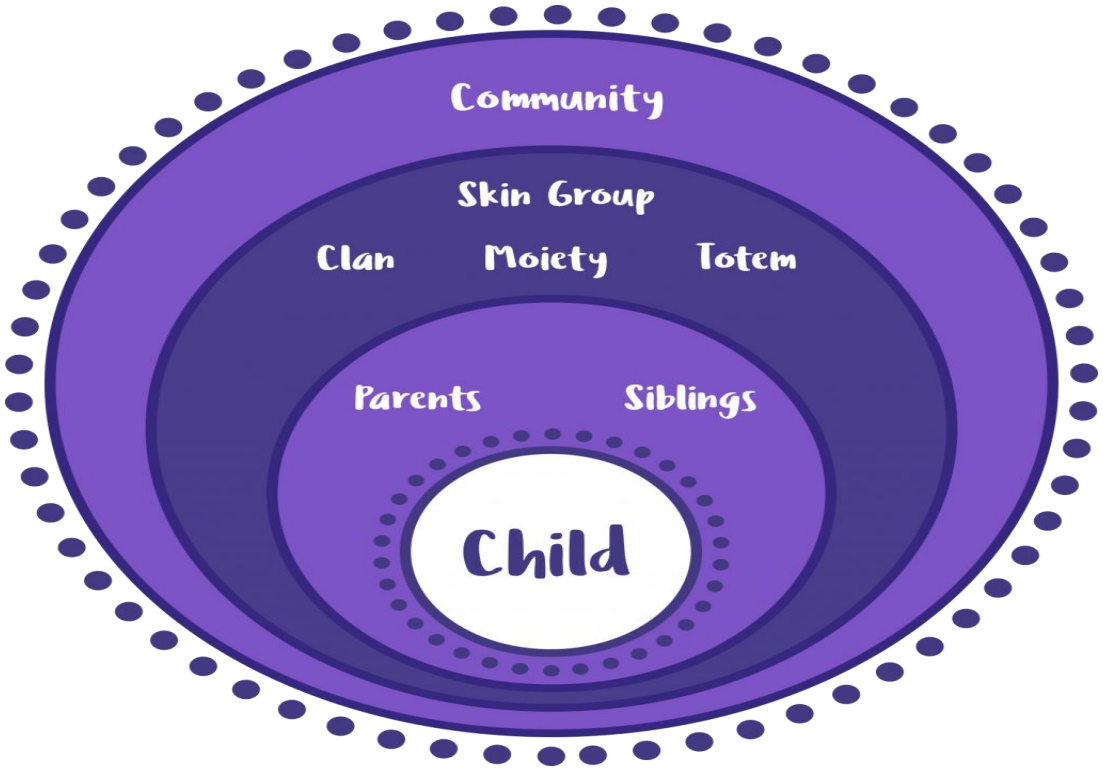

Figure 1: Traditional Aboriginal Family Structure.[43]

Under this approach, a child's existence depends on kinship networks that are based on relationships of blood, marriage, association and spiritual significance, and an Aboriginal child has brothers, sisters, mothers, fathers, uncles and aunts, who are additional to relationships by blood or marriage: for example, the concept of mother might include all maternal aunts (in the western sense of the word), with aunts being respected elders or maternal sisters-in-law (in the western sense of the word).[44] Despite denial and loss of cultural practice through more than two centuries of disruption, imported disease, dislocation and deprivation, many of these relationships are still maintained through involvement in community and the identity of an

[43] Diagram Source: Victorian Aboriginal Child Care Agency *Working with Aboriginal Children and Families: A Guide for Child Protection and Child and Family Welfare Workers* Victorian Aboriginal Child Care Agency, Melbourne September 2006.
[44] McGrath, A 'Chapter 10: The Legacy of History' in *The Royal Commission into Aboriginal Deaths in Custody*, Vol 2., 8-39. Canberra: Government Printer, 1992.

Aboriginal child continues to exists as part of a wider communal and kinship network with inter-connecting rights and responsibilities.[45]

Indigenous approaches are recognised in the negative in Article 30 of the CRC which provides that minority and Indigenous children shall '*not* be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion or to use his or her own language' [emphasis added].[46] As well as recognising ties to land and resources, the Committee on the Rights of the Child has stated that the right under Article 30 is connected to the overarching principles of CRC and 'is conceived as being both individual and collective and is an important recognition of the collective traditions and values in indigenous cultures.'[47] This means that the CRC right must be assessed from the perspective of the child, and needs to be understood with consideration of the potential for conflict between the interests and wishes of the individual child, and the group.

It is beyond dispute that post-1788 colonisation had a devastating impact on Aboriginal communities and cultures. Even so, echoes of the Aboriginal model of childhood and kinship continue to apply in many Aboriginal communities today, and are reflected and applied in, for example, the Aboriginal Child Placement Principle in section 13 of the *Children, Youth and Families Act 2005* (Vic) when assessing whether it is in the best interests of a child to be placed in out of home care. Similar provisions exist in both the NSW and ACT. This means that consideration of Aboriginal identity and culture remains an important component in the theory and practice of Indigenous Justice described elsewhere in this thesis, and therefore needs to be recognised effectively in the conferencing programs for each jurisdiction under review.

4.8 The start of an international children's rights movement

Building on the shifts of the nineteenth century in western European attitudes that children merited separate treatment, the early part of the 20th century was characterised by the internationalisation and institutionalisation of humanitarian ideals by organisations such as, the International Committee of the Red Cross, the League of Nations and the International Labour Organisation (ILO). Children were one of the first groups to benefit from this process. One of

[45] Lohoar S, Butera N and Kennedy, E *Strengths of Australian Aboriginal cultural practices in family life and child rearing* CFCA Paper No. 25, Australian Institute of Family Studies, September 2014.
[46] Article 30, Convention on the Rights of the Child.
[47] UN Committee on the Rights of the Child (CRC), *General comment No. 11 (2009): Indigenous children and their rights under the Convention [on the Rights of the Child]*, 12 February 2009, CRC/C/GC/11, paras 16, 32, 38.

the first treaties that dealt specifically with children as a group, was the *International Agreement for the Suppression of the "White Slave Traffic"* signed in Paris on 18 May 1904.[48] The international protection of children's rights received further impetus in 1919, with the establishment of the League of Nations and the ILO. In particular, Part XIII of the 1919 *Treaty of Versailles* included reference to the protection of children and young persons in its Preamble – this part of the treaty dealt with questions of labour. The *Minimum Age (Industry) Convention* was adopted at the first session of the International Labour Conference; the conference body of the ILO.[49] Since then, the ILO has adopted a number of conventions and recommendations concerning the minimum age for employment in diverse activities, as well as hours and conditions of work. Furthermore, within a decade of its founding, the League of Nations adopted the *International Convention for the Suppression of Traffic in Women and Children 1921*[50] and the *Slavery Convention 1926*.[51]

This momentum gained greater traction following the tumult of World War One. In the aftermath of that War, and the contemporaneous Spanish Flu Epidemic, the International Save the Children's Union ("the ISCU") was established in 1920, as the international counterpart of the British Save the Children organisation founded some years earlier by sisters Eglantyne Jebb and Dorothy Buxton.[52] Adopting a global perspective based on the domestic aim of its UK counterpart, Jebb and Buxton's intention in establishing the International Save the Children's Union was to create 'a powerful international organisation, which would extend its ramifications to the remotest corner of the globe'.[53] The nascent organisation was placed under the patronage of the International Committee of the Red Cross and worked to bring together organisations from a number of countries that were working to tackle child suffering and deprivation around Europe, following the dislocation caused by the First World War and the globally debilitating Spanish Flu Pandemic.[54] On 23 February 1923, the ISCU, largely at Jebb's insistence, adopted a document that included the following five key principles:

[48] League of Nations, Treaty Series, Vol. I 84.
[49] Minimum Age (Industry) Convention, 1919, for ratification by the Members of the International Labour Organisation in accordance with the provisions of the Constitution of the International Labour Organisation No. 5, 1919.
[50] *International Convention for the Suppression of Traffic in Women and Children 1921* League of Nations, Treaty Series, Vol. IX 415.
[51] *Slavery Convention 1926* League of Nations, Treaty Series, Vol. LX 253.
[52] See "Our story" on the "Save the Children" <www.savethechildren.net/about-us/our-story>
[53] Jebb quoted in Gnaerig B and Maccormack, C 'The Challenges of Globalization: Save the Children' (1999) 28 *Nonprofit and Voluntary Sector Quarterly* 140 – 146.
[54] Ibid.

5. The child must be given the means requisite for its normal development, both materially and spiritually.

6. The child that is hungry must be fed, the child that is sick must be nursed, the child that is backward must be helped, the delinquent child must be reclaimed, and the orphan and the waif must be sheltered and succoured.

7. The child must be the first to receive relief in times of distress.

8. The child must be put in a position to earn a livelihood, and must be protected against every form of exploitation.

9. The child must be brought up in the consciousness that its talents must be devoted to the service of its fellow men.[55]

In September 1924, the General Assembly of the League of Nations adopted the ISCU's document as the *Geneva Declaration of the Rights of the Child*.[56] Not phrased in the language of rights in a modern sense – and clearly echoing the more welfarist approach of *parens patriae* and the concerns of the nineteenth century, the *Geneva Declaration* did not create binding law. It is best understood as an historical expression of aspirational guidelines for nations to follow within their respective domestic policy environments in order to 'extend particular care to the child' – as the *Geneva Declaration* was subsequently characterised in the preamble to the *Convention on the Rights of the Child*.

4.9. Children's rights post 1945: the 1959 United Nations Declaration

In 1959, the UN adopted the first international instrument to contain a comprehensive, although incomplete, statement of children's rights or, perhaps more accurately, a list of claims or entitlements. It owed its ancestry in no small part to the League of Nations 1924 Geneva *Declaration of the Rights of the Child*.[57] Until the adoption of the CRC some 30 years later, the

[55] Of note, one of the signatories of the original 1923 Declaration was Henryk Goldszmid, better known to the world as Januscz Korczak, who true as he could to the Declaration, accompanied the children living with him in an orphanage in the Warsaw Ghetto on their last journey to Treblinka Death Camp, from where none of the group survived the Nazi genocide of Europe's Jewish communities. It was to honour his memory that Poland played a key role in the later development of CRC.
[56] League of Nations, Official Journal, Special Supplement No. 23, Records of the Fifth Assembly, Geneva, 1924, at 177. Available at <www.un-documents.net/gdrc1924.htm>
[57] 1924 Geneva Declaration of the Rights of the Child (League of Nations, Official Journal, Special Supplement No. 23, Records of the Fifth Assembly, Geneva, 1924, at 177. Available at <www.un-documents.net/gdrc1924.htm>

1959 Declaration embodied 'the most important policy statement [on children's rights] adopted by the [United Nations] General Assembly'.[58] It also represented the greatest step forward in respecting children and elevated their needs higher on the national and international agendas. While the 1924 Geneva Declaration[59] reflected concern for the material needs of children afflicted by the devastation of World War I and subsequent flu epidemic, the UN 1959 *Declaration of the Rights of the Child* addressed the needs and interests of children in a wider social welfare context, covering such areas as housing, social security, health and medical care, food and nutrition, education and each child's entitlement from birth to a name and a nationality – in this last respect, essentially a modern re-statement of *Calvin's case* of 1572.[60]

The *1959 Declaration* essentially reaffirmed and expanded the provisions of the *1924 Geneva Declaration.* However, unlike the *1924 Declaration*, the 1959 instrument is devoted almost exclusively to economic, social and cultural concerns, omitting important classical civil rights as life and liberty, criminal due process and freedom from cruel, inhuman or degrading treatment or punishment. Although the *1959 Declaration* is overly general and vague in parts, this was necessary to secure its acceptance by so many UN Member States with diverse social and cultural traditions and practices. However, like its 1924 predecessor, the *1959 Declaration* created only unenforceable obligations on states to provide for the care and protection of children through child welfare programs and other legislative and administrative measures.

Nevertheless, the wide acceptance of the *1959 Declaration* marked a significant step towards the articulation of clear and comprehensive children's rights 30 years later, in the CRC. According to one scholar, the Declaration only really 'gives' children some human rights so they can become 'a complete and perfect human being' rather than acknowledging them as rights holders *per se:* in return for human rights, children need to grow up in a particular way.[61] Principle 2 of the *1959 Declaration* demonstrates this:

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[58] Alston, P 'Children's Rights in International Law' (1986) 10 Cultural Survival Quarterly 59.
[59] The 1924 Geneva Declaration of the Rights of the Child (League of Nations, Official Journal, Special Supplement No. 23, Records of the Fifth Assembly, Geneva, 1924, at 177. Available at <www.un-documents.net/gdrc1924.htm> was not phrased in the language of rights in a modern sense – and clearly echoing the more welfarist approach of *parens patriae* and the concerns of the nineteenth century, the 1924 Geneva Declaration did not create binding law. Instead, it can best be seen as an historical expression of aspirational guidelines for nations to follow within their respective domestic policy environments in order to 'extend particular care to the child' – as the Charter was subsequently characterized in the preamble to the *Convention on the Rights of the Child*.
[60] *Calvin's Case* [1572] Eng.R. 64, (1572–1616) 7 Co.Rep. 1a, 77 E.R. 377.
[61] Cuevas Cancino, Rapporteur of the Drafting Committee on the Declaration on the Rights of the Child, UNHCHR, Legislative History of the Convention on the Rights of the Child, Volume I (New York and Geneva 2007) 21.

> The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.[62]

The next iteration of children's rights is seen to a limited extent in the *International Covenant on Civil and Political Rights* (ICCPR). While Article 24 addresses for a range of matters relevant to children, Article 14(4) is of more importance to this study, because it provides that '[i]n the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.'[63] These provisions in the ICCPR, helped lay further groundwork for the specific *Convention on the Rights of the Child*.

4.10 Children's rights in juvenile justice: the "*Beijing Rules*"

Also predating the CRC and the work of the Committee on the Rights of the Child, is the 1985 *Standard Minimum Rules for the Administration of Juvenile Justice*, commonly referred to as the Beijing Rules. [64] The Beijing Rules are non-binding recommendations of the UN on the minimum standards for national youth justice systems, and now complement the provisions of the CRC.[65] They provide guidance to states on protecting children's rights and respecting their needs when developing separate and specialised systems of juvenile justice. The *Beijing Rules* were the first international legal instrument to comprehensively detail norms for the administration of youth justice with a child rights and child development approach. The *Beijing Rules* are explicitly mentioned in the Preamble to the CRC. They have also, as discussed below, been endorsed by the Committee on the Rights of the Child in the Concluding Observations to State Parties, including Australia.[66] Consistent with rights contained in the later CRC (e.g. Article 37 and Article 40), The *Beijing Rules* encourage,

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[62] Principle 2 of the 1959 Declaration.
[63] Article 14(4) of the ICCPR.
[64] UN General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"): resolution / adopted by the General Assembly*, 29 November 1985, A/RES/40/33.
[65] For example, see *Certain Children v Minister for Families and Children & Ors (No 2)* [2017] VSC 251 (11 May 2017) per Dixon J at para 261; *R v JA* [2007] ACTSC 51 (12 July 2007), 34; *DPP v S E* [2017] VSC 13 (31 January 2017), para 11 fn 8; *DPP v S L* [2016] VSC 714 (29 November 2016) para 8, fn 11; *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children* [2016] VSC 796 (21 December 2016), para 152 – 155.
[66] Committee on the Rights of the Child: Concluding observations on the combined second and third periodic reports of Australia CRC/C/15/Add.26820. See also Committee on the Rights of the Child: Concluding observations on the fourth periodic report of Australia CRC/C/AUS/CO/4, para 74.

1. the use of appropriate community programs;

2. that proceedings before any authority be conducted in the best interests of the child;

3. that careful consideration be given before depriving a juvenile of liberty;

4. that there is specialised training for all personnel dealing with juvenile cases;

5. that there be consideration of release of a child both upon apprehension and at the earliest possible occasion thereafter; and

6. the organisation and promotion of research as a basis for effective planning and policy formation.

According to the *Beijing Rules*, a youth justice system should be fair and humane, emphasise the wellbeing of the child and ensure that the reaction of the authorities is proportionate to the circumstances of the offender as well as the offence. The importance of rehabilitation is stressed, requiring necessary assistance in the form of education, employment or accommodation to be given to the child and calling for volunteers, voluntary organisations, local institutions and other community resources to assist in that process.

The *Beijing Rules* provide principles on which national youth justice systems should operate, which are general enough to be applicable to differing national legal systems and codes. [67] Although the Beijing Rules are technically 'soft law', and thus not binding on states, Van Bueren notes that 'one of the extraordinary but unchallenged extensions of the UN Committee [on the Rights of the Child]'s mandate is [that]….[r]ather than seeing them as mainly non-binding *per se*, States appear to have accepted without comment the application of the [Beijing] rules to the child criminal justice system.'[68]

Within Australia, the Beijing Rules have linked to the child's best interests right in cases such as *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children* and *Certain Children v Minister for Families and Children & Ors (No 2).*[69] In the former case, which turned on the application of the best interests rule in section

[67] Van Bueren G *International Law on the Rights of the Child* Martinus Nijhoff Publishers, 1998.
[68] Van Bueren G 'Article 40: Child Criminal Justice', in Alen A, Vande JL, Verhellen E, Ang F, Berghmans E and Verheyde M (eds.), *A Commentary on the Rights of the Child* Martinus Nijhoff Leiden 2006, 3.
[69] *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children* [2016] VSC 796 (21 December 2016); *Certain Children v Minister for Families and Children & Ors (No 2)* [2017] VSC 251 (11 May 2017).

17(2) of the *Charter of Rights and Responsibilities Act 2006* (Victoria) with respect to children in adult custody, Justice Garde stated,

> 152. The United Nations Standard Minimum Rules for the Administration of Justice ('the Beijing Rules') require the youth justice systems of States to emphasise the wellbeing of children and ensure that 'any reaction to juvenile offenders shall always be in proportion to the circumstance of both the offenders and the offence.' The Beijing Rules provide that:
>
> > while in custody, juveniles shall receive care, protection and all necessary individual assistance – social, educational, vocational, psychological, medical and physical – that they may require in view of their age, sex and personality.'
>
> 153. The Beijing Rules also recognize [sic.] that it is in the interest and wellbeing of the child for the child's parents or guardians to have a right of access.
>
> **Relevance to the Charter**
>
> 154. In my view, s 17(2) of the Charter is given context and informed by the Beijing Rules. They provide an established international framework by which substance and standards can be given to s 17(2).[70]

Justice Garde's reasoning was endorsed the following year in a factually similar case in which Justice Dixon held,

> 261. In Certain Children, Garde J held that the central element of the right protected by s 17(2) is the best interests of the child. His Honour accepted that guidance from the CROC and materials from the United Nations inform the scope of the right protected in s 17(2).[176] In particular, the United Nations Standard Minimum Rules for the Administration of Justice (Beijing Rules) provide an established international framework by which substance and standards can be given to s 17(2).[71]

Neither case has been overruled and therefore, although predating the CRC, there is clear judicial approval in an Australian jurisdiction to consider the Beijing Rules as part of an

[70] *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children* [2016] VSC 796 (21 December 2016), per Garde J para 152 – 155.
[71] *Certain Children v Minister for Families and Children & Ors (No 2)* [2017] VSC 251 (11 May 2017), per Dixon J para 261.

assessment of the fundamental rights of children who come into contact with the justice system, particularly when considering the operation of youth justice arrangements from a best interests perspective. Although predating the CRC, the Beijing Rules augment it by providing more detailed administrative guidance to understanding child rights in connection with youth justice.

4.11 The United Nations Convention on the Rights of the Child

The CRC represents the first human rights treaty specifically concerned with the rights of children. After eleven years of negotiation and drafting, the CRC was adopted by the UN General Assembly in 1989, and entered into force in September 1990.[72] The CRC stands out from virtually all other treaties and human rights standards as having reached 'virtual universality', with 196 State Parties.[73] The USA, which played an active role during the treaty drafting negotiations, is the only UN member State that has not ratified CRC, although it has signed it and ratified two of the Optional Protocols. A number of reasons have been speculated as to why the USA has not yet ratified CRC but there is no official position.[74]

The CRC provides not only civil and political rights but also economic, social, cultural and humanitarian rights. The CRC 'assumes that the child is not merely an object of solicitude and care. [Rather] the child is a subject of fundamental rights and basic liberties.'[75] This shifts away from the quasi-contractual language of the *1959 Declaration* and the recognition of the individual subjectivity of the child provides a starting point for our understanding children's rights.

Under Article 1, the CRC defines 'children' as all people under the age of 18. The most specific articles in relation to child justice are Articles 37, 39 and 40. However, children in conflict with the law also continue to enjoy the wide range of other rights set out in the Convention and therefore, for the purpose of this thesis, it is important to consider these articles in the context of the CRC as a whole and especially its main 'umbrella rights', which, as noted previously

[72] United Nations, *Treaty Series*, vol. 1577, p. 3; depositary notifications C.N.147.1993. TREATIES-5 of 15 May 1993 [amendments to article 43 (2)]; and C.N.322.1995.TREATIES-7 of 7 November 1995 [amendment to article 43 (2)].
[73] Rios-Kohn R 'The Convention on the Rights of the Child: Progress and Challenges', (1998) 5 *Georgetown Journal on Fighting Poverty* 139, 140. See list of ratifications at <treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-11.en.pdf>
[74] Helman C 'Opposing Viewpoints: In Favor of United States Ratification of the Convention on the Rights of the Child' (2020) 39 *Children's Rights Legal Journal* 191; Galvin, C 'Opposing Viewpoints: The U.S. Should Not Ratify the United Nations Convention on the Rights of the Child, (2020) 39 *Children's Rights Legal Journal* 198.
[75] Lopatka A 'An Introduction to the United Nations Convention on the Rights of the Child' (1996) 6 *Transnational Law and Contemporary Problems* 251.

include Article 2 (non-discrimination); Article 3(1) (the best interests of the child); and Article 12 (the right to participation).

The Committee on the Rights of the Child (CRC Committee), (discussed below), is the body with responsibility for monitoring compliance with the CRC. It has emphasised that States Parties are required to implement the CRC's provisions in accordance with Article 4, through the adoption of laws that are themselves compliant with the CRC, and through a range of other measures including the 'development and implementation of appropriate policies, services and programmes.'[76]

The requirement for State Parties to develop a comprehensive youth justice policy has been emphasised by the Committee through its General Comments. Further guidance is derived from the Beijing Rules, and two instruments that immediately post-date the entry into force of the CRC, namely, the UN Guidelines for the Prevention of Juvenile Delinquency ('the Riyadh Guidelines')[77] and the UN Rules for the Protection of Juveniles Deprived of their Liberty ('the Havana Rules')[78]. While these three instruments are non-binding, they provide important insight into how the rights of children should be implemented in youth justice systems and are frequently cited by the Committee on the Rights of the Child.

4.12 The work of the Committee on the Rights of the Child

The CRC Committee is one of the 10 UN human rights treaty bodies, and was created by the Convention on 27 February 1991. Its origins trace back to a proposal by Poland during the negotiating phase of CRC that there should be a process by which each State Party should submit regular reports to the United Nations' ECOSOC. Although Poland's proposal failed, the final text of the CRC included Articles 43 – 45 that established the Committee and set out its composition, function and role.

[76] UN Committee on the Rights of the Child, General Comment No. 5: *General measures of implementation of the Convention on the Rights of the Child* (2003) CRC/GC/2003/5, para 1 and 9.
[77] UN General Assembly, *United Nations Guidelines for the Prevention of Juvenile Delinquency ("The Riyadh Guidelines"): resolution / adopted by the General Assembly*, 14 December 1990, A/RES/45/112.
[78] UN General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty: resolution / adopted by the General Assembly*, 2 April 1991, A/RES/45/113.

The CRC Committee comprises eighteen 'experts of high moral standing and recognised competence in the field covered by the Convention.'[79] Members are elected by States Parties for a four-year term but can be elected for a second term.

Under Article 44(1), every State Party to CRC must report on measures it has 'adopted which give effect to the rights recognised herein and on the progress made on the enjoyment of these rights.' A State Party's first implementation report must be submitted to the Committee within the first two years of CRC entering into force for the respective State Party. Following this initial submission, periodic implementation reports are required to be submitted every five years.

Following the submission of an implementation report from a particular State Party, UN agencies and NGOs have the opportunity to submit shadow reports. The CRC Committee then reviews all the information pertaining to a State Party and sends a list of follow-up questions ('List of Issues') to the relevant State Party. The next step is that a representative from each State Party appear to discuss their report. The monitoring procedure is finalised with the CRC Committee publishing 'Concluding Observations' that set out suggestions and recommendations to improve the implementation of the Convention. Each State Party is expected to remain in dialogue with the CRC Committee, and to follow the recommendations with a view to reporting back progress at the next report, five years later. Australia has submitted six periodic reports to the CRC Committee and the Committee's Concluding Observations are of relevance to this analysis and are analysed in more detail later in this chapter. As noted above, the reporting process highlights contrasting positions between the government and non-government submissions relating to Australia.

Another important function of the CRC Committee is to publish General Comments, which are authoritative interpretations of different aspects of the CRC and provide guidance for State Parties on implementation. Although Concluding Observations and General Comments do not have formal binding force, their normative weight is significant because the General Comments in particular, offer an important contemporary source for interpretation and implementation of the CRC. For the purposes of this thesis, the Committee's work provides considerable assistance by lending meaning to the children's rights being used to assess the extent to which the three Australian youth conferencing programs comply with the CRC.

[79] Article 43(2) of the Convention on the Rights of the Child.

General comment No. 24 on children's rights in the child justice system which the Committee published in 2019, is of particular relevance to the restorative justice and the youth justice fields given its aim of providing states with 'a contemporary consideration of the relevant articles and principles in the Convention on the Rights of the Child, and to guide States towards a holistic implementation of child justice systems that promote and protect children's rights.' [80] *General Comment No 24* is analysed further in Chapter 7.

In addition to *General Comment No 24*, the Committee has published other *General Comments* that are relevant to understanding the intersection between conferencing, youth justice and children's rights, which are also analysed in more detail in subsequent chapters. These General Comments address general measures on implementation of the CRC,[81] addressing the best interests of the child,[82] the right of children to be heard,[83] the rights of Indigenous children,[84] the rights of children with disabilities,[85] the rights associated with adolescent health and development[86] and public budgeting for the realisation of children's rights.[87] Each of these General Comments are relevant to a consideration of children's rights in the field of child justice.

Importantly, paragraph 4 of *General Comment No 10* – which was replaced in 2019 by *General Comment 24* – sets out the parameters of what the CRC Committee expects States Parties to do to comply with the Convention from the perspective of child justice:

> ... the Convention requires States parties to develop and implement a comprehensive juvenile justice policy. This comprehensive approach should not be limited to the implementation of the specific provisions contained in articles 37 and 40 of the Convention, but should also take into account the general principles enshrined in

[80] UN Committee on the Rights of the Child (CRC) *General comment No. 24 on children's rights in the child justice system* CRC/C/GC/24, 18 September 2019, para 6.
[81] Ibid.
[82] UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC /C/GC/14.
[83] UN Committee on the Rights of the Child (CRC) *General Comment No. 12 (2009) The right of the child to be heard* CRC/C/GC/12.
[84] UN Committee on the Rights of the Child (CRC), *General comment No. 11 (2009): Indigenous children and their rights under the Convention [on the Rights of the Child]*, 12 February 2009, CRC/C/GC/11.
[85] CRC/C/GC/9/Corr.1 Nov 2007.
[86] UN Committee on the Rights of the Child (CRC), *General comment No. 20 (2016) on the implementation of the rights of the child during adolescence*, 6 December 2016, CRC/C/GC/20.
[87] CRC/C/GC/19 July 2016.

articles 2, 3, 6 and 12, and in all other relevant articles of the Convention, such as articles 4 and 39.[88]

This was again a theme in *General Comment 24*:

> The principles of the Convention should be infused into all justice mechanisms dealing with children, and States parties should ensure that the Convention is known and implemented.[89]

Thus, the CRC Committee, as the peak international body on children's rights, has stated that the articles that specifically address youth justice, namely Articles 37 and 40, must be read in the context of the umbrella/guiding principles under the CRC. Expanding on this, the CRC Committee used *General Comment No. 24* to emphasise the need for States Parties to adopt a comprehensive approach to child justice and commit themselves to the necessary broad reforms of their criminal justice and social responses to children in conflict with the law. The Committee reiterated the leading CRC principles that must shape such a comprehensive approach to child justice reforms, as follows:

(i) Safeguards against discrimination are needed from the earliest contact with the criminal justice system and throughout the trial, and discrimination against any group of children requires active redress. In particular, gender-sensitive attention should be paid to girls and to children who are discriminated against on the basis of sexual orientation or gender identity. Accommodation should be made for children with disabilities, which may include physical access to court and other buildings, support for children with psychosocial disabilities, assistance with communication and the reading of documents, and procedural adjustments for testimony.[90]

(ii) The Committee emphasizes that the reaction to an offence should always be proportionate not only to the circumstances and the gravity of the offence, but also to the personal circumstances (age, lesser culpability, circumstances and needs, including, if appropriate, the mental health needs of the child), as well as to the various and particularly long-term needs of the society. … Weight should

[88] *General Comment No 10* para 4.
[89] *General comment No. 24* para 40.
[90] Ibid., para 104.

be given to the child's best interests as a primary consideration as well as to the need to promote the child's reintegration into society.[91]

(iii) Children have the right to be heard directly, and not only through a representative, at all stages of the process, starting from the moment of contact. … A child who is above the minimum age of criminal responsibility should be considered competent to participate throughout the child justice process.[92]

As well as identifying these key principles, the primary purpose of *General Comment No 24* was to provide a contemporary consideration of the relevant articles and principles in the Convention on the Rights of the Child, and to guide States towards a holistic implementation of child justice systems that promote and protect children's rights.[93] The key link between domestic child justice policies and the CRC is made explicit through *General Comment No 24*, as it was under *General Comment No 10*. It is this link and authoritative statement by the CRC Committee that justifies the approach of this thesis to evaluate the NSW, Victorian and ACT youth conferencing programs against the child rights norms articulated in the CRC. The themes of non-discrimination, best interests and participation emphasised by the CRC Committee and quoted above are consider in depth in Chapters 5, 6 and 7 respectively.

4.13 What does a child rights compliant youth justice system involve?

More generally, Article 37 and Article 40 of the CRC set out important standards with respect to the treatment of children in conflict with the law. Article 37 focuses on children deprived of liberty, highlighting their vulnerability and requiring that detention should only be used as a last resort, a principle also echoed in the Beijing Rules. For the purposes of Article 37, there are detailed provisions in the Havana Rules that set out requirements that relate to the conditions of youth detention, including the importance for children to have access to specific programs to meet their needs and provide for their development. These programs include education, healthcare, recreation, and to communication with the outside world. While these principles are important and are fundamental to State Parties' obligation to provide differential treatment to children in custody, the operation of conferencing programs do not turn on the

[91] Ibid., para 76.
[92] Ibid., para 45-46.
[93] Ibid., para 6.

general question of child custody rights, aside from the general point that youth conferences are available to young people in custody in all three jurisdictions under review.[94]

However, as explored in more detail in Chapter 7, Article 40 is especially relevant to defining a child rights compliant youth justice system because it sets out in detail fundamental principles that should apply in youth justice systems. It also incorporates important legal rights, safeguards and treatment to which a child in conflict with the law is entitled. At this stage however, it is appropriate to note some key themes.

Under Article 40(1), States Parties have an obligation to ensure that a child in conflict with the law is 'treated in a manner which is consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.'[95] This is a fundamental feature of a rights compliant youth justice system, and consistent with both the jurisprudence of the CRC Committee and the Beijing Rules. Giving effect to it requires that goals of retribution and punitiveness must give way to goals of rehabilitation and restorative justice, so as to ensure the best interests of the child are protected.

The international standards also provide guidance on the key elements that must be in place in a rights-compliant youth justice system. *General Comment No 24* emphasises prevention as part of a comprehensive youth justice strategy.[96] The Riyadh Guidelines set out core elements of crime prevention and emphasise the need to take a holistic approach on the part of society as a whole to promote the harmonious development of children from early childhood, with a focus on well-being as a whole.[97] The Riyadh Guidelines also emphasise the need to avoid penalising or criminalising children where possible, the importance of focusing on community-based services and programs in preference to formal agencies of social control, and the need for positive socialisation and development of all children in society through family, education, community, mass media and social policies.[98]

[94] UN General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty: resolution / adopted by the General Assembly*, 2 April 1991, A/RES/45/113.
[95] Article 40(1) CRC.
[96] *General Comment No.24*, paras. 9-12.
[97] See Rule 3 of the Riyadh Guidelines.
[98] See Rule 3, 5, 6 Part IV and Part V of the Riyadh Guidelines.

4.14 Restorative Justice and CRC

Against this backdrop of the core components of a child rights compliant youth justice system, the CRC contains no specific mention of conferencing specifically or restorative justice more generally; nor is there any reference in any of the precursor instruments, such as the *1959 Declaration* or the *Beijing Rules*. This is not surprising given that these instruments were formulated before the term 'restorative justice' had real currency.

Nonetheless, it is clear that restorative justice has been endorsed by the CRC Committee as part of its outputs relating to a CRC-compliant youth justice system, including, for example, *General Comment No 10,* and its replacement *General Comment 24*, which endorse the use restorative justice as consistent with the CRC.[99]

As well as endorsing restorative justice in its General Comments, the CRC Committee has also explicitly recommended it in its Concluding Observations. For example, the Committee recommended that Kiribati 'develop and implement responses from the ideas of restorative justice, including mediation, alternative dispute resolution and family conferencing'.[100] Similarly, in the case of the UK, the Committee welcomed '...the State party's initiatives to introduce restorative justice and other constructive community-based disposals for juvenile offenders.'[101] It is therefore clear that there is endorsement for restorative justice within the international regime relating to children's rights.

As noted in earlier chapters, there have been a number of NGO conferences and resulting declarations that have endorsed the place of restorative justice within youth justice regimes. This includes the 2006 Belfast Declaration that arose out of a meeting of the World Congress of the International Association of Youth and Family Judges and Magistrates,[102] as well as, the 2009 first World Congress on Restorative Juvenile Justice held in Lima, Peru. The concluding Lima Declaration avoided categorising restorative justice as simply a diversionary measure justified under Article 40(3)(b) CRC. Rather, and arguably more appropriately, the Lima Declaration expressed greater synergy between restorative justice and Article 40(1) of the CRC

[99] *General Comment No 10; General comment No. 24*, para 1. See also para 17 in which conferencing is recognised as an intervention that avoids resorting to judicial proceedings.
[100] Concluding Observations of the Committee on the Rights of the Child, Kiribati, U.N. Doc. RC/C/KIR/CO/1 (2006), para 64 (e).
[101] Committee on the Rights of the Child: Concluding Observations: United Kingdom of Great Britain and Northern Ireland CRC/C/15/Add.18), para 59.
[102] See Chapter 1 of this thesis.

with its references to '…reintegration and the child assuming a constructive role in society.' To that end, and with express reference to Article 40(1) CRC, the Lima Declaration recommends that States undertake,

> … necessary measures to include restorative justice programs as an integral part of the administration of juvenile justice…
>
> … the country wide introduction of restorative juvenile justice and on the legislative measures to provide a solid basis for a sustainable practice of restorative juvenile justice as the main characteristic of its juvenile justice system…[103]

There is therefore clear endorsement at an international level, for the inclusion of restorative justice programs in youth justice systems in order to give effect to children's rights as set out in the CRC.

4.15 The status of the CRC in Australia

Legislative power in Australia is shared between the Commonwealth and the states and territories. The Commonwealth Constitution (the Constitution) sets out the legislative power of the Commonwealth with the effect that all residual legislative powers sit with the states, as the continuation of the pre-Federation Colonies.[104] Section 109 of the Constitution provides that Commonwealth law takes precedence over state law in the event of inconsistency. Section 51(xxix) of the Constitution gives the Commonwealth legislative power with respect to external affairs, which includes the power to make laws to give effect to treaties negotiated and entered into by the Commonwealth Government through its exercise of executive power under section 61 of the Constitution. The external affairs power also allows the Commonwealth Government to make laws in matters which are otherwise under the jurisdiction of the states.

While Australia has ratified the CRC, it is not directly in force in any Australian state or territory. This is because Australia is a 'dualist' country in which a treaty does not become directly enforceable within Australia until such time as it has been incorporated into domestic

[103] Lima Declaration, paras 5 and 6.
[104] *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12, s 9; Section 51 of the Commonwealth of Australia Constitution Act 1900/1901 ('the Constitution').

law.[105] Aside from anti-discrimination laws with respect to race, sex, age and disability, there are no Commonwealth human rights laws, including with respect to children.[106] The Commonwealth Government justifies the lack of national legislation to incorporate international human rights treaties, including the CRC, on the basis of the need to avoid interfering with the legislative power of the states, and on the basis that existing statutory protections and common law provide sufficient human rights protection.[107]

At the same time, it has been noted that state and territory child protection and youth justice regimes exhibit 'sectoral incorporation' of the CRC to varying degrees by including provisions that are informed by and compatible with the Convention.[108] In its 2018 Periodic Report to the CRC Committee, Australia reported that it was committed to the CRC and to respecting its requirements at state and federal level:

> This Report demonstrates Australia's commitment to furthering the rights of children. The Australian (federal), and State and Territory governments devote significant resources to ensuring children in Australia are able to reach their full potential and realise the rights set out in the CRC and Optional Protocols.[109]

However, an alternative report submitted by the Australian Child Rights Task Force identified gaps in Australia's performance under the CRC based on 'analysis of the data and legislative assessments.'[110] As discussed in Part II of the thesis, the view of the Australian Child Rights Task Force is correct when it comes to the youth conferencing programs in Victoria, NSW and the ACT. The CRC Committee has also identified issues of concern and in its 2019 Concluding Observations recommended that Australia take steps,

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[105] *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, per Gibbs CJ at 193 and Mason J at 224-25; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 per Mason CJ and Deane J at 286 – 87 and Toohey J at 298.
[106] Charlesworth H and Triggs G 'Australia and the International Protection of Human Rights' in Rothwell D and Crawford E (eds) *International Law in Australia* (2017) 128.
[107] Ibid., 129. See also Charlesworth H 'The UN and Mandatory Sentencing' 2000 (25) Australian Children's Rights News 1 and 4; *Commonwealth v Tasmania* (1983) 158 CLR 1.
[108] Tobin, J 'Incorporating the CRC in Australia' in Kilkelly U, Lundy L and Byrne B *Incorporating the UN Convention on the Rights of the Child into National Law'* Cambridge University Press 2021, 22. See also McCall-Smith, K 'To Incorporate the CRC or Not: Is This Really the Question?'(2019) 23 *International Journal of Human Rights* 425, 426.
[109] Committee On The Rights Of The Child, *Combined Fifth and Sixth Periodic Reports Submitted by Australia under Article 44 of the Convention, Due in 2018* (22.11.2018) CRC/C/AUS/5-6, para. 2.
[110] Tobin 2021 (Op. cit.) 13. See also Australian Child Rights Taskforce *The Children's Report: Australia's NGO Coalition Report to the United Nations Committee on the Rights of the Child* (UNICEF 2018), 4 at <www.unicef.org.au/Upload/UNICEF/Media/Documents/Child-Rights-Taskforce-NGO-Coalition- Report-For-UNCRC-LR.pdf >

> To actively promote non-judicial measures, such as diversion, mediation and counselling, for children accused of criminal offences and, wherever possible, the use of non-custodial sentences such as probation or community service;**[111]**

The CRC Committee's 2019 Concluding Observation is consistent with observations made in response to each of Australia's previous periodic reports. For example, in its 1997 Concluding Observations on Australia's initial report, the Committee noted that,

> 22. The Committee is also concerned about the unjustified, disproportionately high percentage of Aboriginal children in the juvenile justice system,
>
> …
>
> 32. …The Committee is also of the view that there is a need for measures to address the causes of the high rate of incarceration of Aboriginal and Torres Strait Islanders children. It further suggests that research be continued to identify the reasons behind this disproportionately high rate, including investigation into the possibility that attitudes of law enforcement officers towards these children because of their ethnic origin may be contributing factors.[112]

Similar observations were made in the Committee's 2005 Concluding Observations on Australia's second and third periodic reports, as well as in the concluding observations for Australia's fourth periodic report in 2012 in which, at paragraph 74, there is a clear statement of the primary sources of rights for children in the youth justice system, including the Beijing Rules:

> 74. The Committee recommends that the State party bring the system of juvenile justice fully into line with the Convention, in particular articles 37, 40 and 39, with other United Nations standards in the field of juvenile justice, including the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty and the Vienna Guidelines for Action on Children in the Criminal

[111] Committee on the Rights of the Child: Concluding observations on the combined fifth and sixth periodic reports of Australia CRC/C/AUS/CO/5-6, para 48.
[112] Committee on the Rights of the Child: Concluding observations on the initial periodic reports of Australia CRC/C/15/Add.79.

Justice System, and with the recommendations of the Committee made at its day of general discussion on juvenile justice (see CRC/C/46, paras. 203-238). In this regard, the Committee recommends in particular that the State party:

> (c) Urgently remedy the over-representation of indigenous children in the criminal justice system;
>
> (d) Deal with children with mental illnesses and/or intellectual deficiencies who are in conflict with the law without resorting to judicial proceedings. [113]

The principles and rights in the CRC are an appropriate standard against which to measure the three conferencing programs under review in this thesis, because they represent the gold standard when it comes to children's rights. In addition, Australia has ratified the treaty and is committed to its principles as confirmed in Australia's periodic reports to the CRC Committee, notwithstanding that the treaty itself has not been directly incorporated into domestic law.

4.16 Conclusion

Our understanding of children and children's rights is a product of history, noting that within Australia – and around the world – there are historically and socially different conceptions of the child. Nonetheless, the primary contemporary universal source of children's rights is the CRC. An analysis of the CRC and the work of the Committee shows that there are core rights that are important in the context of youth justice, including the right to non-discrimination, the right to have best interests taken into account as a primary consideration and the right of a child to express views, participate and be heard. Each of these rights interconnects with other rights within the CRC, including the specific rights connected with youth justice. The work of the CRC Committee – in particular through its General Comments and Concluding Observations – provides authoritative guidance on the way in which different rights within the CRC should be understood and implemented.

Of course, children's rights throw up challenges, including grappling with the reality of non-discrimination, giving means to concepts such as the best interests of the child, how to reflect differing levels of maturity and evolving capacities of children and finding ways for a child to

[113] Committee on the Rights of the Child: Concluding observations on the combined second and third periodic reports of Australia CRC/C/15/Add.26820. See also Committee on the Rights of the Child: Concluding observations on the fourth periodic report of Australia CRC/C/AUS/CO/4.

express their views and be heard. However, it is irrefutable that the entry into force of the CRC in 1990, has led to the clear acceptance that children have rights, which 'has come to represent a major shift in contemporary responses to the issues confronting children in society.'[114]

The work of the CRC Committee over many decades provides insight into the 'best practice' interpretation of the various rights in the CRC. The challenge is to take this insight and move to a substantive approach to children's rights that involves 'strategies that are designed to enliven the provisions of the CRC and the idea that children have rights in a way that is principled and practical.'[115]

For the purpose of answering the research questions in this thesis, the almost universal ratification of the CRC means that there is strong support for children's rights. Further, those involved in children's rights support restorative justice, and those focused on expanding restorative justice do so by reference to children's rights.

Australia has ratified the CRC and the hard and soft law instruments associated with the CRC provide a solid basis for analysing the extent to which the youth conferencing programs in NSW, Victoria and the ACT comply with children's rights. Starting with the Article 2 right to non-discrimination, Part II of this thesis analyses the three distinct conferencing programs to determine whether they respect, protect and fulfil children's rights by reference to three core principles of the CRC.

[114] Tobin, J 'Children's Rights in Australia: Still Confronting the Challenges' in Gerber, P and Castan, M (eds.) *Critical Perspectives on Human Rights Law in Australia (Volume 2)* Thomson Reuters (2022)
[115] Ibid.

CHAPTER 5

Conferencing, Article 2 and the child's right to non-discrimination

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5.1 Introduction

This chapter considers the principle of non-discrimination in Article 2 of the CRC in the context of youth justice conferencing in NSW, Victoria and ACT. It analyses the application of Article 2 to these programs from two specific perspectives, namely indigeneity and geography/locality, but acknowledges that questions of discrimination can extend to many other areas such as gender, sexual orientation, children in the child protection system, education status, religious background, the status of parents, children with disabilities and children from culturally and linguistically diverse communities.[1] However, the two issues chosen for analysis in this chapter have been selected because of the availability of empirical data with respect to the impact of location and, more significantly, the 'enduring over-representation' of Aboriginal young people in youth justice systems across Australia.[2]

As an opening observation, it should be noted that the CRC Committee has referred to Article 2 directly in every one of its Concluding Observations to Australia regarding its compliance with the CRC. In 1997, the CRC Committee expressed concern 'that the general principles of the Convention, in particular those related to non-discrimination (art. 2) and the respect for the views of the child (art. 12) are not being fully applied'; that there was an 'unjustified, disproportionately high percentage of Aboriginal children in the juvenile justice system' and that investigation was needed into 'the possibility that attitudes of law enforcement officers towards these children because of their ethnic origin may be contributing factors.'[3] Similar observations were made in the Committee's 2005 Concluding Observations in response to Australia's second and third periodic reports, as well as in the Concluding Observations for Australia's fourth periodic report in 2012, in which the Committee again highlighted discrimination experienced by Indigenous children as well as concerns about children with mental illnesses and/or intellectual deficiencies. [4] In 2019, the Committee noted the need for

[1] Walsh, T 'From Child Protection to Youth Justice: Legal Responses to the Plight of 'Crossover Kids'' (2019) 108 *University of Western Australia Law Review* 90, 108. Bartels L, *Crime prevention programs for culturally and linguistically diverse communities in Australia*, Australian Institute of Criminology, Research in practice no.18, 2011; See also Sewak S, Bouchahine M, Liong K, Pan J, Serret C, Saldarriaga A, Farrukh E *Youth Restorative Justice: Lessons From Australia* A Report for HAQ Centre for Child Rights 2019, 129; M Grossman M, and Sharples J, D*on't go there: young people's perspectives on community safety and policing: a collaborative research project with Victoria police, region 2 (Westgate)*, Victoria University, 2010; Children's Rights Information Network *Guide to non-discrimination and the CRC* Child Rights Information Network 2009.
[2] UN Committee on the Rights of the Child: Concluding Observations on the combined fifth and sixth periodic reports of Australia (2019) CRC/C/AUS/CO/5-6, para 47(b).
[3] UN Committee on the Rights of the Child: Concluding Observations on the initial periodic reports of Australia (1997) CRC/C/15/Add.79.
[4] UN Committee on the Rights of the Child: Concluding observations on the fourth periodic report of Australia (2012) CRC/C/AUS/CO/4, para 74; See also UN Committee on the Rights of the Child: Concluding observations on the combined second and third periodic reports of Australia (2005) CRC/C/15/Add.26820.

Australia to 'address disparities in access to services by Aboriginal and Torres Strait Islander children.'[5]

Consistent with the repeated concern expressed by the CRC Committee, this chapter identifies that there is an 'Indigenous Irony' in the operation of three conferencing programs under review: Aboriginal children are both over-represented in youth justice statistics but under-represented or insufficiently supported in the exercise of their rights in some conferencing programs. In addition, there is a history of regional variation – 'postcode injustice' – in the use of youth conferencing, which has been especially evident in NSW. This regional variation arises when conferencing programs, and in particular diversionary conferencing programs that operate separately from the courts, are offered and/or used inconsistently across different areas within a single jurisdiction. This gives rise to what might be termed geographic discrimination at an operational. This situation is compounded further by the fact that Indigenous children are significantly more likely to reside outside major cities – approximately 25 percent of Indigenous children live in remote or very remote parts of Australia – intertwining both geographic and Indigenous disparity.[6]

This chapter starts by analysing the right to non-discrimination as set out in Article 2 of the CRC and interpreted by the CRC Committee. This is followed by an examination of the way in which each of the three jurisdictions addresses matters of discrimination in their legislative and operational frameworks, particularly regarding Indigenous peoples and regional access to youth conferencing.

5.2 The meaning of non-discrimination under Article 2 CRC

Article 2 of the CRC provides that,

> 7. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

[5] UN Committee on the Rights of the Child: Concluding observations on the combined fifth and sixth periodic reports of Australia (2019) CRC/C/AUS/CO/5-6, para 19.
[6] Australian Bureau of Statistics *4714.0 - National Aboriginal and Torres Strait Islander Social Survey, 2014-15* Australian Bureau of Statistics 28 April 2016; See also Australian Bureau of Statistics *4714.0 - National Aboriginal and Torres Strait Islander Social Survey 2008* Australian Bureau of Statistics, 2008:13.

8. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

On its face, Article 2 is not controversial or complicated, and the CRC Committee has not published a specific General Comment on this provision. However, it has been found that the CRC Committee has identified 53 potential grounds of discrimination against children, including the two types of discrimination being considered in this chapter, namely geography and indigeneity.[7] Further, the CRC Committee has repeatedly highlighted that non-discrimination is one of the core principles of the CRC and therefore that it is 'a general principle of fundamental importance for the implementation of all the rights enshrined in the Convention.'[8]

Given the number of potential grounds for discrimination, it is not surprising that the CRC Committee has addressed non-discrimination in multiple General Comments addressing other aspects of the CRC. For example, in *General Comment No. 5 on General measures of implementation of the Convention*, the Committee noted that,

> Particular attention will need to be given to identifying and giving priority to marginalized and disadvantaged groups of children. The non-discrimination principle in the Convention requires that all the rights guaranteed by the Convention should be recognized for all children within the jurisdiction of States … [and] the non-discrimination principle does not prevent the taking of special measures to diminish discrimination.[9]

This is an important observation, because it provides clear guidance to States Parties that the right to non-discrimination imposes an obligation on them to take positive action to ensure that disadvantaged or marginalised children receive appropriate support in the form of special measures to overcome individual or systemic discrimination. This can be read to mean that there is an obligation on authorities in each jurisdiction under review – NSW, Victoria and the ACT – to consider whether special measures, and if so what measures, are needed with respect

[7] Children's Rights Information Network 2009 (Op.cit.).
[8] UN Committee on the Rights of the Child (CRC), *General comment No. 11 (2009): Indigenous children and their rights under the Convention [on the Rights of the Child]*, 12 February 2009, CRC/C/GC/11, para 23.
[9] *General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5, para 30.

to both the challenge of geography and the challenge of indigeneity (or indeed any other ground of discrimination). In addition, the right to non-discrimination was addressed in two important General Comments issued in 2009 that are relevant in the three jurisdictions under review.

General Comment 11, related to the status of Indigenous children under the CRC. It is therefore particularly important when it comes to interpreting and applying Article 2 to youth conferencing in Australia. *General Comment 11* drew a direct link between the specific right relating to Indigenous children in Article 30 and the general principle of non-discrimination in Article 2.[10] In *General Comment 11*, the CRC Committee recognised that Indigenous children can 'face multiple facets of discrimination' and that special measures to address Indigenous discrimination should also take into account the different situation of Indigenous children in rural and urban situations – thereby overlaying geography as a further potential discriminatory factor.[11]

In *General Comment 11*, the CRC Committee expressly recognised that Indigenous children in many countries are 'disproportionately' over-represented in youth justice statistics, which, in some instances, 'may be attributed to systemic discrimination from within the justice system and/or society.'[12] As noted above, the CRC Committee has explicitly made this point to Australia in its Concluding Observations. Thus, *General Comment 11* emphasises the importance of culturally appropriate special measures to address discrimination in connection with a number of areas impacting Indigenous children, including 'juvenile' (now child) justice.[13]

General Comment No. 11 referred to the Riyadh Guidelines for Prevention of Juvenile Delinquency and the importance of establishing diversionary community based programs.[14] It expressly noted the importance of restorative justice as an effective diversionary method to deal with Indigenous young people in trouble with the law but highlighted that any such programs need to operate 'in accordance with the rights set out in the Convention' and that they need to be developed 'in consultation with indigenous peoples.'[15] Referring to Article 12, *General Comment 11* emphasised that 'all children should have an opportunity to be heard in any

[10] General Comment 11 (Op.cit.), para 14.
[11] Ibid., para 29.
[12] Ibid., para 74-76.
[13] Ibid., para 24-25.
[14] Ibid., para 74-77.
[15] Ibid.

judicial or criminal proceedings affecting them, either directly or through a representative' and therefore that an Indigenous child should be 'guaranteed legal assistance, in a culturally sensitive manner.'[16] Finally, *General Comment 11* emphasised the importance of ensuring that 'professionals involved in law enforcement and the judiciary should receive appropriate training … including the need to adopt special protection measures for indigenous children and other specific groups.'[17]

The second important General Comment issued in 2009 was *General Comment 12*, which offers guidance on the meaning of Article 12. Reflecting the position taken in *General Comment 11*, *General Comment 12* linked the right to non-discrimination to the child's right to be express a view and have due weigh accorded to the view under Article 12. General Comment emphasised that the right to express a view and be heard under Article applied to every child and therefore that States Parties have an obligation to take 'adequate measures' so that every child could 'freely express his or her views and…have those views duly taken into account without discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.'[18] In doing so, the CRC Committee explained that States Parties had a positive obligation to 'address discrimination, including against vulnerable or marginalized groups of children, to ensure that children are assured their right to be heard and are enabled to participate in all matters affecting them on an equal basis with all other children.'[19]

The CRC Committee has made it clear that non-discrimination under Article 2 CRC is a positive right for every child, but this does not mean identical treatment. Rather, it is appropriate that State Parties take special measures to diminish or eliminate conditions that cause discrimination for vulnerable and disadvantaged groups in the youth justice system, which, in the Australian context, includes systemic discrimination that affects Indigenous children and children in remote parts of a state or territory. The CRC Committee has highlighted legal representation, consultation with community, independence and training as important tools to redress discrimination . To give effect to Article 2, the CRC Committee also endorsed the Human Rights Committee's observation that 'addressing discrimination may require changes

[16] Ibid.
[17] Ibid, para 77.
[18] UN Committee on the Rights of the Child (CRC), *General comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12, para 75.
[19] Ibid.

in legislation, administration and resource allocation, as well as educational measures to change attitudes.'[20]

In light of the CRC Committee's observations regarding the interpretation and implementation of Article 2, there are questions that need to be answered about the operation of the three conferencing programs, from the perspective of both locality and indigeneity. In particular,

1. Are there differences in the operation of conferencing programs based on location?
2. Are there differences in the operation of conferencing programs based on whether the child offender is Indigenous?
3. Is conferencing being used to address Indigenous over-representation in the youth justice system in each jurisdiction?
4. Is conferencing made available to Indigenous children in a culturally appropriate way, that respects, protects and fulfils their rights?
5. What measures are needed to ensure that conferencing programs contain sufficient measures to address discrimination based on indigeneity or location?

This chapter will review the programs in order to provide answers to these questions.

1. 5.3 The impact of location and postcode: justice denied or justice delivered?

The question of location is more relevant to the conferencing programs in NSW and Victoria than the ACT; the ACT is the smallest mainland territory in Australia, covering a total land area of only 2,358 km² (cf NSW: 801,150 km² and Victoria: 227,444 km²). As a result, the ACT is too geographically compact to identify any differential trends within the jurisdiction.

This section analyses problems that underpin differential treatment on the basis of location. Fundamentally, discrimination arises from the exercise of police discretion. However, the starting point is to recognise that youth offending and youth offenders are dispersed across each state. Figures 1 – 3 below, show youth offending per 100,000 persons across local government areas in NSW in 2021 for common categories of offence that are within range of the state's conferencing program. These offence categories are dishonesty offences, assaults and property

[20] UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989.

damage. The data shows that offending in each offence category occurs at significant rates in many parts of the state, even allowing for low population in some areas.

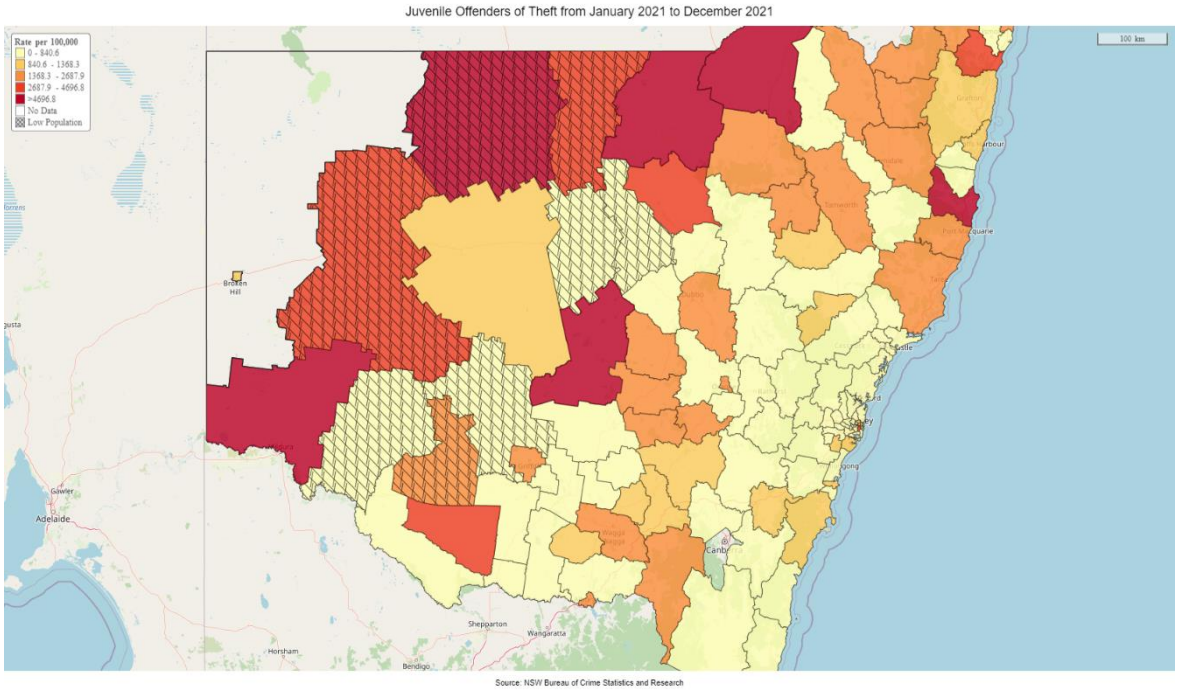

Figure 1: Theft (including other dishonesty offences) across NSW in 2021 involving young offenders.[21]

[21] Map created via crime mapping tool available at NSW Bureau of Crime Statistics and Research website at http://crimetool.bocsar.nsw.gov.au/bocsar/.

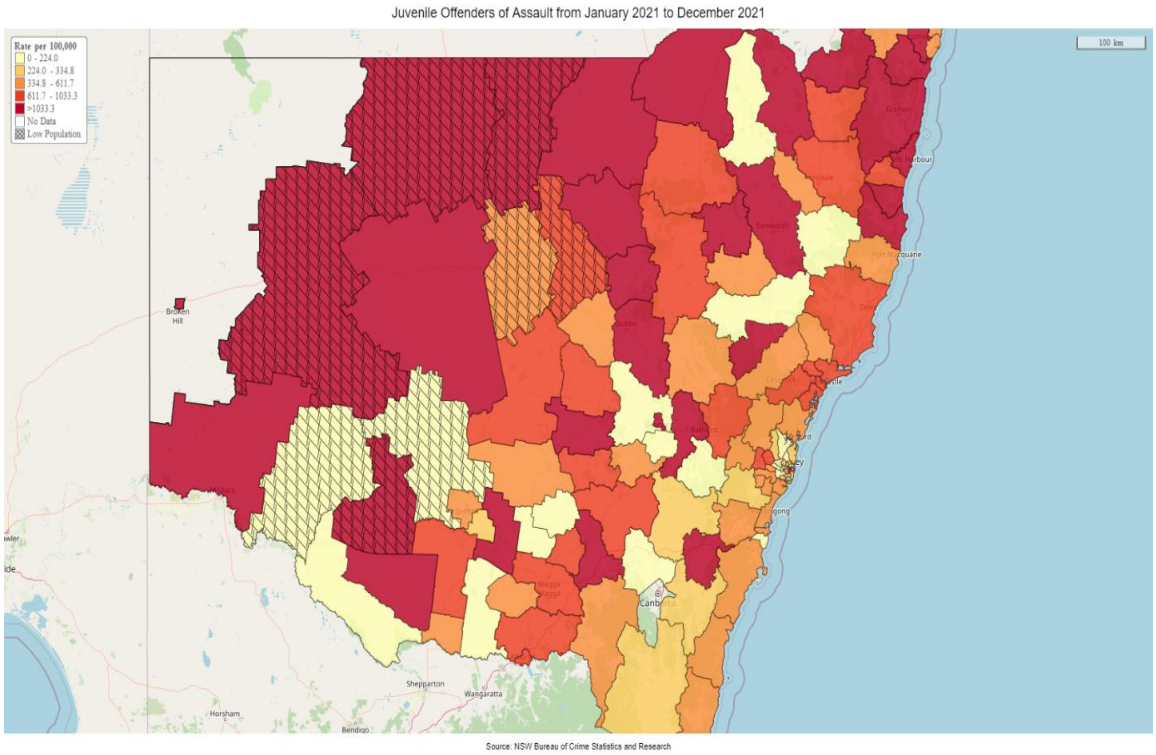

Figure 2: Assaults across NSW in 2021 involving young offenders.[22]

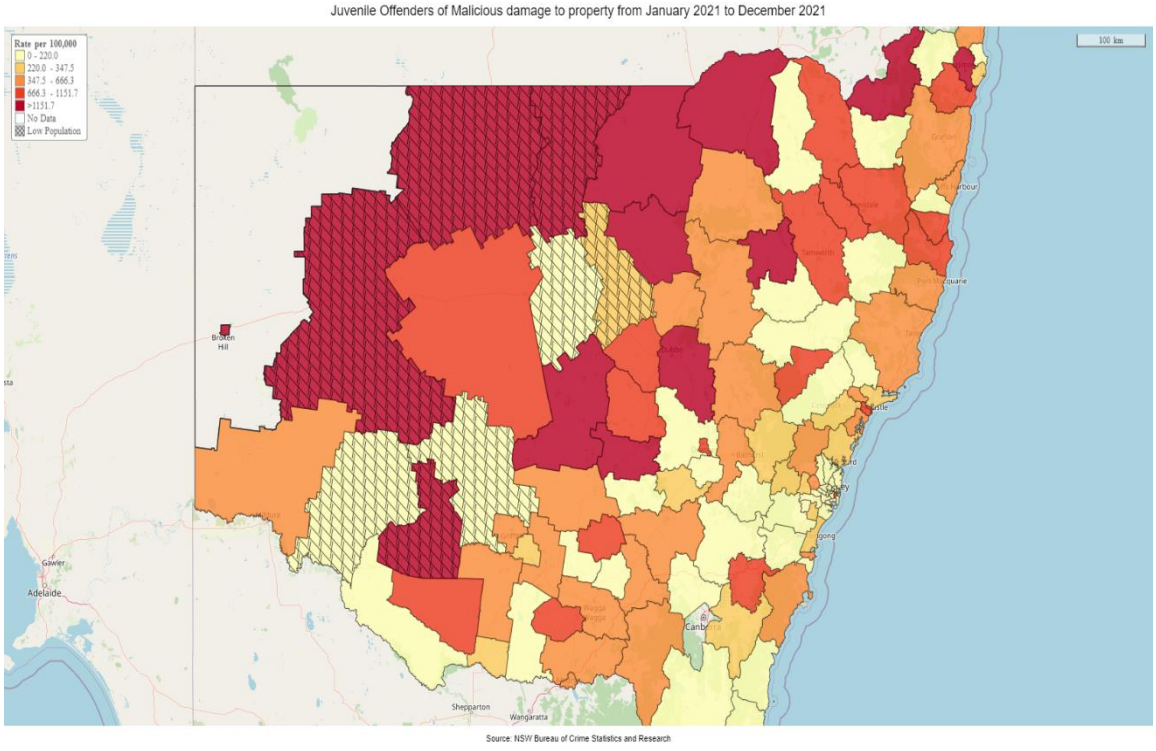

Figure 3: Property damage across NSW in 2021 involving young offenders.[23]

[22] Ibid.
[23] Ibid.

The expectation that arises from these data maps, is that all things being equal, the use of conferencing under the *Young Offenders Act 1997* (NSW) should reflect the state-wide patterns of offending, with areas that experience higher rates of youth offending tending to have higher rates of referral to conferencing. However, this is not the case, and has not been for an extended period of time. A major state-wide review into the NSW youth justice system in 2010 found that 'the use of diversionary options is not uniformly applied across all Local Area Commands.'[24] This review identified clear evidence of regional variation, with higher socio-economic status urban areas having much higher rates of conferencing than outer suburban and regional areas where offenders with similar profile were more likely to be subject to proceedings in court. [25] Data gathered across the state in the review found that there were 28 Local Area Commands in NSW where five or fewer children were found to be suitable for conferencing, whereas at the other extreme, higher socio-economic areas of Sydney's eastern suburbs and north shore had referrals numbering 70 – 100, which is significantly disproportionate even allowing for population differences.[26]

Although this remains an under-researched issue because of the limited data available, other research about police discretion confirmed these findings.[27] In particular, one study that looked more broadly at police diversionary options (warnings, cautions and conferences) under the *Young Offenders Act* noted that 'some LACs had unexpectedly low rates of diversion, these remained even after adjusting for case and person-level characteristics.'[28] Similarly, a 2021 study into the exercise of police discretion with respect to bail in NSW, found that moving between police jurisdictions across NSW had a greater impact on the probability of bail refusal, than many legal factors, including prior court appearances and bail breaches.[29] More tellingly, the rates of conferencing across NSW local area commands to June 2020 vary from 31.5 per 100,000 to 669.3 per 100,000 depending on local government area.[30] However, the difference

[24] Noetic Solutions *A Strategic Review of the New South Wales Juvenile Justice System Report for the Minister for Juvenile Justice* Noetic Solutions Sydney 2010.
[25] Ibid.
[26] Ibid.
[27] Taussig, I *Youth Justice Conferences: Participant profile and conference characteristics* NSW Bureau of Crime Statistics and Research Issue Paper no. 75, 2012, 10.
[28] Ringland C and Smith N *Police use of court alternatives for young persons in NSW* Contemporary Issues in Crime and Justice Number 167, NSW Bureau of Crime Statistics and Research 2013, 10.
[29] Klauzner I and Yeong S 'What factors influence police and court bail decisions? NSW Bureau of Crime Statistics and Research Crime and Justice Bulletin No. 236, 2021, 22.
[30] Bureau of Crime Statistics and Research (BOSCAR) *Youth Crime* at https://www.bocsar.nsw.gov.au/Pages/bocsar_pages/Young-people.aspx

now is that the extremes are between the wealthy Northern Beaches region at the low rate of conferencing, and Orana and the Far West with the higher rate of conferencing.[31]

These results over time lead to the conclusion that there is differential treatment for a young person based on location. While acknowledging that it is not possible to look fully behind the data – for example, to explore whether an individual child refused to admit an alleged offence or chose not to consent, which, as explained in Chapter 3, are prerequisites for referral to a conference under the *Young Offenders Act* – it is nonetheless more than likely that the rate of referrals to conferences in NSW depends very much on the attitude of the Police Local Area Command. Discrepancies in referrals to youth conferencing for similar offences in different geographical appears to amount to discrimination under Article 2 CRC because children in all areas of the state are not having equal access to conferencing on the same basis as each other.

The specific cause of the problem lies in the discretion afforded to NSW police to act as the primary 'gatekeepers' of the conferencing programs. As discussed in Chapter 3, while the *Young Offenders Act* provides for some separation of decision-making around the referral of a matter to a conference, this separation is not fully independent of the investigating officer or the police force in general and it appears that they are not operating consistently across the state. This problem is further complicated by the limited protection for children around their rights to advice with respect to admitting an offence or providing consent to participate in a conference. Contrary to the recommendations of the CRC Committee, legal advice is not mandatory at the crucial referral stage of a conference outside of the court process. Are children in regional parts of NSW or areas of lower socio-economic status being referred to conferences when a less intensive diversionary option – or no action at all – would be used in metropolitan or wealthier areas?

The data from NSW is in many ways replicated in Victoria. While conferencing in Victoria does not operate as a formal diversionary option in the same way as it does in NSW, there is research into the exercise of police discretion with respect to the use of diversionary cautioning and bail that suggests there are similar factors at play as identified in NSW. Figure 4 and Figure 5 below illustrate this point. As in Figures 1 – 3 for NSW, Figure 4 shows the crime rate per 100,000 young people for Victoria over a 12-month period. It shows that the crime rate varies

[31] Bureau of Crime Statistics and Research (BOSCAR) *Youth Crime* at https://www.bocsar.nsw.gov.au/Pages/bocsar_pages/Young-people.aspx.

across the state. Figure 5 shows the use of police cautioning over the same period. It could be expected that the two maps would overlap to show consistent exercise of police discretion, but they do not. Rather, Figure 5 shows that there are high rates of cautioning in some areas of low offending, such as the Macedon Ranges to the west of Melbourne, and low rates of cautioning in high crime areas such as Horsham and La Trobe Valley. This suggests that police discretion is not being exercised objectively; young people experience different outcomes depending on location. As in NSW, this differential treatment appears to constitute discrimination under Article 2 of the CRC.

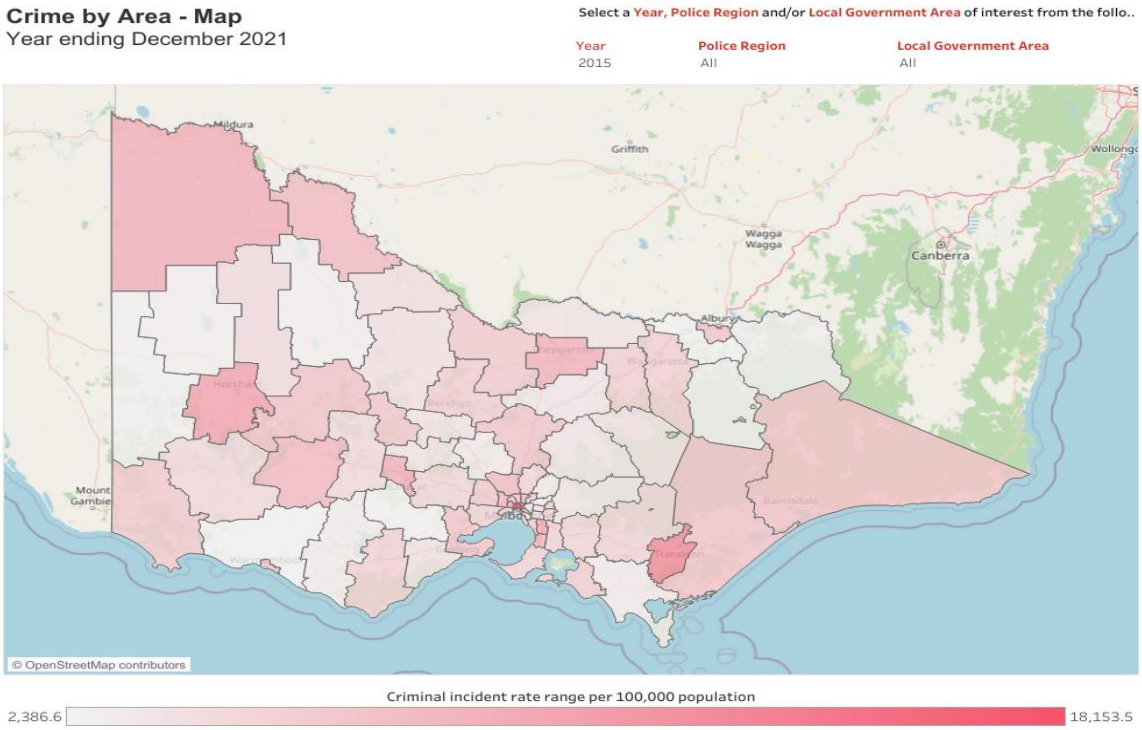

Figure 4: Crime rate per 100,000 in Victoria in 2015 (NB: the reference to December 2021 is an error in the mapping tool – the reference to 2015 as the "Year" is correct).[32]

[32] Map created via Crime Statistics Victoria at https://www.crimestatistics.vic.gov.au/crime-statistics/latest-crime-data-by-area.

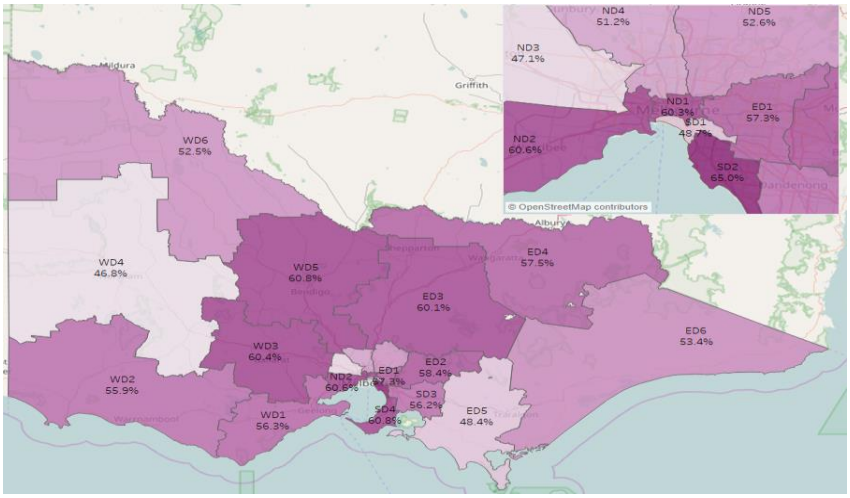

Figure 5: Map of Victoria showing the percentage of young people cautioned by Police Division, April 2015 to March 2016.[33]

A 2017 study into the exercise of police discretion in cautioning in Victoria reached similar conclusions to data depicted on the above two maps. It identified that those residing in the 30 percent least disadvantaged postcodes were twice as likely to be cautioned as those living in the 30 percent most disadvantaged postcodes. Reflecting the exercise of police discretion with respect to conferencing in NSW, the study noted with concern that the 'police utilisation of cautions varied widely across the state.'[34] The same study noted the importance of an admission of guilt by the young person as the entry point for a diversionary outcome and noted that 'a number of factors may influence a young person in pleading guilty [sic.] and therefore, being eligible for a caution.' The study highlighted the importance of legal advice as well as 'the demeanour and training of the individual officers involved.' As noted in part 5.2 of this chapter, these are all matters that have been highlighted by the CRC Committee as important factors to address in order to combat discrimination.

Victoria also exhibits another challenge for conferencing in regional areas, which is a lack of engagement by police with the process. Even though conferences are not initiated by police in Victoria, they are required to attend under s415(6)(c) of the *Children, Youth and Families Act.*

[33] Shirley, K *The Cautious Approach: Police cautions and the impact on youth reoffending* Crime Statistics Agency Melbourne 2017, 7-8.
[34] Ibid.

However, some regions, such as Gippsland, have had to postpone or cancel conferences because of reluctance of police to engage fully with the program.[35]

The overall conclusion from this assessment is that a child's location matters in conferencing because police discretion and police participation matter. The evidence is that discrimination can arise where police have discretion on whether to refer a matter for a conference (or any diversionary option). This is important because it suggests that there is a fundamental problem with allowing police as investigating officers to have discretion to determine whether a matter should be considered for conferencing, as is currently the case in both NSW and the ACT. The data from NSW and Victoria support this conclusion, and therefore the gateway to conferencing via direct police referral needs reconsideration. In order comply with Article 2 of the CRC, the power of police to refer young offenders to conferencing needs to be removed, so that courts are the sole referring body. Alternatively, if police retain power to refer young offenders to conferencing, then the child must be provided with legal advice. This could be accompanied by a power to allow a child to seek a review of any initial decision by the police not to offer conferencing.

2. 5.4 Indigenous people: Over-represented and under-represented

Turning now to consider the question of the contemporary use of youth conferences for young Indigenous offenders in NSW, Victoria and the ACT. The starting point is the recognition that Indigenous people are significantly over-represented in the criminal justice system across Australia. This over-representation continues despite multiple policy and practice reforms initiated after the Royal Commission into Aboriginal Deaths in Custody.[36] This over-representation extends to the youth justice system, where, for example, in NSW in 2005, 52 percent of people aged 10–17 years in youth detention, were Indigenous despite representing barely three percent of the population of the state.[37] By 2019, these numbers had seen some movement but were still unacceptably high: 44.73 percent of young people in youth detention

[35] Anglicare Gippsland *Group Conference Steering Committee meeting documents*, March 2017.
[36] *Royal Commission into Aboriginal Deaths in Custody*, Australian Government Publishing Service, Canberra, 1991 at http://www.austlii.edu.au/au/other/IndigLRes/rciadic/
[37] Noetic Solutions *A Strategic Review of the New South Wales Juvenile Justice System Report for the Minister for Juvenile Justice* Noetic Solutions Sydney 2010.

were Indigenous, yet the same cohort only represented 6.25 percent of the equivalent state population.[38]

Nationwide, young Indigenous people are 31 times more likely to be detained than non-Indigenous youth,[39] and the Australian Bureau of Statistics figures show that the number of Indigenous offenders aged between 10 and 19 *increased* by 5 percent between 2008–09 and 2010–11, whereas non-Indigenous offenders of the same age *decreased* by 12 percent during the same period.[40] In 2016, it was noted that, 'Aboriginal and Torres Strait Islander Australians are over-represented in the criminal justice system, as both victims and offenders.'[41] Similar conclusions were expressed in the 2022 Productivity Commission Report:

> Aboriginal and Torres Strait Islander young people are overrepresented in the youth justice system, and to a slightly greater extent in detention-based supervision (18 times the rate for non-Indigenous young people nationally in 2019-20) … compared to community based supervision (17 times the rate for non-Indigenous young people nationally in 2019-20).[42]

The driving factors behind these figures often include an overlay of situational factors such as substance abuse, family problems, peer delinquency and school related problems that are generally more prevalent for Indigenous than non-Indigenous Australians.[43] At the same time, while the number of Indigenous young people is disproportionate at every stage of the youth justice system, the experience of Indigenous young people with conferencing has been summed up as in the following terms,

> Indigenous young people are more likely to have their matters dealt with by the courts and less likely than non-Indigenous youths to receive a caution or the benefits of

[38] Productivity Commission 2022 (Op.cit.) Table 17.A17 and Table 17A.26
[39] Australian Institute of Health and Welfare *Young people aged 10–14 in the youth justice system 2011–12* Juvenile justice series No.12. JUV 19. Canberra: AIHW 2013.
[40] *National Aboriginal and Torres Strait Islander Social Survey, 2014-15* ABS Canberra 2015.
[41] SCRGSP (Steering Committee for the Review of Government Service Provision) 2015, Report on Government Services 2015, vol. F, *Youth justice services*, Productivity Commission, Canberra. See esp 16.3.
[42] Productivity Commission 2022 (Op.cit.) Table 17.6
[43] Ringland C, Weatherburn D, and Poynton S 'Can child protection data improve the prediction of re-offending in young persons?' (2015) *Crime and Justice Bulletin*, Contemporary Issues in Crime and Justice, No. 188; see also Snowball L and Weatherburn D 'Indigenous over-representation in prison: The role of offender characteristics' (2006) *Crime and Justice Bulletin*, Contemporary Issues in Crime and Justice, No. 99.

diversionary responses to offending such as a police referral to a youth justice conference.[44]

Two research studies found that, even after controlling for the effects of age, sex, offence type and offending history, young Indigenous offenders were less likely than non-Indigenous young offenders to be diverted, including into conferencing programs.[45] This under-representation in conferencing coupled with a significant over-representation in youth justice figures presents an 'Indigenous Irony' that remains the case 'despite evidence which suggests that diversionary alternatives, including conferencing and cautioning are effective in reducing reoffending.'[46]

Overall, this starting position suggests that there is a discrimination deficit when it comes to compliance with Article 2 of the CRC.

5.4.1 New South Wales

As set out in Chapter 3, NSW has maintained relatively high rates of conferencing for Indigenous young people compared to the significant decline in numbers in both Victoria and the ACT.[47] As also set out in Chapter 3, the NSW conferencing program operates under the *Young Offenders Act 1997*. This sets up a framework of diversionary options for dealing with young offenders. The primary object of the Act is set out in section 3(a), which provides that the purpose of the Act is 'to establish a scheme that provides an alternative process to court proceedings for dealing with children who commit certain offences through the use of youth justice conferences, cautions and warnings.'[48] Under this primary objective, section 3(d) of the Act specifically addresses over-representation of Indigenous children in the youth justice system by stating that another object of the Act is 'to address the over representation of

[44]Australian Institute of Health and Welfare 2013 (Op.cit.); see also Snowball L *Diversion of Indigenous juvenile offenders* Trends & issues in crime and criminal justice no. 355. Canberra: Australian Institute of Criminology 2008.
[45] Snowball 2008 (Op.cit.); Allard T, Stewart A, Chrzanowski A, Ogilvie J, Birks D and Little S (2010) 'Police diversion of young offenders and Indigenous over-representation' *Trends & Issues in Crime and Criminal Justice*, No. 390, Australian Institute of Criminology, Canberra 2010; see also Richards K 'Police-referred restorative justice for juveniles in Australia' *Trends & Issues in Crime and Criminal Justice* no.398. Canberra: Australian Institute of Criminology 2010.
[46] Snowball L 2008 (Op.cit.).
[47] See Table 1 in Chapter 3.
[48] Section 3(a) *Young Offenders Act* 1997 (NSW).

Aboriginal and Torres Strait Islander children in the criminal justice system through the use of youth justice conferences, cautions and warnings.'[49]

Section 3(d) is significant because it specifically links the importance of using youth conferences (together with other diversionary outcomes, including warnings and cautions) to reduce Indigenous over-representation in the youth justice system. It therefore provides a clear example of using a legislative special measure to address a fundamental problem of discrimination, as recommended by the CRC Committee in its Concluding Observations to Australia about the situation of Aboriginal young offenders.

There is no equivalent legislative provision in either the ACT or Victorian governing legislation for youth conferences. Nor does the human rights legislation in either of these jurisdictions – the *Charter of Human Rights and Responsibilities Act 2006* (Vic.) or the *Human Rights Act 2004* (ACT) – go so far as to expressly identify a clear legislative need to address Indigenous over-representation in the criminal justice system. In this respect, section 3(d) of the NSW legislation can be seen as positive.

The conference referral process under the *Young Offenders Act* also, on its face, provides further measures that could be used to give effect to the objective of addressing over-representation of Indigenous young people. After dealing with warning and cautions, section 34 of the Act sets out the principles and purposes of conferencing, which include requirements, under section 34(1)(a)(v) 'to be culturally appropriate, wherever possible.' Section 34(1)(c)(iv) then directs that conference outcomes need to take into account 'the gender, race and sexuality of any such children.'[50] The combination of the provisions in sections 3 and 34 provide a clear legislative basis for young Indigenous people receive the full benefit of the state's conferencing program, both as young people (i.e. to minimise any stigma and be diverted from more intrusive court processes) as well as having particular regard to the over-representation of Indigenous people throughout the youth justice systems.

However, the diversionary conference referral process set out in section 37 of the Act establishes a two-stage test that appears to be counter-effective to the framework established earlier in the Act. The first stage, under section 37(1) sets out that a matter may be referred to a conference if it is deemed unsuitable for a caution by the investigating officer. When this

[49] Section 3(d) *Young Offenders Act* 1997 (NSW).
[50] Section 34(1)(c)(iv) *Young Offenders Act* 1997 (NSW).

arises, section 37(2) sets out that an investigating officer may refer a matter to a specialist youth police officer (a role defined under section 4 of the Act) to determine whether the matter should be referred to a conference administrator (again, defined in section 4) for a conference to take place. In other words, the discretion to refer an offender to a conference is one step removed from the investigation, but still remains within the police force. The discretion for the specialist youth officer with respect to making a referral for a conference is set out as follows,

> (2) Despite subsection (1), the child is not entitled to be dealt with by holding a conference if, in the opinion of the specialist youth officer to whom the matter is referred, it is more appropriate to deal with it by commencing proceedings against the child or by giving a caution because it is not in the interests of justice for the matter to be dealt with by holding a conference.

On its face, this seems to make sense. An investigating officer cannot decide to hold a conference or refuse to hold a conference independently: the matter must be referred to a specialist youth officer. However, a specialist youth officer is also a member of the police force. Section 37(2) provides that a specialist youth officer can de-escalate a matter to a caution or conversely, can escalate a matter with the commencement of proceedings in court. However, the test is the interests of *justice* not, as discussed in Chapter 6, the best interests of the *child,* and there is no guidance as to whether this should include the purpose of reducing indigenous over-representation as set out in section 3(d) of the Act. In addition, section 38(4) imposes a presumption that the specialist youth officer will consult with the investigating officer before making any decision regarding the disposal of a matter – which suggests that the investigating officer has significant input into the final decision whether or not to refer a matter to a conference. A better approach would be to recognise that conferencing is fundamentally different to the other two diversionary options under the *Young Offenders Act* because a conference is a more involved and intensive than a warning or a caution. Given the concerns raised in Section 5.3 above, about the exercise of police discretion, it would be safer for a court to be the arbiter of whether a conference proceeds, regardless of whether it is diversionary – without a finding of guilt – or dispositional as part of the sentencing process. This is addressed further in Chapter 8.

In this respect, section 40 provides for referrals to conferences by the NSW Director of Public Prosecutions (DPP) and by courts – referrals by courts can take place at any stage, even after a

finding of guilt. Echoing the guidance for the other referral pathways at pre-court stage, section 40 sets out matters to be taken into account, albeit with slight variation between consideration by the DPP and consideration by the court. However, neither list directly addresses Indigenous over-representation. As a legislative special measure to address a factor of discrimination, it would be preferable for the section to include an express reference to the section 3(d) object of the Act as fundamental to the exercise of the discretion under the section. In this way, consideration of Indigenous over-representation would be central to any decision under section 40.

If a conference is held, section 47 of the *Young Offenders Act* sets out the people who may participate in a conference. There is no direct mention of Indigenous community participation. Instead, section 47(2)(a) provides that a conference convenor may invite 'a respected member of the community, for the purpose of advising conference participants about relevant issues' if the conference convenor considers that this invitation would be appropriate. Unlike the absence of an express reference to Aboriginal over-representation in the sections that deal with whether a conference should be held, the adoption of flexible drafting in this section is positive. It is flexible and facilitative. It does not treat Indigenous children differently but is drafted in such a way as to enable respected persons from any community to participate. While not precluding Indigenous community involvement in a conference, it allows for the fact that an Indigenous child might prefer a respected person who is not Indigenous to be part of the conference.

In May 2021, Youth Justice NSW published a *Youth Justice Conferencing Manual* (the Manual) under section 49 of the Act.[51] The Manual provides further guidance for convenors who conduct conferences. The Manual asks the specific question: Is Youth Justice Conferencing culturally appropriate for Indigenous participants?[52] In answering the question, the Manual re-iterates the importance of addressing over-representation in the justice system of Indigenous young people though greater use of conferences. It then refers to 'traditional processes for resolving disputes within Aboriginal lore' as part of the pedigree of the NSW conferencing system, although it must be recognised that this is a contentious claim given the clear origins of the program in the Wagga Wagga police model.[53] Perhaps more accurately given the complex arrangements under the *Young Offenders Act*, the Manual goes on to

[51] Youth Justice NSW *Youth Justice Conferencing Manual* Department of Communities and Justice NSW May 2021.
[52] Ibid., 7.
[53] Ibid., 7.

acknowledges that conferencing is a 'formal, legislated process' that 'can be regarded as being far-removed from traditional practices' and therefore practiced as a separate process.[54] Nonetheless, the Manual emphasises the need for 'flexibility' and most importantly from the perspective of Article 2 of the CRC, makes the point that,

> the inclusion of cultural elements and cultural communities within the conferencing processes and outcome plan must be self-governed by the young person. … It must not be applied in a 'one size fits all' approach. YJC must be undertaken in a culturally responsive way that is individual to the young person's needs and cultural self-determination.[55]

Such an approach is to be applauded because it allows the young person to determine the extent to which support is required to make the process more inclusive. Unlike the 'bare bones' approach in Victoria or the highly legislated ACT model, the NSW Manual offers a much more modern regulatory approach through comprehensive guidelines that extend beyond indigeneity, to address others bases of potential discrimination – linking also with the other principles of best interests and participation – such as age and level of development, the needs of disadvantaged young people, or those disconnected from their families, the needs of any young people with disabilities, and gender, race and sexuality.

In this respect, the Manual must be seen as something of an antidote to an early review of the *Young Offenders Act* in which it was noted that,

> ... disappointingly, but perhaps not surprisingly, the Act is not yet working as it should in Indigenous communities. Cautioning rates and conference referral numbers for Indigenous children and young people remain low in many parts of the state.[56]

A subsequent review in 2013, found that the diversionary options under the *Young Offenders Act,* including conferences, were effective in diverting both Indigenous and non-Indigenous

[54] Ibid.
[55] Ibid.
[56] Bargen J (unpublished), '*The Young Offenders Act 1997 (NSW) - a blueprint for restorative organisational reform in juvenile justice in NSW*?' A paper presented at the Government Lawyers Conference, Parliament House, Sydney 4 August 1999 quoted in Strang H *Restorative Justice Programs in Australia: A Report to the Criminology Research Council* Criminology Research Council Canberra 2001, 36.

young people from subsequent custodial sentences – when they were used.[57] However, the review also noted that the purpose of section 3(d) was not operating effectively in practice:

> A principle of the YOA is that the over-representation of Aboriginal and Torres Strait Islander children in the criminal justice system should be addressed by the use of warnings, cautions and conferences. It is of concern to find that, compared with non-Indigenous young persons, Indigenous young persons were less likely to be diverted away from the court by police, even after adjusting for factors such as prior cautions, conferences and court appearances.[58]

Two years after this study, figures from 2015 showed that only 32.7 percent of alleged Indigenous young offenders received a diversionary outcome under the NSW Act, which is below 50 percent of the 73.8 percent of non-Indigenous alleged young offenders who were dealt with under the Act.[59] This discrepancy in the rate of referral between Indigenous and non-Indigenous young people has been broadly consistent since 2004, suggesting that the conferencing arrangements have failed to operate in a non-discriminatory way, notwithstanding the objects of the Act set out in section 3 and the various referral pathways in sections 37-41.[60] Interestingly, the Productivity Commission figures published for 2014-2015, also shows some significant difference based on Indigenous status in terms of offences for which conferences take place, with Indigenous children more likely to be referred to conference for arson and 'other offences against the person, whereas non-Indigenous children are more likely to be cautioned for these offences.[61] This suggests that Indigenous children have a different experience of conferencing in NSW based on indigeneity.

More recent data for 2019-2020 and 2020-2021, shows that one third to one half of all conferences in NSW were for Indigenous children.[62] Drilling down further, the rate of conferencing in Orana and the Far West to June 2020 is 1626 per 100,000 for Indigenous Children and 167.4 per 100,000 for non-Indigenous children.[63] During the same period the rate

[57] Wan W, Moore E and Moffatt S 'The impact of the NSW Young Offenders Act (1997) on likelihood of custodial order' (2013) *Crime and Justice Bulletin,* Contemporary Issues in Crime and Justice, No. 166.
[58] Ringland C and Smith N *Police use of court alternatives for young persons in NSW* Contemporary Issues in Crime and Justice Number 167, NSW Bureau of Crime Statistics and Research 2013, 10.
[59] Productivity Commission 2015 (Op.cit.). See esp 16.3
[60] Ibid.
[61] Ibid, Table 11A.3.6.
[62] Productivity Commission 2022 (Op.cit.), Table 17.A11. See also Table 1 in Chapter 3.
[63] Bureau of Crime Statistics and Research (BOSCAR) *Youth Crime* at https://www.bocsar.nsw.gov.au/Pages/bocsar_pages/Young-people.aspx

of conferencing for an Indigenous child in the Northern Beaches was 425.5 per 100,000 and only 16.5 per 100,000 for a non-Indigenous child.[64] However, the rate and basis of referral remains distorted, as set out above, with conferences being used differently, either for a different offence class or where a lower diversionary option would be used for a non-Indigenous child.[65]

While the direct evidence is somewhat limited, it seems likely that both Indigenous disparity and geographic disparity in the use of conferencing in NSW arise as a result of discriminatory (even if unconscious) police practice, either to young people in particular areas or to Indigenous young people. As noted in a recent study on police attitudes to bail, it seems that 'Aboriginal defendants with similar characteristics to non-Aboriginal defendants' face different outcomes from the processes, and are more likely to be refused bail in the first instance by the police, and therefore to have to appear before a court for a bail determination. This warrants further investigation.[66]

The analysis above suggests that the NSW conferencing system requires greater oversight, either through mandatory legal professional involvement, as in Victoria, or via the courts, in order to reduce discrimination. How this might happen is considered further in Chapter 8, where a child rights informed conferencing model is explored. Despite having a clear legislative statement in section 3(d) about the importance of addressing Indigenous over-representation, NSW presents as a jurisdiction that has failed to take sufficient measures to address discrimination in the impact of its program, notwithstanding that on paper it has done so, via the *Young Offenders Act 1997*, as well as in its May 2021 *Youth Justice Conferencing Manual*.

5.4.2 Victoria

In Victoria, Indigenous children represent 1.6 percent of the population aged 10-17, but 16 percent of young people in custody in 2019-2020.[67] This is an over-representation by a factor of 10, which is mirrored in the fact that 16 percent of young people taking part in conferences in the same year were Indigenous: 29 out of 186. [68] This is a slight reduction from 2014-2015,

[64] Ibid.
[65] Productivity Commission 2022 (Op.cit.), Table 17.A11. See also Table 1 in Chapter 3.
[66] Kaluzner I and Yeong S (Op.cit.) 22.
[67] Productivity Commission 2022 (Op.cit.) Table 17.A17 and Table 17A.26
[68] Ibid. Table 17.A11. See also Table 1 in Chapter 3.

when Indigenous children represented almost 20 percent of conference participants: 45 out of 228 conferences.[69]

As noted in Chapter 3, the conferencing regime in Victoria operates on a different basis to New South Wales and the ACT because the only legislative pathway to a conference is a pre-sentence referral by a court under section 414 of the *Children, Youth and Families Act 2005*. In other words, conferences are not an alternative diversionary pathway to a prosecution and a conference is predicated on a formal finding of guilt by the Children's Court. This means that a judicial officer ultimately approves each conference referral and a young person is legally represented (by virtue of section 524 of the *Children, Youth and Families Act 2005*), at the time that a decision is made to refer a child to a conference.

Under section 414(1)(a) of the *Children, Youth and Families Act 2005*, the test for the court is that it is in the interests of the child to defer sentence, and that the child must consent to the deferral. 'In the interests of the child' is not spelt out in the Act and there is no specific mention of Indigeneity as a factor in favour of a conference. The *Children, Youth and Families Act 2005* is otherwise silent on the referral process but sets out the purpose of a conference in general terms in section 415 as:

(a) to increase the child's understanding of the effect of their offending on the victim and the community;

(b) to reduce the likelihood of the child re-offending; and

(c) to negotiate an outcome plan that is agreed to by the child.

As noted above, unlike section 3(d) in the *Young Offenders Act 1997* (NSW), the *Children, Youth and Families Act 2005* does make any reference to the utility of conferencing to address Indigenous over-representation in the youth justice system. Instead, the *Children, Youth and Families Act 2005* is silent on any systemic purpose for its conferencing program beyond the matters listed above.

While the Act makes extensive provision for the establishment of the Children's Koori Court as an alternative sentencing forum and recognises the importance of allowing self-identification of Aboriginality for a child, there is no equivalent provision in the Act to section 3(d) of the NSW legislation, to guide to the treatment of Indigenous young people in the youth justice

[69] Ibid.

system. This is surprising because the *Children, Youth and Families Act 2005* devotes considerable space, in sections 11 – 14 of the Act, to recognising the importance of maintaining Aboriginal family units and establishing Aboriginal decision-making principles to help guide administrative care decisions and decisions in the child protection division of the court. Thus, while indigeneity is recognised as a fundamental legislative value in child protection to address the long history of over-representation of Aboriginal children in out of home care, there is no equivalent guidance for decision making – including the use of conferencing – in the criminal division of the court.

While the Children's Koori Court operates as a distinct division of the court – and can refer a child to a group conference – it does not operate at all court venues, and not all Indigenous children choose to appear before it for any number of reasons. Therefore, given the systemic and consistent over-representation of Indigenous children in Victorian youth crime statistics, there is clear scope in the Victorian legislation to introduce a provision similar to section 3(d) in the *Young Offenders Act 1997* (NSW). Including express legislative recognition of the over-representation of Indigenous youth in the criminal justice system would provide decision makers with helpful guidance as to factors to be considered when deciding whether to refer a child to a conference. This is particularly so, given the mandatory requirement in section 362(3) of the *Children, Youth and Families Act 2005* for a court to impose a 'less severe' sentence on a child who has participated in a group conference than it would have imposed had the child not participated in a group conference. The addition of such a provision would provide a much needed legislative measure to address the systemic discrimination experienced by Indigenous children in Victoria – leaving aside the separate question of whether a court should be able to order a conference as a diversionary alternative to a formal finding of guilt.

Once a referral is made to a conference, section 415(6) and (7) of the *Children, Youth and Families Act 2005* set out who can participate in a group conference. These sections stipulate that it is mandatory for the child and a legal practitioner for the child to attend. They also provide that it is discretionary for a range of other support people for the child, including, under section 415(7), members of the child's family and 'other persons of significance to the child.' The Act does not provide any further guidance on the conference process or even the content of the report to the court on the outcome of the Stage 2 mediated process.

The Victorian Youth Justice Group Conferencing Guidelines were prepared by the then Department of Human Services in 2010, and remain in operation today, with little or no amendment.[70] The Guidelines are primarily for use by conference convenors and require convenors to enlist the assistance of culturally appropriate persons to attend the conference, with express reference to Aboriginal persons. In this respect, the Guidelines provide basic recognition of the special situation for Indigenous children. However, unlike the May 2021 NSW Guidelines, the Guidelines but do not expressly address any discriminatory issues – indigeneity, location, child protection status, cultural background or health/disability status – as reasons to engage in a conference, or as matters to be addressed carefully throughout the conference process.

Overall, the narrow scope of conferencing in Victoria as a post-guilt deferral of sentence option in the Children's Court has the benefit of protecting young people from a major failing of the NSW system, namely the problematic exercise of police discretion. As detailed in the Section 5.3 of this chapter, there is evidence that police cautioning is not exercised evenly across Victoria, and the same study noted that, when all other variables are controlled for, Indigenous status is a significant predictor for cautioning, with 'young people identifying as Aboriginal or Torres Strait Islander approximately twice as likely (*OR* = 2.1) to be charged compared to non-Indigenous young people.'[71] Therefore, although Victoria does not operate conferencing as a pre-court diversionary option in the same way as NSW and the ACT, there is nonetheless evidence that were it to do so, it would likely operate in way that discriminates against Indigenous children. This situation would likely be exacerbated further by the limited legislative provisions, and Guidelines that are over ten years old, and not sufficiently attuned to address the fundamental challenge of over-representation of Indigenous children in the youth justice system.

5.4.3 Australian Capital Territory

As discussed in Chapter 3, the ACT has a comprehensive conferencing regime centred on the *Crimes (Restorative Justice) Act 2004*, which is supplemented by the *Crimes (Restorative Justice) Sexual and Family Violence Offences Guidelines 2018* (the ACT Guidelines). Of the three jurisdictions under review in this thesis, it takes the purest restorative justice approach,

[70] DHS Victoria Youth Justice *Youth Justice Group Conferencing program guidelines* State of Victoria 2010.
[71] Shirley, K *The Cautious Approach: Police cautions and the impact on youth reoffending* Crime Statistics Agency Melbourne 2017, 12-13.

with mandatory victim involvement. Like NSW, it offers conferences as both pre-court diversionary processes via police or prosecution referral, or at any stage of the court process. As in the other two jurisdictions, its conferencing program exhibits systemic problems for Indigenous young people.

Section 36(d) of the *Crimes (Restorative Justice) Act 2004* mandates consideration of a (child) offender's personal characteristics as part of the suitability assessment for a conference for both court referred, and non-court referred diversionary conferences. However, personal characteristics are defined in section 29 to include age, gender and social or cultural background in general terms. There is no requirement to consider specific systemic issues such as indigeneity in deciding whether to engage in a conference. To the contrary, the ACT Guidelines expressly state that when there is insufficient support, a conference should not proceed, even though 'every effort' should be made to include 'supporters with specific expertise in relation to the particular vulnerability, who can assist the participant to have a voice and make decisions in their own best interests.' [72]

As discussed in Chapter 3, the *Crimes (Restorative Justice) Act 2004* requires a child to consent to participate in a conference, and allows, but does mandate, a child to obtain legal advice about their participation. As also noted in Chapter 3, the *Crimes (Restorative Justice) Act 2004* prohibits representation by a legal practitioner during a conference – an advocate who could directly address issues of systemic discrimination – and goes so far as to require them to be assessed by the convenor for their 'suitability to participate in ways that assist offenders to take fullest responsibility and assist victims to feel empowered, vindicated and validated.'[73] There is no consideration of the question of discrimination through this process, and as previously noted, no mention of the need to use diversionary conferencing as a way to work towards reducing Indigenous over-representation in the youth justice system.

In 2014-2015, the rate of referral to youth justice conferences for Indigenous young people in the ACT was approximately one third of the rate of non-Indigenous young people based on the numbers of young people apprehended by police: 16.1 percent for Indigenous referrals compared with 42.8 percent for non-Indigenous referrals.[74] In 2013 – 2014, the figures were 19.9 percent Indigenous referrals and 45.5 percent non-Indigenous referrals (149 and 596

[72] *Crimes (Restorative Justice) Sexual and Family Violence Offences Guidelines 2018,* 15.
[73] Ibid,14.
[74] SCRGSP (Steering Committee for the Review of Government Service Provision) 2015, (Op.cit.) 16.3.

young people respectively); in 2012-2013, the figures were 25 percent and 40 percent (128 Indigenous young people and 814 non-Indigenous young people).[75] In 2019-2020, the numbers had changed: there were only 50 conferences of which four – 8 percent – involved an Indigenous young person.[76] In 2019-2020, Indigenous young people represented only 3.06 percent of young people in the ACT.[77] While the absolute numbers are low, they suggest, as in NSW, that conferencing is used differently for indigenous children compared with non-Indigenous children.

The ACT conferencing legislation commenced in 2004. A first phase review was published in 2006, in which the need to promote the referral of young Indigenous people to restorative justice was recognised, as was the need to strengthen links with the ACT Indigenous community to ensure that the program could achieve positive results for young people.[78] To that end, the ACT Department of Justice and Community Safety at that time 'worked closely' to 'foster positive relationships with the Indigenous community' by making the ACT Aboriginal Justice Centre a member of the Restorative Justice Unit's Reference Group, and disseminating information about restorative justice targeted to the Indigenous community.[79]

However, an ACT Legislative Assembly report in 2008, noted that there are 'difficulties for Indigenous young people', and that 'Indigenous offenders have a higher rate of declining to participate than non-Indigenous.' [80] The same report noted that Indigenous participants had 'a higher rate of noncompliance with their agreements than non-Indigenous', and despite special efforts there is an overall 'difference between Aboriginal and Torres Strait Islander participation and non-Aboriginal and Torres Strait Islander participation.'[81]

Ten years later, the challenge remained. In the May 2019 *Blueprint for Youth Justice in the ACT 2012-2022*, the ACT Government Community Services Taskforce noted that 1,502 young people had participated in a conference under the Act between 2004 and September 2018. [82] The *Blueprint* highlighted that 'restorative justice continues to be an integral and positive part

[75] Ibid.
[76] Productivity Commission 2022 (Op.cit.) Table 17.A11. See also Table 1 in Chapter 3.
[77] Ibid. Table 17.A27
[78] ACT Department of Justice and Community Safety *First Phase Review of Restorative Justice* 2006, 19.
[79] Ibid., 22
[80] ACT Legislative Assembly Standing Committee On Education, Training And Young People *Restorative Justice Principles in Youth Settings – final report* 2008, 116.
[81] Ibid.
[82] ACT Government *Community Blueprint for Youth Justice in the ACT 2012-2022: Final Report*, ACT Government May 2019, 38.

of the response of the ACT youth justice system' but that a priority needed to be 'reducing the over-representation of Aboriginal and Torres Strait Islander children and young people in the youth justice system, including by the use of diversionary conferencing.'[83] The Taskforce identified that working effectively in partnership with the Aboriginal and Torres Strait Islander community would also be a key priority to improving outcomes in the future.[84]

To that end, the ACT now employs a dedicated Indigenous Guidance Partner whose role includes the provision of assistance to Indigenous young offenders and their supporters to understand the restorative justice process and to help them decide whether they will participate.[85] The Indigenous Guidance Partner is also available to support compliance with any outcome plans following a successful conference.[86] In a move likely to establish greater 'buy in' for Indigenous young people, the Indigenous Guidance partner, while working in conjunction with the convenor, nonetheless makes the first contact with all Indigenous young offenders to explain how they can help support them through the process. [87]

The Indigenous Guidance Partner then attends all interviews undertaken by the convenor to determine suitability for participation in restorative justice and attends the conference to provide support and guidance to the person in fulfilling their outcome agreements. [88] This is an innovative role from the perspective of addressing systemic discrimination although it is complicated by the fact that the same person can also advise Indigenous victims on the same basis, giving rise to a potential conflict of interest.

5.5 Indigenous young people and conferencing: An 'Indigenous Irony'

It is often suggested that conferencing programs are of benefit to Indigenous communities because they are seemingly attuned to them because,

[83] Ibid.
[84] Ibid.
[85] See https://www.justice.act.gov.au/standard-page/indigenous-support
[86] Ibid.
[87] Ibid.
[88] Ibid.

> … the potential exists in the openness of the process to differing cultural sensibilities and to addressing relations of inequality. [Conferencing] has the potential to promote a 'dialogic view of morality' compared to the 'monologic voice of law'.[89]

However, the above analysis of the three jurisdictions under review suggests that this is not necessarily happening on the ground. An early study of the New Zealand family group conferencing system reported that while 'conferences could transcend tokenism and embody a Maori process, they often failed to respond to the spirit of Maori or [to reach outcomes] in accord with Maori philosophies and values'.[90] This early study noted that 'the new system [of conferencing] remains largely unresponsive to cultural differences', a situation that the study identified as being a consequence, at least in part, of the government not honouring its commitment to provide resources.[91] This was despite the fact that the New Zealand legislation 'specifically advocates the use of culturally appropriate processes and the provision of culturally appropriate services.'[92] The authors of this study suggest that problems of communication and understanding arose when differing cultural groups were represented as crime offenders and victims in a conference. Since that time, scholarly literature relating to the New Zealand program ranges from hesitantly positive[93] or lukewarm[94] to strongly critical[95] of how well the conference process has grappled with cultural, class and racial differences.

Within Australia, while conferencing is generally acknowledged as being beneficial for young Indigenous offenders because of the greater flexibility and potential to incorporate a wider range of factors, questions have been raised about the appropriateness and effectiveness of

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[89] Daly K 'Restorative Justice: the real story' Revised paper from plenary address given to the Scottish Criminology Conference, Edinburgh, 21-22 September 2000; see also La Prairie C 'Altering Course: New Directions in Criminal Justice: Sentencing Circles and Family Group Conferences' (1995) 28 *Australian & New Zealand Journal of Criminology* 78, 84.

[90] Maxwell, G and Morris, A 'Research on Family Group Conferences with Young Offenders' in Hudson J, Morris A, Maxwell G and Galaway B (eds.) *Family Group Conferences: Perspectives on Policy and Practice* Annandale The Federation Press 1996, 95-96.

[91] Ibid.

[92] Morris, A 'Creative Conferencing: Revisiting Principles, Practice and Potential', in Morris A and Maxwell G (eds.) *Youth Justice in Focus: Proceedings of an Australasian Conference held 27-30 October 1998 at the Michael Fowler Centre*, Wellington: Institute of Criminology, Victoria University of Wellington, 4.

[93] Lynch, N 'Restorative Justice through a Children's Rights Lens (2010) 18 *International Journal of Children's Rights* 161, 167.

[94] Olsen et al., 9Op.cit.) 1995; Maxwell, G and Morris, A 'Research on Family Group Conferences with Young Offenders' in Hudson J, Morris A, Maxwell G and Galaway B (eds.) *Family Group Conferences: Perspectives on Policy and Practice* Annandale The Federation Press 1996; Tauri J and Morris A 'Re-forming Justice: The Potential of Maori Processes' (1997) 30 *Australian and New Zealand Journal of Criminology* 149.

[95] Tauri J 'Explaining Recent Innovations in New Zealand's Criminal Justice System: Empowering Maori or Biculturalising the State?'(1999) 32 *Australian and New Zealand Journal of Criminology* 153.

conferencing in Indigenous communities. For example, the following observations remain valid in respect of Indigenous experience of the various youth justice conferencing arrangements,

9. a failure to negotiate and consult with Aboriginal communities and organisations when programs were first established, whether as pilots or as formal legislated programs;[96]

10. concerns about the discretionary powers of police in the referral process;

11. inadequate attention to cultural differences during conference processes; and

12. only tokenistic recognition of Indigenous rights.[97]

Going further, 'the disregard for Indigenous Australians and their distinct cultural differences, combined with police discrimination, has led to indirectly discriminative restorative justice practices which are largely inaccessible to Indigenous youth.'[98] Such inaccessibility occurs when conferencing is either not recommended as an option for Indigenous children, or conversely, it is used as a net-widening mechanism in circumstances where a less interventionist outcome would be given to a non-Indigenous child offender.[99] Similarly, youth conferencing appears to be less effective in reducing recidivism by Indigenous young people post-conference than for non-Indigenous young people.[100]

[96] Blagg H 'A just measure of shame? Aboriginal Youth and conferencing in Australia' (1997) 37 *British Journal of Criminology* 481, 492, 496 (noting the fact that police have played a far from neutral role in the social control of Aboriginal Australians since colonisation). Kelly and Oxley similarly refer to the 'social trauma' caused by dispossession, child removal and criminalisation, and point out that this is 'within the living memory of Indigenous people': Kelly L and Oxley E 'A dingo in sheep's clothing: The rhetoric of Youth justice conferencing' (1999) 4 *Indigenous Law Bulletin* 4, 5. Bargen J 'Kids, cops, courts and conferencing: A note on perspectives' (1996) 2 *Australian Journal of Human Rights* 209, 215.

[97] Cunneen, C 'Community Conferencing and the Fiction of Indigenous Control' (1997) 30 *Australian and New Zealand Journal of Criminology* 292.

[98] Sewak et al 2019 (Op.cit), 8. See also Cunneen C, White R, and Richards K, *Juvenile Justice: Youth and Crime in Australia* (5th ed) Oxford University Press 2013, 357; Blagg, H 'Restorative Visions and Restorative Justice Practices: Conferencing, Ceremony and Reconciliation in Australia' (1998) 10 *Current Issues in Criminal Justice* 5.

[99] Sewak S, Bouchahine M, Liong K, Pan J, Serret C, Saldarriaga A and Farrukh E *Youth Restorative Justice: Lessons From Australia* A Report for HAQ Centre for Child Rights 2019, 8. See also Cunneen C, White R, and Richards K, *Juvenile Justice: Youth and Crime in Australia* (5th ed) Oxford University Press 2013, 357; Taussig, I *Youth Justice Conferences: Participant profile and conference characteristics* NSW Bureau of Crime Statistics and Research Issue Paper no. 75, 2012, 10.

[100] Little S, Stewart A, Ryan N 'Restorative Justice Conferencing: Not a Panacea for the Overrepresentation of Australia's Indigenous Youth in the Criminal Justice System' (2018) 62 *Int J Offender Ther Comp Criminol* 4067, 4081.

From the perspective of non-discrimination, the above analysis of the NSW, Victorian and ACT youth conferencing programs suggests an 'Indigenous Irony' that has the following four characteristics:

i. As discussed in Chapter Two, champions of modern restorative justice often hail restorative justice programs – including conferencing – as having been derived from Indigenous – and specifically Maori – cultural practice.

ii. Conferencing is therefore – at least superficially – seen as organically Indigenous and therefore advanced as especially culturally appropriate for Indigenous communities. Conferencing is therefore viewed as beneficial in the Australian context as a means of addressing over-representation of Indigenous young people in the youth justice system.[101]

iii. Despite these first two characteristics, the data demonstrate that Indigenous young people are not being referred to, or otherwise able to access, legislated conferencing programs at the rate that their numbers within the youth justice system would suggest that they should, especially if conferencing is valued for this cohort. There is a discrepancy between the proportion of young Indigenous people accessing the various youth justice conferencing programs compared to their non-Indigenous counterparts, a point recognised in wider research. [102]

iv. However, even when Indigenous young people are referred to conferences, the data analysed above, especially in NSW, suggest that Indigenous youth are referred inappropriately when no equivalent action would be taken against a non-Indigenous young person. There is no other way to explain the difference in rate of referral of 16.5 conferences per 100,000 non-Indigenous young people in parts of Sydney and 1626 conferences per 100,000 Indigenous young people in Orana and the Far West – a region that even conferences non-Indigenous young people 'only' at a rate of 167.4 per 100,000. While section 3(d) of the *Young Offenders Act* emphasises the need to use

[101] Xin Yi Chua S and Foley T 'Implementing Restorative Justice To Address Indigenous Youth Recidivism And Over-Incarceration In The Act: Navigating Law Reform Dynamics' (2014/2015) 18 *Australian Indigenous Law Review* 138.
[102] Cunneen C, White R and Richards K *Juvenile Justice: Youth and Crime in Australia* (5th ed.) Oxford University Press, 2013, 357.

> diversionary options to address Aboriginal over-representation, these staggering differences in conferencing rates perpetuate discrimination, rather than address it.

In addition, there is some argument that Indigenous cultural participation in conferencing is ultimately, even if unintentionally or unconsciously, discriminatory on the basis of research that suggests that,

> … while Indigenous young people are represented as belonging to communities, non-Indigenous young people are not – at least, not beyond their 'community of care' meaning that … the[re are risks of] disproportionate responsibilisation of Indigenous young people, families and communities.[103]

In other words, does specific Indigenous cultural recognition in conferencing legislation and program guidelines, particularly regarding attendance of Elders or respected persons, give rise to unintended discrimination, by viewing Indigenous offenders as qualitatively different to non-Indigenous offenders? This is a complex question that warrants

In respect of Indigenous children, Kelly and Oxley's early study noted that youth justice conferences typically involved an Indigenous young 'offender', a non-Indigenous 'victim' and a convenor who demographically matches the victim.[104] On this basis, they concurred with earlier research that suggested that restorative justice techniques could 'just operate to extend the scope of police powers over Aboriginal young people, intruding on what would otherwise be considered the domain of welfare.'[105] This constitutes discrimination in breach of Article 2 of the CRC. More recent research revisited this question of police control and reached a similar conclusion, cautioning against 'formal, police-driven youth justice conferences' because of its net widening scope for differential treatment for while remaining supportive of conferencing more generally.[106] This research also concluded that '[b]est practice programs seek to minimise the involvement of police officers in restorative justice processes whereas in Australia, conferences are run by police or youth justice officers, who may also be responsible for the

[103] Richards K 'Locating the community in restorative justice for young people in Australia' (2014) 12 *British Journal of Community Justice* 7.
[104] Kelly L and Oxley E, 'A dingo in sheep's clothing: The rhetoric of Youth justice conferencing' (1999) 4 *Indigenous Law Bulletin* 4, 5. See also Bargen J, 'Kids, cops, courts and conferencing: A note on perspectives' (1996) 2 *Australian Journal of Human Rights* 209, 215
[105] Blagg, H 'A just measure of shame? Aboriginal Youth and conferencing in Australia' (1997) 37 *British Journal of Criminology* 481, 483.
[106] Walsh, T 'From Child Protection To Youth Justice: Legal Responses To The Plight Of 'Crossover Kids'' (2019) 108 *University of Western Australia Law Review* 90, 108.

initial charge.'[107] This raises real issues for the ACT and NSW where, despite child rights affirming legislation in the ACT, and a new more flexible Manual in NSW, police and other prosecuting or youth justice agents are the primary initiators of conferences with concomitant risk of discriminatory outcomes on a systemic level, as demonstrated in the data.

5.6 Conclusion

This chapter has identified that each of the three jurisdictions being analysed in this thesis display signs of systemic discrimination in violation of Article 2 of the CRC. The different referral rates for non-Indigenous and children in definable locations demonstrates the existence of discrimination in diversionary (i.e. non-court) youth conferencing – even when factors such as age, sex and prior criminal history are taken into account.[108] The data point to a conclusion that Indigenous and non-metropolitan children are not being referred to the programs at the same rate or on the same basis as non-Indigenous and metropolitan children. The fact that a far higher proportion of Indigenous children live in remote locations, compared to non-Indigenous children, exacerbates the issue.

The primary referral pathway to a diversionary conference in each jurisdiction except Victoria is via an investigating police officer. However, the data suggests that there are insufficient safeguards to ensure non-discrimination at this crucial first stage. Even in NSW with its 2021 Manual and clear legislative statement of the need to address Indigenous over-representation in the justice system, the somewhat convoluted referral approval process via a specialist youth officer does not appear to reduce discrimination – and indeed, seems to make no discernible difference for regional children in particular, given the very different referral rates amongst different police command regions.

While it is not possible to examine each and every case to determine the reasons why – or why not – a matter was referred (or not) for a conference, the overall pattern suggests that there is, at best, an implicit bias that affects the decision whether to refer a young person to a conference.

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[107] Walsh, T 'From Child Protection To Youth Justice: Legal Responses To The Plight Of 'Crossover Kids'' (2019) 108 *University of Western Australia Law Review* 90, 108. See also McAra L and McVie S 'Youth justice: The impact of system contact on patterns of desistence from offending' (2007) 4(3) *European Journal of Criminology* 315, 320.

[108] Snowball L and Weatherburn D 'Indigenous over-representation in prison: The role of offender characteristics' (2006) *Crime and Justice Bulletin*, Contemporary Issues in Crime and Justice, No. 99. See also Taussig, I *Youth Justice Conferences: Participant profile and conference characteristics* NSW Bureau of Crime Statistics and Research Issue Paper no. 75, 2012, 10.

This may be because of insufficient knowledge of conferencing options by police. Or it might be due to specific individual prior knowledge of the young person or the family – especially in remote areas – or the way in which an investigating officer discusses the conference in order to obtain the young person's consent or because of statutory limits on the types of offences or number of times that a young person can be referred.

The evidence suggests that these referral decisions are being made differently for Indigenous and remote children than for non-Indigenous and metropolitan children. In addition, there is some evidence that other groups of children, such as 'cross-over' children in the child protection system might be referred to a conference for offences in their placements for which 'mainstream' children might only receive a warning, or when there is insufficient evidence to sustain a charge. The problem seems worst when the discretion to refer to a conference rests with the investigating or prosecuting agency – the police – and there is no independent oversight to ensure that conferencing is not used in a discriminatory way.

NSW has the clearest legislation with its reference to Indigenous over-representation in section 3(d) of the *Young Offenders Act 1997* (NSW). At the same time, the problem of police inconsistency remains, and the rates of conferencing suggest that it operates to widen the youth justice net more than address over-representation. In this respect, the Victorian approach of having the court as the referral pathway for all conferences achieves the best outcomes from a non-discrimination point of view, even if this reduces the number of conferences, compared to a 'busier' conferencing jurisdiction such as NSW. That said, allowing courts to order diversionary conferences, similar to the options available under the legislative frameworks in NSW and the ACT would improve the Victorian approach further. This because it would maintain the significant advantage of minimising stigma by an ultimate outcome of not having a matter determined by a court, while at the same time providing a greater degree of consistency and independence in the conference referral process. This would also accord with international best practice in which police gate-keeping is not supported.[109]

Five questions were asked in part 5.2 of this chapter:

1. Are there differences in the operation of conferencing programs based on location?

[109] McAra L and McVie S 'Youth justice: The impact of system contact on patterns of desistence from offending' (2007) 4(3) *European Journal of Criminology* 315, 320.

2. Are there differences in the operation of conferencing programs based on whether the child offender is Indigenous?
3. Is conferencing being used to address Indigenous over-representation in the youth justice system in each jurisdiction?
4. Is conferencing made available to Indigenous children in a culturally appropriate way, that respects, protects and fulfils their rights?
5. What measures are needed to ensure that conferencing programs contain sufficient measures to address discrimination based on indigeneity or location?

The answers to the first four questions are clear. There are definite differences in the operation of conferencing programs based on location, and likewise discernible differences for Indigenous young people based on the rates of referral. The way in which conferencing is used, especially in NSW, suggests that it is not being used effectively to address Indigenous over-representation but instead perpetuates it – despite the positive statement in its legislation. The ACT Indigenous Guidance partner provides one model to help make conferencing more culturally appropriate.

The analysis in this chapter leads to the conclusion for the final question that there is a need for legislative reform, as well as changes to administrative practices, resource allocation and education and training to overcome the systemic discrimination that exists within the youth conferencing programs in all three jurisdictions. Compliance with Article 2 of the CRC would be significantly enhanced if the Children's Court/Youth Court were the sole referral pathway, or at least had a clear power to refer a young person to a diversionary conference where this has not been previously approved. Likewise, the ACT Indigenous Guidance Partner is a positive innovation, and a similar proposal is explored in Chapter 8 as part of the CRIC Model. This, and other reform measures to address discrimination in youth conferencing, are discussed in-depth in Chapter 8, in the context of a proposed new model to align youth conferencing with children's rights.

CHAPTER 6

The Best Interests Principle and Youth Conferencing: Can they Coexist?

Table of Contents

6.1 Introduction

This chapter analyses whether the NSW, Victorian and ACT youth conferencing programs are consistent with the 'best interests' principle derived from Article 3(1) of the CRC. This analysis is crucial to answering the first research question in this thesis, namely,

> Do the legislated child conferencing programs in NSW, Victoria and the ACT respect, protect and fulfil children's rights in accordance with the core principles of the UN Convention on the Rights of the Child?

Fundamentally, no program relating to children can be considered child rights compliant if it is not based on the best interests of the child.

Article 3(1) of the CRC provides that,

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Sometimes seen as an 'indeterminate' or 'subjective' concept, it has been argued that it is difficult to establish what the principle means and how it is to be applied on a case-by-case basis for any matter concerning a child.[1] More specifically, there are two complexities that are relevant to conferencing. First, there is a degree of ambivalence about the place and applicability of the best interests principle within youth justice generally. As McCall-Smith has noted, many jurisdictions take a 'sectoral' approach to the incorporation of CRC rights, with best interests seen to sit comfortably in some areas – such as family law – but less so in youth justice.[2] Second, there are particular concerns because of the relational aspects at the core of restorative justice: how are the best interests of child offenders respected in restorative justice processes where the express focus is on the needs of victims and the community? In this respect, the fundamental question is whether the best interests of a child offender can be

[1] For example, per Brennan J in *Department of Health and Community Services v JWB* (1992) 175 CLR 218 at 271: 'it must be remembered that, in the absence of legal rules or a hierarchy of values, the best interests approach depends upon the value system of the decision maker'. See also Shelton D 'Introduction, Law: non-law and the problem of 'soft law" in Shelton D (ed.) *Commitment and compliance: the role non-binding norms in the international legal system* Oxford University Press Oxford 2000, 1. For criticism prior to the CRC, see Mnookin, R 'Child-Custody Adjudication: Judicial Functions in The Face Of Indeterminacy' (1975) 39 *Law and Contemporary Problems* 225, 229.

[2] McCall-Smith, K 'To Incorporate the CRC or Not: Is This Really the Question?' (2019) 23 *International Journal of Human Rights* 425, 426.

reconciled with the interests of others given the overall objectives of restorative justice as set out in Chapter 2. While acknowledging that child offending can involve child victims, this thesis, and this chapter, focuses on child offenders, noting that there is already an extensive body of work about the rights of child victims in restorative justice.[3]

This chapter begins with an exploration of the place, basis and substance of the best principle in the CRC and the insight into its meaning and application that the CRC Committee has provided. This is followed by an analysis of the extent to which the best interests principle is applied in the NSW, Victorian and the ACT youth conferencing programs. The chapter concludes that the best interests principle is not clearly articulated or consistently applied in the three conferencing programs under review because of its ambivalent place in each jurisdiction's conferencing regime despite its fundamental relevance to international children's rights standards.

6.2 The origins and relational challenge of a child's best interests

The origins of the Article 3(1) 'best interests' principle, pre-dates the CRC. As a concept, it emerged out of the *parens patriae* doctrine discussed in Chapter 4, and express reference to the 'best interests of the child' in an international instrument first appeared in the 1959 *UN Declaration of the Rights of the Child*. Principle 2 of that Declaration provided that,

> The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, *the best interests of the child* shall be the paramount consideration.[4] [emphasis added]

Also predating the CRC, the best interests principle made two appearances in the 1979 *Convention on the Elimination of All Forms of Discrimination against Women*[5] and has been

[3] Gal, T *Child victims and restorative justice: a needs-rights model* Oxford University Press, Oxford, 2011; see also Vanfraechem I, Bolívar Fernández D and Aertsen, I *Victims and Restorative Justice* Routledge 2017.
[4] Principle 2 of the 1959 *UN Declaration on the Rights of the Child.*
[5] UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13. See article 5(b) and article 16(1)(d).

referred to by the Human Rights Committee in General Comments on the application of the ICCPR in regards to issues associated with family break-up.[6]

Of note, however, is a shift in Article 3(1) CRC from the earlier wording of '*the paramount* consideration' in the *1959 Declaration*, to the phrasing of best interests as '*a primary* consideration.' This change was a matter of much debate during the drafting of the CRC. Initially, the 1959 wording was considered for inclusion as a guiding principle for the CRC, or alternatively, the phrase '*the* primary consideration' [emphasis added].[7] Both of these formulations were rejected in favour of the current wording, which is intended to accommodate the idea that a child's best interests are not necessarily the only consideration in matters involving children.[8] In this respect, the use of the indefinite article "a" instead of the definite article "the" signifies that other matters can be considered, and, if necessary, given appropriate weight depending on the circumstances.

To underline the significance of this drafting distinction, a number of other articles in the CRC that address specific issues, such as Article 21 with respect to adoption, take a different approach: 'States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be *the paramount consideration.'* [emphasis added]. Thus, in the context of adoption, no person's interests should take precedence over the best interests of the child. As Alston has noted, the use of the phrase '***a*** primary consideration' rather than '***the*** primary consideration' in Article 3(1) means that the best interests standard permits a certain flexibility that allows other peoples' interests to prevail in some cases.[9] Of course, a question then arises with respect Article 3(1) and determining where the 'balance ought to be struck' when competing interests are involved.[10]

In response to this question, the CRC Committee stated that 'the right of a child to have his or her best interests taken as a primary consideration means that the child's interests have high

[6] See Human Rights Committee ICCPR *General Comments Nos. 17 and 19*, HRI/GEN/1/Rev.8, pp. 185 and 189.
[7] Freeman, M. *A commentary on the United Nations Convention on the Rights of the Child, Article 3: The best interests of the child.* Brill Nijhoff (2007).
[8] For an overview of drafting history, see Eekelaar J and Tobin J 'Article 3: The Best interests of the Child' in Tobin J *The UN Convention on the Rights of the Child: A Commentary* Oxford Commentaries on International Law, Oxford Scholarly Authorities on International Law (OSAIL) 2019, 96-97.
[9] Alston P 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' in Philip Alston (ed), *The Best Interests of the Child: Reconciling Culture and Human Rights* (1994), 13.
[10] Tobin J 2019 (Op.cit.), 98.

priority and [are] not just one of several considerations.'[11] In other words, the CRC Committee position is that 'a larger weight must be attached to what serves the child best.'[12] There are three factors that justify this interpretation of the impact of the principle. First, it is justified on a textual basis within the broader *corpus* of international law because the CRC is the only treaty that establishes that the interests of a particular social group need to be treated as a primary consideration: therefore, the intention of the drafting of the CRC is clear.[13] The second justification is both factual and moral: decisions that affect children 'will have a longer-term or more significant impact on their interests, relative to others whose interests are also at stake.'[14] The third justification is that children have 'a special vulnerability' and therefore 'it is reasonable to demand that some degree of priority be accorded to the children's interests in such circumstances.'[15] On this basis, the CRC Committee has explained that:

> If the solution chosen is not in the best interests of the child the grounds for this must be set out in order to show that the child's best interests were [treated] as a primary consideration, despite the result.[16]

Thus, the best interest principle cannot simply be displaced as not relevant. Nor can it be treated as secondary or subsidiary to other interests, such as a victim's interests, in a youth conference: 'the best interests principle is considered to be a right of children to demand that their best interests are a primary consideration in all matters affecting them.'[17] Therefore, the best interests principle needs to be considered alongside other interests – and this applies equally in all actions concerning children. This point was also made by the High Court in the case of *Minister of State for Immigration and Ethnic Affairs v Teoh* in which it was held that, from an administrative decision-making perspective,

[11] UN Committee on the Rights of the Child *General Comment No 14: The Right of the Child to Have his or her Best Interests Taken as a Primary Consideration' (29 May 2013)* UN Doc CRC/C/GC/14, para 39.
[12] General Comment 14, para 39.
[13] Tobin 2019 (Op.cit.), 98-99
[14] Tobin 2019 (Op.cit.) 98-99
[15] Ibid.
[16] General Comment 14, para 97.
[17] Tobin, J *The Convention on the Rights of the Child: The Rights and Best Interests of Children Conceived Through Assisted Reproduction* Victorian Law Reform Commission 2004, 4.

> A decision-maker with an eye to the principle enshrined in the Convention would be looking to the best interests of the children as a primary consideration, asking whether the force of any other consideration outweighed it.[18]

In other words, it is only after the principle has been given active consideration that a decision can be made as to the extent to which it is relevant to a particular situation. This construction of the best interests principle in Article 3 highlights challenges for youth conferencing. This is because, as discussed previously, the restorative justice foundations of conferencing axiomatically require a central focus on the interests of the victim and community, rather than the best interest of the child offender.

On the one hand, the open/indefinite construction of the best interests principle in Article 3(1) does not of itself establish a *prima facie* contradiction between the best interests principle as found in the CRC and youth conferencing as an expression of restorative justice because it conceptually allows for the best interests of the child offender to be balanced with other persons' interests in a youth conference. At the same time, while a simple reading of article 3(1) exhibits no *prima facie* contradiction between the best interests principle and restorative justice principles that underpin youth conferencing on the basis that the best interests principle is not *the* primary consideration, this approach does not mean that the principle sits comfortably within conferencing where 'a victim-centred approach is not in line with recognition of special characteristics of children.'[19]

6.3 The meaning of best interests principle and General Comment 14

But what does the 'best interests of the child' mean? Article 3(1) has a very wide compass insofar as it imposes a very broad obligation on States Parties to consider the best interests of the child 'in *all* actions concerning children' whether initiated or carried out by private bodies, NGOs or the state. The effect is that the terms of Article 3 'should not be narrowly construed.'[20] Further, Article 3(1) establishes not only a right in itself but should also be considered in the

[18] *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 per Mason CJ and Deane J at 292.
[19] Lynch, N 'Restorative Justice through a Children's Rights Lens (2010) 18 *International Journal of Children's Rights* 161, 178.
[20] General Comment 14, para 26.

interpretation and implementation of all other rights.[21] This necessarily includes the youth justice rights contained in Articles 37 and 40.

However, the definition and application of the best interests standard has provoked much debate: '[it] is one of the most complicated concepts to pin down, and the Committee defines it as 'a dynamic concept that requires an assessment appropriate to the specific context.'[22] In addition, the fundamental utility and legitimacy of the principle has been challenged on the basis that the concept is 'indeterminate and speculative' at its heart – in other words, that it has no concrete meaning.[23] A related concern centres on the subjectivity of the principle and the concomitant challenges presented by applying it in a kaleidoscope of cultures – for instance divergent Indigenous and non-Indigenous settings – and situations.[24] A further concern that appears throughout academic writing on the best interests principle is the suggestion that the principle means both everything and nothing, with the effect that it operates as a virtual invitation for unfettered discretion founded on an ill-defined principle that simply serves to mask an individual decision-maker's 'beliefs and values' as the basis for decisions about the future of a child.[25] Tobin responds to this assertion by stating that,

> While the principle remains a fluid and flexible concept, it is not unfettered or entirely subject to the personal whims of a decision-maker. Rather, it is informed and constrained by the rights and principles provided for under the Convention. Put simply, a proposed outcome for a child cannot be said to be in his or her best interests where it conflicts with the provisions of the Convention.[26]

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[21] Ibid., para 1. See also Alston P 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' in Philip Alston (ed), *The Best Interests of the Child: Reconciling Culture and Human Rights* (1994) 1, 2; Breen, Claire. *The Standard of the Best Interests of the Child: A Western Tradition in International and Comparative Law*. The Hague: Kluwer Law International, 2002, ch1.

[22] Ruggiero, R 'Article 3: The Best Interest of the Child' in Vaghri Z., Zermatten J., Lansdown G and Ruggiero R (eds) *Monitoring State Compliance with the UN Convention on the Rights of the Child. Children's Well-Being: Indicators and Research*, vol 25. Springer 2022, 22.

[23] Mnookin, R 'Child-Custody Adjudication: Judicial Functions in The Face Of Indeterminacy' (1975) 39 *Law and Contemporary Problems* 225, 229.

[24] UN Committee on the Rights of the *Child General comment no. 11 Indigenous children and their rights under the Convention*, (2009) CRC/C/GC/11 para 30. See also Long, M and Sephton, R 'Rethinking the "best interests" of the child: Voices from Aboriginal child and family welfare practitioners' (2011) 64 *Australian Social Work* 96.

[25] Banach, M 'The best interests of the child: Decision-making factors. Families in Society' (1998) 79 *The Journal of Contemporary Human Services* 331. See also Kelly, J 'The best interests of the child: A concept in search of meaning' (1997) 35 *Family and Conciliation Courts Review* 377.

[26] Tobin, J *The Convention on the Rights of the Child: The Rights and Best Interests of Children Conceived Through Assisted Reproduction* Victorian Law Reform Commission 2004, 4.

The CRC Committee has also provided increasing guidance on the meaning of the best interests principle and its nexus to the Convention as a whole through its General Comments and Concluding Observations processes. The CRC Committee has consistently emphasised that Article 3(1) is fundamental to the overall implementation of the CRC. [27] To this end, the CRC Committee has explicitly linked Article 3(1) to the overall obligation contained in Article 4 of the CRC that provides that States are required to take 'all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention.'[28] The point that starts to emerge is the indivisible and inseparable nature of the best interests principle from a children's rights approach more generally. The CRC Committee has further emphasised that engagement and proper compliance with children's rights, including the best interests principle, hinges on regular review and reassessment at all levels including both government and NGO levels. *General Comment No. 5 on General measures of implementation of the Convention on the Rights of the Child* (2003) did not, however, engage with an exploration of the scope and meaning of the best interests principle.

However, this was remedied in 2013 when the CRC Committee published *General Comment No. 14 On the right of the child to have his or her best interests taken as a primary consideration* (2013). This General Comment provides more specific guidance to States Parties on the substance and implementation of Article 3(1). Reflecting the particular challenge in youth conferencing when different parties – child, victim, police, parents – hold different, and potentially diverging interests, *General Comment 14* provides some assistance to understanding the meaning to be attached to the principle and with reconciling these differences. In effect, General Comment 14 starts from the recognition that the 'best interests of the child is prone to misapplication in a range of circumstances' such as when 'lip-service' is given to the principle to bolster or justify a position, or by those who seek to 'balance or trade (perhaps negatively) the rights of the child with the rights of others.'[29] The CRC Committee recognises this in General Comment 14 and states that,

> The best interests of the child is a dynamic concept that encompasses various issues which are continuously evolving. The present general comment provides a framework

[27] UN Committee on the Rights of the Child (CRC), *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5, para 12; see also General Comment 14, para 1.
[28] Article 4. CRC
[29] Tobin, J 'Judging the Judges: Are They Adopting the Rights Approach in Matters Involving Children?' (2009) 33 *Melbourne University Law Review* 579.

> for assessing and determining the child's best interests; it does not attempt to prescribe what is best for the child in any given situation at any point in time. … [The] overall objective is to promote a real change in attitudes leading to the full respect of children as rights holders.[30]

It further provides that,

> the purpose of assessing and determining the best interests of the child is to ensure the full and effective enjoyment of the rights recognized in the Convention and its Optional Protocols, and the holistic development of the child.[31]

To this end, *General Comment 14* provides that the assessment of a child's best interests is 'a unique activity to be undertaken in each individual case, in the light of the specific circumstances of each child, or group of children, or children in general.'[32] Thus, it becomes an individual right and from the perspective of youth conferencing, each individual child offender's best interests must be considered at each stage of a youth conference at which a decision is made. This requires those involved in the initial decision to refer a child to a conference to consider whether a conference is in a child's best interests. It also requires participants in the later stages of a conference to consider a child's best interests in the development of an outcome plan and in its execution. This would include a victim who has a power of veto over a conference outcome plan or to authorities that have the right to withdraw a conference referral prior to a conference having been held but after a child has consented to take part in the process.[33]

General Comment 14 sets out a number of substantive factors to guide an assessment or determination of a child's best interests. These factors including taking into account the child's views on a particular decision or course of action; paying attention to the child's identity; recognising the importance of the preservation of the child's family environment and maintaining relations with the child's family; where appropriate, taking into account the need to ensure the care, protection and safety of the child; actively considering any situation of vulnerability facing the child; furthering the child's right to health; and furthering the child's

[30] General Comment 14, paras 11 – 12.
[31] Ibid., para 82.
[32] Ibid., para 48.
[33] For example, see section 47(3)(a) *Crimes (Restorative Justice) Act 2004* (ACT); section 44 *Young Offenders Act 1997* (NSW).

right to education.[34] Setting out the types of matters that can be taken into account in determining a child's best interests provides much needed guidance as to what had otherwise been a somewhat open-ended concept that could be used as a convenient jurisprudential band-aid to cover over cracks or gaps in any substantive analysis of the particular circumstances of an individual child or group of children – including in a conference setting. These substantive factors are relevant at each stage of a conference because they are individual to the child. They need to be considered in a decision of whether to refer a child to a conference, for example to consider whether a child's care and protection status merits a diversionary conference outcome instead of a prosecution. They are relevant in any meeting between those affected by the child's conduct because a child's vulnerability could affect the way in which they engage in this part of the conference process and therefore be relevant to the development of a suitable outcome plan.

General Comment 14 further provides guidance on navigating the inter-relationship between the matters that go to the substance of a best interests assessment. This guidance includes a recognition that not all the elements are relevant to every case in the same way and that 'different elements can be used in different ways in different cases.'[35] It also provides a recognition that different elements may be in conflict, depending on the circumstances.[36] In undertaking a substantive and relational best interests assessment, *General Comment 14* further imports the need to recognise the evolving capacity of the child – itself, a principle recognised in Article 5 of the CRC. Having regard to the evolving capacities of the child, General Comment 14 provides that,

> decision-makers should therefore consider measures that can be revised or adjusted accordingly, instead of making definitive and irreversible decisions. To do this, they should not only assess the physical, emotional, educational and other needs at the specific moment of the decision, but should also consider the possible scenarios of the child's development, and analyse them in the short and long term. In this context, decisions should assess continuity and stability of the child's present and future situation.[37]

[34] General Comment 14, paras 53 – 79.
[35] Ibid., para 80.
[36] Ibid, para 81.
[37] Ibid., para 84.

Two issues emerge from this statement that affect a child at key points throughout the conference process. First, the question of decision makers is important. As noted above, this could extend beyond conference convenors. It can involve any person – primarily police – involved in a decision to refer a child to a conference. It can include any person with a legislated power to veto a conference progressing, such as a specialist youth officer in NSW under section 44 of the *Young Offenders Act 1997* (NSW). It would also extend to any participant who has a role in the determination and approval of an outcome plan, which in some jurisdictions includes the victim or all conference participants. Second, are continuity and stability useful factors where a child is engaging in offending conduct, especially if in the context of difficult wider personal or environmental circumstances? This question is important at the different stages of the conference process because a child's presentation at the referral stage – for example at a police station – could change in the short term. Likewise, the conduct of the conference and the formulation of an outcome plan need to be formulated having regard to a child's evolving capacity, including any change in the child's circumstances since the time of the alleged conduct that brought the child into conflict with the law.

General Comment 14 sets out eight procedural safeguards associated with the best interests principle, a number of which intersect with fundamental participatory and procedural rights, highlighting the linkages between Articles 3, 12 and 40.[38] In particular, these rights include the right of the child to express their own view, the right to have facts established by competent well-trained professionals, the importance of timely decision making, a requirement for legal representation when a child's best interests are being assessed, the use of legal reasoning to demonstrate that a child's best interests have been a primary consideration in any matter, and mechanisms to review decisions. These rights are discussed further in Chapter 7.

In addition to *General Comment 14*, *General Comment 24* links the best interests principle to the administration of youth justice. It provides that 'weight should be given to the child's best interests as a primary consideration [in youth justice] as well as the need to promote the child's reintegration into society.[39] This reinforces the place of the Article 3(1) principle in all youth justice programs and processes, including conferencing**.** In addition, rule 14.2 of the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")* also endorses the best interests principle as applicable to youth justice programs, adding

[38] Ibid., paras 85-99.
[39] UN Committee on the Rights of the Child (CRC) *General comment No. 24 (2019) on children's rights in the child justice system* CRC/C/GC/24, para 76.

weight to the argument that the best interests principle under Article 3 CRC should be understood and applied as a dynamic principle within the youth justice system generally, and youth conferencing specifically.[40]

Thus, based on the General Comment 14, giving effect to the best interests principle in Article 3(1) involves a consideration and application of substantive, relational and procedural elements. Further, Article 3(1) applies to youth justice and therefore applies in youth conferencing. The analysis in this chapter demonstrates that this is not the case in any of the three jurisdictions under review.

6.4 The CRC best interests principle in Australia

Although Australia has ratified the CRC, the convention as a whole is not part of Australian domestic law. As a dualist nation, ratification of a treaty by Australia does not make a treaty part of domestic law; legislation must be enacted in order to give a treaty domestic effect.[41] However, the failure to incorporate the entirety of the CRC into domestic law does not mean that it has no relevance in Australia. In fact, the best interests principle provides a counter-story and a clear demonstration of a sectoral approach to implementation of the CRC.[42] This arises because the principle is well-embedded in family law and child protection legislation at both Commonwealth and State level.

For example, it is legislated in section 60CA – 60CC of the *Family Law Act 1975* (Commonwealth) with respect to being a parenting orders, even though it has not been included in section 43 of the Act as a principle to be applied generally by courts exercising family law jurisdiction. Likewise, it has been incorporated into state and territory child protection legislation, such as section 8 and section 349 of the *Children and Young People Act 2008* (ACT) or section 10 of the *Children, Youth and Families Act 2005* (Victoria). Further, section 60CC(3) of the *Family Law Act 1975* (Commonwealth), section 349 of the *Children and Young People Act 2008* (ACT) and section 10 of the *Children, Youth and Families Act 2005* (Victoria) each provide a list of factors to guide how the best interests is to be ascertained; each list fundamentally mirrors the substantive matters identified by the CRC Committee in General

[40] *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")* A/RES/40/33 29 November 1985, 96th plenary meeting, rule 14.2.
[41] Tobin, J 'Incorporating the CRC in Australia' in Kilkelly U, Lundy L and Byrne B *Incorporating the UN Convention on the Rights of the Child into National Law'* Cambridge University Press 2021, 22.
[42] McCall-Smith, K 2018 (Op.cit.), 426.

Comment 14, including the importance of seeking the child's views and wishes, should they be ascertainable.

It is therefore clear that it is possible to legislate the best interests principle into legislation in Australia in such a way to reflect Article 3(1). However, with one exception in the ACT, discussed below, the same approach has not been taken in youth justice. The CRC Committee has observed and commented on Australia's underwhelming compliance with Article 3. In particular, in response to Australia's second and third periodic reports, the CRC Committee stated in its Concluding Observations that,

> 27. The Committee is concerned that this principle, while laid down in many laws and policies, is not always reflected in the implementation phase of legislation and policies, e.g. in the area of alternative care. [43]
>
> 28. The Committee recommends that the State party strengthen its efforts to ensure effective implementation of the general principle of the best interests of the child as enshrined in article 3 of the Convention in all legal provisions as well as in judicial and administrative decisions and in projects, programmes and services that have an impact on children.[44]

Thus, The CRC Committee recognised and highlighted the disconnect between legislation and policy on the one hand and the practical implementation of the principle, on the other. This position was echoed and taken further in the next Concluding Observations on Australia, in 2012, when the CRC Committee stated that,

> 32. The Committee urges the State party to strengthen its efforts to ensure that the principle of the best interests of the child is widely known and appropriately integrated and consistently applied in all legislative, administrative and judicial proceedings and all policies, programmes and projects relevant to, and with an impact on children. In this regard, the State party is encouraged to develop procedures and criteria to provide guidance for determining the best interests of the child in every area, and to disseminate

[43] CRC/C/15/Add.268, para 27-28.
[44] CRC/C/15/Add.268, para 27-28.

them to public and private social welfare institutions, courts of law, administrative authorities and legislative bodies.[45]

This Concluding Observation emphasised the universality of the best interests principle and its relevance in 'every area', which includes youth conferencing. Most recently, the Committee stated in its 2019 Concluding Observations in response to Australia's fifth and sixth periodic reports that,

> 20. With reference to its general comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration and recalling its previous recommendations on the best interests of the child (CRC/C/AUS/CO/4, para. 32), the Committee recommends that the State party:
>
> (a) Ensure that procedures and criteria guiding all relevant persons in authority for determining the best interests of the child and for giving it due weight as a primary consideration are coherent and consistently applied throughout the State party;
>
> (b) Make publicly available all judicial and administrative judgments and decisions regarding children, specifying the criteria used in the individual assessment of the best interests of the child.[46]

At the same time, the comments from the CRC Committee are very general and do not specifically nominate youth justice as an area in which the best interests principle is not addressed sufficiently in legislation or policy or implemented in practice: this interpretation is by implication only. As Gerber and Timoshanko have noted the 'Committee can improve its Concluding Observations by providing more specific and tailored recommendations' rather than providing general observations that do not assist the State Party to any extent in implementing the recommendations.[47]

However, based on the work of the CRC Committee in its General Comments and Concluding Observations to Australia, it is possible to discern how the best interests principle should be

[45] CRC/C/AUS/CO/4, para 32.
[46] CRC/C/AUS/CO/5-6, para 20.
[47] Gerber P and Timoshanko A 'Is the UN Committee on the Rights of the Child Doing Enough to Protect the Rights of LGBT Children and Children with Same-Sex Parents?' (2021) 4 *Human Rights Law Review* 786, 804.

interpreted and applied. It is also possible to identify examples in which it has been incorporated in Australian legislation. The next section analyses specifically how Article 3 is being applied – or not applied – in youth conferencing in the three Australian state and territories under review.

6.5 Application of the Best Interests Principle to Current Youth Conferencing Programs in NSW, Victoria and the ACT

A 2011 comparative review of Australia's state and territory found that there is 'an an alarming degree of disparity between the various jurisdictions' in their application of Article 3 in a youth justice context.[48] In the decade since, nothing has changed. NSW, Victoria and the ACT have poor compliance with Article 3 from both a substantive and procedural perspective when it comes to their conferencing programs.

6.5.1 New South Wales

The object of the *Young Offenders Act 1997* (NSW) is to establish a scheme that provides an alternative process to court proceedings for children who commit certain offences through the use of cautions, warnings and youth justice conferences. Section 7 of the Act endorses the use of least restrictive sanction and to the extent that these diversionary outcomes are in the best interests of the child, they align with the principle. In addition, while the best interests principle was recognised in a strategic youth justice review, there is only one express reference to the principle in the Act.[49] Section 48(3) addresses who may attend a conference, and provides that,

> If the conference convenor is of the opinion that the presence of a person (other than the child or any victim) may frustrate the purpose or conduct of a conference, or is otherwise **not in the best interests of the child**, the convenor may, having regard to the views of the child, exclude that person from attending the conference at all or may, during the course of the conference, exclude the person from continuing to attend the conference.

This section 48(3) shows only limited engagement with the best interests principle. The principle is applied at a key stage of the conference process when the process could be de-

[48] Coppins V, Casey S and Campbell A 'The Child's Best Interest: A Review of Australian Juvenile Justice Legislation' (2011) 4 *The Open Criminology Journal* 23, 29.
[49] Noetic Solutions *A Strategic Review of the New South Wales Juvenile Justice System Report for the Minister for Juvenile Justice* Noetic Solutions Sydney 2010.

railed by another participant and can only be exercised in a child-centric manner insofar as the convenor is mandated to seek the views of the child as part of the determination to exclude a person from the conference. In order to comply with Article 3 of the CRC, the legislation should recognise the best interests of the child in all aspects of youth conferencing, not just who may attend.

Section 34 of the Act touches on the principles and purposes of conferencing. This section addresses some substantive matters that could fall under the best interests umbrella as set out in *General Comment 14*, such as strengthening the child's connection with their family, being culturally appropriate and ensuring outcomes that promote development, and are appropriate for the child, particularly given their age. Similar matters are listed in section 52 with respect to more specific rules for the final conference outcome. However, section 52 provides a victim who attends a conference has an ability to veto the whole conference without any cause – clearly contradicting the CRC Committee's focus on clarity and justification of decision-making around a best interests assessment under Article 3.

Section 44 imposes a test of 'interests of justice' for a specialist youth officer not to continue with a conference. However, this is a distinctly different standard and cannot be considered comparable to a consideration of the best interests of the child.

The NSW *Youth Justice Conferencing Manual*, published in 2021, is the most comprehensive set of guidelines of the three jurisdictions and operates in conjunction with a portal at which a convenor can obtain a substantial amount of information, including questionnaires and checklists to assist them in their role. [50] The *Youth Justice Conferencing Manual* includes communication tips and practice tips for convenors meeting with young people prior to the Stage 2 mediated process. These tips include asking the young person about any cultural elements or community involvement in a conference and recognising that conferences should be 'self-governed' by the young person and that conferences should not operate in a 'one-size-fits-all' manner. Similarly, communication methods are to be adjusted depending on the person although curiously, convenors are instructed to minimise the use of text messages. This is a curious position because it is is potentially inconsistent with the best interests of the child

[50] Youth Justice NSW *Youth Justice Conferencing Manual* (version 1.0) NSW Department of Communities and Justice 2021; see also https://www.youthjustice.dcj.nsw.gov.au/Pages/youth-justice/conferencing/youth-justice-conference-convenor.aspx.

insofar as they may be less engaged with the process if they are not free to use their preferred means of communication.

The *Youth Justice Conferencing Manual* also emphasises that participants in the conference must also 'deal with children in a way that reflects their rights, needs and abilities and provides opportunities for development' but also hold children 'accountable for offending behaviour and encourage children to accept responsibility for their offending behaviour.'[51] Conference convenors – who are local volunteers or sessional staff – must complete a four day induction course through Youth Justice NSW that focuses on conference process and then undertake five hours annual training for each year of appointment and be observed in conducting at least one conference per year.[52] It is unclear whether the training covers children's rights based on the CRC in any detail or even at all.

From a best interests perspective, the combination of the materials and structured convenor process provides some support for a conferences to operate within the substantive and procedural limbs of the best interests principle as articulated by the CRC Committee in *General Comment 14*. However, a lot of these materials are new and relatively untested. Compliance with them is also not mandatory; they are mere guidelines. For youth conferencing in NSW to comply with Article 3, the legislation needs to call for conference convenors to identify and focus on the best interests of child offenders. This could be achieved by, for example, including in the objects of the Act in section 3, that the best interests of the child is a primary consideration of the program (along with the needs of victims, addressing Indigenous over-representation and emphasising restitution and acceptance of responsibility by the offender).[53] Such a legislative mandate should then flow through to the Manual and the training that convenors receive.

6.5.2 Victoria

Victoria demonstrates a clear example of a legislative disconnect between the best interests principle as set out in the CRC and youth justice arrangements, including conferencing, under the *Children Youth and Families Act 2005*. This disconnect arises because of the interplay

[51] Youth Justice NSW 2021 (Op.cit.), 8.
[52] Youth Justice MSW *Conferencing Convenor Management Policy* NSW Department of Communities and Justice 2020 at https://www.youthjustice.dcj.nsw.gov.au/Documents/yjc/Youth-Justice-Conference-Convenor-Management-Policy.pdf.
[53] Section 3 *Young Offenders Act 1997* (NSW).

between sections 9 and 10 of the Act. While section 10 sets out a formulation of the best interests principle, section 9(2) expressly excludes its application to the youth justice provisions in the Act, which includes all provisions relating to youth conferencing. Part of the explanation for this could be that section 10 of the *Children Youth and Families Act 2005* in 2004-2005 uses language that is more consistent with the 1959 Declaration with its reference to best interests as 'paramount' rather than framing best interests as 'a primary consideration' as per article 3(1) of the CRC. That is, the standard in section 10 is actually stronger than the language used in the CRC, suggesting that the drafters of the legislation considered the best interests of the child to be very important in care, welfare and protection proceedings in the Family Division of the Children's Court, but did not see the same right being relevant in the youth justice system.

Instead, deferral of sentence to take part in a conference under *Children, Youth and Families Act* is dependent on section 414(1)(a) of the Act which allows the court to defer sentence for the child to participate in a conference where the court considers that it is in the interests (but not necessarily the best interests) of the child to do so. The Victorian position under the *Children Youth and Families Act 2005,* is at odds with the CRC, but also contradicts the then state Attorney General Rob Hulls' very clear position, in September 2004, in relation to his justification for increasing the age jurisdiction of the Children's Court of Victoria from 17 to 18, being that that the change would 'bring Victoria into line with the United Nations Convention on the Rights of the Child.'[54]

At the same time, despite the legislative deficiency in the *Children Youth and Families Act 2005,* there is a line of judicial reasoning that has emerged through the exercise of section 17(2) of the *Charter of Rights and Responsibilities Act 2006* (Vic) as a way to incorporate CRC standards, including Article 3(1) into the Victorian youth justice system. Section 17(2) of the *Charter of Rights and Responsibilities Act 2006* provides that 'Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.'[55]

[54] Hulls R Second reading speech *Children and Young Persons Age Jurisdiction Bill* 16 Sept 2004 in Hansard of the Victorian Legislative Assembly.
[55] Section 17(2) *Charter of Rights and Responsibilities Act 2006* (Vic).

In *DPP v SL*[56] and *DPP v SE,*[57] Justice Bell held that under section 6(2)(b) of the *Charter*, the court is obliged to apply the relevant *Charter* rights in relation to sentencing, bail proceedings and detention at court and trial. As the Charter reflected the standards of the International Covenant on Civil and Political Rights, this instrument can also be taken into account as discretionary considerations by the court. At paragraph 11 of *DPP v SE,* Bell J held:

> These requirements [enabling a more child-friendly process] arise as a matter of human rights under the Charter and, on a discretionary basis, under certain international obligations. They especially arise under the fundamental principle of the best interests of the child.[58]

The court went further, highlighting the need to ensure effective participation of the child in the sentencing process, resting its reasoning in sections 8(3) (equal protection under the law) and 25(3) of the *Charter* (right to procedures which take into account a child's age and the desirability of rehabilitation), and, in relation to the later section, 'its counterparts in the ICCPR and CROC'.[59]

Similarly, in *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children,* Justice Garde held that the CRC and 'materials from the United Nations inform the scope of the rights protected by s 17(2) of the Charter'.[60] As well as General Comments issued by the CRC Committee, and the UN Human Rights Committee, Justice Garde also referenced the Beijing Rules.[61] In combination, Garde J held that these materials provide 'an established international framework by which substance and standards can be given to s 17(2)'.[62] In coming to this position, Garde J held that Articles 3(1) as well as Articles 6(2), 12 and 40(1) of the CRC were relevant for this purpose. In particular, Justice Garde held that Article 3(1) of the CRC creates special protective obligations 'because 'children differ from adults in their physical and psychological development, and their emotional and educational needs.'[63]

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[56] *DPP v SL* [2016] VSC 714.
[57] *DPP v SE* [2017] VSC 13.
[58] *DPP v SE* [2017] VSC 13 per Bell J at 11.
[59] *DPP v SE* [2017] VSC 13 per Bell J at 11.
[60] *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children* [2016] VSC 796 per Garde J at 146.
[61] Ibid. at 154.
[62] Ibid. at 154.
[63] Ibid. at 149.

Another Victorian case that involved the direct application of the best interests principle is *Certain Children v Minister for Families and Children & Ors*.[64] In this decision, Justice Dixon noted the similarity between Article 24(1) of the ICCPR and Article 3(1) of the CRC, and section 17 of the *Charter*. For Dixon J, the international instruments stressed that children require different treatment in the criminal justice process by reason of their age and continuing development. In particular, this includes Article 3 because, as the CRC Committee stressed, children differ from adults in their development and needs.[65] Justice Dixon endorsed the earlier views of Justice Garde.

Victoria is better placed to respect the best interests of the child in youth conferencing than NSW because of the Charter. Thus, although the legislation specifically governing youth conferencing in Victoria is weak when it comes to requiring the best interest of children be considered in the youth justice context, the state's human rights legislation helps overcome this shortfall. However, while leveraging the *Charter* is helpful to address shortcomings in the *Children Youth and Families Act*, it would be better to amend the *Children Youth and Families Act* to include a clear statement that the best interests of the child are a primary consideration in all criminal proceedings, including in the conduct of a conference under s414 and s415.

The other advantage that Victoria has from a best interests protection point of view is, as discussed throughout this thesis, its unique position of mandating that the child's legal practitioner participates in the conference process. This is important because legal representation as identified as a key best interests safeguard in General Comment 14.[66]

6.5.3 ACT

The ACT is a story in two Acts, the *Children and Young People Act 2008* and the *Crimes (Restorative Justice) Act 2004*. The best interests principle is embedded in child justice legislation in the *Children and Young People Act 2008* which applies in the ACT Children's Court, but not is absent – and in fact contradicted – in the *Crimes (Restorative Justice) Act 2004* which governs conferencing.

In section 8 of the *Children and Young People Act 2008*, the best interests of the child is expressed as 'the paramount consideration.' While Victoria has a similar statement in section

[64] *Certain Children v Minister for Families and Children & Ors (No 2)* [2017] VSC 251
[65] Ibid. per Dixon J at 262.
[66] General Comment 14, para 96.

10 of the *Children Youth and Families Act 2005*, as noted above, section 9(2) of the Victorian legislation excludes it from operation in connection to the criminal provisions under the Act. By contrast, section 8(2) of the *Children and Young People Act 2008* (ACT) augments the best interests of the child with the youth justice principles contained in section 94. Uniquely in Australia, section 94(3) provides that 'the youth justice principles are intended to be interpreted consistently with relevant human rights instruments and jurisprudence.' Section 94(3) expressly lists the CRC as an example for this purpose.

However, this legislation does not directly apply to conferencing, which is covered by the *Crimes (Restorative Justice) Act*. There are number of anomalies under the *Crimes (Restorative Justice) Act* that limit the child's best interests from being the determinative factor at key decision points in the conferencing process. Section 33(1) of the Act sets out general conditions of suitability for restorative justice in the following terms:

> In deciding whether restorative justice is suitable for an offence, the director-general must consider the following:
>
> (a) any government or administrative policy relating to the treatment of offences of the relevant kind;
>
> (b) the nature of the offence, including the level of harm caused by or violence involved in its commission or alleged commission;
>
> (c) the appropriateness of restorative justice at the current stage of the criminal justice process in relation to the offence;
>
> (d) any potential power imbalance between the people who are to take part in restorative justice for the offence;
>
> (e) the physical and psychological safety of anyone who is to take part in restorative justice for the offence.

None of these factors take into account the best interests of the child as conceived in the jurisprudence of the CRC. Likewise, section 36, which addresses the suitability of an offender, the director-general of restorative justice in the ACT is directed to consider,

> (a) the extent (if any) of the offender's contrition or remorse for the offence;

(b) the offender's personal characteristics;

(c) the offender's motivation for taking part in restorative justice;

(d) the impact of the offence as perceived by the offender.

Section 39 further provides that a conference cannot be called for an offence unless an eligible victim or parent, as well as the offender, given consent for a conference to be called. This effectively gives a victim a veto over whether a conference takes place, regardless of whether a conference is in the best interests of the child. While section 39 imposes an obligation on the director-general to advise participants of their 'rights and duties at law and under this act' this does not include any express requirement for a victim or the director-general to consider whether a conference in in a child's best interests. Similarly, the discontinuance of conferencing under section 47 of the *Crimes (Restorative Justice) Act* again does not require any consideration of the child's best interests as a determinative factor.

At the same time, the ACT program performs better than NSW or Victoria from a best interests point of view under section 46 in which it provides for greater variety of forms of conference, such as face to face meeting, exchange or statements or pre-recorded videos, or teleconferencing or videoconferencing. Given the variety of circumstances of individual child offenders, the choice of conference media is better able to give effect to their best interests in their participation in the conference.

When it comes to the development of an outcome plan from a conference, section 51 of the *Crimes (Restorative Justice) Act* provides that an agreement must include measures intended to repair the harm caused by the offence. The section sets out that agreements must be fair, cannot be unlawful, degrading, humiliating or otherwise cause distress to an offender. However, there is no requirement to consider that an agreement for a child needs to consider their best interests as a primary consideration.

The *Crimes (Restorative Justice) Act* applies to both adults and children. It is however surprising that a jurisdiction with otherwise strong child rights protection in the *Children and Young People Act 2008* has adopted a position under the *Crimes (Restorative Justice) Act* that ignores assessment of a child's best interests at fundamental points at each stage of a conference. This is further complicated by the fact that section 44(3) prohibits the participation in a conference of persons acting for a conference participant in a professional capacity – which

expressly includes lawyers. This contradicts the CRC Committee position with respect to the importance of legal representation in assessment of a child's best interests.[67]

Unlike the other two jurisdictions in which community volunteers (NSW) or NGOs (Victoria) run the conferencing programs, the ACT conferencing program is managed by the ACT Government Restorative Justice Unit, which sits within ACT Government Community Services Unit. According to their website, 'the Office of Children, Youth and Family Support Caseworkers from the OCYFS and RJU convenors liaise regularly on the management of young people to ensure that the best interests of young people remains a priority throughout their restorative justice experience.'[68] However, there is no legislative requirement to do so.

Further, unlike Victoria, the *Human Rights Act 2004 (ACT)* does not have an equivalent provision to section 17(2) of the *Charter of Rights and Responsibilities Act 2006* (Vic) with a clear reference to the best interests of the child, meaning that, despite having human rights legislation, it is more difficult to seek judicial outcomes in the way that has been achieved in Victoria.

Overall, the central tenet of the conferencing program under the ACT's *Crimes (Restorative Justice) Act* is that a young offender must accept responsibility for their criminal actions. As discussed in Chapter 3, the Act does not make the needs of the young offender a priority, instead elevating the position of the victim. Nor does the Act show any consideration for the young person's reintegration into the community as part of the outcome plan, which is again focused on the victim's needs. In fact, when considered in its entirety, the focus on the victim at the expense of the young offender contradicts Article 3 of the CRC.[69]

6.6 Conclusion

In the introduction to this chapter, it was noted that the best interests principle presented challenges in conferencing. First, there is an ambivalence about the place of the best interests principle in youth justice arrangements in Australia generally. It is only specifically included in legislation in one of the three jurisdictions, namely the *Children and Young People Act 2008* (ACT). However, this Act does not apply to conferencing, which is governed by the *Crimes*

[67] General Comment 14, para 95.
[68] https://www.justice.act.gov.au/sites/default/files/2019-08/MinisterialReview_RJU_SEP2006.pdf
[69] Coppins V, Casey S and Campbell A 'The Child's Best Interest: A Review of Australian Juvenile Justice Legislation' (2011) 4 *The Open Criminology Journal* 23, 27.

(Restorative Justice) Act 2004 (ACT). On the other hand, Victoria has a clear statement of the best interests principle in its *Charter of Human Rights and Responsibilities Act 2006* (Vic), and this has been used effectively in Supreme Court litigation for young people in custody. However, in all three jurisdictions Article 3 of the CRC has not been given a clear legislative basis in any youth conferencing programs. On this basis, none of the programs can be said to be fully compliant with the CRC on this point.

Second, even if it were legislated, the question remains about its relationship with other interests, and especially victim interests, in a conferencing program. Surprisingly, despite being one of two jurisdictions with human rights legislation, the ACT's paramount focus on victims in its conferencing legislation makes it non-compliant with the best interests of the child being a primary consideration as set out in Article 3 of the CRC.

Third, what does best interests mean? Here, the work of the CRC Committee provides clear guidance as to the substantive, relational and procedural aspects of the principle. Notwithstanding, the legislative gap in each jurisdiction, NSW has the strongest framework for protecting the best interest of the child, two reasons. First, the structure of its purely diversionary *Young Offenders Act* means that clear principles have been articulated for young people who fall within the scope of the Act for cautions, warnings and conferences. By contrast, the ACT program is based in legislation that covers both adults and children and the Victorian program is constrained by the rules around deferral of sentence. Second, NSW has developed comprehensive materials and training for its convenors, which address matters that are relevant to the best interests of the child as interpreted by the CRC Committee. Although these materials are not legislated, they provide a good model for other jurisdictions to follow.

It is clear that the foundational pillars of restorative justice do not *prima facie* mean that conferencing is inconsistent with the application of the best interests principle in Article 3(1) CRC: the child's best are to be a primary consideration but are not required to be the paramount consideration. However, there is a lack of specific guidance either in legislation – where it is either absent in connection with conferencing or subordinated to other interests – or program guidelines in each of the three jurisdictions under review to ensure, that consistent with the CRC, the child's best interests are a primary consideration at each stage of a conference. Finally, in General Comment 14, the CRC Committee identified that the ability for a child to exercise their rights, including their best interest rights, depends on fundamental right of the child to express a view and be heard. This is the addressed in the next chapter.

CHAPTER 7

Can you hear me? Conferencing, Article 12 and Article 40

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7.1 Introduction

This chapter considers whether the conferencing programs in the three jurisdictions analysed for this thesis, respect, protect and fulfil the rights of the child under Articles 12 and 40 of the CRC. This analysis is essential in order to answer the two research questions:

3. Do the legislated child conferencing programs in Victoria, NSW and the ACT respect, protect and fulfil children's rights in accordance with the core principles of the UN Convention on the Rights of the Child?

4. If not, what reforms would be needed to make youth conferencing compliant with the CRC?

Articles 12 and 40 are fundamental to conferencing because they relate to the child's right to be heard and to the child's associated participatory, procedural and youth justice rights as derived from the CRC. Article 12 is a 'crucial right' in CRC, while Article 40 is a multi-faceted provision that relates specifically to children who are alleged to have infringed the law.[1] The nexus between the two articles is that the rights set out in Article 40 are fundamentally underpinned by the right to express views and to have these views given due weight under Article 12.

The chapter starts by analysing Article 40 and its application to youth conferencing programs. Article 40 creates specific child rights and imposes obligations on State Parties to the CRC, with respect to youth justice arrangements. It therefore has application to the analysis of the conferencing programs as programs that sit within a youth justice framework. If youth conferencing is to be compliant with the CRC, then it must comply with Article 40.

While Article 40 needs to be understood and applied in the context of the CRC as a whole, including the core principles in Articles 2 and 3 examined in the previous two chapters, Article 12 has particular significance to Article 40 because it provides the vehicle for a child to exercise their due process rights under Article 40 in connection with youth justice responses such as conferencing.

[1] UN Committee on the Rights of the Child (CRC) *General Comment No. 5 (2003) General measures of implementation of the Convention on the Rights of the Child* (arts. 4, 42 and 44, para. 6) CRC/GC/2003/5 para 50.

In this respect, this chapter argues that a substantive application of Article 12 can be achieved in conferencing programs by a complementary reading of Hart's well-known ladder of participation with Lundy's more recent model. At present, the conferencing programs do not reach this standard and therefore do not comply with Articles 40 or 12.[2]

7.2 Article 40: A separate framework for youth justice

As discussed in Chapter 4 in connection with the evolution of children's rights, separate rules for the treatment of children in criminal law began to emerge in the 19th century. Dominated by welfare concerns, it 'was based on the premise that crime was a sign of personal pathology, which required a cure rather than punishment.'[3] As discussed in Chapter 2, the welfare model fell out of favour in the 1960s and 1970s, to be supplanted by the justice model in which the primary focus was greater attention to the same due process rights as adults coupled with modified sentencing processes.

The justice model had significant shortcomings that included a disregard for the 'reality of children's experiences and their cognitive development, which differs markedly from adults.'[4] In contrast, Article 40 CRC offers a 'progressive' approach that 'overcomes the limitations of the justice and welfare models, whilst simultaneously retaining their strengths' by providing children with 'special rights to accommodate their relative immaturity and evolving capacities *and* an entitlement to the due process rights enjoyed by adults within criminal justice systems.' [5] In this respect, van Bueren made the following observations,

> Upon adoption of the Convention on the Rights of the Child, there was much rejoicing at the potential of Article 40 to transform child justice systems, which were still governed by the punitive, to those more closely aligned to the family court principles of the best interests of the child….[6]

[2] Hart, R *Children's participation: From tokenism to citizenship*. Florence: UNICEF 1992; Lundy, L 'Voice is not enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child' (2007) 33 *British Educational Research Journal* 927.
[3] Tobin J and Read C 'Article 40 The Rights of the Child in the Juvenile Justice System' in Tobin, J (ed.) *The UN Convention on the Rights of the Child: a commentary* Oxford University Press 2019, 1600.
[4] Ibid., 1601.
[5] Ibid.
[6] Van Bueren G 'Article 40: Child Criminal Justice' in: Alen A, Vande Lanotte J, Verhellen E, Ang F, Berghmans E and Verheyde M (Eds.) *A Commentary on the United Nations Convention on the Rights of the Child* Martinus Nijhoff Publishers, Leiden, 2006, 1.

Van Bueren also noted that,

> As with other articles of the Convention, many of the provisions enshrined in Article 40 are *de novo*. These include minimum age, the emphasis on diversions, and the promotion of the child's sense of dignity and worth as a fundamental principle of the child criminal justice system. [7]

Article 40 is a comprehensive provision consisting of four sections and over 500 words. Each of the sections addresses a different theme. Article 40(1) sets out general principles. Article 40(2) contains an important list of rights and guarantees intended to ensure that every child alleged as or accused of having infringed the penal law receives fair treatment and trial. Many of these guarantees can also be found in Article 14 of the International Covenant of Civil and Political Rights and cover matters such as the presumption of innocence, the right to be promptly informed and to have legal or other appropriate assistance, the right to a fair hearing and to have matters determined without delay, freedom from compulsory self-incrimination and the right to an interpreter and to appeals. Article 40(3) sets out the requirement for special laws and measures for children in conflict with the law including a minimum age of criminal responsibility and diversionary processes. Article 40(4) imposes obligations with respect to ensuring a variety of alternative dispositions to institutional care to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

As well as a strong inter-dependency with Article 12, in order for the child to have the agency to exercise these rights, Article 40 must be understood in the context of the other core principles of the CRC. With respect to the prohibition against discrimination under Article 2, Article 40 requires State Parties to ensure that all children in conflict with the law are treated equally with the effect that states need to 'take positive measures' to address the needs of especially vulnerable cohorts of children such as 'street children, children belonging to racial, ethnic, religious or linguistic minorities, indigenous children, girl children, children with disabilities and children who are repeatedly in conflict with the law.'[8]

Likewise, the Article 3 best interests' principle discussed in Chapter 6, applies to every aspect of a child's engagement with the justice system – including youth conferencing – and this must

[7] Ibid. 7.
[8] Tobin, 2019 (Op.cit.), 1603.

be understood in the context of the rights contained in the two articles being examined in this chapter, namely the due process rights listed under Article 40 and the right of children to express their views on all matters affecting them under Article 12.

In 2019, the CRC Committee issued *General Comment 24* to 'provide a contemporary consideration of the relevant articles and principles in the Convention on the Rights of the Child, and to guide States towards a holistic implementation of child justice systems that promote and protect children's rights.'[9] *General Comment 24* was issued to replace General Comment 10 because of 'developments that have occurred since 2007. … the Committee's jurisprudence, new knowledge about child and adolescent development, and evidence of effective practices, including those relating to restorative justice.'[10] In order to demonstrate compliance with the CRC, and in particular, Article 40, the three conferencing programs under review should meet the standards set out in *General Comment 24*.

7.3 *General Comment 24*, restorative justice and conferencing and Article 40(1)

While *General Comment 24* re-enforced the principle that 'preservation of public safety is a legitimate aim' of the child justice system, it also expressly stated that this aim is subject to 'obligations to respect and implement the principles of child justice as enshrined in the Convention on the Rights of the Child.'[11] Specifically, these principles include the overarching requirements under Article 40(1) which provides:

> States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.[12]

Given the discussion in Chapter 2 about the principles of restorative justice, it is clear that Article 40(1) 'aligns with the restorative justice model' because of its emphasis on 'a non-retributive model of accountability,' its emphasis on respect for the rights of others and its end goal of reintegration.[13] To this extent, there is no dispute that the *existence* of youth

[9] UN Committee on the Rights of the Child *General comment No. 24 (2019) on children's rights in the child justice system* CRC/C/GC/24, para 6.
[10] Ibid., para 1.
[11] Ibid., para 3.
[12] Article 40(1) CRC.
[13] Tobin 2019 (Op.cit), 1602..

conferencing programs can be seen to conform with Article 40(1). However, the legislative purpose and objective of the New South Wales, Victorian, and ACT conferencing programs offer mixed adherence to the standards of Article 40(1).

The purpose and objectives of the Victorian conferencing program are set out in section 315(4) and (5) of the *Children Youth and Families Act 2005* (Vic.) in the following terms:

> (4) The purpose of a group conference is to facilitate a meeting between the child and other persons (including, if they wish to participate, the victim or their representative and members of the child's family and other persons of significance to the child) which has the following objectives—
>
> (a) to increase the child's understanding of the effect of their offending on the victim and the community….
>
> (c) to negotiate an outcome plan that is agreed to by the child.
>
> (5) An outcome plan is a plan designed to assist the child to take responsibility and make reparation for his or her actions and to reduce the likelihood of the child re-offending.

These purposes emphasise the rights and fundamental freedoms of others – victims and the community – but do not expressly import the other elements of Article 40(1) relating to a child's dignity, worth and reintegration. Instead, while principles of promotion of child dignity and reintegration can be derived in the non-binding Guidelines, these do not have the status or authority of a statutory instrument.[14]

By contrast, section 34(1) of the *Young Offenders Act 1997 (NSW)* provides a more encompassing set of statutory principles for conferencing that includes a focus on reintegration of the child in section 34(1)(a)(iii):

> (1) The principles that are to guide the operation of this Part and persons exercising functions under this Part, are as follows—

[14] DHS Victoria *Youth Justice Group Conferencing program guidelines*, April 2007, 2.

(a) The principle that measures for dealing with children who are alleged to have committed offences are to be designed so as—

(i) to promote acceptance by the child concerned of responsibility for his or her own behaviour, and…

(iii) to provide the child concerned with developmental and support services that will enable the child to overcome the offending behaviour and become a fully autonomous individual, and

(iv) to enhance the rights and place of victims in the juvenile justice process; and…

(vi) to have due regard to the interests of any victim.

Compared with Victoria, section 34 aligns better with Article 40(1) because its reference to assisting the child to overcome offending and become an autonomous individual better reflects the CRC focus on the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

The purposes of restorative justice in section 6 of the *Crimes (Restorative Justice) Act 2004* (ACT) are drafted to apply equally to adults and children, and do not address young offenders specifically. As such, section 6 includes a strong focus on victim rights and prioritising victim interests and is understandably silent on the other matters in Article 40(1).

In order to meet the standards set out in *General Comment 24*, the legislative purposes of each program should be amended to include an express reference to the importance of recognising the child offender's 'dignity and worth' in all steps of the conference process. And the legislation governing youth conferences should expressly refer to the importance of supporting a child's best interests and their reintegration, in addition to any express reference to the interests of the victim.

7.4 *General Comment 24*, restorative justice, conferencing, and Article 40(2) and (3)

General Comment 24 expressly lists conferencing as a form of restorative justice.[15] It also confirms that diversion for the purposes of Article 40(3)(b) of the CRC includes 'measures for referring children away from the judicial system, at any time *prior to or during* the relevant proceedings [emphasis added]. [16] This is important for two reasons. First, it envisages the possibility for diversionary outcomes operating through a court. For the NSW and the ACT programs, this would mean that the risks associated with diversionary conferencing that occur outside court process such as such as net-widening or failure to comply with procedural rights, could be obviated by restricting diversionary conferences to court referrals. Second, for Victoria, this reading of Article 40(3) could extend conferencing to be a diversionary option and not just a dispositional option. Introducing relevant changes would contribute to greater compliance with Article 40 for all three jurisdictions, particularly when understood in the context of further guidance contained in *General Comment 24*.

In this respect, *General Comment 24* re-stated the importance for diversionary programs, including conferencing, to comply with the Article 40(3)(b) requirement to 'ensure that the child's human rights and legal safeguards are fully respected and protected.'[17] Procedurally, the CRC Committee has emphasised important procedural matters built on the requirements of Article 40(2). These requirements include that diversionary options outside the court system should only be used when there is 'compelling evidence that the child committed the alleged offence, that he or she freely and voluntarily admits responsibility, without intimidation or pressure, and that the admission will not be used against the child in any subsequent legal proceeding.'[18] Compliance with this is problematic in both NSW and the ACT, where there is no standard of proof required for a conference to be held apart from a general admission of the offence by the child or even in the case of a 'less serious offence' in the ACT, that the child does not deny responsibility for the commission of the offence – an even lower standard.[19] In addition, section 20 of the *Crimes (Restorative Justice) Act 2008* (ACT) specifically states a person can take part in a restorative justice process and then plead *not* guilty to an offence. It is difficult to see how these provisions comply with the CRC Committee's statements with

[15] *General Comment 24*, para 8.
[16] *General Comment 24*, para 8 and para 13.
[17] *General Comment 24*, para 14 and 16. See also Article 40(3)(b) of the CRC.
[18] *General Comment 24*, para 18.
[19] Section 36(b) *Young Offenders Act* (NSW); section 19(1)(b)(i)B *Crimes (Restorative Justice) Act* 2008 (ACT).

respect to a requirement only to engage youth justice processes – diversionary or otherwise – when there is sufficient evidence to establish an offence.

Further, *General Comment 24* provides confirmation that a child's participation in diversionary programs – whether prior to or during proceedings – needs to be 'free and voluntary consent' based on 'adequate and specific information on the nature, content and duration of the measure, and on an understanding of the consequences of a failure to cooperate or complete the measure' and that 'relevant decisions of the police, prosecutors and/or other agencies should be regulated and reviewable.'[20] In other words, Article 40 requires that a child must consent freely to participate in a conference, and that they need sufficient information to understand the process and consequences of a decision to participate or not participate. This aspect is discussed in more detail in connection with the assessment of Article 12 below. However, at this stage it can be noted that it is questionable whether this occurs in NSW or ACT because of the absence of any mandatory independent legal or other advice for a child. Likewise, it is questionable in these jurisdictions whether the conference information provisions are sufficient, or in the case of NSW even genuinely independent in the context of the role accorded to specialist youth officers in the referral process. Again, Victoria operates differently because conferencing only occurs as a narrower pre-sentence process in proceedings in which a child is required to be represented under section 524 of the *Children Youth and Families Act 2005* (Vic.).

General Comment 24 emphasises the need for training and support for 'state officials and actors' and that professionals 'should be able to work in interdisciplinary teams, be well informed about the physical, psychological, mental and social development of children and adolescents, as well as about the special needs of the most marginalized children.'[21] There are no training or accreditation requirements for conference convenors in Victoria or NSW, which means that these jurisdictions are open to non-compliance on this point. By contrast, the ACT has requirements are set out in section 40 of the *Crimes (Restorative Justice) Act 2008 (ACT).* Again, this is something that needs to be addressed in each jurisdiction so that decisions to refer a child to a conference, and assessments of a child offender's suitability to participate in a conference throughout the conference process by a convenor, are made by appropriately qualified and trained professionals.

[20] *General Comment 24*, para 18.
[21] Ibid., para 18 and 38.

On the question of non-discrimination and consistent with the analysis of Article 2 in Chapter 5, *General Comment 24* highlights a need for safeguards, and consistent with Article 2 of the CRC, requires 'active redress.'[22] With respect to the Article 40(2) procedural rights, *General Comment 24* reiterated the presumption of innocence in Article 40(2)(b)(i) and drew a distinction between responding to suspicious behaviour by a child – which could be caused by 'lack of understanding of the process, immaturity, fear or other reasons' and the requirement to prove an offence beyond reasonable doubt.[23] This is a potential problem in police initiated conferencing in NSW or the ACT where individual preferences or interpretation of child behaviour by investigating officers could lead to a child being referred for a conference in the absence of sufficient evidence to prove an offence beyond reasonable doubt. This is a problem because, as noted in *General Comment 24*, 'the nature and duration of diversion measures may be demanding, and that legal or other appropriate assistance is therefore necessary.'[24] In NSW, conferencing is the most intensive diversionary non-court outcome under the *Young Offenders Act 1997* (NSW) and therefore, there is a need ensure sufficient safeguards at the referral stage to avoid net-widening.

Article 40(2)(b)(ii) imposes an obligation to provide a child with prompt and direct information of the charge(s). *General Comment 24* notes that 'providing the child with an official document is insufficient and an oral explanation is necessary' but that while parents or appropriate adults can assist, 'authorities should not leave the explanation of [documents]' to such people.[25] *General Comment 24* expands on the right to legal or other appropriate assistance under Article 40(2)(b)(ii) noting that 'States should ensure that the child is guaranteed legal or other appropriate assistance from the outset of the proceedings' and that in the context of diversionary programs, that '"other appropriate assistance" by well-trained officers may be an acceptable form of assistance if they have 'sufficient knowledge of the legal aspects of the child justice process and receive appropriate training' but that 'States that can provide legal representation for children during all processes should do so.'[26] Again, the current arrangements in NSW and the ACT do not meet these standards given the lack of any mandatory requirement for independent legal advice associated with obtaining the child's consent or mandatory involvement of legal practitioners in their programs – noting that they

[22] Ibid., para 40.
[23] Ibid., para 43
[24] Ibid., para 72.
[25] Ibid., para 48
[26] Ibid., para 49 and para 52.

are expressly prohibited from attending the mediated session Step 2 of a conference in the ACT.[27]

7.5 *General Comment 24*, Article 40(3) and a minimum age of criminal responsibility

Article 40(3)(a) provides for States Parties to establish a minimum age of criminal responsibility.[28] In *General Comment 24*, the Committee on the Rights of the Child recommended a minimum age of criminal responsibility of 14 on the basis that:

> Documented evidence in the fields of child development and neuroscience indicates that maturity and the capacity for abstract reasoning is still evolving in children aged 12 to 13 years due to the fact that their frontal cortex is still developing. Therefore, they are unlikely to understand the impact of their actions or to comprehend criminal proceedings. They are also affected by their entry into adolescence. As the Committee notes in its general comment No. 20 (2016) on the implementation of the rights of the child during adolescence, adolescence is a unique defining stage of human development characterized by rapid brain development, and this affects risk-taking, certain kinds of decision-making and the ability to control impulses. States parties are encouraged to take note of recent scientific findings, and to increase their minimum age accordingly, to at least 14 years of age. Moreover, the developmental and neuroscience evidence indicates that adolescent brains continue to mature even beyond the teenage years, affecting certain kinds of decision-making.[29]

By contrast, this minimum age is currently set at 10 years of age in all jurisdictions in Australia. However, consistent with *General Comment 24*, the ACT has committed to increase its minimum age to 14 and released a paper in August 2021 to review the service system and implementation requirements of doing so.[30] Shortly afterwards, there was a support by state Attorneys-General for the development of proposal to increase the minimum age of responsibility to 12 at the November 2021 Meeting of Attorney-Generals; if implemented this would see Victoria and NSW increase from 10 to 12.[31] However, the current position is the

[27] Section 44(3) *Crimes (Restorative Justice) Act 2004* (ACT).
[28] Article 40(3)(a) of the CRC.
[29] *General Comment 24*, para 22.
[30] McArthur M *Review of the service system and implementation requirements for raising the minimum age of criminal responsibility in the ACT* Australian National University Canberra 2021.
[31] *Communique – Meeting of Attorneys-General – 12 November 2021* at https://www.ag.gov.au/about-us/publications/meeting-attorneys-general-mag-communique-november-2021

minimum age is set at 10 years of age, which operates as an expression that the law recognises an age below which a child is formally not sufficiently developed to be subject to criminal proceedings or penalties – including being referred to diversionary programs. As Tobin has noted, this gives rise to an 'explicit' discrepancy 'between the Convention and the regimes adopted within each state or territory.'[32]

Instead, the current law depends on the doctrine of *doli incapax,* with the effect that there is something of a sliding scale between the ages of 10 and 14 between an age of absolute incapacity at 10 and to full capacity at age 14. Within this age range, the purpose of the legal doctrine of *doli incapax* is to recognise the varying ages at which children mature and develop and to recognise that due to their varied developmental trajectories, children learn the difference between right and wrong—and between behaviours that are seriously wrong and those that are merely naughty or mischievous—at different ages. In all three jurisdictions, persons aged 10 to 14 years are considered to be *doli incapax* with the effect that there is a rebuttable legal presumption that a child is 'incapable of crime' under legislation or common law. According to Blackstone, the doctrine of *doli incapax* dates at least to the reign of King Edward III.[33] In late 2016, the High Court of Australia in *RP v The Queen* re-affirmed unanimously that the common law doctrine of *doli incapax* is part of the law of Australia holding that:

> The rationale for the presumption of *doli incapax* is the view that a child aged under 14 years is not sufficiently intellectually and morally developed to appreciate the difference between right and wrong and thus lacks the capacity for *mens rea*.[34]

In allowing the appeal, the Kiefel, Bell, Keane and Gordon JJ based their reasoning on aspects of child development, namely the fact that the appellant suffered 'intellectual limitations' which meant that they were not satisfied that the prosecution could adduce sufficient evidence to prove beyond reasonable doubt that the appellant understood the moral wrongness of his acts.[35] Gageler J likewise allowed the appeal, and again placed considerable jurisprudential weight on the appellant's state of development and in particular evidence relating to his mental capacity and his significant intellectual disability and poor cognitive development at the time

[32] Tobin, J 'Incorporating the CRC in Australia' in Kilkelly U, Lundy L and Byrne B *Incorporating the UN Convention on the Rights of the Child into National Law'* Cambridge University Press 2021, 23.
[33] William Blackstone, *Commentaries on the Laws of England*, Book 4 (1769), 23.
[34] *RP v The Queen* [2016] HCA 53
[35] Ibid. at [32]

of the alleged offending.[36] Consequently, according to Gageler J, the appellant's capacity to understand that the conduct was seriously wrong by normal adult standards – the hurdle for the prosecution to overcome in *doli incapax* cases – remained a 'real and unanswered question', and thus the evidence could not support the trial judge's finding of guilt.[37]

Although *RP* is not a case that deals directly with youth conferencing, its approach to child and adolescent brain development underpins the two challenges. First, it indirectly highlights the problem of diversionary programs that operate under legislation without independent judicial oversight: again, this is an issue in NSW and the ACT. The significance of this is that while courts are able to adjudicate on *doli incapax* when a young person is charged and brought before a court, there are young people who may in fact be *doli incapax* at law who are nonetheless being referred to conferencing as a diversionary alternative for offending that could not be proved to the requisite criminal standard in court: this means that there is a serious risk of net-widening through the use of out of court conferencing in the ACT and NSW in the absence of legal assessment of the *doli incapax* doctrine .

The evidence for this proposition is contained in studies that suggest that those aged under 14 years are 'significantly more likely than older adolescents and adults to have compromised ability to act as competent defendants in court.'[38] Even more startlingly, it is suggested that around one third of those within the *doli incapax* age range as well as twenty percent of those in the 14 – 15 year old age bracket have been found to be 'as impaired in capacities relevant to adjudicative competence as are seriously mentally ill adults who would likely be considered incompetent to stand trial.'[39]

Thus, a child's stage of development is a significant factor in any decision that they make to agree – or not to agree – to participate in a youth conference. While diversionary conferences do not operate as formal findings of guilt, it is nonetheless the case that in ACT and NSW young people can participate in a youth conference when there may, in fact, be insufficient evidence to prove a matter beyond reasonable doubt based on their age and application of the *doli incapax* principle. In these circumstances, especially when coupled the limitations discussed above on a child accessing legal advice in connection with conferencing at referral

[36] Ibid. at [42]–[43]
[37] Ibid. at [43]
[38] Grisso T, Steinberg L, Woolard J. et al. (2007) 27 *Law and Human Behaviour* 333, 347.
[39] Ibid., 356.

stage or during the mediated interaction with the other conference participants, it is difficult to see how this can be consistent with Article 40(3) for a child aged under 14. In this respect, it can be concluded that consistent with previous studies, 'best practice programs seek to minimise the involvement of police officers … or youth justice officers, who may also be responsible for the initial charge.'[40]

7.5 Article 40 and conferencing: too legalistic?

Is the emphasis in *General Comment 24,* on Article 40 procedural rights, misplaced when it comes to conferencing? Part of the challenge is to overcome a school of thought – particularly from 'pure' restorative justice theorists or practitioners – that procedural protections for a young offender are not as necessary in restorative justice processes because it has a 'higher purpose' of reconciliation and reintegration between the offender and the victim – in other words, that the general provisions of Article 40 can be achieved in the absence of Article 40(2). This view is exemplified in the work of Skelton who states,

> The protection of rights is surely important, but in restorative justice we are striving for more than formalistic protection – we are aiming higher, hoping for behaviour change, hoping to prevent re-offending, hoping to balance the needs of the offender with the needs of the victim.[41]

However, this perspective raises serious questions because it diminishes the capacity to recognise any potential for coerciveness or unfairness in a restorative justice response. For example, from a young offender's point of view, is there much difference between retributive sanctions such as unpaid community work, and a conferencing outcome plan that involves unpaid work, but is aimed at restoring and repairing the harm to the victim? Likewise, to what extent do restorative justice responses genuinely take into account the fact that a young person may have little genuine choice in whether to participate in the first place, or whether, having done so, they really have any choice to refuse a particular outcome plan?

[40] Walsh, T 'From Child Protection to Youth Justice: Legal Responses to The Plight Of 'Crossover Kids'' (2019) 108 *University of Western Australia Law Review* 90, 108.
[41] Skelton A 'Restorative Justice as a Framework for Juvenile Justice Reform: A South African Perspective' (2002) 42 *The British Journal of Criminology*, 496, 506. See also Moore S and Mitchell R 'Rights-based Restorative Justice: Evaluating Compliance with International Standards' (2009) 9:1 *Youth Justice* 27-43.

While all three programs legislatively guarantee that conferencing can only take place with the child's consent, and there are guidelines in each jurisdiction about reviewing a child's consent, this may be illusory for many young offenders – and indeed for their families – if they have limited capacity to engage with authority, for instance because of language, previous interactions with law enforcement, disability or socio-economic circumstances. Just as welfare responses justified a paternalistic 'state knows best' response to offending behaviour by young people, it may be that there is a risk for conferencing if there is insufficient attention paid to fundamental procedural rights that attach to 'traditional' criminal process.

In particular, given the adolescent development and socio-economic profile of many young offenders, it is highly likely that there will be major inequalities in bargaining power between a child and their family, and even the convenor and police at the time of consent to participate in the referral stage or during the later stages of the conference process. In this respect, it has been noted that young offenders represent the 'extreme end of developmental vulnerability':

> Young people who become involved in the youth justice system are among the most vulnerable in our community. Overwhelmingly, they are drawn from low socio-economic status families and communities and have faced a raft of social, emotional, and academic adversities in the developmental period.[42]

While restorative justice theory points to its egalitarian and communitarian response to criminal conduct, is it really the case from a young offender's perspective, that the outcome is genuinely voluntary? As Lynch noted in the New Zealand context,

> Consenting implies the ability to walk out of the situation without prejudice. Justice processes rarely provide that opportunity. If restorative justice is premised on free participation negating the need for rights, is it fair to put the onus on the child to raise issues of rights? There is more of an argument for this in relation to adult offenders, who should have the capacity to make a choice like this.[43]

[42] Snow, P 'Restorative Justice Conferencing, language competence, and young offenders: Are these high-risk conversations? (Invited manuscript) Prevention Researcher, 20(1), 18-20, 2013 quoted in Snow P 'Submission to Senate Legal and Constitutional Affairs Committee Inquiry into the Value of a justice reinvestment approach to criminal justice in Australia' Parliament of Australia June 2013.
[43] Lynch, N 'Restorative Justice through a Children's Rights Lens (2010) 18 *International Journal of Children's Rights* 161, 181.

There should be no question that Article 40 is relevant and important when it comes to conferencing from a child rights point of view. It is critical to consider how children's procedural rights can be guaranteed in conferencing programs without compromising the potentially positive values of restorative justice, such as informality of process, opportunity for participation, and the potential for restoration. The best answer to this question comes from thinking about how to overlay the 'lynchpin' of the Convention – Article 12 – onto the rights contained in Article 40, because Article 12 'recognises the child as a full human being with integrity and personality and with the ability to participate fully in society' – a point also made in *General Comment 24*.[44]

7.6 Article 12: *primus inter pares?*

This section analyses Article 12 CRC, which provides that,

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 12 is of fundamental importance to a contemporary understanding of children's rights. Indeed, it has been observed that 'the contribution of any one article is perhaps no greater than that offered by article 12.'[45] Its innovation in the CRC – it is not present in the 1924 and 1959 Declarations on the Rights of the Child – has been described as the 'lynchpin' of the Convention because it 'recognises the child as a full human being with integrity and personality and with the ability to participate fully in society.'[46] It is therefore of critical importance when answering the research questions in this thesis.

[44] *General Comment 24*, para 44 – 45.
[45] Tobin 2019 (Op.cit.) 398.
[46] Freeman, M 'Whither Children: Protection, Participation, Autonomy?' (1994) 22 *Manitoba Law Journal* 307, 319. See also Tobin 2019 (Op.cit.) 398.

Article 12 is one of the four general principles of the CRC 'which highlights the fact that this article establishes not only a right in itself, but should also be considered in the interpretation and implementation of all other rights.' [47] In *General Comment 12*, the CRC Committee described it as a 'unique provision in a human rights treaty [that] addresses the legal and social status of children, who, on the one hand lack the full autonomy of adults but, on the other, are subjects of rights.'[48]

The effect of Article 12 is that State Parties are under a 'strict obligation' to 'ensure that mechanisms are in place to solicit the views of the child in all matters affecting her or him and to give due weight to those views.'[49] Further, the child has the right to express their views freely, which is 'intrinsically related to the child's "own" perspective: the child has the right to express her or his own views and not the views of others.'[50] In this respect, the right of the child to express their views requires the child 'to be informed about the matters, options and possible decisions to be taken and their consequences' and that the 'right to information is essential, because it is the precondition of the child's clarified decisions.'[51] This provides a clear link between this aspect of Article 12 and the procedural rights in Article 40(2). The child's views also need to be understood in light of their evolving capacity and the impact of the outcome on the child.[52]

With respect to Article 12(2), the CRC Committee noted that Article 12 applies to all proceedings, including those for children in conflict with the law, and that consideration needs to be given to the environment in which the child is to be heard, including the 'provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers.'[53] Article 12 requires the child to have the choice to heard directly or through a representative, but that there is a real risk of conflict of interest with representatives – especially parents – who need to ensure that they 'represent exclusively the interests of the child and not the interests of other persons (parent(s)), institutions or bodies.' [54] In this respect, the Committee emphasised that representatives 'must

[47] UN Committee on the Rights of the Child (CRC) *General Comment No. 12 (2009) The right of the child to be heard* CRC/C/GC/12 para 2.
[48] Ibid., para 1.
[49] Ibid., para 19.
[50] Ibid., para 22
[51] Ibid., para 25.
[52] Ibid., para 28 – 31.
[53] Ibid., para 32 – 34.
[54] Ibid., para 35 – 37.

have sufficient knowledge and understanding of the various aspects of the decision-making process and experience in working with children.'[55]

General Comment 12 emphasised the importance of preparing the child to be heard and that the hearing itself needs to be 'enabling and encouraging.' Likewise, it emphasised the importance of training about Article 12 'for all professionals working with, and for, children, including lawyers, judges, police, social workers, community workers….'[56] *General Comment 12* further notes that Article 12 is linked to other general principles in the CRC, such as Article 2, and that it is 'interdependent' with Article 3.[57] In this respect, *General Comment 12* states that:

> … there can be no correct application of article 3 if the components of article 12 are not respected. Likewise, article 3 reinforces the functionality of article 12, facilitating the essential role of children in all decisions affecting their lives.[58]

Finally, *General Comment 12* specifically addresses the application of Article 12 in the context of Diversion, which as noted in the above discussion of Article 40(3)(b), includes processes that occur both prior to or during proceedings – and therefore applies to all three conferencing programs under review:

> In case of diversion, including mediation, a child must have the opportunity to give free and voluntary consent and must be given the opportunity to obtain legal and other advice and assistance in determining the appropriateness and desirability of the diversion proposed. [59]

The fundamental problem is that neither NSW nor the ACT mandate that a child is provided with legal advice at the crucial time of determining whether to consent to take part in a conference or not. While a child in both jurisdictions is entitled to seek legal advice, there is no mandatory obligation to ensure that they do so.

7.7 The challenge of conferencing for Article 12

[55] Ibid., para 36.
[56] Ibid., para 49.
[57] Ibid., para 68.
[58] Ibid., para 74.
[59] General Comment 12, para 59.

Conferencing presents a unique challenge for Article 12 because the central premise of restorative justice is that the offender engages with the victim or community and accounts personally for what they have done. This requires the offender to express their views about their conduct in order to facilitate reparation to the offender and/or community in order to facilitate the reintegration of the offender into the community.

At a high level, this approach would seem to accord with Article 12(1) when applied to a child offender in all of the three jurisdictions under review, and this reading of Article 12(1) is reflected in the legislation or guidelines for each program under review. This starts from the fact that participation in each program is by consent and therefore a child does not have to express a view or be heard if they choose not to participate; in such circumstances a conference would not proceed and full weight has been given to the child's views in the decision to hold the conference.

Likewise, in each jurisdiction, the child can also withdraw their consent throughout the conference process without adverse impact on proceedings that might otherwise be taken. Further, the restorative justice pillar of an inclusive process, analysed in Chapter 2, means that weight must be given to what the child offender says in the conference process, including in the preparation of the outcome plan. On this basis, it would seem that conferencing can align with Article 12, although the limits on legal representation in NSW and the ACT present real challenges for full implementation of Article 12(2) as conceived by the Committee on the Rights of the Child in *General Comment 12*.

At the same time, from this perspective, the mere existence of youth conferencing in the three jurisdictions demonstrates a commitment, of sorts, to child participation in youth justice for the purposes of Article 40 because conferencing is built on restorative justice theory that emphasises greater engagement between the (child) offender and the victim. Extending this line of thinking suggests that where a child is supported appropriately, youth conferencing can indeed offer a strong vehicle to enhance participation. The child can express their views and be heard and contribute to an assessment of their best interests for the purposes of the final stage of reintegration.

However, there are real challenges to effective participation in youth conferencing, especially in the two jurisdictions that do not provide for a child to have legal or other independent representation. This is particularly the case in NSW and the ACT where police or other

investigation or prosecution agency can play a key role in the decision to refer a child to a diversionary conference. This is also the case when a victim can veto a conference occurring or can veto an outcome plan once it has been developed because this takes away the opportunity for the child to be heard. In this respect, there are studies that have highlighted concern about the fact that children – especially children in the child protection system – do not seek legal advice before they agree to take part or make admissions in youth justice conferences, 'particularly if the referral is made at the policing stage.'[60]

However, the more significant issue relates to viewing conferencing from the perspective of the child. Many children may prefer not to have to talk about or explain their offending behaviour, particularly in front of family or strangers – such as the victim – despite the fact that a youth conference may present a real opportunity to involve and empower children in decisions regarding themselves. Again, questions of coercion and the role of professionals in the initial referral is something that must be considered in any analysis of compliance with CRC standards of participation (in its broad sense) under Article 12. In jurisdictions where the child does not have an independent advocate, the structure of a conference, including the fact that it is adult dominated in terms of other participants – police, parents, workers, victims (often) and convenor – means that it is more difficult for a child to participate in any meaningful way.[61]

Given the scope of the obligation on states under Article 4 of the CRC to ensure proper resourcing to give effect to CRC as a whole,[62] and noting the comments in its Concluding Observations to Australia that it is one of the wealthiest countries in the world,[63] NSW and ACT should be in a position to mandate legal assistance at all stages of the conference process and extend legal assistance services to guarantee legal support for youth conferences so as to comply with Article 12, on the same basis as Victoria under that state's provision of legal assistance of lawyers to represent children in youth conferences.[64]

[60] Walsh 2019 (Op.cit.), 108.
[61] Kellett, M *Children's Perspectives on Integrated Services: Every Child Matters in Policy and Practice* Palgrave MacMillan 2010.
[62] UN Committee on the Rights of the Child (CRC), *General comment No. 20 (2016) on the implementation of the rights of the child during adolescence*, 6 December 2016, CRC/C/GC/20.
[63] For example, see UN Committee on the Rights of the Child *Concluding observations (Australia)* (2012) CRC/C/AUS/CO/4.
[64] See Table A of the Victoria Legal Aid Handbook available at https://handbook.vla.vic.gov.au/handbook

7.8 The challenge of child development, conferencing and Article 12

Even with assistance, there is a question of whether a child will have sufficient oral language competence to engage meaningfully in the conferencing process.[65] There are also concerns about the fact that the general developmental profile of young offenders in Australia can be at odds with key features of restorative justice conferencing.[66] In particular, there is a clear tension between the general developmental profile of young offenders – in particular in relation to social and economic deprivation often combined with poor oral language competence and cognition – and the need for emotional intelligence and the ability to engage meaningfully in a mediated process with victims of crime and other interested parties, such as police or other authority figures, a number of whom are mandated to attend or contribute to youth conferences.

As an expression of restorative justice, youth conferencing involves,

> … a high-stakes and highly verbal interchange. However, the medium by which the conference is transacted (auditory–verbal communication) is likely to be one of the most fragile skillsets that the young offender brings to the conference.[67]

In other words, the principles of restorative justice and the assumptions of participation that underpin conferencing are potentially mismatched with the overall profile of developmental capacity of young offenders in Australia. This means that the conferencing programs in the three jurisdictions under review present challenges from a children's rights perspective under Article 12. This is because the child is often from a background or has individual impediments that mean that they cannot meaningfully and equally exercise capacity to choose at key points along the restorative justice continuum involved in a conference. This extends from the initial conference referral process of admission of an offence or consent to participate – whether via

[65] Snow P and Sanger D 'Restorative justice conferencing and the youth offender: Exploring the role of oral language competence (2011) 46 *International Journal of Language and Communication Disorders* 324, 333; see more generally Aoslin A, Baines R, Clancy A, Jewiss-Hayden L, Singh R and Strudgwick J 'WeCan2: exploring the implications of young people with learning disabilities engaging in their own research' (2010) 25 *European Journal of Special Needs Education* 31-44.
[66] Sutherland P and Millsteed M *Patterns of recorded offending behaviour amongst young Victorian offenders* Crimes Statistics Agency Victoria, September 2016.
[67] King, M 'Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' (2008) 32 *Melbourne University Law Review* 1096; Hayes H and Snow P 'Oral language competence and restorative justice processes: Refining preparation and the measurement of conference outcomes' *Trends & Issues in Crime and Criminal Justice* no. 463 Canberra: Australian Institute of Criminology 2013.

investigating authority such as the police or a court – through to the conference itself and agreement or finalisation of any outcome plan.

In this respect, the previously mentioned case of *RP* highlights a fundamental constant about young offenders in Australia – and indeed around the word.[68] This is, they present a markedly different overall profile in terms of cognitive and psycho-social development to non-offenders in the same age bracket. This presents a particular problem for conferencing where the young person is required 'to listen to and comprehend sometimes complex and emotionally charged narratives delivered by people who have been affected by their wrongdoing.'[69] This situation is also illustrated by the fact that approximately half of children in the youth justice system have had prior contact with child protection services because of maltreatment issues and many have experienced periods of out-of-home care. As noted in one study in which a child's concern was expressed about net-widening through the use of conferencing for this cohort in the context of a relatively minor incident in an out of home care placement:

> I would argue though that for those small issues, that really shouldn't even be going to a full process. It's a pretty demeaning process for a young person to have to go to a conference and say I'm sorry for taking food to a park.[70]

Young people from Indigenous backgrounds represent about one in twenty young people in the community (approximately 5 percent), but almost 40 percent of those under youth justice supervision. This over-representation is even higher in some states and territories. Again, the models of engagement in conferencing do not necessarily match Aboriginal cultural practice, and while all programs operate with some guidelines, they do not always do so effectively.

In terms of intellectual disability, while three percent of the Australian population has an intellectual or cognitive disability, 17 percent of juveniles in detention in Australia have an IQ below 70 – a figure that is even high among Indigenous young people who are also more likely to re-offend.[71] Similarly, mental illness is also disproportionately present among young offenders with the Australian Human Rights Commission finding that 88 percent of young

[68] *RP v The Queen* [2016] HCA 53
[69] Snow and Sanger 2011 (Op.cit.) 327.
[70] Walsh 2019 (Op.cit.) 101.
[71] Frize M, Kenny D and Lennings C 'The relationship between intellectual disability, Indigenous status and risk of reoffending in juvenile offenders on community orders' (2008) 52 *Journal of Intellectual Disability Research* 510; see also HREOC 2005

people in custody reported symptoms consistent with a mild, moderate or severe psychiatric disorder.[72]

The corollary of the above material is critical for understanding the link between development, participation and conferencing. There is research that suggests that large numbers of young offenders experience language deficits as a result of their overwhelming disproportionate developmental vulnerability. To this end, studies have found that 19 percent of young offenders in the US experience language comprehension and expression problems,[73] as do between 23 and 73 percent in the UK[74] and 50 percent of young male offenders in Australia.[75] This contrasts with estimates of approximately 14 percent of adolescents in the general population.[76] The challenge then becomes that young people are not sufficiently equipped to participate meaningfully in any conferencing program because they lack the social cognition to 'draw inferences about another person's affective state, in real time during an interaction, and to use language and other interpersonal skills to ensure that both parties remain attuned and able to avoid misunderstanding or dissent.'[77]

This then presents challenges at each stage of the conferencing process, from referral – whether by police officer or court – through the preparation stage, the conference itself and the final outcome stage. In particular, the challenges are at the referral stage and at the mediated process stage (Stage Two). The problem at the Stage One referral point is ensuring that the young person has the agency and capacity to make an informed decision to participate in a conference

[72] Calma T *Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues* Australian Human Rights Commission, Sydney, March 2008, 9.
[73] Larson V and McKinley N *Language disorders in older students: preadolescents and adolescents* Eau Claire, WI: Thinking Publications 1995; Sanger D, Creswell J, Dworak J and Schultz L 'Cultural analysis of communication behaviours among juveniles in a correctional facility' (2001) 33 *Journal of Communication Disorders* 31–57.
[74] Bryan K 'Preliminary study of the prevalence of speech and language difficulties in young offenders' (2004) 39 *International Journal of Language and Communication Disorders* 391–400.
[75] Snow P and Powell M 'Youth (in) justice: Oral language competence in early life and risk for engagement in antisocial behaviour in adolescence' *Trends & issues in crime and criminal justice no.435* Australian Institute of Criminology Canberra 2012; Snow and Sanger 2011 (Op.cit.). See also Snow P and Powell, M 'Oral language competence in incarcerated young offenders: Links with offending severity. (2011)13 *International Journal of Speech Language Pathology* 480- 489; Snow P and Powell M 'Oral language competence, social skills, and high risk boys: What are juvenile offenders trying to tell us?' (2008) 22 *Children and Society* 16-28. Snow P and Powell M 'Interviewing juvenile offenders: The importance of oral language competence (2004) 16 *Current Issues in Criminal Justice* 220-225.
[76] McLeod S and McKinnon D 'Prevalence of communication disorders compared with other learning needs in 14,500 primary and secondary school students' (2007) 42 *International Journal of Language and Communication Disorders* 37–59.
[77] Cohen N *Language impairment and psychopathology in infants, children and adolescents*. Thousand Oaks CA: Sage Publication 2001, 47.

– here the issue is lack of access to appropriate support, in particular legal advice, in diversionary conferences in NSW and the ACT. Likewise, Stage Two presents significant challenges from a children's rights conception of participation under Article 12, because of the total reliance on the young person, in many cases unrepresented on being able to communicate meaningfully in the conference as it moves through the phases of introduction, storytelling and negotiation of the outcome plan. In other words, the formal conference phase fundamentally requires the young person to have the social cognition to relate how the offence transpired and to be able to acknowledge the harm they have caused to the victim. The young person needs to be able to listen and digest the views of the victim or their representative – plus any other conference participants – before responding and, ideally, being in a position to apologise and develop an outcome plan that is agreed to by all present.

Research on children's language and cognitive development suggests that vulnerable and socially marginalised young people, in particular, lack the oral language competence to genuinely participate in restorative justice conferences.[78] These young people, including a disproportionate number of Indigenous young people, do not have the capacity to fully participate, in the absence of independent support and advice throughout the conferencing process. Nor can it be said that there is any genuine participation where a victim or other party has a right to veto an outcome designed by the child. While the preparation phase of a conference should ensure that there is support for a child to participate in both the meeting phase and the outcome phase of conferences, there needs to be greater consideration to the question of representation if the conference process as a whole is going to be an exercise in genuine child participation, in accordance with Article 12, in which the child can express their views effectively and have appropriate weight accorded to them.

7.9 Models of participation

Why does participation matter? In 2012, Farthing identified four main justifications for youth participation, namely:[79]

(e) Children's rights based on Article 12 of CRC.

[78] Snow and Powell 2012 (Op.cit.); see also Snow and Sanger 2011 (Op.cit.) 324–333.
[79] Farthing, R 'Why Youth Participation? Some Justifications and Critiques of Youth Participation Using New Labour's Youth Policies as a Case Study' (2012) 9 *Youth & Policy* 71-97.

(f) Empowerment on the basis that participation is an opportunity for children to have greater control and more power in their lives.

(g) Service efficiency based on the idea that participation makes child services more relevant and more cost-effective.

(h) Positive youth development on the basis that children's participation in adult arrangements assists them with their personal and social development with the end point of becoming model citizens.[80]

These points clearly align with youth conferencing where the ultimate restorative aim is for the child to explain their behaviour themselves to those affected by them, and to take an active role in developing an outcome to redress the harm done. At the same time, Farthing cautions that participation can end up as a way for adults to control children and young people because it is adults who set the boundaries – in other words, similar to Tobin's concerns with respect to invisible, incidental, selective and superficial approaches to children's rights more generally.[81]

In addition, a number of scholars propose an alternative 'substantive rights' or 'children's rights' or 'capability approach' to children's rights under the CRC.[82] These approaches based, for instance, on the work of Nussbaum, Tobin and Peleg recognise 'the value that children's voices can play in contributing to effective and sustainable policies in matters that affect children.'[83] This approach to participation starts from the position that a person should have agency and full participation in decisions that affect them: on this reading, participation becomes a process through which children can exercise their 'ability to live lives worth living by expanding their capability and increasing their real opportunities.'[84] On this approach, the purpose of participation is not just the 'one size fits all' end point of becoming an adult, but the ability for a child to exercise the freedom to make decisions along the way based on their own individual experience.[85] From this perspective, children are not a homogenous group, but rather

[80] Farthing, R 'Why Youth Participation? Some Justifications and Critiques of Youth Participation Using New Labour's Youth Policies as a Case Study' (2012) 9 *Youth & Policy* 71-97.b
[81] Tobin 2021 (Op.cit.) 31 – 37.
[82] Tobin 2021 (Op.cit.) 12 – 43. See also Peleg N 'Reconceptualising the Child's Right to Development: Children and the Capability Approach' (2013) 21 *The International Journal of Children's Rights* 523.
[83] Tobin 2021 (Op.cit.) 37 – 41; See also Peleg 2013 (Op.cit.) 529; Nussbaum M *Creating Capabilities The Human Development Approach* Harvard University Press Boston 2011, 31; Nussbaum M 'Women's Capabilities and Social Justice' (2000) 1 *Journal of Human Development* 219, 242.
[84] Peleg 2013 (Op.cit.), 529.
[85] Nussbaum 2011 (Op.cit.), 31.

individuals with agency to make their own free decisions, based on their own experience, and on what they 'are actually able to do and to be.'[86] The challenge is to be able to incorporate this into conferencing programs, which is considered in the next section.

7.10 Theories of child engagement: Hart and Lundy

One of the best-known theories of child participation is Hart's 1992 Ladder of Youth Participation, which was published by UNICEF less than two years after CRC entered into force, so well-before *General Comment No 12*. Hart's ladder – which he produced visually in his work (and which is set out below) – involves eight rungs that commence with three rungs of non-participation, namely (i) manipulation (ii) decoration and (iii) tokenism. He then identifies a further five rungs that he classifies as constituting genuine participation. These rungs are (iv) assigned but informed, (v) consulted and informed, (vi) adult-initiated shared decisions with children, (vii) child initiated and directed and a final rung at the top of the ladder that comprises (viii) child-initiated shared decisions with adults.[87] The eight rungs have been encapsulated as follows:

> **1. Manipulation (non-participation):** The lowest rung which Hart encapsulates as the 'end justifies the means.'[88] The child is consulted but is given no feedback on how the ideas they shared during the consultation are used.
>
> **2. Decoration (non-participation):** This is where there is an adult-led activity where the child provides merely decorative entertainment through performances, or simply providing evidence of their involvement.
>
> **3. Tokenism (non-participation):** On this rung it appears that the child has a voice. They are, for example, invited to sit on conference panels as representatives of children but are not really provided with an opportunity to formulate their ideas on the subject of discussion. Likewise, there is no process in place to enable them to consult with other children whom they are supposed to represent.
>
> **4. Assigned-but-informed (participation):** This represents the first level of genuine participation. On this rung, the child understands the intentions of the project. The child

[86] Nussbaum 2000 (Op.cit.), 242.
[87] Hart, R *Children's participation: From tokenism to citizenship*. Florence: UNICEF 1992.
[88] Ibid., p9.

knows the basis for their involvement. They are given a meaningful role and volunteered for the project after it was made clear to them.

5. Consulted-and-informed (participation): Here, the project is designed and run by adults but the child understands the project and their opinions are treated seriously.

6. Adult-initiated, shared decisions with Youth (participation): Although adults initiate the project, decision-making is shared with young people.

7. Youth-initiated and directed (participation): the child can initiate and direct their own projects. Adults are available but do not take charge.

8. Youth-initiated, shared decisions with adults (participation): This is the highest level of participation. On this rung, the central approach is that young people incorporate adults into child designed and managed projects. Hart states that this kind of participation is very rare.[89]

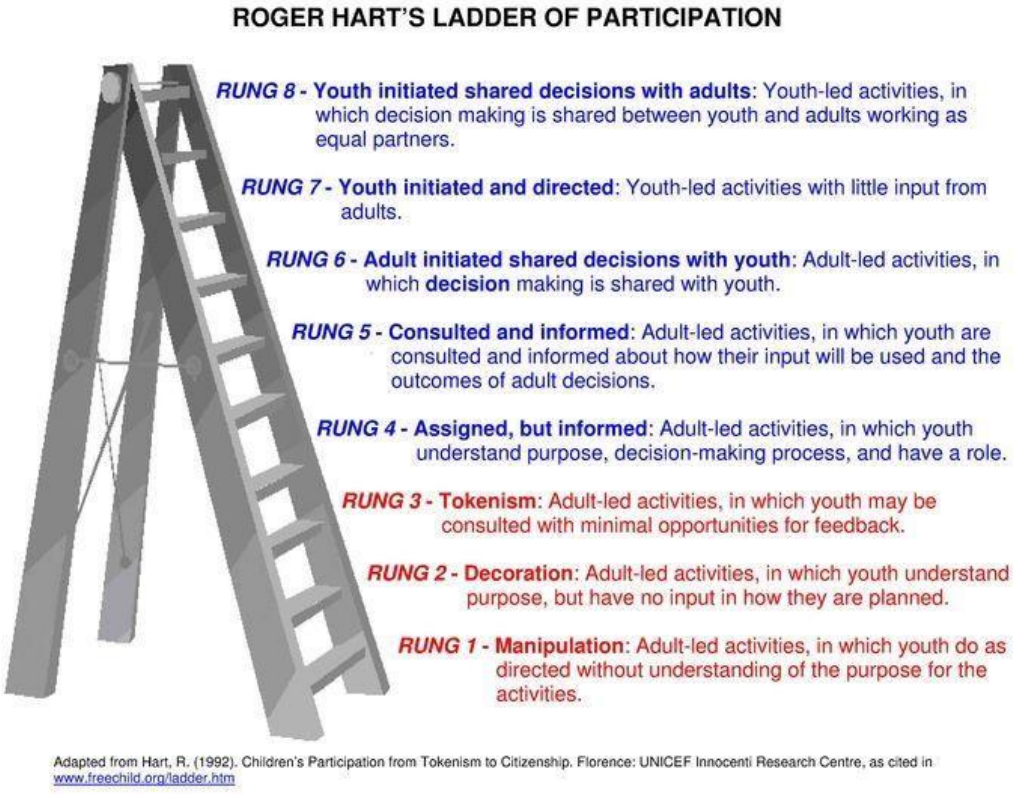

Diagram 1: Hart's ladder of participation

[89] Ibid.

Where does youth conferencing sit on Hart's ladder? The answer is that it depends on the stage of the conference, and the jurisdiction. In NSW and the ACT models, there is risk that the referral process to a conference, where there is no obligation to provide advice, can sit at the lower rungs. This could even be at Rung 1 for a child in a child protection setting who has been recommended for a conference for offences such as vandalism or minor assault in a residential care setting, and who has no independent adult support.[90]

At the other end, the best run conferences in any jurisdiction would not exceed either rung 5 (Consulted-and-informed) or rung 6 (Adult-initiated, shared decisions with Youth). This is because adults have designed the framework for the conferencing program in each jurisdiction, in terms of the legislation and the operational guidelines and procedures, with no input from youth. Further, it is adults – whether as police officers, judicial officers or youth justice workers – who are the initiators, gatekeepers and enablers of a conference in each jurisdiction. In this respect, it is clear that no conference program is a youth-initiated activity, as each program is initiated by a court referral or the referral of a youth worker or a police officer, depending on the jurisdiction, even if the consent of the child is a necessary precursor.

While Hart's ladder has been widely adopted by a number of researchers who have, for example, described it as 'a powerful evaluation tool',[91] other researchers have been critical of the seemingly sequential and hierarchical character of Hart's model – and indeed, the above analysis effectively adopts this hierarchical approach, with identification of lower rungs as less "good", from a child's rights perspective, than higher rungs, on the basis that lower rungs suggest less significant participation.[92] Also, while it helps when thinking about conference program design, it does not assist with program operation.

In this respect, Lundy has developed a practical and adaptable model of the way to centred on the fundamental elements of Article 12 of the CRC, interconnected to other relevant CRC articles and principles. Lundy's model is depicted in the diagram below: [93]

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[90] Walsh 2019 (Op.cit.) 108.
[91] Pridmore, P 'Ladders of participation' in V. Johnson, E. Ivan-Smith, G. Gordon, P. Pridmore and P. Scott (eds) *Stepping forwards: Children and young people's participation in the development process* London: Intermediate Technology 1998.
[92] Reddy, N and Ratna, R *A journey in children's participation* Bangalore: The Concerned for Working Children 2002; see also Hart, J Newman, J Ackerman, L and Feeney, T *Children changing their world: Understanding and evaluating children's participation in development* Surrey: Plan International 2004.
[93] Lundy, L 'Voice is not enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child' (2007) 33 *British Educational Research Journal* 927, 933.

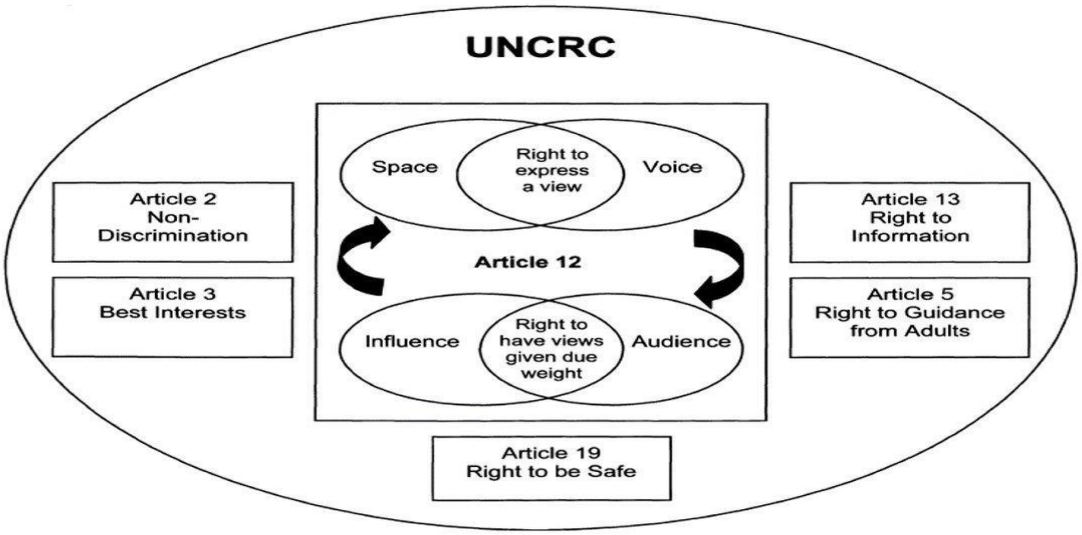


Figure 1. Conceptualising Article 12

Diagram 2: Lundy's model of child participation. [94]

Lundy's model was developed through research in Northern Ireland about the implementation of the CRC. The research was conducted for the Northern Ireland Commissioner for Children and Young People (NICCY) with the aim of identifying areas where children's rights were ignored or underplayed. The team conducted interviews with over 1,000 children and 350 adult stakeholders. Reflecting the centrality of Article 12 to the CRC, Lundy's study identified a lack of compliance with Article 12 as a cross-cutting theme that affected children in all aspects of their lives, including education. In particular, **Lundy identified that o**ne of the factors that appeared to hinder the full realisation of Article 12 was the fact that the precise nature of the Article was not fully understood by CRC duty-bearers, the adults responsible for facilitating children's rights.[95]

Since 2014, Lundy's model has been increasingly used and adopted by national and international organisations, agencies and governments to inform their understanding of children's participation.[96] Based around core concepts of space, voice, audience and influence, it offers a helpful way of thinking about the intersection between Article 12 and youth conferencing. A simplified version of the model is below:

[94] Ibid.
[95] Ibid.
[96] See https://www.qub.ac.uk/Research/case-studies/childrens-participation-lundy-model.html?utm_source=timeshighereducation.com&utm_medium=content_hub&utm_campaign=smc_international_mixed_world_class_21_22

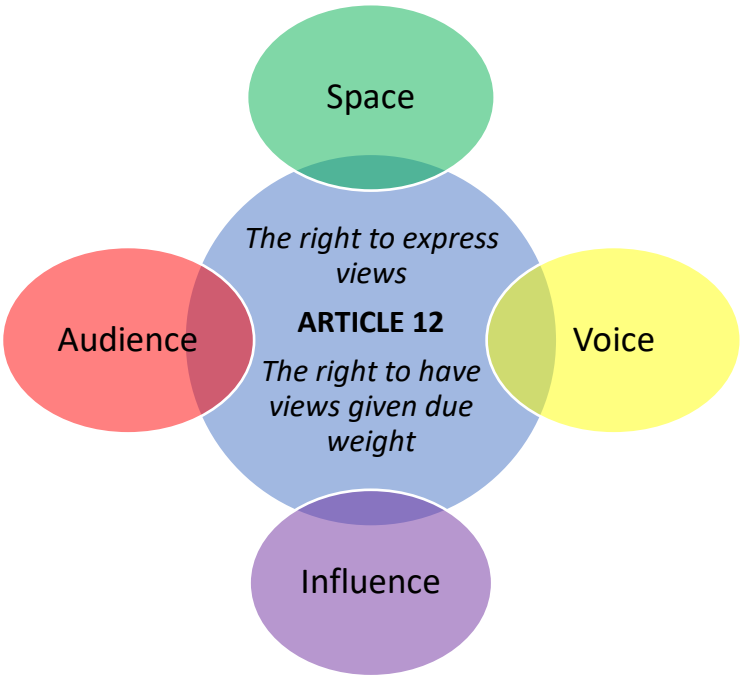


Diagram 3: Lundy's Model of Participation

Over and above Hart's model, the individual components of Lundy's model can be used to assess whether a conferencing program respects, protects and fulfils a child's rights under Article 12 at each stage of a conference setting. At the referral stage, Lundy's model helps to think about the way in which a child can make a decision whether to participate. Does the child have the right information to express a view? Does the child have the right support? Is the child comfortable – including with respect to time and space – to give a view and is the child confident that their view will be respected? The same considerations apply at the remaining stages when the child explains their conduct to conference participants, works on preparing an outcome plan and then finalises it. Applying Lundy's model to the three programs underlines the importance of individualised support, and especially legal support. At the referral stage, how else can a child express an informed choice based on the information available about whether to accept responsibility for an offence and to consent to participate challenge in a conference? How does a child know how or where to obtain legal advice? How does a child understand the information that they have been given?

Applying Lundy's model therefore highlights the inherent weakness of the NSW and ACT models of conferencing from the perspective of Article 12 because they do not ensure that the child has a proper voice to determine whether to participate – it is not enough to say that a child has a right to obtain legal advice. Likewise at the conference, outcome plan and finalisation stages, it is difficult to see how the child has the space and voice to ensure they will be heard

and that their view will be respected in the two programs that do not mandate the attendance of a legal practitioner. Therefore, it can be seen that these two conferencing programs do not ensure compliance with a child's rights under Article 12 CRC.

7.11 Conclusion

The three youth conferencing program under review are not compliant with Articles 12 and 40 of the CRC primarily because of the lack of appropriate independent advice and representation for children at the point at which they decide whether to admit an offence and consent to participate in a conference. This is particularly true in NSW and the ACT, where there are also concerns about child offenders' capacity to express views and be heard throughout each stage of the process because of the approach taken in each jurisdiction with respect to legal representation. On this basis, Victoria has better safeguards than the other two jurisdictions because of the narrower entry to conferencing through the court process and the requirement for a child to be legally represented.

At the same time, Victoria has very low number of youth conferences, all of which are referred through the Children's Court.[97] The challenge is not the model of conference, whether it is pre-court or post-court. Instead, the problem is that any conference that does not ensure that a child has independent support and advice at all stages of the conference process will inevitably fall short of the requirements of Article 12 and Article 40 of the CRC.

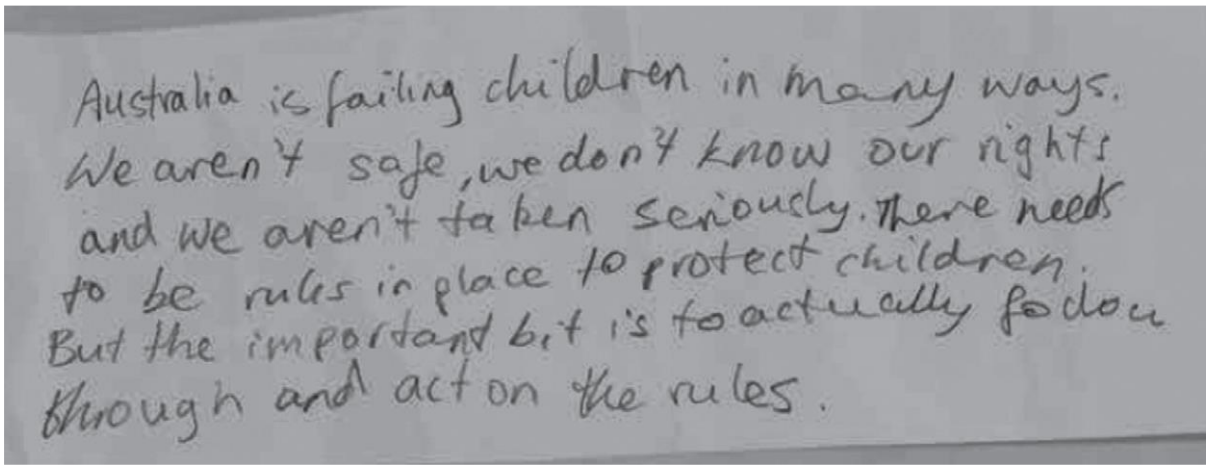
While restorative justice purists might view youth conferences as separate to mainstream youth justice outcomes, overlaying theories of child participation onto the conferencing programs themselves mean that genuine compliance with Articles 12 and 40 cannot be achieved without greater expert advice and support to children at each stage of the conference process. While this might be contrary to the 'pure' restorative justice ideal of offenders accounting for their own conduct, the power imbalances and child and adolescent development issues addressed in this chapter demand that a different approach be taken, if the rights of child offenders are to be respected. Using a checklist based on Lundy's model of participation provides a way to reconceptualise youth conferencing in a way that gives effect to Articles 12 and 40 of the CRC.

Under Article 4 of the CRC, there is a requirement for states to provide appropriate resources to ensure overall compliance with the treaty, and Article 42 requires states to ensure that

[97] See Chapter 3.

children and the community are aware of children's rights under CRC. This cannot be achieved for youth conferencing programs without ensuring that children have access to independent, expert advice, and that the adults involved are appropriately trained and skilled in understanding young people and their participatory and procedural rights under the CRC.

Finally, the anonymous note below highlights a child's perception of children's rights in Australia. It provides a useful starting point for Part III of this thesis, which considers how we can better respect children's rights in youth conferences in NSW, Victoria and the ACT.



Anonymous young person as quoted by the Australian Child Rights Taskforce [98]

[98] Anonymous young person as quoted in Australian Child Rights Taskforce, *The Children's Report: Australia's NGO Coalition Report to the United Nations Committee on the Rights of the Child* (UNICEF 2018), quoted in Tobin 2021 (Op.cit.), 12.

Chapter 8

Towards Child Rights Informed Conferencing

Table of Contents

8.1 Introduction

This thesis has analysed youth conferencing as the primary restorative justice program used in New South Wales, Victoria and the ACT. Scepticism about the ability of these programs to do more than pay 'lip service to the idea of children's rights' was first expressed in the mid-1990s when relatively few programs existed.[1] Notwithstanding that there is limited evidence that youth conferencing is consistent with children's rights, it has, since its inception, proven to be alluring to policy makers, legislators and child advocates. Indeed, it is now a formal part of the child justice regime in every state and territory in Australia.

As discussed in Chapter 2 and examined jurisdictionally in Chapter 3, youth conferencing is based on the core premise of restorative justice that offending behaviour is best addressed through the direct engagement of those affected in order to achieve a common understanding and agreement about how the harm or wrongdoing can be repaired and justice achieved. In other words, 'Restorative justice programmes are based on the belief that parties to a conflict ought to be actively involved in resolving it and mitigating its negative consequences.'[2]

However, questions remain about its place in the justice system. Is restorative justice 'an approach whose time has come'?[3] Is it a new paradigm that has the capacity to replace the traditional dichotomy between welfare and justice responses to child offending? Should restorative justice 'become the standard means of resolving the majority of cases'?[4] Or, is restorative justice a good idea 'whose time has gone'?[5] In considering the wider place of restorative justice, Cunneen and Goldson note that there is a fundamental dichotomy between the overall *theory* of restorative justice – 'the restorative justice that *might be'* – and the *practice* of restorative justice – 'the restorative justice that *is*'.[6] This thesis builds on this idea by exploring whether the legislated youth conferencing programs in Victoria, NSW and the ACT respect, protect and fulfil children's rights in accordance with the core principles of the CRC.

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[1] Bargen, J 'Kids, Cops, Courts, Conferencing and Children's Rights - A Note on Perspectives' (1996) 2(2) *Australian Journal of Human Rights* 209. See also Kelly, L and Oxley, E 'A Dingo in Sheep's Clothing? The Rhetoric of Youth Justice Conferencing and the Indigenous Reality' (1999) 4 *Indigenous Law Bulletin* 4.
[2] United Nations Office On Drugs And Crime *Handbook on Restorative Justice Programmes* United Nations New York, 2006, 5.
[3] Salz, A. 'Chair's Introduction', in Independent Commission on Youth Crime and Antisocial Behaviour Time for a fresh start: *The report of the Independent Commission on Youth Crime and Antisocial Behaviour* The Police Foundation and Nuffield Foundation London 2010, 5.
[4] Ibid.
[5] Blagg, H. *Aboriginality and the Decolonisation of Justice* Hawkins Press Sydney 2008.
[6] Cunneen, C and Goldson, B 'Restorative Justice? A Critical Analysis' in Goldson, B and Muncie, J (eds) *Youth, Crime and Justice* (2nd ed), Sage, London 2015, 156.

The conclusion reached is that they do not. To adopt Cunneen and Goldson's language, the 'conferencing that *is'* is not compliant with the CRC.

However, this does not mean that youth conferencing cannot be modified to make this form of restorative justice compliant with the CRC. This chapter proposes a model which has been titled 'Child Rights Informed Conferencing' (CRIC), that seeks to demonstrate how youth conferencing could be implemented in a manner that respects the rights of child offenders. The CRIC Model starts from the premise that individuals in the child justice system, including those involved in youth conferencing, are first and foremost, *children*. And, as the CRC clearly articulates, children have rights as individuals that they do not lose when they enter the justice system. The CRIC Model seeks to embed the relevant CRC rights into the youth conferencing framework to create a conferencing model that is consistent with the rights set out in the CRC. In doing so, it answers the second part of the research question in this thesis, namely can youth conferencing be undertaken in a way that respects the rights of child offenders.

Section 8.2 of this chapter provides an overview of the CRIC Model, which is built around the core principles of the CRC, as set out in in Figure 1 (below). The analysis of three existing conferencing programs provided the foundation for developing the CRIC Model, and aspects of these programs that do respect the rights of young offenders have been incorporated into this model, as set out in Table 1 (below).

Section 8.3 analyses each of the four core components of the CRIC Model. Of course, a model is only as good as its implementation, so section 8.4 identifies four key features that must inform the implementation of the CRIC Model.

The four components of the CRIC Model, in combination with the four key elements of implementation, offer a pathway to a robust and substantive child rights informed model of conferencing that culminates in 'the conferencing that *should be*.'

8.2 The Core Components of the CRIC Model

As illustrated in Figure 1 below, the CRIC Model involves embedding standards derived from the CRC into youth conferencing. The proposed model provides an opportunity to apply these CRC principles to the four common stages of a youth conference that were identified in Chapters 2 and 3 of the thesis, namely,

13. a formalised process for the referral of a child offender to the program;

14. an out-of-court mediated process facilitated by a convenor who prepares and brings together the people directly involved in, or affected by an offence;

15. targeted reparation ("creative restitution") by the child that is agreeable to the participants, aimed primarily at some direct reparation that involves the victim (if there is one) or a task, such as a commitment by the child to complete a course of education or to do something to "make up" for the harm caused by their offending behaviour; and

16. the opportunity for the (re)integration of the child into the community through their direct participation in the process and fulfilment of the agreed reparative outcome; a concept that has been described as reintegrative shaming.[7]

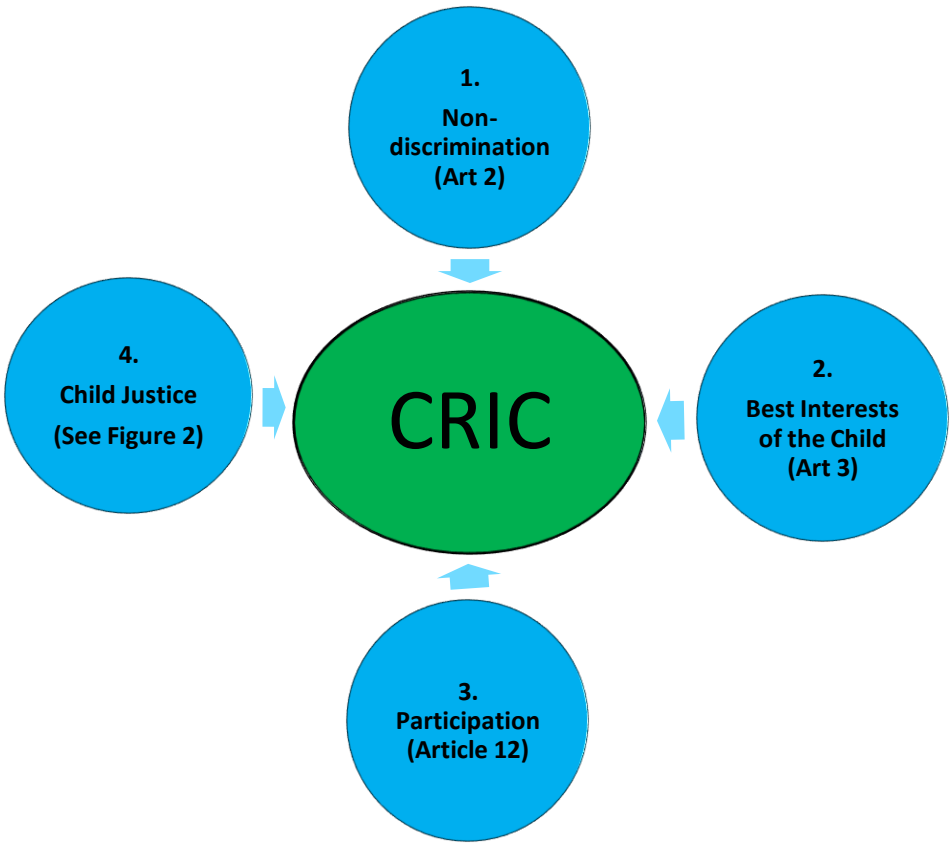

Figure 1: The four elements of the Child Rights Informed Conferencing Model

[7] Braithwaite, J *Crime, Shame, and Reintegration*. Cambridge: Cambridge University Press, 1989.

The CRIC Model is underpinned by what Tobin describes as a 'substantive rights' approach to children's rights.[8] A substantive children's rights approach can be contrasted with other less comprehensive approaches to children's rights, such as invisible; incidental; selective; superficial; and rhetorical.[9] As noted by Tobin, the adoption of a substantive approach to children's rights involves four components:

1. the conceptualisation of the issues in terms of the rights of children;
2. the procedures to be adopted for the determination of these issues;
3. the meaning to be given to the content of the rights in question; and
4. the substantive reasoning by which to resolve the issues and balance the competing interests.[10]

While a substantive approach to children's rights has been applied in various contexts, it has not yet been applied to youth conferencing. [11] The CRIC Model provides an opportunity to do so and, in the process, to provide a way to reconceptualise youth conferencing from a children's rights perspective. From this perspective, the practical application of the four elements of the CRIC Model offers a way to recast the steps in youth conferencing in terms of the rights of the child, and the meaning to be attributed to children's rights in each of the four stages of the conference.

As a caveat, it should be noted that a substantive approach to children's rights would ordinarily require children to be involved in the design and development of the program. This has not happened for the purposes making a scholarly contribution to knowledge in this thesis by proposing the CRIC Model. Instead, this would need to be remediated by extensive involvement of children in the monitoring and evaluation of a pilot program of the CRIC Model.

In addition, the practical application of the CRIC Model adopts and adapts the positive aspects of each of the programs under review. The aspects of the programs reviewed in this thesis that

[8] Tobin, J 'Judging the Judges: Are They Adopting the Rights Approach in Matters Involving Children?' (2009) 33 *Melbourne University Law Review* 579. See also Tobin, J 'Children's Rights in Australia: Still Confronting the Challenges' in Gerber, P and Castan, M (eds.) *Critical Perspectives on Human Rights Law in Australia (Volume 2)* Thomson Reuters (2022).
[9] Tobin, J. 'Children's Rights in Australia: Still Confronting the Challenges' Chapter 11 in Gerber, P and Castan, M (eds.) *Critical Perspectives on Human Rights Law in Australia (Volume 1)* Thomson Reuters (2021).
[10] Tobin 2009 (Op.cit.).
[11] For example, see examples in fn 30 – 37 of Tobin, J 2022 (Op.cit.).

were considered child rights compliant, and therefore suitable for incorporation into the CRIC Model, are set out in Table 1 below – noting that some features identified in one program are also available in another, such as the diversionary conferences in NSW and ACT.

NSW	Victoria	ACT
Legislative recognition of importance of addressing Indigenous over-representation in youth justice.	All referrals to conferences made by courts.	Indigenous Guidance Partner.
Comprehensive Youth Conferencing Manual and a structured convenor training and appointment procedure.	Mandatory legal practitioner for the child.	Requirement for convenors to be able to advise those who take part in restorative justice of their rights and duties in relation to restorative justice.
Diversionary and dispositional conferences with ability for a court to refer a child away from 'mainstream' proceedings to a conference as a diversionary outcome.	Child's agreement to conference outcome plan mitigates sentence.	Dedicated restorative justice unit as a separate administrative unit to manage conferences.
	Conferencing only available for offences that could attract supervisory order.	

Table 1: Child rights compliant aspects of existing conferencing programs for incorporation into the CRIC Model

The CRIC model demonstrates that it is possible to have a youth conferencing program that embraces the principles of restorative justice AND respects, protects and fulfils the rights of young offenders as set out in the CRC.

8.3. CRC principles of the CRIC Model

While all the rights in the CRC are relevant to all matters concerning children, there are four aspects of the CRC that are particularly relevant to youth conferencing. This section explains the key role that each of these rights plays in youth conferencing that is undertaken in accordance with the CRIC Model.

8.3.1 Non-Discrimination

Chapter 5 analysed the right to non-discrimination as set out in Article 2 of the CRC. It explored how data, empirical studies and qualitative assessments reveal that Indigenous children and children in regional and remote areas do not participate in conferencing at the same rate as other children; nor do they have the same outcomes when they do.[12] For example, 'the disregard for Indigenous Australians and their distinct cultural differences, combined with police discrimination, has led to indirectly discriminative restorative justice practices which are largely inaccessible to Indigenous youth.'[13] Such inaccessibility occurs when conferencing is either not recommended as an option for Aboriginal and Torres Strait Islander children, or conversely, it is used as a net-widening mechanism in circumstances where a less interventionist outcome would be given to a non-Indigenous child offender.[14] Similarly, youth conferencing is less effective in reducing recidivism by Indigenous young people post-conference compared to non-Indigenous young people.[15] Youth conferencing has been found to raise similar issues of discrimination for children in the child protection system,[16] children from culturally and linguistically diverse communities[17] and children from regional areas.[18]

To address this problem, the CRIC Model considers non-discrimination from a perspective that goes to the heart of restorative justice theory. This perspective is derived from a critique that focuses on the way in which socio-cultural differences are not fully addressed in restorative justice more generally:

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[12] Taussig, I *Youth Justice Conferences: Participant profile and conference characteristics* NSW Bureau of Crime Statistics and Research Issue Paper no. 75, 2012, 10.
[13] Sewak S, Bouchahine M, Liong K, Pan J, Serret C, Saldarriaga A and Farrukh E *Youth Restorative Justice: Lessons From Australia* A Report for HAQ Centre for Child Rights 2019, 8. See also Cunneen C, White R, and Richards K, *Juvenile Justice: Youth and Crime in Australia* (5th ed) Oxford University Press 2013, 357; Blagg, H 'Restorative Visions and Restorative Justice Practices: Conferencing, Ceremony and Reconciliation in Australia' (1998) 10 *Current Issues in Criminal Justice* 5.
[14] Sewak et al 2019 (Op.cit.), 357; Taussig 2012 (Op.cit.), 10.
[15] Little S, Stewart A, Ryan N 'Restorative Justice Conferencing: Not a Panacea for the Overrepresentation of Australia's Indigenous Youth in the Criminal Justice System' (2018) 62 *Int J Offender Ther Comp Criminol* 4067, 4081.
[16] Walsh, T 'From Child Protection To Youth Justice: Legal Responses To The Plight Of 'Crossover Kids'' (2019) 108 *University of Western Australia Law Review* 90, 108.
[17] Sewak et al 2019 (Op.cit.), 129. See also Bartels L, *Crime prevention programs for culturally and linguistically diverse communities in Australia,* Australian Institute of Criminology, Research in practice no.18, 2011; M Grossman M, and Sharples J, D*on't go there: young people's perspectives on community safety and policing: a collaborative research project with Victoria police, region 2 (Westgate)*, Victoria University, 2010.
[18] Taussig 2012 (Op.cit.), 10.

> The lack of attention to issues of race, gender, and social class within RJ research on its own practices is not an indictment of any failure to solve structural problems as much as it is a critical oversight of how social stratification and cultural differences may in turn structure social interactions within restorative processes – in terms of imbalances in social and cultural capital among participants; in terms of cultural differences in rituals of apology, accountability and amends; and indeed in terms of who may be included or excluded from RJ as an "alternative" justice practice.[19]

The CRIC Model addresses the challenge of non-discrimination by requiring that it is considered and focused on at each stage of the conference process, that is, from the initial referral stage, through the conference meeting, the outcome plan and all the way through to re-integration. Of course, the measure of non-discrimination in youth conferencing is ultimately empirical. It fundamentally depends on the collection and analysis of data that demonstrates that children participate in, have similar experiences of, and achieve similar outcomes regardless of difference in demographic or socio-economic factors. In other words, the rates, experience and criminogenic outcomes of children in youth conferencing should be statistically similar regardless of individual difference of gender, Indigenous status, child protection status, whether a child has different abilities or is from a particular cultural background, such as Pacific Islander or African children, that is otherwise vulnerable to be over-represented in the youth justice system. Non-discrimination will be achieved when we see that children of diverse backgrounds are not only being offered and choosing to participate in a conference program at the initial referral stage but are remaining engaged throughout the middle meeting and reparation stages and ultimately record similar success to other children at the reintegration stage in terms of recidivism rates in particular. As discussed below, this requires consideration of who is involved at key decision points throughout the conference process.

The pathway to non-discrimination requires more than a narrow legal solution. The NSW legislation contains a clear statement of the importance of using diversionary conferences to address Indigenous over-representation, and yet discrimination continues. While this provides clear recognition of a serious issue to help guide decision-making, it also shows that it is not possible simply to legislate discrimination away. As in all other jurisdictions, NSW still experiences significant over-representation of indigenous children in its youth justice system.

[19] Wood W and Suzuki M 'Four Challenges in the Future of Restorative Justice' (2016) 11 *Victims and Offenders* 149, 166.

Although an express recognition of Aboriginal over-representation is important, merely mandating that children from vulnerable groups must participate in youth conferencing in proportion to their numbers in the wider youth justice cohort is not the answer. For one thing, such an edict could potentially run counter to other elements of the CRC, such as whether a conference is in an individual child's best interests or whether an individual child wishes to participate.

With this in mind, the CRIC Model requires non-discrimination to be addressed through operational changes to conferencing programs that are designed to overcome 'cultural, structural and service-related barriers' that make conferencing, like other youth justice services 'difficult to access or unattractive.'[20] The CRIC Model seeks to facilitate recognition by the adults involved in the initial consideration of a youth conference – police, lawyers, youth workers and judicial officers – that young people from vulnerable groups report feeling hopeless, disconnected and 'locked out' from the wider community.[21]

The CRIC Model requires the application of methods that have been identified as important in reducing the involvement of vulnerable minorities in the youth justice system generally. Thus, the starting point is recognising that these diverse groups require tailored strategies to address their distinct risk-factors and build on their unique strengths.[22] This requires genuine community involvement at every stage of the conference process. At present, there is some scope for community supporters (for example, an elder or respected person), to be involved in Stage 2 of a youth conference, but not at the critical initial referral stage or at the reparation or reintegration stages.

To address this problem, the CRIC Model adapts recommendations made by groups such as VCOSS,[23] the Youth Affairs Council[24] and the Koorie Youth Council.[25] These groups have identified the need to develop 'joined up strategy' for Indigenous children in the justice system

[20] VCOSS *Submission: Inquiry into youth justice centres in Victoria 2017*, 28; see also Bartels L, *Crime prevention programs for culturally and linguistically diverse communities in Australia*, Australian Institute of Criminology, Research in practice no.18, 2011.
[21] Fatouros H, *Is our youth justice system really broker?* Castan Centre for Human Rights Law Conference, Victoria Legal Aid, 22 July 2016.
[22] Noetic Solutions Pty Limited, *Review of Effective Practice in Juvenile Justice*, Report for the Minister for Juvenile Justice, January 2010.
[23] VCOSS *Submission: Inquiry into youth justice centres in Victoria 2017*, 28.
[24] Youth Affairs Council of Victoria, *Inquiry into Youth Justice Centres in Victoria, A submission to the inquiry by the Standing Committee on Legal and Social Issues, Parliament of Victoria*, March 2017.
[25] Koorie Youth Council *Ngaga-dji (hear me) Young voices creating change for justice* Koorie Youth Council 2018.

more generally. They recommend targeted support, tailored programs and 'employing Koorie [in the case of Victoria] youth workers and youth workers from culturally diverse communities to provide positive role-modelling and mentoring, assertive outreach, and recreational programs' to ensure that generalist interventions are 'culturally relevant and safe.'[26]

In the context of supporting non-discrimination, the CRIC Model adapts these recommendations in combination with adapting the current ACT Indigenous Guidance Partner role discussed in Chapter 5. The CRIC Model proposes the establishment of a Community Support Panel (CSP). The CSP would comprise a pool of volunteers – Conference Guidance Partners – who would be available in person or remotely at each stage of the conference process. The distinguishing feature of the CSP is the flexibility of its membership. Ideally, some of its membership would consist of former participants in conferencing programs, which would provide genuine child input into its operation. It would also include persons from a diverse range of backgrounds who can provide guidance to *all* participants about developing a socially and culturally appropriate conference for a child. It should also have an expert in child rights or child psychology available to it. Unlike the ACT model of having an Indigenous Guidance Partner dedicated to supporting all Indigenous participants at all stages of the conference process, the CSP gives greater agency to the child to choose how they identify and from whom they want support at each stage of the conference.

The purpose of the CSP is to require that all children eligible for a conference are provided with the opportunity to discuss the possibility of participation in a conference with an individual Conference Guidance Partner from a relevant gender/gender identity, cultural or social background chosen by the child before they decide whether to participate in the program. Further, a child must be provided with a clear opportunity to refer to a Conference Guidance Partner from the CSP at *any* stage of the conference process, and this person should also check in with the child at each stage. The role of Conference Guidance Partner is to augment the narrower legal advice that a lawyer might be able to provide to a child about the legal implications of participation in a conference. The Conference Guidance Partner uses their

[26] VCOSS *Submission: Inquiry into youth justice centres in Victoria 2017*, 29. See also Stewart J, Hedwards B, Richards K, Willis M and Higgins D, *Indigenous Youth Justice Programs Evaluation*, Australian Institute of Criminology, 2014; Youth Affairs Council of Victoria, *Inquiry into Youth Justice Centres in Victoria, A submission to the inquiry by the Standing Committee on Legal and Social Issues, Parliament of Victoria*, March 2017.

experience and social/cultural knowledge to be a valuable, situational resource and support for the child.

Introducing the CSP as part of the CRIC Model will see youth conferencing programs shift from the convenor alone controlling the program, with mere 'cameo' appearances by elders or respected community persons at the second stage of the conference, to a model that benefits from the contribution of a wider range of Conference Guidance Partners at every stage of the conference process. The development and inclusion of the CSP is especially important to address the problem that has been identified with respect to youth conferences involving Indigenous children, namely that 'conferences typically involve an Indigenous young 'offender', a non-Aboriginal 'victim' and a convenor who demographically matches the victim.'[27] The risk of an Indigenous child feeling like an 'outsider' is exacerbated further by the likelihood that the investigating police officer and legal representative will also match the demographic background of the convenor. The same observation can be made for other especially vulnerable groups in the child justice system.

Even where victims and offenders are from the same community, the CSP can help to ensure that a child is not discriminated throughout the conference process by ensuring that the child has support available to them, including from people like them should they so choose, throughout all stages of the conference process. The CSP takes on a dual role. The CSP can provide context and guidance to the convenor about the child, while also providing the child with culturally or socially tailored guidance on the conference process and outcome. The ongoing involvement of a CSP is also vitally important in the targeted reparation and reintegration stages of a conference, in which the child develops and completes an outcome plan. This is because the data suggests differential outcome plans and completion rates depending on a child's location, age, gender and Indigenous status.[28]

In order to protect against discrimination, the CRIC Model proposes that the initial decision to refer a child to a conference should be made by a judicial officer rather than by police. This change would help to reduce the inconsistent application of discretion that has been shown to exist when police, and especially officers involved in the initial investigation of an offence, are able to determine whether a child should be referred to a diversionary conference, without any

[27] Walsh 2019 (Op.cit) 108. See also Kelly, L and Oxley, E 1999 (Op.cit.) 5.
[28] Taussig, I *Youth Justice Conferences: Participant profile and conference characteristics* NSW Bureau of Crime Statistics and Research Issue Paper no. 75, 2012, 10.

oversight by a court.[29] Having the initial decision to refer a child to youth conferencing made by an independent judicial officer will reduce the risk of discrimination, regardless of whether this decision is for a post-proof dispositional conference or a pre-proof diversionary conference.

The court referral can be done 'on the papers' without the need for the child to attend court for a diversionary conference. Under the CRIC Model, such a referral decision does not mandate a child's participation in the conference, but simply that the prospect of a conference can be canvased with the child and their legal representative, and that the child should be made aware of the guidance available from the CSP. Whether to participate in the youth conferencing, is, however, ultimately the child's decision.

8.3.2 Best interests of the Child

The CRC Committee's Concluding Observations to Australia, in 2012, stated that,

> The Committee urges the State party to strengthen its efforts to ensure that the principle of the best interests of the child is widely known and appropriately integrated and consistently applied in all legislative, administrative and judicial proceedings and all policies, programmes and projects relevant to, and with an impact on children. In this regard, the State party is encouraged to develop procedures and criteria to provide guidance for determining the best interests of the child in every area, and to disseminate them to public and private social welfare institutions, courts of law, administrative authorities and legislative bodies.[30]

More recently, the CRC Committee stated in its 2019 Concluding Observations in response to Australia's fifth and sixth periodic reports that,

> 20. With reference to its General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration and recalling its previous recommendations on the best interests of the child (CRC/C/AUS/CO/4, para. 32), the Committee recommends that the State party:

[29] Sewak et al 2019 (Op.cit), 8.
[30] UN Committee on the Rights of the Child: *Concluding observations on the combined fifth and sixth periodic reports of Australia* (2019) CRC/C/AUS/CO/5-6, para 32.

(a) Ensure that procedures and criteria guiding all relevant persons in authority for determining the best interests of the child and for giving it due weight as a primary consideration are coherent and consistently applied throughout the State party.

One of the biggest challenges of youth conferencing from a child rights perspective is the central tension that arises from the core restorative justice focus on the interests of the victim and wider community, in contrast to the interests of the child offender. A substantive rights approach under the CRIC Model is not about a child's rights 'trumping' the rights of other interested parties in the conference. Rather, it is about recognising that the fundamental restorative justice end goal of a conference cannot be achieved in the absence of 'a more inclusive and sophisticated examination of all the issues in a way that recognises, but does not necessarily prioritise, the rights of children.'[31] In taking this approach, the CRIC Model minimises the risk that the perceived best interests of the child in a conference do not end up as a 'proxy' for the 'interests of others'.[32]

The CRIC Model addresses two fundamental problems associated with the best interests principle in the context of 'traditional' conferencing. The first problem is that current models of conferencing, and especially police initiated diversionary conferencing, provide a licence for others to determine whether a child can participate in a conference in the first place. Under the CRIC Model, such a decision must be informed by what is in the child's best interests, not the preference of a police officer, or to appease a victim or, in the case of a diversionary conference, when there is insufficient evidence to mount a prosecution.[33]

The second problem relating to the best interests of the child extends from the first problem. This challenge is to ensure that a conference does not proceed nor develop an outcome plan under the guise of a child's best interests, when in reality the process is being used as a proxy for the interests of others – parents, guardians, victims, police – under the guise of the child's best interests.[34]

Both these problems are illustrative of what Tobin might describe as a 'superficial' or 'rhetorical' approach to children's rights. Such an approach is a very real risk in youth

[31] Tobin J 2009 (Op.cit.), 625.
[32] Ibid.
[33] Kelly, L and Oxley, E 1999 (Op.cit), 4; Walsh, T 2019 (Op.cit.) 108.
[34] Ibid.

conferencing because of the emphasis on victims and community in restorative justice theory.[35] The risk that arises from these problems is that the process ends up operating on a narrow conception of children's rights that reflects what someone else considers to be in a child's best interests, which can be used as a cloak for different ends in a conference, without a full consideration of the child's substantive rights.

Under the CRIC Model, the child's best interests in a conference must be continuously assessed at every stage of the conference process. Given that the starting point for a conference is a criminal act or omission by a child, the challenge for the CRIC Model is to ensure that an individual child's level of development is accommodated and supported to the maximum extent possible through each stage of the conference process. This requires careful work by a judicial officer when determining whether a matter is suitable for a conference, as well as consistent work by the allocated conference convenor to ensure that all conference participants are aware of matters that are relevant to determining what is in the child's best interests. An assessment of a child offender's best interests goes beyond a convenor simply informing participants of 'their legal rights in the conference process', including that a child does not have to participate.[36] It also goes beyond the role of a lawyer with respect to advice as to the legality of the process, or the proportionality of any outcome.

Criteria to consider when assessing how to determine and act in a child's best interests should include the criteria set out in paragraphs 52 – 79 of *General Comment 14,*[37] which includes the assessment of matters such as the child's general well-being; the child's physical, mental, spiritual, moral, psychological and social status; and the child's need for education and a healthy and safe environment. It also needs to recognise the 'rapid and vulnerable' process of development that differentiates children from adults.[38] Indeed, it has been observed that,

> Evaluating a child's best interests involves a welfare appraisal in the widest sense, taking into account, where appropriate, a wide range of ethical, social, moral, religious, cultural, emotional and welfare considerations. Everything that conduces to a child's welfare and happiness or relates to the child's development and present and future life as a human being, including the child's familial, educational and social environment,

[35] Tobin, J 2009 (Op.cit.) 579.
[36] NSW Department of Justice, Youth Justice Conference Policy, (Policy, 12 September 2016) 7.
[37] UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC /C/GC/14,
[38] Morag, T 'The Principles of the UN Convention on the Rights of the Child and their influence on Israeli Law' (2002) 22 *Michigan State International Law Review* 545.

and the child's social, cultural, ethnic and religious community is potentially relevant and has, where appropriate, to be taken into account.[39]

When evaluating the best interests of a child at various stages of a conference, the defining aspect of the CRIC Model is that the child's views need be considered and given due weight at each stage, so the child can have a significant role in determining what is in their best interests (elaborated upon further in the analysis the third element of the model, below). Here again, the proposed CSP is an important resource because a Conference Guidance Partner can provide a nexus between the child and the conference process in a way appropriate to the child that goes beyond the more procedural role of the lawyer. In addition, the CSP can provide guidance to the conference convenor as well.

An exacerbating factor that impacts fulfilment of a child's best interests in youth conferencing is the wider problematic assumption of restorative justice theory, which is that programs start from the position that victims and offenders in a restorative justice process possess 'a generous, empathetic, supportive and rational human spirit'[40] and a 'degree of moral maturity and empathetic concern.'[41] Regardless of the position of victims, the starting point for considering the place of the child's best interests in the conference process needs to be a recognition that 'documented evidence in the fields of child development and neuroscience indicates that maturity and the capacity for abstract reasoning is still evolving in children … due to the fact that their frontal cortex is still developing.'[42]

The CRIC Model addresses these issues by requiring all convenors to be appropriately trained (discussed in section 8.4.2 below) across disciplines in order to be able to engage with a young offender effectively throughout the process, and that additional support canc 8ome from the CSP.

Finally, under the CRIC Model, a conference should be terminated if it is determined by the convenor that the conference is no longer in a child offender's best interests. This must be done without any adverse impact on any other process that is undertaken in response to an alleged offence, for example, referral of the matter back to court.

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[39] *Re G (Children)* [2012] EWCA Civ 1233 per Lord Justice Munby.
[40] Cossins A 'Restorative Justice and Child Sex Offences: The Theory and the Practice' (2008) 48 *British Journal of Criminology* 359, 363.
[41] Ibid., 363.
[42] UN Committee on the Rights of the Child *General comment No. 24 (2019) on children's rights in the child justice system* CRC/C/GC/24, para 22. See also Grisso, T and Schwartz, R 'Adolescents' capacities as trial defendants', in Grisso, T and Schwartz, R (eds.), *Youth on trial. Developmental perspectives on juvenile justice* Chicago: University of Chicago Press, 2000, 67–71; Grisso, T., Steinberg, L., Woolard, J., Cauffman, E., Scott, E., Graham, S., Lexcen, F., Reppucci, N.D. and Schwartz, R., "Juveniles' competence to stand trial: A comparison of adolescents' and adults' capacities as trial defendants" (2003) 27 *Law and human behavior* 333–363; Steinberg, L 'Adolescent brain science and juvenile justice policymaking' *Psychology*, Public Policy, and Law 2017 (23(4)), 410–420.

8.3.3 The right to express a view and to have due weight accorded to the views

The adoption of a substantive approach to children's rights in the CRIC Model requires recognition of, and respect for, the fundamental 'linchpin' right of a child to express a view and have that view given appropriate weight under Article 12 of the CRC.[43] This Article requires that a child must be given an 'opportunity to be heard in any … proceedings affecting' them in accordance with their age and level of maturity. The CRIC Model recognises that the driving force behind Article 12 is that it shifts the child from being a passive object of law to an active participant in the process of decision-making.[44] This resonates with the restorative justice objective that all affected by an offence need to work together to respond to the offence.

The starting point to protecting a child's right to participate, is that a child must not be compelled to participate in any conference. While this is already enshrined in legislation,[45] full and free consent to participate in a conference necessitates that a child offender must be provided with adequate information in a form that they understand before they make a decision about participating. The CRIC Model requires that this information needs to expand beyond pure legal advice, from a legal representative, about the impact on court proceedings. It should include information conveyed via alternative resources – including, perhaps, multi-media resources – as well as confidential information about the conference process, including steps, expected timelines and consequences, the impact of any admission of responsibility, the implications of withdrawing from the process, monitoring of outcome plans, and any limits of confidentiality. This information should come from the CSP, as a supplement to any legal advice that a child's legal representative provides or assessment by a convenor as part of the approval process. By adopting this approach, the CRIC Model recognises that the current relatively low rates of young offenders choosing to participate in conferences as set out in Chapter 3 (and especially low rates of Indigenous participation in Victoria and the ACT) is likely to be a reflection of the fact that children are not currently sufficiently or appropriately advised about the process in order to make an informed decision about whether to participate.[46]

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[43] Freeman, M 'Whither Children: Protection, Participation, Autonomy?' (1994) 22 *Manitoba Law Journal* 307, 319.
[44] Tobin, J *The UN Convention on the Rights of the Child: A Commentary* Oxford Commentaries on International Law, Oxford Scholarly Authorities on International Law (OSAIL) 2019.
[45] For example, see s414(1)(c)(ii) *Children Youth and Families Act 2005* (Victoria).
[46] Productivity Commission, *Australian Government, Annual Report on Government Services: Chapter 17 Youth Justice Services*, (Report, 2018) 17.22.

Stage 2 of a conference is all about the child's direct engagement with other conference participants, including the victim and the police. Current legislation or guidelines for conferencing in each jurisdiction either preclude the involvement of a legal practitioner (the ACT) or constrain a legal representative's advocacy during this stage to providing information to participants about what would be expected as a penalty for the offence at court; the child otherwise is expected to speak for themselves.[47] Likewise, the child's legal representative has limited input into the development and adoption of an outcome plan in Stage 3, or the completion of it beyond any appearance required at court during Stage 4. While the young person might have supporters with them at Stage 2 of a conference – such as parents or guardians – the CRIC Model recognises that it is unrealistic to expect that all such support persons will have the procedural knowledge of conferencing or even the ability to assist the child to express their views throughout the conference. The CRIC Model also recognises, as noted in the discussion of best interests, that such persons could have separate interests from the child, which could impact on their ability to facilitate the child's meaningful participation in the conference.

This is a real problem because a 2017 study of young offenders who had participated in a conference found that most young offenders did not understand the overall purpose of the conferencing process; nor did they understand what the conference convenors were asking throughout the conference and they struggled to grasp the seriousness of what they had done, and were unable to articulate their remorse in the stage 2 conference meeting.[48] This study also found that 'stressful situations' such as meeting victims and investigating officers 'may exacerbate their verbal or oral limitations and result in the offender suppressing their emotions out of fear or anxiety.'[49] This is not a unique finding; other studies have raised similar issues about a child's comprehension of the conferencing process and their oral language competence to effectively participate.[50]

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[47] *NSW Youth Justice Conference Policy* NSW Government, 2016; *Victoria Youth Justice Group Conferencing program guidelines* DHS Melbourne 2010, 18.
[48] Riley M, and Hayes H, 'Youth Restorative Justice Conferencing: Facilitator's Language - Help or Hindrance?' (2018) 21 *Contemporary Justice Review* 99, 100.
[49] Ibid., 101.
[50] Hayes H & Snow P 'Oral language competence and restorative justice processes: Refining preparation and the measurement of conference outcomes' *Trends & issues in crime and criminal justice* no. 463. Canberra: Australian Institute of Criminology 2013.; Snow P & Powell M 'Youth (in)justice: Oral language competence in early life and risk for engagement in antisocial behaviour in adolescence' *Trends & issues in crime and criminal justice* no. 435. Canberra: Australian Institute of Criminology 2012.

To address these deficiencies, the CRIC Model provides for the CSP to be available to the child offender at every stage of the conference process. The CSP will maximise the child's ability to participate in their own right. The CSP can be a sounding board for the child, or indeed a sounding-off board. More particularly, the function of the CSP is to support the child's ability to participate in the conference process through four tasks:

1. **Assess** the child's communication style and consider any specific communication requirements;

2. **Describe** the communication needs of the child to the conference convenor. This could include providing recommendations on how to best communicate with the child, for example explaining restorative justice concepts that the child may have difficulty understanding;

3. **Facilitate** communication between the child and other conference participants to prevent or overcome a communication breakdown, especially in the Stage 2 meetings; and

4. **Write** reports about the child's communication needs (if required) and provide practical strategies to the convenor for managing these needs.

In addition to having a CSP at youth conferences, given the more nuanced role of the lawyer, the CRIC Model requires that only specialist accredited legal representatives can represent a child in a youth conference. Obtaining accreditation means a lawyer is able to demonstrate deep knowledge of restorative justice processes and children's rights and that they have the skills to effectively represent children within such processes. Such accreditation can be operated through in the specialist accreditation programs offered by bodies such as the Law Institute of Victoria[51] and the Law Society of New South Wales.[52]

[51] See <https://www.liv.asn.au/Web/Content/Communities---Networks/Accredited_Specialisation/Become_an_Accredited_Specialist/Become_an_Accredited_Specialist.aspx

[52] See https://www.lawsociety.com.au/specialist-accreditation/program-areas

Further, as discussed in Chapter 7, Lundy's model of participation offers a practical and robust framework for all adult participants in a conference process to engage with a child offender at each stage of the process.[53] Lundy's model is summarised below in Figure 2.

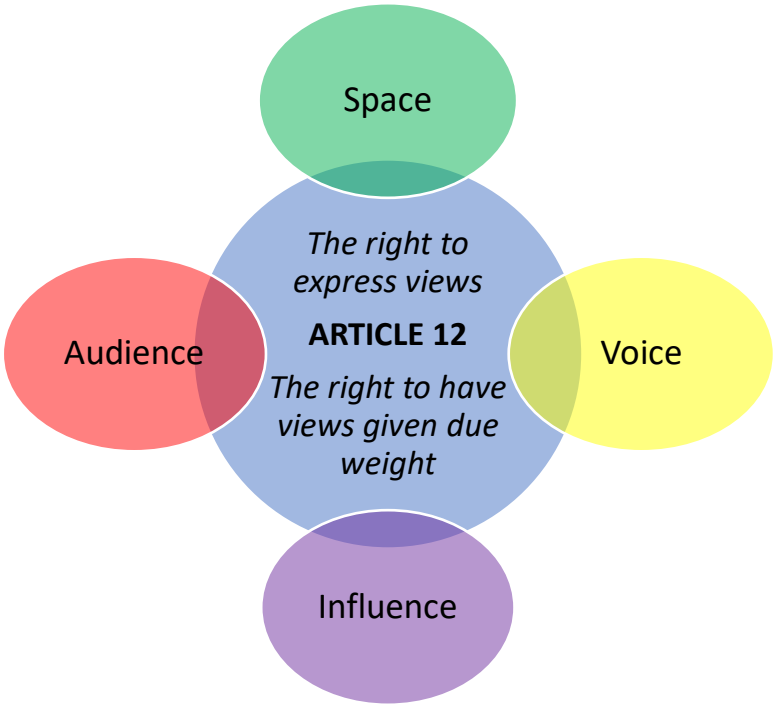

Figure 2: Lundy's Model of Participation

Figures 3 – 6 separate each of the four components of Lundy's model to provide a practical checklist to guide engagement with the child throughout the conference process under the CRIC Model.

[53] Lundy, L 'Voice is not enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child' (2007) 33 *British Educational Research Journal* 927.

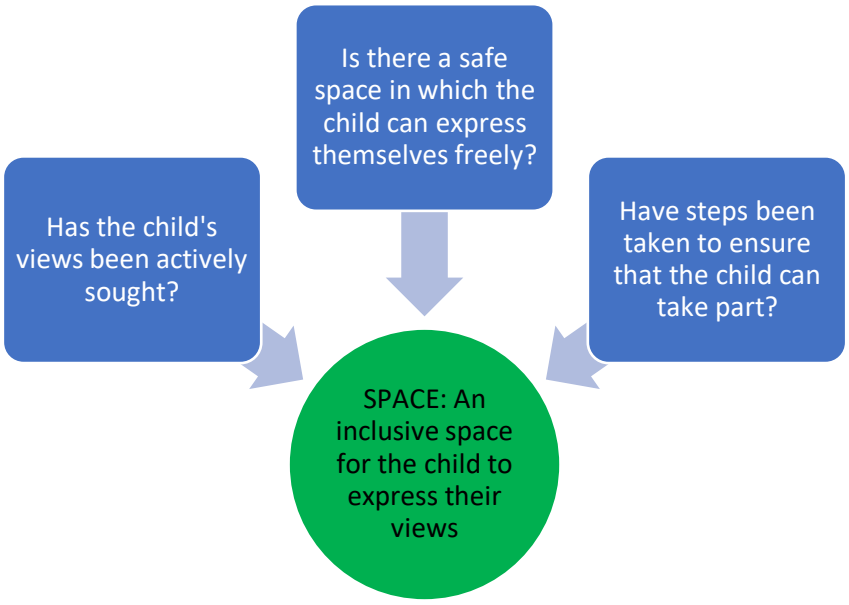

Figure 3: Lundy's Voice Model Checklist (Space)

In the CRIC Model, the component of space could be as simple as ensuring that conversations with the child about whether to take part in a conference take place privately, and not in high-tension locations such as police stations or courts. It is also about thinking about whether the child is comfortable to express a view, for example by considering who is present with the child and that they can have supporters with them, for example the Conference Guidance Partner. This element also applies to choosing an appropriate venue for any meeting, including consideration of whether a face-to-face meeting is the best way for a child to participate, or whether other processes, such as an exchange of videos might be more effective for the child to engage in the conference process.

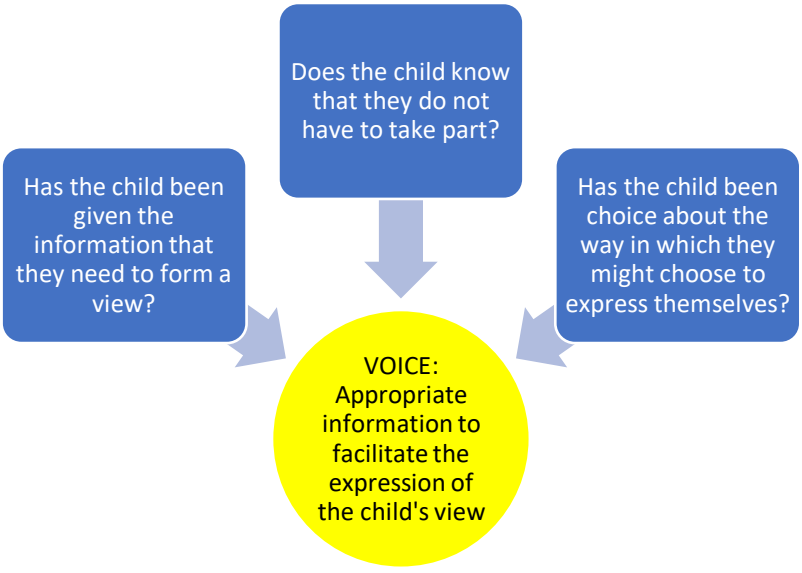

Figure 4: Lundy's Voice Model Checklist (Voice)

The element of voice is fundamentally about ensuring that the child is provided with sufficient and appropriate material at each stage of the conference. This is fundamental at the referral stage but applies also at the stage 2 of a conference. Again, this might involve consideration of the best mode of communication both for providing information to the child and for helping the child to understand all the detail so that they can effectively participate. This of course includes sufficient information about whether to accept responsibility for an offence and whether to consent to participate in a conference: no conference should proceed in the absence of these two factors. The element of voice in a conference process highlights the importance of legal advice and representation. Fundamentally, how can a child make an informed choice about whether to accept responsibility for an offence and take part in a conference or consent to do so without legal assistance to understand the repercussions of their choice?

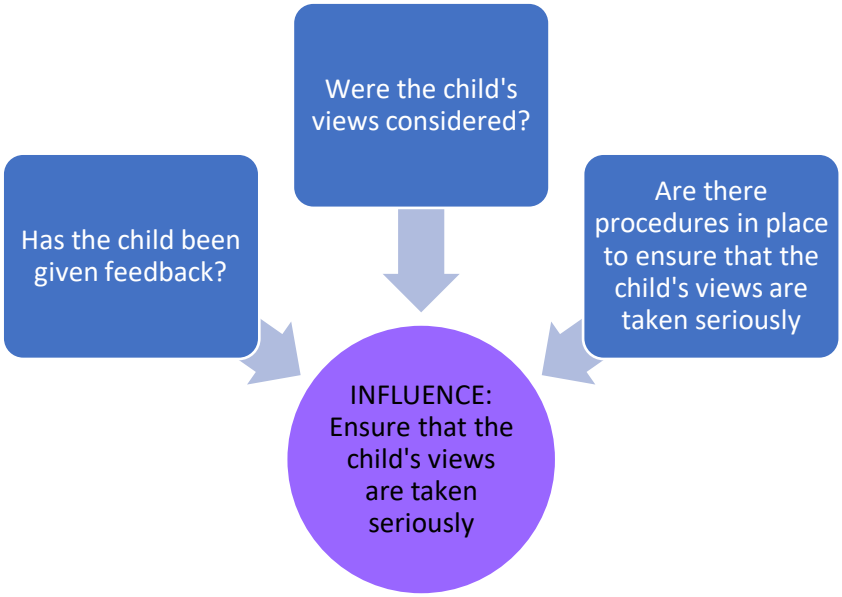

Figure 5: Lundy's Voice Model Checklist (Influence)

As with the element of Voice, the element of influence is fundamental at each stage of the conference. A conference cannot proceed unless a child accepts responsibility for an offence (at a minimum) and consents to participate. Likewise, all participants involved in any mediated interaction with the child at stage 2 of a conference – regardless of mode of interaction – need to acknowledge the child's views on the offending, the impact on any victim and the outcome plan. While the element of influence underlines the importance of legal representation for a child at each stage of the conference to ensure that the child's views are taken seriously, this element extends to all participants in a conference process because it goes to the heart of restorative justice theory about the importance of all parties coming together to resolve the offending conduct. This cannot happen unless the child offender's views are taken seriously.

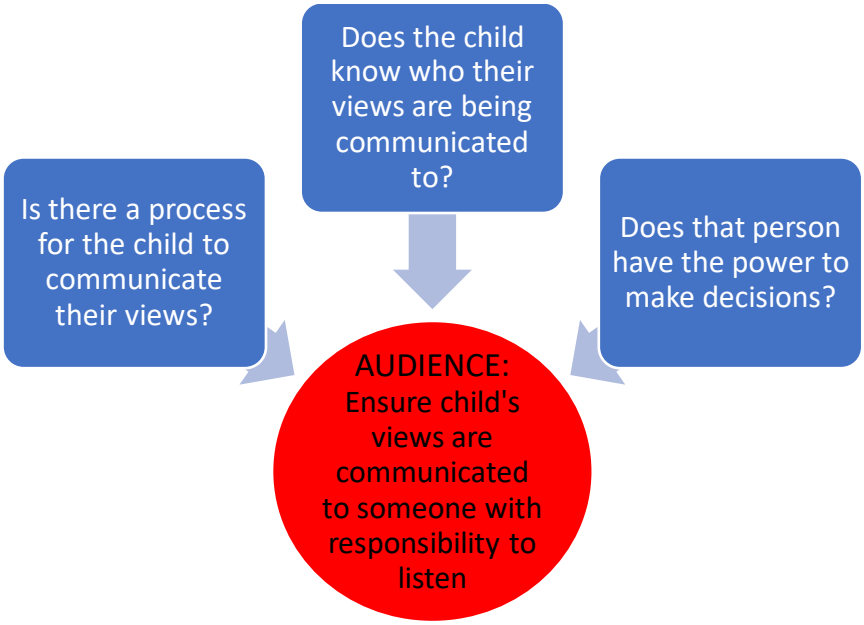

Figure 6: Lundy's Voice Model Checklist (Audience)

Finally, Audience connects with Voice. If restorative justice is about victims, offenders and community coming together to resolve offending conduct, youth conferencing has no value unless all participants are prepared to listen to what a child offender says. The conference process must be about hearing from the child, and therefore this element needs to be reflected throughout the process as well.

8.3.4 Child Justice

The final children's rights element of the CRIC Model is a compilation of several rights in the CRC. Figure 7 below illustrates the provisions of the CRC that are collectively captured in the CRIC Model element of child justice. Each of these elements is discussed below.

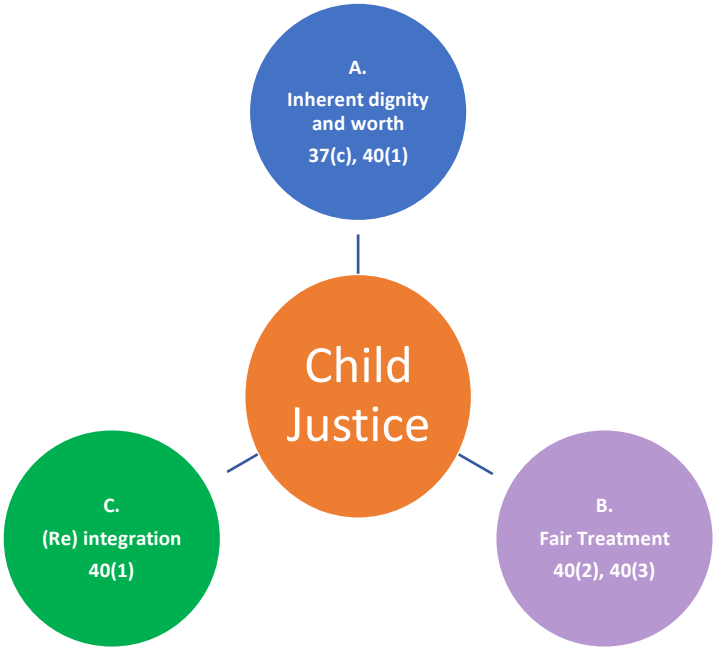

Figure 7: CRC provisions that combine to form child justice

A. Inherent dignity and worth

Articles 37(c) CRC and 40(1) of the CRC impose an obligation on States Parties to ensure that a child is treated with humanity and respect for their inherent dignity and worth when they are respectively deprived of liberty and/or alleged to have committed an offence. These values are fundamental to any justice system. Therefore, these articles are relevant to the CRIC Model because conferencing programs are available to any child alleged to have committed an offence, including a child in custody and all three jurisdictions make provision for this to occur, including in the case of the ACT, after sentence has been imposed.[54.]

While the current number of custody conferences in each jurisdiction is low, a 2019 report recommended the expansion of restorative justice programs in Australia to cover almost all categories of offence on the basis of its effectiveness for more serious offending.[55] This included post-sentence conferences for murder,[56] as well as conferences for sexual assault,[57] offences against the person,[58] drug offences[59] and dishonesty and property offences.[60] If this

[54] Section 415(1)(e) *Children Youth and Families Act 2005* (Victoria); section 46 *Young Offender Act 1997* (NSW); *Crimes (Restorative Justice) Sexual and Family Violence Offences Guidelines 2018 (ACT),* 17.
[55] Sewak et al 2019 (Op.cit.).
[56] Ibid. 52.
[57] Ibid. 61, 65-67.
[58] Ibid. 78.
[59] Ibid. 87-88.
[60] Ibid. 87-88, 93.

were to occur, it would be a significant expansion of existing programs. It would also be a radical improvement for the ACT and NSW which primarily use conferencing as a diversionary option for lower-level offending in restricted offence categories. Given the number of steps and intense process involved in a conference, the CRIC Model proposes that conferencing should be targeted, as it is in Victoria, to offences that could result in a supervisory sentence, but still with the option that the Step 4 Reintegration stage could be achieved as a complete diversionary referral away from any formal court or criminal record.

To ensure that the child's inherent dignity and worth is respected, the CRIC Model requires that a child is guaranteed the ability communicate freely throughout the conference process, not only with their legal representative, but with the conference convenor and to obtain individually tailored information from members of the CSP.

B. Fair treatment

The fair treatment theme within the child justice element of the CRIC Model centres on procedural rights articulated in Article 40(2) of the CRC and the principle of proportionality contained in Article 40(3)(b). The principle of fair treatment forms an integral part of the CRIC Model and is designed to protect child offenders from unlawful, arbitrary, discriminatory or manifestly disproportionate outcomes.

The CRIC Model, requires that a child's procedural rights must be accommodated at every stage of the youth conference. These rights include the right to be presumed innocent until proven guilty, the right to have guilt determined without delay by an independent and impartial authority, the right to legal or other appropriate assistance, the right to have their privacy respected and to be tried behind closed doors, the right to appeal and the right to participate effectively in the proceedings.

In order to ensure fair treatment, the CRIC Model requires that a conference cannot result in a disproportionate outcome; for example, a child ending up with a more onerous outcome plan than they would have received had they gone through the mainstream court process. The CRIC Model also mandates that a conference not take place unless there is sufficient evidence to prove an offence beyond reasonable doubt. This requirement is to address the risk that conferencing is susceptible to being used as a form of 'net-widening' by police and other prosecuting agencies in the absence of sufficient evidence to prosecute.

To address this issue, the CRIC Model requires that the only referral path to youth conferencing is through the courts. Further, under the CRIC Model, a court can refer a child to a diversionary conference (without a formal finding of guilt), as well as, a dispositional conference (a conference as part of the sentencing process). Thus, the CRIC Model embeds the child's fundamental right to be presumed innocent and provides independent judicial oversight over all decisions relating to a child participating in a youth conference.

One potential impact of this aspect of the CRIC Model (court referral) is that it may negatively impact on the right to have proceedings resolved 'without delay', as required by Article 40(2)(b)(iii) of the CRC. One study found that 'even after controlling for index offence and offender-related characteristics', court-referred conferences were associated with significantly greater delay in processing time, compared to police-referred conferences, and indeed 'mainstream' court convictions.[61]

To address this potential problem of delay, the CRIC Model proposes that all matters should *prima facie* be deemed suitable for a conference, aside from murder, manslaughter and sexual offences, which require a case-by-case assessment. The purpose of this *prima facie* presumption is to end the current practice in which a conference is not canvassed or considered until a court is considering a deferral of sentence, at which point an assessment is made under the applicable guidelines,[62] often requiring an adjournment. Under the CRIC Model the *prima facie* presumption means that a conference can be actively canvassed from the first listing at court. Such a process would ensure that the child can access a CSP in accordance with the child's Article 40(2)(b)(ii) right to other appropriate assistance, even while obtaining legal advice regarding the sufficiency of the evidence. While participation is still approved by a judicial officer, the CRIC Model means that the time involved to initiate a conference could be considerably shortened by commencing the Step 1 court referral consideration at the earliest opportunity.

Fair treatment under the CRIC Model also extends to stages 2, 3 and 4 of the conference. A child offender's participation in a conference process must not lead to perverse outcomes. This includes the stage 2 meeting, which, for a child, is often a more challenging undertaking than

[61] Moore, E *Youth Justice Conferences versus Children's Court: A comparison of time to finalisation* NSW Bureau of Crime Statistics and Research, Issue Paper No. 74, 2011.
[62] *NSW Youth Justice Conference Policy* NSW Government, 2016; *Victoria Youth Justice Group Conferencing program guidelines* DHS Melbourne 2010.

other diversionary or mainstream court processes. The CRIC Model requires that convenors be given the express power under Guidelines to control the conduct of participants who could hinder the conferencing process, for example, the parent of a child victim who wishes to use a conference to insult or verbally abuse a child offender, or a police officer who wishes to use the conference to vent their frustration inappropriately at a child offender or their family about the child. Fair treatment could be achieved by, for example, adjourning the conference for a short period to address the issue with the participant in question, or to ask the participant to leave the conference. It is unclear whether the current operating model of each conference program provides this authority to a convenor. The CRIC Model requires that this power be explicit and that it can be exercised without the conference necessarily being terminated.

Fair treatment also needs to be built into stages 3 and 4 of the conference, to ensure that conference outcomes are not more onerous than would be expected to be imposed in a court dealing with the matter without a conference having taken place. For this reason, the CRIC Model requires that conferencing only operate with judicial oversight; both as part of the sentencing process as well as a diversionary option for a child prior to any formal finding of guilt.

C. Social (re)-integration

The final theme within the child justice element of the CRIC Model is social (re)integration. This theme also goes to the heart of restorative justice theory discussed in Chapter 2 and reflects the ultimate objective of a substantive children's rights compliant child justice system more generally. Its primary expression is in Article 40 (1) CRC: '…the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.' As noted in *General Comment 24*, this goal requires outcomes that avoid stigmatisation of the child, ensure the protection of a child's privacy and limit the negative consequences of a child's exposure to the justice system on the child's future.[63] The rationale of Article 40(1), which is consistent with restorative justice theory, is that achieving successful reintegration, serves the interests of both the child and the community.

Where a child participates in a conference, the CRIC Model requires that outcome plans be appropriate to the circumstances of the offending conduct by taking into consideration the

[63] UN Committee on the Rights of the Child *General comment No. 24 (2019) on children's rights in the child justice system* CRC/C/GC/24 paras 66 to 71.

child's age, physical and mental wellbeing, development, capacities and personal circumstances. The outcome plan of a conference must not be focused on punitive tasks. To achieve this, the CRIC Model requires that outcomes developed in stage 3 include at least some activities that strengthen the quality of the child's key relationships and enhance their access to resources to enable them to flourish and to develop into responsible adults. In order to achieve this the CRIC Model requires mandated support for the child during stages 3 and 4 of the Conference, by the CSP.

The three components of the child justice element of the CRIC Model complement the other three elements of the CRIC Model because they provide a child justice focus to the core principles of the CRC that are reflected in a substantive child rights approach to conferencing more generally. The CRIC Model demonstrates that it is possible to undertake youth conferencing in a way that complies with the CRC.

8.4 Implementation of CRIC

Creating a conferencing model that is informed by and embeds a substantive approach to children's rights is not, on its own, sufficient to ensure compliance with the CRC. It must also be *implemented* in a manner that is consistent with children's rights. This section sets out four recommendations to facilitate the implementation of the CRIC Model in a manner that respects, protects and fulfils the rights of child offenders. These recommendations relate to:

1. accessibility;
2. education and training;
3. a pilot program; and
4. monitoring and evaluation.

Each of these elements is discussed in depth below.

8.4.1 Accessibility

According to the Law Council of Australia, the rule of law and human rights of all people are core tenets of a modern democracy and having access to justice, is an important part of protecting these rights.[64] Similarly, the Australian Law Reform Commission characterised access to justice as 'an essential element of the rule of law … involving the 'affirmative steps'

[64] Law Council of Australia *The Justice Project: Children and Young People Consultation Paper* August 2017.

necessary to ‘give practical content to the law’s guarantee of formal equality before the law.’[65]

Article 4 of the CRC imposes an obligation on State Parties ‘to undertake all appropriate legislative, administrative, and other measures for the implementation of the rights’ recognised in the Convention. This is further supported in the youth justice context by Article 40 (2)(b)(ii) and (iii) of the CRC, which focus on the legal capacity of children to take action, to have legal representation and legal or other appropriate assistance.

However, ‘children and young people commonly view the legal system as intimidating, overwhelming, stressful and expensive', which is compounded by their less developed cognitive and communication skills compared to adults, and the justice system often does not provide the necessary system supports to help young people understand and navigate the legal system.[66] This is particularly true for vulnerable children, including, those in the child protection system, and Indigenous young people.

To be successful, the CRIC Model must be accessible. Accessibility can be achieved by ensuring that child offenders have equal opportunity to participate in youth conferencing in a timely manner. This requires ensuring that all children know about and have the opportunity to participate in a youth conference. This means the government must provide adequate funding for the full conferencing program to be available to all children, regardless of where the child is based, so as to address geographic discrimination. This requires governments to ensure that there are sufficient resources available, namely speedy court approval, funded and sufficient CSP and suitably qualified/accredited legal representation.

8.4.2 Education and Training

The CRC Committee has noted that legal assistance must be provided in ‘a culturally sensitive manner’ in order to address systemic discrimination, and more widely that professionals involved in justice activities need to ‘receive appropriate training on the content and meaning of the provisions of the Convention and its Optional Protocols, including the need to adopt

[65] Pathways To Justice–Inquiry Into The Incarceration Rate Of Aboriginal And Torres Strait Islander Peoples (ALRC Report 133) , 2018, 10.1.
[66] Law Council of Australia *The Justice Project Children and Young People Consultation Paper* August 2017, 2.

special protection measures for indigenous children and other specific groups.'[67] More recently, in *General Comment No. 24*, the CRC Committee emphasised that 'all the professionals involved receive appropriate multidisciplinary training on the content and meaning of the Convention … [that] includes established and emerging information from a variety of fields on, inter alia, the social and other causes of crime, the social and psychological development of children, including current neuroscience findings, disparities that may amount to discrimination against certain marginalized groups such as children belonging to minorities or indigenous peoples, the culture and the trends in the world of young people'.[68]

Currently there are no mandatory minimum qualifications to be a youth conference convenor in any Australian jurisdiction.[69] Since 2021, NSW has a four day structured induction program for convenors that focuses on conference process and child engagement rather than an overall understanding of conferencing from a child rights perspective. In the ACT, section 40 of the *Crimes (Restorative Justice) Act 2004* (ACT) requires convenors to be able to advise conference participants about their (procedural) 'rights and duties.' This does not meet the requirements of the CRIC Model that convenors have in-depth knowledge and understanding of the rights of children.

Convenors have a paramount role to play in ensuring adherence to child rights standards. It is thus vital to the successful implementation of the CRIC Model that conference convenors have a clear understanding of children's rights, and how to implement each element of the CRIC Model. Conference convenors must also have sophisticated communication capacities to engage with children having regard to their background and evolving developmental capacities.[70]

To remedy this deficiency, the CRIC Model requires governments to ensure that all conference convenors meet mandatory minimum qualification or accreditation standards, which must be inclusive of demonstrated knowledge and understanding of children's rights and how they apply to youth conferencing. The training and accreditation should focus on the elements of the CRIC Model and how to implement them. Additionally, the training should ensure that

[67] UN Committee on the Rights of the Child (CRC), *General comment No. 11 (2009): Indigenous children and their rights under the Convention [on the Rights of the Child]*, 12 February 2009, CRC/C/GC/11, para 74-77.
[68] UN Committee on the Rights of the Child (CRC), *General comment No. 24 (2019) on children's rights in the child justice system* CRC/C/GC/24
[69] Sewak et al 2019 (Op.cit.), 8.
[70] Riley M, and Hayes H, 'Youth Restorative Justice Conferencing: Facilitator's Language - Help or Hindrance?' (2018) 21 *Contemporary Justice Review* 99.

convenors have a high level of proficiency in the use of simple and comprehensible language to communicate effectively with young offenders throughout the process. Similar training should be provided to members of the CSP.

The education and skill development for convenors could be modelled on the training provided to persons seeking to become accredited mediators, which includes many opportunities for trainees to role play different parties in a mediation.[71] Applying this to training about the CRC and the CRIC Model, conference conveners would participate in mock conferences, as well as observe youth conferences being undertaken in accordance with the CRIC Model. To attain accreditation, convenors would need to shadow an experienced convener (or other relevant party, such as, a CSP member) for a minimum specified number of hours.

In addition to the above practical training, individuals wanting to participate in youth conferencing would need to complete specific modules on:

i. children's rights,
ii. sociology of Aboriginal and other culturally and linguistically diverse communities,
iii. oral communication skills,
iv. Indigenous culture and cultural competence,
v. equality, non-discrimination and unconscious bias, and
vi. child development and psychology.

Successful completion of the theoretical and practical components of a suitable training program needs to be a prerequisite to any individual being able to participate in youth conferences in any official capacity.[72]

Given the importance accorded to the CSP in supporting the child offender in the CRIC Model, there are also minimum training requirements for CSP members to ensure that they understand the core components of the CRIC Model, the principles of restorative justice and the stages in a conference process. Just as mediator training and accreditation is a useful model for youth conference convenors the training provided to volunteers in the Youth Referral and

[71] See, for example, the NMAS Mediator Training course, which includes nine separate role play exercises. Available at www.mediationinstitute.edu.au/nmas-mediator-course/?gclid=Cj0KCQiAmpyRBhC-ARIsABs2EAqr5dpqN27M8XXQ8R7qJl5YRimfg7zfVC-VHhx9m98LAWMbEMqvLwEaAm5OEALw_wcB. Another option is to adapt the training provided to volunteers in the Youth Referral and Independent Person Program (YRIPP), which is delivered in Victoria by the Centre for Multicultural Youth in partnership with the Youth Affairs Council of Victoria, Community.
[72] Section 480 *Children Youth and Families Act 2005* (Victoria).

Independent Person Program (YRIPP) in Victoria provides a possible model for CSP training because it focuses.[73] The YRIPP program is delivered in Victoria by the Centre for Multicultural Youth in partnership with the Youth Affairs Council of Victoria to assist young people in police custody who might not have a parent or other suitable adult available to support them.

8.4.3 Pilot program

Whenever a new program is developed, it is important to initially implement it on a small scale.[74] This allows for any problems or deficiencies to be identified early, increasing the likely success of the program when rolled out on a larger scale.[75] Conducting a pilot program provides additional information and knowledge that helps to improve the prospects of the innovation being successful when fully implemented.[76] Over the last 20 years, a number of restorative justice pilot programs have been implemented in Australia; indeed the current youth conferencing programs in Victoria and NSW started as pilot programs before becoming fully legislated state-wide programs.[77]

The CRIC Model presents a significant change to existing conferencing arrangements and should therefore be piloted in a limited setting. In this respect, section 414(2)(a) of the *Children Youth and Families Act 2005 (Vic.)* states that the Secretary of the Department of Human Services in Victoria can provide limited approval to a person or body to operate a group conference program, and under section 414(2)(c) can withdraw approval if the service is not of adequate standard. This provision could be used to authorise a pilot program to test the CRIC Model in Victoria. The pilot could be funded to operate in a limited area for a limited period.

The CRIC Model requirement of court approved diversionary conferences in addition to dispositional conferences could be accommodated under section 356D and section 356G(g) of the *Children Youth and Families Act 2005 (Vic.)* which together could enable a restorative

[73] Youth Referral and Independent Person Program (YRIPP) Position Description available at https://www.cmy.net.au/wp-content/uploads/2021/11/2021_YRIPP-PD.pdf.
[74] Queensland Government Statistician's Office, Queensland Treasury, *Wise practice for designing and implementing criminal justice programs for Aboriginal and Torres Strait Islander peoples*, 2021.
[75] Strang H *Restorative justice programs in Australia: A report to the Criminology Council*. Canberra: Australian Institute of Criminology 2001 http://www. criminologyresearchcouncil.gov.au/reports/strang/; see also Gerkin P, Walsh J, Kuilema J and Borton. I 'Implementing Restorative Justice Under the Retributive Paradigm: A Pilot Program Case Study' (2017) 7 *SAGE Open* 1.
[76] Larsen JJ, *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology Report No 127, 2014) 6, 9, 10.
[77] Ibid.

diversion program to operate. Thus, in Victoria, the legislative imprimatur already exists to enable the implementation of a pilot program of youth conferencing, conducted in accordance with the CRIC Model.

A pilot program would provide the opportunity to assess whether the CRIC Model is able to ensure that, within youth conferencing, the rights of child offenders are respected, protected and fulfilled If the pilot is successful (according to the monitoring and evaluation discussed in the next section), it could then be rolled out on a larger scale.

8.4.4 Monitoring and evaluation

The UN Office on Drugs and Crime's Interagency Panel on Juvenile Justice (IPJJ) has noted that the essence of program evaluation is to measure the 'intended and unintended consequences of a program and relate that to its goals and objectives.'[78] To this end, the IPJJ has published *Criteria for the Design and Evaluation of Juvenile Justice Reform Programs*.[79] This document explicitly recognised as the starting point, that good youth justice policy hinges on an overall capacity for relevance both to 'the promotion of the rights of the child and the prevention of crime.'[80]

More specifically, the CRC Committee's *General Comment No.* 5 emphasised that engagement and proper compliance with children's rights, including the best interests principle, hinges on regular review and reassessment at all levels including both government and NGO levels. Therefore, monitoring of youth conferences that are undertaken in accordance with the CRIC Model provides critical information on whether the program is achieving the intended targets and outcomes. Evaluation provides the evidence of why targets and outcomes have (or have not) been achieved. Thus, monitoring and evaluation of the CRIC Model is essential to understanding whether it 'works'. That is, does implementation of the CRIC Model increase the extent to which children's rights are respected and protected within youth conferences, while also reflecting the principles of restorative justice? Monitoring and evaluation are

[78] Interagency Panel on Juvenile Justice *Criteria for the Design and Evaluation of Juvenile Justice Reform Programmes* United Nations Office on Drugs and Crime Vienna 2010, 13.
[79] Ibid.
[80] Ibid., 14.

already well ingrained in the restorative justice system.[81] As Moore noted in the Canadian restorative justice context, evaluation of youth conferencing programs is important.[82]

As noted above in part 8.2 of this chapter, monitoring and evaluation of youth conference must include the views of children who are central to the process. This could be done by engaging academics to observe youth conferences and conduct qualitative interviews with key participants at each stage of the conference process. In addition, long and short form surveys similar to those proposed in Moore's Canadian toolkit, or available via NSW Convenor portal post-2021, could be developed.[83] These surveys can be framed using the CRIC Model to ensure each of the four elements is reflected in the questions. Further, surveys can be adapted to recognise the different role of each participant, including child participants, and their individual preferences when it comes to the format of completing the survey.

This approach to monitoring has the advantage of being consistent with the fundamental principle that distinguishes a substantive approach to children's rights from a welfarist approach to children's rights, namely the centrality given to child participation in matters that affect them in accordance with Article 12 of the CRC.[84] In this respect, the CRC Committee has noted that child participation under Article 12 has evolved to 'describe ongoing processes, which include information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes.'[85]

8.5 Conclusion

This thesis asked two central questions:

(1) Do the youth conferencing programs in NSW, Victoria and the ACT respect, protect and fulfil children's rights in accordance with the core principles of the CRC?

[81] Larsen 2014 (Op.cit.); Sewak et al 2019 (Op.cit.); Strang 2001 (Op.cit.).
[82] Moore, S *Rights-Based Restorative Practice Evaluation ToolKit* Human Rights Center, University of Minnesota 2008.
[83]Ibid. See also See also NSW Youth Justice Conference Convenor Portal at https://www.youthjustice.dcj.nsw.gov.au/Pages/youth-justice/conferencing/youth-justice-conference-convenor.aspx
[84] UN Committee on the Rights of the Child General Comment No. 12 (2009) *The right of the child to be heard* CRC/C/GC/12, para 2.
[85] Ibid., para 3.

(2) If not, what reforms would be needed to make youth conferencing compliant with the CRC?

This chapter has answered the second question. While the three conferencing programs reviewed in this thesis do not comply with the CRC, the CRIC Model provides a pathway to ensure that future youth conferences can be undertaken in a way protects and respects the rights of child offenders. It does this by providing an overlay of children's rights onto the principles of restorative justice by adapting the best features of each of the three contrasting programs. The CRIC Model can turn current youth conferencing programs into child rights compliant youth conferences: as noted in the introduction, the conferencing that *should be*.

The next and final chapter summarises key findings of this thesis and identifies further opportunities for scholarship that build on this research and further advance our knowledge regarding protecting the rights of children participating in youth conferences.

CHAPTER 9

Almost there: The road to compliance with the *Convention on the Rights of the Child*

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9.1 Introduction

Chapter 1 in this thesis was entitled "Youth Conferences and Children's Rights: Can they work together?" It is fitting that the title to the last chapter offers the answer to that question. In short, youth conferences and children's rights can co-exist, but we are not there yet.

The purpose of this chapter is to summarise the key research findings. In doing so, this chapter outlines the contribution that the thesis makes to the existing knowledge and explains its wider significance. However, it is appropriate to remember the beginning of this journey, which was the expansion, in the 1990s, of the use of restorative justice, including youth conferencing. It was during this period, that restorative justice became increasingly attractive because it offered a potential avenue to reconcile the failings of the welfare/best interests' model of youth justice with the problems associated with a 'new punitiveness' and increasing emphasis on retributive punishment. Although the phrase 'restorative justice' does not appear anywhere in the CRC, it has been repeatedly endorsed in the CRC Committee's Concluding Observations and General Comments.

As expressions of restorative justice, youth conferencing is part of the youth justice landscape across Australia. This thesis asked two specific questions about this form of restorative justice, namely,

1. **Do the legislated youth conferencing programs in Victoria, NSW and the ACT respect, protect and fulfil children's rights in accordance with the core principles of the UN Convention on the Rights of the Child?**
2. If not, what reforms would be needed to make youth conferencing compliant with the CRC?

The three jurisdictions were chosen because they offered contrasting models of conferencing. NSW has the longest history of conferencing and is the largest user in terms of raw numbers. Youth conferencing in NSW sits legislatively as the most intensive of three diversionary options available to police as an alternative to commencing a prosecution but is also available to the state's DPP and Children's Court as a diversionary or dispositional option. In 2021, NSW published a comprehensive *Youth Justice Conferencing Manual* targeted at conference convenors in order to help guide the operation of its program at both a local and systemic level. By contrast, Victoria offers only a 'light touch' dispositional only model: its conferencing

program rests on a few sections connected with deferral of sentence after a finding of guilt in the *Children, Youth and Families Act 2005* (Vic). Finally, the ACT has dedicated restorative justice legislation that applies to both adults and children. The ACT youth conferencing program is also the 'purest' from a restorative justice point of view because it does not apply to victimless crimes.

In addressing the first research question, the thesis focused on three of the overarching rights in the CRC together with the rights contained in Article 40 which address youth justice more specifically. The three core principles - non-discrimination in Article 2, best interests of the child in Article 3 and the right to respect for the views of the child under Article 12 – form 'fundamental values' that give substance to the CRC as a whole.[1] As such, they illuminate and assist in the interpretation of all other rights under the CRC, including Article 40. The thesis interpreted these rights based primarily on the evolving jurisprudence of the Committee on the Rights of the Child in order to evaluate whether the youth conferencing programs in NSW, Victoria and the ACT complied with the standards under the CRC. Having determined that none of the three models analysed in this thesis complied with the CRC, a new model was developed in an attempt to answer the second question flowed by identifying reforms to better protect the rights of young offenders.

This chapter consists of five sections, starting with this Introduction. Section 2 sets out the primary research findings. This is done by summarising the main arguments in each chapter and establishing the basis for the answers to the two core questions. Section 3 demonstrates the way in which this research makes an original contribution to the body of knowledge around youth conferencing and children's rights in Australia. Section 4 acknowledges the limits of the research and makes recommendations for future research that can build on the findings of this doctoral research. The final section provides the overall conclusion to this thesis.

[1] Tobin, J (ed.) *The UN Convention on the Rights of the Child: a commentary* Oxford University Press 2019, 74. See also UN Committee on the Rights of the Child (CRC), *General comment No. 20 (2016) on the implementation of the rights of the child during adolescence*, 6 December 2016, CRC/C/GC/20, para 14; see also UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC /C/GC/14 para 41-45; UN Committee on the Rights of the Child (CRC), *General comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12, Introduction para 2; UN Committee on the Rights of the Child (CRC), *General comment No. 11 (2009): Indigenous children and their rights under the Convention [on the Rights of the Child]*, 12 February 2009, CRC/C/GC/11 para 14; UN Committee on the Rights of the Child (CRC), *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5, para 12.

9.2 Summary of Findings

While restorative justice has its detractors and conferencing has not radically transformed the youth justice regimes in the way that its early pioneers had hoped, this does not mean that conferencing is inherently inconsistent with children's rights. Indeed, this thesis argues that the Victorian, ACT and NSW youth conferencing programs could be reformed in such a way that they retain their restorative justice principles, while also giving better effect to the CRC.

This section highlights the findings of each chapter and how they contribute to answering the two research questions.

9.2.1 Part I – Laying the foundations

The first four chapters analysed the relationship between restorative justice and children's rights and set out the key features of the conferencing regimes under review. Chapter 1 provided the rationale for the research, namely, that there has been limited evaluation of restorative justice youth conferencing programs in Australia from the perspective of the rights of youth offenders. While there has been research that explores the experience of child victims and studies on recidivism, Chapter 1 identified a gap in the literature from the perspective of rights of child offenders.[2] This gap is surprising given the contemporaneous emergence of youth conferencing programs with the entry into force of the CRC in 1990, and greater emphasis being placed on the CRC in legislative and policy design across Australia, including in the jurisdictions under review.

Chapter 2 reviewed the evolution of the foundational pillars of restorative justice that underpin conferencing and considered the literature that examines the efficacy of conferencing programs more generally, including the purported positive impact for victims and findings regarding rates of recidivism. The literature review revealed that rather than being founded on any conception of children's rights, restorative justice programs developed primarily as an experimental response to the 'what works' debate that occurred from the 1970s onwards, both in criminal justice generally, and youth justice in particular. This analysis illustrated how conferencing programs were designed with reference to core restorative justice principles: creative

[2] Gal T and Moyal S 'Juvenile Victims in Restorative Justice: Findings from the Reintegrative Shaming Experiments' (2011) 51(6) *Br J Criminol* 1014-1034; Gal, T *Child Victims and Restorative Justice: A Needs-Rights Model* OUP Oxford 2011. On recidivism, see Latimer J, Dowden C, Muise D 'The Effectiveness of Restorative Justice Practices: A Meta-Analysis' (2005) 85 *The Prison Journal* 127.

restitution, a victim/community inclusive process and reintegrative shaming. The result is a model of justice that is focused on the satisfaction of the victim, rather than the rights of the (child) offender. Despite growing endorsement of restorative justice in international forums, this chapter concluded that there are unresolved questions about whether the underlying restorative justice principles can be reconciled with children's rights.[3]

Chapter 3 explored the legislative and policy framework of the three conferencing programs under review and included data on the number of conferences over an extended period and the Indigenous status of offenders. The chapter found significant differences between the programs in both legislative design and substance.[4] Under the Victorian legislation, conferences are only available as part of the sentencing process, whereas conferences in NSW and the ACT are available as an out of court diversionary option in addition to being available via the court process, which, in the ACT, also includes post-sentence referrals. As noted above, the ACT does not extend to offences without a suitable victim. In addition, the three jurisdictions differ with respect to the offences for which a youth conference can be held, the role accorded to legal representatives throughout the conferencing process, the mandated and optional participants in a conference and whether, and on what basis, a conference can be vetoed by different participants. The chapter concludes that despite the differences between them, the three programs reflect restorative justice principles but also exhibit the tension that exists between restorative justice principles and children's rights.[5]

Chapter 4 explored the evolution of children's rights. It found that restorative justice is not part of the 'hard' law of children's rights. Instead, the parallel histories of children's rights explored in this chapter and restorative justice, explored in Chapter 2, have meant that the growing international endorsement of restorative justice after the entry into force of the CRC has fundamentally been a product of non-binding 'soft' initiatives, including General Comments and Concluding Observations issued by the Committee on the Rights of the Child. As such, the

[3] Lynch, N 'Restorative Justice through a Children's Rights Lens (2010) 18 *International Journal of Children's Rights* 161.
[4] Legislatively, Victoria sits at one extreme with a 'light touch' legislative model that depends only on one section and four subsections in the *Children Youth and Families Act 2005* (Vic.). At the other extreme, the ACT has dedicated restorative justice legislation that applies to adults as well as children. This legislation supplements other legislation relevant to youth justice including the *Children and Young People Act 2008* (ACT) and the *Crimes (Sentencing Act) 2005* (ACT). NSW, which is the jurisdiction with the longest use of conferences in Australia, has developed comprehensive Guidelines to supplement its legislation. Uniquely, the ACT legislation includes an express reference to the CRC in section 94(3) of the *Children and Young People Act 2008*.
[5] Tobin, 2019 (Op.cit.) 1656-1657.

chapter found that there are challenges for conferencing in the wider jurisprudence of the CRC but that it is still necessary for conferencing programs to respect, protect and fulfil children's rights under the CRC.

In order to be child rights compliant, Chapter 4 concluded that youth conferencing needs to engage with core children's rights concepts such as, non-discrimination, the best interests of the child, how to adapt to differing levels of maturity and evolving capacities of children, ensuring effective processes and safeguards for a child to express their views and ensuring that procedural rights are respected. The chapter concluded that these matters are fundamental to the operation of a child rights compliant youth justice system and therefore need to be reflected in the legislative and operating models of individual youth conferencing programs.

9.2.2 Part II – Compliance

Part II of the thesis comprised three chapters which assessed the three programs against the CRC standards of non-discrimination under Article 2, best interests under Article 3, the right to participate and be heard under Article 12 and rights in youth justice under Article 40. All three programs present challenges in their operation against these standards. The analysis in chapter 5, 6 and 7 demonstrated that none of the programs are sufficiently attuned legislatively or under operating guidelines to address the specific rights of particular groups of children in respect of referral or conference process.

Chapter 5 specifically highlighted deficiencies in the suitability and availability of conferencing for Aboriginal children and regional children from the perspective of non-discrimination. At the same time, it was noted that some positive measures had been taken to address aspects of discrimination. The ACT Restorative Justice Unit has an Indigenous Guidance Partner to provide guidance and support to young Aboriginal and Torres Strait Islander offenders and their families who are referred to restorative justice. Similarly, the *Young Offenders Act 1997* (NSW) expressly linked conferencing and other diversionary options under the with the need to address Aboriginal over-representation in the youth justice system. However, in both cases, evidence suggested that there was a fundamental problem with the exercise of police discretion in any determination of whether a matter was suitable for a conference. The discrepancies in conferencing rates in NSW in different parts of the state and between Indigenous and non-Indigenous rates of conferencing were significant and therefore,

the Victorian position of restricting the use of conferencing to judicial referrals offered the best way to safeguard against discrimination.

All three jurisdictions exhibit an unresolved tension between a CRC understanding of the best interests of the child and accommodating the interests of other participants in a youth conference process. In particular, while the CRC does not mandate that a child's best interests are paramount, it is nonetheless concerning that victims and police or prosecutors in NSW and the ACT have the power to discontinue a conference, or that a victim can veto an outcome plan in NSW, even if this is contrary to the best interests of the child. Further, demonstrating a 'sectoral approach' to the domestic application of the 'best interests' principle, consideration of the child's best interests is not the stated legislative aim of any of the programs.[6] Instead, the focus of each of the programs is on ensuring that the child understands the impact of their offending, in particular the impact of their offending on any victim of an offence.

While the jurisprudence of the CRC recognises that entrenching a young person in a criminal justice process is not in the child's best interests or consistent with their youth justice rights, there is a real risk of 'net widening' in NSW and the ACT because of limited independent oversight in their diversionary conferencing models. Consistent with research in other jurisdictions, the research found that there are insufficient safeguards to limit diversionary conferencing from being used by investigating officials to ratchet up outcomes.[7] In this respect, it needs to be remembered that youth conferencing is a more intensive tool than warnings or cautions because of the multiple steps and participants involved with the child in the process. Therefore, the availability to refer matters to diversionary conferencing without sufficient independent oversight in these jurisdictions can result in young people being processed for matters for which there might not be sufficient evidence to bring charges, or where a less intrusive outcome would otherwise have been appropriate. While it is difficult to quantify the extent to which this happens in practice in the jurisdictions under review, there is evidence that this occurs in other jurisdictions that also operate diversionary conferencing without judicial

[6] McCall-Smith, K 'To Incorporate the CRC or Not: Is This Really the Question?'(2019) 23 *International Journal of Human Rights* 425, 426. See also Tobin, J 'Incorporating the CRC in Australia' in Kilkelly U, Lundy L and Byrne B *Incorporating the UN Convention on the Rights of the Child into National Law'* Cambridge University Press 2021, 22.

[7] Walsh, T 'From Child Protection To Youth Justice: Legal Responses To The Plight Of 'Crossover Kids'' (2019) 108 *University of Western Australia Law Review* 90, 108; Kelly, L and Oxley, E 'A Dingo in Sheep's Clothing? The Rhetoric of Youth Justice Conferencing and the Indigenous Reality' (1999) 4 *Indigenous Law Bulletin* 4.

oversight, for example, for Aboriginal children in Western Australia.[8] At the same time, the Victorian system presents a converse problem insofar because it does not allow the Children's Court to refer a young person to a conference that would thereby divert the child from the youth justice system, and is therefore too restrictive from the perspective of Article 40(3)(b) of the CRC.

Compounding the problem of potential net-widening, the three jurisdictions take divergent approaches with respect to legal representation. In Victoria, a legal representative provides assistance to a child during the initial conference referral process because it happens through the Children's Court where a child must be represented. By contrast, in the other two jurisdictions, a child may – but not must – be advised that they may obtain legal advice about agreeing to participate in a conference should they wish to do so.

Wider research suggests that children do not necessarily understand the need, purpose or role of a lawyer, and therefore are unlikely to seek this advice independently, nor have the appropriate support to do so.[9] This can mean that a child has insufficient appropriate information about whether to admit responsibility for an offence or to agree to participate in a conference if they do. This research concluded that it is difficult to see how these programs can be reconciled with procedural rights under Article 40 of the CRC, or indeed a child's fundamental right to be express their views, should they wish to do so, or to be heard under Article 12.

Similarly, Victoria *mandates* the attendance of the child's legal representative at a conference and their involvement in the development of an outcome plan. By contrast, NSW *permits* the attendance of a legal representative at the conference it is not mandatory, and the ACT *prohibits* them from attending in their professional capacity. These different positions impact a child's ability to exercise procedural rights under Article 40 as well as to exercise fully their Article 12 rights in a conference setting, or indeed to ensure that their best interests are advanced in a process that can be intimidating or overwhelming given the attendance of a large number of people with competing interests – especially in jurisdictions that require the parties to meet face-by-face whether in person or virtually.[10]

[8] Blagg H *Youth Justice in Western Australia: A Report Prepared for the Commissioner for Children and Young People* WA 2009.
[9] Law Council of Australia *The Justice Project Children and Young People Consultation Paper* August 2017, 2.
[10] Tobin 2019 (Op.cit.), 1656.

That said, the regime in Victoria is the most compliant with the standards under the CRC because mandatory legal representation provides the best safeguard to support a child to exercise their rights.

9.2.3 Part III – Developing a solution

Part III of this thesis consists of just two chapters; Chapter 8 and this concluding chapter. Chapter 8 overlayed the findings from the analysis in Part II onto the foundations in Part I to develop the CRIC Model of conferencing. The CRIC Model consists of four distinct elements derived from the CRC and utilises the most rights-compliant elements from the three jurisdictions to provide much of its substance. Chapter 8 proposed that the CRIC Model can be implemented to transform youth conferencing into a practice that promotes and protects the rights of young offenders. As such, it offers a robust model of youth conferencing that is consistent with the principles of restorative justice while also providing a substantive application of children's rights based on the CRC.

The CRIC Model helps to create a more responsive model of conferencing that can offer appropriate independent support to children from diverse backgrounds at each stage of the conference process through the creation of a Child Support Panel. The CRIC Model also addresses fundamental problems associated with the best interests principle in the context of 'traditional' conferencing. The first problem is that current models of conferencing, and especially police initiated diversionary conferencing, provide a licence for others to determine whether a child should be able to participate in a conference in the first place. Under the CRIC Model, such a decision must be informed by what is in the child's best interests, not the preference of a police officer, or to appease a victim or, in the case of a diversionary conference, when there is insufficient evidence to mount a prosecution.[11] The second problem relating to the best interests of the child extends from the first problem. This challenge is to ensure that a conference does not proceed nor develop an outcome plan under the guise of a child's best interests, when in reality the process is being used as a proxy for the interests of others – parents, guardians, victims, police – under the guise of the child's best interests.[12]

[11] Bargen, J 'Kids, Cops, Courts, Conferencing and Children's Rights - A Note on Perspectives' (1996) 2(2) *Australian Journal of Human Rights* 209; see also Kelly and Oxley 1999 (Op.cit.); Walsh 2019 (Op.cit.) 108.
[12] Cunneen, C and Goldson, B 'Restorative Justice? A Critical Analysis' in Goldson, B. and Muncie, J. (eds) *Youth, Crime and Justice* (2nd ed), Sage, London 2015, 154. See also see also Kelly and Oxley 1999 (Op.cit.); Walsh 2019 (Op.cit.).

The CRIC Model provides safeguards against these concerns through its recommendations for legal representation for a child at all stages of a conference coupled with a shift away from diversionary conferencing being completely parallel from the courts, and for accreditation and training for convenors and lawyers. Further, the CRIC Model proposes that child offenders should have the right to withdraw from a conference without adverse inference but that no other participant should be able to veto a conference taking place, or an outcome plan, where it remains in the child's best interests to proceed.

Having regard to challenges around implementation of a new program, the CRIC Model should be trialled as a pilot program. Of the three jurisdictions under review, Victoria presents as the most appropriate jurisdiction for a pilot program of the CRIC Model because, unlike NSW and the ACT, it could be implemented within the existing legislative framework without any amendments being required. The pilot would have the added benefit of increasing conference participants' understanding of children's rights in a youth justice context.

9.3 Contribution to Knowledge and Wider Significance of the Research

Although not specifically included in the CRC, the place of youth conferencing and restorative justice in youth justice systems has been endorsed internationally by the Committee on the Rights of the Child. The use of conferencing has also expanded around the world since the 1990s, including within Australia. There is therefore a need for ongoing assessment of conferencing programs as they mature. There is, however, limited research that focuses specifically on the rights of young offenders, especially in connection with Australian conferencing programs. This thesis contributes to the body of knowledge regarding these programs by providing an offender child rights analysis of conferencing based on three contrasting jurisdictions. In addition, the thesis not only provides an in-depth analysis of the youth conferencing programs in Victoria, NSW and the ACT but also contributes to a deeper understanding of the evolution of modern restorative justice principles, the history of children's rights and the somewhat uneasy intersection between the two.

Societies have seen a transition over the last three centuries in the way in which children – including child offenders – are treated at law. Children's rights are no longer 'a slogan in search of a definition.'[13] Rather, children are now recognised as rights-holders in their own individual

[13] Rodham H 'Children under the Law' (1973) 43 *Harvard Educational Review* 487, 487.

capacity. The engine room of this change is the CRC and there is a growing international jurisprudence about the substance and meaning accorded to these rights. Indeed, it has been observed that 'there can be no suggestion that the Convention is simply a collection of vague, aspirational and ambiguous terms.'[14] Therefore, while it is, of course, important to find effective and innovative ways to address youth offending, it is equally important to do so in ways that respect, protect and fulfil children's rights.

From this perspective, the analysis in this thesis, and in particular the development of the CRIC Model, offers a way to recast the steps in youth conferencing in terms that are consistent with the rights of the child. In this way, the CRIC Model developed in this thesis provides an illustration of the application of a 'substantive' approach to children's rights in a particular context.[15] While a substantive approach to children's rights has been applied in a number of different contexts, prior to this thesis, it had not been applied to youth conferencing.[16]

The adoption of the CRIC Model to balance the focus on victims in the three conferencing programs also increases adult understanding of children's rights in a youth justice setting and thinking about how the best interests of a child offender can be reconciled with the interests of others. In this way, this thesis contributes to increased knowledge about the extent and importance of children's rights in responding to youth offending, and the way in which rights of different participants relate to one another.

A pilot program of the CRIC Model in Victoria, would assist in increasing police understanding of children's rights beyond just basic procedural rights.[17] Thinking about the best interests of a child from a child's perspective does not lead to conferencing becoming a 'soft' option. Nor does ensuring that a child is able to participate in a process concerning their conduct with appropriate individualised support that extends beyond the procedural and strategic support of a legal representative. Application of the CRIC Model should lead to more effective outcomes that facilitate children engaging in decisions that affect their lives in ways that respect their individuality and evolving capabilities, and which is consistent with the CRC.

[14] Tobin 2019 (Op.cit.), 20.
[15] Tobin, J 'Children's Rights in Australia: Still Confronting the Challenges' in Gerber, P and Castan, M (eds.) *Critical Perspectives on Human Rights Law in Australia (Volume 2)* Thomson Reuters (2022) [11.130].
[16] For example, see examples in fn 30 – 37 in Tobin 2022 (Op.cit).
[17] Section 415(6)(c) *Children, Youth and Families Act 2005* (Vic.).

More generally, the research in this thesis and aspects of the CRIC Model could be applied to analysis of other restorative justice programs – such as Circle Sentencing or Victim-Offender mediation programs – as well as to other innovative justice programs, both for children and for adults. Even for adults, adopting a rights-focused approach to the evaluation of justice programs allows for the consideration of wider questions about 'what works' in response to offending conduct, and perhaps to identify better and smarter ways to do justice for offenders, victims and the community.

9.4 Limits of the Research and Recommendations for Future Research

Chapter 1 identified the limits of this research. In particular, the analysis of conferencing programs was confined to three contrasting jurisdictions. While this allowed an in-depth analysis of the jurisdictions in question, including consideration of the differences between them, it inevitably meant that the framework and practice of youth conferencing in other states and territories was excluded from the study. The result is that the findings are not Australia wide. Just as there are important differences that were considered in this thesis between the conferencing programs in Victoria, NSW and the ACT, there are individual characteristics in the conferencing programs in the other jurisdictions that warrant assessment and comparison from a child rights perspective, including in comparison with the programs that have been reviewed in this thesis.

Thus, there is scope for future research to analyse the remaining jurisdictions using the same methodology in this thesis with respect to those conferencing programs. Further, this doctoral research did not involve any empirical study and there is clear scope to test the findings of this thesis 'in the field' in a practical way. This could become possible as Australia moves into a different stage of the COVID Pandemic with fewer restrictions on movement and personal interactions.

The implementation of the proposed CRIC Model provides opportunities for further research to monitor and evaluate the extent to which it improves respect for the rights of young offenders participating in youth conferences. Thus, there is scope to conduct further research to determine the viability and effectiveness of the CRIC Model. In addition, this research would also presents a valuable opportunity to contribute directly to a substantive application of children's rights by engaging young people and incorporating their views directly into the design of the program.

More generally, the CRIC Model has potential to be used to assess other child justice arrangements and programs in any jurisdiction – in Australia or internationally – in order to explore the extent to which the rights and interests of children in conflict with the law can be better respected, protected and fulfilled through programs and systems that deal with child offending more generally.

9.5 Conclusion

Restorative justice emerged as a relatively early example in the quest that began in the 1970s to find 'better' or 'smarter' ways to do justice. It is not without its critics, but quickly achieved international endorsement, including by the Committee on the Rights of the Child. It proved especially attractive in many quarters for its seeming potential to bridge the welfare/justice dichotomy apparent in youth justice jurisprudence.[18] In Australia, youth conferencing has emerged as the primary form of restorative justice for young offenders.

At the same time children, have rights. The corollary is that states, and the adults that run them, have obligations to ensure that these rights are respected, protected, and fulfilled. This includes the rights for young offenders in conflict with the law, many of whom come from backgrounds of relative disadvantage or vulnerability. The rationale for this research was that youth conferencing programs need to reflect children's rights and need to ensure that they can be exercised by children at all stages of the conference process. This thesis considered the extent to which children's rights are currently protected in the youth conferencing programs in Victoria, NSW and the ACT. After concluding that they were not well respected, a model that would better infuse children's rights into youth conferencing, was proposed.

Nelson Mandela observed that '[h]istory will judge us by the difference we make in the everyday lives of children.'[19] History will judge Australia's youth conferencing programs harshly if they are not reformed to provide better protection for the rights of children at a time when they are at their most vulnerable. The CRIC Model proposed in this thesis, provides an opportunity for history to judge us better, because we will be endeavoring to make a real and positive difference to the lives of children within the youth justice system.

[18] Cunneen and Goldson (Op.cit.), 154.
[19] Luncheon hosted by United Nations Secretary General Kofi Anan at the special session of UN for Children, New York City May 9, 2002.

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