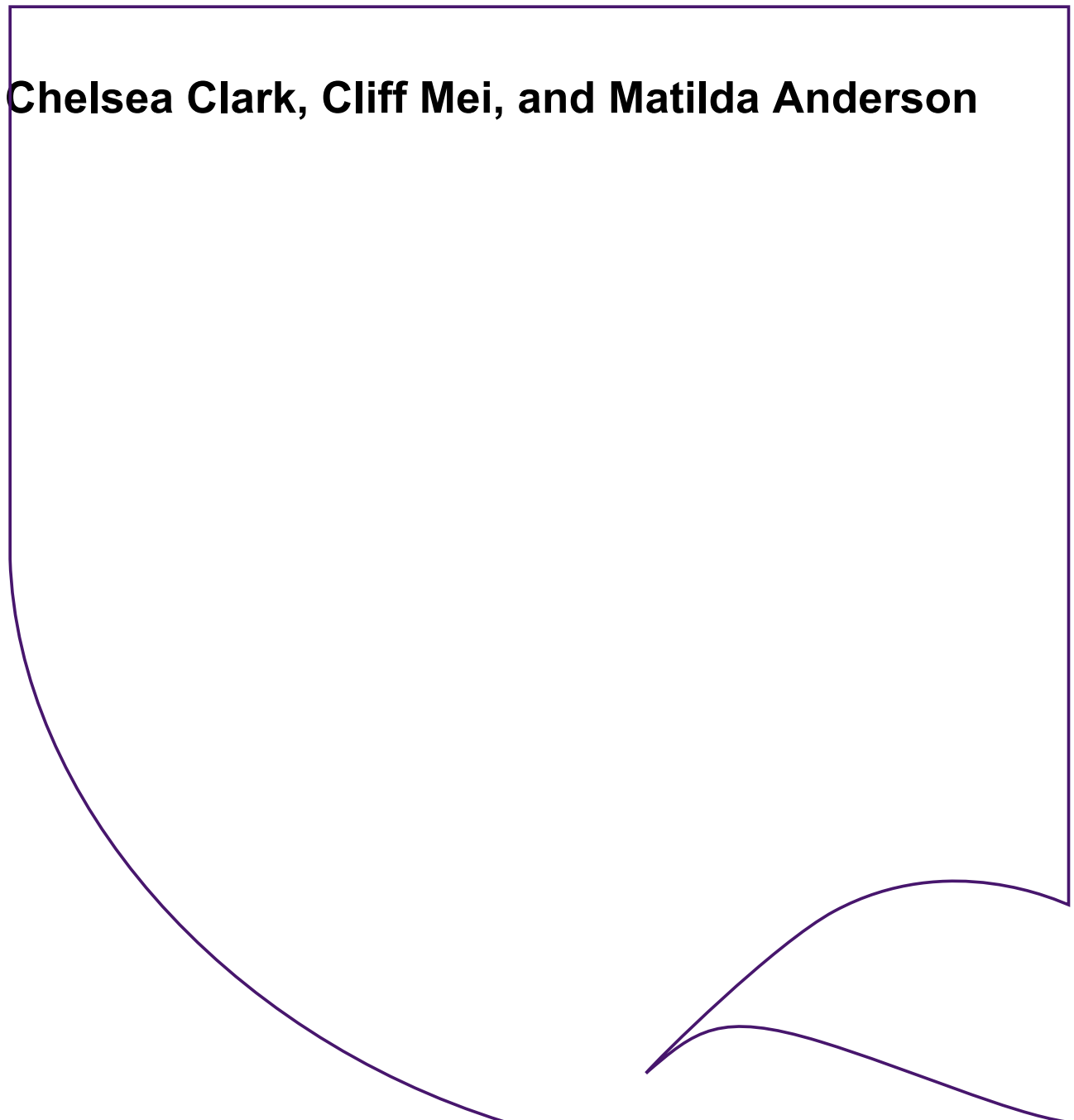


Out-of-Home Care and the Human Rights Act 2019 (Qld)

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About the Authors

This report was researched and authored by UQ law students **Chelsea Clark, Cliff Mei, and Matilda Anderson** under the academic supervision of Pro Bono Centre Director **Mandy Shircore**. This report was prepared for and on behalf of Homestretch, a group of organisations that advocate for youth in the Out-of-Home care system to have the option to remain in care until the age of 21. Student researchers and Mandy Shircore undertook this task on a *pro bono* basis, without any academic credit or reward, as part of their contribution to service as future members of the legal profession.

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1. Executive Summary

Out-of-Home care (OOHC) refers to services that provide care for young people that are placed away from their family home usually due to safety or family crisis reasons. These children are legally placed in the care of the state. There are various types of OOHC, including home-based relative or foster care, residential care, and independent living.¹ In Queensland, OOHC is legally governed by the *Child Protection Act 1999* (Qld) (CPA), and is administered by the Department of Children, Youth Justice and Multicultural Affairs. Under the CPA, statutory OOHC ends when the child turns 18, meaning the State-funded living arrangement ceases and the young person can no longer access other OOHC support services. Queensland has recently extended OOHC funding to 19 for foster and kinship home-based care arrangements,² however under current legislation there is still a lack of universal extended care beyond the age of 18. The authors acknowledge that the Queensland Government has recently announced it will extend OOHC to the age of 21 from 2023-24.³

Ending care at 18 makes the transition to adulthood more difficult for young people, especially considering the increased vulnerability of those in OOHC as they have often faced instability in their upbringing. Around 80% of 18-21-year-old people in Australia are still living at home,⁴ but care leavers are expected to provide for themselves at 18. This report demonstrates that the current law and policy of ending OOHC at 18 is not just detrimental to young people but creates a human rights issue. It undermines various rights protected under the *Human Rights Act 2019* (Qld) (HRA), and the objects of and rights under the HRA would be better protected by raising the age of leaving care to 21.

Three rights protected under the HRA have been identified as being directly undermined by ending OOHC at 18. These are:

¹ Senate Community Affairs References Committee, Parliament of Australia, *Out of Home Care*, (Report, August 2015) 5 ('Senate *Out of Home Care* Report').

² 'Extension to Carer Allowance', *Queensland Foster and Kinship Care* (Web Page) <<https://www.fcq.com.au/news-events/latest-news/102-extension-to-carer-allowance>>

³ Leanne Linard, 'Support for young people leaving care makes history' (Media Statement, Queensland Government, 18 June 2022).

⁴ Roger Wilkins et al, *The Household, Income and Labour Dynamica in Australia Survey: Selected Findings from Waves 1 to 19* (Annual Report, 2021) 10 ('HILDA Report').

- Recognition and equality before the law (section 15)
- Right to life (section 16)
- Protection of families and children (section 26)

Furthermore, five rights protected under the HRA would be better promoted if the age of leaving care was extended to 21. While the connections between the following human rights and OOHC are tenuous, it is nonetheless arguable that raising the age of leaving care would benefit the protection of these rights:

- Taking part in public life (section 23)
- Cultural rights - generally (section 27)
- Cultural rights - Aboriginal peoples and Torres Strait Islander peoples (section 28)
- Right to education (section 36)
- Right to health services (section 37)

Overall, ending care at 18 perpetuates the vulnerability and disadvantage experienced by young people in the OOHC system. This is incompatible with the rights protected by the HRA because these young people are treated differently from their peers and denied the support most people in society receive in various areas of life during the 18-21-year-old period. Raising the age of leaving care to 21 would mitigate this disadvantage, and better promote and protect the relevant rights under the HRA discussed in this report.

2. Methodology

This review of the compatibility of the OOHC system with the HRA first involves an explanation of the purpose, operation, and effect of the HRA. The authors have then identified the human rights affected by ending care at 18, analysed how the rights operate and outlined how these rights would be better protected by raising the leaving care age to 21.

This process involves considering the relevant legislation, case law, and secondary materials. The relatively new enactment of the HRA means there is a significant lack of

applicable Queensland case law. Instead, the authors have drawn on the guidance provided through the application of similar laws in comparable jurisdictions domestically and internationally.

3. Overview of the *Human Rights Act 2019* (Qld)

The *Human Rights Act 2019* (Qld) has three main purposes: to ‘promote and protect human rights’; to ‘build a culture in the Queensland public sector that respects and promotes human rights’; and to ‘promote a dialogue about the nature, meaning, and scope of human rights’.⁵ The Act protects 23 human rights of individuals in Queensland, and these are drawn from key international human rights conventions. Individuals do not need to be an Australian citizen, Queensland resident, or hold a relevant visa to be protected by the Act.⁶ The rights, however, are not absolute and can be subject to reasonable and justifiable limitations.⁷

The human rights obligations imposed by the Act are intended to permeate every aspect of government. Specifically, parliament must consider the Act when introducing new legislation and produce a statement of compatibility, courts and tribunals are expected to interpret legislation to be compatible with human rights insofar as it is possible, and public entities must act in accordance with human rights.⁸ Government agencies and departments are public entities, therefore the Department of Children, Youth Justice and Multicultural Affairs, which is responsible for the OOHC system, falls within the scope of the Act.

The Act also creates a complaints procedure when public entities act or make a decision in a way that is incompatible with human rights or fail to give proper consideration to the relevant human right.⁹ People who feel their human rights have been breached by a relevant public entity can make a complaint to the Queensland Human Rights Commission (QHRC). The QHRC has powers of conciliation to resolve the complaint. However, breach of a human right under the Act does not alone give rise to a claim of relief or remedy by the courts. Instead, the individual must make a claim independent of the Act, and ‘attach’ the alleged

⁵ *Human Rights Act 2019* (Qld) s 3.

⁶ *Ibid* s 11.

⁷ *Ibid* s 13.

⁸ *Ibid* ss 38, 43, 48, 58.

⁹ *Ibid* ss 63-67.

human right breach to the proceedings to be considered by the court.¹⁰ These claims are known as 'piggy-back' actions.

Importantly, the Act does not operate retrospectively, meaning that decisions that were made or legislation that commenced prior to 1 January 2020 does not automatically need to be reviewed to be compatible with the human rights protected under the Act. However, as detailed in the objects of the Act, the purpose of the Act is to create dialogue and promote a culture that respects and promotes human rights. Following the passing of the HRA, government departments have asked the QHRC to conduct a review of existing legislation so that it can be amended to increase compatibility with the HRA and better protect human rights.¹¹

It is therefore clear that the review of legislation to raise the age of OOHC to 21 is an appropriate and reasonable response to the incompatibility of the current OOHC system with the human rights protected under the Act.

¹⁰ *Innes v Electoral Commission of Queensland & Anor (No 2)* (2020) QSC 293; HRA s 59(1).

¹¹ See, eg, 'ADA Review' *Queensland Human Rights Commission* (Web Page) <<https://www.qhrc.qld.gov.au/law-reform/about-the-review/terms-of-reference>>.

4. Review of applicable rights

The following sections analyse how eight rights protected under the HRA are relevant to the argument that OOHC should be extended to 21. It is argued that the first three rights are directly undermined by the age of leaving care remaining at 18, and that therefore the current law and policy surrounding OOHC is incompatible with the HRA. The latter five rights would be better promoted and protected if the age of leaving care were to be extended to 21, and therefore this proposed change would better fulfil the objects and purpose of the HRA.

4.1 Recognition and equality before the law

What is the right?

Section 15 of the HRA states:

- “(1) Every person has the right to recognition as a person before the law.
- (2) Every person has the right to enjoy the person’s human rights without discrimination.
- (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination.
- (4) Every person has the right to equal and effective protection against discrimination.
- (5) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.”

This is based on Articles 16 and 26 of the *International Covenant on Civil and Political Rights* (ICCPR).¹² The definition of discrimination under the HRA includes direct or indirect discrimination within the meaning of the *Anti-Discrimination Act 1991* (Qld),¹³ including discrimination on the basis of characteristics set out in section 7 of that Act. Withdrawing OOHC at 18 arguably discriminates against people in the OOHC system on the basis of their family circumstances and age.¹⁴

¹² Explanatory Notes, Human Rights Bill 2018 (Qld) 18.

¹³ *Anti-Discrimination Act 1991* (Qld) s 10-11.

¹⁴ *Ibid* s 7.

Applicability to OOHHC

Direct discrimination occurs where someone is treated less favourably than another due to an attribute.¹⁵ Young people who were part of the OOHHC system are arguably treated less favourably than other young people once they turn 18 due to their family circumstances. Considering that around 80% of 18-21-year-old people in Australia are still living at home,¹⁶ it can be presumed that those young people are receiving some sort of financial, emotional, and social support from their family. This assumption of extended support from parents into young adulthood is exemplified in government policy, such as Centrelink's classifications of independence.¹⁷ By comparison, people of the same age group who have entered state care due to their family circumstances are cut off from support once they turn 18. This fails to recognise the vulnerability of care leavers and creates inequality between young people based on whether their family circumstances necessitated the use of state care during their childhood.

It can also be argued that 18-21-year-olds are discriminated against on the basis of their age, as they are denied the support people younger than 18 in the OOHHC system are offered. Forcing young people to leave state care at 18 fails to consider the individual needs of the young person, and therefore is at risk of being arbitrary. Young people aged 18-21 who have exited the care system may be just as vulnerable when compared to those under 18 in the care system. The 2021 Post-Care Report by CREATE found that 17.2% of young people leaving care had youth justice contact from 18-20.¹⁸ The Australian Housing and Urban Research Institute (AHURI) found that access to drug or alcohol treatment was 21 times larger for care leavers than the general population, access to Specialist Homelessness Services was 17.5 times larger, and emergency presentations were 4.5 times larger.¹⁹ The removal of care at 18 lacks recognition of the vulnerabilities of this cohort, and creates an arbitrary inequality between, for example, a 17 year old and an 18 year old.

¹⁵ *Anti-Discrimination Act 1991* (Qld) s 10.

¹⁶ HILDA Report (n 4) 10.

¹⁷ See, eg, Australian Government, 'Dependent or independent', Services Australia (Web Page) <<https://www.servicesaustralia.gov.au/dependent-or-independent-for-youth-allowance-job-seeker?context=43921>>.

¹⁸ Dr Joseph McDowell, *Transitioning to Adulthood from Out-Of-Home-Care: Independence or Interdependence?* (Report, December 2020) 27.

¹⁹ Australian Housing and Urban Research Institute, *Accommodating transition: improving housing outcomes for young people leaving OHC* (Report, No 364, September 2021) Table 6 ('AHURI Report').

Extending care to 21 would provide better equality before the law by ensuring young people in OOHC are supported during a formative period in their life, during which young people outside of the care system normally receive support. An analysis by Deloitte Access Economics suggested that Queensland care leavers were half as likely to leave care homeless or in need of homeless support services if they were supported in the OOHC system until 21 rather than 18.²⁰ The analysis suggested hospitalisation, mental health illness and alcohol and drug illness would also significantly decrease.²¹ Extending OOHC would remove age limitations that are not reflective of the data on the needs of young care leavers. Furthermore, raising the age of leaving care would likely better provide the stability and security needed to enable full engagement with education and employment.²² This would mean that young people who have been in the care system are able to enjoy their human rights without discrimination due to their family circumstances or their age.

4.2 Right to life

What is the right?

Section 16 of the HRA states that:

“Every person has the right to life and has the right not to be arbitrarily deprived of life.”

This is modelled from article 6(1) of the ICCPR, which states that all human beings possess the intrinsic right to life and that said right is safeguarded by the law.²³ A duty exists for the government to adopt appropriate measures in order to preserve the right to life.²⁴ In addition, section 16 of the HRA is analogous to article 6 of the *Convention on the Rights of the Child*

²⁰ Deloitte Access Economics, *Extending Out-Of-Home Care - a Queensland Perspective* (Report, September 2021) Appendix C <https://thehomestretch.org.au/site/wp-content/uploads/2021/11/OOHC_QldReport_FINAL.pdf> (Deloitte *Extending Out-Of-Home Care*).

²¹ Ibid.

²² Rachel Rosenberg and Youngmi Kim, ‘Aging Out of Foster Care: Homelessness, Post-Secondary Education, and Employment’ (2017) 12(1) *Journal of Public Child Welfare* 99, 101-3 (‘Aging Out of Foster Care’).

²³ Explanatory Notes, Human Rights Bill 2018 (Qld) 3.

²⁴ Queensland Human Rights Commission, *Fact Sheet: Queensland’s Human Rights Act 2019* (Fact Sheet, July 2019) <https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0009/19908/QHRC_factsheet_QueenslandHumanRightsAct.pdf>.

(CRC),²⁵ as well as Article 10 of the *Convention on the Rights of Persons with Disabilities* (CRPD).²⁶ The right to life imposes a far-reaching positive duty on public authorities to take appropriate steps to protect life and reduce threats to life.²⁷

Applicability to OOHHC

Leavers of the OOHHC system are more likely to suffer long-term negative outcomes, exhibited through their high risk of homelessness or involvement in criminal conduct.²⁸ The 2016 Census revealed that 2744 individuals aged 19-24 experienced homelessness in Queensland, in which this trend has undertaken a generally upward trajectory following both the 2006 and 2011 Censuses.²⁹ With evidence highlighting parallels between socioeconomic status and health outcomes, socially excluded populations such as homeless individuals have proven to have ‘high all-cause mortality.’³⁰ This conjecture is corroborated by other reports where similar sentiments are expressed; homeless young people experience high mortality due to the phenomenon of multi-morbidities, sustained from a plethora of mental health issues, violence, and substance abuse.³¹ Where section 16 of the HRA encompasses the obligation for the government to make a concerted effort in protecting one’s right to life, ultimately, current literature reveals that the mortality rates of homeless people and other socially excluded groups are ten times that of the general population.³² Furthermore, a study conducted in the United Kingdom similarly observed a paradigm where adults who had been in care had a mortality hazard ratio of 1.62 times higher than adults who had never been in care.³³ The authors substantiated that this excess

²⁵ *Conventions on the Rights of the Child*, Australia-United Nations, [1991] ATS 4 (entered into force 16 January 1991).

²⁶ *Conventions on the Rights of Persons with Disabilities*, Australia-United Nations, [2008] ATS 12 (entered into force 16 August 2008).

²⁷ Explanatory Notes, Human Rights Bill 2018 (Qld) 19; *Olga Tellis v Bobmay Municipal Corporation* [1985] 3 SCC 545 [2.1]; *Association X v United Kingdom Application 7154/75* 14 DR 31 (1978) 32.

²⁸ Queensland Child Protection Commission of Inquiry, *Taking Responsibility: A Roadmap for Queensland Child Protection* (Report, June 2013) 292.

²⁹ Queensland Youth Housing Coalition Inc., *QYHC Qld Wide 2018 Fact Sheet* (PowerPoint) <<https://www.qyhc.org.au/wp-content/uploads/2019/02/QLD-Wide-Homeless-Fact-Sheet-2018.pdf>>.

³⁰ Robert Aldridge et al, ‘Morbidity and mortality in homeless individuals, prisoners, sex workers, and individuals with substance use disorders in high-income countries: a systematic review and meta-analysis’ (2017) 391(10117) *The Lancet* 241, 242.

³¹ Jessica Heerde & George Patton, ‘The vulnerability of young homeless people’ (2020) 5(6) *The Lancet*, 302.

³² Andrew Davies & Lisa Wood, ‘Homeless health care: meeting the challenges of providing primary care’ (2018) 209(5) *The Medical Journal of Australia*, 230.

³³ Emily Murray et al, ‘Association of childhood out-of-home care status with all-cause mortality up to 42-years later: Office of National Statistics Longitudinal Study’ (2020) 20(735) *BMC Public Health*, 1.

mortality was a product of self-harm, accidents, and mental and behavioural causes.³⁴ A U.S. report also documented that individuals placed in OOHC during their younger years had increased mortality risks between the ages of 20 to 56.³⁵

Considering the aforementioned studies and reports, there is a connection between the age of leaving care and the positive duty to protect life. The 'Policy and Practice Supports for Young People Transitioning from Out-of-Home Care: An Analysis of Six Recent Inquiries in Australia' noted that care leavers experience poorer outcomes as they lack sufficient maturity and living skills at 18 to live independently and that leaving care often leads directly to homelessness.³⁶ The connection between homelessness and high mortality rates indicates care leavers lives would be better protected if they received care beyond 18. Extending the age of leaving care to 21 would minimise the risk of care leavers facing homelessness and other risks to their life, therefore promoting section 16 of the HRA. The efficacies of this proposition have been demonstrated through the ACT's 'A Step Up for Our Kids' strategy in providing support for care leavers up to the age of 25. In accordance with sections 6, 14 and 19B of the *Human Rights Commission Act 2005* (ACT), one target area was to promote the rights of children and young people.³⁷ Although enhancements need to be made, the team reported benefits of positive transition into adulthood and improved health and wellbeing outcomes for young people.³⁸ Considering these findings, it is reasonable that by raising Queensland's leaving care age to 21, the right to life under the HRA can be better preserved.

³⁴ Ibid.

³⁵ Menghan Gao, Lars Brannstrom and Ylva Almquist, 'Exposure to out-of-home care in childhood and adult all-cause mortality: a cohort study' (2016) 46(3) *International Journal of Epidemiology*, 1014.

³⁶ Philip Mendes and Samone McCurdy, 'Policy and practice supports for young people transitioning from out-of-home care: An analysis of six recent inquiries in Australia' (2020) 20(4) *Journal of Social Work*, 599, 601, 607.

³⁷ ACT Government, *A Step Up for Our Kids: One Step Can Make a Lifetime of Difference* (Report, October 2014)

<https://www.communityservices.act.gov.au/__data/assets/pdf_file/0009/682623/CSD_OHCS_Strategy_web_FINAL.pdf>.

³⁸ Ibid.

4.3 The protection of families and children

What is the right?

Section 26 of the HRA states:

- 1) “Families are the fundamental group unit of society and are entitled to be protected by society and the State.
- 2) Every child has the right, without discrimination, to the protection that is needed by the child, and is in the child’s best interests, because of being a child.
- 3) Every person born in Queensland has the right to a name and to be registered, as having been born, under a law of the State as soon as practicable after being born.”

This right is based on Articles 23(1), 24(1), and 24(2) of the ICCPR.³⁹ The requirement of affording protection that is in the ‘best interests’ of the child is also drawn from Article 3 of the CRC.

The protection offered by section 26 of the HRA is stronger than non-interference with the family unit, as it guarantees institutional protection of the family and requires the State to undertake positive measures for the protection of children.⁴⁰ This recognises the particular vulnerability of children which necessitates special protection from their family, society, and the State.⁴¹

Applicability to OOHC

While the term ‘family’ under the HRA must be interpreted broadly to include different cultural and social understandings of family, the limited case law guidance suggests ‘family’ does not extend to foster care arrangements.⁴² Therefore, section 26(1) of the HRA is unlikely to be applicable to the OOHC system.

However, a link can clearly be established between the right protected under section 26(2) of the HRA and OOHC. OOHC exemplifies protection that is needed by children, and is in

³⁹ Explanatory Notes, Human Rights Bill 2018 (Qld) 22.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² *RE and RL v Department of Child Safety, Youth and Women* [2020] QCAT 151.

the best interests of children, provided by the State. Section 26(2) is therefore a relevant consideration for public entities in making decisions about OOHC.

In making an argument that this human right is undermined by OOHC ending at 18, and that the right would be better protected if the leaving care age was extended to 21, one is confronted with the issue that a person is no longer legally defined as a child once they turn 18.⁴³ However, ending state care at 18 not only negatively affects those over 18, but is contrary to the best interests of children in their mid-to-late teens. Preparing for the transition to leave OOHC commences when the child turns 15,⁴⁴ meaning that in the child's final years of schooling they are forced to plan for living independently from 18 onwards. Not only is this distinct from the experience of most of their peers, it also puts a pressure on children that can lead to poor mental health, disengagement from education or hobbies, and risk-taking behaviour. Consequently, secure and successful leaving care plans are often not achievable for young people, leading to many 18-year-old people exiting OOHC and entering homelessness and poverty.⁴⁵ Therefore, ending OOHC at 18 unreasonably and unjustifiably limits necessary protection in the best interests of children.

By contrast, extending the leaving care age to 21 would better promote and protect section 26 of the HRA, as the best interests of mid-to-late teens could be better safeguarded. For example, in California, since OOHC was extended to 21 in 2010, there have been significant increases in young people in state care finishing high school, a decrease of 28% to 17-year-olds being homeless, couch surfing, or becoming parents, and the number of 17-year-olds arrested has decreased by 41%.⁴⁶

There is also a link between extending the age of leaving care to 21 and increased outcomes for the children of care leavers, thus reducing the chance of intergenerational disadvantage.⁴⁷ The longer period of support for young people in the OOHC system increases their engagement in education and employment, thus allowing them to better

⁴³ *Child Protection Act 1999* (Qld) s 8.

⁴⁴ Philip Mendes, Guy Johnson, and Badal Moslehuddin, 'Effectively preparing young people to transition from out-of-home care' (2011) 89(1) *Family Matters* 61, 65.

⁴⁵ Senate *Out of Home Care Report* (n 1) 110.

⁴⁶ Mark Courtney, Nathanael Okpych and Sunggeun Park, *Findings on the Relationship between Extended Foster Care and Youth's Outcomes at Age 21* (Report, November 2018) iii.

⁴⁷ B Bradbury, *Young Motherhood and Child Outcomes* (SPRC Report No 1/11, 2011).

provide for their children.⁴⁸ Therefore, the protection of the best interests of the next generation of children would be better promoted and safeguarded, in line with the section 26 of the HRA, if Queensland extended the age of leaving care to 21.

This reasoning is supported by Victoria's 2020 amendment to the *Children, Youth and Families Act 2005* (Vic) which raised the age of OOHC to 21. The amendment Bill was proposed with a statement of compatibility regarding the human rights protected by the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter). The statement of compatibility argued that raising the age of leaving OOHC did not interfere with any human rights protected by the Charter, and may promote the right to protection of children and families.⁴⁹ Considering the Victorian and Queensland protection of this right are drawn from the same source, and have nearly identical wording, it is reasonable to conclude raising the leaving care age to 21 in Queensland would promote the purpose of the HRA by better protecting children and families.

4.4 Taking part in public life

What is the right?

Section 23 of the HRA affirms that:

- 1) "Every person in Queensland has the right, and is to have the opportunity, without discrimination to participate in the conduct of public affairs, directly or through freely chosen representatives.
- 2) Every eligible person has the right, and is to have the opportunity, without discrimination-
 - a) to vote and be elected at periodic State and local government elections that guarantee the free expression of the will of the electors; and
 - b) to have access, on general terms of equality, to the public service and to public office."

⁴⁸ Ibid.

⁴⁹ Victoria, *Parliamentary Debates*, Legislative Council, 5 February 2020, 121 (Fiona Patten).

This right is based on article 25 of the ICCPR.⁵⁰ In essence, section 23 confers a fundamental right to a democratic system. Other than the standard limitation that this right can be restricted where it is reasonable and demonstrably justified in a free and democratic society, the scope of this provision does not provide a right to specific outcomes from one's participation and takes into consideration residence, age and imprisonment as factors in voting, holding office and access to public service.⁵¹

Applicability to OOHHC

Tentative links can be drawn between the right protected under section 23 of the HRA and OOHHC. Evidence reveals that care leavers exiting the OOHHC system at 18 have demonstrated increased rates of homelessness, poverty, lower education levels.⁵² A South Australia study found that 56% of the study population (people over 18 accessing specialist homelessness services) are enrolled to vote and in that, around 40% of those voters vote regularly.⁵³ That equates to a 22% turn out rate in comparison with enrolment rates of around 97% of registered voters in Australia generally.⁵⁴ Additionally, it was found that the most significant obstacles to participants' voting irrespective of enrolment status included not having adequate knowledge of politics or the election process and finding voting too burdensome or complicated.⁵⁵

If the age of care leavers was increased to 21, not only would the risk of homelessness and subsequent disengagement in public affairs be minimised, but individuals would have greater opportunity to become educated about public affairs. This way, the right to take part in public life under section 23 can be better protected.

⁵⁰ Explanatory Notes, Human Rights Bill 2018 (Qld) 4.

⁵¹ Queensland Human Rights Commission, *Taking part in public life: Section 23 of the Human Rights Act 2019* (Fact Sheet, July 2019) <<https://www.qhrc.qld.gov.au/your-rights/human-rights-law/taking-part-in-public-life#:~:text=Section%2023%20of%20the%20Human,or%20through%20freely%20chosen%20representatives>>.

⁵² Philip Mendes, *Young people transitioning from out-of-home care: What do public inquiries tell us about the state of current policy and practice in Australia?* (Short Article, May 2019) <<https://aifs.gov.au/resources/short-articles/young-people-transitioning-out-home-care-what-do-public-inquiries-tell-us>>.

⁵³ Veronica Coram et al, 'An Exploration of Homelessness and Electoral Participation' (Report, University of South Australia and the University of Adelaide, 2019).

⁵⁴ Ibid.

⁵⁵ Ibid.

Another relationship that can be established between section 23 and OOHC is the fact that care leavers at 18 are more likely to be an offender of the criminal justice system. In Queensland, one is not entitled to enrol and vote if they are serving a sentence of three years or longer.⁵⁶ Where the prospect of engaging in criminal conduct is high upon leaving OOHC at 18,⁵⁷ there is a greater probability that one's freedom to participate in public affairs will be restricted. This could be mitigated if requisite social and economic support is provided through the extension of OOHC to 21. Therefore, the right to participate in public affairs may be more holistically protected by raising the age of leaving care to 21 as it reduces the likelihood of care leavers entering the criminal justice system.

4.5 Cultural rights – generally

What is the right?

Section 27 of the HRA provides:

“All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy their culture, to declare and practise their religion and to use their language.”

This is based on article 27 of the ICCPR, which protects the rights of minorities in countries to enjoy their own culture, practise their own religion, and use their own language.⁵⁸ Section 27 of the HRA protects the rights of all people, whether minorities or not, to enjoy their culture with the aim of safeguarding individual expression and the continued development of cultural heritage as a whole.⁵⁹ This section also copies the wording of the provision protecting cultural rights in the Victorian *Charter of Human Rights and Responsibilities* (the Charter). A denial of this right under the Charter has been interpreted as amounting to a substantial restriction of the enjoyment of culture, religion, race, or language.⁶⁰ While the right

⁵⁶ Australian Electoral Commission, *Prisoner Voting* (Fact Sheet, October 2007) <https://aec.gov.au/About_AEC/Publications/Fact_Sheets/fact_sheets/prisoner-voting.pdf>.

⁵⁷ Susan Baidawi, *The transition from out-of-home care and offending behaviours* (Short Article, September 2017) <<https://aifs.gov.au/resources/short-articles/transition-out-home-care-and-offending-behaviours>>.

⁵⁸ Explanatory Notes, Human Rights Bill 2018 (Qld) 23.

⁵⁹ Ibid.

⁶⁰ Victorian Government Human Rights Unit, *Charter of Human Rights and Responsibilities* (Report, 2008) 121.

references community, it is considered an individual right which each person can exercise, rather than a collective right that must be exercised with other members of the community.⁶¹

Applicability to OOHC

There is a distinct lack of national or recent data on the number of culturally and linguistically diverse (CALD) young people in OOHC, however an estimated 25% of children in OOHC are from CALD backgrounds.⁶² The cultural background of these young people means they may be even more vulnerable than others within OOHC, as there may be language and educational barriers, family relationship pressures, and social isolation.⁶³ Being placed within care may also mean that children are removed from their cultural community, and therefore their ability to engage with and enjoy their culture, religion, race, or language is minimised.

It is not suggested that the existence of the OOHC system undermines cultural rights under the HRA, as it is a necessary service, but its inability to provide effective care for the transition to adulthood means that young people from CALD backgrounds are prevented from enjoying their cultural rights because they are instead preoccupied with experiencing homelessness, poverty, or incarceration. Barriers to cultural engagement generally are affordability, accessibility, poor physical and mental health, and a lack of opportunities.⁶⁴ As discussed in other sections of this report, increasing the age of leaving care to 21 in other jurisdictions has resulted in increased educational, income, physical and mental health, and social outcomes for young people. The stability and security offered by these outcomes allows young people to engage with and enjoy their culture, religion, race, or language. Therefore, raising the age of leaving care to 21 would provide better protection and promotion of cultural rights generally under the HRA.

⁶¹ Ibid

⁶² Senate *Out of Home Care Report* (n 1) 271.

⁶³ Ibid 271-272.

⁶⁴ Louise Baxter, Alexandra Burton and Daisy Fancourt, 'Community and cultural engagement for people with lived experience of mental health conditions: what are the barriers and enablers?' (2022) 10(71) *BMC Psychology* 1, 11.

4.6 Cultural rights – Aboriginal peoples and Torres Strait Islander peoples

What is the right?

Section 28 of the HRA provides:

- 1) “Aboriginal peoples and Torres Strait Islander peoples hold distinct cultural rights.
- 2) Aboriginal peoples and Torres Strait Islander peoples must not be denied the right, with other members of their community—
 - a) to enjoy, maintain, control, protect and develop their identity and cultural heritage, including their traditional knowledge, distinctive spiritual practices, observances, beliefs and teachings; and
 - b) to enjoy, maintain, control, protect, develop and use their language, including traditional cultural expressions; and
 - c) to enjoy, maintain, control, protect and develop their kinship ties; and
 - d) to maintain and strengthen their distinctive spiritual, material and economic relationship with the land, territories, waters, coastal seas and other resources with which they have a connection under Aboriginal tradition or Island custom; and
 - e) to conserve and protect the environment and productive capacity of their land, territories, waters, coastal seas and other resources.
- 3) Aboriginal peoples and Torres Strait Islander peoples have the right not to be subjected to forced assimilation or destruction of their culture.”

This provision is modelled on article 27 of the ICCPR, as well as articles 8, 25, 29, and 31 of the *United Nations Declaration on the Rights of Indigenous Peoples*.⁶⁵ This right is separate from section 27 in order to recognise the distinct cultural rights held by Aboriginal and Torres Strait Islander Peoples, which hold particular significance in Australia.⁶⁶ Like the preceding provision, this right aims to ensure individual expressions as well as the survival and development of culture as a whole.⁶⁷

⁶⁵ Explanatory Notes, Human Rights Bill 2018 (Qld) 23.

⁶⁶ Ibid.

⁶⁷ Ibid.

The Victorian Charter similarly protects the distinct cultural rights of Aboriginal and Torres Strait Islander Peoples under section 19(2). This right has been interpreted by Victorian courts to require recognition of cultural issues, including the disadvantage or vulnerability one may face as a member of a particular cultural group.⁶⁸ In *DPP v SE* [2017], the court stated that the fact the defendant was an indigenous person, a child, and had an intellectual disability meant that their decision must accommodate those vulnerabilities in order to achieve equality before the law.⁶⁹ In Queensland, there has not yet been any guidance from the courts as to the interpretation of this section.

Applicability to OOHC

There is a clear overrepresentation of Aboriginal and Torres Strait Islander Peoples in the OOHC system. Aboriginal and Torres Strait Islander children represent one in three children living in OOHC, and authorities are ten times more likely to impose state care on Aboriginal and Torres Strait Islander children than non-Indigenous children.⁷⁰ The reasons for this include socio-economic disadvantage, intergenerational trauma, and cultural incompetency of child protection officers.⁷¹ This disproportionate admission of Aboriginal and Torres Strait Islander children into state care has been likened to the creation of another Stolen Generation.⁷²

The high number of Aboriginal and Torres Strait Islander children in the OOHC system has significant implications for the fulfilment of their cultural rights. In Queensland, the Indigenous child placement principle guides the placement of Aboriginal and Torres Strait Islander children in care through recognition of the importance of family, community, culture, and practice.⁷³ Queensland legislation reflects this, requiring that ‘proper consideration’ is given to placing Aboriginal and Torres Strait Islander children with a member of their family

⁶⁸ See *DPP v SE* [2017] VSC 13.

⁶⁹ Ibid.

⁷⁰ Family Matters, *The Family Matters Report 2021: Measuring Trends to Turn the Tide on the Over-Representation of Aboriginal and Torres Strait Islander Children in Out-Of-Home Care in Australia* (Report, 2021) 3.

⁷¹ Senate *Out of Home Care* Report (n 1) 220.

⁷² Ibid 224.

⁷³ ‘Child Placement Principle’, *Queensland Government Department of Children, Youth Justice and Multicultural Affairs* (Web Page, 15 May 2022) <<https://www.cyjma.qld.gov.au/foster-kinship-care/training/aboriginal-torres-strait-islanders/child-placement-principle>>.

group or cultural community.⁷⁴ However, as of 31 December 2021, only 37.8% of Aboriginal and Torres Strait Islander children in OOHC were placed with kin, Indigenous carers, or Indigenous residential care services.⁷⁵ Therefore, being placed in care, which will likely be separate from your family or cultural group, deeply undermines the promotion and protection of section 28(2) of the HRA, as Aboriginal and Torres Strait Islander children are disconnected from their culture.

Attempts are made to connect Aboriginal and Torres Strait Islander children in care with their culture through cultural support plans aimed at keeping children connected with their family and cultural community while in care and after leaving.⁷⁶ While 85.1% of Aboriginal and Torres Strait Islander children in care had a current cultural support plan as of 31 December 2021,⁷⁷ there is limited evidence of compliance with the planning or positive outcomes through their implementation.⁷⁸ As above, OOHC is thus harmful to the fulfilment of section 28(2) of the HRA.

The solution to better promote and protect this right would be to ensure that less Aboriginal and Torres Strait Islander children are placed into care. The connection between this goal and raising the age of leaving care age to 21 is exemplified through this paper's discussion on other human rights under the HRA, namely the rights to recognition and equality before the law, life, the protection of children and families, and education. Providing greater support to young people may lead to increased outcomes in education and employment opportunities, therefore increasing their ability to provide for their children.⁷⁹ This could contribute to breaking the intergenerational social disadvantage and trauma that influences the overrepresentation of Aboriginal and Torres Strait Islander children in the OOHC system.

⁷⁴ *Child Protection Act 1999* (Qld) s 83.

⁷⁵ 'What we Achieve' *Queensland Government Department of Children, Youth Justice and Multicultural Affairs* (Web Page, 2022) <<https://performance.cyjma.qld.gov.au/?domain=4ng99xeqmb60&subdomain=737yfwz9e80&tab=5shhjdu6pao0#5slxzg46y9s0>>.

⁷⁶ 'Working with Aboriginal and Torres Strait Islander children and families' *Queensland Government Department of Children, Youth Justice and Multicultural Affairs* (Web Page, 2022) <<https://performance.cyjma.qld.gov.au/?domain=4ng99xeqmb60&subdomain=1zpq16xkoxz4&tab=1gqv1reli89s>>.

⁷⁷ *Ibid*

⁷⁸ SNAICC, *Baseline Analysis of Best Practice Implementation of the Aboriginal and Torres Strait Islander Child Placement Principle Queensland* (Report, April 2018) 3.

⁷⁹ Dr Andrew Harvey et al, *Out of care, into university: Raising higher education access and achievement of care leavers* (Final Report, March 2015) 20.

Amending the system to minimise intergenerational displacement of Aboriginal and Torres Strait Islander children gives way for families to enjoy their cultural rights under section 28(2) of the HRA and prevents the ongoing destruction of culture in accordance with section 28(3) of the HRA.

4.7 Right to education

What is the right?

Section 36 of the HRA states:

“(1) Every child has the right to have access to primary and secondary education appropriate to the child’s needs.

(2) Every person has the right to have access, based on the person’s abilities, to further vocational education and training that is equally accessible to all.”

The right focuses specifically on vocational education, although it is based on Article 13 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) which also references higher education more broadly.⁸⁰

Applicability to OOHHC

Failing to extend OOHHC after age 18 undermines a young person’s ability to access education and vocational training. The 18-21-year-old period is generally when a young person will transition from school-based education to further education or training. Removing support at this time makes this transition more difficult as a young person will have to devote more attention to other needs such as finding financial support or housing. An AHURI analysis found that 44% of care leavers experienced homelessness within four years of leaving care and a further 12% were at risk of homelessness.⁸¹ Homelessness is disruptive to educational outcomes and may prevent young people from pursuing further education and training.⁸² It is now common for young people to rely on their parents for support during the transition period between school-based education and further training; and it has been

⁸⁰ Explanatory Notes, Human Rights Bill 2018 (Qld) 5; *ICESCR* Article 13.

⁸¹ AHURI Report (n 19) Table 8.

⁸² Rosenburg and Kim (n 22) 101-3.

established that unstable home environments do not facilitate positive learning outcomes.⁸³ Instability in this time for potential education and training may have flow on effects to employability later in life. It is also relevant to note that not all students will have completed Year 12 by their 18th birthday. This means that lack of continued care may not only impact on further vocational education but also on secondary education.

The 2021 CREATE Post-Care Report found that 57% of care leavers had completed Year 12.⁸⁴ In a UK pilot evaluation of 'Staying Put' arrangements, 19-year-old care leavers were compared to young adults in the Staying Put arrangement of the same age. Twenty-two percent of care leavers remained in full time education compared to a significantly larger 55% of 19-year-olds accessing the Staying Put arrangements.⁸⁵ Access to education and training has been a key component of extension of care legislation overseas. For example, in Texas, extended foster care support is available for young people continuing education (or employment).⁸⁶ Similarly, in Ontario there is a Stay Home for School Program for young care leavers yet to complete school education.⁸⁷

Therefore, the right to access further vocational training, and in some cases secondary schooling, would be better promoted and protected if the age of leaving care was extended to 21, as young people would be able to focus more efforts on education rather than independently meeting basic needs like food and shelter.

⁸³ Ibid.

⁸⁴ McDowell (n 18) 23.

⁸⁵ Emily Munro et al, *Evaluation of the Staying Put: 18 Plus Family Placement Programme: Final report* (Research Report, DFE-RR191, 2010) Page 62.

⁸⁶ 'Extended Foster Care', Texas Department of Family and Protective Services (Web Page) <https://www.dfps.state.tx.us/Child_Protection/Youth_and_Young_Adults/Transitional_Living/Extended_Foster_Care/default.asp>.

⁸⁷ 'Youth leaving care', Ontario Ministry of Children, Community and Social Services (Web Page) <<https://www.children.gov.on.ca/htdocs/English/childrensaid/leavingcare.aspx>>.

4.8 Right to health services

What is the right?

Section 37 of the HRA states:

- “(1) Every person has the right to access health services without discrimination.
- (2) A person must not be refused emergency medical treatment that is immediately necessary to save the person’s life or to prevent serious impairment to the person.”

This right is drawn from Article 12 of the ICESCR.⁸⁸ In Australia, it is largely guaranteed by the public Medicare system which supports people to pay for their medical care.⁸⁹ Medicare provides a baseline of support for people who cannot (or do not want to) access private health insurance due to the upfront cost. The Pharmaceutical Benefits Scheme also reduces the costs of some medicines.⁹⁰ While these services go a long way to ensuring access to health services, not all types of healthcare are covered.⁹¹

Applicability to OOHHC

For young people leaving care, limited access to medical services can exacerbate existing vulnerabilities. Many young people are not in stable paid employment after care, meaning that they may struggle to find money to pay for medical expenses, limiting their access to treatment or routine care.⁹² Care leavers also have poorer health outcomes than the general population, therefore it is concerning that these needs may not be met.⁹³ Extending care until age 21 would provide care leavers with the financial backing to access necessary medical care. It would allow time for young people to establish themselves financially, such as through employment or training, to be able to meet their medical needs. During the transition period, young people could be provided with the support and guidance needed to navigate the health care system to ensure a more informed entry to independence.

⁸⁸ Explanatory Notes, Human Rights Bill 2018 (Qld) 5.

⁸⁹ Australian Government, ‘About Medicare’, Services Australia (Web Page) <<https://www.servicesaustralia.gov.au/about-medicare?context=60092>>.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² McDowell (n 18) Figure 3.20.

⁹³ Fernando Lima, Miriam Maclean and Melissa O’Donnell, *Exploring outcomes for young people who have experienced out-of-home-care* (Report, 2018) Table 6.

Physical health

AHURI found that 1 in 5 young people were admitted to hospital within a year of leaving care, which is notably higher than the 8% of people admitted in a similar age cohort and year.⁹⁴ This demonstrates the increased health needs for care leavers, as has been reported in relevant literature.⁹⁵ While bulk billing can provide a great deal of support, specialists often require out-of-pocket expenses that are not covered by the Medicare rebate. This can make it difficult for people with complex health needs to access affordable services. There are also exclusions from Medicare such as most dental services and sight and hearing aids.⁹⁶ This leaves an access gap where young care leavers may find it difficult to access services.

Mental health

Medicare may provide a rebate for up to 20 sessions with a mental health professional per year.⁹⁷ If the doctor bulk bills, then the entire fee may be covered however significant costs can be incurred if there is no bulk billing.⁹⁸ A recent AHURI report found that within the four years after leaving care, 1 in 5 young people had presented to the emergency department due to self-harm.⁹⁹ One in four received out-patient clinical mental health care and 12% reported to inpatient services.¹⁰⁰ Not only could extending care support positive mental health outcomes to reduce the need, but it could also increase the ability of young people to access mental health services when required by providing the assistance to do so.

It is accepted by Children's Health Queensland that young people in OOHC 'are a highly vulnerable group with increased physical, mental and social needs'.¹⁰¹ Extending OOHC will better promote the right the health services by ensuring that young people have some

⁹⁴ AHURI Report (n 19) Table 2; 'Patient Experiences in Australia: Summary of Findings, 2016-17', *Australian Bureau of Statistics* (Web Page, 14 November 2017) <<https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4839.0~2016-17~Main%20Features~Hospital%20admissions%20and%20emergency%20department%20visits~5>>.

⁹⁵ Lima, Maclean and O'Donnell (n 93) Table 6.

⁹⁶ Australian Government, 'Health care and Medicare', *Services Australia* (Web Page) <<https://www.servicesaustralia.gov.au/health-care-and-medicare?context=60092>>.

⁹⁷ Australian Government, 'Mental health care and Medicare', *Services Australia* (Web Page) <<https://www.servicesaustralia.gov.au/mental-health-care-and-medicare?context=60092>>.

⁹⁸ Ibid.

⁹⁹ AHURI Report (n 19) Table 2.

¹⁰⁰ Ibid.

¹⁰¹ Queensland Government, 'Children and Young People in Out-Of-Home Care', *Children's Health Queensland Hospital and Health Service* (Web Page, 7 February 2022) <<https://www.childrens.health.qld.gov.au/chq/health-professionals/out-of-home-care/>>.

financial and social support to access healthcare, which their peers outside of OOHC would generally receive through family.

5. Overview of comparable jurisdictions

The following table provides an overview of the law and policy surrounding the age of leaving care in comparable domestic and international jurisdictions. Human rights legislation is in force domestically in Victoria and the Australian Capital Territory,¹⁰² and internationally in the United Kingdom, New Zealand, and Canada.¹⁰³ All of the below jurisdictions have extended care in some form to 21. Therefore, Queensland is clearly behind in terms of the support offered to young people in the OOHC system in comparison to similar jurisdictions.

5.1 Domestic

State/Territory	Policy
Victoria	In Victoria, section 16(1)(g) of the <i>Children, Youth and Families Act 2005</i> requires the Secretary to “provide or arrange the provision of services to assist in supporting a person under the age of 21 years to gain the capacity to make the transition to independent living where— (i) the Secretary has had parental responsibility for the person; and (ii) on the Secretary's parental responsibility ending, the person is of an age, or intends, to live independently...”
ACT	Many of the new policy directions espoused by the ‘A Step Up for Our Kids’ strategy can be actioned within the framework of the current <i>Children and Young People Act 2008</i> . There are a few areas where the strategy’s implementation would be assisted by legislative change.

¹⁰² *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT)

¹⁰³ *Human Rights Act 1998* (UK); *Human Rights Act 1993* (NZ); *Canadian Human Rights Act 1985* (Canada).

	○ The Act empowers the Director-General of CSD (Community Services Directorate) to exercise parental responsibility for children and young people in care. ○ Under s 529JA (1), this section applies if (a) a young adult is younger than 21 years old; and (b) a transition plan is in force for the young adult which provides for the young adult to live with a previous out-of-home carer; and (c) the young adult is in fact living with the previous out-of-home carer. ○ Under s 529JA (3), the director-general may provide financial assistance only if satisfied on reasonable grounds that the assistance is reasonably necessary considering the previous out-of-home carer's circumstances.
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5.2 International

Country	Policy
United Kingdom	England: <i>Children Act 1989</i> (UK) ○ S 23CZA: staying put arrangements allow former foster children to remain with their former foster carer until age 21, and receive local authority support (including financial support) to do so Scotland: <i>Children (Scotland) Act 1995</i> (UK) ○ Continuing Care: care leavers can remain in accommodation placement they were in during care until 21 (s 26A)¹⁰⁴ ○ Aftercare support: 'advice, guidance and assistance' from the local authority (s 29) and some financial assistance until 26 (s 30)

¹⁰⁴ Children and Families Directorate, 'Looked After Children', *Scottish Government* (Policy) <<https://www.gov.scot/policies/looked-after-children/children-leaving-care/>>.

United States	Texas ○ Arrangements for continued care until age 21 to support education or employment¹⁰⁵ ○ Option of Supervised Independent Living Placement¹⁰⁶ Minnesota ○ Foster care extends to age 21¹⁰⁷
New Zealand	<i>Oranga Tamariki Act 1989/Children's and Young People's Well-being Act 1989 (NZ)</i> ○ S 386AAD: care leavers can live with a carer until age 21 ○ S 386A: care leavers are entitled to advice and assistance until age 25 ▪ S 386B(2): This may include - legal advice, financial support, counselling and assistance in obtaining education, accommodation or employment
Canada	Ontario¹⁰⁸ ○ Continued Care and Support for Youth: potential eligibility for financial and guidance support until 21 for 18+ care leavers ○ Stay Home for School Program: potential support for remaining with the caregiver available until 21 for care leavers yet to complete high school

¹⁰⁵ 'Extended Foster Care', *Texas Department of Family and Protective Services* (Web Page) <https://www.dfps.state.tx.us/Child_Protection/Youth_and_Young_Adults/Transitional_Living/Extended_Foster_Care/default.asp>.

¹⁰⁶ 'Extended Foster Care', *Texas Department of Family and Protective Services* (Web Page) <https://www.dfps.state.tx.us/Child_Protection/Youth_and_Young_Adults/Transitional_Living/Extended_Foster_Care/default.asp>.

¹⁰⁷ 'Extended foster care to age 21', *Minnesota Department of Human Services* (Web Page) <<https://mn.gov/dhs/people-we-serve/children-and-families/services/adolescent-services/programs-services/extended-foster-care.jsp>>.

¹⁰⁸ 'Support for youth in the child welfare system', *Ontario Ministry of Children, Community and Social Services* (Web Page) <<https://www.ontario.ca/page/support-youth-child-welfare-system#section-1>>.

6. Conclusion

The Queensland government has made a significant step in protecting the human rights of care leavers through their recent announcement of extending OOHC to 21. This report demonstrates that the removal of OOHC at 18 undermines human rights that are protected under the HRA, namely the right to recognition and equality before the law, the right to the protection of children and families, and the right to life. Extending the age of leaving care to 21 better promotes and protects these and other various rights safeguarded under the HRA, thereby greater fulfilling the objects and purpose of the Act.

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