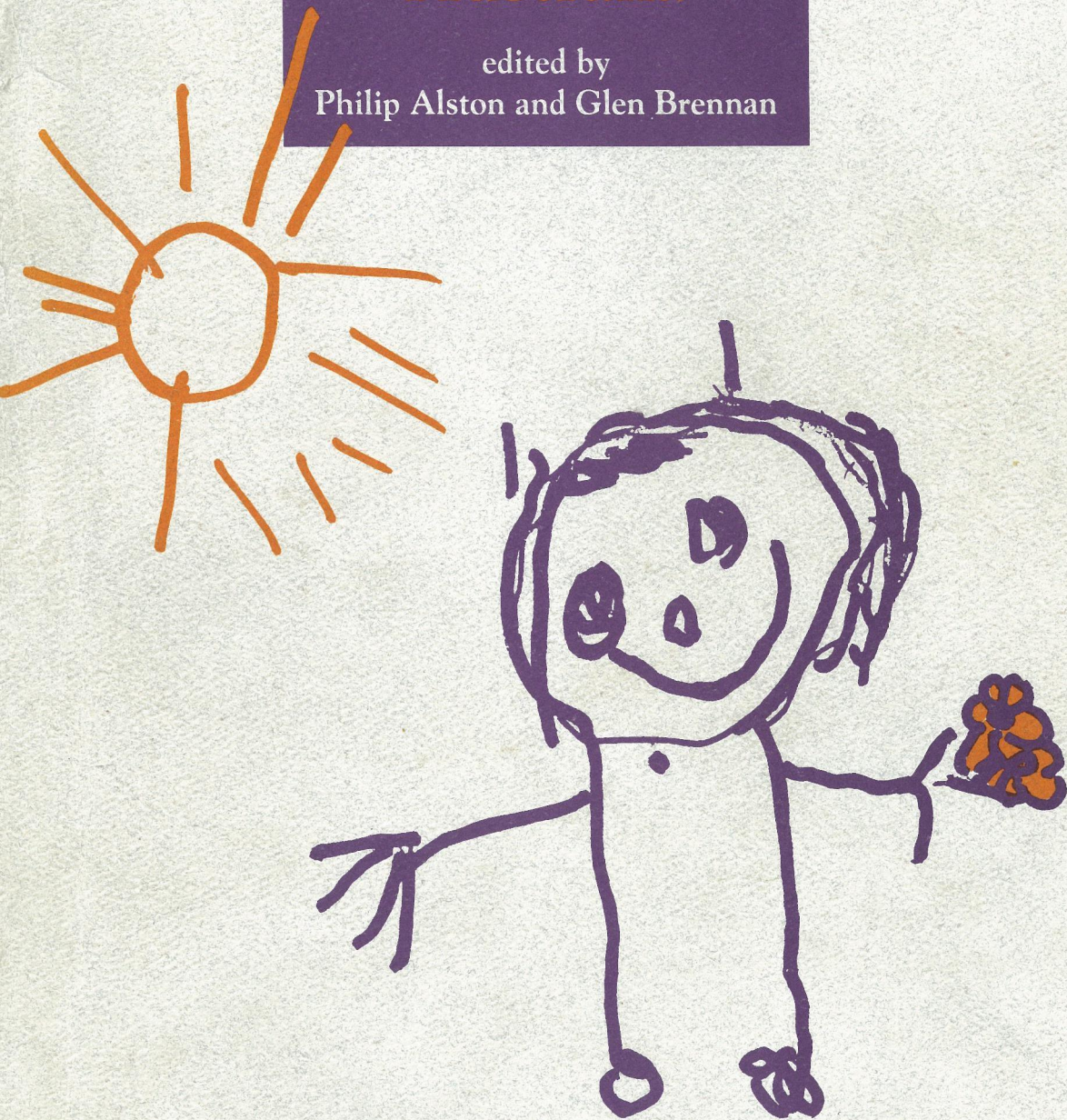


# The UN Children's Convention and Australia

edited by  
Philip Alston and Glen Brennan



Human Rights and Equal Opportunity Commission  
ANU Centre for International and Public Law  
Australian Council of Social Service

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## FOREWORD

On 17 December 1990 Australia ratified the Convention on the Rights of the Child which had been adopted by the United Nations General Assembly only a little over one year earlier (20 November 1989). The Convention has been hailed as a Magna Carta for children and had already been ratified by a total of 96 countries as of 4 September 1991. If account is also taken of the countries which have signed (but not yet ratified) the Convention the total number of States Parties plus signatories is 140.

The full text of the Convention, as well as a list of all of the countries that have ratified or signed it, and of those that have done neither, are included as Appendices to this volume.

The Convention is of major significance for a number of reasons. In the first place, it is the single, most comprehensive statement of children's rights ever drawn up at the international level. Secondly it deals, often for the first time in such a context, with a wide range of issues which have only recently emerged on the international agenda. These include inter-country adoptions, child abuse and sexual exploitation, drug-related problems, rehabilitation for children who have been exposed to cruel or exploitative treatment, etc. Thirdly, the Convention emphasises the right of each child to be involved - to participate - in decision-making on matters that affect his or her interests and for the child's evolving capacities to be taken into account in that regard.

In a world in which there are, according to UNICEF's *State of the World's Children Report 1991*, 40,000 child deaths each day from ordinary malnutrition and disease, 150 million children in ill health and suffering from poor growth, and over 100 million 6 to 11-year-olds who are not in school, the need for a major human rights treaty addressed to the rights of the child would seem beyond dispute.

But what is the situation in Australia? Do we really need to take the Convention seriously? Or is our ratification only a symbolic gesture aimed at showing international solidarity with those countries where the Convention *is* really needed?

It is not only appropriate that we should now address such questions; the Convention actually obliges us to do so. Thus, some of the papers in this collection review the present situation of children in Australia. The plight of Aboriginal children is a theme to which frequent reference is made. Other issues specifically addressed are the problems of homeless children, wards of the state and the mentally-ill, the inadequacy of social security arrangements for children and the need for a range of measures to offset the impact of the current recession.

The theme running through all of the papers is that while ratification of the Convention is one thing; its implementation is quite another. In other words, while formal acceptance of the obligations contained in the Convention is a relatively straightforward process, the



## *Foreword*

transformation of its many provisions into Australian law, policy and practice is infinitely more complex and demanding. The papers in this volume seek to identify and explore some of the key issues which arise in that regard.

In addition, because of the value of comparing Australian approaches to those of some of our peers in the community of nations, international perspectives from Canada, New Zealand, the United Kingdom, and the United States are also included.

Earlier drafts of the papers in this volume were presented to a Conference entitled "Transforming the Convention on the Rights of the Child into Australian Law and Practice" which was held at the Australian National University on 19 July 1991. The Conference was organised by the ANU's Centre for International and Public Law in conjunction with the Human Rights and Equal Opportunity Commission, and the Australian Council of Social Service. In addition, Sydney University's Welfare Law and Social Policy Program, directed by Professors Bettina Cass and Terry Carney, contributed to the work of the Conference and to the publication of these proceedings.

Particular thanks are due to the Human Rights and Equal Opportunity Commission for its support of the Conference and of the publication of the resulting papers. In addition, various individuals contributed very significantly to the organisation of the Conference and the preparation of this volume. They include: Stephen Parker, John Seymour and Tom Campbell of the ANU Law Faculty; Glen Brennan, Emilija Beswick, Bernard Fung and Mara Bustelo of the Centre for International and Public Law; Theresa Helen and Sylvie Leila for their artwork; Kathie Griffiths for her cover design; Michael Hogan of the Public Interest Advocacy Centre; Elaine Fishwick of Sydney University's Department of Social Work; and David Mason of the Human Rights and Equal Opportunity Commission.

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# I. AUSTRALIA AND THE CONVENTION

**Philip Alston**

## **The Significance of Children's Rights**

The concept of children's rights brings together two of the most important twentieth century developments in the history of ideas. The first is the widespread, if not universal, acceptance of the idea that every individual, solely by virtue of being human, is entitled to enjoy a full range of human rights. The second is recognition of the idea that children should be treated as people in their own right and not as mere appendages of, or chattels belonging to, the adults under whose responsibility they fall. By combining these two ideas it becomes clear that children are entitled to be treated as holders of human rights and that any qualification to the range of rights that they are accorded by society has to be fully justified by reference to other human rights principles rather than to the predilections, prejudices or narrowly conceived self-interest of adults.

While these principles are now entrenched in international law and have gained acceptance under national law in the vast majority of countries in the world, we should not under-estimate the extent of the changes in attitude and practice that still remain to be achieved. Just as the principle that all individuals are entitled to full and equal respect for their human rights continues to threaten deeply entrenched vested interests in many societies, so too does the very idea of children's rights threaten some long-cherished notions of unfettered parental dominance and of governmental and community abstention in matters arising within the 'private' domain of the family in our own society. But the challenge of change is inherent in the movement to secure full respect for both human and children's rights. The major question then is how we respond to that challenge and how we go about introducing the changes that are required.

## **The Australian Debate**

It has been persuasively argued that "Australia does not have a rights culture".<sup>1</sup> Such a conclusion is certainly consistent with the failure of successive recent attempts to secure the entrenchment of a Bill of Rights in the Australian Constitution. By the same token there may well be other reasons for those failures. But, whatever the explanations may be in the case of domestic Constitutional initiatives, such resistance has not been apparent in relation to other important rights-related initiatives.

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Galligan, B. "Australia's Rejection of a Bill of Rights", 28 *Journal of Commonwealth and Comparative Politics* (1990), 365.

## **Australia and the Convention**

In particular, Australia has followed all other Western countries (with the possible exception of the United States) in embracing the concept of active human rights law-making in the international domain and in ratifying many of the resulting multilateral treaties. Australian Governments of both major political persuasions have done so and, in general, Australia's involvement in the international human rights regime has had clear cross-party support.

Despite this background, the prospect of Australia's ratification of the Convention on the Rights of the Child gave rise to significant, or at least highly vocal and quite unequivocal, opposition from some quarters. At least some of that opposition is widely considered to have been misinformed or even mischievous, as a number of the contributors to the present volume suggest. Without disagreeing with such a characterisation, it would nevertheless seem appropriate to address some of those concerns in the present context in order to show that some of the fears that were raised were without foundation.

In brief, some of the Convention's opponents branded it as an external imposition of alien values, designed to undermine the traditional role of the family, and to vest in the United Nations the authority to determine Australia's domestic policies. If we take each element of that criticism it can be seen that a failure to understand both the nature of the Convention and its content are involved.

Thus, for example, the suggestion that the Convention constitutes an 'external imposition' reflects a fundamental misunderstanding of the drafting and ratification processes. Australia was fully and actively involved in the drafting of the Convention. The Australian position was based on continuing consultations with the relevant authorities at both State and Federal levels. Moreover, the process of ratification is an entirely voluntary one, done on terms that Australia decided for itself. Had any provisions been deemed to be incompatible with Australian values or with what is considered to be able to be achieved within our society, a reservation on the issue in question would have been appropriate.

An equally important point to note in this regard is that a multilateral human rights treaty such as the Convention does not give any supranational body, including the United Nations, the authority to dictate Australia's domestic policy with respect to children and the family. The 'implementation' process, as it is termed, relies ninety-nine percent on actions taken at the national level. The other one percent consists of the power vested in a committee of independent experts (the Committee on the Rights of the Child) to make observations as to whether or not it considers Australia to be in compliance with its obligations. Leaving aside the fact that comparable committees have long existed and have, for well over a decade, had precisely that power with respect to Australia, the reality is that none has so far used its authority to make very precise recommendations for changes in Australian law or practice in the human rights field. But even if they do begin to make such recommendations (and it is certainly to be hoped that they eventually will), the fact remains that the weight to be attributed to those suggestions will depend much more on their

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intrinsic merits than on their source. Australia remains free to accept or reject any such advice.

Moreover, the method by which the Convention is to be implemented in Australia is through the adoption of appropriate legislation by the Australian Federal and State Parliaments. The Convention itself does not constitute the law of the land, although we are obligated to give effect, in the most appropriate manner, to its provisions. The process of implementation thus remains a wholly domestic exercise.

It is sometimes suggested that the Convention contains 'alien values'. This characterisation might relate to the actual content of the provisions or to the fact that some of those provisions have been supported by, as Margaret Harrison puts it in her paper below, "totalitarian and atheistic regimes". There are many responses which might be made to such allegations. The fact that a regime of which we disapprove has embraced certain human rights principles would usually tell us far more about the regime's capacity for hypocrisy and its quest for (artificial) legitimacy than about the acceptability of the norm in question. Mr Brehznev's hard-line Communist Government in the Soviet Union formally accepted all of the principles contained in the International Covenant on Civil and Political Rights but none of the leaders of the democratic revolution now taking place in that country has ever suggested that the principles are authoritarian. On the contrary, they have been widely embraced as providing the foundation stones upon which a new system of governance should be based.

At another level, the suggestion that the Convention contains 'alien values' reflects a general ignorance either of the actual content of the Convention or of the principles already widely accepted in the legal systems of countries such as the United Kingdom and our own. Thus, for example, while Michael Freeman argues in his paper that the terms of the 1989 British Children's Act, which is to come into force in October 1991, are not sufficient in themselves to satisfy the obligations contained in the Convention, it is clear that the two documents contain many very similar types of provisions. In this respect, the Convention is very much a reflection of the underlying values already accepted in British and Australian family law.

Even if opponents of the Convention can point to a single provision which they believe to be 'alien', that does not justify rejection of the document as a whole. Would they brand as 'alien' the child's right: to survival and development; to a name and a nationality; to privacy; to the highest attainable standard of health; to education; to freedom from exploitation; to freedom from torture or other cruel, inhuman or degrading treatment or punishment etc.? Surely not. It is thus irresponsible and misleading to suggest that the Convention as a whole consists of alien values. Each of its provisions needs to be assessed on its merits and criticism needs to be targeted and analytically focused on the Convention rather than on fears that derive from the pre-conceptions of the beholder instead of from the text itself.

It is also suggested that the Convention seeks to undermine traditional family values. This criticism has some validity. The

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Convention quite explicitly aims to undermine values such as those which involve: the exploitation or abuse of the child; the denial of the child's personality; the belief that children of a particular race, gender or religion are inherently superior and are entitled to more rights than others; or the belief that the child has no legitimate interests other than those which are identical to those of the family as a whole. Australian family law has long shared those aims, even if it has not always succeeded in protecting them.

Moreover, the text of the Convention itself belies the suggestion that it aims to downplay or undermine the type of family values that our society seeks to uphold. Thus, without getting into a detailed legal analysis in the present context, reference can be made to various provisions of this type. For example, the Preamble to the Convention begins (in the fifth paragraph) by noting that "the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community". The following paragraph adds that "the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding".

Similarly, Article 5 provides that "States Parties shall respect the responsibilities, rights and duties of parents ... or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention". Article 8 requires States "to respect the right of the child to preserve his or her ... family relations as recognized by law without unlawful interference", and Article 16 provides that "no child shall be subjected to arbitrary or unlawful interference with his or her ... family...".

Thus the argument that family values are ignored or undermined by the Convention is usually another way of saying that particular approaches to family values (such as those based on sexism, racism or other denials of children's rights), which the Australian community at large rejects anyway, are not upheld by the Convention. To that extent, the argument is, fortunately, correct.

Finally, it seems appropriate to respond to a more recent criticism to the effect that the Australian Government ratified the Convention in undue haste and without giving appropriate consideration to the obligations involved. It is true that the Federal Government's decision to ratify was able to be made more rapidly than had been the case with most previous international human rights treaties. There are, however, a number of factors which serve to justify the decision to ratify some ten months after the Convention was adopted by the United Nations.

In the first place, the issue of children's rights was already prominent on the domestic political agenda, partly as a result of the sustained efforts of the Human Rights Commissioner, Brian Burdekin, to draw attention to the plight of homeless children within our society.



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Secondly, much of the ground covered in the Convention is already dealt with by various other treaties (albeit not specifically in the context of children) to which Australia had long since been a party. Thirdly, the process of drafting the Convention took over a decade, during which time Australia was an especially active and effective participant. The Government's attitudes to the Convention's provisions had thus been carefully worked through at the drafting stage, thus obviating the need to undertake yet another comprehensive analysis of the Convention once it had been finally adopted.

### **The Challenge for the Future**

The question of whether or not Australia should ratify the Convention on the Rights of the Child is now moot. That debate has been played out and a decision has been taken. In that respect Australia is in the company of the great majority of other countries in the world. The challenge for the future, therefore, is to determine how best to approach the task of implementation.

But this is not to suggest that legitimate differences of perspective, emphasis or approach should not continue to be voiced. Indeed, in many respects, the debate over children's rights is just beginning. The framework for that debate will be provided by the Convention and its provisions will be the starting point in the development of specific approaches. In that sense, ratification of the Convention sets an agenda for community reflection and discussion and it is as a contribution to that process that the papers contained in the present volume are offered.

## **2. TRANSFORMING THE CONVENTION INTO AUSTRALIAN LAW AND PRACTICE**

**Brian Burdekin**

Children are human beings with human rights. To say this should be to state something obvious and universally accepted.

The Universal Declaration of Human Rights of 1948 and the International Covenants on Human Rights of 1966 recognise rights to be respected and ensured to 'everyone' and to 'all individuals' without discrimination.

But just as children - together with women, racial or ethnic minorities, people with disabilities, and a number of other vulnerable groups - have often been denied equality before the law, and full recognition as persons within national legal systems, so children have often been overlooked as part of the 'everyone' entitled to human rights.

Just last year, I had to correct an adviser to the leaders of one of our major Churches who asserted that children were not entitled to human rights in their own right, under international law prior to the Convention on the Rights of the Child (and in particular under the International Covenant on Civil and Political Rights), but could only claim rights through their families. Such a view would, of course, mean that the child would be a mere chattel, lacking the rights to liberty and security of person, or to life itself, against his or her parents. Similarly, the child without a family would lack any rights at all.

So much for theory. In reality, the human rights of children are in fact daily neglected, abused, or violated throughout the world.

The Convention confirms that children are entitled to the full range of human rights recognised in international law (subject to limitations relating to their capacity to exercise these rights and to the responsibilities of families). It also recognises a range of rights relating to the special needs of children. It seeks to ensure that the protection of these rights in law and practice is improved.

### **The Convention: Ratification and Beyond**

Since its adoption by the United Nations General Assembly in November 1989 the Convention has achieved a remarkable degree of international acceptance.

I want to state that this degree of international acceptance is in large part attributable to the pivotal role played by Australia in what I would call a quality control exercise which ensured that the text finally adopted was of a very high standard and was widely acceptable.

## *Transforming the Convention*

Australia ratified the Convention on 17 December 1990. This was much more speedy than the ratification of other major human rights instruments. For example, ratification of the International Covenant on Civil and Political Rights took 14 years - from 1966 to 1980. Even the Convention on the Elimination of All Forms of Discrimination Against Women, with the strong political support of the women's movement, took 4 years - from 1979 to 1983 - to ratify.

Moreover, ratification of the Convention on the Rights of the Child was achieved in the face of a much publicised, misleading, and in my view mostly mischievous campaign of misinformation.

Clearly, the efforts of the Human Rights and Equal Opportunity Commission in providing accurate information to counter this campaign, and the support of a wide range of non-government organisations, were crucial in achieving ratification. But it is also clear that we need to do more.

Ratification was a significant achievement, but it is essential that we are not satisfied simply to have ratified.

### **Legislation and Political Power**

The Declaration of the Rights of the Child, and now the Convention on the Rights of the Child are, of course, not yet incorporated into federal legislation in the same way that those international conventions prohibiting discrimination against women, or racial discrimination, are incorporated in Australian law. It might well be asked why. I believe one of the reasons - at once trite, but nevertheless often forgotten - is that children are not a group within our community with any significant political power. I think this imposes a collective responsibility on all of us to advocate on their behalf where that is necessary, and to ensure that their own voices are heard.

### **Need for Ongoing Review**

One of the reasons advanced for delay in ratification of other human rights treaties has been an official view that we should not ratify human rights instruments until we are satisfied that we already comply with their provisions. The basis of this is said to be taking human rights treaties seriously and not entering into commitments which we are not sure that we can fulfil.

Prior to ratification of the Convention, I disagreed with this view on a number of occasions, publicly and in advice to Government. I pointed out that, apart from indicating complacency, and being a recipe for delay, such an approach failed to take into account the provision (express or implied) under many human rights instruments for a significant element of progressive implementation, rather than immediate compliance being required in all respects and in every detail. In particular, the Convention on the Rights of the Child clearly represents an ongoing program, rather than being a once and for all, 'set and forget' instrument.

## *Transforming the Convention*

It would be pleasing to think that Australia's relatively speedy ratification reflected acceptance of this advice by all our governments, and a commitment to the ongoing action required. However, there are disturbing indications that at least some of our governments believe that, with Australia's ratification, full compliance with the Convention has already been achieved in most if not all areas.

All Australian governments were kept informed by the Federal Government throughout the long process of development of the Convention. Yet it remains open to question how far a thorough assessment of the implications of the Convention for law and practice has been made.

I would particularly emphasise 'law and practice' in this context. Bringing the law into conformity with international instruments, and getting legal standards in place which proscribe behaviour that violates those standards is important, but it is not sufficient. This applies in whatever area of human rights we look at: in relation to sex discrimination and equality for women, racial discrimination, the rights of people with disabilities - and the rights of children and young people.

### **ACOSS/HREOC Project**

With this in mind, the Human Rights and Equal Opportunity Commission decided last year to conduct a study jointly with the Australian Council of Social Service of Australian law and practice in relation to the Convention, including by surveying governments and community organisations concerned with children.

This project is continuing. It had been hoped to present findings in these proceedings. That has not proved possible - because important responses to the survey are still being received, and because of the size of the task which has become more apparent as the project proceeds.

HREOC and ACOSS will issue the Report of the Project when it is available to us. But it is already clear that there are at least serious grounds for concern regarding compliance in practice with very many of the rights recognised by the Convention.

Later papers in this volume address issues in a number of areas in more detail. What I want to do is give a brief snap-shot of some of the reasons why, having ratified the Convention and committed ourselves to implementation, it is important that we actually get on with it - and do it.

### **Aboriginal Children**

A national program for the implementation of the Convention on the Rights of the Child would be justified by reference to the situation of Aboriginal children alone. Other papers in this volume, and previous papers by HREOC and others, address the importance of the Convention for Aboriginal children. I will just give one piece of evidence. In recent hearings of the reconvened Homeless Children Inquiry we heard that 30 to 40 percent of Aboriginal children in areas of Australia

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are sniffing petrol or glue. That of course sometimes leads to death, and frequently involves brain damage, and all sorts of further problems regarding education, employment, family relationships and culture, and conflict with the legal system.

Of course, we are all interested in the human rights of these young people, but we need to keep hammering our governments and our political leaders with the message that we will pay an enormous cost in quite pragmatic and measurable ways if we do not respond to the situation of these children, and the violation of their rights in this country today. We can afford to remedy this situation: indeed, we cannot afford not to.

### **Mental Illness Inquiry Evidence**

I recently embarked on a public inquiry which is looking at what is happening to mentally ill people in our country, against a backdrop of international instruments to which Australia is committed (in particular, the International Covenant on Civil and Political Rights, the Declaration on the Rights of Disabled Persons and the Declaration of the Rights of the Child).

Evidence to this Inquiry so far indicates urgent needs. We have something like 80,000 young people in Australia affected by serious mental illness or disorder. The evidence also indicates that in our most populous State, we have got just 70 specialist psychiatric beds for young people, all of which are in three facilities within 10 kilometres of each other in Sydney. If you are anywhere else in the State and your child or young person becomes psychotic, you are in a lot of trouble.

As for young people in rural areas, quite frankly there is not much out there. Maybe that is one of the reasons our suicide rate amongst young people in rural areas has increased by a far higher proportion (500-600 percent) than in cities (200-300 percent) over the last generation.

In Victoria, evidence indicated that children and young people experiencing mental illness or disorder are not infrequently locked up in detention facilities or remand centres because there is nowhere appropriate to put them. That is an outrageous violation of the rights of young people by any standard you choose. It is particularly disturbing for a country of our affluence and supposed standard of development. It is certainly a violation of human rights in terms of those outlined in the Convention on the Rights of the Child.

Our laws are clearly not perfect, but in many areas they are not the major problem; the problem is resources. This is one of the things we need to confront. Laws without appropriate resources to back them up really do not have a lot going for them. They are a necessary precondition, but in my experience they are never sufficient.

In Brisbane recently I felt constrained to remind my audience that the State of Queensland alone, in terms of its resource base and natural assets, is probably wealthier than 100 of the 160 countries in the world. I think it is salutary to remind ourselves of facts such as this

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when we are told that times are tough and we can not afford social expenditures. The reality is we can afford it. It is only a question of whether we give our children and young people a sufficiently high political priority to ensure that resources are committed.

### **Homeless Children and Children in Poverty**

I do not want to say much here about homeless children, but it is no longer disputed that we have got thousands of children who are homeless. Now, again, most of the relevant laws in our country may not be in need of major overhaul, but the resources we are providing to care for and protect the basic rights of these young people to shelter, to education, to adequate nutrition, and to adequate health care are sadly lacking.

Beyond that, it is an undeniable fact that there are still hundreds of thousands of children living in poverty. Hundreds of thousands of children are living in families where the single parent (in 88 percent of cases, the mother) has inadequate income, and, often, inadequate supports to cope with all the pressures and stresses of the situation.

### **State Wards**

Why is it in the late twentieth century that, as we become enlightened about things like de-institutionalisation and avoiding locking children up in large institutions, we do not put the necessary resources in place elsewhere? (The same comments can be made in other areas, such as mainstreaming education for children with disabilities.) The reality is - as it emerged from the recent reconvened hearings of the Homeless Children Inquiry - that in the case of many children 'in need of care', while we do not lock them up any more, we just do nothing. Consequently, they keep turning up at crisis refuges. There, over-stressed and usually under-trained youth workers and others have to care for many of the most disadvantaged, sometimes the most behaviourally disturbed, of our children, sometimes psychotic, many of them (two-thirds, according to the latest Salvation Army survey) involved in substance abuse. There is evidence that many young people who would otherwise be made state wards are not, because of lack of resources. For those who are made state wards, the state often does little to fulfil its parental responsibilities.

To take one example from the Homeless Children Inquiry: we found that all of the young boys prostituting themselves on the Wall in Darlinghurst, in Sydney one evening, were or had been wards of the state. It says a great deal about how good we are at looking after our most disadvantaged kids in this country. We are continually and grossly under-resourcing the services and the people who are trying to care for those young people. We will pay an enormous price if we continue to do so.

### **Accountability and Awareness**

There are also many areas where no systematic evaluation has been done, or in some cases where data is not available or accessible,

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to enable us to say confidently that rights are respected in practice. It is clear that we need means to ensure that governments are in fact accountable for how well the rights recognised in the Convention are realised in practice. I regard the discussion later in this volume of national mechanisms and of a Children's Commissioner as particularly important.

Human rights are still not entrenched in Australia's consciousness, in our institutions and in our political processes in the same way as, for example, industrial rights are. We ratify international instruments and international treaties, and yet without exaggeration seven out of ten Federal officials (let alone their State counterparts) would not know what is in them. There is a lack of basic awareness of international human rights instruments even in some areas of Governments directly responsible for giving legal advice on these instruments. For example, in the lead up to ratification of the Convention, after years of consultation, a very senior State legal official raised difficulties with me that showed he did not understand that 'States Parties' to the Convention meant nations rather than the Australian States. That gives you an idea anecdotally how seriously the international law of human rights is taken in some of our States.

### **A National Plan of Action**

Last year Australia participated in the World Summit for Children, and has now signed the Declaration which the World Summit adopted. That Declaration emphasises the central importance of the Convention on the Rights of the Child. It calls not only for the ratification of the Convention - which Australia has achieved - but for effective implementation. Specifically, the Declaration of the World Summit to which we have committed ourselves calls for a National Plan of Action to fulfil its goals, including implementation of the Convention.

In my view we, and Australia's children, are now entitled to ask when these commitments made to them will be met. The bottom line for me is that although we have got the Convention we have not done much about translating it into practice. It is not simply a matter of changing the law where necessary. It is about an appropriate allocation of our resources, and the implementation of those standards by providing the resources to do it

Until we get an effective National Plan of Action (or National Agenda, to use terminology which has been used in other areas), with national monitoring mechanisms and real responses from our governments in relation to the standards laid down in this Convention, we will be kidding ourselves that we have even started to do the job.



### **3. HOW CAN 'RIGHTS-TALK' HELP CHILDREN: A PRACTICAL PERSPECTIVE**

**Bishop Michael Challen**

#### **Introduction**

In 1989 the Brotherhood of St Laurence conducted a nationwide campaign called "Promise the Children". Its purpose was to encourage our Federal Government to provide sufficient income support for families who were in need so that the children of those families might not be in poverty - that is, they would have at least adequate shelter, food and clothing. This challenge to the Government was therefore a challenge for it to implement, with respect to these basic needs and accompanying rights, the Declaration on the Rights of the Child which we Australians have adopted through our own legislation of 1986.<sup>1</sup>

I could summarise the views of the Brotherhood of St Laurence by saying: let us not have more talk about the rights of the child; rather, let us allocate the human and material resources that will make these indisputable rights a reality. However, the question to be addressed in the present setting is how can 'rights-talk' help children.

#### **The Need for 'Rights-Talk'**

To be truthful, I was quite stunned when I first saw the proposed Convention on the Rights of the Child some years ago. I thought it was all so unnecessary. The list of rights was a statement of the obvious, the essential and what I thought was already normatively accepted. But of course the obvious is not always observed.

In 1958 officers of the Western Australian Government were still raiding Aboriginal camps and missions to seize children who were arbitrarily judged to be less than 'full blood', to take them away from their parents and family and to place them in distant White-run hostels, for their betterment. In this process, the wishes, feelings and hopes, let alone rights of the child, were completely ignored.

To come closer to home, and to be more personal, there was a time when one of our daughters was under stress and acted desperately. She was over the legal age of majority and her plight was unknown to us. I rushed her to the nearest hospital for emergency treatment. Upon arrival, I was swept to the side. She was, thankfully, given very professional treatment expeditiously and recovered the next day. At no point was either her mother or father consulted about her

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<sup>1</sup>The Declaration of the Rights of the Child is one of several international Instruments annexed to the Human Rights and Equal Opportunity Commission Act 1986.

### *'Rights-Talk' in Practice*

circumstances. Nor were we informed about her prognosis or future needs, and thus our responsibilities. The rights of the child properly prevailed but the duties of the parents were displaced.

I conclude there is a great need for 'rights-talk' at all levels of our society.

However, there is another reason, of a political nature, that makes 'rights-talk' necessary. There has been much uninformed if not mischievous debate suggesting that the Convention on the Rights of the Child undermines the family and the rights of parents. Those who promote these views are either ignorant of the full provisions of the Convention or are being manipulative and selective in their presentation of it.

Principle 6 of the 1959 Declaration of the Rights of the Child, on which the 1989 Convention is based, clearly places the child in the context of the family of origin. It states: "The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security .... Society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support." Articles 12 and 16 of the Universal Declaration of Human Rights also require the state not to interfere arbitrarily with the right of individuals, both children and adults, to family life.

Thus, the various misconceptions about, and/or misuses of the United Nations principles concerning the respective rights of parents and children clearly need to be exposed, and then removed from people's minds.

Much of the anxiety about the rights of parents and children could be resolved if, in fact, people generally kept in mind that in the context of the family, the Convention on the Rights of the Child is also directed to that situation where family relationships have become so destructive that the well-being of the vulnerable child is obviously under threat, or those relationships have become so weak and irrelevant that the child has no material, emotional or social support.

Finally, the need for 'rights-talk' with respect to children arises from the unequal, but changing relationship over time that exists between a parent and a child even where that relationship is truly positive and creative. It is clear that the nature and the form of the relationship between parent and child, when the latter is a sucking babe and then an adventurous self-willing adolescent, are radically different. Changes are not only occurring within the so-called 'child'. Changes are required of the parents. Intellectually most parents know that. But emotionally and practically it is so hard to make those changes. Basically the parents have to maximise the freedom of the child, and share if not let go entirely the power they had over the youngster. It requires a refined love as well as a mature mind to work through that process with mutuality and a minimum of trauma.

## **The Content of 'Rights Talk'**

The concept of 'rights', for me, is inadequate. Dr Stephen Parker, in the next paper in this volume, expounds his own misgivings about this term and its use. A less legalistic and divisive approach and a more healthy understanding of 'rights' develops when that concept is seen within a relationship of 'love', or 'bond', or if you will 'mutuality'; that is, a situation within which persons interact positively with one another, thereby providing satisfaction, enrichment and fulfilment.

This positive delight in humans and human relationships is something that cannot be fostered by mere talk about legal prescriptions. It can only arise from positive experiences of people in our earliest years, and thus within our own family of origin. 'Rights-talk' fundamentally is to be conducted by example, practice and words, within the context of family life. Parents, for good or for ill, are the models of 'rights-talk' - as they are for other aspects of human responsibilities and practices. Putting 'rights-talk' into the context of family means that these issues need to be a part of preparation for marriage (or its counterparts), and parental training. But we may well ask what effective training structures exist for these vital roles.

The second most significant institution of socialisation is the school (kindergarten through to Year 12). The school has the similar responsibility of treating all children as persons of inherent and infinite worth notwithstanding their personal characteristics. This principle is to be lived out both in the classroom and the schoolground. In particular the school's use of authority needs to be consistent with the rights of the pupil if in fact that student is to maintain an attitude by which he or she will have the same positive regard for other people now and when an adult. This suggests that the use of corporal punishment has little place in a society committed to the 'rights of the child'.

However, the promotion of the 'rights of children' is not only something to be lived out, it needs to be talked about and talked through - the philosophy and values need to be made explicit by being verbalised and discussed. White Australians of an Anglo-Saxon tradition are getting better at discussing convictions, philosophies and values in public and within the family; although more of us need encouragement to function readily at this intimate level. In this respect, our younger citizens seem to be better equipped and this could augur well for the future.

An essential philosophical and value question that presses upon partners today, in this age of supposed control over conception, is whether or not to have children. For many, but not all, adults this is a real choice. Children have no say over their birth. Children who are wanted from conception are more likely to be raised in a healthy environment where the matter of rights becomes irrelevant. But this happy situation does presume that the parents have seen that their own rights to sexual activity are related to their responsibility for their child so conceived. Thus, a relevant context for 'rights-talk' is our own sexual life.

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Vital to genuine 'rights-talk' is developing within individuals, families and groups, the capacity to acknowledge and accept differences in outlooks and patterns of behaviour yet holding justifiable convictions. This is not so much a matter of intellectual but rather emotional maturity.

Concomitant with this personal characteristic is the desire and ability to resolve conflict. So often children are victims of frustration amongst and between adults as much as between their parents and themselves.

But what about the family or social situation which is far less than ideal? This is where the Convention really comes into its own. It is relevant to those who have failed in their care for their child. It is also relevant to those people who and those services which, dare to step in - such as the Native Welfare officers of Western Australia who seized Aboriginal children who were not aware of the colour of the skin of their father.

The Convention is a means whereby a pluralistic society which lacks a comprehensive and agreed set of values sets limits to the Irresponsibility of adults, and at the same time gives direction to their responsibility to care. The Convention is a benchmark whereby both our Federal and State Governments may evaluate their programs of Social and Community Services as well as housing, education and health in terms of the needs and rights of our children.

While I am anxious that a Convention may be misused by legalistic-minded people who, wanting to avoid responsibility, interpret it prescriptively rather than indicatively, such a commitment by our society through our Government says: "children are people; they matter as much as adults do; they are to have the same provisions and opportunities and rights as adults". Unfortunately there are familial and community situations so destructive for children that it is imperative that citizens and governments can appeal to such an irrefutable Convention. For this reason then, 'rights-talk' must go on not only in the bedroom but also in the media; in the hotel as well as the golf course; in the Church as well as the service clubs; in trade and professional organisations - as well as in the courts.

## 4. HOW CAN 'RIGHTS-TALK HELP CHILDREN: AN ACADEMIC PERSPECTIVE

**Stephen Parker**

I'm not quite sure why the honour has been bestowed upon me to address this topic. My only qualifications are that I am a family lawyer who sees things in terms of power as well as rights. It is true, however, that I am not a complete convert to rights-talk itself and perhaps my comments will provide a note of dissent, or at least caution, at an early stage.

To avoid being misunderstood, I want to make some things clear at the outset. I have no doubt that some children in all societies suffer grave injustices, on any theory of what is injustice, and that adults are responsible for that injustice. I mean all societies, so I include affluent countries like Australia and the United States. We have to assume that all the injustice is avoidable. To avoid it, however, some societies will have to give up more of their cherished assumptions than other societies - so adults will have to change more in some countries than in other countries. But, in principle, it is all avoidable. Whether the vehicle of rights is the best means of bringing change about is, to me, a much more difficult issue.

Other participants in this symposium deal with vital matters of detail: homelessness, social security, the family, aboriginality and so on. I do not want to trespass on any of that. Instead, I want to look at some more general issues.

A number of the participants have, in an earlier workshop on children's rights, tried to deal with some broad questions. We looked at questions like: what are we saying when we say that children have rights? Is it useful to talk about rights when some children can do nothing to enforce them? Should children be treated only as future adults, or is there something distinctive about childhood that should be protected? Should the law aim to protect the best interests of the child or the right of the child to make mistakes? How do we (we being adults) know what the best interests of the child are? What is a child? Assuming that it is something, when does childhood stop? Is the family the source of oppression for children, or the source of protection? Is it a simple choice between oppression or protection?

There are two things which, to me, have emerged clearly from these discussions. The first is less controversial than the second.

The first is that we have to continue dealing with theoretical matters, however much they may seem to be the deliberations of those in ivory towers. No Convention is ever going to be agreed upon on a subject like this where you can just read the words and then say immediately what it all means. In the real world, Conventions have

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general words and they have clauses which seem to conflict with one another. Something more is always going to be required. Take for example the stipulation in Article 3 of the UN Convention on the Rights of the Child that in all actions concerning children the best interests of the child shall be a primary consideration. This is far more complex than it might seem. What are the best interests of the child? Because they are only a primary consideration, which others rank equally?

I think all of the participants in the workshop agreed that something else has got to be supplied to the Convention to make it workable; that theory construction has a place alongside empirical enquiry and policy formation. I should add, however, that there is no reason why only academics should engage in theory construction.

The second thing to emerge from the discussions, for me at any rate, was that rights-talk might be double-edged. Let me try to describe the two ways that it might cut.

First the plus side of talking about children's rights. Quite simply, in societies like ours, if people believe there is a right about something then they are more likely to respect that something than if they are told that it is merely desirable or a good thing. We are used to thinking about rights as giving us private spaces where we control things. Rights are like ring-fences. Subject to some limits, we can do what we want inside those fences, even if it is unpopular. The legal philosopher Ronald Dworkin has used a powerful metaphor by describing rights as trumps. They are things which, subject to certain conditions, will always win the trick unless a higher trump is put down. In societies where the individual and liberty are supposed to be valued, then rights as ring-fences have obvious appeal.

A good analogy to draw with the children's rights movement is, I think, the feminist movement. Although feminism comes in many different strands, it is generally agreed that in liberal societies like Australia the position of women has been advanced because their claims were expressed as claims that women have rights which must be respected. I think this emotional and political appeal of rights has been recognised by the anti-abortion lobby which has tried to put forward its case in terms of the rights of the unborn child rather than simply the alleged immorality of abortion. I should make it clear that I find neither formulation persuasive but that is a different matter altogether. The point I am making is that there is evidence that rights-talk gets things done where other kinds of talk does not. In Britain there is an advertisement for beer which claims that this particular beer reaches parts that other beers cannot reach. The same might be said about rights-talk. It reaches parts that other kinds of talk cannot reach.

Where a claim to rights captures the public agenda then changes to the law often take place. Again, the history of the women's movement illustrates this. After all, if it is seen that there is a right about something then one has to come up with a good reason not to change the law.

In addition, where rights are recognised then it is often said that existing laws are applied differently. For example, the test currently

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applied in a wide range of decisions about children, such as custody and access decisions, is the best interests of the child test, or the welfare principle. In Australian family law, the welfare of the child is said to be the paramount consideration. In deciding what is in the welfare of the child, a mixture of matters are taken into account, of which the child's wishes are but one. John Eekelaar has argued that if one sees these decisions differently, as being about the rights of the child rather than the welfare of the child, then one starts from the other end. One begins by asking what she or he wants. Not only that, one listens to the answer. If the decision-maker does not want to go along with the child's wishes, then the decision-maker has got to say why.

Now, one obvious response to this is that some children are too young or immature to express a wish. This is obviously so in some cases, although it may have been conveniently exaggerated by adults. Even here, some people argue that one can do the next best thing by asking what this child would have wanted if she or he were able to express a wish. To put it differently, what would this child, in her or his actual circumstances, thank you for later on. To help ensure that this does not become just a convenient way of adult values being smuggled into the process, Eekelaar argues that we should start collecting data about what children of different ages and in different circumstances say they want or would have wanted. It is quite possible that we would be in for a few surprises.

This then is one of the cutting edges of rights-talk. Rights-talk is the way to make people look at problems from the other end; to make them take notice; to expose hypocrisy; to give pressure groups some leverage; to embarrass the hell out of governments.

But there is another edge. It is difficult to express because one has to add a number of things together and each of these things seems rather feeble when compared with the power of rights to change things for the better. I will try, however, to bring out some of the elements of the down-side of rights.

The most general element of the down-side is the contribution that rights make to the world at large. Do we really want to see a world of isolated, self-absorbed right-holders? Some people argue, and I agree with them, that the rights of parents and other significant adults, are part of the problem for children. But do you really solve it by creating counter-balancing rights for children? Now, I know that there are many activists who will be very impatient with this kind of musing. Something needs to be done now to deal with homelessness, abuse and discrimination. If rights help to empower the disempowered then the price is worth paying. If I were sure that rights-talk is the only way to do this then I would agree. But I am not sure. It may be that the powerless are treated in the way they are because the world lacks connectedness; because self regularly and persistently comes before other. If this is so, then we should also be thinking about ways of connecting people together. Creating new classes of right-holders may not be the best way to go about it.

Another problem with the rights approach to change can be called the problem of co-option. Some feminists have argued that anti-



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discrimination laws and affirmative action laws have their drawbacks because they help a small number of women, but in the process they defuse pressure for more radical change. This problem, if it exists, cannot be directly translated to the case of children. Suppose, however, that the words in laws concerning children are changed so that their 'rights' are referred to wherever possible, but suppose also that the new words are interpreted to give much the same results as before, then we may actually have gone backwards because it will be harder to force the issue back onto the public agenda. In English family law during the 1980's it was common to hear that the pendulum had swung too far in favour of women (the voices were suspiciously often male ones). In fact, it is not at all clear that legal change in the 1970's had brought about an unqualified improvement in the position of women - empirical work here, in Britain and America is forcing us to doubt it. Nevertheless, it is difficult now to have a new wave of legislation because it will be greeted (again in voices suspiciously often male) in terms of 'now what do they want?'.

This leads me to my final point. It is that, at the end of the day, a right is only a word. It may have emotive and legal force in some instances, but in others it may not. We are ultimately talking about imbalances of power and resources which are deeply embedded in the way we live and are organised. In tackling these imbalances I think we should adopt a range of strategies, of which rights-talk is only one. I think there is still something dignified in saying that we are interested in someone's welfare as well as in someone's rights. It is possible that rights got us into this mess. Merely adding more of them - and I stress the 'merely' - may not get us out of it.

## 5. WHY CHILDREN? WHY RIGHTS?

**John Eekelaar**

I pose the questions: "why do we need a Convention for Children?; and why do they need rights?" I answer from a United Kingdom perspective.

The United Kingdom is a full participant in the regime established by the European Convention for the Protection of Human Rights and Fundamental Freedoms. Individuals in the UK who allege the United Kingdom is in breach of that Convention with respect to themselves may bring the Government before the European Commission of Human Rights, which will attempt a resolution of the dispute; but failing such resolution the matter may go to the European Court of Human Rights. The decisions of the European Court do not form part of UK law, but the Convention does oblige the Government to take appropriate measures, such as promoting legislation, to give effect to the Court's judgments.

The European Convention was drafted shortly after the end of World War II and many of its provisions are designed to protect the family against the kinds of monstrous intrusion into domestic life which characterized the pre-war totalitarian European governments. They are not designed to deal with more recent concerns of the following kinds; first, possible rights which individual family members should enjoy against one another and, secondly, the kind of claim which vulnerable members of society might make for an appropriate form of support. Hence, the Council of Europe is now actively considering whether to draft a separate Convention dealing with the rights of the child, which would be supplemental to the Human Rights Convention, and would bind participating states, like the UK, in the same way as the European Convention on Human Rights (to which there are also nine protocols) and the European Convention on the Prevention of Torture.

The UN Convention addresses these matters specifically in the case of children and this provides one answer to the question: "why children?" The right to protection against physical and mental violence, neglect or negligent treatment and sexual abuse may be held by children against their parents or other carers, and parents are specifically required to give their children appropriate direction and guidance in the exercise of (not in derogation of) all the rights given to them under the Convention (such as the right to express their views). Indeed, adequate protection of such rights could well require Intervention Into the family. But this intervention would not be made in order to further some general state or community ideology, or even to impose the state's view about what it thought was best for the family, but to protect the rights of children as explicitly set out in the Convention.

But in choosing children as the subject of rights the Convention extends significantly beyond simply seeking to ensure for children a

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secure childhood. The rights to "the enjoyment of the highest attainable standard of health", to an "adequate" standard of living and to "education" on the basis of equal opportunity and without discrimination on the basis of the child's or the parent's or guardian's race, colour, sex, language, religion, political opinion, and so on look beyond childhood. A healthy, well nourished and educated child has considerably greater chances of fulfilling his or her potential as an adult than a sick and deprived child. So the attainment of these rights in childhood lays the foundations for the whole of the next and subsequent generation, a matter of profound importance in poor countries and in developed countries in which various segments of the community are relatively deprived.

Why rights? To talk of children having rights can alarm many adults. They might feel less threatened if the Convention had been written, as it could logically have been written, as a list of duties and responsibilities adults had towards children. But the language of rights performs an important function. It acknowledges that there are certain things which we should provide for children, not just because adults think it would be nice if they had them, but because we are prepared to recognise that children want them, or can be reasonably assumed to want them. They are not hand-outs, but proceed from a recognition that children warrant the respect due to any human beings who assert their claims or desires independently of others.

The Convention should initiate a process whereby adults would actively seek, and pay careful attention to children's views in all matters affecting the child. Such a process must also involve informing and educating children. This does not mean that the Convention obliges adults to do everything children want. Other people, adults and children, have rights as well. But it does put the adult world on notice that it must provide adequate justifications for overriding the claims they make or can be assumed to make. And even if at various times decisions are made against children, the fact that their claim-making is recognised means that those claims remain on the agenda to fight another day. So we must find ways to set up a continuing process of dialogue and communication with children and young people if we are to avoid the Convention turning into just another adult device for indulging in our own predilections, or soothing our own consciences.

## **6. TOWARDS A NATIONAL AGENDA**

### **FOR CHILDREN**

**Bettina Cass**

To address the question: "does Australia really need the Convention on the Rights of the Child?" requires firstly, an understanding of the spirit and the implications of the Convention. Secondly, it requires the recognition that, under the Convention, children's claims to have their various needs recognised are accorded the same status as the cluster of human rights accorded to adults. Finally, it is necessary to ask what duties and obligations fall upon parents, communities and governments if children's positive rights are to be enforceable and realisable?

To ask these questions is to engage in the social, political and economic policy debates required if there is to be a much greater measure of economic and social justice in Australia's liberal democracy. To expect that those debates will take place around the needs and rights of children is to make the very plausible assertion that the first and last duty of governments and their agencies, of schools, courts, community groups, and parents is to further the interests of the most vulnerable group in the society. Children's vulnerability resides in their generally total lack of economic and social resources, and their inability to generate these resources through their own actions. Children's claims to resources are mediated through their parents. In addition, in most, but certainly not all advanced industrial countries, children have mediated claims against the state for entitlements which are enforceable to varying degrees. For example, the right to have their family's income augmented by payments which recognise the increased costs associated with child-rearing; the right to expect shelter through the action of public housing authorities when their parents are unable to purchase or rent shelter on the private market; the right to education; and the right to health care.

Even to delineate this modest, basic list is to make it clear that children's rights are defined and constructed not only in relation to their parents for physical and emotional care, but also in relation to the state, which is enjoined to protect, when parents abrogate their responsibilities and to provide a range of community services and income supports which enable parents to carry out their duty of care. In addition, states are entreated to provide the resources which will enable a young person to leave the parental home because they have been forced, through infliction of various harms, to do so. By extension, it is reasonable to expect that similar resources would be available when education and job search require a young person to live independently.

The delineation of this list of children's positive social rights, which, if they are to be realised, require that various public institutions

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recognise their obligations to children, is the most compelling reason why Australia needs the Convention on the Rights of the Child.

The Preamble to the Convention entreats states who are party to it to recognise the inherent dignity, and the equal and inalienable rights of children because they are human and goes on to extend to them the cluster of legal, civil, social, economic and cultural rights extended to adults in previous Conventions, Declarations and Covenants. It also recognises that children, because of their vulnerability, need special care and protection and emphasises that those responsibilities lie firstly with the family as the "natural environment for the growth and well-being of ... children". But it does not succumb to a romantic, conservative fallacy about the goodwill of all families, declaring that the "best interests of the child" must prevail, and that, in the event that parents and guardians fail to provide adequate care as is necessary for the child's well-being, it is the responsibility of states to provide that care (Article 3).

The spirit and implications of the Convention are to challenge fundamentally the alleged dichotomy between private and public, between family life and its privacy on the one hand and the state and its public instrumentalities on the other. The principle of the 'best interests of the child' demands that while it is the role of families to nurture, care for and protect children, it is the role of states to provide adequate resources and services (education, housing, health care, child care, social security) to enable them to do so; and the role of states to provide adequate alternative sources of social support, income and housing to protect children and young people who cannot remain in the parental home. Universally applicable tenets are enumerated with the purpose of strengthening the legislative authority and political will of governments to bias their laws and their allocations of income and services in favour of meeting the rights and needs of children.

This challenge to the alleged dichotomy of private responsibilities and the state's collective responsibility resides not only in the Convention's calling for formal civil and legal rights for children, but in calling for social rights, which demands that governments adopt stronger social policies which redistribute benefits and resources to families caring for children, and to children and young people themselves. The rights of children are constituted as the most powerful rationale for policies characteristic of a just social democracy. Indeed, it is conceived as the proper role of government to ensure that three sets of rights for children are met:

- \* the basic interests of children to physical, emotional and intellectual care;
- \* the developmental interests of children to enable them to enter adulthood without disadvantage;
- \* the autonomy interests of children; their freedom to express their lives and their choices and to be treated with dignity as rational actors.<sup>1</sup>

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<sup>1</sup> This categorisation is derived from Freeman, M D A, *The Rights and Wrongs of Children* (London, Frances Pinter, 1983), and from Eekelaar, J, "Children's

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The question has been raised: children cannot usually articulate their interests, not only because they are young, but because they rarely if ever, have full knowledge of the alternative life chances, with their accompanying resources and benefits, which might best serve their interests. Indeed, it is the crux of vulnerability - relative powerlessness - not to be able to express one's interests because of the absence of knowledge about alternatives.<sup>2</sup>

To resolve this dilemma we could ask the following questions:

What sorts of positive obligations would we, as children, expect of families, communities and governments, which would provide us with the means to reduce our vulnerability through the provision of adequate income, services, resources and health care, so that we can survive to become adults and develop our capacities fully without disadvantage?<sup>3</sup>

What obligations would ensure that the continuing tyrannies of poverty and unacceptable levels of inequality are reduced and mitigated, so that the significant proportion of us who currently suffer poverty would no longer bear the injuries and harms (physical, psychological, developmental and intellectual) of absolute and relative deprivation?

What material, social and educational resources would we consider necessary to grow to adulthood as people able to participate actively in the life of our communities, as full citizens?

This is a communitarian conception of children's rights, which cannot in modern societies be brought to fruition by families alone, and it is the considerable strength and promise of the Convention that it recognises the proper role and responsibility of governments to provide the necessary resources.<sup>4</sup>

The key Articles of the Convention which refer to the shared responsibilities of parents and the state in child-rearing include:

### Article 18(2)

For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing

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Rights and Children's Welfare: How far does the United Nations Convention Really Secure Children's Rights", in Alston, P. Parker, 5, and Seymour, J (eds), *Children, Rights and the Law* (Oxford, Oxford University Press, forthcoming 1992).

2 See Lukes, S. "Power and Structure", in *Essays in Social Theory* (London, Macmillan, 1974).

3 These questions are an extension of the question invoked by Freeman, *supra* note 1, about the choices which children would make (if they were enabled to do so) in order to mature to a rationally autonomous adulthood.

4 See Ferge, S. "Social Policy and the Economy" in Bulmer, M, Lewis, J and Piachaud, D (eds), *The Goals of Social Policy* (London, Unwin Hyman, 1989), for an elaboration of the social and economic rights envisaged in a communitarian conception of social and economic policy.

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responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

### Article 27

States Parties recognise the rights of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.

States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes.

The Convention, in this context, mentions explicitly child care services and facilities; housing programs; the rights of children to benefit from social security ("taking into account the resources and circumstances of the child and persons having responsibility for the maintenance of the child"); the rights of children to the highest standard of health and medical services and protection of their right of access to health care services; the state's duty to ensure the provision of primary, secondary and higher education.

What is the challenge for the Commonwealth Government, which is the party signatory to the Convention, and the only site of government in Australia able to act in the national interest? Firstly, it is clear that the rights of children are matters of national interest because children are a national resource, a future investment as citizens, and therefore not only parents' private responsibility as a consumption good (as some so-called rational economists would have it). As a national resource, government responsibility for children's economic and social well-being is called for: a responsibility which the Commonwealth Government must coordinate, for which it must allocate adequate resources equitably, establish and mandate proper standards, monitor the outcomes for children of the policies and laws which affect them, and plan again, if necessary, through democratic processes.

To do this, the Commonwealth Government might build on and extend its social justice agenda with an agenda for children, an agenda which brings together, either through one national agency, or a systemisation of legislation, a comprehensive and integrated set of income support and community service measures which actively promote children's interests.

This might sensibly and powerfully consist of:

- \* A declaration that all children's payments and family payments which recognise the presence of children in the tax and social



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security system will be integrated to provide an indexed, guaranteed minimum income for children. This would consist of a payment which is made universally in respect of all children, where the amount of payment is graduated so as to redistribute most to low income children.

In this way the principle of equity for all children could be integrated with the principle of redressing the disadvantages of children in low income families. This could be achieved by building on the system of family income support introduced between 1987 and 1990: an indexed payment of family allowances (which currently assists children in about 90 percent of families), integrated with an additional indexed payment of family allowance supplement for children in about 30 percent of families with very low incomes.<sup>5</sup> Introducing a guaranteed minimum income for children and naming it so, and improving the adequacy of payments through incorporating in the payment the value of tax rebates for dependents (like the dependent spouse rebate) which currently give children little direct benefit - would allow Australia to claim an 'act of historic justice' in the international community.

- \* The Commonwealth could go on to make a further declaration that young people will continue to receive a guaranteed minimum income adequate to their needs when they are unemployed or low income students and living in the parental home, and particularly if they must leave the parental home to live independently. Reform of income support for young people living away from the parental home would recognise that the costs of food, shelter, training and job search which they must bear are similar to the costs borne by adults, and that there is no justification for 'youth rates' of income support in a world of adult costs. In the latter event, sufficient, secure, supported accommodation would be provided to them; both short term accommodation and medium to long term accommodation. It would be recognised as the proper role of the Commonwealth Government to fulfil the national interest by planning, regulating and monitoring this key component of children's welfare, and the role of Commonwealth and State/Territory Governments to fund jointly the housing programs and associated support services. At the same time, it would be the Commonwealth's responsibility to plan and provide with the States and Territories for the integration of young people into secure paid work, through education, training, and job creation policies so that they might join the community of autonomous and interdependent adults.
- \* The Commonwealth could go on to declare that it will prevent and mitigate the causes of poverty: exclusion from paid work at adequate levels of pay. Unemployment, particularly long-term unemployment, affects the economic welfare and life-chances of all family members: the unemployed person, the spouse,

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<sup>5</sup> Cass, B. "Reforming Family Income Support: Reforming Labour Markets: Pursuing Social Justice in Australia in the 1980's" in Manning, N and Ungerson, C (eds) *Social Policy Review, 1989/90* (London, Longman, 1990).

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dependent children and young people in the transition from education to the labour force.

Studies carried out by the Social Policy Research Centre indicate that while social security reforms for families since 1987 have improved both the absolute and the relative standard of living of low income families with children, the route to sustainable and long-term improvements in standard of living requires unemployed parents' and young peoples' integration into the labour force.<sup>7</sup> This points to a vigorous role for Commonwealth and State/Territory Government programs of labour market training, job expansion and job creation. To give this major project a context, a philosophy and an impetus, the Commonwealth Government might adopt a 'Full Employment Commitment', and incorporate this into industry, training and education policies. Exclusion from secure employment through long-term unemployment and joblessness and insecure low paid work is the greatest economic injustice to which parents and their children can be subjected.

- \* The fourth component of this agenda for children would recognise that the affordability and security of housing constitute a basic right of children to have their material interests and developmental interests met. This requires that Governments at every level take steps to ensure that low income families with children and young people living away from the parental home have access to social housing programs which are designed to improve the affordability of housing, provide security of occupancy, and provide housing whose location enables access to jobs, education and community services.<sup>8</sup>
- \* An essential fifth component of this agenda would be a Children's Services policy which ensures that child care arrangements are adequate and affordable: that high quality standards are set, maintained and enforced by direct Commonwealth Government involvement; and that services are allocated equitably across the country according to socio-economic need.

This is not a utopian wish-list: every element of this comprehensive agenda for children's justice could be developed, extended and formulated using the seeds of existing programs and services. What is needed is an integrated approach to bring all of these elements together into one well-debated and well understood plan of action, concerned with fostering the civil, social and economic rights of children, comprising the following:

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- 6 Bradbury, B, Garde, P. and Vipond, V. *Bearing the Burden of Unemployment - Unequally* (Social Welfare Research Centre. R & P No 53. University of New South Wales, 1985).
  - 7 Saunders, P. and Matheson, G. *An Ever-Rising Tide? Poverty in Australia in the Eighties* (Social Policy Research Centre Discussion Paper. No 30, University of New South Wales, 1991).
  - 8 In 1988, 57 percent of households in rental housing provided by State housing authorities were comprised of families with children, indicating the importance of social housing programs in providing affordable housing at the child-rearing stage of the life-course.

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- \* a guaranteed minimum income for children and for unemployed and low income young people who are in education, training or looking for work;
- \* a guaranteed level of affordable children's services of high quality;
- \* a commitment to full employment to mitigate the deprivations of poverty and social exclusion;
- \* a social housing program based on affordability, security of occupancy and accessibility to jobs, services, education and amenities.

Ratification of the Convention on the Rights of the Child presents the Australian Government and Australian democratic processes with an historic opportunity to create a policy climate which discriminates directly and positively in favour of children's welfare. Since it is at the start of life that disadvantage is laid down and entrenched, it is at the childhood stage of the life-course that social and economic inequalities can be mitigated and redressed.

Rights without the social resources to enforce them are 'no-rights'.

## 7. DOES AUSTRALIA REALLY NEED THE CONVENTION?

**Margaret Harrison**

Having been given the dubious honour of providing an overview as a precursor to more specific topics, I have treated the question of our needing the Convention as being a rhetorical one, given Australia's adoption of it at the end of 1990. There are two components to the question. It must be asked (1) whether the economic, social and political position of children in this country is congruent, not just with the minimum standards of the Convention, but with the standards expected of a first world country; and (2) whether their position will be improved by Australia's ratification of the Convention.

The first question is fairly easy to answer at one level, but there is such a paucity of comprehensive information that a complete picture of the state and status of all children in this country is not available. The problem is exacerbated by the division of responsibility for the many aspects of relevant children's services among various governmental departments and levels. Provision of accurate, comprehensive information must be a top priority if the necessary stocktake of laws, policies and practices is to be carried out as a plank in Australia's first compliance report. Having said that, it obviously will not be done by the end of 1992, or even by 1997 when the first five-year report is required, and pressure must be used to have it even officially recognised as a major area of concern now.

This issue is considered below by Fishwick and Hogan, but it should be noted that the preliminary findings of the ACOSS/HREOC joint project on the impact of the Convention on Australian law and practice<sup>1</sup> make specific reference to the inadequacies of information and the lack of uniformity between the States in their methods of data collection.

In the space available, and in view of the information provided by other contributors, it is not necessary to give specific details of the various areas where children are apparently being sold short. However, some facts are necessary to avoid any suggestion of the complacency which sometimes surfaces when Australia is compared with other, usually much less advantaged, countries. In view of the cautious wording of many of the articles of the Convention and their frequent references to 'appropriateness' of various measures, our affluence and first world status must constantly be borne in mind. Despite media accounts and dire predictions about our economic future, Australia is not a banana republic. There is a great danger that higher standards will not be sought, and that a pervasively minimalist approach will be taken by the Federal and various State Governments.

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<sup>1</sup> See Chapter 17, *infra*, for details.

## *The Need for the Convention*

Perhaps the most striking available statistics relevant to children's welfare are those concerning the position of Aboriginal children. Their problems are the most serious and shameful to us as a nation, and they must be constantly publicised in the hope that action will soon follow. To give just a few examples; Aboriginal children have an average life expectancy at birth which is 20 years lower than that of white children, and their infant mortality is nearly three times that of position of non-Aboriginal children. In addition, just under one third of Aboriginal children between the ages of 0 and 9 have trachoma.

In a wider sense, increasing numbers of children are spending portions of their childhood in poverty because of parental unemployment, family breakdown, rising housing costs and inadequate government support. Between 1982 and 1986 the proportion of children affected by their parents' unemployment rose by 80 percent. Given the extent of the recession and the growth in unemployment after that time, this can only have increased. Children of unemployed men suffer a disproportionate amount of behavioural disorders, accidents, truancy and withdrawal.<sup>2</sup> In 1988, 360,000 children were living in families with incomes below the poverty line and more than half of the 325,000 Australian single-parent families are likely to be living within the austere criteria which comprise the Henderson poverty line. For too long membership of a female-headed single-parent family has been automatically associated with economic deprivation, and it is currently predicted that about one third of all children will spend some period of their childhood in such a family. The impact of even relatively short exposure to poverty during formative years has been shown to affect children's life chances on important indicators, such as remaining at school.

Other vulnerable young people obviously include the homeless. In its submission to the re-convened hearings of the National Inquiry into Homeless Children in mid-1990 the Australian Institute of Family Studies, along with other groups, argued that there is no evidence of any decline in the numbers of young homeless children, or any significant increase in the level of appropriate accommodation and services. This is, of course, despite the publicity and widespread shock expressed when the Burdekin Report on Homeless Children was released in 1989. The problem we are constantly faced with as a society is that talk about concern for children is cheap, and children are not.

It is therefore apparent that many of our children are disadvantaged in a number of ways, and some are obviously more affected than others. Australia has children living in conditions which would be unacceptable in disadvantaged countries let alone our own. It provides an uneven array of services and facilities, and its reliance on the paramountcy of the child's welfare may be queried at a number of levels. Unfortunately, the recent emphasis on our economic ills has created a milieu in which it is widely believed that Australian society is unable to afford many of the services which have traditionally been relied on, and universal health services, school dental and nutrition, and counselling and other family services have suffered as a result.

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<sup>2</sup> Edgar, D. "Early Childhood and Poverty: The Need to Invest More, Earlier in Our Children", address to Annual Family Day Care Conference, November 1988.

## *The Need for the Convention*

This message is an oft-repeated one, there are many dedicated children's lobbyists in the community, and the message that 'something ought to be done' becomes tedious. But we cannot afford to stop saying it - in a repetitive chorus in a variety of ways, and with the accompaniment of various action plans and strategies.

The Convention has provided the opportunity for this to be done, and while it obviously cannot be seen as an end in itself, it should be viewed in many positive ways, providing the energy is there.

To return briefly to the information gap problem, the United States National Commission on Children has recently highlighted the parlous position of many American children in its report, *Beyond Rhetoric* - although apparently the title is somewhat misleading and the action to be taken as a result of the project is unclear. The Commission has also published a number of recommendations, including an income support plan, increasing educational achievement and preparing adolescents for adulthood.

As another example, the US group Children Now<sup>3</sup> in its annual 'report card' on the position of California's children provides an annual update which enables benchmark data on a number of issues to be juxtaposed against previous year's performances. The results are very telling, the publication is clear and informative, and Australia would benefit from something along these lines. It is ironical that it should be the United States, which fails to provide services such as a universal health insurance scheme, and has a dreadful infant mortality rate, which has not signed the Convention and has shown no intention of so doing, and which has excellent advocates for children and better figures than Australia does.

The second question is: "will the deficiencies identified by whatever means be remedied by the Convention?" The obvious answer is "no", in the sense that no magic wand accompanies the formality of ratification, no legislation or programs spring into being and the height of the safety net remains unchanged. The momentum to implement change must come through loudly and strongly, and the issue of public understanding, acceptance and support for the Convention and all it stands for is patently of great importance. Unfortunately, objective information about its major principles and purpose has not been readily available. Misinformation has been far more accessible to the public, and has caused waves of unjustifiable panic among parents and even some children.

Put simplistically, and ignoring the large sector of Australians who know nothing whatever about it, there appear to be three views of the Convention in the community.

The first is that its implementation will bring about some form of disaster. There are a number of reasons given for this position, ranging from the argument that it erodes parents' rights, and gives young people far too much authority and power, to concerns that it will

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<sup>3</sup> Children Now. *The Right Start for Calybrnia's Children: The California Children's Report Card and Action Plan for the 1990's (1990).*

## *The Need for the Convention*

undermine our Christian heritage, that it concentrates too much power at the Federal level and that it will lead to the adoption of principles which are supported by totalitarian and atheistic regimes.

The second view is a rather cynical belief that the intention behind the document is laudable, but that its espousal of a number of 'motherhood' statements about children will not alter their position to any significant extent. The broadly phrased generalisations in the Convention, and the attitude that as a country Australia needs to do little to discharge its basic obligations as a signatory, fuel this line of thought. It is reinforced by the Federal/State division of power and the resultant 'duck shoving' between the layers of government about their various responsibilities.

Some of the dismissive nature of this approach is based on the belief that the rights framework is unhelpful, fuzzy and driven by a variety of beliefs and views of childhood which are characterised by inconsistency.<sup>4</sup> Another view that the Convention's relevance is marginal springs from the opinion that international law is too remote and ineffective a mechanism to contribute to an improvement in children's lives.

The third view is that the existence of the Convention will improve the lot of many Australian children, either because of its explicit articles or (more commonly) because of its clout as a lobbying instrument.<sup>5</sup> A variation on this is the "how will Australia look internationally if it does not sign?" view. This last point is, of course, now academic, but has been raised in countries such as the United Kingdom to try to shame governments into making a formal commitment.<sup>6</sup> Certainly, the impact of the Convention both worldwide and domestically is strengthened by the number of signatories and the symbolism associated with a public commitment to an international treaty.

Analyses such as those undertaken in this volume and in the project being undertaken by ACOSS/HREOC are vital if the full potential of the Convention as a catalyst for change and a guide for future improvements is to be reached.

In summary, the most positive and pragmatic view is that Australia's commitment to the Convention should be used as a lever to raise levels of consciousness and knowledge about children, and create some form of program for sustained action. Whether this is to be formulated through a special Commissioner, Ombudsperson, Children's Electoral Lobby, focused impact statements or some other form is still undecided.

The political clout of children is of course very small, although political rhetoric is often loud and large. In the United States it has

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Wade, J, *Commentary notes* on Evatt, "The Draft UN Convention of The Rights of the Child", Third Family Research Conference, Ballarat, 1989.

5 Harrison, M, "Saving the World's Children? Children's Rights and the United Nations Convention", 27 *Family Matters* (1990), 8-13.

6 Van Beuren, G, "The United Nations Convention on The Rights of the Child", 3(2) *Journal of Child Law* (1991), 63-66.

### *The Need for the Convention*

been argued that the decline in the birthrate and the increase in the proportion of citizens over 65 provides an opportunity for increased polarisation between old and young who form the bulk of the dependent population. In the battle for resources children's incapacity to vote or act for themselves means they only have their parents as a source of political influence. According to American commentators,<sup>7</sup> they are losing that resource battle, especially in the ever burgeoning health budget area. The message is that eternal vigilance is obviously required, not that resources be diverted from our old people, but that they be provided at a realistic and sustained level for all those in need.

Coming from a research institute I would also like to make a plea that Australia really needs sustained interest - and funding - for research into the needs, expectations and experiences of children if the necessary changes to policy and practice are to be apposite to them. The Convention is vague not only because it needs to accommodate the resources and cultural expectations of a number of diverse nations, but because its generalities are also intended to cover the developmental levels (and developing rights) of helpless neonates up to mature minors.

As the social context of childhood is continually changing, so we need to understand and monitor the implications of these changes for children throughout the period of their dependency and gradual accumulation of responsibility. The Australian Institute of Family Studies is currently examining issues relating to child care, the experiences of children whose parents have divorced, transitions to adulthood, youth mediation, homeless families and the living standards and availability of services of Australian families in a number of urban and rural areas. Other bodies are engaged in a number of projects equally relevant to children, and they must be given every opportunity to continue their work. They in turn have a responsibility to make their findings available to policy-makers and assist with the translation of research findings into credible programs. Where possible children themselves should be involved in research projects in which they are the subjects.

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Glendon, M A, "Changes in the relative importance of family support, market work and social welfare in providing economic security for individuals and families", paper presented to the fifth World Conference, International Society on Family Law, Brussels, Belgium, 1985.



## **8. TAKING SERIOUSLY**

### **THE CHILD'S RIGHT TO BE HEARD**

**Moira Rayner**

My interest in the rights of children arises from my experiences as a lawyer and as a teacher of Law. I have often acted for children accused of criminal acts; parents or children in Family Law disputes about custody, guardianship or access; children (or their parents) in defended State welfare interventions; and children who had been harmed by the criminal or negligent acts of others. In more recent years, as Chairman of the Western Australian Law Reform Commission, I was involved in recommending changes to the law about the giving of children's evidence, and children's participation in decisions about their own health care.

In the former role I experienced the obvious dilemmas about 'acting on the instructions', or making decisions 'in the best interests', or a combination of both, of children. In the latter I had a very real experience of the strongly opposing views about the rights of children in Australia. So in looking at the Convention on the Rights of the Child and its value to Australia, I'm interested in the part it might play in redefining children's status.

In my view the Convention's principal usefulness is its focus on children themselves both as being fully entitled to human rights, rather than being the objects of social concern and control; and as having a legal and ethical right to be heard.

The whole of our legal and social structures is based on some concept of individual autonomy. Ancient common law principles reflected the need for human beings who live in association with one another to a personal, inviolable, 'space'. The obvious boundary is one's own body, but as we get more sophisticated we also claim the property we use as ours.

Children do not have a space of their own. We control their bodies and their property, because we are bigger and stronger, and can give or withhold the essentials of life at our discretion; and we do so with the authority of Laws and social institutions. The legal rules we have about the rights and responsibilities of children who are not as able as adults to defend those boundaries have given others rights and responsibilities to make those claims.

Fears about recognising children's rights are usually expressed in terms of parents losing their authority. The implication is that their unleashed anarchy will destroy adult society. But law has always

## *A Right To Be Heard*

recognised children's acquisition of self-determination: the *Gillick*<sup>1</sup> case was only shocking because the House of Lords expressed the limits of parental authority in an unavoidably authoritative way. The Convention's recognition of children's incremental acquisition of the powers of self-determination is also an authoritative statement. Parents do not and never have had an absolute right to make all decisions for children. Parents have a special responsibility and, because of the trust vested in them by their own children, and their considerable control, the Community also has an interest in how parents exercise those powers. There is no dichotomy of rights, but a shifting balance of power and influence - from the right of control, to the offering of advice - among parents and children, a kinetic relationship which the law recognises. Children's dependency is not, after all, a permanent or even a static aspect of the relationship. They grow up, gradually acquire other resources and supports, assert their independence, and leave.

The Convention should give Australians the language and concepts to talk about the balance of rights and responsibilities among guardians, children and the state in terms of the equality of opportunity of every human being, not moral judgments.

Over the last century or so we have overlaid some rather simple concepts in laws designed to promote the needs of social animals for order, with moral and quasi-religious concepts of child, parental and family rights, and with scientific (or quasi-scientific) tenets of good child-care or welfare practices and 'best interests' assessments.

This softening process has confused our thinking about children, about whom we hold very different views at different stages of their social and emotional development. We have quite a distinct view about small children - their need for love, play, care and protection - from older children, such as the difficult teenagers who are rude to us at home or on the bus, disruptive on the streets, defiant of their parents, who might steal our cars or get drunk or get pregnant, and who look unemployed.

We are tolerant of small children's need to learn by their mistakes, and indulge 'bad manners' in toddlers, but not in teenagers. We tolerate the anarchy and social failings of young children because we know they will, after all, grow out of it. We are not so accepting of the failings of older children who we treat as offenders against the criminal law but who also, statistically, 'grow out of it'.

Nowhere is this inconsistency more obvious than in the history of our treatment of Aboriginal children. State welfare authorities 'rounded up' Aboriginal children and placed them in White foster care or institutions in order, as they saw it, to protect them from neglect and abuse, and give them a better chance in life by their assimilation and loss of cultural identity. As they reached the age of criminal responsibility - in Western Australia, until recently, seven years old, but in most States, ten - the criminal law was used to control and detain the same children and young people for committing offences

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<sup>1</sup> *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112. [1985] 3 All ER 402.

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precipitated by alienation, anger and poverty which an Anglo society created in the first place.

We make other distinctions among children which are ethically and logically unjustifiable. The same sort of people who weep over a starving, huge-eyed Ethiopian baby on television also tolerate the allocation of resources which leaves children at a life-long disadvantage; go to public meetings which demand mandatory five-year imprisonment terms for second-time teenage car thieves (as happened in Western Australia recently); and argue that Australia should not adopt the Convention because it would destroy parental authority.

And we apply double standards. If, for example, we think that older children should have 'real' sentences for certain kinds of crime, and if we replace the welfare model with justice-model juvenile criminal systems, then we have to provide legal advice and representation for those children, and we have to provide it in a way that recognises their 'special needs' and their lack of financial and social resources and skills to seek it out for themselves. Basic principles of natural justice require that they be properly informed about their obligations and their rights. They are not. We either provide nothing, or we grossly underfund existing generic services, or leave it to the private legal profession. We don't even train legal advocates in the special skills needed to advise and represent dependent and vulnerable people; such as how to separate their values and judgments from the client's wishes and needs. How can you advocate when you have not learned to listen?

We need to acknowledge, because we do not in practice respect, the rights of children to 'due process'. The Convention expressly recognises their right to be presumed innocent; to know the case against them and to test "under conditions of equality" the evidence, in a fair and speedy trial before an impartial tribunal; to receive "legal or other appropriate assistance in the preparation and presentation of his or her defence"; and to participate in legal proceedings "in the presence of legal or other appropriate assistance" (Article 40). The Convention also expressly provides the right to due process if any children are to be removed from their homes.

If for no other reason, Australia needs the Convention so that it confronts its lack of a coherent approach to the protective and participative rights of children at both ends of the continuum of childhood.

We expect people to stand up for their own rights. Children cannot demand remedies for their wrongs. They are a large, uninfluential section of the community. They do not have access to the means of exerting power, or protecting their own vulnerability. They are restricted in the extent they can make decisions about their own lives. They do not play any part in the processes which determine the policies which affect them. They, unlike other subjects of discrimination, are peculiarly unable to organise themselves politically. But there is something more at work. Even the concerns of those adults who advocate for children and young people have a low political priority.

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We have an 'attitude problem' in Australian society. We do not accept the dignity of the child nor even their right to bodily integrity. We need only look at our approach to parental authority, and the indemnity given to a caregiver who hits as a means of 'discipline'. We know violence teaches children how to use violence, and gives them the experience of pain, rage, humiliation and frustration and, often, a deep sense of injustice. Any society which tolerates violence to children cannot be held to recognise their rights. A 'smack' is a euphemism for an assault on a child, which is not 'important': Duncan Chappell, Chair of the National Inquiry into Violence, was admonished by the then Minister for Justice for 'trivializing' the work of the Committee in suggesting (in 1989) that 'disciplinary' violence to children was such a main cause of adult violence that it should be prohibited.

The law regulates relationships between dependents and others because of the risk of exploitation inherent in them. Legal rules and social systems give adults the power to make decisions for children. The 'objective' measure of performance is whether the decisions promote the child's welfare or 'best interests'. This test has itself led to error and human rights abuses of children. In a variety of 'welfare' interventions, such as in Cleveland in 1987, and most recently the South Ronaldsey ritual abuse claims, children believed to be at risk were removed without notice from their homes, some in circumstances of great trauma. The intervention decision was taken without consultation with the children themselves. Their removal and subsequent investigations, by state social and police workers, were found, in the Cleveland Inquiry, to have done as much or more damage than the actual or alleged abuse. The issue is not the fallibility of 'scientific' means of detecting abuse, but the fact that the concerned, professional adults either refused to listen to what the children themselves said or failed to ask them at all. Events were seen entirely from adult and professional points of view.

Even when the views are taken from a child's perspective those perspectives tend not to be taken seriously - children's expression of wishes in Reports to the Family Court, for example, or to their legal representatives, may be over-ridden by that Court. If children's rights are basic human rights then the measure of compliance with the Convention should be one of equality: if children are entitled to help make the choices about how they will live their daily lives then they have the right to equal consideration in the choice which affects them most.

The refusal to take children seriously appears to me to be the key to the blighted Australian perception of children. The focus has been on the child as a family asset or liability, or a therapeutic, forensic or professional object.

The major advantage of the Convention, it seems to me, is that it requires a return to first principles, to acknowledging the right of children - the same as all humans - to be treated with respect. The Preamble to the Convention on the Rights of the Child expressly recognises "the inherent dignity and ... the equal and inalienable rights of all members of the human family". Children are entitled to "special

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care and assistance" so they "can fully assume [their] responsibilities within the community."

Looking at the child's situation from the point of view of a child as a human being, entitled, now, to the full enjoyment of human dignity so as to enable him or her to take on, with maturity, the full range of responsibility, seems to me to clarify much of the functional confusion in the debate about children's participation in decisions which affect them. A focus on the child's rights, and not on other people's rights over them, means acknowledging the child's feelings, wishes, and values and potential for growth.

Janus Korczak<sup>2</sup> said in 1929 that if you were to treat children as worthy of respect they themselves would respect others. There are not, he said, "two lives, one serious and respectable [that of the adults] and the other, indulgently tolerated, of less value" [the child's]. Children are human beings with different experiences, different drives, and different reactions from adults. Their hopes and fears and perceptions are, if anything, more serious, more deserving of consideration than our own, though as he remarked "people take the tears of adults more seriously than those of children". Children also have the right not to be over-protected. They have the right to make, and learn by, their own mistakes. Because they are vulnerable it is our right and duty to modify the harm which might flow from this process. This respect for the learning process is something we have not taken into the Australian world-view.

At common law children gradually acquire the capacity to protect their own interests. This incremental acquisition of knowledge and competence is recognised by the common law and also expressly, by Article 5 of the Convention which requires "States Parties [to] respect the responsibilities, rights and duties of parents ... to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the ... Convention".

These are rights common to all human beings living in society. None of them are absolute. However we have to give children not only rights but the means of enforcing them. The opportunities to define or test their limits should happen in daily life, because children's access to the courts is, of course, limited. The issues still come before the courts when adults raise them - it was Mrs Gillick, not her 16-year-old daughter, who brought the limits of parental authority to the House of Lords. Even when children have specific rights in the legal/welfare systems they are applied, or not, depending on adults' views as to whether they are appropriate. The Orkney children had the 'right' to be heard before a Place of Safety Order was made, and to have their interests represented by a 'Safeguarder' when the Children's Panel was deciding to remove them from their homes in the Orkneys earlier this year, but the Panel didn't bother to arrange for either. The degree of children's participation in decision-making, even when it is legally mandated, depends on the attitude of the decision-maker to the child.

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2 Korczak, J, "The Right of the Child to Respect", in *Selected Works* (Wolins, M (ed), Washington, National Science Foundation, 1967).

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Australia needs the Convention so that it has the right concepts for addressing the needs of children and young people as dependent and fallible human beings learning how to live. We need a framework for understanding our ambivalence to children, and our failure to see childhood as a continuum, and for critically assessing the legal rules and the social structures we have knotted together over the last 200 years. Australia needs the Convention's express recognition of the kinetic relationship between adults and children, its focus on individual equality rights, to destroy absolutist rights-claims. Australia badly needs such an overview of children's rights to ensure that children of all ages enjoy the right to be heard.

## 9. CHILD AND FAMILY WELFARE

Jan Carter

In this paper I will try to show, first that the conceptualisation and the practice of 'rights in children and family services in Australia is infrequent, if not almost non-existent. Second, I will demonstrate that the Convention, if it is to be relevant to Australian law and practice, will have to address a series of rights-obstacles over the next decade.

### Background

In Australia, most child and family services can be classified into four types:<sup>1</sup>

Substitute services are those where the agency seeks to substitute for the parents of children. By legal process, the state takes over the parental rights of children, whether or not a child continues to reside in the parental home. (Many children under state guardianship, of course, live in alternate forms of care, such as foster or residential care.)

Supervisory services are those where the state (in theory at least), again by legal order, oversees the care of a child or young person by a family. A legal order provides the mandate.

Supplementary services are those where on a voluntary basis resources are directed to the most vulnerable, needy families. Families are selected for their likelihood or potential for breaking down, and services such as family day care, family support services are offered.

Supportive services are universal services for children and families. The child care service has the potential for universality but is unlikely to achieve this without an influx of Commonwealth resources. Australia's only universal service - income security through the Family Allowance - was withdrawn on a universal basis in 1987.

The service types above can be situated along a continuum of legal intervention, with no intervention at one end of the scale (supportive services) and maximum intervention at the other end of the scale (substitute services). The implications for rights vary too, as we shall see. The service provided can be governmental, non-governmental but non-profit-making, or private and profit-making. Government services concentrate their activities at the substitute and supervisory end of the scale, and non-government services and private services at the other end of the scale.

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Carter, J, "Protection to Prevention: Child Welfare Policies", (Sydney, Reports and Proceedings No. 29, Social Welfare Research Centre. University of New South Wales, 1983).

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• As we are all aware, the question of services for children and families invoke much broader conceptions of rights than the purely legal. Marshall<sup>2</sup> in his well known discussion of citizenship, suggested that "the 20th century is that of social rights". Peter Berger,<sup>3</sup> the American sociologist, has argued that an increased sensitivity to human rights of previously dependent and exploited populations, including children, has been one of the distinguishing features of this century:

Anyone denouncing the modern world *tout court* should pause and question whether he wishes to include in that denunciation the specially modern discovery of human dignity and human rights. The conviction that even the weakest members of society have an inherent right to protection and dignity; the proscription of slavery in all its forms, of racial and ethnic oppression; the staggering discovery of the dignity and rights of the child are moral achievements that would be unthinkable without the peculiar constellations of the modern world.

During the 1980's, Australian reviews of children and family services have attempted to move service systems away from narrow legal definitions to encompass social rights. Carney, in Victoria, developed a children's charter with his review of the child welfare system in that state.<sup>4</sup> The welfare and community services review in Western Australia recommended that children and family services should be "enabling, preventive, accessible, non-coercive and participatory".<sup>5</sup>

### **Benchmarks for Children and Family Services**

Where are we coming from? The Convention provides us with a series of benchmarks against which we can test the policies, protocols, procedures and practices of children and family services for their compliance with the Convention. These benchmarks have been outlined by Harris<sup>6</sup> in a discussion of the implications of the Convention for children's services.

\* Universality of entitlements: all rights are to be held without any distinction whatsoever or any regard to economic, gender, racial or geographic attributes.

Adequate living standards: all children are entitled to a level of income adequate for their physical, mental, moral and social development.

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Marshall, T, *Citizenship and Social Class and other Essays* (Cambridge, Cambridge University Press, 1950).

3 Berger, P. *The Homeless Mind* (Harmondsworth, UK, Penguin, 1973).

4 Victorian State Government, *Report of the Child Welfare Practice and Legislation Review* (Melbourne, Government Printer, 1984).

5 Carter, J, *The Well-being of the People: the Final Report of the Welfare and Community Services Review in Western Australia* (Perth, West Australian Government Printer, 1984).

Harris, P. *All our children* (Melbourne, Child Poverty Policy Review no 4, Brotherhood of St Laurence, 1990).



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- \* High quality services: all children have a right to the highest obtainable standards of health and to an education which promotes personality and talents to the fullest extent.
- \* The preservation and promotion of cultural identity: all children have a right to their own language and culture and to take part in education which fosters their cultural identity and values.
- \* All children have the right to protection from harm, neglect, cruelty and exploitation.
- \* There must be respect for the child and opportunities for involvement in decision-making.

### **Australian Children and Family Services and these Benchmarks**

In the light of the Convention and with the benefit of hindsight over a century, empirical evidence can be mounted to show that child and family services have failed children.<sup>7</sup>

Universality of entitlements is non-existent. Education and health care are universally available in theory, but not in practice. Some children are denied participation in secondary and tertiary education by reason of insufficient income or geographic location. Health services under Medicare have become universal, in the limited sense that they are free, but they are not universally available or accessible. Children-specific health services are still located in the centre of capital cities and are geographically remote from fringe outer suburbs and rural children.

Many children lack an income adequate for their physical, mental, moral and social needs. Adequacy of income improved for many Australian children in 1987 because of the Federal Government's introduction of the indexed Family Allowance Supplement, targeted to almost two million low-income families. As a result, the living standards of many Australian children improved.<sup>9</sup> Nevertheless, almost 500,000 children lived below the Henderson poverty line at the end of 1990.<sup>10</sup> Access to the social security system has become more difficult for children and young people, and young people under the age of 21 are paid less than the adult rate of Unemployment Benefit (now Job Search Allowance); access to the Youth Homeless Allowance is qualified by a serve of administrative obstacles, and children of parents at present on extended waiting periods for social security are without any income at all.

In our own agency in Melbourne the impact of the current recession is such that scores of families with young children ring us

<sup>7</sup> Victorian State Government, *supra* note 4; Carter, *supra* note 5 and other reviews of state welfare during the decade.

<sup>8</sup> Sheen, V. *Fair Chance in Education* (Melbourne, Policy in Practice no 1, Brotherhood of St Laurence, 1989).

<sup>9</sup> Carter, J (ed), *Measuring Child Poverty* (Melbourne, Child Poverty Policy Review no 6, Brotherhood of St Laurence, 1990).

<sup>10</sup> *Id.*

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every day asking for food and money because their unexpected unemployment disallows them from immediate qualification for social security. There has been a complete neglect of adequate living standards for homeless children, particularly those aged 12 to 15 for whom the Commonwealth has, to date, refused to take responsibility, and to whom State Governments have turned a blind eye. It is estimated that half the homeless children on the streets at any one time are present or former wards of state, who have been discharged from state care without any support (income, housing, education and training, reliable adult support).<sup>11</sup> There is neglect of Aboriginal children: many live in 'absolute poverty', in Third World conditions, in poor or non-existent housing, with infrequent or non-existent health care and with little access<sup>12</sup> to appropriate education to foster their cultural identity and values.

High quality services need to be available and accessible. However the availability of services for many Australian children is variable. It depends on the family's location (for example, some rural areas still have no form of child-care), cost (some parents cannot even afford the extras in a supposedly free state education), and quality of staffing (not all staff are empathic, competent and trained).

Many Aboriginal families regard education as undermining of Aboriginal identity and culture<sup>13</sup> and antithetical to the Convention's intention that children have rights to the preservation and promotion of their cultural identity.

Although no national data on child abuse exists, it is clear from State statistics that children are abused at reasonably high rates in Australia.<sup>14</sup> Evidence given to the Human Rights and Equal Opportunity Commission Inquiry into Youth Homelessness demonstrates many young people suffer abuse and exploitation, before they leave home, whilst in the care of responsible authorities and whilst they are on the streets.<sup>15</sup>

Government child welfare services often set up to counter child abuse and neglect, are sometimes accused of abusing the rights of children and treating their parents in a cavalier fashion.<sup>16</sup> Few State Government services for prevention exist and those which do are under threat because of restrictions in grants from the Commonwealth to the States over the latter period of the 1980's.<sup>17</sup>

Respect for the child via engagement in decision-making is almost non-existent. Few child and family agencies, whether state,

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11 Taylor, J. *Leaving Care and Homelessness* (Melbourne. Child Poverty Policy Review no 5, Brotherhood of St Laurence, 1990).

12 Choo, C. *Aboriginal Child Poverty* (Melbourne, Child Poverty Policy Review no 2. Brotherhood of St Laurence, 1990).

13 *Id.*

14 Carter *et al.* *Mandatory Reporting and Child Abuse* (Melbourne. Policy in Practice no 2. Brotherhood of St Laurence, 1989).

15 Human Rights and Equal Opportunity Commission (HREOC), *Our Homeless Children: Report of the National Inquiry into Homeless Children* (Canberra, Australian Government Publishing Service, 1989).

16 See Carter, *supra* note 5.

17 Victorian Council of Social Service, "Budget Submission to the Victorian Government 1991-92" (unpublished manuscript. 1991).

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federal or non-government, have protocols to support children's rights. Reviews of government services in the States during the 1980's found them to be deficient in relation to this criterion. If government services are deficient, it is likely that non-government services will be deficient as well, because of their dependence on the legislative framework and the resources of government. (Few children/family services in Australia are independently funded.)

### **Current Criteria for Allocation of Services**

Thus, the Convention challenges the organising principles of children and family services in Australia, by implying that the criteria for access to, and participation in government services for most of this century should be abandoned. The ground for access to services under the Convention is that of entitlement. The traditional grounds for access to service are either ability to pay, administrative eligibility or professionally defined need. However, it is unlikely, in the short and medium term, that high-quality children and family services will become universally available, accessible and participative. Progress is likely to be incremental and as a result, it is important that the present criteria for organising services are examined to see where they overlap or contradict the organising principle of the Convention, that of children's rights.

The criterion of ability to pay needs little explanation. Many children are disqualified for services simply by the user pays principle. In Australia, as in most Western countries, access to systems of health, education and child-care are purely dependent on the parents' ability to pay. There has never been a study which has investigated the quality in private, as opposed to public care, but the perception is that ability to pay is associated with higher-quality services and offers more choice.

The second traditional criterion of organising services is that of restricting the forms of eligibility. Over a century, the categories have changed from moral suitability for rescue<sup>18</sup> to qualification by administrative eligibility. Decisions are made about the acceptability of children and family for services according to their conformity to pre-selected categories imposed by the service giver - age, race, disability, gender and a range of definitions of problems (for example, delinquency, abuse or handicap).

Imposing criteria of administrative eligibility is: first, a way of rationing limited services; second, a means of retaining the control or autonomy of the service provider, and third, a way of distributing the skills of a specialist work force in a specialised manner.

The third traditional criterion of defining accessibility to services is the criterion of need. Just as the twentieth century might be noted for the progressive development of human rights, so the twentieth century has also been the fulcrum of the progressive recognition of particular human needs and the subsequent organisation of society to meet them. Indeed it might be argued that logically, recognition of

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18 Kennedy, R, "Charity and Ideology in Colonial Victoria" in *Australian Welfare History: Critical Essays* (Melbourne, MacMillan, 1982).

special needs precedes the understanding of human rights. According to Bradshaw,<sup>19</sup> the concept of social need is inherent in the idea of social service. The history of the social service is the history of the recognition of social needs and the organisation of society to meet them. The satisfaction of need is the internal goal of the social services, defining the objectives of the services and providing a measure of their effectiveness<sup>20</sup>

The 'needs' approach to child and family services views each child and family as unique, different, with a set of requirements that are relative, impermanent and culturally variable. At best, the needs approach can be empowering.<sup>21</sup> At worst, the needs approach can be paternalistic, arbitrary and restrictive of freedom and action. The recognition and meeting of needs has been the dominant motif of occupational training in the professions and semi-professions which deal with children since the 1960's. It is dependent on reductionist definitions - and progressive re-definitions - of knowledge concerning children, and belief in the professional as a benign decision-maker and as a distribution agent of resources to meet need.

There is, however, a price to the 'needs' approach. The recipient of services distributed according to need can feel stigmatised or selected out. This is particularly true in services for children and families who are economically disadvantaged: the stigma of being a recipient of charity or benevolence is associated with low self-esteem and reduction in personal and family confidence. However the concept of entitlement can transform the stigma of being a recipient of charity or benevolence. Needs can be the basis of rights, with the right holder having a strict duty to provide the services for those in need.<sup>22</sup>

Nevertheless some would argue that the implication of the Convention is that the three criteria that I have outlined (user pays, administrative eligibility, and human need) should be supplanted by a strict view of rights - that alike cases must be treated alike and different cases differently. But what do the rights in the Convention actually mean? The Convention offers children and families some "ideal" rights.<sup>23</sup> Ideal rights are those which people ought to have; but strictly speaking they are not rights at all but simply those which ideally would exist.

## **Implementation Depends on Achieving Social Rights**

The practical problem is that the implementation of the ideal rights of the Convention is almost entirely dependent on the realisation of social rights. My work at the Brotherhood of St Laurence, a social welfare agency with a bias to improving the position of the poorest and most disadvantaged Australian families, makes it clear that the first step in implementation is to achieve adequate social rights. In

19 Bradshaw, P. "The Concept of Social Need", 496 *New Society* (1971), 640-643.

20 Walton, R. "Need: a Central Concept". 43 *Social Service Quarterly* (1969), 13-17.

21 Gilley, T. "Empowering Poor People", (Melbourne, Research for Action no 2. Brotherhood of St Laurence, 1990); Taylor, J. "Giving Women Voice", (Melbourne, Research for Action no 1, Brotherhood of St Laurence, 1990).

22 Jones, P. "Rights, Welfare and Stigma", in Titmus, N (ed), *Social Welfare: Why and How?* (Routledge, Keagan & Paul, 1980).

23 Campbell, T. "Rights Without Justice", 83 *Mind* (1974), 445-448.

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Australian social welfare policy we have experienced a move away from access to services based on rights and human need during the late 1980's. In their place we are experiencing a revival of policies based on rationing access through imposing formal eligibility criteria and on the user pays principle. The substitution of formal eligibility qualifications for the concept of entitlement (under the guise of targeting services to those administrators perceive as the most disadvantaged) is the philosophy behind the introduction of the recent Newstart scheme, and is a substitute for entitlement to Unemployment Benefit. Likewise, user pays principles are thought to be a substitute for offering services on the basis of human need. Thus economic and legal policies are pulling in contradictory directions. Separate units within the one Commonwealth department might issue programs and materials based on variant eligibility criteria. For example, the Access and Equity program in the Department of Prime Minister and Cabinet pursues the notion of access and participation in services for immigrants as of right, whilst other - economically based - sections of Federal Departments promote resource allocations based on qualifications by user pays.

If ideal rights are to be implemented, what types of social rights are required? I suggest that we need a mixture of two types of social rights: resource rights and process rights. The Convention does have the potential to transform children and family services in Australia, but only in so far as policy makers and service providers take the notion of resource rights and process rights seriously. As Patricia Harris in *All our Children*<sup>24</sup> notes, a clear agenda is needed. Her recommendations have five stages:

- \* Availability of adequate and guaranteed income and secure housing as pre-requisites for achieving the rights of every child.
- \* Access to universal services, free of financial barriers, locally located, and well publicised.
- \* Positive discrimination measures are required to allocate extra resources to particular children on the basis of need (for example, children living in families with low incomes; children living outside families, such as those who are homeless).
- \* Counter discrimination strategies are needed to eradicate social and cultural barriers and provide equality of participation (for example, for Aboriginal and immigrant children).
- \* Measures are required to ensure that services evolve from, and are used by the community they service, which also play some part in their operation.

On the basis of these principles, the Brotherhood of St Laurence has recently put a national plan for children - a program for the decade - to the Federal Government.<sup>25</sup> It assumes that the Federal Government will wish to implement the Convention and that, in order

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24 A discussion of the Convention for the future of Australian children and family services by Harris, P. *supra* note 6.

25 Carter, J. and Trethewey, J. *Promising the Children : A Discussion Paper on a National Plan for Children* (Melbourne, Brotherhood of St Laurence, 1990).

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to do so, will commence with a program which attempts to deal with the need of the most disadvantaged children and families first. The plan suggests a structured approach to providing social rights (both resource rights and process rights) through a 'ladder of opportunity' based on Patricia Harris' framework outlined above.

Availability of the resource rights of adequate income and secure housing, and the universal services of health and education are the first steps. The process rights (measures to achieve the positive discrimination, to counter discrimination and to provide the means for participation) are next. Together, an analysis of resource rights and process rights would provide a useful framework for a commencement to implementation of the Convention. Both types of rights are essential: the Brotherhood of St Laurence's experience, gleaned over the 1970's and 1980's, is that both resources and processes are essential. Providing resources is the first step; the second is to provide the processes to enable the participation of children and families.<sup>26</sup>

To benefit from resource and process rights, children and families need to have available access to, and participation in general community-sponsored resource and process rights at some times and particular sets of community-sponsored resources at other times. And the particular sets of community resources and processes required can only be detected by analysis of the special needs of particular groups (for example, special disability or language groups). Thus children's rights must be illuminated and driven by a progressively changing understanding of children's needs.

Underpinning the implementation of resource and process rights must be the acknowledgment that the allocation of services must always be redistributive: that is, they must be to the greatest benefit of the most disadvantaged first. Otherwise poor children and families will always be disadvantaged.<sup>27</sup> In the 1990's it will be easier to focus on the implementation of process rights rather than resource rights. Process rights are important; it is essential to ensure that children and families participate in any service process in which they are involved. However, as many of the experiments of the 1960's and 1970's in anti-poverty programs demonstrated, participation of itself may improve self-esteem, but rarely changes a resource-deficient system. Thus process rights alone are a very limited form of entitlement and implementation of the Convention demands much more: it requires a reallocation of the resource base of the service system along the lines outlined in this paper.

### **Absolute and Relative Rights**

Are children's rights ends in themselves or should the implementation of the Convention be a means to other ends? Probably the Convention is best regarded as a complex chain of means and ends. But arguably, the goals of achievement in child and family services should be first, the removal of poverty, and second, the development of families, neighbourhoods and communities where children can reach

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26 *Id.*

27 Harris, P. *Child Poverty, Inequality and Social Justice* (Melbourne, Child Poverty Policy Review no 1, Brotherhood of St Laurence, 1989).

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their full potential. This implies that some aspects of the Convention may offer more fundamental rights than others.

The nature of child poverty can vary greatly<sup>28</sup> but most analysts agree that absolute forms of child poverty denote that even subsistence living conditions for basic physical needs are absent. For example, children<sup>29</sup> in absolute poverty in Australia include many Aboriginal children<sup>29</sup> and homeless children:<sup>30</sup> both groups suffer from grossly inadequate (or no) income and grossly inadequate (or no) housing. This is why Harris' outline of the steps needed to implement the Convention started with the provision of income and housing.<sup>31</sup> Without food, clothing and shelter, what child can make use of education, or health care or other services? If absolute poverty exists, services must attend to it first.

However, most discussions of poverty draw a distinction between absolute and relative poverty. The latter views child poverty not only as the lack of basic subsistence requirements, but as a lack of the means needed for participation in the community, relative to others. Thus relative poverty implies, for example, lack of recreational outlets for children or an inability to take part in educational activities because of lack of income.<sup>32</sup> It may not be unreasonable, therefore, to think of absolute and relative rights: a child's right to income and housing is absolute, not relative.

The notion of relative poverty has been under attack<sup>33</sup> but few serious analysts would recommend its abandonment. Nevertheless when goals of children and family services encompass the reduction of relative poverty (or disadvantage) the distributional issues become more complex. During the 1980's, targeting services on the most disadvantaged became a favoured policy measure. But the demands of the goals of citizenship - full participation of each child and family in the community - require commitment to 'progressive universalism'.<sup>34</sup> Even if priorities are arranged and targeting achieved to remove absolute child poverty, removing relative poverty will not be achieved without implementation of a redistributive strategy, to rectify the structural deficits of inequality.<sup>35</sup>

The stumbling block is the absence of a consensus about redistributive measures. Distribution of resources is ultimately a political allocation. Ultimately, as Goodin<sup>36</sup> points out, the choices are twofold. First, a possible strategy is the maximisation of resources across the community - bringing every child up to a preconceived median standard by increasing the supply of resources to the relatively needy. The second choice is the equalisation of resources - providing

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28 Carter, *supra* note 9.

29 Choo, *supra* note 12.

30 Taylor, *supra* note 11; HREOC *supra* note 15.

31 Harris, *supra* note 6.

32 Trethewey, *J. Aussie Battlers: Families and Children in Poverty* (Melbourne, Collins Dove/Brotherhood of St Laurence, 1989).

33 See Carter *supra* note 28.

34 See Harris *supra* note 6.

35 See Harris *supra* note 27.

36 Goodin, R, "Relative Needs" in Ware, A. and Goodin, R, *Needs and Welfare* (London. Sage Modern Politics Series vol 26, Sage, 1990).

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the better-off with fewer resources, thus reducing the supply to the less needy. This second way of coping with relative need means that everyone's supply of relatively needed resources is minimised, by simply reducing the relativities. The problem with the first choice is that it tends to ask for more resources and for growth in services in an era where costs are being contained, or cut back. The problem with the second choice, the equalisation of resources, is that the parallel service systems referred to earlier (state and private non-profit-making) can be undercut by the third system, the market, which can compete to offer greater choices, higher quality and thus relativities, than non-market services. However, are the services offered by state and non-government organisations, although uniformly minimal, better as a resource to meet relative need than either no services at all or a distribution of services which favours the better-off in terms of income or location (as many children and family services do)? It is at this point - the strategies required for implementation of the Convention - that future work and effort needs to concentrate.

### **Conclusion**

Children's rights cannot be considered *in vacuo*. The Convention provides ideal rights for children, but a concept to link law and policy, entitlement and need is needed. The notion of social rights encompasses both resource and process rights. The most disadvantaged must not be left behind, so the identification of need is still crucial in framing routes of access and participation to children and family services, finding pathways through positive discrimination and counter-discrimination for those who would otherwise be ignored, exploited or victimised. The Convention provides ideal rights for children: plans are available to implement these rights<sup>37</sup> but the missing ingredients are political consensus and community pressure.

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37 See Carter and Trethewey *supra* note 25.



## 10. AN ABORIGINAL VIEW ON THE CONVENTION

**Brian Butler**

The acceptance by the United Nations General Assembly of the Convention on the Rights of the Child and its subsequent ratification by the Australian Government are unquestionably important events. The enshrining of the rights of all children in an international instrument establishes basic standards for which to aim.

Whilst many in this country may still think the Convention is applicable mainly to Third World peoples and their children, because of the abject state of their living conditions and rights, the reality is that it will also provide a stern measure of the position of Aboriginal children in this society.

The Convention must, however, be placed in its proper context. Its usefulness to Aboriginal People and our children must be viewed in the context of the other international instruments which have passed through the UN General Assembly and which have been ratified by the Australian Government. It is a sad, but undeniable, fact that these have not made much difference to our position in Australian society.

A number of recent reports testify to this fact. The *Aboriginal Child Poverty Report*, the *Racist Violence Report*, *Violence Directions for Australia* and the *Final Report of the Royal Commission into Aboriginal Deaths in Custody*, all underline the lack of rights we experience. These reports all point to the state of oppression of our people, or as it is popularly and euphemistically called these days, the structural disadvantage of Aboriginal People.

One of the difficulties Aboriginal People have is translating these International conventions! instruments into levers which can be used to dislodge the weight of 'structural disadvantage' or oppression. Realistically speaking, one would have to say that this is extremely difficult, if not impossible. In principle, international conventions are incorporated into domestic laws which provide for individual rights. The enjoyment of these rights assumes a certain standing as a citizen, enjoying other basic non-legal advantages such as good health, education, housing, and the like. These conventions can also be translated into government policy and programs, which, as we all know, are subject to the pressures of other factors such as economics. In this battle it would appear we always come out second best.

Despite these sobering considerations, the Government's ratification of the Convention on the Rights of the Child must be viewed as a positive development. It provides us with an internationally accepted standard that we may use in exposing the absence of these rights in Australia.

While the Convention itself may not be the instrument that safeguards and establishes rights, the discussion generated by the

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public and non-government organisations about the content of the Convention has been beneficial. Occasionally this discussion has been hysterical and misinformed, but generally it has contributed to an awareness of the existence of the rights of all children.

Although we are sceptical about the likely impact of the Convention in improving the position and the rights of Aboriginal children, the fact that improvements are needed is indisputable.

It is our view that no matter what the formal level of rights our children may enjoy under Australian law, unless the 'structural disadvantage' is removed, these rights will remain of limited use, accessible mainly to those who can break out of the condition of their poverty and disadvantage.

We are concerned about the continuing, disproportionately high rate of entry of our children into the child welfare and juvenile justice systems. In spite of the legal changes which have taken place over the years in this area in a number of States and Territories, Aboriginal children remain over-represented in the statistics. This has been confirmed recently in the *Report of the Royal Commission into Aboriginal Deaths in Custody*.

In places where the Aboriginal child placement principle does exist in either child welfare policy or legislation. Aboriginal children are still slipping through the net. In some instances, government is actually undermining this principle. The existence of poverty and concomitant social problems also means the shortage of Aboriginal carers for children needing alternative placements.

The effectiveness of provisions maintaining Aboriginal children in the care of their own communities will have a significant bearing on the ability of Aboriginal people to bring up their children as Aboriginal. A legal system that gives priority to the rights of the individual, inevitably evaluates all other considerations in the light of that priority. Notions of community and tribe, and the responsibilities and obligations of children towards their community, do not hold in a legal contest between the two. The normal process that exists in most families, whereby culture, language and custom are passed onto children, is obstructed in the case of Aboriginal families and their children.

These concerns strengthen our belief that we need national legislation in Australia that protects the rights of our children. This legislation needs to provide the Commonwealth with powers that override the powers of the States in the event of State actions which undermine the rights of indigenous children.

This has, in fact, happened recently. In Queensland, after the Department of Family Services and the Mt Isa AICCA decided to return a four-year-old boy, Curtis Cubby, to his natural extended family in Doomadgee, the Aboriginal foster-parent of the child went to the press with her objection. The press ran a campaign in support of the foster-parent claiming Doomadgee was a 'hell-hole' and the interests of the child would be better served by Curtis remaining in Brisbane. The

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Minister for Family Services capitulated and reversed the decision of her Department and the AICCA.

In this case the AICCA, along with the Department, believed that Curtis' best interest would be served by being with his extended family and his siblings in Doomadgee. These considerations for them, far outweighed the comparative material disadvantages he would experience. The Minister, in reversing her original decision, contravened the Aboriginal child placement principle, which is the accepted policy of her department.

In other recent cases similar results have obtained. In North-West Australia, some young Aboriginal mothers have made private arrangements with non-Aboriginal families, allowing these families to take Aboriginal babies into their care. The State Department and the community involved are powerless to intervene.

These experiences show us that it is not enough to have laws alone that establish these rights. It is essential to have other support systems available to Aboriginal people too. They also show that the racist elements in the media can, if they wish, influence the decisions of politicians to the detriment of Aboriginal rights. This was also borne out by the experience of Senator Grant Tamblings engineered backlash in 1988. It would appear that the foundations on which our rights rest are extremely fragile.

There are many other matters affecting the rights of our children with respect to which the Convention can play a specific role. For instance: the question of teaching Aboriginal languages to Aboriginal children and other general curriculum issues in schools; the availability of health services to Aboriginal children where they live; adequate levels of nutrition; the right to be protected from violence, both in the environment in which our children live and from the violence perpetrated by the police. The rights of those children who were removed from their families need also to be considered. Are their cases covered by the provisions of this Convention ?

In concluding I would only like to add that we will use whatever means are available to us to achieve what we feel is best for our children. In 1984 when the Australian Law Reform Commission approached us to assist them with their report into Aboriginal Customary Law in the area of Aboriginal Child Custody, Fostering and Adoption we did so with the firm conviction that whether or not something came out of their deliberations, we would have put our opinion on the agenda. Unfortunately nothing has happened since then, even though the Commission did recommend the insertion of the Aboriginal placement principle in national legislation that safeguarded Aboriginal customary law.<sup>1</sup>

In the light of this experience perhaps you may understand why we are sceptical. Nevertheless, we welcome the Convention and look forward to its implementation.

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<sup>1</sup> *The Recognition of Aboriginal Customary Laws*, Law Reform Commission Report No. 13 (AGPS, Canberra, 1986) Vol 1, para 366.

## 11. SOCIAL SECURITY: DIALOGUE OR CLOSURE?

Terry Carney

### Introduction

The Convention on the Rights of the Child of 1989 deals both with individual (civil and political) and 'social' (economic, social and cultural) rights. Social rights differ from individual rights in various ways: they involve connective relationships (such as assistance to participate in society) rather than personal zones of immunity from interference; they are centrally concerned with civil life rather than private activity; and they involve questions about the equity of the distribution of resources (whether of income and wealth, community services, avenues for realising human potential for development, or access by citizens to community life).

This paper suggests that different contributions are made by the Convention in the two spheres. Social rights find expression in broad-grained, general language. This language does provide new leverage in arguments about distributional justice: it makes a contribution towards, but not the only (or necessarily even the main contribution to) the case for a fairer distribution of resources which would further the interests or needs of children. Yet that contribution takes the form of providing an alternative starting point, and an additional form of discourse, for social policy debate. It is not a basis for 'closure' of that debate.

This argument that the implications of the Convention for social security are less than definitive, rests on a judgment about the level and character of the 'social' obligations posited in the document itself. But first a preliminary point about its domestic force. While the Convention only becomes part of Australian law when domestic legislation is enacted,<sup>1</sup> the national Parliament, unlike its State counterparts, cannot resort to the defence that 'this was negotiated by another level of Government'. Both morally and under international law, the Commonwealth Government is more strongly obligated to ensure that its house is in order; and it inescapably carries a national leadership role of ensuring that States discharge their separate constitutional responsibilities (whether through co-operative arrangements, tied grants conditioned on compliance with standards, or national legislation based on the Convention).

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Treaties do not become part of the law of Australia simply by ratification; legislation is necessary to translate the precepts into obligations or rights under domestic law. They may however be accorded a limited status as a benchmark reference point for the work of the Commonwealth Human Rights and Equal Opportunity Commission: Carney, T. "Children" in Pagone, T and Wallace, J (eds), *Rights and Freedoms in Australia* (Sydney, Federation Press, 1990), 63-74; and generally, Weeramantry, C, "Human Rights", *ibid.* 240-255. ACOSS and HREOC have commissioned a national survey of compliance (see Chapter 17, *Infra*, for details).

## **Social Rights in the Convention and the Scope of Welfare**

There are two primary considerations: what is the character of the 'obligations' contained in the Convention; and what is the scope of 'social security' (or welfare)?

### **1. The Character of the Obligation**

If the relevant provisions of the Convention had been expressed in (Hohfeldian) 'right-duty' language, and had that language been sufficiently precise, there would then have been clear benchmarks against which to assess social security. In the area of social rights, however, the Convention takes a different tack.

As detailed elsewhere,<sup>2</sup> the early drafts of the Convention (in the early 1980's), were attacked for devoting too much attention to economic, social and cultural rights.<sup>3</sup> The concern (partly an 'east/west' tension) found expression as an objection to the 'policy-isation of rights' (the expression as rights of matters best left to public policy debate).<sup>4</sup> The final text deliberately offset these clauses with provisions spelling out civil (individual) rights, in order that Western nations would support the document, thus enabling it to attract the unanimous endorsement which the document ultimately obtained. One consequence of this history is that the economic and social rights specified in the Convention are expressed at a higher level of generality than is the case for those concerned with individual rights.

### **2. The Scope of Social Security**

An understandable misconception in public debate is that social welfare is coincident with cash transfer programs of the state. But it embraces much more. As Titmus observed many years ago:

Many of the services, transactions and transfers, we study, whether they are classified as social, public, occupational, voluntary or fiscal, contain both economic and non-economic elements. It is the objectives of these services transactions and transfers in relation to social needs, rather than the particular administrative method or institutional device employed to attain objectives, which largely determine our interests in research and study and the categorisation of these activities as social services.<sup>5</sup>

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2 Carney, T. "The Convention on the Rights of the Child: How Fares Victorian Law and Practice?", 16 *Children Australia* (1991), 22-29.

3 Cohen, C. "Introductory Note", 28 *International Legal Materials* (1989), 1448, at 1449.

4 Bennett, W H. "A Critique of the Emerging Convention on the Rights of the Child", 20 *Cornell International Law Journal* (1987), 1, at 36; Cohen, *supra* note 3, at 1449.

5 Titmuss, R, *Commitment to Welfare* (London, Allen and Unwin, 1968), 21.

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Judged against this yardstick of breadth of coverage, the Convention includes a wide range of economic and social rights. Thus the Convention includes topics such as child labour and compulsory education laws<sup>8</sup> which are the constitutional preserve of the States (at present). In Australia, in some States, the record is less than optimal when judged against the requirements of the Convention. State laws on child employment are very patchy for instance (thus in Victoria child employment reforms remain outstanding although they have been achieved elsewhere<sup>8</sup>). In a federation, this patchwork quilt of divided responsibility is probably unavoidable.<sup>9</sup> However, as the experience with child care demonstrates, there is a leadership role which is available to be exercised by the national government (in setting standards as a condition of funding). While it may be easier to bring such 'hybrid' Commonwealth-State areas into line with the precepts of the Convention (qualified though the child-care entitlement is), we should not lose sight of the direct obligations carried by the State and Territory Governments (such as in complying with standards for the care and treatment of cases of child neglect and young offenders).

The Convention itself is a less than perfect standard, however. It specifies less than a universal set of such rights, and those which are specified are by no means all expressed in unqualified form. Some Articles are limited to selected populations: thus Article 18(3) deals with child care for children of working parents, while the remaining articles are at best neutral about the child care entitlements of other carers (Article 7(1)). Again, some of the principles are expressed in wide language which is designed to prevent the occurrence of particular harms (Article 19(2) dealing with support services for children or their carers as a means of preventing abuse). Other provisions, however, are so heavily conditioned that they lose much of their power: Article 18(3) for example largely negates the entitlement to child care by adding the words "for which they are eligible"; thus permitting compliance to be claimed by an otherwise affluent country on the basis of guaranteeing full access by all persons qualified under a niggardly and restrictive scheme of eligibility.

In short, the Convention provides a generously broad, but somewhat uneven, reference point or standard for judging 'welfare' compliance. Moreover, any comprehensive assessment of the social welfare implications of the Convention must embrace both federal and state provisions.

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6 Articles 32 (employment) and 28 (education).

7 *Equity and Social Justice*, Report of the Child Welfare Practice and Legislation Review Committee (Melbourne, Victorian Government Printer, 1985), 173-179.

8 Children's Services Act 1986 (ACT). Part VIII ss. 126-136.

9 That is not to say that the Federal Parliament could not displace such laws in reliance on the external affairs power (Hanks, P. *Constitutional Law in Australia* (Sydney, Butterworths. 1991). 350-351; *Koowartha v Bjelke-Peterson* (1982) 153 CLR 168), but such a course would isolate children from the mainstream administration of such laws, and therefore is not attractive.

## **Some Possible Implications of the Convention**

In assessing federal and state laws, the most pertinent of the provisions of the Convention are to be found in Articles 26 and 27.

Article 26 requires that States "recognise for every child the right to benefit from social security" subject, among other things, to "taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child".<sup>10</sup>

There are many possible implications of this for Australian social security. They include:

- \* the availability of income support to young adolescents in their own right (here, those under age 16);
- \* the adequacy (and pre-conditions to) income support for 16 and 17 year olds;
- \* the treatment of 'disability'; and
- \* the acceptability under the Convention of the imposition of lengthy 'waiting' periods (non-payment periods), to be served before income support is paid (for example the 13 week period required to be served by school-leavers).

Only some of these can be sketched here.

### **1. Income Support Below the Age of 16**

Until very recently, the policy of the Department of Social Security was to generally deny Special Benefit to young people under the age of 16. This rested on three bases. First, it was said that to pay at such a young age would provide an incentive for young people to leave the care of their family (undercutting the role of the family). Second, it was argued that a government payment would dilute the primary responsibility of families to provide adequate maintenance. Third, it was contended that if anyone should step in it should be State Governments; the constitutional 'division of labour' was that State Governments had responsibility for child welfare (of which this was one manifestation) while the national Government provided income support to adults in their own right, or in order to assist them in the care of dependent children.

Recent, and unheralded, relaxation of this policy brings the administration by the Federal Government of this aspect of social security law into closer conformity with a plain reading of this Article. Indeed it introduces a sense of historic closure: the Administrative Appeals Tribunal, in cases such as *as Ezekiel*<sup>11</sup> had ruled, as early as 1984, that the law should be administered in this fashion, citing among

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<sup>10</sup> Article 26 (1) and (2) respectively.

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other considerations the human rights sentiments flowing from other civil rights treaties entered into by the federal government.<sup>12</sup>

### **2. The Adequacy of Payments for 16-18 Year Olds**

Another of the features of federal income security policies to call for scrutiny is the 'common youth structure' - with its lower rate scales for young people; lower rates for young persons living at home; and the imposition of a 'parental income test' on a portion of the payments. This was first suggested in 1984 by the Office of Youth Affairs, as a way of eliminating perverse incentives which rewarded (with higher payments) young people who discontinued schooling and became dependant on welfare while seeking work (and neglecting opportunities for acquiring necessary skills and training). The scheme was adopted in the 1985-86 Budget, with a three year phasing-in period. During this time education allowances have been raised to prevailing age-related levels of unemployment benefit (which were frozen for younger age groups, however). Consequently the common rate scale varies with age and is quite austere.<sup>13</sup>

As might be anticipated from the above, the Convention does not give a cut and dried answer to whether this scheme is consistent with the obligations. Certainly the payments under the common youth scale are of very dubious adequacy as an anti-poverty measure, and they may well have unintended outcomes: they may exacerbate deprivation consequent on youth homelessness and they may also discourage independent living. But Article 26 goes no further than to require that States "recognise ... the right to benefit from social security" [emphasis added], and that access is provided here. Certainly the very austere rate scale for people living at home, and possibly also the less than generous rate for young people living independently, may both be said to flow from the qualification in the Convention that account be taken of "the resources and the circumstances of the child and persons having responsibility for the maintenance of the child". In other words it is open to argue that the common youth structure passes muster under Article 26.

Article 27 is a little more obscure. It speaks of Parties to the Convention:

recognis[ing] the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. [emphasis added]<sup>14</sup>

Certainly it is possible to give this a broad reading: stress can be laid on the words highlighted in the quotation. So read, Article 27 could support a critique of Commonwealth and State programs of income

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11 *Re Ezekiel and Director-General of Social Security (1984)* 6 ALD N235.

12 Carney, T, "A Youth Guarantee and the Law: Employment Unemployment and Education", 13 *Australian Business Law Review (1985)*, 265-294.

13 See for example Rome, J. "Reform Options: Youth Income Support", unpublished paper presented at the Council of Social Welfare Ministers "Income Support" Seminar (Melbourne, December 1986).



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support and services on two bases. Objection might be taken to their lack of adequacy. This was one of the key evaluative criteria laid down by the Cass Review<sup>15</sup> of Social Security, and the levels of payment to younger people under the common youth allowance may run into difficulty here. Secondly, it is open to argue that the rates of payment are too low to permit young people to realise the opportunities for 'social development' of which the Convention speaks. That is, it denies the "social rights of citizenship" (the benchmark laid down by Marshall).<sup>16</sup>

These promising lines of argument gain some added force from one of the two more concrete elaborations on this theme to be found in the balance of Article 27. The injunction in the Convention to "provide material assistance and support programmes particularly with regard to nutrition, clothing and housing",<sup>17</sup> could be invoked to support a critique of the young homeless allowance.<sup>18</sup> This payment purports to cater to the needs of isolated young people who are unable to draw on the resources of their family for support. The Convention might support a critique of this aspect of the scheme of payments on the grounds of its unduly narrow eligibility criteria, its inadequate level of payment and in terms of the inability of most States to develop packages of matching support services, housing and community services.

However the message is distorted by the second example mentioned in Article 27: that of making parents responsible for child support. Here the emphasis shifts to family rather than direct state responsibility. The Australian scheme for recovering child support<sup>19</sup> discharges the obligation to "take all appropriate measures to secure recovery of maintenance for the child from the parents ...".<sup>20</sup> But it also demonstrates that the promotion of adequate standards of income support (or standards of living) may not exclusively rest with the state. And that is the rub: the rationale for the common youth allowance is that a balance must be struck between state and parental responsibilities; a policy position which arguably mimics that of the Convention.

Overall, then, the broad-grained expression of 'social' interests as laid down in the Convention are advanced to at least an acceptable level under the current state of law and practice. But it neither follows that Australia is realising optimal (as distinct from satisfying minimally acceptable) standards for the provision and guarantee of 'social rights'

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14 Article 27(1).

15 Cass, B, *The Case for Review of Aspects of the Australian Social Security System*, (Canberra, DSS, 1986), 9 (one of eight goals identified at the outset of the work of the Social Security Review).

16 Marshall, T, *Sociology at the Crossroads and Other Essays* (London, Heinemann, 1963), 74; Eekelaar, J, "The Emergence of Children's Rights", 6 *Oxford Journal of Legal Studies*, (1986), 161, at 170.

17 Article 27(3).

18 Provided under s. 118(8) Social Security Act 1947 (Cth).

19 For a summary and preliminary evaluation of stage one of the scheme: Harrison, M, Snider, G, and Merlo, R, *Who Pays for the Children?: A First Look at the Operation of Australia's New Child Support Scheme* (Melbourne, Institute of Family Studies, 1990).

20 Article 27(4).

of children and families, nor that the Convention is capable of meeting the challenges of changing conditions in the future.

## **Challenges for the Future**

Two of the issues of the future are likely to be the role of the welfare state and the extent to which support is directed to young people rather than to families on their behalf. Both are influenced by shifting economic and social conditions.

### **1. The Role of the State**

One possible challenge with which the Convention (and policy-makers) might be required to come to terms, is the increasingly problematic role of the state (at least in the mind of some commentators). One of the influential lines of argument questioning the role of the state contends that individual rights (and law as the enforcer of those rights) ought exclusively to be concerned with protecting individual choice/liberty from interference by the state.<sup>21</sup>

The essence of the welfare state, however, is that individual rights are in large part a product of entitlements to access the goods and services provided by the public sector. As we have seen, the law has not done a great deal to nail down those 'social rights'. It has not done enough by way of provision of resources and supports to enable the family to function effectively; and it has not done enough by way of provision of the income support, accommodation and other services required by young people seeking to strike out on their own behalf, whether through choice or necessity (such as family violence).

The Convention, through its extensive coverage of social rights, lends support to the case for securing greater access to the goods and services which can only be provided by the public sector. It supports the welfare state against its reductionist critics.

### **2. Welfare Provision to Young People or Families?**

It has been argued<sup>22</sup> that the law may risk not being in tune with emerging socio-economic realities. Among those changing social conditions are the more extended periods of education and training (and later re-training) required to be undertaken by young people. It follows that consideration should be given to providing children and young people with access, as of individual legal right, to the range of education allowances and related support services for families, and to the income supports and accommodation required for independent, or semi-supported independent living by students and trainees.

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21 Simon, W, "The Invention and Reinvention of Welfare Rights", 44 *Maryland Law Review* (1985), 1-37.

22 Carney, *supra* note 2.

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Another of those realities may be a lesser proportion and a reduced durability on the part of so called 'standard nuclear' families, as family formation is delayed, rates of marriage breakdown remain high, and larger proportions of *de facto* marriage, single parent, and solo-adolescent units arise.<sup>23</sup> A logical consequence of this is that the family will be less securely placed to carry the increased burden of financial responsibility for enabling young people to acquire the education and other skills required. Entitlements to child care and other supports for families is one strand of a possible response to such social arrangements. Another is to accord greater recognition of the capacity for young people themselves to develop those opportunities, through provision of adequate resources and support from the state.

Both of these trends would favour a policy of enhancing the 'social rights of entitlement'. These are an incident of the welfare state: part and parcel of what are now termed 'social justice rights', but which were seen originally as 'rights of citizenship'<sup>24</sup> (in its inherent social membership rather than its legal sense). For older adolescents these rights would translate into entitlements of young people in their own right (rather than proxy rights entrusted to the family unit): it would involve expanding adequacy and broadening access to education allowances, young homeless allowance, etc. At younger ages, however, this would involve extending family supports - services which secure 'preventive rights' for the family unit in its various forms.

### **3. The Flexibility and Responsiveness of the Convention**

The most sanguine feature of the Convention is its capacity to serve as a vehicle for the development of just such a case. The open-textured form of the language in which the 'social rights' are expressed, and the tension between state and family obligations, provides a nice balance. A balance between the overly-prescriptive and the vacuous, and a balance between the polar extremes of the policy debates. It provides a framework within which to conduct the debate between those who would contend that the proposals just outlined accord too little independence of access to needed state services and supports on the part of the younger adolescent; and those who would argue that it unduly detracts from family responsibility for the upbringing and support of the older adolescent.

It is a basis for developing the argument that, in the absence of such family-centred strategies for younger children, the family will crumble further in the face of the increasing press of socio-economic changes - with resultant greater stress to the children affected by such a decline in the capacity of functioning family units to look after the interests of their members. Equally it is a basis for contending that in the case of older adolescents, if the independence of the young person is unduly compromised, or the state places too great an economic

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23      Nearly one in five women live in *de facto* relationships at some time, one third of marriages end in divorce (after 10 years on average), and one in five households live 'alone'.

24      Marshall, T. *Sociology at the Crossroads and Other Essays* (London, Heinemann, 1973), 67-127.

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burden on the straightened circumstances of ordinary members of the family unit, then social alienation may result, and society may be the poorer.

There are also other forums - including the vexed one of federal/state relations - in which this flexibility of the Convention may prove to be an asset. The notion of partnership between individuals, families, communities and the state which has been advanced here is applicable in this context also. It is encouraging to see that the State and Australian Governments are prepared to review the distribution of responsibility for different areas of government. It is to be hoped that there will be some creative thinking on the division of responsibility for the issues discussed here. Certainly it does not seem appropriate either for the States to assert that 'child welfare' and provision of services to children and families is their exclusive territory, or for the Australian Government to confine itself to income security measures for young people over the age of 16. Workable partnerships call for adaptive flexibility, and a willingness to negotiate integrated packages which knit income support in with other services (such as housing and job opportunities), to create the opportunities for young people to acquire the skills and capacities necessary for them to realise their potential and thus advance the collective social interest. It is not a time for governmental 'demarcation disputes' whether between levels of government, or between the government and non-government sectors.

### **Conclusion**

The Convention, then, is no simple panacea. The social rights are expressed in broad-grained, general language. In contemporary social policy debates that language is not strong enough, nor precise enough, to bring about closure of the debate: rather it serves to assist in the privileging of the claims for meeting the welfare needs of children, young people and families. It assists in facilitating the policy dialogue in favour of strengthening welfare provision; but that case will continue to rest mainly on other supports than the Convention itself.

In the longer-term, however, these slightly 'fuzzy' expressions of entitlements, and the careful delineation of competing interests, will serve policy debate well. The clauses of the Convention will continue to ground the case for a fairer distribution of resources which would further the interests or needs of children. And they will prove flexible enough to accommodate the likely shifts consequent on changed economic and social conditions. Social equity and social justice sentiments will continue to draw sustenance from their expression in the various Articles of the Convention on the Rights of the Child.

However the Convention provides no more than a catalyst for policy dialogue about these contemporary and future issues. The Australian community continues to bear the responsibility to debate the extent to which those sentiments are realised in the changing social and economic conditions which confront this country.

## 12. HOMELESSNESS

Ian O'Connor

Homelessness is an experience and a process which pervades every aspect of an individual's life. It is not simply an event, associated with the absence or loss of shelter (though it may encompass this). It is an experience which limits or prevents access to the necessities of life, which forces a young person to society's margins and which renders a young person vulnerable to physical, emotional, sexual and economic exploitation. These factors, as well as flaws in, and the paucity of the existing responses to youth homelessness actually serve to restrict the young person's exit from homelessness.

The Human Rights and Equal Opportunity Commission's Inquiry into youth homelessness was significant for many reasons, but I will highlight two. Firstly, the Inquiry recognised that homelessness was a process and an experience, rather than just an event. Secondly, and perhaps most importantly, it considered homelessness from a human rights, rather than welfare perspective. For young people who have over the past century been subject to much intervention and control in the name of welfare, the importance of an approach based on a respect of their basic humanity cannot be underestimated.

In this paper my intention is to briefly discuss:

- \* the nature and extent of homelessness;
- \* the relevance of different articles of the Convention and the extent of compliance with these articles; and
- \* implications for implementation and monitoring.

### Becoming Homeless

The Convention appropriately recognises the importance of the family in the care and upbringing of the child, and the state's responsibility to support and assist this process.

Research on youth homelessness <sup>1</sup> indicates that young people become homeless over a period of time. Young people do not simply leave home and never return on a whim, or over an argument about whether they can go out on Friday night. Rather, they leave or are forced out as a result of: long-standing conflict; or physical or sexual

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O'Connor, I, *Our Homeless Youth: Their Experiences* (Sydney. Human Rights and Equal Opportunity Commission, 1989); Waters, K, Sheehan, G. Eldridge, D. and Crossroads Staff Team, *Unfinished Business* (Melbourne, Salvation Army Youth Policy Development Project, 1991); and Chamberlain, C. MacKenzie, D. and Brown, H. *Homeless in the City* (Melbourne, Department of Applied Social Research, Monash University, 1991).

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abuse; or they are removed by state welfare authorities and are allowed to drift in care and become homeless. In each of these situations there are normally one or many failed attempts to return home.

Once out of their family, the lack of, and inappropriateness of available services, traps a young person into a spiral of homelessness. Put simply, the lack of income, accommodation and support, forces the young person further and further to the margins, renders them more reliant on illegal sources of income or more vulnerable to economic, sexual or physical exploitation.

### **Extent of Homelessness**

The HREOC Inquiry conservatively estimated that 20-25,000 young people were homeless. Whilst some efforts have been made to implement the recommendations of the Inquiry, it is evident that the number of young homeless people has not declined. Indeed in this period of recession, it is reasonable to conclude that the number of homeless may have increased substantially. When the HREOC report<sup>2</sup> was released the rate of youth (15-19 years) unemployment had dropped to less than 15 percent. In May 1991 the rate of youth unemployment had risen dramatically to 26 percent. This compared to 9.2 percent unemployment rate for the overall workforce.

Economic disadvantage, lack of access to the labour market and low levels of social security benefits are structural factors associated with lack of access to housing and other services. It should be noted that youth unemployment is not evenly distributed across the population. Rather, certain youth are particularly disadvantaged (for example, young women, Aboriginal youth, youth from low income backgrounds, etc).

### **The Relevance of the Convention and the Extent of Compliance**

There is a somewhat complacent assumption within Australia that the laws of the Commonwealth and States are consistent with the Convention. On the whole this is so: each State has laws which purport to protect children from sexual and physical exploitation and abuse and neglect, which renders unlawful exploitation and discrimination. There is free, compulsory education and so on. However, homeless children are the human face of the gap between the letter and the actuality of the law.

Homelessness affects almost every area of a young person's life and therefore nearly every Article of the Convention is of direct relevance. In this paper I will confine myself to dealing briefly with those of central relevance.

Article 4 requires the government, to the maximum of its available resources, to undertake legal, administrative and other

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<sup>2</sup> See Human Rights and Equal Opportunity Commission, *Our Homeless Children: Report of the National Inquiry into Homeless Children* (Canberra. Australian Government Publishing Service, 1989).

## *Homelessness*

measures for the implementation of the rights recognised in the Convention. While homelessness is a serious problem it is not beyond the economic resources of Australia to respond to it effectively. As the HREOC report documented, the real financial costs of not responding (in terms of the long term costs of social security, health, crime, tax foregone, etc.) will outweigh the costs of a coordinated response.

Article 2 requires governments to guarantee the rights in the Convention without discrimination of any kind. This article is frequently breached in practice. The social conditions of Aboriginal children and youth have been documented in the National and State reports of the Royal Commission into Aboriginal Deaths in Custody. Many Aboriginal children and youth in North Queensland Communities are living in Third World conditions - denied access to their right to even basic shelter as well as to health and nutrition.

Young women are subject to particular discrimination which is evident in the causes of their homelessness (frequently, sexual and physical abuse), the consequences of their homelessness (sexual exploitation), and in the inadequacies of support services for young women.

Articles 19, 32, 34, and 36 require governments to protect young people from economic, physical, sexual or other forms of exploitation or abuse. They are required to take appropriate legislative, administrative, educational and other measures to protect children. The import of these Articles is twofold. Firstly, the Articles embody a preventative focus requiring programs of support for children and those who care for them. The lack of such preventative programs is a direct cause of much youth homelessness. Secondly, abuse, violence and sexual exploitation are reasons why many young people leave home - they are also part of the daily experience of homelessness. As Commissioner Burdekin stated:

Rather than being protected by government from sexual exploitation, the inadequacy of income support, accommodation and other government services is forcing many homeless children into prostitution or other forms of sexual exploitation to survive.<sup>3</sup>

Article 39 requires the state to take all appropriate measures to promote the psychological and physical recovery and social reintegration of those who have been victims of abuse, exploitation or violence. Existing service mechanisms cannot even provide the basic material necessities of life, let alone foster recovery and reintegration.

Article 26 provides for the child's right to social security. Though income support is theoretically available to the young homeless, the restrictive definition of youth homelessness, the imposition of waiting periods for benefits and the inadequacies in its administration mean that many homeless young people are denied access to any form of legal income. For example, in 1990 only 32 percent of homeless children who

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3 Burdekin, B. "The Homeless Children Inquiry: An Example of a Children's Rights Issue in Australia", 14(2) *Australian Journal of Early Childhood* (1989), 26-30.

## *Homelessness*

sought assistance from Melbourne's 'Info Deli' were in receipt of any form of Commonwealth benefit. Sixty-three percent had no income. In contrast, only 22 percent of homeless people aged 18 to 24 years were without income, while 73 percent were reliant on a Commonwealth benefit.<sup>4</sup>

To adequately comply with Article 26 the legal conditions for eligibility for payment of benefits needs to be changed, as does the manner in which benefits for the young homeless are administered by the Social Security and Education Departments. The issue of income support for children under 16 years is in particular need of clarification and action.

Article 27 recognises the right of every child to an adequate standard of living. It requires the provision of programs of material provision and support, particularly in the areas of housing, clothing and nutrition. It is clear that the current level of benefits does not allow an adequate standard of living for homeless young people who manage to access these benefits. Similarly even at the most basic level of material aid - the provision of emergency accommodation - there are inadequate resources. For example, in Queensland in 1989 there were approximately 260 places for homeless youth in services specifically funded to accommodate and support young people. In the year ending June 1989 these services accommodated 4276 young people. During the same period some 10,000 requests for accommodation could not be met. While there is clearly some double counting, it is also evident that the level of service provision and the range of services are simply inadequate to assure homeless young people an adequate standard of living.

Article 12 provides that all children have a right to be heard in matters affecting them. Even in situations such as courts where children have a formal right to be heard, this Article is frequently breached in practice.<sup>5</sup> This Article is central to the Convention - to recognise an individual's right to be heard is to recognise an individual's basic humanness - to recognise the other as subject not object.

Our society - our families, our schools, our welfare agencies, etc - have actively failed to listen to young people. For homeless youth the consequence of this is manifold. My own research found that many youths sought assistance with their family and other difficulties, but those whom they tried to tell did not listen, did not believe their stories.

It is not just families and the organs of government that fail to listen to young people, that fail to allow young people to be heard on matters affecting them. Many non-government services established for youth are guilty of similar neglect. Youths who are resident in supported accommodation or refuges, or clients of youth services, are frequently the subject of significant decisions relating to matters such as the provision of services or the manner in which services are

<sup>4</sup> Chamberlain, C. MacKenzie, D. and Brown, H, *supra* note 1, at 34.

<sup>5</sup> See for example, O'Connor, I, and Sweetapple, P. *Children in Justice* (Melbourne, Longman Cheshire, 1988) and Youth Justice Coalition, *Kids in Justice* (Sydney, Youth Justice Coalition, 1990).



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provided or eviction from accommodation, without any right to be heard by the decision-maker.

Because the delivery of personal services is increasingly being transferred to the non-government sector, it is essential that the basic safeguards of the new administrative law which regulate relations between the citizen and the state are given effect to in the non-government sector. These safeguards include the right to information, the right to reasons for decisions, the right to be heard and the right to appeal to an independent decision-maker.

The implementation of Article 26, that is listening to young people, will require a transformation of our relationships with them.

### **Towards Implementation and Monitoring**

The issue of implementation and monitoring is the focus of other contributors to this volume. I will confine myself to noting that an important role in relation to the implementation and monitoring of the Convention in relation to homeless young people should be played by peak youth and welfare organisations and by professional groups.

The Convention provides the framework:

- \* of minimum standards against which practice may be judged;
- \* around which professional education may be organised; and
- \* for lobbying for the improvement of the life conditions of homeless young people.

While certain Articles of the Convention require government action, other Articles are not so dependent. For example, there is nothing preventing youth services from implementing Article 12 in their own organisations.

The Convention provides the basis for accountability not only for government organisations but for all who work with homeless young people.

## 13. ABORIGINAL CHILDREN

**Rebecca Bailey-Harris**

The Convention on the Rights of the Child is a comprehensive statement of standards, expressed in terms of positive rights, to be observed for all children; Australia by ratification undertakes to take steps to comply with those standards.

There are no children within Australia for whom the Convention has more significance than it does for Aboriginal and Islander children. These children currently experience chronic disadvantage in respect of virtually all the 'rights' of which the Convention makes explicit statement. The source of such disadvantage has been identified as the disempowerment of the Aboriginal and Islander people through two centuries of White domination. The recent *Report of the Royal Commission into Aboriginal Deaths in Custody* was explicit in attributing disadvantage to systematic disempowerment of the Aboriginal people by successive governmental policies and practices. So also are studies such as the recently-released *Through Black Eyes: A Handbook of Family Violence in Aboriginal and Torres Strait Islander Communities*.<sup>1</sup> However theorists may categorise children's rights - basic / developmental / autonomy,<sup>2</sup> or economic/ civil/ social / cultural - and whatever their philosophical nature,<sup>3</sup> there can be no doubt that Aboriginal and Islander children in Australia do not currently possess the rights articulated in the Convention. The Convention may well be criticised for the generality and imprecision of its language, but even accounting for that, Australia falls far below the declared standards in respect of its indigenous children.

If disadvantage can be traced to disempowerment, then the elimination of disadvantage lies through the future empowerment of the Aboriginal and Islander people. I will return later to the special importance of this in the Convention's implementation.

Numerous articles of the Convention have particular significance for Aboriginal and Islander children, and aim to set standards of which current Australian law, practice and policy fall lamentably short. Firstly, the Convention explicitly articulates the general principle of non-discrimination on the basis of, *inter alia*, race and colour (Article 2 and Preamble); the rights set out in the Convention should be enjoyed by all children in Australia without distinction. This most basic of principles is not observed in a society where health, educational and social support standards for Aboriginal and Islander children fall far below those of their White counterparts, and where there is no equality before the law and its enforcement agents. To be more specific, Article 6 recognises the child's right to life,

1 Secretariat of the National Aboriginal and Islander Child Care, 1991.

2 Eekelaar, J. "The Emergence of Children's Rights", 6 *Oxford Journal of Legal Studies*, (1986) 161-82.

3 Campbell, T, *The Left and Rights* (London, Routledge, 1983).

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and the state's obligations to ensure a child's survival and development. Yet for Aboriginal/Islander children, the infant mortality rate is twice that of Australian children generally. Article 24 declares the child's right to enjoy the highest attainable standard of health, yet the health problems of Aboriginal/Islander children are well documented; those diseases tend to reflect poor living conditions, for example, eye and ear infections. Those poor living conditions in themselves fall foul of Article 27 of the Convention. The child's right to education on an equal opportunity basis is recognised in Article 28, but one in eight Aboriginal/Islander children under nine does not attend school. Article 19 requires the state to protect the child from all forms of physical or mental violence, yet the recently released report, *Through Black Eyes*, states that "up to and over 50% of our kids are victims of family violence and child abuse".<sup>4</sup>

Article 40 sets standards for the administrators of the criminal justice system where children are concerned. For instance, delays in proceedings are to be avoided, and alternatives to court appearances and institutional placements are to be promoted. Yet the unequal treatment of Aboriginal/Islander children by the juvenile justice system in Australia has been documented in detail. Gale, Bailey-Harris and Wundersitz<sup>5</sup> found gross over-representation of Aboriginal children at all stages of the criminal process, from arrest, through referral to court rather than to diversionary alternatives such as Aid Panels, to detention.<sup>6</sup> Such findings also emerge clearly from the *Report of the Royal Commission into Aboriginal Deaths in Custody*, and the pattern is repeated in adulthood, so that whilst Aborigines die in custody at exactly the same rate as whites, they are there far more often. The reason for such over-representation can again be traced to disempowerment in terms of socio-economic status and to poor relations with the agents of the White 'justice' system.

Of crucial significance for Aboriginal/Islander children is the Convention's express enshrinement of the principle of respect for cultural identity:

In those States in which ... persons of indigenous origin exist, a child ... who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture .... [Article 301.]

The Preamble also notes "... the importance of the traditions and cultural values of such people for the protection and harmonious development of the child". More specifically, Article 20 requires due regard to be paid to a child's cultural background in fostering and adoption placements, and Article 29 makes the development of respect for a child's own cultural identity one of the proper aims of education.

The assimilation policy adopted by White governments for so many years in Australia was specifically aimed at forcing Aboriginal people to be absorbed into Western culture and to relinquish their own.

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4       Supra, note 1. at 4.

5       *Aboriginal Children and the Criminal Justice System*. (Cambridge, Cambridge University Press. 1990).

6       *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991).

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Even today, Aboriginal and Islander people view with deep suspicion the policies of White-dominated welfare agencies, particularly in relation to fostering and adoption. There is no issue of greater current controversy in Australian child welfare law than the status to be accorded to the 'placement principle' - that is, that Aboriginal and Islander children should be placed with members of their own community. Aboriginal welfare agencies regard this principle as absolute, since a placement away from the community is seen not only as being detrimental to the individual child and the child's future, both immediate and long-term, but also as striking at the whole fabric of Aboriginal society. By contrast, White-dominated State welfare agencies by and large accept the placement principle only subject to the proviso that it is not absolute - in other words, that the welfare of the individual child must be assessed in respect of each individual placement. White welfare workers tend to take a shorter-term view of a child's welfare. White agencies do not generally accept that a child's welfare is invariably best served by being placed within his or her own racial community. This debate is currently unresolved in Australia, with recent cases having attracted considerable media attention. Whilst the Convention enshrines respect for cultural values and thus might be seen as supporting the Aboriginal/Islander cause, it does not entirely settle the debate, for it also articulates the 'welfare principle' in Article 3. The essence of the debate is what are the best interests of an Aboriginal/Islander child, and who is competent to assess them (see also Article 9). The debate is likely to remain with us for some time. Note that the Royal Commission into Aboriginal Deaths in Custody has recommended that

... in States or Territories which have not already so provided there should be legislative recognition of:

- the Aboriginal Child Placement Principle; and
- the essential role of Aboriginal Child Care

Agencies. [Recommendation 54]

I have shown the great importance of the Convention in setting standards for virtually every aspect of the lives of Aboriginal and Islander children in Australia. Its relevance to those children is self-evident. But how can the statements of principle contained in the Convention be turned into reality? The present collection of papers focuses on turning the Convention into reality. This means a number of things - changing legislation where necessary, changing administrative practices, changing government policies and procedures. The latter are at least as important as changes to written laws. Much of the law affecting children's welfare is State and Territory law, not Commonwealth. There is also the monitoring function at international level - Australia will have to report on its progress to an elected international committee.

What is of crucial importance is that Aboriginal and Islander people be directly involved at all stages in the implementation process. If the disadvantages manifestly suffered by Aboriginal people stem from their disempowerment, the way out of that disadvantage is through their empowerment in Australian society. Royal Commissioner

## *Aboriginal Children*

Johnston<sup>7</sup> envisaged this empowerment, through Aboriginal people's desire and capacity to control their own lives, as the way forward. He called for the rest of Australian society to assist them in this.

Hence to turn the Convention's statements of rights into reality for Aboriginal and Islander children, governments and legislatures throughout Australia must consult widely and from the very start with Aboriginal groups such as the AICCA and Aboriginal Legal Rights Movements. As part of the empowerment, Aboriginal and Islander people must, under the principle of self-determination, be assisted to formulate their own solutions to problems within their communities such as child poverty, poor health and family violence. In moving towards implementation of the Convention, White Australia must ask the Aboriginal and Islander communities what they want for their children, and how they wish to go about it.

In another context, Dr Stephen Parker has asserted that "... the major liberal societies of the world reckon that they comply with most aspects of the Convention". That is patently not the case for Australia with respect to its indigenous children. Article 4 requires that Australia undertake all appropriate legislative, administrative and other measures for implementing the rights recognised in the Convention. Whilst this process is, by the same Article, made subject to 'available resources' in respect of economic, social and cultural rights, few would argue against the proposition that Australia is a relatively wealthy country by world standards, the current recession notwithstanding.

Professor Michael Freeman has spoken of the need for 'distributive justice' in resolving children's rights issues. The distributive justice required to improve the position of Aboriginal and Islander children necessitates the involvement of their peoples at every stage of the processes leading to the Convention's implementation, and in monitoring its future progress. To conclude with the words of Royal Commissioner Johnston, the empowerment of Aboriginal society in Australia

... requires that the broader society, on the one hand, makes material assistance available to make good past deprivations, and on the other hand approaches the relationship with the Aboriginal society on the basis of the principles of self-determination.<sup>8</sup>

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*Id.*  
*Report of the Royal Commission into Aboriginal Deaths in Custody, Overview, at 23.*

## 14. A UNITED STATES PERSPECTIVE

**Frances Olsen**

I believe that I have the dubious distinction of being the only participant in this symposium from a country that has not ratified the International Human Rights Covenants. Although most of the international participants are from countries that, unlike Australia, have not yet ratified the Convention on the Rights of the Child, their countries have all at least signed it, which is a significant step toward ratification. As of this time, the United States has not even signed the Convention. My country has thus placed itself at odds with virtually every European country and together with Cambodia, Iran, Iraq, India, Saudi Arabia, South Africa, and their like.

As you have perhaps guessed, I disagree with this position of my government, and believe that for a great many reasons the United States should ratify the Convention on the Rights of the Child. The reasons the United States has not signed or ratified the Convention are largely historical - the United States has a very poor record on signing such international treaties in general. I believe that this poor record actually relates in a complex way to the abysmal record the United States has of breaking virtually every treaty we ever signed with the native population of North America, but I do not pretend to understand very well the position of my government, or to be able to explain it adequately, if indeed any adequate explanation might be possible. The kinds of arguments one hears are that the United States does not need to sign human rights treaties because it already grants more human rights than international treaties would require, or that most such treaties simply do not relate to the American context and might require the United States to take some action that would be inappropriate or wrong-headed. These are nonsense reasons that any country could claim, often with no less basis than the United States.

Rather than try to explain a position for which I feel so little sympathy, I would like to make three points. First, I discuss one way I think we should not try to get the Convention on the Rights of the Child ratified by the United States. Then, I make two observations from the American context that you may find relevant to Australia.

### **How Not to Promote US Ratification of the Convention**

Americans who want the United States to adopt the Convention on the Rights of the Child may be tempted to employ a narrow reading of the document and to emphasize how little change it would require. Such a strategy was used by many in the women's movement who wanted to win ratification of the Equal Rights Amendment (ERA), a proposed constitutional change that would have subjected discriminations based on gender to the same scrutiny to which discriminations based on race are subjected, or are supposed to be subjected. In the case of the ERA, I believe that the soft-sell strategy

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was a mistake. It did little to reduce the opposition while it tended to de-energize and demobilize ERA supporters. For similar reasons, I would oppose efforts in the United States to promote the Convention on the Rights of the Child by exaggerating its ineffectiveness.

A better approach, it seems to me, and one that some children's advocates are using in the United States, is to make an important political issue of the failure of the United States to ratify the Convention. The fact that most countries of the world have signed the Convention can, and should be used to bludgeon or shame the government of the United States into doing more for children. It is always possible that children's advocates in the United States can achieve more from the country's failure to sign the Convention than they could from ratification, especially ratification achieved on the basis that the Convention does not really mean much.

In fact, it is indeterminate what effect the Convention on the Rights of the Child will have in the countries that have ratified it. Like all other laws and treaties, the Convention is capable of many different interpretations. What the Convention means is not so much a backward-looking as a forward-looking question. It is less a question of interpretation, to which one might obtain the correct answer by assembling the right number of sufficiently smart academics and cloistering them away for a week, but rather a question of political struggle. The meaning of the Convention is yet to be determined. It will mean what we all collectively make of it. Many readers of this volume may well play a crucial role in determining and establishing the meaning of the Convention on the Rights of the Child. The Convention provides a context for the struggles that go on about how society treats children.

### **Women's Rights and Children's Rights**

My second point relates to the terms in which struggles over children's rights take place. There is a very destructive impulse in the United States to blame women for anything that goes wrong in a family, and to try to control women. Thus, many blame mothers for any problems children have and attempt to deploy children's rights against women's rights. Another participant in this volume referred to anti-abortionists in the United States increasingly replacing their earlier talk of sexual morality with talk of 'foetal rights'.<sup>1</sup> There are also examples from throughout the country of women being prosecuted for foetal abuse, being forced to undergo controversial medical treatment some doctor believes will benefit their foetus, or being barred from certain activities that others fear might harm a foetus. There is no end of ways that claims of children's rights could be used to punish, penalise and control women. This is a very bad idea, however, and I believe people concerned with the welfare of children should resist these efforts.

First, the urge to control or punish women provides a very weak and unstable basis for children's rights. Those who argue foetal rights in order to control women generally do very little actually to facilitate the healthy development of a foetus. Similarly, people who use

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Parker. S. *supra*, Chapter 4.

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children's rights specifically against women are not likely to be reliable defenders of children's rights in any other context.

Second, the devaluation of women harms all children, boys as well as girls. Anything that undermines the role and status of women is likely to jeopardize the welfare of children. In fact, I believe that one important reason children are not treated better is that they are associated with women, and there is a tendency for anything associated with women to be valued less highly than the things associated with men. Consider, for example, which children are most likely to be left in poverty - children who are not living with a father (or other male). An improvement in the role and status of women is likely to benefit children.

Let us take the most common example of sexual abuse of children. When a father abuses his child, too many people ask "where was the mother?" more readily than they ask "why did the father do that to his child?" The same tendency to blame women for anything that goes wrong in a family makes all too many people ask of a battered wife, "why doesn't she leave?" more readily than they ask of a battering husband, "why does he batter her?" Quite a number of studies have focused on the pathology of women who are victims or mothers of child victims (and often both). The studies usually find that the women feel powerless or inadequate. Too often the studies fail to ask whether the women really are relatively powerless or to examine whether they would protect themselves and their children if they had the power to do so. Too few studies focus on why so many men abuse the power they have or on how to stop them from doing so. Based on the studies that have been done, however, it would seem clear that reducing the power imbalance between men and women would reduce abuse within the family.

### **The 'Our Children' versus 'Their Children' Syndrome**

My final point involves the schism we too often allow to develop in our thinking between 'our children' and 'their children'. This schism is particularly sharp in the United States where racism is such a long-standing problem, considerably worsened in the past decade for short-term political gain. Political expediency has resulted in leadership that furthers racism rather than leadership that opposes racism. Increasingly 'our children' are the ones of our race, while other races are 'their children'.

My professorship is at the University of California at Los Angeles, which is a city that has a large number of visitors and a wide variety of city tours. A tour that I would like to conduct would start in the slums of South Central Los Angeles, where poverty is rampant and children may be shot dead in the street or on their doorstep. The tour would end in the toy stores of Beverly Hills, where a single toy may cost hundreds or even thousands of dollars.

The question I would pose at the end of the tour would be how the United States treats its children. Do we spend money on our children? On one hand, we seem to spend huge quantities of money on our children. Moreover, couples may spend thousands of dollars at a



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fertility clinic or tens of thousands for IVF (In Vitro Fertilization) treatments (that usually do not work) in order to try to have their 'own' child. On the other hand, we do not seem at all willing to spend much money on 'their children'. Nothing is too good for 'our children', but for 'their children' anything more than the nothing they have now would be likely to be wasted.

'Our children' live in families that are havens of love and support. 'Their children' often live in families that are hells of neglect, conflict and abuse. 'Our children' do not need rights; all they need from the state is to be left alone. 'Their children' have too many needs for the state possibly to meet. If a family situation is hellish enough, the state should remove 'their children' to a new, safer home. But any attempt to help 'their children' in their families is thought to run the risk of merely rewarding the undeserving parents who made the family hell.

This 'our children' / 'their children' dichotomy also exists on an international level and explains some of the United States' attitudes toward the Convention on the Rights of the Child. 'Our children' in the United States do not need the Convention. 'Their children' in much of Asia and Africa may need the Convention, but they also have many more pressing needs like food, housing and medical care, which an international agreement may promise, but can never deliver.

The dichotomy is false from both sides. First, all children are 'our children'. They belong to our society and should be the concern of all. Moreover, it is not only 'their children' who are at risk. Psychological, physical and sexual abuse occurs in families of all races and across all classes. 'Our children' are all at risk, and all children are 'our children'.

Finally, Just as it is important to realize that 'their children' are also 'our children', it is also important to recognise the ways in which no children are ours, or theirs. They do not belong to anyone, they are their own.

## 15. A CANADIAN PERSPECTIVE

### Rod Macdonald

The comments which follow have been organized around three themes:

- \* the current status of the Convention in Canada;
- \* concerns which have been expressed about the desirability of ratification; and
- \* opportunities open to those states which have ratified to generate greater commitment to the aims and ambitions of the Convention.

#### The Present Situation

Although a signatory, Canada has not yet ratified the Convention on the Rights of the Child, and there are no imminent prospects of its doing so.

In Canadian constitutional law, the power to make treaties is federal. This power arises not in consequence of any formal grant of authority in the *Constitution Act 1867*, but as a result of the 1947 instrument entitled "Letters Patent constituting the office of Governor General of Canada" by which the United Kingdom monarch delegated the prerogative powers over foreign affairs to the Governor General of Canada.

Nevertheless, because treaties are not automatically considered as operative domestic law, the implementation of any treaty obligation which requires a change to internal law can only be achieved through legislation. The only concession which Canadian courts heretofore have made to the possible independent normative force of international law is to interpret domestic statutes as far as possible in conformity with treaty obligations. In cases of clear and unmistakable conflict between treaty obligations and municipal law, however, the domestic statute prevails. A similar principle applies, in attenuated form, to the interpretation of the common law.

The implementation of treaty obligations by legislation is further complicated in Canada by the federal nature of the Constitution. Section 132 of the *Constitution Act 1867* provides that "the Parliament of Canada shall have all powers necessary to perform the obligations of Canada or any province, as part of the British Empire, towards foreign countries, arising under treaties between the empire and such foreign countries". Once Canada gained sovereignty in respect of the conduct of external affairs, this provision was deemed spent. In the *Labour*

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*Conventions Case'* of 1937 the Privy Council held section 132 to be no longer applicable, and further held that the *Constitution Act 1867* did not provide for any distinct 'treaty-making' power vested in the Federal Government. It follows that in order to implement fully treaties which bear on matters of provincial competence, provincial legislation will be necessary. Normally, therefore, the Federal Government will not seek ratification of a Convention or Treaty which requires provincial action until it has received assurances from all provincial Governments that consequential legislation will be enacted.

Under the *Constitution Act 1867* the general field of "Property and Civil Rights" is given, by section 92(14), exclusively to the provinces. The bulk of the provisions of the Convention, therefore, fall under provincial jurisdiction. Depending on the outcome of negotiations currently underway with the provinces, Canada may or may not ratify the Convention, or may ratify it with reservations, or may ratify it with partial reservations. The outcome of these ongoing federal/provincial negotiations is particularly uncertain at present because of Canada's continuing constitutional amendment saga: in the wake of the failure of the Meech Lake Constitutional Accord, the country's second most populous province, Quebec, has expressed ambivalence about resuming normal federal/provincial round-table negotiations on any matters as long as its constitutional concerns are not addressed and resolved.

There are, nevertheless, a number of provisions of the Convention which fall under federal heads of power. The most relevant sub-sections of section 91 of the *Constitution Act 1867* which sets out federal powers relevant (in no particular order of importance) are: sub-section 91(6) - the Census and Statistics; 91(24) - Indians and Lands Reserved for Indians; 91(25) Naturalization and Aliens; 91(26) Marriage and Divorce; 91(27) - the Criminal Law; 91(28) - the Establishment, Maintenance and Management of Penitentiaries. To these enumerated heads of power must be added section 95, which makes immigration a joint federal and provincial responsibility. Whether the Government of Canada would seek to ratify the Convention in respect of its own constitutional jurisdiction, and pass the appropriate enabling legislation, is at this point unknown. There is, to my knowledge, no precedent for doing so, and public statements by Canadian officials suggest an unwillingness to proceed in this manner.

Notwithstanding the above, the great majority of the provisions of the Convention are already a part of Canadian federal or provincial domestic law. This is so for one of two reasons: either, the Convention imposes negative obligations on states which are already in place (subject to the section 33 override) under the Canadian *Charter of Rights and Freedoms*; or it imposes certain positive obligations on states which have already been the subject of legislative enactment (usually by the provinces).

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*Attorney-General for Canada v Attorney-General for Ontario and others* [1937] AC 326.

## Concerns in Relation to Ratification

Let me begin this section with the bald assertion (based on only the briefest conversation with low-ranking officials in the Canadian Department of External Affairs and in the Quebec Intergovernmental Affairs Department) that none of the provisions of the Convention appear to create any great substantive difficulty in Canada. Neither do they appear to require any great flurry of legislative amendments in order to bring Canadian law into conformity with the Convention. Nor do they appear to require any significant change to judicial or administrative practices. Yet, as in all international instruments imposing domestic obligations, there are certain features of the Convention which are capable of generating resistance in Canada. Critics have identified five.

To begin, there is the complex issue of legislative audits. We may well think that existing provincial or federal legislation is adequate to meet our obligations under the Convention, only to discover that some long-accepted practice, such as, Residential Training Schools for Aboriginal Canadians, infringes one of its provisions. This example refers particularly to Article 30. As was recently discovered in Canada following the enactment of the *Charter of Rights and Freedoms* in 1982, broad overriding standards, no matter how carefully one works through a legislative audit, can have unanticipated and embarrassing outcomes, once actual cases are litigated.

In addition, there is the question of national sovereignty. There are still a substantial number of Canadian politicians and jurists who have not been weaned from the notion that the nation state is the only appropriate locus of democratic political sovereignty. This concern will, no doubt, be voiced most forcefully in connexion with Articles 43 and 44. Yet Canada is signatory to (and has ratified) many Conventions with external reporting and monitoring structures. As a result, there is no present reason to suspect that this objection to ratification will be determinative. Nevertheless, the co-ordinate nature of the federal system established under the *Constitution Act 1867* gives the question of national sovereignty a particular spin in Canada. Because there is no pre-emptive federal jurisdiction as in Australia, provinces insist on making their own decisions about legislative policy. In the past they have sometimes refused to enact certain statutes for no apparent reason other than to show their independence *vis-à-vis* the federal government. Thus, even though federal/provincial negotiations are now underway with a view to getting consensus on ratification, there is no certainty that they will be successful (even should the constitutional hurdle posed by Quebec's boycott be overcome).

Furthermore, for many Canadian common law jurists at least, there is an issue relating to the form and content of the Convention. Its 'mushy language', its extraordinarily broad 'loopholes', and the absence in the Convention of a number of rights thought particularly important are three aspects of this critique. Each of these points merits some development. Unlike citizens in the United States, Canadians are not likely to object to the inclusion of economic, social and cultural rights in the Convention. They have not done so in the past, and many (although far from all) such rights are now enshrined in domestic

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legislation and, to a lesser extent, in the constitutional *Charter of Rights and Freedoms*. But the general hortatory tenor of the Convention means that '*raison d'etat*', and other policy exceptions could be used by certain states to gut the Convention of meaning in their own jurisdiction, but hold up other states to ridicule on the basis of particular domestic law which is not couched in the self-serving affirmations often found in non-common law legislation. It is unclear at this time whether such objections will actually carry much weight in federal/provincial ratification negotiations, although the recent failure of the Meech Lake Constitutional Accord (in large part on the basis of the vague affirmation that Quebec constituted a 'distinct society'), gives one pause.

A fourth concern expressed by some relates to cost. Comprehensive instruments such as the Convention require more than bare legislative action. They immediately demand intellectual and material resources. A list of rights is no more than a meaningless affirmation unless integrated into a general theory of the whole text. For example, the formula 'best interests of the child' has a rich, but equivocal meaning. It is not clear to me that there is today in Canada an adequate theoretical ground for advancing the agenda of the Convention. Furthermore, even were there such a theoretical understanding, there remains the question of resources. Most politicians (indeed most Canadians) do not at present want government to assume alone the financial burden of implementing the social and administrative structures needed to make the Convention effective. Until advocates of ratification develop and argue for a theory of social justice and of the state which captures the public imagination, the necessary resources are not likely to be forthcoming.

Finally, there is the larger policy issue which has plagued efforts to establish international recognition of children's rights since the 1924 League of Nations Declaration. Objections based on this policy issue have two aspects, neither of which seems to have been given much play in Canada so far. The less controversial objection is that children are already adequately protected in international law, and that a separate Convention would be harmful to the human-rights treaty-making process. This objection does not, however, seem to be an insuperable obstacle to ratification in Canada, where constitutional and legal pluralism have a respectable pedigree, and where (as in many countries) children have become a focus of domestic legislative policy in a like manner.

The more controversial objection is external to the Convention itself. Given the number of important issues on the world legislative agenda - war, pestilence, famine, poverty, environmental degradation, etc. - and given the traditional organization of structures of legal rights, why should children be singled out for special treatment at this time? Why should the international community take on another Convention Project when so much still remains to be done to ensure implementation of existing treaties? Here the Canadian position seems to be more ambiguous. Certain sectors in the Department of External Affairs take the public position (for domestic consumption) that ratification of this Convention does not prevent progress being made on other fronts, and indeed, if multiplying the number of 'single issue'

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Conventions actually generates greater international comity, then proceeding wherever progress is possible, without regard to some overall policy agenda, is to be preferred. By contrast, there are other sectors in the Department who argue that effective implementation of existing Conventions should precede any ratification of new Conventions. This position seems to be most prevalent among senior administrators, and can be seen in Canadian speeches delivered at the 1991 session of the United Nations Human Rights Commission. Canada's real position on this question appears to be still uncertain.

### **Opportunities Open to States Having Ratified the Convention**

Let me conclude this brief overview with a very unofficial (and highly personal) statement of steps which might now be taken by states such as Australia that have ratified the Convention, in order to promote its aims and ambitions. I have two general approaches to signal - one external, one internal. Both presume that the primary task ahead is one of political persuasion, not legal enforcement.

Externally, that is, insofar as Australia's position *vis a vis* states (especially so-called First World and Western states) which have not ratified is concerned, I have three complementary suggestions.

First, encourage other states to ratify, using all means possible. Many states such as Canada are proud of their record in supporting international initiatives, and in promoting international human rights. Australia should trade on this pride and, if necessary, embarrass these states (and speaking as a Canadian I say, especially Canada) over its failure to ratify.

Second, deploy the negotiation of bilateral agreements in fields like foreign trade and international development as a vehicle for directly promoting aspects of the Convention. A commitment such as this may have negative economic consequences for Australia (for example, missing out on a transfer of technology agreement with the United States or Japan) but if the agenda of the Convention is to be perused as a matter of public policy, at least some economic cost will have to be borne.

Third, work to stop the international arms trade, and if necessary, place a trade embargo on states such as France and the United States which are the worst offenders. The direct exploitation of children by war through juvenile military service, and their indirect exploitation through the corruption of the economy and the degradation of social services caused by disproportionate spending on weapons, makes this a high priority.

Internally, that is, in respect of steps which may be taken within Australia, I also have three suggestions.

First, immediately undertake a comprehensive legislative and administrative audit to ensure the conformity of Australian law with the Convention. Both legislation and practice (including judicial practice) must be held up to scrutiny.

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Second, recognise that making the Convention work requires political organization and action. Governments must be convinced of the priority of the Convention. In order to put one's money where one's mouth is, two options are open. Either governments must be pressured into reallocating their expenditures towards providing the necessary services; or higher taxes must be imposed. Only concerted political organization can ensure that the former is the primary route for implementing the objectives of the Convention.

Third, seek to understand causes, in addition to treating symptoms. Let me give one example of what this might mean. In Canada there are a number of studies which indicate that physical abuse of children is significantly correlated to adult stress. Are we devoting resources to identifying and eliminating the causes of adult stress? What is being done to overcome stress related to poverty, or to the numbing structure of factory assembly lines? I assume that in Australia the answer would be the same as in Canada: precious little. Yet, in this one area (and probably in several others) the ultimate victims of some of the excesses of late twentieth century industrial capitalism are children. In my view, there can be no higher social priority than attempting to discern the causes of the pathologies which the Convention seeks to overcome.

## 16. A UNITED KINGDOM PERSPECTIVE

Michael Freeman

The United Kingdom has signed, but has not ratified the United Nations Convention. There is a pledge to ratify given in Parliament<sup>1</sup> and repeated several times by Ministers to committed audiences. It is therefore, expected that in due course the United Kingdom will ratify the Convention. It is however, likely to make a number of reservations on such matters as immigration and nationality, juvenile custody, employment, termination of pregnancy and children's hearings in Scotland.<sup>2</sup> The Government believes it has identified these as the sole areas where commitment to the Convention will raise problems.

Others, including myself, are less optimistic.<sup>3</sup> Our former Prime Minister, Margaret Thatcher, could state that "... children come first because children are our most sacred trust",<sup>4</sup> but her Government presided over a steep rise in child poverty and deprivation. The same Government (it matters little that another Prime Minister is in charge) could also boast (though it did not shout it too loudly) that the number of children living in families with incomes around the supplementary benefit standard (that is subsistence level) increased between 1979 and 1985 by 49 percent.<sup>5</sup> The number of homeless households has doubled since 1981.<sup>6</sup> One of the most interesting housing projects of the eighties was 'Cardboard City',<sup>7</sup> nestling beneath the arches of the National theatre, an eyesore and an affront to human dignity, eventually demolished on governmental orders because it was feared it might affect its election prospects. There has been a dramatic increase in the number of young people who are homeless and living rough on the streets of large cities.<sup>8</sup> And though there has been a decline in infant mortality, rates have declined more slowly than in a number of other comparable countries. They are still high in comparison with for

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1 Written Answer, *Hansard*. 21 March 1991. col 192-193.

2 Listed in *Id.*

3 A comprehensive analysis of the shortfalls in UK laws and practices can be found in Newell, P, *The UN Convention and Children's Rights in the UK* (London, National Children's Bureau, 1991).

4 George Thomas Society Inaugural Lecture, 17 Jan 1990.

5 28.6 percent of all children were living around this standard. This figure is derived from official Department of Social Security statistics.

6 Bradshaw, J, *Child Poverty and Deprivation in the UK* (London, (National Children's Bureau, 1990), 40.

Brilliantly satirized in Tony Harrison's play *The Trackers of Oxyrynthus* performed at the National Theatre in 1990 and again in 1991 and published by Faber.

See Gosling, J, and Diarists. *One Day I'll Have a Place of My Own* (Central London Social Security Advisors' Forum and Shelter, 1989) estimating that over 150,000 experience homelessness every year as a result of leaving home or care and being unable to find or afford accommodation. Changes in social security rules that removed entitlement for 16 and 17 year olds and reduced it for other young people have aggravated this situation: Craig, C. and Glendinning, C. *The Impact of Social Security Changes : the Views of Families using Bamardo's Pre-School Services*, (London, Bamardo's Research and Development Section, 1990).



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example, France, Italy and Sweden.<sup>9</sup> "Causes of death which can be regarded as 'preventable' ... cause infant deaths in Social Class V at about three times the rate for Social Class 1."<sup>10</sup> When data like this is produced (and it could be multiplied several times over), it is difficult to see how the United Kingdom can ratify even so fundamental an article as Article 3 of the Convention. The "best interest of the child" a "primary consideration" in all actions concerning children (Article 3,(1)) States Parties to "undertake to ensure the child such protection and care as is necessary for ... well-being" (Article 3(2)). It is clear the UK law, the policies and practices of the Government and institutional structures fall far short of such ideals. Or, to take another example, to what extent does the UK comply with Article 4 which requires commitment "to the maximum extent" of available resources to further 'economic' rights ? How could a Government committed to a radical (*sic*) or sick (according to radicals) version of income redistribution - from the poor to the rich - possibly comply with this provision?

There are many more Articles with which the United Kingdom does not comply, either wholly or partially. England has a new Children Act, passed in 1989, and about to be implemented on October 14, 1991.<sup>11</sup> Government Ministers, often misreading or misconstruing the Convention or the Act or both, have suggested that the new Act goes further than the Convention, the implication being that legislation in England (this Act does not apply to Scotland) achieves virtually all that is necessary. To see the ignorance inherent in such assertions it is only necessary to compare Article 3 of the Convention with section 1 of the Act. Both exalt best interest principles but, whereas the Convention requires the best interest of children to be a primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the English Act states that when 'a court' determines a question relating to a child's upbringing or the administration of his or her property, the child's welfare is to be the paramount consideration. Admittedly, 'paramount' is stronger than 'primary' (which suggests other considerations have value), but the scope of the provision is clearly much narrower than that in the Convention. Despite this Virginia Bottomless, the Minister of Health, and an ex-social worker, can vaunt this section as implementing Article 3.<sup>12</sup>

Ratifying the Convention, even if there were no reservations and even were the laws and practices of the United Kingdom to be brought into line with it is, however, little more than a half-measure. A statement of rights in itself is nothing more than an exercise in symbolic politics.<sup>13</sup> Children's lives are not improved by the passing of a Convention. Nor will they be ameliorated by its adoption by ratification in any particular country. Things have to happen as a result of a Convention and congratulatory speeches by Ministers are not one

9 National Children's Home, *Children in Danger* (London NCH Factfile about Children Today. 1989).

10 OPCS, Occupational Mortality 1979-80 and 1982-83.

11 For a recent critical assessment see Packman, J, and Jordan, B. "The Children Act: Looking Forward, Looking Backward", 21 *British Journal of Social Work* (1991), 315.

12 At various conferences in 1991.

13 Cf Gusfield, J, *Symbolic Crusade* (1963).

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of those things. Rights without services are meaningless: services without the commitment of resources cannot be provided. Some of the noblest ideals of the new English Children Act, including the new emphasis on services for children 'in need' and their families, may founder because finding the necessary resources has not assumed a sufficient priority.<sup>14</sup> Whatever its protestations, there is no indication that the United Kingdom Government is prepared to commit more money for children in order to make the Convention have a meaningful impact in children's lives than it has in the past. There can be no better example of this reluctance than the battle it fought last year to resist demands that child benefit (a non-means tested allowance provided for each child) be raised in line with inflation. It took a groundswell of opposition to convince the Government that the benefit ought to be raised, and, then, churlishly, it effected the compromise of raising it for the first child in the family only.

But in any country committed to rights something else is required: the establishment of organisational structures to monitor laws, practices, policies, institutions and to represent the aggrieved. This is not a lesson yet learnt by the United Nations, whose structure for surveillance of the Convention is far from adequate. A further comment on this is reserved for the end of this paper. How is the United Kingdom responding to this question?

An equivocal answer is merited. If by the United Kingdom is meant 'the Government of the United Kingdom' the answer is 'not at all'. True, under the Children Act new structures for representation and complaint are being introduced but these relate largely to children in care.<sup>15</sup> Otherwise, no new institutions have been established or are planned. Indeed, one was disbanded in 1981.<sup>16</sup> Unlike Norway or New Zealand or Costa Rica there is no intention of introducing a children's ombudsman or a child impact statement, both of which ideas I recommended in 1987,<sup>17</sup> or a Minister of Children,<sup>18</sup> which was advocated by Brian Jackson somewhat earlier.

On the other hand, there are a number of initiatives which are being taken in the United Kingdom. A unit, called the Children's Rights Development Unit, is about to be established. This is an independent, non-profit organisation with charitable status established in 1991, initially for three years, to promote the implementation in the United Kingdom of the UN Convention on the Rights of the Child. It has four aims:

To identify the implications and promote the fullest possible implementation in the UK of the UN Convention ... and other related international instruments.

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14 It is worrying that local authorities are already redefining statutory concepts to fit with available resources: 'in need', for example, becoming 'at risk'.

15 See s. 26.

16 The Children's Committee, deemed by the Government, in its test of the day, not 'clearly essential'.

17 "Taking Children's Rights Seriously", 1(4) *Children and Society* (1987), 299.

18 *New Society*. 15 Jan 1976.

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To ensure that central and local government recognise the Convention as setting minimum standards for all children in practice as well as in law.

In this context to collaborate with other relevant organisations - voluntary, statutory, professional and private - with concerned individuals, as well as with children and young people themselves, to identify priorities for policy development and practice improvement and to act as a catalyst for such activities.

To monitor the implementation of the Convention in the UK, including the Government's obligations to make the provisions of the Convention widely known, and to report on progress towards implementation to the UN Committee on the Rights of the Child two years after ratification.

The members of the Unit are drawn from voluntary child care and children's rights organisations throughout the UK. The Unit has, rightly I believe, emphasised Article 12 of the Convention (arguably the most important provision in the Convention). It accordingly wishes to involve young people in promoting the Convention. It intends to set up working groups of young people with relevant experience to contribute towards determining priorities, policies and strategies in relation to specific Articles of the Convention. It is committed to disseminating the voice of children and young people on the implications of the Convention, as well as to supporting existing self-advocacy organisations amongst young people, and to encouraging the growth of new ones.

A further focus of its attention is the creation of a governmental Children's Rights Commissioner, an independent statutory office. This has been advocated separately in a new booklet by Martin Rosenbaum and Peter Newell entitled *Taking Children Seriously*.<sup>19</sup> The purpose of the Commissioner, as envisaged by Rosenbaum and Newell, would be to promote children's rights throughout the UK by:

influencing policy makers and practitioners to take greater account of children's rights and interests;

promoting compliance with the minimum standards set by the United Nations Convention on the Rights of the Child and other relevant international treaties or agreements;

seeking to ensure that children have effective means of redress when their rights are disregarded.

The main functions of the Commissioner would be: to highlight ways in which current policies or practices were failing to respect rights and interests of young people; to conduct formal investigations; to analyse and comment upon proposed government policies (in particular

19 Published by the Calouste Gulbenkian Foundation, 1991.

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to ask government departments to produce a 'child impact statement'); to conduct or commission research linked to policy development; and to monitor the use by children of complaints procedures. But the Commissioner would not deal with individual complaints. This may be wise but it draws attention at the same time to the need to establish additional institutions to receive complaints and seek redress on behalf of children. The case for a Children's Rights Commissioner is strong: other groups, such as ethnic minorities, women, and the mentally ill already have national statutory bodies which promote their rights. Policies affecting children cross departmental boundaries: co-ordination, already recognised in some areas such as child abuse, has to be intensified if the lives of children are to be improved.

It is worthy of note that a recent Scottish committee, the Child Care Law Review Group, a multi-disciplinary body set up by the Secretary of State for Scotland to recommend improvements in child care law, has had similar thoughts.<sup>20</sup> It has put forward the idea of a Child Welfare Commission to be "concerned with the whole range of public services which impact on the lives of children - care, education and health in particular". The details of the proposal are sketchy, but the thinking is clearly close in conception to the proposals for a Children's Rights Commissioner. The Secretary of State for Scotland is currently considering the proposal. It would be premature to predict his conclusion.

Another suggestion made in Britain in the past was for a Minister of Children. One problem with such a notion is that with cabinet responsibility so entrenched the Minister would necessarily be committed to Government policy, with the Minister concerned as much with excusing Government policy as making it.<sup>21</sup> Calls for a Minister of Children are not often heard now, though the Labour Party is committed to establishing a Minister for Women.

A vigorous debate is, it will have been observed, being carried on in the United Kingdom. This augurs well for the future, though the immediate prospects are not as good. If the lives of children are to be improved, it is essential that children's rights are better promoted. But, as I have argued, rights without remedies will continue to lack bite. If the world community is truly committed to children's rights, it ought to consider the possibility of children, and institutions representing children, being given the capacity to take their own states to court when aggrieved by actions (or inactions) of their state in breach of the UN Convention. The model of the European Convention on Human Rights, with a Commission and a Court, and the right, where conceded, of individual petition, is one worth considering. It is often said that the way a society treats its weaker members is a good barometer of that society.<sup>22</sup> The same can be said of the world community. The world has made a gesture, but only a gesture, in passing this Convention. It must explore ways of putting it into practice.

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20 *Review of Child Care in Scotland*, Report of a Review Group appointed by the Secretary of State, HMSO, 1990.

21 Rogers, R, *The Guardian*, 2 Oct 1979.

22 Freeman, M D A. *The Rights and Wrongs of Children* (London. Pinter, 1983).

## 17. LOOKING AHEAD: STRATEGIES FOR MONITORING COMPLIANCE

**Elaine Fishwick and Michael Hogan**

### **Introduction**

#### **1. The Project**

The Public Interest Advocacy Centre has been engaged as a consultant by the Human Rights and Equal Opportunity Commission (HREOC) and the Australian Council of Social Services (ACOSS) to conduct a six-month review examining the implications of the UN Convention on the Rights of the Child for Australian law and practice relating to children.

Work began in January 1991 and as of September, is still in progress. The project was so potentially open-ended that it was necessary to target selected issues for consideration and to re-assess the capacity of the project to provide an in-depth review of all aspects of law, policy and practice in all Australian jurisdictions. The following paper provides some general impressions of the current Australian position with respect to the Convention and canvasses possible strategies and options which could be adopted in the future to monitor compliance.

It is hoped that the final report from the project will be a spur to further research and work in this area, and that it will prompt serious and continued consideration of the Convention, its implications for law, policy and practice in Australia, and the proposals for monitoring compliance.

It is important to stress that the views expressed in this paper are those of the consultants to the project and are not to be regarded as HREOC/ACOSS policy positions.

**2. A i m s** As stated above the aims of the project are very broad.

They are

to:

examine law and practice relating to children, particularly child and adolescent welfare legislation, care and protection, and juvenile justice, and other relevant areas in each Australian jurisdiction, including identifying areas of similarity and differences among jurisdictions;

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assist in the development of an understanding of the Convention, and an understanding of what it means in the Australian context;

identify areas of concern regarding legal and practical breaches of standards set out in the Convention;

- \* assess the extent of compliance with the Convention;

identify issues requiring further attention, investigation and action;

- \* strengthen the national network of organisations and individuals concerned with the implementation of the Convention in Australia;

put forward options for structures and processes for on-going consultation, monitoring and implementation of the Convention; and

- \* assist in developing the human rights dimensions of a national agenda for children, particularly in the area of child welfare and juvenile justice.

### **3. Strategies**

To achieve these aims a number of strategies were developed. They included:

- \* distributing a detailed questionnaire to peak Non-Government Organisations (NGOs);
- \* establishing an expert reference panel which has representatives from national groups (who have interests in children's issues), academics, and representatives from ACOSS and HREOC;

collating resources, data, papers, books from Australia and overseas relating to the Convention;

establishing and conducting consultations with representatives from both the government and non-government sector and with academics with interests in the area;

- liaising with the National Secretariat of Social Welfare

Administrators; and

- participating in seminars which are of relevance to the project.

### **4. Success**

Non-government organisations have been extremely helpful to the project, giving a great deal of time and providing invaluable information about their perspectives on the current and future compliance of Commonwealth and State Governments with the Convention. The information from NGOs has been collected through

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written and oral responses to the project's survey and through the consultation process.

Unfortunately, there have been varying degrees of co-operation from Commonwealth Departments and State Governments. This is partly due to the fact that the Convention remains a very sensitive and emotive issue, but also due to the lack of information and knowledge about it.

The consultation process with government officers and NGOs has proved useful in:

- \* reducing the sensitivity amongst some officials about our project;
  - giving officials and NGOs further information about the nature and requirements of the Convention, especially the timetable for reporting;
- getting officials and NGOs to think more seriously about the Convention's implications;
- getting the Convention on the agendas of existing advisory and co-ordinating bodies at State and national levels; and
- obtaining information, ideas and reports more quickly than might otherwise have been the case.

### **5. General Impressions**

There are a number of general points which have emerged out of the consultations which are worth highlighting:

that for the most part Australia complies with the Convention when taken as a statement of minimum standards; crucially the strongest exception relates to the situation facing Aboriginal children;

- the publicly expressed official view is that Australia complies with the Convention, and all is well;
- the official view in some quarters acknowledges that Australia has a few problems in establishing compliance;

the private view of quite a few officials is that there are some major questions about compliance;

- there seems to be a political and bureaucratic inclination to put the Convention back in the bottom drawer, or to use state/federal demarcation disputes as a means of warding off action or discussion;

few people can be said to have any developed notion of what might be the implications and uses of the Convention;

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- \* little effort has gone into public, professional or official education and information about the Convention;  
few people have had responsibility for seriously considering the signing, ratifying, reporting and implementing of the Convention;  
further it has not been clearly established who has executive responsibility for the implementation of the Convention;  
agencies are not sure where to start;  
there has been little inter-departmental or governmental co-operation in examining the Convention;  
there is no national 'vision' of what should be done; and  
there is a commitment among most NGOs and some government officials to address the articles of the Convention to identify problems and improve laws, policies and practices.

## **Implementation and Compliance**

### **1. Constraints on Compliance**

A detailed report on the discrepancies in law, policy and practice which exist in relation to the Convention will form the basis of the final report from the project. There are also some more generalised constraints which inhibit full compliance:

- lack of political will
- systemic racism
- persistence of social inequalities
- lack of statistics/resources  
present difficult economic situation
  
- public/private division, privatisation of services
  
- lack of uniformity of legislation, policy and procedures
- underdevelopment of standards/protocols
  
- lack of comprehensive advocacy services
- uneven levels of accountability - legal, political, managerial, procedural
- inconsistencies in and inadequacies of case planning/review  
mechanisms
  
- divided community opinion



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### **2. A National Agenda**

The central problem which needs to be faced here is how do we give due regard to children? It is clear that a more national approach is highly desirable. This does not necessarily mean the Commonwealth taking over, it means that matters affecting children are matters of national interest.

It seems evident that the need for a national plan/agenda/strategy for children is a primary matter for consideration, due to the fact that:

- \* we do not have a national 'vision' of the place of children in Australian society;
  - there is little public consensus as to what constitutes good relations with and situations for children, or what is the 'best' law, policy or practice;
  - the mainstream political agenda does not include children's issues;
  - \* children's interests, needs or rights are not routinely taken into account in public policy, and are frequently ignored;
- we know little of the implications for children of many public policy decisions; and
- we fail to recognise children as our most vital resource and invest in their future.

There are a number of precedents for national strategies:

- \* *Towards a Fairer Australia: Social Justice Under Labor*
- the *Social Justice Strategy for Youth*
- the *National Agenda for a Multicultural Australia ... Shaping our Future*
- the *National Environment Agenda*
- \* the *National Women's Agenda*
- and national plans for railways, housing, trees, etc.

As an example of a step in this direction, in New Zealand, the Office of the Commissioner for Children recently produced a report of a seminar entitled, *Toward a Child and Family Policy for New Zealand*.

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In consideration of these issues, a series of questions needs to be addressed:

- Should there be a national agenda for children?  
Is there a need for a separate agenda for Aboriginal children?
- What might these contain?  
Who should have ultimate executive responsibility for the national agenda and for the Convention: the Department of the Prime Minister and Cabinet?
- What role should the Aboriginal and Torres Strait Islander Commission play?
- \* How should the responsibilities of all government agencies be incorporated?  
Should a national authority be established such as an Office for the Child?
- Should a national agenda include proposals for national legislation?  
Should a national agenda include national programs?
- Should a national agenda incorporate a greater emphasis on education, information and consultation in the community about the Convention?

### **Potential Mechanisms to Ensure Compliance**

As stated earlier the focus of this paper is to canvass options of strategies which could be utilised to give effect to the Convention in particular referring to the roles of different agencies which could potentially contribute to this process. These options have been developed by examining international recommendations and policies, analysing domestic commentaries and resources and from views expressed by government and non-government organisations, and individuals during the project's consultations.

These options fall into five categories:

Monitoring bodies

- \* Judicial enforcement

Administrative mechanisms

- Parliamentary oversight
- \* Advocacy

- Role of NGOs

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### **1. Monitoring Bodies**

As indicated above in the discussion about factors which inhibit compliance, comments were made in the consultations about the need for legislation, policy and practice relating to children to be more accountable, and more open to scrutiny for appropriate remedies to be provided. A number of suggestions were made about the importance of domestic monitoring of compliance with the Convention and the situation of children. There was general agreement about the need for official yet independent watchdogs. ACOSS and NAPCAN have called previously for the appointment of a Children's Commissioner.

At the moment, the development of monitoring bodies in Australia is very uneven. South Australia has the only specialist, statutory children's rights monitoring body - the Children's Interests Bureau. Otherwise, reliance is placed on general bodies - at the Commonwealth level there are the Human Rights, Race and Sex Commissioners at HREOC; in most States and at the federal level there is an Ombudsman, and in a few States, there is an Equal Opportunity Commissioner or Anti-Discrimination Board.

There are many issues to be raised in this context:

- should existing monitoring bodies be utilised or new ones established?
- should generalist monitoring bodies be utilised or specialist ones (ie solely concerned with children)?

what should there be at Commonwealth and State levels?

should there be a separate monitoring body for Aboriginal children?

The options for establishing specialist monitoring bodies include:

- \* a Commissioner for Children;
- \* a Children's Ombudsperson;
- \* a Children's Bureau.

The appropriate option depends to a large extent on 'local conditions' in each jurisdiction taking account of the experiences of existing bodies. Australians need to determine whether there is a need for such bodies and what form would be most appropriate.

### **2. Judicial Enforcement**

The Convention does not stipulate what domestic remedies, including judicial remedies, should be introduced when breaches of the Convention occur. It should be noted that only breaches by

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Government are referred to here, since it is upon them that the obligations of the Convention fall.

Australia has a poor record as far as judicial remedies for human rights breaches are concerned (we only have to look at its record in relation to Aboriginal and Torres Strait Islander people). This is partly due to the lack of a constitutionally-entrenched Bill of Rights, partly to the inadequacy of the common law in protecting human rights, and partly to a lack of political will. An attempt in 1974 by Lionel Murphy to introduce a *Human Rights Bill* with judicial remedies was defeated. Unlike the people of European countries, Australians do not have recourse to a regional Court of Human Rights. The closest we come is with the Tribunal established under the *Human Rights and Equal Opportunity Act*, to which allegations of breaches of the *Race Discrimination* and *Sex Discrimination Acts* can be taken.

In addition to the uncertainty of how and where to take breaches of the Convention, in our consultations people re-emphasised that courts are generally inaccessible, alienating and sometimes damaging for children; that in all jurisdictions in Australia there are rules limiting the capacity of children to initiate civil court actions - it usually requires a 'tutor'; and that there is little provision for class/group/representative actions on behalf of, or by, children.

At Commonwealth and State/Territory levels, a number of Issues need to be considered:

- \* whether breaches of the Convention should be actionable and in what forum;
  - whether special remedies are required for children;
  - whether special rules are required to make existing judicial remedies more accessible;
- \* whether general legal reforms such as class action procedures, product liability reforms, etc. would benefit children;
- \* whether courts and tribunals should be required or empowered to have regard to the principles and standards in the Convention; and
- whether courts have the expertise to deal with children's matters.

### **3. Administrative Mechanisms**

During the project consultations the need for public administration to be more sensitive, accessible and accountable to children was a recurring theme. It appears that there is considerable disparity in policies, programs and practices across Australia. There is frequently a large gap between the rhetoric relating to quality and access to services and the reality for children. As outlined above administrative 'checks and balances' seem to be very underdeveloped in relation to children's services. The project has discovered that so far

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there have been very few public agencies which have thoroughly and rigorously considered all the implications and possibilities of the Convention. In the few cases where this was not so, it was often due to the initiative and interest of one individual.

There are a large number of mechanisms that could be used to give administrative effect to the Convention:

- incorporation of the goal of achieving compliance with the Convention into organisational 'missions' and plans;
- reference to the Convention in the development of performance measures;
- the development of specific standards, minimum rules, Codes of Practice, etc;
- greater cross-jurisdictional co-operation in program review and development;
- adoption of rigorous case-planning approaches;
- better co-ordination of service delivery across agencies;
- a more rigorous approach to institutional review mechanisms such as Official Visitors, Inspectors, etc;
- a greater commitment to children's 'voices' and participation (as consumers/clients/users) in decision-making processes;
- greater support and resourcing of client advocacy services;
- ensuring appropriate staff training and professional development, drawing explicitly on the Convention as a key reference tool;
- a greater commitment to consumer evaluation techniques;
- use of the Convention as a reference tool in management audits and reviews;
- ensuring access to credible complaint mechanisms; and ensuring access to administrative appeals mechanisms. It

must be considered which, if any of these, might be fruitful avenues to pursue.

#### **4. Parliamentary Oversight**

There are strong grounds for suggesting that children in Australia have not had the full benefit of effective parliamentary oversight of their situations, interests or rights. There have been a few select or standing committee reports focusing on children, but nowhere a comprehensive or on-going parliamentary programme of review and

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investigation. The only precedent for an ongoing parliamentary committee devoted to children is the Western Australian Parliamentary Standing Committee on Youth Affairs. On an informal level, there is a Parliamentary UNICEF group in the Commonwealth Parliament.

Full and effective use of the Convention in Australia will depend to a large extent on political commitment. Parliamentary oversight of the Convention could be a most beneficial strategy to indicate and build on that commitment.

In Britain, a number of possibilities for creating some parliamentary structures to monitor the Convention are under discussion: a House of Commons Select Committee and an All Party Children's Affairs Committee. The British Parliament already produces a Children's Hansard which records debates and papers relating to children.

There are a number of issues that are relevant:

whether a Parliamentary Committee on Children, on the UN Convention, or to oversight the possible Children's Commissioner, Children's Bureau or Children's Ombudsman is necessary;

whether there are existing Committees which could take on a brief to review implementation and compliance with the Convention;

whether parliamentary consideration of the impact of Bills upon children could be improved, for example, through 'Child Impact Statements'.

## **5. Advocacy**

**Advocacy** is a crucial strategy for accessing, using, promoting and protecting children's rights. Whilst this term is rather broad, and notwithstanding that there are many models of advocacy, the HREOC/ACOSS project will be addressing issues associated with adequate advocacy services for children.

In the consultations, most NGOs and some officials and individuals highlighted the need for specialised advocates for young people at state and federal levels to represent children in all aspects of decision-making, from case-planning to policy development.

Case studies provided to the project demonstrated that advocacy is vital in order to achieve favourable and just outcomes for children and young people. Aboriginal groups pointed out that there is a need for statutory provisions in order for governments to be obliged to take the views of and representations on behalf of young people and children into consideration when making decisions about their futures.

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The types of advocacy that need to be considered include:

the roles of statutory-based advocates,

- the roles of independent advocates,
  - \* NGOs as advocates,
  - \* service providers as advocates,
- children and young people as advocates for themselves, and
- \* the co-ordination and quality of advocacy.

A key problem is the lack of programs at national and state levels to ensure comprehensive and competent advocacy for children and young people. This itself raises questions of resourcing, training, accreditation, and monitoring. The gaps and inadequacies of existing services have been pointed out many times over the last decade but as yet have resulted in little concerted action by governments, Legal Aid Commissions, professional bodies or service departments.

Another matter is the lack of integrated children's and youth advocacy services, covering a range of areas - housing, employment, welfare, courts. The best examples of such services are the Youth Advocacy Centre in Queensland, the Burnside Youth Service in Campbelltown (New South Wales), Aboriginal Legal Services and the Aboriginal and Islander Child Care Associations.

Furthermore, there are no national networks of children's and youth advocates, and those at state levels are underdeveloped in most jurisdictions - the Victorian Youth Advocacy Network is the exception.

Again we have to raise the question whether greater provision for advocacy should also be part of a national agenda for children.

### **6. Role of Non-Government Organisations**

NGOs have played a critical role to date in securing early signature and ratification of the Convention by Australia. Likewise, they will have a crucial role in its implementation, reporting and monitoring. NGOs are a key element of what a report by UNICEF refers to as the 'broad coalition for children'.

At the moment, there is a loose network of peak and professional bodies representing various sectors of children's services or programmes at a national level. There are some sectors where there are not yet national groups. Currently, there is no broad-based and representative umbrella body linking concerned and interested individuals or organisations in a specifically designated children's rights or interests organisation.

To obtain optimum participation and effectiveness from NGOs in reporting and implementation processes, consideration needs to be given to the need for and feasibility of a national organisation or



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network. Attention should also be directed to how links and strategies between Aboriginal and non-Aboriginal agencies should be developed.

Moves were initiated in 1989 to establish an Australian Section of Defence for Children International (DCI), an international movement based in Geneva with sections in over 50 countries, but these have not yet come to fruition. At a recent Adelaide conference, the idea of a Children's Electoral Lobby was floated.

At an international level, the NGO Group for the Convention (convened by DCI) has set up a special task force to examine proposals for an International Coalition of National Children's Rights Committees.

The potential constituency of such a group in Australia is very large. There are many sectors relating to children: organisations of service providers, professionals, advocates, activists, parents, etc. These groups exist at national, state, regional and local levels. Some have broad interests, while others are specific or single-issue oriented. Now that the Convention has been ratified, and the Commonwealth must assume more interest in children, all these people and groups have a greater national commonality of interest in children in Australia than ever before.

How should these issues be dealt with in Australia?

## **7. Role of Children and Young People**

In keeping with the principles of the Convention all of the above options need to incorporate an evaluation of the role of children and young people in the decision-making process and in their development and administration.

## **Conclusions**

There are many important and urgent matters which need further detailed consideration to ensure full and effective Implementation of the Convention on the Rights of the Child. This paper has attempted to raise questions about strategies and options. The report of the HREOC/ACOSS project will seek to provide some directions for the future as well as examining the present situation. It is hoped that it will be a spur to further debate and action concerning implications for transforming the Convention into practice in Australia, and ensuring the well-being of all children.

**18. THE LOCAL LEVEL APPROACH:  
SOUTH AUSTRALIAN CHILDREN'S INTERESTS BUREAU**

**Sally Caste11-McGregor**

I will begin by citing a letter. It is a bureaucratic letter, and it is rather boring. But it has significance.

The letter is from the Department of Immigration, Local Government and Ethnic Affairs. It reads as follows:

Dear ...

I refer to your application for an extension of stay in Australia as a visitor.

Applicants for visit visas are expected to apply overseas for the full period of intended stay in Australia. The application form contains advice to this effect and applicants, when applying, sign a declaration that they will depart at the conclusion of the authorised visit period.

Generally, visitors are granted a stay of six months in Australia. To be granted a further stay in a visitor class you must:

- have complied substantially with any conditions attached to your visitor visa or entry permit: and -
- have compelling personal reasons for seeking for (*sic*) extending your stay, or
- be seeking an extended stay for the purposes of tourism, or
- be seeking an extended stay for the purposes of business negotiations or arrangements.

On 5 June 1991 you applied for an extension to enable you to stay with your father and step-mother until their baby was born in November 1991 and to see more of Australia.

You have failed to satisfy the requirements of Migration Regulation 120 in that you have been unable to establish compelling personal reasons which would warrant this department granting you a further temporary entry permit.

In addition you have failed to abide by your conditions of entry as you have studied during your stay in Australia.

I am sorry to inform you that your application to extend your stay in Australia has not been approved.

There is no right of review.

Your temporary entry permit has expired, you are now required to make immediate arrangements to depart Australia. You should notify this office of your departure arrangements within seven (7) days from the date of this letter when your passport will be returned to you.

Yours sincerely

It may or may not surprise you to learn that this letter was sent to a twelve-year-old girl, a British citizen, who was visiting her father, an Australian citizen, in Australia. The girl's step-mother approached the Bureau and requested assistance to explain Immigration

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Department procedures, and to ask for assistance in keeping the child in the country. The Immigration Department had threatened to take the child into custody unless a \$50 visa extension fee was paid forthwith. If not paid, the child was threatened with deportation. This situation had arisen because the family had originally been given conflicting information about the date the visa expired. So how did we, a local Institution, respond to this crisis and protect the child's interests? First, the response had to be immediate as custody and deportation were imminent.

The only way out for the family was to pay the \$50 visa renewal fee even though it was not responsible for the initial confusion.

An exhaustive series of negotiations ensued with Immigration Department officials, the South Australian Attorney General's Department, a constitutional lawyer and the Legal Services Commission to clarify the information at hand, to ascertain the validity of the Immigration Department's proposed action and to put a case for the child to stay. The Bureau also facilitated contact between the family and the Immigration Department in Canberra and last, but not least, provided emotional and practical support for a family in distress.

We learned that the family had been given three different dates on which the child had to be deported, and were quite confused about where they stood. It became clear that the child needed representation in her own right and pursuing this was in itself problematic. The family was forced to seek private legal advice due to the urgency of the child's plight, and the lack of response from the Department in question. We were against the family having to pay the \$50 visa extension fee as it was incurred through no fault of their own.

We also learned that to change one's status from illegal Immigrant to a legal visitor you have to leave the country and re-enter it! You cannot, we were told, change your status while in the country. For this particular child this would have meant being returned to a mother in England who had allegedly abandoned her, and separating her from her father who was also her legal guardian.

The Executive Officer eventually rang the office of the Minister of Family and Community Services to whom the Bureau is responsible and requested active intervention on behalf of the child. This occurred and eventually the Immigration Department reconsidered its position. This advocacy on behalf of the child took the best part of three days.

The immediate crisis resolved, we then looked at the implications of the Immigration Department's decision for other children and analysed the human rights issues involved. Apart from the lack of sensitivity as illustrated by the original letter, no attempt was made to engage legal representation for the child. We became her advocate. In 1988, in another highly political matter involving the deportation of the parents of two Australian-born children, the Children's Interests Bureau asked the Department of Immigration what steps it took to ensure the independent representation of children in immigration decisions involving children. There were none. We reminded them of the article in the then United Nations draft

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Convention on the Rights of the Child which emphasised the child's right to be represented in legal and administrative proceedings. Now the Convention is a reality and Article 12 states this principle clearly. We are in the process of asking the Department of Immigration what it intends doing to implement Article 12.

But this little girl's crisis raises other critical questions. How could her interests and views be given to the Department? Who would act as a 'next friend' to secure her representation? Who would pay? Who, apart from ourselves, recognised that this child had independent interests which had to be articulated to those in authority? What is the point of having a 'right' as enunciated in Article 12, if no remedy exists when that right is infringed, or if the bureaucratic processes imposed in the pursuit of the remedy are so cumbersome and unresponsive as to make the right itself almost meaningless? What attention, yet alone priority, have governments given to funding independent youth /children's legal centres? How many lawyers are there in Australia who have the training, commitment and skill to represent children?

These are among the questions that the Children's Interests Bureau will put to a meeting, convened by the South Australian Minister of Youth Affairs, which will discuss the need for, and structure of, a Youth Legal Centre. We will argue that essential components of child advocacy are:

- \* separation and independence from any government agency;
- \* a willingness to serve the child continuously in any legal or administrative process;
- the power to pursue and achieve the interests of the child;
- \* the determination to follow matters through by review and as an independent observer; and
- \* the willingness and ability to work co-operatively with non-legal professionals.

The determination to pursue matters to secure a beneficial outcome for the child has become the hallmark of the Bureau's working philosophy. We do this notwithstanding that our statutory monitoring and reviewing function is officially limited to the State Department of Family and Community Services. This situation could well change when new legislation establishing the Children's Interests Bureau under its own separate Act is introduced into State Parliament. In the meantime we justify our wider involvement by taking a very broad interpretation of Sections 26 3(a) and (b). (see Appendix 1 at the end of this chapter).

The following example of Bureau intervention in a non-welfare matter illustrates how practices and policies can be changed and made more child-focused and responsive.

The matter involved a complaint by parents about an alleged physical assault of their nine-year-old child by a teacher. A trivial

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incident in the classroom had escalated to the point that the teacher allegedly used physical force to restrain the child who had also been sat on. A subsequent visit to the doctor confirmed bruising. Other parents and children who witnessed the incident were upset, and one parent reported the matter to the Department for Family and Community Services.

Further contacts with the parents, who were seeking redress for what had occurred, gave us cause to be concerned about the school's response. The school had adopted a collegiate approach to decision-making and its Executive had decided that efforts be made to reconcile the child and the teacher. It also transpired that the teacher had written to all parents of children attending the school to give his version of what had happened; some aspects of this were disputed by the parents.

From a child's rights perspective we identified the following issues that needed action:

- \* the lack of a behaviour management policy which respects the dignity of the child;
- \* the absence of any clear accountability or complaint structures which could settle grievances;
- lack of regard for basic rights to confidentiality.

We wrote to the Non Government Schools Secretariat voicing our disquiet and our letter was in turn referred to the Non Government Schools Registration Board, the body that monitors educational policies in the independent school sector. The issues we raised were taken up by the Board with the school. In a letter from the Board we were advised that "the problems identified ... were recognised and were being addressed by the school through a re-definition of their committee roles and structures, together with a revision of policy and procedures for handling such matters in future".

I have given just two examples of the sorts of children's rights issues the Bureau staff take up. There are many more: the child who complained that her lawyer, appointed by the Family Court, was not listening to her views about access; the mother of a hearing-impaired child who needed help to apply for a disability allowance; the mother in prison who wanted to see her baby; and the teenage boy who had been sexually abused, and was unhappy with the way the police had prepared his statement. In every case we do our best to negotiate an outcome that is satisfactory to the child. In the process we try to humanise the bureaucracies with which parents and children have to deal. We have found that parents are often determined and tireless advocates for their children, which should reassure those who perceive the notion of children's rights as being confrontative and conflicting.

I am often asked what it is that makes the Children's Interests Bureau effective in its advocacy role. While we have not been subject to any objective review as to our effectiveness or otherwise, we suggest that the many public contacts (often by word of mouth), the requests to

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sit on major committees and working parties, and the many requests to talk about children's rights indicate the value of our work. I have identified some of the elements that make the Children's Interests Bureau an effective advocate for children;

- \* The Bureau has a unified, philosophical focus. We are there for the child. This does not mean that we are against parents or others but our focus must be the child.
- \* We attempt to emulate the best standards of a University Department by having top-class academics and others as members of the Bureau. We are not experts on everything. We do, however, seek out advice from those qualified to give it when we need it. Thus, in our submissions and policy statements, those members of the Bureau with an expert competence in the subject are key advisers and contributors.
- \* The Bureau is an unusual combination of research and 'hands on' practice. We do our best to keep up to date with research in child-related areas overseas and nationally. This is particularly necessary in the child protection field, where the Bureau's Child Advocacy Unit has a specific advocacy function in relation to children in the State care system, and in child advocacy developments. It is important that we are well prepared so that when an issue arises we do not need to reinvent the wheel. We also make our knowledge and information available to others and recognise the knowledge and expertise of others. The 'hands on' work, particularly the duties of the child advocates, means that we never become divorced from the reality of how miserable life is for some children.
- \* The Bureau has detailed local knowledge with a network of contacts with politicians, governmental heads and academics. We know who to contact, and how to get action. This enables us to mediate on behalf of children or on behalf of parents who have taken up matters for their children.
- \* The Bureau reviews and monitors by following matters up and asking "what have you done?"
- \* The Bureau responds immediately and is accessible to everyone.
- \* The Bureau has credibility which we think is evidenced by the number of people who learn about us by word of mouth: "they did something for me, why don't you ring them?"
- \* The Bureau does its best to remind government and other agencies to listen to children and to seek their views and to treat them as people, not appendages of adults.

For all the reasons outlined, local child advocacy institutions such as ours have a vital part to play in making the Convention a reality in Australia. Local must not be dismissed as parochial. Matters we have taken up at a local level, such as children with AIDS and services for their families, were national firsts, and put the needs and

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interests of HIV infected children on the national AIDS agenda for the first time.

Neither should local imply narrowness. Our international contacts with children's rights organisations show a remarkable similarity as to the issues identified as needing action, such as implementing proper complaint systems for children in State care; requiring governments to produce 'child impact statements' when policies and legislation affecting children are being considered and last but not least, establishing independent, properly funded Ombudsman-type offices for children at the local and national level.

Do not under-estimate the importance of local child advocacy institutions. They have a vital and important part to play in making children's rights a reality in Australia.

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### **Appendix**

#### **Legislative Basis of the Children's Interests Bureau.**

Under Section 26 of the Community Welfare Act the Bureau now has the following functions and duties:

- a. to increase public awareness of the rights of children, and of matters relating to the welfare of children, by the dissemination of information, or by any other means the Bureau thinks appropriate;
- b. to carry out research or conduct inquiries into such matters affecting the welfare of children as the Bureau thinks fit or the Minister directs;
- c. to develop within the Department such services for the promotion of the welfare of children as the Minister directs;
- d. to monitor, review and evaluate the policies of the Department in relation to children;
- e. to carry out such other functions as the Minister may assign to the Bureau; and
- f. to report in writing to the Minister, in accordance with his directions, on the work carried out by the Bureau.

The additional legal mandate is;

to provide the Minister, on request, with independent and objective advice on the rights and interests of any child who is, has been or is likely to be, the subject of proceedings under this Act or any other Act dealing with the care and protection of children. (*Community Welfare Act Amendment Act 1988, s. 26(30)(ca)*)

This strengthened role of the children's Interests Bureau is echoed in the Children's Protection and Young Offenders Act 1979 as amended. This states that before the Minister makes an application to the Children's Court seeking a declaration that a child is in need of care, the Minister:

should, except in cases where urgent action is required, arrange for a conference between appropriate employees of the Department and the Children's Interests Bureau to provide advice assisting the Minister to decide on the action that should be taken in relation to the child. (*Children's Protection and Young Offenders Act Amendment Act 1988, s. 12(1)(a)*)

In addition, a Children's Interests Bureau staff member or some other person not an employee of the Department for Family and Community Services must be present at Reviews of children under State guardianship. (*Children's Protection and Young Offenders Act Amendment Act 1988, s. 24(2)(0)*)



## 19. A CHILDREN'S RIGHTS COMMISSIONER

Ian Hassan

### Introduction

New Zealand's experience with a Children's Rights Commissioner is clearly of relevance if consideration is to be given to the creation of such an office in Australia as a possible component of any plans to implement and monitor the Articles of the Convention on the Rights of the Child.

My message in essence is that while the need for such an office exists independently of the UN Convention, its functions are well suited to the pursuit of the Convention's objectives.

### The Role of the Commissioner for Children

I do not claim to have developed the position of Commissioner for Children to its full potential in the two years I have held the office in New Zealand, nor even that I will be able to in the next few years. However, my experience and that of the pioneers of this role is that there is a set of functions which is common to the kind of role we are talking about.

These functions are spelled out in the Acts of Parliament in Norway, under which their Office of Commissioner for Children (sometimes translated as Children's Ombudsman) was established, and in South Australia under which their Children's Interests Bureau was established. They have been developed by the first office holders in these two States, respectively, Malfrid FlekkOy and Sally Castle-McGregor, to each of whom I owe a great deal. There are now various publications available which shed considerable light on the functions performed by such offices.'

My belief is the establishment of a Commissioner for Children, at Federal and at State and Territory levels, is desirable if the Convention is to be transformed into law, policy, and practice in Australia.

The 1989 Convention is a comprehensive statement of the rights of children insofar as they can be ensured by a state's policies, laws,

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Section 411 of the Children Young Persons and Their Families Act 1989 (NZ), which prescribes the Commissioner's functions; Rosenbaum, M, and Newell, P, *Taking Children Seriously: A Proposal for a Children's Rights Commissioner*, London (Calouste Gulbenkian Foundation, 1991); FlekkOy, M G, *A Voice for Children: Speaking Out as Their Ombudsman*, London (UNICEF & Jessica Kingsley Publishers, 1991); Flekksby, M G, *Models for Monitoring the Protection of Children's Rights*, Meeting Report, Florence 27 Nov - 1 Dec 1990, (Florence, UNICEF International Child Development Centre, 1991).

### *A Children's Commissioner*

and practices. Its Articles cover a wide range of fields including: welfare, health, education, housing, justice, etc.

For these rights to be upheld requires a network of agencies and interests incorporating:

- \* a complaints mechanism;
  - a research programme;
  - \* lobbying both within government and from without;
- a public articulation of children's rights; and
- a public presence of children.

Long before the Convention was adopted by the UN General Assembly in November 1989, the need for this network was apparent, and, of course, its components existed. Where do Commissioners for Children fit in? They must be prepared to be active in any or all of these areas either directly or by encouraging and sponsoring others but they may be most effective in a direct role in seeking to influence the development of law, policy, and practice so that these reflect a concern for children's well-being. That is, the lobbying role.

The extent to which the Commissioner should respond to complaints must be considered. At one extreme the office cannot afford to be swamped by becoming an advice line, open to all comers, but nor can it afford to lose touch with the concerns of children and their families. Malfrid Flekkoy discusses in her book the resolution of this problem, and opts for a large portion of her work being complaints oriented. Rosenbaum and Newell, on the other hand, argue in favour of the office ensuring that complaints procedures exist, and against directly operating them.

There is some considerable specificity in the pursuit of children's rights in comparison with other anti-discriminatory offices and processes and I would argue in favour of a separate children's rights office. Children must be seen to belong naturally in their families and the usual approach to a children's rights issue must therefore be mediatory and conciliatory rather than confrontational. Investigation of an alleged infringement of a child's right cannot begin from the position that the child is of equal power and ability, before the law, as an adult because this is not true. The notion of discrimination can much less often be appropriately applied in the case of children than in the case of the disabled, the aged, ethnic minorities, females. and so on.

### **Defence of Children's Rights**

In addition to the five functional components of a children's rights network that I have outlined above, three levels can be described on which children's rights can be defended. The individual level, the issues level, and the conceptual level.

### **The Individual Level**

At the individual level is a child or group of children whose rights have been infringed. They may come to attention through making a complaint or through the news media. There must be a mechanism for such complaints to be:

- \* evoked (a well known, accessible, user-friendly person or people as a point of contact);
  - \* heard (an investigatory process);
  - determined (an assessment process);
  - \* acted upon (a requirement for active consideration to be given to recommendations and a public explanation for failure to act rather than dictatorial powers being given to the Commissioner); and
- 
- appealed.

This is a familiar process which takes place in the Courts, and in many instances that is the best and/or only place for it to be followed. If it fails to defend children's rights, the faults in it should be identified, and amendments to legislation and procedure sought.

In addition to the justice process though, mechanisms of personal advocacy have evolved in recent times through the appointment of ombudspople, complaints authorities, tribunals, and the like because people often do not know how to act to defend their rights or are not heard, or are ignored by the powerful agencies of the state and others. Areas in which there is no such system or it is ineffective should be actively sought out and such a system put in place at a level which is sufficiently close to people to be used by them: in the school system, the health system, in relation to local government, and so on.

It would be wrong to leave the subject of advocacy at the individual child level without addressing a question which has been raised in several other papers in this volume. One way of framing it would be: "Does what we do for children out of love and duty suffer from our having to do it because it is the law?" My answer to this is "No", because the law cannot be invoked unless, and until, love and duty fail to provide for the child to an extent which transcends family styles and methods of child rearing.

The first and usually the most fierce and most persistent advocates for children are their parents and families, and they can be relied upon to act on their children's behalf and to fight for them. Nothing in the UN Convention or in the terms of reference of Commissioners for Children gives them licence for wholesale intervention in family life. Nor would any of us wish to be given such licence. There have always been a few people who believe that they know best how to bring up other people's children, but that is quite a separate matter and although they may claim support from the

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Convention, such a claim cannot be justified by a reading of the Convention.

### **The Issues Level**

The rights of classes of children in particular situations must be pursued as issues. There are many such areas: matters of safety, the AIDS problem, problems of immigrants, the child as witness, the adoption problem, etc. Researching as well as preparing and presenting a case are the essential elements in pursuing these issues. Submissions, papers, discussions, briefings, and media releases are the tools of the trade. The option of pursuing the matter in the Courts must also be available to the Commissioner.

The aim is usually an increased awareness and often a change in law, policy, or practice to cover the class of children or situation that is the subject of the issue.

### **The Conceptual Level**

Pursuit of children's rights at this level involves making children and their legitimate interests: visible, emotionally felt, and intellectually understood. In this respect I believe political parties should be required by the electorate to have a stated policy on children and families, so that what the state does, and what it does not do in relation to children is visible. One of the benefits of ratification of the Convention will be that the state and status of children must be reported on, and thus made visible. The proceedings of a seminar held by the Office of the Commissioner for Children in November 1990 addressed the need for a policy for children and families.<sup>2</sup>

But it is more than a policy for children and families that is needed to place them on the agenda. That is what government can do, but the whole of our society must examine the place it accords children. I believe they are in danger of being squeezed out. Nowadays, there are as many households that have no children as there are that have them. Children are absent from large sectors of our lives: in workplaces, in places of recreation, and in our city streets. Our society is developing a serious alienation from its children. This has a number of origins, but the main one is the profound change in our society that has been brought about by children having become, for most people, a matter of choice rather than an inevitability. The institutions of our society do not now have to be built on the premise that children must be accommodated because they are bound to be there.

In these circumstances children become strangers to us, people with whom we are awkward - even fearful. Some of the demand for control of children and young people comes from this alienation and fear. This is a sinister trend.

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<sup>2</sup> Maxwell, G, Hassan, I, and Robertson, J (eds), *Toward a Child and Family Policy for New Zealand* (Wellington, Office of the Commissioner for Children, 1991).

*A Children's Commissioner*

Perhaps one of the most important things we can do is to insist that children be involved, that provision be made for them wherever there are adults, if only on the grounds that we need them as much as they need us in order to fully express our humanity - let alone our aspirations for the future.

**APPENDIX I**  
**CONVENTION ON THE RIGHTS OF THE CHILD**

**PREAMBLE**

*The States Parties to the present Convention,*

*Considering* that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

*Bearing in mind* that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

*Recognizing* that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

*Recalling* that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

*Convinced* that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

*Recognizing* that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

*Considering* that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

*Bearing in mind* that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of

## *Appendix 1 - The Convention*

specialized agencies and international organizations concerned with the welfare of children,

*Bearing in mind* that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth",

*Recalling* the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules); and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict,

*Recognizing* that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration,

Taking *due account* of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child,

*Recognizing* the importance of international co-operation for Improving the living conditions of children in every country, in particular in the developing countries,

*Have agreed* as follows:

### **PART I**

#### *Article 1*

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.

#### *Article 2*

1. 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.

2. 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.

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### *Article 3*

1. 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.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

### *Article 4*

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

### *Article 5*

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

### *Article 6*

1. States Parties recognize that every child has the inherent right to life.

2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

### *Article 7*

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.



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### *Article 8*

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to speedily re-establishing his or her identity.

### *Article 9*

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

### *Article 10*

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents.

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Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (*ordre public*), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

#### *Article 11*

1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.
2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

#### *Article 12*

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 13*

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.
2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others; or
  - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

#### *Article 14*

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

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3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

#### *Article 15*

1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.

2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

#### *Article 16*

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

2. The child has the right to the protection of the law against such interference or attacks.

#### *Article 17*

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health. To this end, States Parties shall:

(a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;

(b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;

(c) Encourage the production and dissemination of children's books;

(d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;

(e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.

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### Article 18

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

3. States Parties shall take all appropriate measures to ensure that children of working 'parents have the right to benefit from child-care services and facilities for which they are eligible.

### Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

### Article 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, *inter a/ia*, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

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### *Article 21*

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 and they shall:

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

(b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;

(c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;

(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

### *Article 22*

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent inter-governmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

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### Article 23

1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.

3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.

4. States Parties shall promote, in the spirit of international co-operation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.

### Article 24

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

(a) To diminish infant and child mortality;

(b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;

(c) To combat disease and malnutrition, including within the framework of primary health care, through, *inter alia*, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;

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(d) To ensure appropriate pre-natal and post-natal health care for mothers;

(e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breast-feeding, hygiene and environmental sanitation and the prevention of accidents;

(f) To develop preventive health care, guidance for parents and family planning education and services.

3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

#### *Article 25*

States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

#### *Article 26*

1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.

2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

#### *Article 27*

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.

3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support

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programmes, particularly with regard to nutrition, clothing and housing.

4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

*Article 28*

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular

(a) Make primary education compulsory and available free to all;

(b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;

(c) Make higher education accessible to all on the basis of capacity by every appropriate means;

(d) Make educational and vocational information and guidance available and accessible to all children;

(e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

3. States Parties shall promote and encourage international co-operation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

*Article 29*

1. States Parties agree that the education of the child shall be directed to:

(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;



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(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate and for civilizations different from his or her own;

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

(e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

*Article 30*

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous 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.

*Article 31*

1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.

2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

*Article 32*

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant

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provisions of other international instruments, States Parties shall in particular:

- (a) Provide for a minimum age or minimum ages for admission to employment;
- (b) Provide for appropriate regulation of the hours and conditions of employment;
- (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

*Article 33*

States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

*Article 34*

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.

*Article 35*

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

*Article 36*

States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

*Article 37*

States Parties shall ensure that:

- (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

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(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

### *Article 38*

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.

2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.

4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

### *Article 39*

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse, torture or any other form of cruel, inhuman or degrading treatment or punishment, or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

### *Article 40*

1. 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

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account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used

(vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

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(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to Judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

#### *Article 41*

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:

- (a) The law of a State Party; or
- (b) International law in force for that State.

## **PART II**

#### *Article 42*

States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

#### *Article 43*

1. For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided.

2. The Committee shall consist of ten experts of high moral standing and recognized competence in the field covered by this Convention. The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems.

3. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.

4. The initial election to the Committee shall be held no later than six months after the date of the entry into force of the present Convention and thereafter every second year. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to States Parties inviting them to submit their nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons

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thus nominated, indicating States Parties which have nominated them, and shall submit it to the States Parties to the present Convention.

5. The elections shall be held at meetings of States Parties convened by the Secretary-General at United Nations Headquarters. At those meetings, for which two thirds of States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

6. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. The term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting.

7. If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party which nominated the member shall appoint another expert from among its nationals to serve for the remainder of the term, subject to the approval of the Committee.

8. The Committee shall establish its own rules of procedure.

9. The Committee shall elect its officers for a period of two years.

10. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee. The Committee shall normally meet annually. The duration of the meetings of the Committee shall be determined, and reviewed, if necessary, by a meeting of the States Parties to the present Convention, subject to the approval of the General Assembly.

11. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.

12. With the approval of the General Assembly, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide.

### *Article 44*

1. States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights:

(a) Within two years of the entry into force of the Convention for the State Party concerned;

(b) Thereafter every five years.

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2. Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned.

3. A State Party which has submitted a comprehensive Initial report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1 (b) of the present article, repeat basic information previously provided.

4. The Committee may request from States Parties further information relevant to the implementation of the Convention.

5. The Committee shall submit to the General Assembly, through the Economic and Social Council, every two years, reports on its activities.

6. States Parties shall make their reports widely available to the public in their own countries.

### *Article 45*

In order to foster the effective implementation of the Convention and to encourage international co-operation in the field covered by the Convention:

(a) The specialized agencies, the United Nations Children's Fund, and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialized agencies, the United Nations Children's Fund and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite the specialized agencies, the United Nations Children's Fund, and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;

(b) The Committee shall transmit, as it may consider appropriate, to the specialized agencies, the United Nations Children's Fund and other competent bodies, any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications;

(c) The Committee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the rights of the child;

(d) The Committee may make suggestions and general recommendations based on information received pursuant to articles 44 and 45 of the present Convention. Such suggestions and general recommendations shall be transmitted to any State Party concerned and reported to the General Assembly, together with comments, if any, from States Parties.

*Appendix I - The Convention*

**PART III**

*Article 46*

The present Convention shall be open for signature by all States.

*Article 47*

The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

*Article 48*

The present Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

*Article 49*

1. The present Convention shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification or accession.

*Article 50*

1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties, with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly for approval.

2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of States Parties.

3. When an amendment enters into force, it shall be binding on those States Parties which have accepted it, other States Parties still being bound by the provisions of the present Convention and any earlier amendments which they have accepted.



*Appendix 1 - The Convention*

*Article 51*

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.

2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.

3. Reservations may be withdrawn at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall then inform all States. Such notification shall take effect on the date on which it is received by the Secretary-General.

*Article 52*

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

*Article 53*

The Secretary-General of the United Nations is designated as the depositary of the present Convention.

*Article 54*

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

In witness thereof the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

**APPENDIX II**  
**STATUS OF THE**  
**CONVENTION ON THE RIGHTS OF THE CHILD**

**As of 4 September, 1991**

Adopted by the United Nations General Assembly on 20 November, 1989, and opened for signature and ratification on 26 January, 1990.

Date of entry into force of the Convention: 2 September, 1990.

As of this date (4/9/91), 140 countries have either signed the Convention or have become States Parties to it by ratification or accession.

**1. States Parties to the Convention by ratification (r) or accession (a) : 96**

Angola	05.12.1990 (r)
Argentina	04.12.1990 (r)
Australia	17.12.1990 (r)
Bahamas	20.02.1991 (r)
Bangladesh	03.08.1990(r)
Barbados	09.10.1990 (r)
Belize	02.05.1990(r)
Benin	03.08.1990 (r)
Bhutan	01.08.1990 (r)
Bolivia	26.06.1990 (r)
Brazil	24.09.1990 (r)
Bulgaria	03.06.1991 (r)
Burkina Faso	31.08.1990(r)
Burundi	19.10.1990 (r)
Byelorussian SSR	01.10.1990 (r)
Chad	02.10.1990 (r)
Chile	13.08.1990 (r)
Colombia	28.01.1991 (r)
Costa Rica	21.08.1990 (r)
Cote d'Ivoire	04.02.1991 (r)
Cuba	21.08.1991 (r)
Czechoslovakia	07.01.1991 (r)
Cyprus	07.02.1991(r)
Dem People's Rep of Korea	21.09.1990 (r)
Denmark	19.07.1991 (r)
Djibouti	06.12.1990 (r)
Dominica	13.03.1991 (r)
Dominican Republic	11.06.1991 (r)
Ecuador	23.03.1990 (r)
Egypt	06.07.1990 (r)
ErSalvador	10.07.1990(r)

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Ethiopia	14.05.1991 (a)
Finland	20.06.1991 (r)
France	07.08.1990 (r)
Gambia	08.08.1990 (r)
GDR	01.10.1990 (r)
Ghana	06.02.1990 (r)
Grenada	05.11.1990 (r)
Guatemala	06.06.1990 (r)
Guinea	13.07.1990 (a)
Guinea Bissau	20.08.1990 (r)
Guyana	14.01.1991 (r)
Holy See	20.04.1990 (r)
Honduras	10.08.1990 (r)
Indonesia	05.09.1990 (r)
Jamaica	14.05.1991 (r)
Jordan	24.05.1991 (r)
Kenya	30.07.1990 (r)
Lao People's Dem Republic	08.05.1991 (a)
Lebanon	14.05.1991 (r)
Madagascar	19.03.1991 (r)
Malawi	02.01.1919 (a)
Maldives	11.02.1991 (r)
Mali	20.09.1990 (r)
Malta	30.09.1990 (r)
Mauritania	16.05.1991 (r)
Mauritius	26.07.1990 (a)
Mexico	21.09.1990 (r)
Mongolia	05.07.1990 (r)
Myanmar	15.07.1991 (a)
Namibia	30.09.1990 (r)
Nepal	14.09.1990 (r)
Nicaragua	05.10.1990 (r)
Niger	30.09.1990 (r)
Nigeria	19.04.1991 (r)
Norway	08.01.1991 (r)
Pakistan	12.11.1990 (r)
Panama	12.12.1990 (r)
Paraguay	25.09.1990 (r)
Peru	04.09.1990 (r)
Philippines	21.08.1990 (r)
Poland	07.06.1991 (r)
Portugal	21.09.1990 (r)
Romania	28.09.1990 (r)
Rwanda	24.01.1991 (r)
Saint Kitts and Nevis	24.07.1990 (r)
Sao Tome and Principe	14.05.1991 (r)
Senegal	31.07.1990 (r)
Seychelles	07.09.1990 (a)
Sierra Leone	18.06.1990 (r)
Spain	06.12.1990 (r)
Sri Lanka	12.07.1991 (r)
Sudan	03.08.1990 (r)
Sweden	21.06.1990 (r)
Togo	01.08.1990 (r)
Uganda	17.08.1990 (r)

*Appendix H - The Status of the Convention*

Ukrainian SSR	28.08.1991 (r)
United Republic of Tanzania	10.06.1991 (r)
Uruguay	20.11.1990 (r)
USSR	16.08.1990 (r)
Venezuela	13.09.1990 (r)
Viet Nam	01.03.1990 (r)
Yemen	01.05.1991 (r)
Yugoslavia	03.01.1991 (r)
Zaire	27.09.1990 (r)
Zimbabwe	11.09.1990 (r)

**2. Signatories (listed below are only states which have signed but not ratified the Convention) : 44**

Afghanistan	27.09.1990
Albania	26.01.1990
Algeria	26.01.1990
Antigua and Barbuda	12.03.1991
Austria	26.01.1990
Belgium	26.01.1990
Cameroon	25.09.1990
Canada	28.05.1990
Central African Republic	30.07.1990
China	29.08.1990
Comoros	30.09.1990
Gabon	26.01.1990
FRG	26.01.1990
Greece	26.01.1990
Haiti	26.01.1990
Hungary	14.03.1990
Iceland	26.01.1990
Ireland	30.09.1990
Israel	03.07.1990
Italy	26.01.1990
Japan	21.09.1990
Kuwait	07.06.1990
Lesotho	21.08.1990
Liberia	26.04.1990
Liechtenstein	30.09.1990
Luxemburg	21.03.1990
Morocco	26.01.1990
Mozambique	30.09.1990
Netherlands	26.01.1990
New Zealand	01.10.1990
Papua New Guinea	30.09.1990
Republic of Korea	25.09.1990
Saint Lucia	30.09.1990
Samoa	30.09.1990
Suriname	26.01.1990
Swaziland	22.08.1990
Switzerland	01.05.1991
Syrian Arab Republic	18.09.1990
Trinidad and Tobago	30.09.1990
Tunisia	26.02.1990

*Appendix II- The Status of the Convention*

Turkey	14.09.1990
UK	19.04.1990
Vanuatu	30.09.1990
Zambia	30.09.1990

**3. States which are neither Parties nor signatories to the Convention**

Bahrain  
Botswana  
Brunei Darussalam  
Cambodia  
Cape Verde  
Congo  
Equatorial Guinea  
Fiji  
India  
Iran  
Iraq  
Kiribati  
Libyan Arab Jamahiriya  
Malaysia  
Monaco Nauru Oman Qatar St  
Vincent and the Grenadines  
San Marino  
Saudi Arabia  
Singapore  
Solomon Islands  
Somalia  
South Africa  
Thailand  
Tonga Tuvalu United  
Arab Emirates  
USA

