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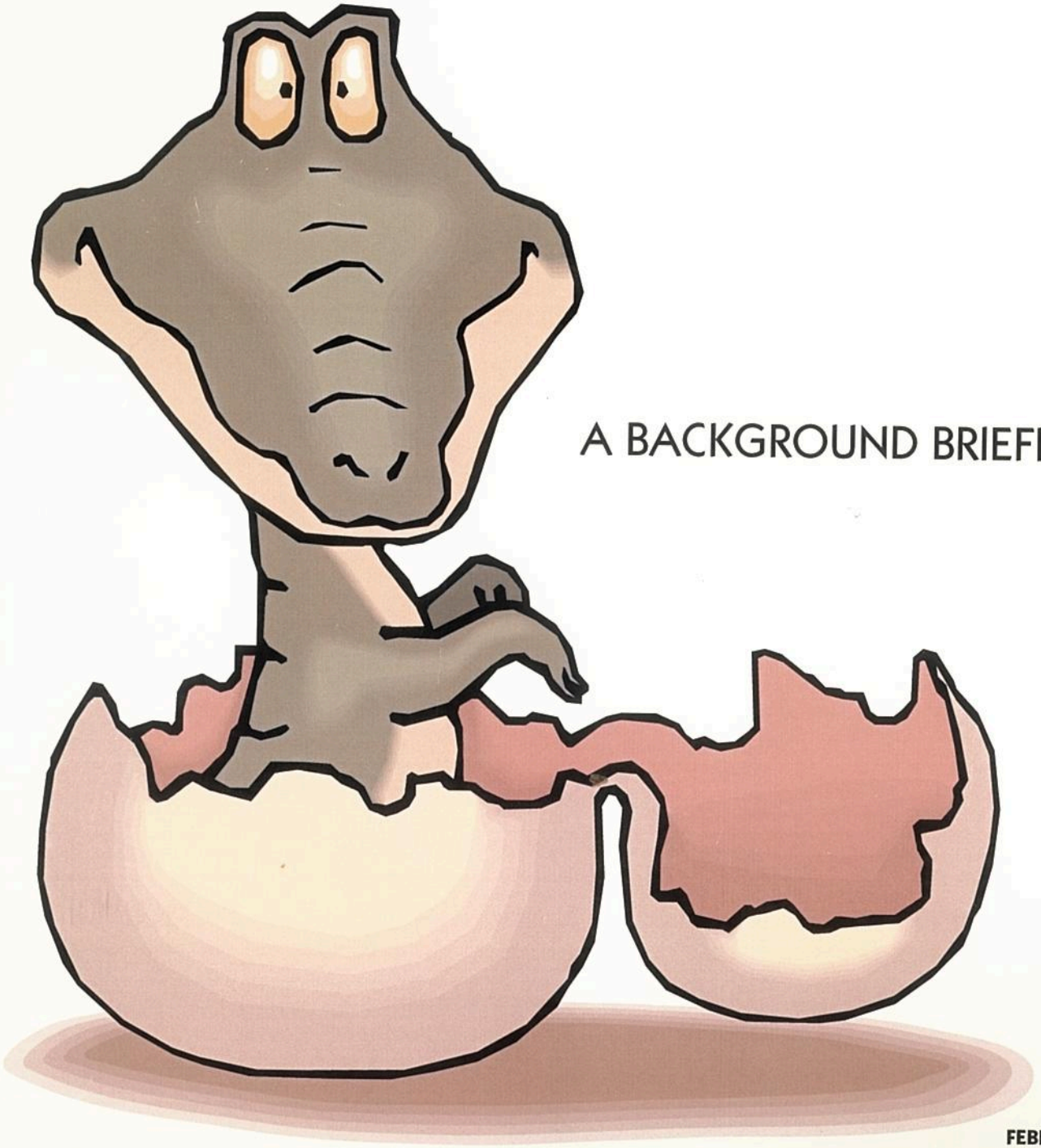

A BACKGROUND BRIEFING

FEBRUARY 2004

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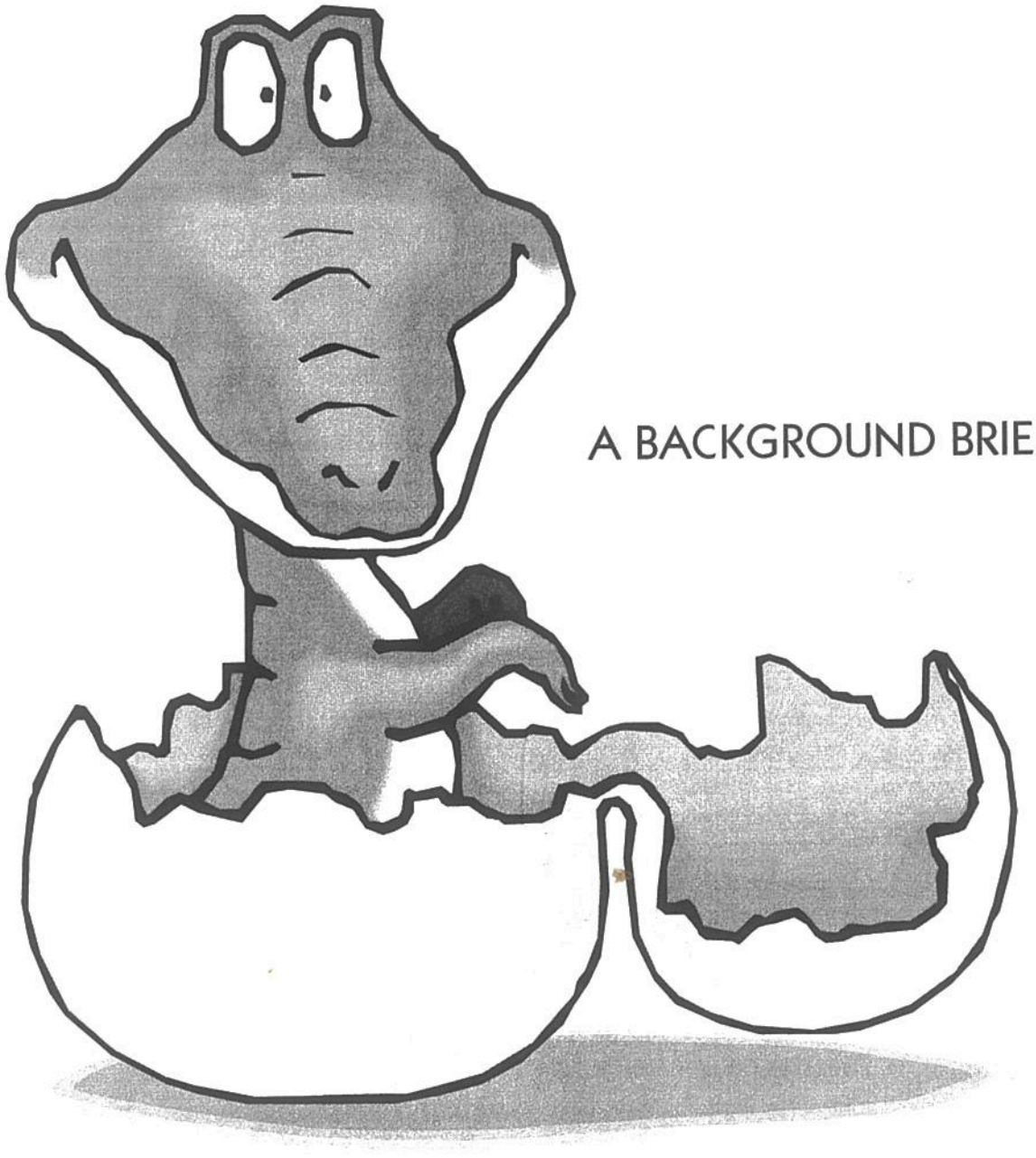

A BACKGROUND BRIEFING

FEBRUARY 2004

THE NATIONAL CHILDREN'S AND YOUTH LAW CENTRE

The National Children's and Youth Law Centre (NCYLC) is an independent non-profit community legal centre incorporated in New South Wales and enjoying charitable status. It was established in 1993 with the aim of working to improve conditions and opportunities for the children and young people of Australia with an emphasis on law reform and legal advocacy.

From its inception, the NCYLC has promoted the Convention on the Rights of the Child and makes reference to it in all its submissions and published discussion papers. The NCYLC had input into Australia's first report under CROC by contributing to the government report.

Check out our website at **www.lawstuff.org.au** and **www.ncylc.org.au**

DEFENCE FOR CHILDREN INTERNATIONAL

The Defence for Children International (DCI) is a global chain of children's rights agencies recognised by the United Nations. The Convention sets out principles, such as the rights of children to protection, provision, promotion and participation, which guide DCI's actions and campaigns.

DCI-Australia is the local link in the DCI network and is a national organisation independent of government and reliant on subscriptions and donations. It has no core funding and no paid staff and apart from some specifically funded projects in the past, all activities are undertaken by volunteers from within DCI-Australia ranks.

The Defence for Children International Australia prepared the first alternative report in 1996 to coincide with Australia's belated first report.

ACKNOWLEDGEMENTS

We would like to acknowledge the assistance provided by UNICEF Australia in the preparation of this Background Briefing and the Consultation Paper. Additionally we would like to thank the contributions from people around Australia. Specifically, thank you to Robert Ludbrook who penned a first draft and of course, many thanks to the volunteers and Social Justice Interns from the University of New South Wales who provided invaluable research and editorial assistance.

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a. introduction

The Convention on the Rights of the Child (CROC)

The Convention on the Rights of the Child (the Convention) was an important landmark for the children of the world. It reiterates the principle that children are not only entitled to the same human rights as adults, but further that they are entitled to special rights which take account of their youth and vulnerability. The text of the Convention can be viewed at **http://www.unhchr.ch/html/menu2/6/crc/treaties/crc.htm**.

Australia supported the Convention through its various stages and was one of the first countries to ratify the Convention in December 1990. CROC became binding on the Australian government on 14 January 1991.

The Convention requires that status reports be presented to the UN Committee on the Rights of the Child (the UN Committee), which is the body that monitors how well countries are meeting their obligations under the Convention. This Committee is currently comprised of 18 independent experts.

Australia's reporting obligations

Australia's first report was due on 16 January 1993 but was not filed until December 1995, almost three years late.[1] The second report due in January 1998 was never completed or filed and a third report that was due in January 2003 was filed in September 2003. It is unlikely that the UN Committee will consider Australia's third report before late 2005. This consistent failure to meet reporting deadlines will mean that Australia will have avoided any scrutiny of its performance under CROC for 10 years.

The need for a non-government report

When governments report on the performance of their obligations under international human rights instruments they tend to focus on the aspects of which they are proud. This can result in only a partial account of the country's performance that glosses over any elements which may be a source of embarrassment or contention and which the government may not want highlighted in an international forum. The UN Committee has urged governments to provide frank and self-critical reports but it is part of the very nature of international diplomacy that a country will put its best foot forward and is reluctant to admit to any failings.

If the UN Committee is to gain a balanced picture of life for Australian children and of progress made since Australia last reported, it is essential that they are presented with a fuller and more critical account of the position of children in this country. The UN Committee has always welcomed NGO reports to provide more detailed information and to alert it to any areas of serious non-compliance with the principles of the Convention.

Process for developing the non-government report

This Background Briefing has been prepared by the NCYLC and the DCI to provide some background information that may be helpful to NGOs and individuals. In order that the UN Committee have an accurate picture of the current state of Australia's children and any areas where laws, policies and practices do not accord with the principles in the Convention, we would like to get comments and feedback from as many organisations and individuals (particularly children and young people) as possible.

[1] It can be accessed at http://www.unhcr.ch/html/menu2/6/crc/doc/past.htm

We have approached you because of your known experience with and interest in children and their rights and we would be greatly appreciative if you could help us to achieve the broadest possible response to the Consultation Paper. Ways in which you might assist include:

- Arranging groups of children and young people to consider the issues and develop a response to the questions raised in the Consultation Paper. It is not essential that there be a response to every issue raised – children and young people may wish to address those topics they consider to be most important to them or about which they feel best qualified to comment.
- Circulating the Background Briefing and Consultation Paper to other non-government organisations and interested individuals encouraging them to send in a response to the Consultation Paper.
- Advise us of any non-government organisations (including any local child or youth organisations) so that we can contact them and seek a response either on line at **http://www.ncylc.org,au** or by way of written response, audiotape or videotape.

Both the Consultation Paper and this Background Briefing are available on-line at **http://www.ncylc.org.au/croc/home.html**. If you would like paper copies of these documents, please let us know.

In an effort to ensure as many people as possible are involved in the consultation process, feedback can be given in response to the whole document or to just a particular section.

There will also be a specific mechanism developed to make the consultation process accessible for children and young people. This will be in the form of a link on the NCYLC's website to a questionnaire or forum for children and young people to give feedback about their experiences as citizens in Australia.

While the focus of the NGO Report will be on laws, policies and practices which fall short of the standards laid down in the Convention and what needs to be done to put right the omissions and failures, we are also interested to have examples of good laws, policies and practices which further the Convention principles.

Who will decide the contents of non-government report

An Advisory Committee comprised of 'expert' individuals will be established to consider what information should be included in the final report document. The UN Committee also provides guidelines as to the information they require in the NGO Report, which can be viewed via: **http://www.unhchr.ch/html/menu2/6/crc/treaties/guide/Guide-NGO-E.pdf**

b. themes for consultation

PARTICIPATION IN DECISION-MAKING

ARTICLE 12

Children are an integral part of Australian society. Legal barriers and social attitudes have often denied children opportunities to have a say when decisions are made which affect them.

What the Convention requires

Article 12 of the Convention gives children a number of participation rights:

- They have the right to express their views freely in all matters that affect them.
- Their views are to be given due weight according to their age and maturity.
- In judicial or administrative proceedings they shall have the opportunity to express their views directly to the decision-maker or through a representative.

The UN Committee has emphasised that the right to have a say in decision-making is a right of fundamental importance that applies to all the Articles of the Convention. The right to express views freely does not mean that children can make their own decisions on all matters that affect them, but it does mean that their views must always be ascertained and taken into account. Article 12 also makes it clear that even very young children and children of reduced capacity have the right to express their views freely.

Children's participation in public life

At common law, children who had not attained the age of majority were seen as under the disability of infancy and their rights could only be exercised through parents or other adults.

In Australia, this notion can still be found in relation to some areas of civil law. For example, the *Minors (Property and Contracts) Act* 1970 (NSW) perpetuates the notion that under-18s are legal non-entities by stating that 'A person is not under the disability of infancy in relation to a civil act in which the person participates when aged eighteen years'.[2]

Also while Australia takes pride in being a democracy and embraces the concept of universal suffrage, children are not able to vote or to stand for election to public office in any Commonwealth, State, Territory or Local Authority election. This means that those under 18 are excluded from having a say in political decision-making.

Decision making and government

Decisions affecting children are made daily by Commonwealth, State and Territory government agencies and by local government bodies. It is rare for government bodies to consult with children when drafting or reviewing laws or policies.

In 2000, the New South Wales Premier issued a directive to all NSW government agencies that children and young people are to be consulted in the development of any new laws and policies that affect them. The 1997 report *Seen and Heard*[3] also recommended that all Commonwealth government

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[2] Section 8, *Minors (Property and Contracts)* Act 1970 (NSW).

[3] Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No. 84, 1997.

agencies should have a requirement written into their charters to consult with children and take their views seriously. There is still no national agency charged with monitoring State and Territory policy and legislation and its impact on children and youth. This has long been sought.

AYPAC, the national peak youth body which had been an effective lobby group for young people and their rights were defunded by the Federal Government in 1997.

Health decisions

Many State and Territory laws allow parents to make health decisions on behalf of their children. Others state a fixed age at which children can make their own health decisions. No State or Territory health laws require that health professionals elicit and give weight to the views of children before making or acting on decisions about a child's health. Children often express concerns about their confidentiality not being respected by health professionals. The NSW Law Reform Commission (NSWLRC) is currently conducting a review of issues around children's consent to medical treatment and children's right to confidentiality.

Decision making in corporations and incorporated associations

Under Australian corporations law, children cannot become a director of a corporation. The rationale is that under 18s lack the knowledge or experience to meet legal obligations and that they should not be exposed to the heavy penalties which can be imposed on directors who fail in their responsibilities. Such legislation acts to prevent corporations with a youth focus having under-18s in their management structure.

In an information paper in December 2002, the Commonwealth Attorney-General's office stated that it had informed the Treasury, which is responsible for corporations law, about constraints arising from the minimum age of directors being set at 18 years.[4] In July 2003, the Treasury confirmed that they had received this information and that the issue is unlikely to be considered for at least 12 months and then as part of a general inquiry into director's duties.

Legislation in some States and Territories does not allow under-18s to be appointed as officers of incorporated associations. This excludes young people from management roles in youth organisations. An example can be found in section 25(2) (a) *Associations Incorporation Act* 1981 (VIC).

Restrictions on children in respect of contracts and property

In every State and Territory, there are legal restrictions on under-18s entering into contracts. While these provisions are intended to protect children, they also disadvantage them by precluding them from entering tenancy agreements or mobile phone contracts unless they have someone over the age of 18 to sign the agreement or to act as a guarantor.

Given there are now a range of protections and remedies available in relation to unfair exploitation of consumers, a strong argument can be made that these restrictions significantly disadvantage children.

Children and educational decision-making

Australian students have no right of participation in school decision-making whether in relation to school governance, curriculum, teaching methods, selection of teaching staff, school facilities, school rules and uniform codes. Some schools do make an effort to involve students in decision-making but this very much depends on the enthusiasm of the principal and the teaching staff.

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[4] Commonwealth Attorney General's Department, *Information Paper: Proposals for Commonwealth Age Discrimination Legislation*, December 2002, para 6.9.

The Western Australia School Education Regulations 2000 provide that one or more students elected by their peers shall form part of the decision-making group of each secondary school. The *Seen and Heard* report recommended that the Commonwealth Government develop guidelines for best practice on student participation and a handbook for teachers explaining the guidelines. The NSW Commission for Children and Young People has put out a publication containing broad guidance on encouraging participation of children in decision-making in schools and local authorities.

The most consistent complaints from students who have been at the receiving end of discipline by both the private and government school system is that the school authorities do not listen to students, that information provided by the students is not taken into account and as no independent review of discipline decisions is available in Australia, students often charge the school system with allegations of bias and scapegoat.

Children and child protection decisions

Child protection laws aim to protect children from abuse and neglect. Recently some States and Territories introduced requirements to ascertain and give due weight to the opinions of children in child protection decisions. This consultation often appears tokenistic as the decision has already been made or because no alternative options are presented to the child.

New South Wales child protection law has a separate *'principle of participation'* which places a responsibility on government child protection workers to ensure children can express their views freely.[5] This involves providing adequate information about the decisions to be made, explaining how opinions will be recorded and used, and any practical assistance necessary for the child or young person to express their views. Children must also be informed of any decision made, the reasons for it and their right to respond such as making a complaint or seeking a review.

In England, a number of official child protection agencies have appointed a Children's Rights Officer who ensures that the rights of children including the right to participate in decision-making are observed by child protection workers. This is seen as an effective way of ensuring that busy child protection workers do not overlook children's rights.

Children's voice in arrangements following family breakdown

An increase in family breakdown has resulted in greater numbers of children becoming the subject of disputes between parents or carers as to their place of residence or contact with the non-custodial parent. Research has shown that children in this position often feel their views are not determined or taken into account when decisions are made. In Australia, arrangements for children following separation are usually made by the parents or carers or, if they cannot agree, by the Family Court.

In June 2003, the Minister for Children and Youth Affairs, the Hon Larry Anthony MP and the Attorney – General, the Hon Daryl Williams AM QC MP requested that the Standing Committee on Family and Community Affairs undertake an inquiry into child residence and contact arrangements in the event of family separation. The inquiry sought submissions concerning – amongst other matters – the factors that should be taken into account in deciding the respective time each parent should spend with their children post separation, in particular whether there should be a presumption that children will spend equal time with each parent and, if so, in what circumstances such a presumption could be rebutted. This inquiry received an unprecedented number of submissions. A Government report from the inquiry will be available in due course.

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[5] *Children and Young Persons (Care and Protection) Act* 1998 (NSW), section 10.

Currently, in the Family Court, children rarely have the opportunity to speak directly to the judge. In a minority of cases, a lawyer is appointed to represent the child's interests but they do not act on the child's instructions and can present a view that differs from the child's to the Court.

Courts and legal representation

Article 12 of the Convention suggests that a person representing a child is to represent the child's wishes rather than form a judgement as to the child's best interests.

The *Seen and Heard* report recommended that a rebuttable presumption be established in law that children 16 years or older and living independently should be competent to initiate or defend litigation. Currently a guardian *ad litem* must be appointed. The Report also proposed that clear standards for the representation of children in all family law and child protection proceedings be developed and that the child's legal representative should act on the child's instructions except where the child was unwilling or unable to give instructions.

Child protection legislation in New South Wales establishes a rebuttable presumption that a child aged 10 or older is capable of giving instructions to a lawyer and a rebuttable presumption that a child under that age is incapable of giving instructions. The Children's Court can on application of the child or the representative override the presumption in particular cases.

Children's evidence

Children are sometimes asked or required to give evidence in criminal or civil proceedings. In most cases they will either be the complainant or a witness. The right of children to express their views freely in matters that affect them must include the right to give evidence in court without being subjected to intimidation, verbal trickery or harassment by lawyers during proceedings.

There are now laws in place in most States and Territories which recognise that child witnesses can be browbeaten, confused and distressed by coming face-to-face with their alleged abuser or by being exposed to destructive cross-examination. Legislative safeguards vary considerably in the different States and Territories and they do not always provide comprehensive protection for child victims and witnesses.

CIVIL RIGHTS AND FREEDOMS

ARTICLES 2, 13, 14, 15, 16

Australians take for granted certain basic civil rights and freedoms even though we have no formal proclamation of rights. Examples of formal proclamations from other jurisdictions include the Charter of Rights of Freedoms (Canada), the statutory Bill of Rights (NZ), a Bill of Rights Act (UK) or a constitution with entrenched human rights provisions (United States). Australia has given statutory effect to a number of rights via anti-discrimination legislation and by ratifying the International Covenant on Civil and Political Rights (the ICCPR) in 1980.

For many years, Australian and overseas courts wrongly decided that the civil rights provisions of the ICCPR and anti-discrimination legislation did not apply to children. The Convention, which largely replicates these rights, serves to reinforce the relevance of basic human rights and freedoms to children.

The civil liberties provisions in the Convention include:

- the right to freedom from discrimination: Article 2
- the right to freedom of expression: Article 13(1)
- the right to receive and impart information and ideas of all kinds: Article 13
- the right to freedom of thought, conscience and religion: Article 14(1)
- the right to freedom of association and peaceful assembly Article: 15
- protection from arbitrary or unlawful interference with privacy, family, home and correspondence Article: 16(1)
- protection from unlawful attacks on one's honour and reputation Article: 16(1).

These civil rights are subject to some limitations. The right to freedom of thought, conscience and religion is subject to the rights and duties of parents to provide direction to their children in a manner consistent with their evolving capacities. The rights to freedom of expression, freedom of association and assembly and the right to religious belief are subject to restrictions to respect the rights and freedoms of others and to the protection of public safety, order, reputation, health and morals.

Fundamental rights and freedoms

While the fundamental civil liberties described above are assured to children under the Convention, they are not, with the exception of the non-discrimination provision in Article 2, guaranteed to children or to adults under Australian law. The UN Committee has urged countries to incorporate these rights into domestic law. The ACT is currently considering enacting a Bill of Rights and in most other English speaking countries there is now legislation giving domestic force to these widely recognised civil liberties.

Freedom from discrimination

Australia has comprehensive anti-discrimination laws at Federal and State and Territory levels. Children who are discriminated against on the grounds of race, colour, sex, nationality, religion, ethnic or social origin, political or other opinion or disability can make a complaint to the relevant anti-discrimination body. Every Australian State and Territory also has legislation that makes it unlawful to discriminate against any person on the grounds of age. The Commonwealth Government is in the course of developing age discrimination provisions to incorporate into the *Human Rights and Equal Opportunity Act* 1986 (Cth) (HREOCA).

Youth wages and other examples of youth discrimination

One area where children in Australia do suffer discrimination is in relation to minimum and junior wage rates under industrial awards and workplace agreements. Such provisions are not subject to anti-discrimination legislation and the Federal Government made it clear in their 2001 election statement that proposed Commonwealth anti-discrimination legislation will not apply to existing policies on youth wages. As a result, children do not generally receive equal pay for equal work.

The usual justification for treating children unequally is that lower wages are necessary to protect their competitive position in the labour market. This argument seems to assume that young workers are less skilled or less conscientious than older workers. Australia's South Pacific neighbour, New Zealand, has made a commitment to remove youth wage rates and to make provisions for lower 'training wages' applicable to workers of all ages where employers offer training in valuable work skills as part of the employment contract.

Despite age discrimination legislation, those under 18 cannot hire a motor vehicle and are disadvantaged when it comes to leasing premises, borrowing money, or obtaining their own Medicare Card to independently access medical services under the public health system. Reports from children also indicate that they experience different treatment from the public and police based on their age when accessing shops and public transport.

In some cases, legislative provisions even permit discrimination against children. For example, section 40 of the *Equal Opportunity Act* 1995 (VIC) allows schools to set and enforce reasonable standards of dress and appearance even if these discriminate on the grounds of sex, race or cultural background. This law was passed after male students successfully challenged a school rule that required them to have their hair cut short.

The right to freedom of expression

The traditional adage that 'children should be seen and not heard' still holds some sway in Australia. Some schools punish students for expressing an opposing view to the teacher. Surveys of children over the last two decades have regularly evinced comments that adults discourage their input and fail to give weight to their opinions. Such responses provide support for the concern that many police officers, school teachers and other officials perceive children who express a definite view as cheeky, precocious or provocative.

The right to receive and impart information of all kinds

Information is the key to equal participation. There is a tendency for adults to keep important information from children, stemming from the desire to maintain control or due to embarrassment, paternalism or because it is believed that certain information may be distressing to children.

Surveys show that parents often conceal relationship difficulties or the fact they are about to separate. Children are often also excluded from Family Court and adoption processes as these are seen as adult issues. Only in Victoria do children conceived as a result of donor sperm or eggs have the right in legislation to information about their biological identity.

Schools often withhold information from students by assuming that giving children information about their rights will encourage them to be demanding and disruptive. There are reports that children in Australian immigration detention centres are denied basic information as to their rights and entitlements. Children are also censored in their access to information via the Internet by programs like 'Net Nanny'.

The right to freedom of thought, conscience and religion

While Australia takes some justified pride in the freedom of citizens to express views, which may be at odds with those of the government or mainstream opinion, there is evidence of a reluctance to extend the freedom of thought, conscience and religion to children.

Schools frequently ban children from expressing political views or taking social action during school hours or within school grounds.

During early 2003, NSW students organised a number of anti war rallies around the State. The Director – General of Education threatened any students who attended the rallies when they should have been at school with the penalty of suspension. Some students were suspended from public schools in NSW for their attendance at anti war-rallies around the State.

Education legislation in some States and Territories gives parents the right to commit to or exempt their children from religious instruction at school: s73 *Education Act* 1979 (NT), s26 *Education (General Provisions)* Act 1989 (QLD), r83 *Education Regulations* 1997 (SA), s23 *Education Act* 1958 (VIC), s42 *Education Regulations* 1960 (WA).

None of these provisions give the child an entitlement to participate in or withdraw from religious instruction provided by the school.

The right to freedom of association and assembly

Children rarely possess or rent their own homes and are dependent on parents or other adults for their accommodation. This limits their freedom to control private space and because they often have needs that differ from those of adults, they tend to make greater use of public spaces like parks, libraries and shopping centres. Some suburbs and towns have youth specific facilities, such as youth centres, cafes and skateboard parks. However, there are many parts of Australia where there are no such facilities or where they do exist, they are inaccessible because of lack of suitable public transport or because costs are prohibitive.

The streets and open spaces are attractive to children and young people for a number of reasons.[6] They provide a place to meet like-minded people free from family restrictions. White has written that the street 'represents for many young people a place to express themselves without close parental or 'adult' control at little or no cost'.[7] White also points out that the streets hold a special attraction for Indigenous young people.

Young people in public spaces are often viewed as a threat or an annoyance because of their noisiness or energetic behaviour or just simply by their presence. Authorities may also be under pressure to keep youth off the streets. Inevitably, public spaces become a focal point for contact between young people and the police. Research studies have shown that children from a wide range of social backgrounds and of both sexes have been stopped by the police in the street, shopping malls or transport terminals.[8]

Over the last decade, a number of laws have been passed which give the police greater powers to stop, question and search people in public spaces. These are often applied in a manner that targets children and young people. A 1999 report *Policing Public Safety* by the NSW Ombudsman shows that people between the age of 15 and 19 years are much more likely to be stopped and searched than any other age group. It also said that 17-year olds are six times more likely to be searched than 27-year olds and 23 times more likely to be searched than 37-year olds.

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[6] See R. White, *No Space of their Own: Young People and Social Control in Australia*, 1990, pp140, *Public Spaces for Young People, 1998*.

[7] R. White, *No Space of their Own: Young People and Social Control in Australia*, 1990.

[8] A NYARS Research Survey in 1992 found that the Police had stopped 80% of young people from four Australian states.

The proportion of searches of teenagers where a knife was discovered was low in comparison with older people. The Ombudsman was particularly concerned at the high proportion of 'unproductive' searches of under-18s and recommended that the police monitor the rates of searching of young people and Indigenous people.[9]

A recent trend has been the commercialisation of public space, which results in large shopping centres which group together not just retail shops but also public services like post offices, government offices and transport terminals. These centres aim to attract the public with comfortable and attractive surroundings, to which children and young people are naturally drawn and actively encouraged by advertising campaigns keen to attract the youth market.

Tensions can be created as these young visitors are unlikely to spend as much money as adult users and retailers fear that a congregation of young people will 'frighten off' genuine customers. Security guards are often employed and encouraged to move on any young people seeking to congregate in public spaces. At times they can legally remove or threaten to remove young people relying on the rights of private ownership or trespass laws.[10]

Protection from arbitrary or unlawful interference with privacy, family, home and correspondence

There is a widespread belief that children have a lesser right to personal privacy than adults. Some parents have no compunction about reading the private correspondence or diary of their children, and teachers have also been known to read private letters or diaries of students. The Convention gives children equivalent rights to the personal privacy enjoyed by adults.

Children who live in institutions are at a greater risk of invasion of their personal privacy. Many boarding schools in the past routinely read the incoming and outgoing mail of students. In juvenile detention centres or residential homes for children, there are not always statutory requirements or practice standards that ensure the personal privacy of detainees or residents. Regulation 27 of the *Children (Detention Centres) Regulation* 2000 (NSW) states that any letter or parcel sent to or by a detainee must not be opened, read or inspected other than by the person to whom the letter or parcel is addressed. It also states that any letter sent to or by a detainee must not be censored subject to a right to open and censor mail where questions arise as to the security, safety or good order of the detention centre.

In Queensland, there is a similar right to send and receive mail subject to a right to open and inspect mail where there is a reasonable belief that it may disclose information, or contain property, that is, or is likely to be, detrimental to the good order and management of the centre: s 23 *Juvenile Justice Regulation* 1993 (QLD). It might be asked whether exceptions that allow the opening and censorship of mail that may be detrimental to good order or management of a centre, are vague or unreasonably wide. Some States and Territories do not have any equivalent provisions assuring children their rights of privacy.

Protection from attacks on one's honour and reputation

Defamation laws, which apply in every Australian State or Territory, provide protection for people whose honour and reputation is wrongly harmed. Children rarely make use of these defamation laws although they often complain of untrue stories being circulated about them in school or the community. Individual schools respond very differently with some regarding this as a form of bullying with prompt and effective measures in place while others do nothing.

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[9] NSW Ombudsman, *Policing Public Safety,* 1999, paras 5.55-5.64

[10] See C. Grant, *Banning the Banning Notice,* 2000, 25(1) Alternative Law Journal p.32.

The media does not infrequently carry stories about children that either intentionally or unintentionally cause distress and or harm to the reputation of an individual child. In some cases, a story about juvenile crime in a neighbourhood will be illustrated with clips showing children who have not been implicated in criminal behaviour. In others, children who suffer from hyperactivity or a mental disability are filmed at a time when their behaviour appears to be out of control. There is some doubt as to when the consent of a child must be obtained before showing footage of that child in a situation that may be harmful to the child.

INDIGENOUS CHILDREN

ARTICLE 30

It has long been recognised that Indigenous people comprise the most disadvantaged group in contemporary Australian society. Despite widespread recognition of this fact and clear empirical evidence, Indigenous adults and children continue to experience inequality in access to services and benefits in comparison to non-Indigenous Australians. More significantly, this situation remains unchanged in a context of developing international awareness of human rights of Indigenous people.

The Convention is the only instrument of international human rights law not directly related to Indigenous peoples that specifically, in Article 30, articulates the rights of Indigenous young people.

Other international law developments pertaining to the human rights of Indigenous children include the Draft Declaration on the Rights of Indigenous People, the United Nations Permanent Forum for Indigenous Issues and the International Decade for Indigenous Peoples.

The UN Committee on the Rights of the Child

The UN Committee on the Rights of the Child is the body that monitors how well states are meeting their obligations under the Convention on the Rights of the Child.

In October 1997, the UN Committee made its Concluding Observations on Australia's performance. They expressed their concern for the 'special problems still faced by Indigenous and Torres Strait Islander (children)...with regard to their enjoyment of the same standards of living and levels of services, particularly in education and health.'[11]

They also noted the 'unjustified, disproportionately high percentage of Indigenous children in the juvenile justice system' and the 'enactment of new legislation in two States, where a high percentage of Indigenous live, which provides for mandatory detention and punitive measures of juveniles, thus resulting in a high percentage of Indigenous juveniles in detention'.[12]

Self-Determination

For the Convention provisions in relation to Indigenous children to succeed, it is essential that participating governments have a clear commitment to self-determination for Indigenous peoples enshrined in their domestic law. Self-determination is the founding concept of international law in respect to Indigenous peoples, reflected in the terms of the International Convention on Civil and Political Rights and the proposed Convention on the Rights of Indigenous Peoples (CRIP).

Whilst self-determination is embodied in the terms of Article 30, the article is weak, as it does not contain an affirmative obligation on States to make resources available to Indigenous peoples so that they can achieve self-determination.

Recommendation 33 of the National Inquiry Into the Separation of Indigenous and Torres Strait Islander Children from their Families requires that national legislation be negotiated and adopted between Australian Governments and key Indigenous organisations to establish a framework of negotiations for the implementation of self-determination.

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[11] Committee on the Rights of the Child Concluding Observations on Australia, 10 October 1997, UN Doc:CRC/C/15/Add.79 at [13].

[12] Committee on the Roghts of the Child Concluding Observations on Australia, 10 October 1997, UN Doc:CRC/C/15/Add.79 at [22].

Day of General Discussion on the Rights of Indigenous Children

The UN Committee on the Rights of the Child has focused on the rights of all Indigenous children at its Day of General Discussion on 19 September 2003. The Indigenous and Torres Strait Islander Social Justice Commissioner made three submissions to the Day of Discussion and those themes provide a useful framework to identify some of the principal ways that Indigenous children are marginalised.[13]

(1) IDENTITY AND CULTURE

The Social Justice Commissioner states:

> "One of the great challenges that many Indigenous young people face is striking a balance between their place in the Indigenous community of which they are a part and their involvement in the mainstream wider society. There are numerous indications that many young Indigneous people in Australia find themselves between 'two worlds'. These indicators include statistics on the disproportionate contact of Indigenous youth with criminal justice processes, lower levels of educational attainment, significantly higher Indigenous youth unemployment rates as well as Indigenous youth suicide rates (which are estimated at 3-5 times higher than non-Indigenous suicide rates)"

Any realistic attempts to address issues of poor performance or risk-taking behaviour amongst Indigenous children and young people must recognise the feelings of conflict and displacement which arise from having to live in two worlds. There must also be acknowledgement of the great diversity in the lifestyles of Indigenous Australians and that cultures evolve over time in response to new circumstances.

(2) NON-DISCRIMINATION AND EQUALITY

The submission of the Social Justice Commissioner provides an overview of the key indicators of quality of life. A helpful profile of Indigenous young people can also be found in Chapter 2 of the Commissioner's Social Justice Report 1999.[14] The Commissioner highlights the following issues: life expectancy, infant mortality and education as key indicators.

(3) LAW AND PUBLIC ORDER, INCLUDING JUVENILE JUSTICE

The Commissioner's third submission relates to law and public order including juvenile justice (specifically, public order offences and police discretion, mandatory sentencing laws and juvenile diversionary schemes).

National Indigenous Youth Leadership Group

The National Indigenous Youth Leadership Group was established in 2001 and represents the views of 16 young Indigenous people aged from 15-24. Information on the group can be found at **http://www.thesource.gov.au/speak_out/index.htm**. Of particular interest are the executive summaries at **http://www.thesource.gov.au/niylg/pdfs/exec_summaries.pdf**

Education and Training

The challenge to education departments and governments concerned with the education of Indigenous and non-Indigenous Australians is the recognition of for Indigenous culture, language and history. This will lead to the preservation of that culture and the necessary dignity to allow for the full and equal representation of Indigenous students in their education.

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[13] The submission can be viewed via the Aboriginal & Torres Strait Islander Social Justice link on the HREOC website at:

[14] This report can also be accessed via the HREOC website at:

The limited introduction of Indigenous languages in NSW schools and the establishment of the NSW Indigenous Languages Centre are welcome developments. Further commitment to the preservation of language by Federal, State and Territory governments is necessary to fully promote the equality of Indigenous students.

Indigenous students are being suspended and expelled from NSW public schools at much higher rates than non-Indigenous students. In 2001, Indigenous students received 14% of all short suspensions and 18% of all long suspensions even though only 4.4% of all students in the State are Indigenous. There were particularly high rates of suspensions amongst Indigenous girls in primary school. 41% of all girls given suspensions in primary school in that year were Indigenous.

In 2002, literacy and numeracy levels for students in years 3, 5 and 7 showed that Indigenous students were at least 5 points behind other students. Only 37% of Indigenous students stay at school until year 12; the average rate is 71%.

Members of the National Indigenous Youth Leadership Group have undertaken significant consultation on the issues of Abstudy, Community Development Employment Projects (CDEP) and alternative Indigenous education. Their executive summaries can be found at **www.thesource.gov.au** These findings highlight the problems in these areas and propose detailed strategies for reform. Please view these summaries if you would like to make comments about these areas specifically.

Health

Indigenous people live approximately 20 years less than non-Indigenous people. Indigenous infant mortality rates are 2.5 times that of non-Indigenous infant mortality. The seriousness of these inequalities indicates that there is a long way to go before health care for Indigenous people can be termed appropriate or adequate. Similarly, there is a long way to go before the standards of health care required under the Convention are met.

The ATSIC Briefing Paper on Indigenous and Torres Strait Islander Health (February 2001) summarises the range of health issues and inequalities that impact on indigenous communities, including indigenous young people:

> "We are twice as likely to be admitted to hospital, usually so ill that we need to stay longer – mainly for dialysis, pregnancy and childbirth complications, respiratory and digestive diseases and injury. We suffer higher than average rates for mental disorders, alcohol and other drug related conditions, circulatory diseases, nervous system disorders, skin diseases and infectious and parasitic diseases. The conditions reach an acute stage because of lack of early attention either because services are not available or because they are inaccessible to Indigenous and Torres Strait Islanders."

In 2000, there were 13.6 infant deaths per 1000 live births in the Indigenous population.[15] The incidence of low birth weight (< 2.5 kg) in children of Indigenous mothers is 13% of all births and 6% for non Indigenous mothers.[16] In October 2001, the Top End Growth Assessment for Action project for 2001 found wasting in 9-18% of Indigenous children.[17] International relief agencies regard a prevalence of 8% of wasting as a nutritional emergency.

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[15] Australian Bureau of Statistics 2001 cited in the National Aboriginal Community Controlled Health Organisation (NACCHO) June 2003 submission entitled "What's needed to improve child health in the Aboriginal and Torres Strait Islander Population."

[16] Edwards RW, Madden R " The health and welfare of Australia's Aboriginal and Torres Strait Islander Peoples", Canberra ABS 2001: 1-199 cited in the NACCHO June 2003 submisision above.

[17] Also cited in the NACCHO submission above.

This is but a glimpse of a few of the health deficiencies suffered by Indigenous children and young people in our country. We welcome as many examples as possible from non Government organisations for inclusion in the report.

Sexual Abuse

The following extract from a paper presented to the Child Sexual Abuse: Justice Response or Alternative Resolution Conference in May 2003 highlights the high incidence of child sexual assault in Indigenous communities and the difficulties in obtaining an accurate statistical representation:

> "Based on child abuse and neglect which was notified (or reported) to child protection departments around Australia in 2001-2002, 3254 Indigenous children under 16 years had some form of abuse substantiated (ie the statutory protection authority believed that physical abuse, psychological abuse, sexual abuse, and or neglect had occurred). This rate of substantiation was disproportionately higher (4.3 times higher on average in the Indigenous population)..."

In 2001-2002, there were proportionately less substantiations of sexual assault of Indigenous children by child protection departments, than for non-Indigenous children. 9% of the substantiations for Indigenous children were for child sexual assault (CSA) while approximately 17% of substantiations for non-Indigenous children were for CSA. However, substantiations for psychological abuse and neglect were disproportionately higher for Indigenous children.

> "Child protection authority statistics are an underestimate of the actual levels of CSA in Australia and it would seem that they are particularly so for Indigenous children as other sources tell a very different story. For example, the Gordon report (Gordon, Halloran and Henry 2000) says that the rate of sexual abuse of Indigenous children is significantly greater than non Indigenous children."[18]

The Ferrante and Fernandez study on sexual abuse rates in Western Australia, cited in the Gordon Report, found the following rates of sexual abuse for 2000:

• 0-9 years old	Indigenous girls	4/1000
	Non-Indigenous girls	2/1000
• 10-17 yo	Indigenous girls	17/1000
	Non-Indigenous girls	9/1000
• 0-9 yo	Indigenous boys	2.1/1000
	Non-Indigenous boys	0.7/1000
• 10-17 yo	Indigenous boys	2.4/1000
	Non-Indigenous boys	2.3/1000

Domestic Violence

The safety of Aboriginal women and children must be the priority for governments generally and specifically for the Federal Government in undertaking to comply with the requirements of the Convention.

The 2003 Government Report identifies the increasing commitment the Federal Government has had to this issue particularly through Partnerships Against Domestic Violence, including the allocation in 2003 of $6.2 million to the Indigenous Grants Program. What is not evident from the Report is whether there has

[18] Janet Stanley, National Child Protection Clearinghouse, Australian Institute of Family Studies with Assistance from Muriel Cadd and Julian Pocock, Secretariat of National Indigenous and Islander Care, *"Child Sexual Abuse in Indigenous Communities"* Paper presented at the Child Sexual Abuse: Justice Response or Alternative Resolution Conference convened by the Australian Institute of Criminology and held in Australia, 1-2 May 2003.

been a reduction in violence since the tabling of the first report in 1995. There is no apparent analysis of the factors contributing to violence and the Government's commitment to addressing them.

The current Government does not have an unequivocal commitment to self-determination of Indigenous people. Without this, it is questionable how aware the Government is of all of the factors which may contribute to violence in Indigenous communities.

Youth Suicide

As a general indication of the prevalence of youth suicide in Indigenous communities, statistics from **www.aihw.gov.au** focusing on Indigenous health indicate that in the 15-24 age bracket, the rate of suicide amongst Indigenous young males is approximately four times higher that for non-Indigenous young males. The rate of suicide amongst Indigenous young women is approximately three times that for non Indigenous young women.

The Federal Government has taken steps to specialise Suicide Prevention programs to specifically address the needs of Indigenous young people, such as the National Youth Suicide Prevention Strategy, which notes that:

> "The Indigenous experience of youth suicide is different from the mainstream, not least because Indigenous concepts of well being are grounded in holistic definitions of health and the cyclical notion of 'life-death-life'. Approaches to suicide prevention in Indigenous communities must therefore be grounded in a broader framework of emotional, social and spiritual well being, and require a separate strategic approach."[19]

Juvenile Justice

The level of over-representation of Indigenous juveniles in detention is 20 times the non-Indigenous rate. The Social Justice Commissioner identified that there are issues of concern for Indigenous youth at all stages of the juvenile justice system, such as:

(I) PUBLIC ORDER OFFENCES AND POLICE DISCRETION

Indigenous young people are disproportionately impacted by laws allowing police to move people on as they are more likely than non-Indigenous youths to be in a public place and also because officers may have a negative attitude towards them.

(II) MANDATORY SENTENCING LAWS

The Commissioner notes that the Western Australian law, which defines juveniles as offenders does not comply with the Convention which defines offenders as 18 years of age. The Western Australian law for juveniles is harsher than that for adults as juveniles detained under third strike laws are not eligible for parole until they have served 50% of their sentence. Adults may be eligible after serving one third. In Western Australia and in the Northern Territory (which has now repealed its mandatory sentencing laws), Indigenous young people are incarcerated at a far higher rate than young people. For example in 2001 in WA, Indigenous juveniles accounted for 81% of all identified 'three strikes' juvenile cases.

(III) JUVENILE DIVERSIONARY SCHEMES

The Social Justice Commissioner has developed best practice principles for diverting Indigenous juveniles from the formal criminal justice system. These can be viewed at **http://www.humanrights.gov.au/social_justice/croc/sub3.htm** and are applied with varying degrees of success in the different States and Territories. The Commissioner notes the importance of continuing to monitor and analyse programs for diversion.

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[19] http://www.mentalhealth.gov.au/resources/nysps/strategy/strat10.htm

EDUCATION

ARTICLES 28, 29

It is the responsibility of State and Territory governments to provide primary and secondary education in Australia, though the extent to which it is available and free does vary considerably in different parts of the country.

Only the *Education Act* 1990 in NSW includes a principle that every child has the right to receive an education and that it is the duty of the State to ensure that every child receives an education of the highest quality. Elsewhere, the right to education is framed in terms of an obligation of parents to enrol their children in a school and to ensure that they attend school regularly. Parents can be prosecuted if their children fail to attend school though such prosecutions are rare.

The absence of a principle entrenching the right of children to free primary and secondary education also has a disproportionate impact on particular groups, such as children with a disability, as it is possible for schools to 'reject' a child stating an inability to meet their needs.

A new Education Standards Bill in Scotland incorporates the educational rights included in Articles 28 and 29 of CROC.

Free education

The Convention requires that primary education be provided free and urges the provision of free secondary education. Government education in Australia is 'free' in the sense that students and parents are not charged for the teaching provided in government schools. However, it is questionable whether government education is truly 'free'. For example, schools are increasingly required to find additional funds in order to provide good quality education for students or education is defined narrowly and a charge is made for teaching materials, particularly in art or technology classes.

Parents of students at government schools are asked to make a contribution each semester towards school funds and an amount is suggested. This contribution is often described as a 'fee' rather than a 'donation' and pressure is put on students and parents to pay the amount requested. In some cases, students have been threatened with punishment or removal of educational entitlements because their parents have not paid the 'fees'. In other incidents, children have been identified in class and embarrassed or humiliated because of non-payment.

Schools also conduct fundraising to provide additional resources and personnel and the outcome tends to reflect the socio-economic standing of the communities served by the school. For example, a recent analysis of the annual contribution of parent provided funds to school budgets showed that schools in localities at the upper socio-economic levels obtained three times as much financial support from parents than those at the other social extreme.[20]

The perception that government has failed to ensure appropriate funding has resulted in a growing number of parents believing that government schools cannot provide adequate education. This has caused a shift of students away from government schools to fee-paying private schools with the result that education is no longer free for those families. A related problem is the drain of quality teachers from the state education system to the private sector, thus improving standards in the private sector to the disadvantage of the government sector.

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[20] T. Vinson, *Inquiry Into the Provision of Public Education in NSW*, Sydney, Pluto Press, 2002, pp.234-236.

Quality of education offered

The child's right to education is broader than providing school buildings. Education must be of sufficient quality and variety to ensure that the aims of education set out in Article 29 are realised. This involves suitable physical facilities and equipment, adequate staffing levels, reasonable class sizes, sufficient trained teachers and teaching methods and school cultures conducive to effective learning.

Little research is available on the qualities that enable teachers to engage with students in their class, to keep them interested in learning and to motivate them to improve their knowledge and skills. Recent research has reported that many boys find school boring, repetitive and irrelevant and that teachers treat them like young children.[21] Concerns were also expressed that often their school did not offer courses they wanted, particularly, courses that would lead to employment opportunities.

While poor behaviour by students can be a response to boredom and the perceived irrelevance of what they are being taught or anger at being treated like a young child, a NSW report states that '(w)hen students find the pedagogy engaging and the curriculum relevant they behave and learn. Lack of interest and motivation cannot always be blamed on students'.[22] Queensland has been to the fore in researching and designing productive curricula and teaching methods, which integrate the learning needs of students with issues and problems that are of concern and relevance to them.

With some notable exceptions, universities providing teacher preparation courses emphasise general theory at the expense of knowledge of practice. They also employ a shorter practicum than is desirable and adopt a less critical approach to student field assessment than is the case with other 'academic' subjects. New teachers appointed to their first school are critical of the amount of assistance they receive to help them with classroom management and identified a need for structured mentoring during the early years of their careers.

Equal access to quality education

In Australia, there are indications that children from low-income families, Indigenous children, immigrating children and children of minority cultural groups suffer educational disadvantages. Schools in higher income areas tend to attract better teachers, offer superior facilities and can more easily raise money from families for extra resources.

Also, the overwhelming majority of Australian teachers follow early appointments to remote and disadvantaged schools with appointments to schools with motivated and achieving students. There is a dearth of experienced and able teachers in disadvantaged schools and incentive schemes are required to help overcome this problem

School facilities

Maintenance of many Australian schools was deferred during the 1980s and 1990s. Further funds need to be allocated to improve the physical environment of government schools to ensure that they are safe, healthy, congenial and conducive to learning.

Children in care

There is some evidence that children in care are not always offered adequate educational opportunities and, in particular, are not provided extra tuition to enable them to recover from the disruption in their education.

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[21] F Trent and M Slade, *Declining Rates of Achievement and Retention: the Perceptions of Adolescent Males*, Flinders University, 2002.

[22] NSW Review of Teacher Education, *Quality Matters: Revitalising Teaching: Critical Times, Critical Choices*.

Measures to encourage attendance and reduce drop out rate: Article 28(e)

Regular school attendance has a direct bearing on educational achievement. Absence from school is an important indicator of a student being 'at risk' and is not simply attributable to naughtiness of children. Failure to attend school is influenced by complex and interrelated factors including staying home to complete assignment work, exhaustion, boredom, teacher relationship problems and finding a subject difficult to manage.[23] In one study, causes of truancy were identified as parent collusion, peer pressure, school rejection, suspension or expulsion, health and mental issues and 'at risk' factors included violence and abuse in the home, alcohol and drug abuse, parental mental health and criminal activities.[24]

School discipline Article 28(2)

Corporal punishment is still practised in government schools in some States and Territories and is permitted in private schools everywhere other than in New South Wales and Tasmania. No Federal or State education legislation prohibits punishments that are cruel, inhuman or degrading. This contravenes Article 37 of the Convention and Article 7 of the ICCPR.

Even where physical punishment is banned, a teacher who canes or straps a student can still rely on the common law defence of reasonable chastisement if facing a criminal charge or civil claim of assault, provided no more than reasonable force has been used.

Alternative sanctions

Like many other Western countries, Australia has adopted a range of responses to student misbehaviour in addition to conventional sanctions such as suspension and expulsion. These additional measures attempt to remedy underlying personal and social problems associated with unacceptable student behaviour. While schools report some success with 'circuit breaker' or relatively short-term withdrawal programs that provide staff and students with the opportunity of a fresh start, there are two problems:

(i) There are not enough of these programs to meet demand, thus requiring a continued reliance on negative sanctions, and

(ii) The now significant number of students with mental health problems often do not gain from non-specialised assistance and continue to present as difficult, undisciplined students.

There is an urgent need in many school regions for specialist mental health workers to guide teachers in their management of students with severe emotional and mental health problems and to provide access to treatment services when that is necessary. In the absence of such help, disturbed students simply 'tread water' until they can leave school.

Exclusion of students

Some States and Territories have a high incidence of students excluded from school for bad behaviour, although local rules use a variety of names and criteria for exclusion. In some States, education policy mandates exclusion of students for certain offences and in other States and Territories, individual schools have introduced blanket rules requiring exclusion for particular misbehaviours such as possession or use of drugs.

While it is generally agreed that exclusion or expulsion should be treated as a last resort, there is considerable evidence that students are sometimes excluded from government schools because of one incident, without first exploring alternative methods to address their behaviour.

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[23] *Keeping Young People at School: Summit Conference on Truancy, Suspensions and Effective Alternatives*, p. 14.

[24] *Keeping Young People at School: Summit Conference on Truancy, Suspensions and Effective Alternatives*, pp. 31 - 32

For many children, exclusion means the end of their education and can also be a very traumatic experience. Apart from the shame and embarrassment, they will often find themselves with nothing to do. If their parents are working, they get no supervision at home and if they are under 15 years, or 16 in Tasmania, it is unlawful for them to be employed during school hours unless they obtain an official exemption. The combination of no source of income and unstructured days leaves them susceptible to contact with the justice system for petty offences.

New Zealand research shows that a majority of excluded students feel that they were treated unfairly. It is not clear whether students can rely on the rules of procedural fairness to challenge unfair school exclusions.[25] It is possible to make a complaint to the Ombudsman, but the investigation usually takes a lengthy time during which the student is not receiving education and the Ombudsman's powers are limited.

In England since 1987, there has been an Exclusion Appeals Panel, which hears and decides appeals against school exclusions.[26]

Compulsory conferences

The *Seen and Heard* report recommended that national standards for school discipline be developed and that they include conferencing models suitable for school discipline matters.

Pilot schemes have been established in several parts of Australia and New Zealand, requiring that a conference be held with parents, teachers and students to work together to alter the behaviour that has precipitated the school's disciplinary action. This has the advantage that the focus is on changing the student's behaviour rather than punishing and isolating the child.

The child's individual personality and ability

Article 29(1)(a) of the Convention states that education should be directed to the development of the child's personality and abilities. The opportunity for the Australian public education system to assist with the personal needs of children is sometimes inhibited by large class sizes, shortage of resources and curriculum-based teaching and learning. Recently, there has been a greater emphasis on teaching the core skills of literacy and numeracy, and this has narrowed the range of courses available to cater to the special interests or abilities of individual students.

Respect for the child's cultural identity, language and values

Article 29(1)(c) of the Convention places an obligation on governments to ensure that education inculcates respect for the child's cultural identity, language and values. The UNICEF Implementation Handbook comments that 'many education systems actively promote patriotism in school children, sometimes at the expense of inculcating respect for different cultures, particularly minority or Indigenous cultures'.

Education systems in Australia vary in the extent to which they offer teaching in languages other than English despite an increasing number of Australian children for whom English is not a first language. Also the differences, which can occur with a disability, are often neglected. For example, the deaf community share a culture and a language and children with a disability may have to engage in practices which are different, such as use of adapted equipment or altered mobility.

Most government schools at secondary level and an increasing number at primary level have detailed uniform, dress and appearance rules. These restrict the right of students to make choices about clothing, hairstyle, ornamentation and appearance. Complaints are sometimes made that such rules are discriminatory in that they ban the wearing of cultural artefacts or culturally recognised dress or hairstyles.

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[25] The NCYLC is currently representing four young people in challenging a suspension on grounds relating to denial of procedural fairness. The matter is due to be appealed in court later this year.

[26] See N Harris and K Eden, *Challenges to School Exclusion*, UK, 2000.

Responsible life skills

Article 29(1)(d) of the Convention states that education should prepare children for responsible living in a free society in a sprit of understanding, peace and tolerance. The Australian education system was modelled on the British system and secondary schools in particular have retained their emphasis on regulation, strict discipline and unquestioning obedience to teacher commands.

Traditionally in most schools, the main principle of discipline has been control and coercion rather than encouraging students to take responsibility for their behaviour. Greater awareness of the extent of school bullying has prompted school programs that stress the importance of tolerance, cultural understanding and non-violence.

Education in human rights and CROC

Article 29(1)(b) sees an aim of education as developing respect for human rights and fundamental freedoms and the principles in the United Nations Charter and Article 42 puts an obligation on the government to make the principles of the Convention known to children.

While individual schools provide some teaching about the general principles of democracy, citizenship and human rights, there is a reluctance to embark on any topic that may be characterised as 'political' or 'controversial'. Also, the teaching is often presented in an academic manner rather than explaining how the principles in the Convention can be used by children who feel they have been treated unfairly.

Students in some schools are discouraged from expressing strong views about issues of domestic and international politics. It is usually seen as bad behaviour for a student to robustly disagree with the views expressed by the school principal or a teacher.

HEALTH AND DISABILITY

ARTICLES 23, 24

In general terms, Australian children enjoy relatively good health and have access to free government health care of reasonable quality. There is clear evidence, though, of poorer health among Australian children in socio-economically disadvantaged families, in single-parent families and in families where no parent is in paid employment.[27] Homeless young people have also been shown to have poor health associated with substandard living conditions.

The health status and available health care for children in Indigenous families is significantly lower than that enjoyed by non-Indigenous Australians. The death rate for Indigenous children in Western Australia, South Australia and Northern Territory is at least double the rate for the Australian population as a whole. In addition, the health status of Indigenous Australians is said to be overall considerably worse than comparable 'Fourth World' countries.[28]

The *Progress of Nations and State of the World's Children Reports* published by UNICEF details Australia's poor record in particular areas of children's health. For example, the immunisation rate of young Australians for measles, mumps and rubella is below the UNICEF goal of 90% and the youth suicide rate is among the highest in the industrialised world. Also, the number of children dying as a result of abuse is higher than many comparable countries and Australia ranks third highest for an industrialised nation for the number of children living in poverty.

Australian Health Ministers endorsed the national health policy for children and young people, aged from birth to 25 years, in 1995. This was an important step forward in that it was the first formal commitment by Commonwealth, State and Territory governments to work cooperatively to maintain and improve the health of all young Australians. It recognised that most of the ill health and injury suffered by Australian children is preventable.

One problem in assessing the health of Australian children is the lack of separate data relating to under 18s, as statistics tend to cover both children and young people. Planning in child health matters is difficult if there is not disaggregated data specific to children.

Article 24(2) of the Convention requires Australia to take all appropriate measures to diminish infant and child mortality, to provide appropriate pre-natal and post-natal health care for mothers and to encourage breast-feeding.

The health of Indigenous children has received a lot of attention in recent years, but to date, increased services and interventions have not resulted in improved health outcomes.

Australian children have a high rate of injury and death from motor vehicle crashes, drowning, tractor accidents and work-related accidents. The annual report of the NSW Child Death Review Team expresses concern about the number of children killed or injured by vehicles backing out of driveways.

Mental health

The 1993 report of the *National Inquiry into the Rights of People with Mental Illness* concluded that there were few areas in Australia with adequate mental health services for children and young people. The report stated that funding, facilities, staffing, worker training, in-patient care, community and home-based care and commitment to the establishment of prevention and intervention services were all inadequate. All these deficiencies were compounded in service provision for Indigenous children and young people.

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[27] Findings in *Health Differentials Among Australian Children*, 1995.

[28] Australian National Centre for Epidemiology and Health.

Two landmark Australian studies also indicate that between 14 and 18% of children and young people experience mental health problems of clinical significance.[29] Despite this, there is a severe shortage of mental health services for adolescents in Australia. Also, the indications from the Commonwealth Government's Consultation Paper for the Third National Mental Health Plan 2003–2008 are that its planning still does not recognise the specific mental health needs of children and young people and has not linked them into the broader national agenda for early childhood.

Youth suicide

The UN Committee noted its concern about the high incidence of suicide among young people in Australia in its concluding observations in 1997.[30] While there have been a number of Commonwealth and State Government initiatives specifically to address youth suicide, for example, the National Youth Suicide Strategy and the recommendations of the NSW Child Death Review Team 2002 report, there is a critical need for mental health services and further prevention and intervention work with children and young people.

Services also need to ensure that particular groups of 'at-risk' young people, such as gay and lesbian youth, young people in rural communities and Indigenous youth receive appropriate and specific responses.

There is mounting concern in Australia at the increasing levels of obesity and unfitness in children and this can be attributed to poor nutrition, the huge growth in consumption of fast foods and junk foods, television advertising directed to children urging them to consume unhealthy foods, less exercise due to greater use of private cars and parental concern about unsupervised play.

Research shows that children are more likely to use health services designed to meet their particular needs, as they feel more comfortable and more certain that their confidentiality will be respected. In particular, the report *Our Homeless Children* identified that homeless children are reluctant to make use of mainstream health services because they found them judgmental and insensitive to their needs. A child is not able to have a separate Medicare Card until they reach the age of 15 and cannot normally access medical advice or treatment without the involvement of their parents.

Children have raised breach of confidentiality as a serious factor discouraging them from accessing health care. Research in Victoria about the attitude of doctors towards a child's right to confidential treatment found there are considerable variations in practice.

The laws giving children and young people the opportunity to consent to medical treatment are different in each State and Territory. Some age thresholds are set, but there is also scope to be recognised as a mature minor having the capacity to consent.

Disability

Under the Convention, children with a disability are entitled to enjoy a full and decent life in conditions that ensure dignity, promote self-reliance and facilitate active community participation by the child. Under Commonwealth, State and Territory anti-discrimination laws, it is unlawful to discriminate against any person, including a child, on the grounds of their disability. However, such laws presume that people will know about these rights and have the necessary access and resources to pursue a claim.

While there is a dearth of information about the extent to which children with a disability make or are the subject of complaints of disability discrimination, there is some evidence that children and their parents make more complaints about disability discrimination than any other ground.

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[29] Sawyer et al, *The Child and Adolescent Component of the National Survey of Mental Health and Wellbeing*, 2000 and Zubrick et al, in the Western Australian Child Health Survey, *Developing Health and Wellbeing in the Nineties*, 1995.

[30] Concluding observations of the UN Committee on Australia, 10/10/97, see B.01 above.

Significantly, much discrimination against children with disability is subtle, for example, presumptions of incapacity, which results in failure to seek their opinions or denial of opportunities.

The Convention states that assistance required by a child with a disability will be provided free-of-charge where possible and take into account the financial resources of the parents or carers.

Although most States and Territories operate some type of technical and equipment assistance scheme for people with a disability, there are strict eligibility requirements. The biggest disadvantage for children is the limit on the frequency of replacement of equipment, which reflects policy based on the growth stability of adult bodies.

CHILD PROTECTION

ARTICLES 19, 25, 36, 37, 39

Children are entitled to have adults protect them from abuse, neglect and harmful influences such as illegal drugs. Article 19 of the Convention is quite brief but very broad in its compass. It requires Commonwealth, State and Territory governments to take 'all appropriate legislative, administrative 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'.

Child protection is the primary responsibility of State and Territory governments. Recent statistics would indicate that child sexual abuse is on the increase. Whether this is due to an increase in reporting or increase in the prevalence of the abuse is not clear. One Australian study estimated that 28% of Australian girls and 9% of Australian boys had been involved in some form of sexual exploitation by an older person.

The Democrats in July 2003 called for a Royal Commission into child sexual assault seeking a national approach to what is appearing to become an even more serious issue for children.

By far the most abuse - a term covering everything from suggestive petting and fondling to penetration and rape - is against girls. Statistics vary, but the widely accepted view in North America is that one in four girls and one in eight boys are sexually abused before the age of 18. Unlike boys, who tend to be abused by a teacher or coach outside the family, girls are usually abused by someone within it: fathers, brothers, male partners of their mothers, uncles, cousins, grandfathers. Only 10% of child sexual abuse is at the hands of total strangers. Over 90% of the offenders are men.

Child protection laws

Each State and Territory has separate child protection laws with considerably different criteria for intervention. It is significant that none of the current child protection laws establishes a right to protection as envisaged by Article 19 of the Convention. The only reference to rights is in the *Children and Young Persons (Care and Protection) Act* 1998 (NSW) and this is limited to a requirement that the Minister prepare a Charter of Rights in section 162 and a right that children in out of home care be provided with information about their authorised carer in section 145. Neither of these sections are in force at July 2003.

The lack of standardised child protection laws throughout Australia enables children known to authorities to be moved interstate to avoid official intervention. It also means that States and Territories with outdated and inadequate legislation cannot benefit from the innovative and progressive initiatives in other areas.[31] Examples of disparity in legislation relate to criteria for intervention, mandatory reporting requirements, legal representation of children, employment screening for those working with children, prioritising permanent placements and child death review teams.

Other areas of law, such as corporations law and criminal law have been standardised via the development of Model Codes which States and Territories have been encouraged to adopt.

Suggestions have been made to create a Commonwealth Commissioner for Children or for the Commonwealth Minister for Children and Youth Affairs to take the initiative in attempting to secure State and Territory support to establish standard child protection practice across Australia.

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[31] Outdated views of children are reflected in the *Child Welfare Act* 1947 (WA) and the *Community Welfare Act* 1983 (NT).

Child protection is much broader than giving powers to government child protection agencies. Other aspects of child protection include:

- Reducing the risk of child abuse by decreasing opportunities, for example, through employment screening provisions and registration requirements for child abusers.
- Support and special facilities for child victims and child witnesses during investigations, medical examinations and court proceedings.
- Specialist facilities for prompt and thorough investigation and assessment of children's allegations of abuse, such as the Magellan pilot scheme in Victoria.
- Safeguards to reduce the possibility of children suffering from systems abuse such as multiple interviewing or insensitive dealing with children who complain of abuse.
- Opportunities throughout the investigation, assessment and decision-making processes for children to be kept fully informed, be supported and be provided with opportunities to express their views freely and have their views taken seriously.
- Development of laws, polices and practices which take account of the particular cultural background of indigenous children, children of minority racial or cultural groups, children whose first language is not English and children with a disability.

In Australia there are examples of good practice in each of these areas, but in some jurisdictions there is failure to address these issues.

Once the State has intervened in relation to the safety and care of children and particularly where they are removed from parents or families, it is of utmost importance that they are not further disadvantaged or abused by being left uninformed, unsupported or allowed to drift in care. It is widely acknowledged that in general far greater, resources are committed to the investigation, assessment of notifications and care proceedings than are made available for the placement and support of children who have been removed from their parents or families.

Certain children have disproportionate contact with care proceedings, such as Indigenous children and children with a disability. For example, international research has found that children with a disability are between 1.5 and 3 times more likely to be maltreated than children without a disability, while locally it has been demonstrated that approximately one quarter of the cases before the NSW Children's Court involved a child with a disability.[39] Anecdotal reports suggest that it can be very difficult to find appropriate placements for Indigenous children and children with a disability.

Numerous international and Australian studies have also shown that some children taken into care fare badly in terms of their mental health, educational and social status. There is, however, increasing evidence that not surprisingly, both the stability and quality of care predict better outcomes for children and young persons in care. Contact with family members and other significant people in the child's life is also generally beneficial, but is often not regular enough or available to the extent required to support these relationships.

Many decisions are made about children and young persons in out-of-home care that affect where they are to live, who with, when those arrangements are to change, when they can see family members and where they go to school. In addition to the participation rights outlined in Article 12, there are good reasons to involve children and young person in out-of-home care in decisions that affect them. These

[39] McConnell, Llewellyn and Ferronato, 2000.

include giving them some sense of control and a feeling that they are 'active agents in relation to their own care rather than the powerless and resentful victims of the whims of adults'. Also, children and young people will be more likely to accept a decision they have been involved in making than if it is imposed upon them.

There are some promising signs that the importance of participation is beginning to be recognised for children and young people in care. All States and Territories now have legislation requiring that children and young people involved in care proceedings be represented and informed about what is happening in court. Recent legislation in the ACT, NSW, Queensland and Tasmania includes principles of participation which require children and young people to be informed, consulted and involved in decisions that affect them under these Acts. Western Australia is also currently reviewing the care legislation and is proposing to include a principle of participation.

In two States, there has also been some progress towards a charter of rights for children and young people in out-of-home care. South Australia has developed a charter, although it is not legislatively based. A yet-to-be-proclaimed section of the NSW Act includes a provision for a charter.

Reviews of children in care: Article 25

Article 25 of the Convention is devoted to the rights of children in out-of-home care to have their placements reviewed periodically. Much has been written about the tendency for children to 'drift in care', with research and a number of inquiries showing that children in care are accorded a low priority receiving little or any case work until there is a crisis in the placement.

The Implementation Handbook states that Article 25 is one of the most important rights for children under the Convention though it is often overlooked in reports submitted to the UN Committee. The Handbook makes the point that children in all parts of the world have suffered neglect and maltreatment after being placed by government authorities in hospitals, children's homes, detention centres or foster or adoption placements.[33]

As a group, young people leaving State care are significantly disadvantaged. They are expected to become independent earlier than other young people despite the fact that they have few social or family supports and they are less likely to have completed school, gained employment or have somewhere stable to live. Although young people living with their families are now leaving home later, at an average age of 23, there is a tendency for care authorities to leave children to 'sink or swim' after leaving care despite their greater vulnerability and lack of support.

Currently, New South Wales remains the only State to have introduced legislation and a funded system of after-care services for young people leaving care. Victoria introduced a Leaving Care Service Model Project in 1998, which aimed to strengthen support for young people leaving care aged 14-18 years. However, after more than four years of research and public consultation, no specific funding has as yet been provided for transitional or after-care programs.

There is some indication that the Commonwealth Government is beginning to recognise its responsibilities in this area. The Department of Family and Community Services has started to roll-out a Transition to Independent Living Allowance (TILA) to provide financial assistance of up to $1,000 for particularly disadvantaged care leavers, such as those who have been in care for an extended period of time.

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[33] Research exploring systems abuse from an Australian perspective can be found in: J Cashmore, R Dolby and D Brennan reported in *Systems Abuse: Problems and Solutions,* 1994.

Although the Commonwealth continues to deny any legislative responsibility for care leavers, the introduction of TILA has been justified on the grounds that early intervention and support programs will help to prevent later demands by care leavers on the welfare system.[34] Arguably, there is also a strong case for the Commonwealth Government to follow the lead of the UK Government in imposing minimum uniform leaving care standards on the States and Territories.[35]

Corporal punishment

Article 19(1) of the Convention requires that all appropriate legislative, administrative and educational measures be taken to protect children from all forms of physical violence, abuse or maltreatment. The UN Committee has consistently taken the view that any physical force against children offends Article 19(1) and has recommended that Australia and many other countries pass laws to ban all physical punishment in the home and in schools.

Australian law has adopted the principle of English law that it is a defence to assault for a parent (and in some States and Territories, a teacher) to use reasonable physical force in order to correct the behaviour of a child under their care. The use of physical punishment is widespread and surveys show that most adults support its use.

New South Wales and Tasmania have banned all corporal punishment in schools and some other States have condemned the practice through government directives or policy guidelines. Even where educational policy forbids the use of physical punishment, teachers can rely on the reasonable chastisement law to defend any criminal prosecution or civil claim for assault.

Physical punishment by parents and carers is authorised by law in all Australian States and Territories. In 2002, New South Wales passed a law limiting the use of physical punishment to situations where (i) the blow is not directed to the child's head or neck, (ii) the punishment causes harm to the child for no more than a short period. It is too early to assess what effect this will have on parental punishment. Surveys of the views of children who have been physically punished show that they find such punishment harmful and humiliating.

[34] Vanstone and Kemp, 2001.

[35] CAFWAA, 2002 at 7 and 13-14; Mendes, 2003.

CHILDREN AND THE FAMILY

ARTICLES 3, 5, 18, 20, 21

The Convention places considerable emphasis on the importance of parents and family for children. Article 5 states that the responsibilities, rights and duties of parents, extended family and community members should be respected in a manner consistent with the evolving capacities of the child. This reflects the view in common law that parental powers are provided to parents to enable them to carry out their responsibilities to their children and that the rights of parents to control the lives of their children diminish as the children grow in understanding and maturity.

In Australia, the law does not usually intrude into the personal lives of children and families and places considerable value on the notion of family autonomy and freedom from bureaucratic interference. This does not always work for the benefit of children. The strong support for the continuation of laws that allow parents to use physical measures to punish or control their children illustrates this.

In Australia, the Federal Government is predominantly responsible for family law and this is regulated by the *Family Law Act* 1975 (Cth). The States and Territories also regulate some areas of family law, such as adoption, resolution of disputes over property of unmarried couples and inheritance laws.

Disputes over residence and contact

Federal Family Courts deal with disputes between parents or carers as to the children's place of residence (custody) and contact with the other parent (access). Western Australia has a separate Family Court with Federal and State jurisdiction. Under both the *Family Law Act* 1975 (Cth) and the *Family Court Act* 1997 (WA), the child's best interests are to be the paramount consideration when decisions are made.[36]

Laws relating to the occupancy and division of family property

Australian legislation dealing with the resolution of property disputes between parents does not require a primary consideration to be the best interests of any children involved. Children also do not have standing to apply for provision or rights of occupation of the family home.

Inheritance laws

Children have rights of inheritance from their parents in every State and Territory regardless of whether their parents are married. Where there is no or inadequate provision made by a parent who has died, application can be made to the courts for provision for a child's maintenance. While the testator family maintenance laws do not make the best interests of the child a primary consideration, they can ensure that a child in need of financial support receives such support.

Both parents have common responsibilities for their child's upbringing: Article 18(1)

The public perception in Australia is that the natural forum for the resolution of issues arising from parental separation is the Family Court. While there have been some modifications, the Family Court retains many features of the adversarial system and once families are drawn into the court process there are a number of factors that tend to exacerbate rather than resolve conflict. For example, the adversarial nature of proceedings may erode personal and parental relationships making it harder for them to effect joint decisions and work together for the benefit of their child. Also, feelings become polarised, trust is broken, and a judge who has limited knowledge of the children and their situation has to make decisions that may profoundly affect both the children and the parents.

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[36] Per sections 65E and 68F (Cth) and sections 66, 145 and 154 (WA).

There are situations where the adjudicative and coercive powers of the courts may be necessary, for example, where there are allegations of physical or sexual abuse. However, the majority of cases appear to be a symbolic battle between angry and distrustful parents, which is costly in time, money and emotional energy. Children seldom benefit from bitter and protracted litigation between those who have primary responsibility for their care, and the unsuccessful party to the litigation often gives up on their child, feeling that their parental role has been undermined by the court decision or by the other parent.

It is now widely accepted that there must be more effective resolution methods and proposals have been put forward which emphasise the importance of counselling and mediation services being available at the earliest possible time after separation.

Government assistance to parents in performance of their child-rearing responsibilities

Article 18(2) of the Convention requires that the government provide assistance for parents and carers in the performance of their child-rearing responsibilities.

Development of institutions, facilities and services for the care of children

Under the Convention, the government made a commitment to ensure the development of institutions, facilities and services for the care of children. The Convention also states that children of working parents have the right to benefit from child-care services and facilities. Australia has a proud record in providing child day-care but it is sometimes claimed that quality child-care is not always available to the children at greatest risk.

Recent reports also identifies that children of parents with a disability are particularly disadvantaged by a lack of facilities and services.[37]

Adoption laws

Under Article 21 of the Convention, the interests of the child are to be the paramount consideration in adoption matters. This is a higher standard than that required in all other matters affecting children, which per Article 3 must treat the best interests of the child as a primary consideration.

While all State and Territory adoption legislation requires that the interests of the child shall be the paramount consideration there have been criticisms that many adoption orders in the past have been made with the primary consideration being the needs of the adoptive parents.[38] Most jurisdictions require the consent of a child aged 12 years or older to be obtained before an adoption order can be made, but it is unusual for the informed consent of children under this age to be required.

The New South Wales *Adoption Act* 2000 (not yet in force) states that adoption is to be regarded as a service for the child and contains requirements that children of all ages will have the opportunity to express their views freely. This legislation also requires that a child must be fully informed and provided with independent counselling before they can give a valid consent.

Child's right to receive information about adoptive parents and circumstances of adoption

The States and Territories are responsible for adoption legislation and adoption orders are made through State and Territory courts. There is no uniform legislation and the laws reflect a time when closed adoption was expected with a 'clean break' between the child and the birth parents. Recent opinion

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[37] Reports by the Standing Committee on Social Issues, *Making It Happen: Final Report on Disability Services* and *Care and Support: Final Report on Child Protection Services*.

[38] See P Boss, *Adoption Australia*, 1992, p23.

encourages open adoption involving the sharing of information and sometimes contact between the birth parents, the child and the adoptive parents, but this is not always being reflected in adoption laws and policy guidelines.

Article 13 of the Convention gives children a right to receive information of all kinds. Only NSW has a statutory requirement that children have a right to information about their adoption or proposed adoption. While most States and Territories allow adoptee access to information, these laws often apply only to adoptees who have reached the age of 18 years, for example, section 94 *Adoption Act* 1984 (Vic). In most adoption legislation, the birth mother can place a veto on the release of information to an adoptee.

Decisions to be made on the basis of pertinent and reliable information: Article 21(a)

Approval of persons wishing to adopt a child has tended to be based on their financial position and their good character rather than on their parenting experience or ability.

Consent of biological father

The consent of the biological father of a child of unmarried parents is not always required under adoption law. The Convention seems to require the consent of parents and other relatives of the child who have been involved in the child's care.

Inter-country adoption

Australia is a party to the Hague Convention on inter-country adoption and each State and Territory has laws applying this Convention to inter-country adoptions with countries that are also parties to the Convention. In the case of inter-country adoption from non-Hague Convention countries, there have been concerns raised about the propriety of the arrangements resulting in an Australian parent adopting a child from that overseas country.

Family law and child protection

If in the course of family litigation where one parent makes allegations of serious physical or sexual abuse of a child, the Family Court on the basis of evidence presented by the parties can rule upon this. Problems arise as the Family Court is expected to make this decision without having the capacity to conduct an independent investigation of these allegations. Also, while the Family Court can alert the relevant State or Territory child protection authority about the allegations, there is no certainty that the matters will be investigated and the child may remain at serious risk.

The Family Law Council in its 2000 report, Family Law and Child Protection, proposed that a Federal Child Protection Service be established and located with the Court but coordinated separately.

Donor conception

The right for children, as far as possible, to know their parents and to preserve their identity flows from the 'best interests of the child' principle in Article 3 and Articles 7 and 8. This right is not yet guaranteed in Australia, except for in Victoria, recently, and depends on State legislation.

It is estimated that more than 37,000 in-vitro fertilisation (IVF) babies have been born in Australia since the first IVF birth in 1980. Unless they were born and conceived in Victoria after 1998, children who are conceived as a result of assisted conception have no right to information about their biological identity. Since January 1998, all donor children in Victoria have the right to access identifying information about their biological parents when they reach 18 years of age.

In Western Australia, a new voluntary register of donors was introduced late last year, but there are very strict rules governing the disclosure of identifying information. Donor children can only access information identifying donors at the age of 18 if they have the written consent of the donor and parents are not to be provided with identifying information even with the consent of the donor.

In Queensland, the ACT, the Northern Territory and Tasmania there is no legislation. Fertility clinics must keep records and the guidelines say the disclosure of identifying details of donors and donor children is not allowed unless there is written consent by those involved.

In South Australia, there is no national register, but clinics are obliged to keep records of donors, donor children and recipient parents, which may be made available later on if a child applies for access to the information, provided there is written consent from the donor. There are moves to change the legislation for a more open system.

In NSW, there is no legislation and no national register. Fertility clinics have the freedom to use anonymous donors or not, but they must keep records.

However, a Bill has recently (2004) been introduced into New South Wales Parliament which proposes to remove the anonymity of sperm and egg donors, as part of a 'major shake-up' of legislation on assisted reproductive technologies (ARTs). The Bill will establish a central register of sperm and egg donors and will enable children born following the use of donated gametes to trace their biological parents when they reach the age of 18. It will also prevent the donation of genetic material between siblings if that would constitute incest, and proposes a maximum limit of 10 offspring per donor.

Currently, children who are the result of donor conception outside Victoria do not have the right to demand to know the full identity of their genetic parents and their medical history. Nor do they have the right to meet them, unless they get the written permission of the donor.

EMPLOYMENT

ARTICLES 32, 36

The International Labour Organisation (ILO) has commented that 'child labour is simply the single most important source of child exploitation and child abuse in the world today'. Article 32(1) of the Convention states that children have a right to be protected from performing work that is harmful to their education or to their health or physical, mental or moral development.

Research shows that many Australian school children have part-time jobs and that they value the opportunity to earn money, make social contacts and develop work skills and networks which will be useful when they seek to enter full-time employment. Most States and Territories have laws that make it an offence for employers to hire children of compulsory school age during school hours, but questions have been raised as to the lack of enforcement of these laws.

Children often work at uncommon hours or in unpleasant conditions, such as early morning deliveries or late rubbish clean-ups after sporting or community events. They may need to work after school to assist their parents meet the unreasonable requirements of their piecework employment, for example, in the clothing industry.

Most States and Territories have laws banning children from taking part in entertainment unless a special licence is obtained and there are laws restricting children from working in mines, hotel bars and casinos and from door-to-door sales, but these vary between States and Territories.

There is some evidence that children in the major cities are employed in prostitution or in the creation of child pornography.

Issues around youth wages are explored above in the previous section dealing with Civil Rights and Freedoms.

Article 32(2) of the Convention requires that governments set a fixed age below which children cannot be employed. The media have stated that some children of home-based workers in the clothing industry, who are often recent immigrants, are expected to work long hours to supplement the family income. Children who do domestic work, babysitting or work in small businesses are well-known to be more vulnerable to sexual abuse and exploitation than children in more mainstream employment situations.

Children who work in factories, shops or farms have a higher rate of work-related injury than adults. This is undoubtedly due to their lack of maturity and work experience. There are few provisions in industrial safety legislation setting special protections for young workers.

ADEQUATE STANDARD OF LIVING

ARTICLES 26, 27

Article 26 recognises the right of children to receive financial support provided by the State when their parents are unable to provide for them. Article 27 recognises the right for children to have a standard of living adequate for their physical, mental, spiritual, moral and social development. While there is not a separate Article of CROC dealing with issues of housing and accommodation, this is clearly encompassed within the right to an adequate standard of living.

The HREOC report *Our Homeless Children* and the Commonwealth House of Representatives *Report on Aspects of Youth Homelessness* highlighted the poor conditions experienced by a growing number of homeless children.[39] While accurate numbers are difficult to determine, a survey in May 1994 suggests there were in excess of 20,000 homeless children in the 12-18 age range. More recent estimates based on an analysis of 1996 Census data suggest that as many as 100,000 young people, aged 12 to 24 years experience homelessness, with around 37,000 being homeless on any given night.[40] Further, a number of children accompany their homeless parents to SAAP services with an estimate in 1999/00 being that up to 67,800 children were accompanying adults.

As the various reports conclude, homelessness is clearly a result of a lack of access to affordable safe accommodation for families and for young people who can no longer live at home. When young people leave home early, this is typically associated with abuse, domestic violence, and rejection or other negative experiences at home or school. The view that the provision of income support for homeless young people provides an inducement for early home leaving is not borne out by the research.[41]

More recent approaches to youth homelessness emphasise early intervention and prevention, and the Commonwealth claims that its Reconnect program has established 89 services across Australia to reconcile children and young people with their families and prevent homelessness. The Government has also developed the *National Homelessness Strategy,* which includes Centrelink identifying families at risk of homelessness and referring them to non-government agencies and developing information tools for children and young people.

[39] Human Rights and Equal Opportunity Commission, *Our Homeless Children,* 1989; Commonwealth House of Representatives, *Report on Aspects of Youth Homelessness,* 1995.

[40] J Healey, 'The Homeless', (2002), *Issues in Society,* 159.

[41] Crane et al., *(Homelessness Among Young People in Australia: Early Intervention and Prevention: A Report to National Youth Affairs Research,)* Hobart, National Clearinghouse for Youth Studies, 1996.

IMMIGRATION

ARTICLE 22

People in Australian immigration detention centres are comprised of two main groups, being 'unauthorised arrivals' and people who have been in the Australian community. The term unauthorised arrivals' refers to people who arrive in Australia without a valid passport or visa, are not immigration-cleared and go directly to detention. People in the community are detained if they do not have a valid visa and come to the attention of the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA).

Unauthorised arrivals are interviewed as soon as they arrive in Australia to assess, among other things, whether the person appears, on the face, to require protection. This entry interview is conducted without the interviewee receiving information about Australia's protection obligations, or legal advice or representation. The DIMIA even refuses to provide copies of the tape or transcripts of these interviews through the Freedom of Information process, raising concerns about the accountability of the decision-maker. Problems identified with the interview process include the duration of the interview, the quality of the interpreter, and the emotional, physical and psychological condition of the interviewee which all affect his or her ability to answer questions accurately.

Only section 256 of the *Migration Act* 1958 (Cth) addresses the right to access legal advice. This section enables the provision of legal advice where the person being detained has requested it. In practice such requests are difficult unless a person has been 'screened' in for the purposes of making a protection visa application and have been referred to a migration agent through the IAAAS program. It is important to note that the legal advice provided also relates only to migration issues.

Unaccompanied minors

The aforementioned processes are no different for children. Generally, if a child is part of a family unit, it is uncertain whether a child will even be interviewed by DIMIA and their fate will be decided on the strength of their family's claims alone. However, where a child is not part of a family unit in which someone is claiming asylum or is unaccompanied, the child's own statements determine the outcome of their 'screening'.

These children will need to enunciate the grounds in which they fear to return to their country of origin, which must be for one of the five reasons in the UN Convention on the Status of Refugees. The interview is not conducted in the presence of a support person or representative of the child, nor is any information provided to the child about what are their rights in seeking asylum or the definition of a refugee.

Often the children being interviewed originate from countries in which there has been severe political or civil unrest and people in authority have committed acts of oppression. The trauma and distress from treatment in their countries of origin, leaving their country, travelling abroad and detention in Australia create circumstances where these children may not be able to completely or accurately express their fears or situation. It is also likely that the subjective fear of the child may be expressed in a manner that does not reflect a Convention basis for a refugee claim, but nevertheless, this Convention nexus may exist.

Deportation of 'screen outs' and children

Following the entry interview, the unauthorised arrival will either become an 'asylum seeker' or a 'screen out'. The 'asylum seeker' will be referred to a migration agent and receive migration assistance to lodge a protection visa. A 'screen out' is viewed as someone with no legal basis to remain in Australia and therefore must be detained and deported at the earliest opportunity. Policies which require those who have been 'screened out' to be separated from others within the detention centres make it difficult to determine what has happened to them.

There is evidence that at Woomera IRPC, young people aged 13-14 years without family in Australia who have claimed they are from a particular persecuted ethnic group in Afghanistan, have been 'screened out' or not received legal assistance for at least a 4 to 5 month period. Also, at Villawood IDC, people claiming to be 14 or 15-year-olds have been taken to the embassy of their country of origin to obtain travel documents to return home after being interviewed by DIMIA.

Only DIMIA employees or interpreters were present at their interviews. It is also a concern that in DIMIA procedures to attempt to deport persons claiming to be children, the individual children involved may not have the legal capacity to consent to DIMIA requests. At the very least such consent cannot be informed if a child is not provided with information regarding their rights in Australia.

Need for an Onshore Parent Visa category (Best interests of a child / rights and duties of parents: Articles 2, 3, 5, 7, 9)

Australian migration law works on a visa system and all non-citizens must have a current valid visa to have lawful status in the country. There are over a hundred different Australian visas, each with their own rules of eligibility. The visa category system is an entitlement-based system: if you meet the rules of eligibility you must be granted a visa. If you do not meet the rules, you cannot be granted the visa. Migration law allows the government to control the migration program by imposing quotas on classes of visas, limiting the number of visas that can be granted in any particular financial year.

However, the law prevents the government from putting a limit on the number of visas granted on the grounds of being a spouse or a dependent child of an Australian permanent resident or citizen. The Minister for Immigration has an ultimate, non-reviewable, non-compellable discretionary power to grant a visa, but this power can only be invoked following a Review Tribunal's decision to refuse a visa.

In this categorical system, there is a gap that significantly infringes on the fundamental right of an Australian child to not be separated from parents against his or her will. This is because there is no visa category that allows a non-citizen parent of an Australian permanent resident or citizen dependent child to apply for a visa from within Australia that will allow them to remain in Australia based on their relationship to that child.

The current parent visa category is generally for parents of adult Australian citizens and permanent residents. The parent applicant must be outside Australia at the time of application, while the sponsoring child must be inside Australia. There are financial obligations required by the sponsor, including payment of a compulsory assurance of support bond and health care levy. Currently there is a cap of 500 parent visas per year, resulting in an excessively lengthy queue. Clearly, this visa category is not suitable for the circumstances of a dependent child who is in immediate need of the care and protection of their non-citizen parent.

A typical illustration of this scenario is where a non-citizen has a child with an Australian citizen or permanent resident, but is not sponsored by that permanent resident or citizen for a spouse visa. For example, the non-citizen parent is a victim of domestic violence, preventing her from staying with the Australian partner. In the absence of a spouse application, the non-citizen parent does not meet the requirements for any onshore visa application that will allow them to stay in Australia and look after their citizen child.

The only option in this situation is for the non-citizen parent to lodge an application for a visa that will fail, be refused by a Review tribunal and then appeal to the Minister to exercise their discretion to grant a visa. Often, the only visa a person can apply for in this situation is a protection visa. To have to navigate through the system and rely solely on the goodwill of the Minister for a final decision is clearly a less

beneficial solution than a visa category based on distinct rules of eligibility and access to full merits review of the decision.

The best interests of a child of any age cannot be served by being separated from either parent and Australia has an obligation to respect the responsibilities, rights and duties of parents towards their children. This significant crack in the Australian visa system breaches the fundamental rights of a citizen child to a family life and to not be separated from their parents.

Discrimination against children of non-permanent residents and citizens (Access to social security and other benefits for temporary visa holders: Articles 2, 3, 6)

There is a growing trend in the Australian migration system of granting temporary rather than permanent visas. This has implications for the quality of life of children of temporary visa holders. Temporary visa holders generally do not have full access to social security, health care and education systems available to permanent residents and Australian citizens.

For example, a citizen child with a non-citizen parent who is not entitled to a social security benefit may be forced to support the family on a single income support payment. Holders of most temporary visas, including temporary resident visas, student visas, visitor visas and bridging visas are required to pay a Temporary Visa Holders Education Fee in order to enrol in public schools.

Inadequate protection for the most vulnerable, 'innocent illegals'

The Migration law contains a special visa category that allows a person to obtain a permanent visa after turning 18, if they became unlawful as a child and have spent their 'formative years' in Australia. This is the 'innocent illegal' category, of the Close Ties visa subclass. This category of visa recognises that young people who became unlawful through no fault of their own as children are entitled to access a permanent visa option.

Changes to migration law that came into effect from 1 March 2003 has restricted the availability of this visa only to children who came into Australia *with their parents*. These changes adversely affect the most vulnerable children, including those who arrived as unaccompanied minors and those who may have been brought here against their will. For example, a child victim of trafficking would now be ineligible for this visa category on turning 18 years old, even if they had spent the formative years of their life in Australia. If not for the amendments to the Close Ties visa category, such a child would have been able to remain here as a permanent resident.

JUVENILE JUSTICE

ARTICLES 37, 40

Juvenile justice issues are frequently controversial. They arise in a context where adults are often critical of youth attitudes and behaviour, which they perceive as rude, loutish or rebellious, Politicians and the media regularly demonise children and young people for their dress, music and high-spirited behaviour. Children also use public space more than adults, which makes them more visible to law enforcement authorities and because children do not constitute an organised lobby group, they are generally unable to respond to and correct negative stereotypes.

In the past, punishments meted out to children have often been equally harsh or even more severe than those used to punish adults. Corporal punishment continues to be viewed by some as an appropriate method of dealing with young offenders, although it is no longer sanctioned by law in any Australian State or Territory. There are a number of reasons why children who break the law should be treated in a different and less punitive manner than adults. For example, children and particularly younger children may lack the ability to foresee the consequences of their actions. Their immaturity and lack of life experience may cause them to act impulsively or recklessly.

It is also well-established that harsh punishments are relatively ineffective in discouraging and deterring children from further offending and that such punishments may result in permanent physical, mental or emotional damage. This is now so widely recognised that adults facing sentences for serious offences will often plead in mitigation that they were harshly punished as children. Children are still learning values and behaviour, and to place a young offender with other juvenile or adult offenders may well result in the child adopting a life of crime.

The Convention contains a number of rights for children in juvenile justice and these are supplemented by the Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines) and the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty (the UN Rules). The attention given by the United Nations to juvenile justice issues indicates the degree of concern expressed over harsh treatment of youthful offenders.

The Convention stresses in Article 40(1) that children accused of having breached the criminal law should be treated in a manner which fosters and promotes their dignity and self-respect, reinforces their respect for the human rights of others and takes into account the child's age and the desirability of their reintegration so that they will assume a constructive role in society.

Juvenile justice laws to take account a child's age

In all States and Territories in Australia, the criminal law takes some account of the age of child offenders. However, there are a number of anomalies in the legislation that illustrate differing attitudes, for example, Victoria's juvenile justice laws apply only to children under the age of 17 while 17-year-olds are processed through the adult criminal system.

Every State and Territory has a minimum age, usually 10 years old, below which children are presumed not to have the capacity to commit a criminal offence. This encompasses the common law principle of '*doli incapax*', which has been incorporated into statutory law in the Criminal Codes of Queensland, Tasmania, Northern Territory and Western Australia. Also children between the ages of 10 and 14 (15 in Queensland) are presumed incapable of committing a crime because they lack the necessary criminal intent. This presumption can be rebutted if the prosecution can show beyond reasonable doubt that the child was aware that their actions were 'seriously wrong', as opposed to merely naughty or mischievous.

After the age of 14 or 15 in Queensland, the law presumes that a child assumes full criminal responsibility, but is still able to be tried in the Children's Court up to the age of 18 in all States and Territories except Victoria.

There have been moves to abolish the *doli incapax* principle in several jurisdictions. A NSW report recommended it be retained and given statutory force. Research has shown that some lawyers representing children are unaware of or do not raise the *doli incapax* defence.

Political pressure results in governments getting 'tough on crime' and a number of measures have been introduced which apply to children as well as adults. For example, most States and Territories have passed laws permitting police to take forensic samples from children and some of these laws allow parents to consent on behalf of their children without consulting the child. Mandatory sentencing laws in Western Australia continue to apply to children in some circumstances, but the Northern Territory has now abolished the mandatory sentencing laws that had resulted in a number of children being sent to prison for trivial offences.

Promoting the dignity and self-respect of children and advancing their understanding of the rights of others - measures for dealing with children without resorting to judicial proceedings: Article 40(3)(b)

Most Australian States and Territories have adopted a system of conferencing, which can be an alternative to prosecution and court appearance or a diversionary measure activated by the court. Typically, it involves young offenders in some situations being required to or having the option of attending a conference with their parents, the victim(s) of the offence, the police and others with an interest in the particular child. Research in New South Wales and New Zealand demonstrates that conferencing has a positive influence in reducing re-offending when compared with traditional methods of prosecution and punishment.

The success of conferencing depends on sufficient resources being made available and on the conference being independently convened and facilitated. Care needs to be taken that a young offender, after receiving legal advice, clearly admits the offence(s) and is not merely pressed to make an admission in the hope of receiving a better outcome. In Tasmania, conferences are sometimes organised by the police and at other times by the community and it is believed there are other States and Territories where conferencing is not as effective as it might be in diverting young offenders from the criminal court system.

Reintegration of children to prepare them to assume a constructive role in society

It is broadly accepted that labelling children as criminals, treating them harshly or in a humiliating manner and separating them from the positive influences in their lives, such as family members, teachers or youth workers, is more likely to reinforce criminal behaviour than to reintegrate them into society as constructive community members.

Article 40(2)(ii) of the Convention states that children shall have a right to appropriate legal assistance in the preparation and presentation of a defence to any criminal prosecution. Most States and Territories provide free legal representation for children facing court proceedings but there is not always access to legal advice when matters are referred to a conference. Also, children who have breached the law and been deprived of their liberty do not always have access to lawyers who might advise them how to appeal against a sentence or otherwise challenge aspects of their detention.

Fair hearing in law and criminal matters to be determined without delay

Article 40(2)(iii) of the Convention entitles children to a fair hearing in law on any charges brought against them or in regards to any sentence or punishment imposed on them, as well as to have criminal matters decided without delay. Children operate in a different time frame to adults and may choose to get the matter 'over and done with' rather than exercise their legal right to challenge the criminal charges.

Involvement of child's parents

Article 40(2)(iii) requires that the parents or carers of a child be provided with opportunities to support their child during any juvenile justice procedures. Most States and Territories have laws which require that a parent or carer be present when a child is interviewed by the police or other law enforcement officer. Some observers have pointed out that the laws vary significantly in different States and Territories and do not always ensure that the child receives necessary advice and support during interviews.

Availability of interpreters

Children or family members whose first language is not English are at a disadvantage when facing criminal investigations or charges. Article 40(2)(vi) of the Convention states that children should have the free assistance of an interpreter if they cannot understand or speak the English language.

Privacy of child to be respected

Article 40(2)(vii) of the Convention outlines the importance of fully respecting the privacy of a child involved in the juvenile justice system. If privacy is breached, the child may be teased, victimised or labelled. State and Territory laws place restrictions on publishing information about child offenders in the media, but there have been criticisms that court arrangements do not always adequately ensure the privacy of children. For example, complaints have been made that children are sometimes expected to share waiting rooms with adults involved in criminal matters and that their names are called out in crowded waiting rooms or disclosed on lists posted in the public areas of the court.

Special laws, procedures, authorities and institutions shall be established which are specifically applicable to children

Australia scores quite highly in this respect. There are specialist Children's Courts in all States and Territories. There are special facilities for the housing of children deprived of their liberty although there are some situations where children share accommodation with adults. Australia has entered a reservation under Article 37 of the Convention allowing this see B.05 above. Some surveys have found that children who are incarcerated prefer to be in a mixed facility because they believe conditions are better and older prisoners 'look out' for them.

A variety of dispositions

Article 40(4) of the Convention requires that a variety of dispositions including care, guidance, counselling, education and vocational training be available as alternatives to institutional care. While Australia has produced many innovative outcomes for children via conferencing schemes, some commentators believe Australia has done less well in offering a range of dispositions available to the courts.

Children in penal institutions

Article 37(b) of the Convention states that no child shall be deprived of their liberty except in conformity with the law and as a measure of last resort. Any deprivation of liberty must be for the shortest appropriate period of time. In the past, it was not uncommon for children to be locked up where there was no legal power to do so. This is less likely to happen today, although there have been regular accounts of this occurring.

A survey of the number of children held in police cells, prisons and detention centres in different States and Territories shows considerable differences in the rate of incarceration and this might suggest that deprivation of liberty is not always being treated as a measure of last resort. In New South Wales, a recent change to bail laws has removed the presumption in favour of bail and the *Bail Amendment Act (2003)* (NSW) applies to child as well as adult offenders.

Conditions in juvenile detention centres and other institutions accommodating children

The Convention establishes important rights for children who are deprived of their liberty and reinforces their right under the ICCPR not to be subjected to cruel, inhuman or degrading treatment or punishment. Article 37(c) requires that children in institutions shall be treated with humanity and respect for their inherent dignity and in a manner that takes into account the needs of persons of their age.

Reports regularly highlight that children deprived of their liberty suffer abuse and that there are not adequate safeguards established in law and policy to protect these children. It is very difficult for children who suffer institutional abuse to complain and have their complaints considered seriously, so consequently abuses may continue over a long time.

Areas in which children in institutions are vulnerable to abuse include:

- The danger of physical, verbal or sexual abuse by staff or other residents of the institution.
- Harsh, cruel or degrading punishments.
- Lack of privacy including interference with correspondence.
- Racist attitudes, remarks or taunts.
- Denial of regular access to friends and family members.
- Lack of sporting and recreational facilities.
- Failure to provide sufficient education directed to the child's needs and abilities.

There is a case for minimum standards to be laid out by statute or regulation and for accessible and effective grievance procedures being available to ensure that children can make a complaint without the fear of retribution or victimisation.

Although the number of Indigenous people appearing before NSW Local Courts remained unchanged between 2001 and 2002 (11,814 versus 11,797 respectively), the percentage of Indigenous people convicted in Local Courts who received a penalty of imprisonment increased, from 14.8 per cent in 2001 to 16.3 per cent in 2002.

The general trend towards tougher laws has been implemented on a nationwide level. In every State and Territory in Australia, the police have the right to demand the name and address of juveniles without giving a reason. Except for the Northern Territory and Victoria, police officers in Australia can disperse and 'move-on' youths if they 'have a reasonable belief that the person has, or is likely to engage, in a violent act'.

In Western Australia, a youth curfew has been implemented banning unsupervised children under 16 from the Perth entertainment precinct of Northbridge. In Tasmania, young people face jail terms up to 6 months for 'committing a nuisance', 'disturbing the peace', 'loitering' and 'drinking in a public place'. In the Northern Territory, the police can fine up to $2,000 for 'disorderly or indecent behaviour', 'obscene language in a public place' and 'disturbing the public peace'. In the ACT, a police officer may detain a person found 'drunk and disorderly' for 8 hours. In NSW, a police officer can 'on reasonable grounds' search anyone they suspect to have a dangerous implement such as a knife or firearm.

Effectiveness of tougher laws

There has been no solid evidence to suggest that the greater police powers have proven beneficial in tackling youth-related problems. Firstly, the moving-on powers have been ineffective in dispersing youths from the streets. This is because moving-on powers have not directly addressed the reason why youths congregate in public areas. White (1990)[42] argues that children 'hang out' in the streets because commercial places require money for entertainment and the streets are a relatively free area where they can escape the constant regulation of adults. The increased punitive powers and the privatisation of public space represent further regulations of their freedom and 'space', and youths will continue to struggle against regulation.

The increase of police discretionary powers has coincided with reported increase in police abuse of powers. In a discussion paper conducted by National Youth Affairs Research Scheme (NYARS) in 1992, 382 youths around Australia were interviewed on their relationship with policemen.[43] A high proportion (80%) of the interviewees had been stopped and spoken to by the police while they were just 'hanging out' or 'walking' in a group or by themselves. Indigenous youth were more likely than other young people to be stopped; boys were also more likely than girls, and youths engaging in marginal activities such as delinquency and substance abuse were more likely than others. In fact, almost all males (94%), Indigenous youths (98%) and 'marginal' youths (96%) had been stopped by police.

Not only were half (53%) held in police cells, many reported being held for eight or more hours and many also reported being held in a cell with adults, or with adults and other young people. The majority (70%) said that they were yelled at or sworn at, just over half (55%) said they were pushed around, and 40% said they were hit.

Less than a third were told about their rights, were able to make a phone call or believed that the police had attempted to contact a support person. Only a third had an adult (other than police officers) present while they were being questioned, and over half were fingerprinted.

While most young people (83%) knew that they did have certain rights when stopped by the police, far fewer knew what these rights were (42%) and most said that they needed more information (82%). Almost all thought the police did not do an adequate job of informing them of their legal rights. In general, their findings indicate that the police were more likely to be heavy-handed in their dealings with young men, Indigenous youths and marginal youths.

Findings like the one above gives weight to the argument that increased police powers have contributed to a 'vicious cycle'[44] in the relationship between youths and the police. An intervention by police usually leads to provocation by youths. The police in turn use (or abuse) their wide-ranging powers to hassle and even assault youths during arrest and questioning. This causes youths to develop a deep hatred of police and of 'justice' in general. The result is that youths will not correct their behaviours and the cycle of intervention by police continues.

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[42] R White, *No Space of Their Own*, Cambridge University Press 1990, Chapter 5.

[43] C Alder, I O'Connor, K Warner, R White, *"Perceptions of the treatment of juveniles in the legal system,"* Report prepared for the National Youth Affairs Research Scheme (NYARS), 1992.

[44] R White, *No Space of Their Own*, Cambridge University Press 1990, Chapter 5.