children's RIGHTS

Where The Law Is Heading And What It Means For Families

Barry Maley

THE CENTRE FOR INDEPENDENT STUDIES

1999

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Policy Monograph 43

THE CENTRE FOR INDEPENDENT STUDIES

Published January 1999 by

The Centre for Independent Studies Limited.

National Library of Australia

Cataloguing–in–Publication Data:

Maley, Barry, 1925- .
Children's rights : where the law is heading and what it means for families.

Bibliography.
Includes index.
ISBN 1 86432 038 9.

1. Children's rights. 2. Children - Legal status, laws, etc. 3. Children (International law). 4. Parent and child (Law). I. Centre for Independent Studies (Australia). II. Title. (Series : CIS policy monographs ; 43).

323.352

Layout and design by Daryl-Anne Le Roux.
Printed by Alken Press, Smithfield, NSW.
Typeset in Garamond 11pt.

Contents

Key Points

- The issue of children's rights has attracted the attention of a significant number of Australian and international organisations.
- There is also widespread community concern with the problems of child neglect and child abuse.
- There is some evidence to suggest a correlation between recent changes to family structures and an increased incidence of child abuse or neglect.
- The most important rights that children have are their rights to care and sustenance from adults, including guidance and socialisation into the adult world.
- There are genuine areas of possible conflict between the positive rights of children (care and protection), which require a well-functioning family to be most effectively met, and their negative or 'autonomy' rights.

- The United Nations Convention on the Rights of the Child (UNCROC) was ratified by Australia in 1990.
- Some of the autonomy rights provided for in UNCROC may clash with parental prerogatives of guidance and control of children.
- Many of UNCROC's provisions are couched in vague and abstract language that makes it impossible to be sure what their implications might be if they were to be incorporated into Australian law.
- UNCROC and similar documents systematically fail to distinguish between positive and negative rights, and in particular fail to recognise the potential injustice in expanding positive rights beyond the familiar categories.

- Although international treaties do not automatically become part of Australian law, the federal parliament may legislate to

implement their provisions by virtue of its external affairs power.

- In the absence of such legislation, the courts may draw on the provisions of international treaties to assist in interpreting vague or ambiguous legislation.
- In *Teoh*'s case, the High Court in 1995 held that Commonwealth administrative decisions could be reviewed on the basis that international obligations should have been taken into account in the exercise of discretionary powers.
- Both the Federal Court of Australia and the Family Court have made some moves towards applying provisions of UNCROC in the interpretation of Australian family law.
- The Joint Standing Committee on Treaties, in its report on UNCROC, does not explore in any detail the question of its incorporation into domestic law, but it does note the reservations expressed in many of the submissions it had received.

- Providing effective representation and advocacy for seriously disadvantaged children is an important task. However, the form that this takes should avoid some of the more radical proposals present in UNCROC.
- Concern for family autonomy should not prevent stringent measures against child abuse or neglect; however, policymakers should be aware of the need to avoid unnecessary interference with family privacy.
- The evidence on the harmful effects of corporal punishment of children is inconclusive.
- There has been a steady trend away from physical forms of punishment, which can be expected to continue, and development of the common law is to be preferred to statutory intervention.
- The causes of the deterioration of family life are many and complex, and will require an integrated set of policy responses rather than piecemeal interventions.

Foreword

The recent 50th anniversary of the Universal Declaration of Human Rights has focused attention on human rights issues. The events of this century have shown the potential for frightful abuses of rights and the need for institutions to protect rights – including the rights of children.

Children's rights have become an important topic of public policy, and one of particular interest, of course, to the Centre for Independent Studies through its *Taking Children Seriously* program. In this book Barry Maley, the program's director, takes a close look at children's rights and the way they are being approached in Australian and international law.

Maley suggests that children, as the most naturally vulnerable members of society, are in a different position from the rest of us when it comes to the nature of their rights. Because of their dependence on adults, 'positive' rights – rights to protection, sustenance and guidance – have an importance for children that rivals that of 'negative' or 'autonomy' rights. In Maley's view, autonomy rights for children can be dangerous, because they might undermine the harmonious functioning of the family unit, on which children depend to have their positive rights met.

The most noteworthy measure put forward to protect children's rights in recent times is the United Nations Convention on the Rights of the Child (UNCROC), ratified by Australia in 1990. One of the strengths of Maley's presentation is the way he exposes UNCROC's uncertain mixture of positive and negative rights, of concessions to parental power and guarantees that might undermine it. (The full text of UNCROC is included as an appendix.) He also explores the different ways in which, even without being embodied in legislation, UNCROC may have an effect on Australian law. In a debate that seems to alternate between the platitudinous and the hysterical, one need not agree with Maley's conclusions to be grateful for his careful treatment of the issues.

A number of other matters are canvassed here, including

child abuse, corporal punishment, 'Children's Commissioners' and advocacy rights. In each case, Maley has stimulating thoughts to offer and makes his own position clear. His concern throughout is to ensure that in our haste to protect the welfare of children we do not give new and dangerous powers to government, which may be used to disrupt the lives of children and adults alike. As usual, those who turn to government as the solution often find that it is a large part of the problem.

The CIS is pleased to publish *Children's Rights* as an important contribution to one of the most fundamental policy issues of our time.

Greg Lindsay
Executive Director

About the Author

Barry Maley is Director of the *Taking Children Seriously* program of the Centre for Independent Studies. He has been Senior Fellow at the CIS since 1989, and prior to that was Senior Lecturer in Behavioural Science at the University of New South Wales. He is the author of *Marriage, Divorce and Family Justice* (1993), *Ethics and Ecosystems* (1994) and *Wedlock and Well-being* (1996), all published by the CIS.

Chapter 1

Genesis and Background of the Children's Rights Movement

Over the last few years, with relatively little public notice or discussion, there has been intense activity in certain academic, legal, international, and governmental circles, and some voluntary associations about questions of 'children's rights' and recommendations for urgent action to implement them. This rights movement now commands the attention of the federal and state governments and their instrumentalities, such as the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission, and specially-appointed committees of inquiry. In recent years, in a number of cases, the highest courts in the land have wrestled with the implications for Australian law of international conventions signed by Australia that involve questions of children's rights. Various non-governmental bodies, including the Churches, the Red Cross, the Australian Council of Social Service, and coalitions of voluntary associations concerned with children's issues, such as Defence for Children International, are also active. These bodies have initiated a range of inquiries and reports which treat children's rights as a central issue.

For example, Defence for Children International Australia, in conjunction with some 114 other organisations, released in 1996 what it called an 'Alternative Report', which it submitted to the United Nations in October of that year. This report was offered as an 'alternative' to the official federal government report dealing with Australia's obligations under the United Nations Convention on the Rights of the Child. Its purpose was to draw attention to what it believed to be deficiencies in Australia's official response to the United Nations committee

dealing with the Convention. The United Nations Convention on the Rights of the Child (UNCROC) has assumed considerable importance for the children's rights movement, and in many ways its Articles epitomise the leading questions under discussion. UNCROC will later be the subject of detailed examination.

For some voluntary bodies and governmental inquiries, action on children's rights is seen as an important route for addressing some of the substantive problems of abuse and neglect of children. For others, it is seen as an issue of high principle in its own right, intended to extend adult liberties to children or to enable children to act in their own interests without legal or 'paternalistic' impediments. UNCROC offers objectives and phrasing which can be recruited for both these purposes. What needs to be discussed more closely, however, is whether full implementation of UNCROC will achieve those ends without incurring collateral damage which more than offsets any benefits. A similar observation applies to many of the recommendations concerning children's rights that are made in various government reports that we will also be discussing.

From the perspective adopted here, one key issue that arises from demands for a variety of 'children's rights' is the need to explore the immediate and more distant consequences for parents and their children that are likely to follow if changes are to be made, via 'rights' legislation, to traditional relationships and prerogatives. Much of the present discussion of children's rights ignores the crucial role of the family system, and the rights and authorities of fit and competent parents, in the effective care and well-being of children. In our haste to remedy present problems and threats to the well-being of children through rights legislation, there is a danger that we may in fact further weaken the main institution protecting their welfare – the ordinary two-parent family.

What also needs to be considered is the way in which claims to rights are expressed in the key documents. This is especially so with the United Nations Convention on the Rights of the Child which, in common with similar instruments that have issued from the United Nations, expresses itself in terms which are

often abstract, open-ended and indeterminate, and which 'contains a wide range of vague political and economic rights and duties ...' (Defence for Children International, 1996: 37). There is a danger that legislation guided by vagueness and muddled thinking will only compound existing problems while erecting large bureaucracies to manage the resulting confusion.

Why Now?

There seems to be a clear connection between current rights talk and the changes in family life generally. It is noticeable that legalistic concern with children's rights has occurred as we have been made more aware of the unacceptably high incidence of child abuse and neglect in conjunction with the rapid growth of family instability and breakdown over the last twenty years.

Over the last few years a large volume of research and statistics on the well-being of Australian children has appeared in scientific journals, government reports and the media. In material terms – money, nutrition, goods, access to services and entertainment – the average level of affluence of this generation of children is very high. Yet, elsewhere, the evidence is disturbing. Rates of child abuse and neglect are rising, pockets of child poverty exist, public education is floundering, juvenile crime is increasing alarmingly, homeless children are a problem, drug use is rising, and youth suicide rates are among the highest in the world (Maley et al., 1996a; Sullivan, 1997).

A society that does not protect and care adequately for its children is a society at risk. Providing that care is necessarily an adult responsibility until children can look after themselves. Whether, and when, they are fit to do so is only partially determined by biological maturational processes, and even then with considerable variability from individual to individual. The attainment of adulthood requires a long process of education and socialisation which can only occur under the tutelage of competent adults. For legal and public purposes, adult status is a determination roughly made on an age basis and on criteria of competence and majority that may be arguable at the margins, but which are widely accepted in principle. In the meantime,

during children's minority, protection and care are the responsibilities of adults – either the child's parents or guardians or those authorised to act *in loco parentis.*

Traditionally, it is the parents who have borne the major responsibility of care and protection. This is recognised by the law in a variety of ways, especially in affording them almost total independence in managing that role, except where unfitness is demonstrated. Law and public policy reflect the common view that natural and adoptive parents normally have the strongest motives for serving their children's best interests and in providing effective care. In all societies, except in unusual circumstances, it is also the parents who are expected to accept responsibility for their children. It is thus universally customary, with some minor variations, that parents are entitled to exercise special prerogatives of education, control and guidance deemed necessary for effectively rearing and socialising their children.

In recent years, public concern with child abuse has grown rapidly. The trend has been reinforced by a number of revelations and public inquiries concerned with uncovering suspected 'pedophile networks', with sexual abuse of students in public schools, maltreatment of orphaned, handicapped and abandoned children in religious and governmental institutions, and abuse by relatives and guardians. This has led to governmental efforts to assess more accurately the incidence of abuse and to the collection of nation-wide statistics. Such data, especially those collated in reports by the Australian Institute of Health and Welfare (1990-91 to 1995-96), reveal a steady increase in the *reported* incidence of forms of child abuse and neglect. Between 1990-91 and 1995-96 reported cases grew from 49,721 to 91,734. In these and the intervening years, *substantiated* cases of abuse or neglect (the ratio between confirmed cases and cases investigated following a report) ranged between 43% and 49%. It may be that the rate of reporting of cases has increased because of heightened awareness of the problem and greater willingness of professionals and others to report incidents. There is therefore some doubt whether the increased numbers of reported cases reflects a real increase in the actual incidence of abuse and

neglect. Nevertheless, the size of the absolute increase in the reporting figures (over 80% in six years), and the steadiness of the substantiation ratio, probably reflects at least some real increase in rates of abuse. There are, moreover, several reasons why the increase could be real and substantial.

Child Protection and Family Structure

Although parents living together will sometimes abuse or neglect their children, it is highly significant that Australian and overseas studies show that children living in sole parent families and step families are more at risk of physical, emotional and sexual abuse, and neglect, than those living with natural or adoptive parents. Of course, many thousands of children are well and successfully reared by lone mothers or lone fathers, frequently under difficult circumstances. But the Australian evidence nevertheless indicates that children living in lone parent families (almost 90% of which are lone mother families) suffer a three times greater incidence of abuse and neglect than children in two-parent families; and, on the whole, children in sole parent families exhibit more behavioural problems. Recent evidence suggests, however, that an important variable in this context is the extent to which mothers change partners: 'Children in families characterized by one or more changes in marital partner manifested significantly higher rates of behaviour problems ...' (Najman et al., 1997: 1363). Children in blended or step-parent families are at five times the risk of abuse compared to children living with their natural parents (Australian Institute of Health and Welfare, 1994-95: 21-22; 1995-96: 33-35).

Studies in Britain and the United States have made similar findings of greater relative risk of child abuse in sole parent and step-families (Tomison, 1996a: 2-5). In reviewing some of the American research literature on the subject, Gallagher (1996: 36) quotes studies which show that:

(i) nonbiological 'father caretakers' were almost four times as likely as biological fathers to sexually abuse children in their care;

(ii) a preschooler who is not living with both biological parents

is 40 times more likely to be sexually abused;

(iii) one out of six women raised by a stepfather was sexually abused by him, compared to one out of 43 women living with their biological fathers;

(iv) although mothers' boyfriends contribute less than 2% of nonparental child care, they commit almost half of all reported abuse by nonparents.

In addition to the relationship between family structure and abuse, the distribution of forms of abuse between males and females reveals significant differences. Boys are more likely than girls to suffer physical and emotional abuse and girls more likely to suffer sexual abuse (Australian Institute of Health and Welfare, 1995-96: 33-35). Studies of abuse and neglect using Western Australian data on substantiated cases, indicate that 'males were believed to be responsible for 55 per cent of physical abuse cases, 52 per cent of emotional abuse cases and 94 per cent of sexual abuse cases; females were believed to be responsible for 88 per cent of neglect cases' (Tomison, 1996b: 5).

Given the relationship between frequency of abuse and neglect, and family type, we would therefore expect increased incidence of these problems when sole parenting and step-family formation increase; and that is precisely what has been happening in Australia over the last 30 years. It is useful to remind ourselves of the pace and extent of the changes that have taken place in family structure over that period.

Since the early 1960s, the divorce rate has more than quadrupled from 0·7 divorces per thousand of the population to 2·9 per thousand in 1996 (ABS, 1986a; 1996a). It has been estimated that about 43% of all marriages will end in divorce over the next 30 years (ABS, 1995: 35). Of the 52,466 divorces granted in 1996, 53·6% (28,138 divorces) involved children – a total of 53,462 children (ABS, 1996a:13). Divorce and separation are the main causes of family disruption affecting children through the formation of sole parent and step-families. Another major cause is unwed motherhood, which has increased almost sevenfold from 4% of all births in the 1950s to 27·4% of all births in 1996

(ABS, 1986b; 1996b: 6). Although many of these unwed mothers are living with the natural father, a substantial proportion (about 40%) are not. In total, 19% of dependent children are living in sole parent families, almost 90% of them lone mother families. When, to such families, we add step-parent or blended families, just over 21% of children, or about one million, are living in families from which one of the natural parents is absent, almost always the natural father (de Vaus and Wolcott, 1997: 33).

These statistics reveal a rapid and substantial change in family structure in Australia in the direction of more family types shown to be at greater risk of abusing and neglecting children and, in other ways, of reducing their well-being. The Western Australian Child Health Survey (Zubrick, 1995: Tables 1 and 2) has shown, for example, that children in blended families face twice the risk of mental health problems as children in original families, and that children in single parent families face almost three times the risk of such problems. The conclusion is therefore inescapable that circumstances which entail sustained separation of children from one or both of their natural parents are associated with significantly higher risk of abuse and neglect and other forms of reduced well-being for the children involved.

Changing Family Relationships

In other respects, the nature of the bonds and relationships between parents, children and other relatives has been changing. Not only do looser ties between parents – evidenced by more divorce and separation, high rates of breakdown of cohabiting relationships involving children, and unmarried and unpartnered motherhood – introduce uncertainties and dangers for children, they often entail the loss of extended family relations through the effective absence from children's lives of grandparents, uncles, aunts, and even siblings. Insofar as *active* kin relationships of these kinds may imply more support in conditions of crisis or stress for most families and their children, and a richer emotional and social environment in general, their absence can entail a more impoverished and less protected life for children.

The massive movement of mothers into the workforce over the last 20 years has also contributed to a perception of family life and parenthood as less settled and more problematic. This has reduced hours of maternal care and supervision of a great many children and their transference into the care of others, including strangers. Hundreds of thousands of pre-school children now spend many hours per week under non-parental supervision, and after-school hours for a great many older children are marked by the absence of both parents at work.

The increase in the incidence of abuse and neglect of children that has accompanied the growth in the instability of the nuclear family and, in many cases, reduced parental supervision in those that remain intact, leads to the plausible perception that the family in general can no longer be relied upon, to the degree hitherto, to provide that responsible and adequate care and protection for children which is the *raison d'etre* of its substantial autonomy, and that other means for protecting children will need increasingly to be called upon.

Such trends, and the partial vacuum of responsible care they suggest, provide a platform for claims that the state should intervene further in what is seen to be a faltering, more abusive and neglectful family life. To this may be added three further observations.

The first is the attack upon the family as oppressive, especially of wives and children. Post-modern criticism of the 'patriarchal' family (predominantly feminist in inspiration) includes the view that even the intact family is a necessarily authoritarian and flawed vehicle for child care, undeserving of its autonomy, and must be carefully watched and monitored. For example, we have the Professor of Sociology and Social Policy at the University of Sydney, Bettina Cass, quoted as referring to: 'the [family's] so-called "right to privacy" which is no more than a protection of patriarchal rights to maintain relations of inequality and dominance under the guise of family inviolability' (Commonwealth Department of Human Services and Health, 1995:78).

The second observation is that in a contemporary Western

culture devoted to 'rights talk', the parental authority and prerogatives of the family may easily be portrayed as entailing the denial to children of their rights.

Finally, it is nowadays a commonplace observation, but no less important for that, that the relations between parents and children have rapidly grown more 'permissive', with parents reluctant to present themselves as authority figures and apologetic and tentative when they have need to be so, no doubt for some of the reasons suggested above.

A number of pathways have thus led to the creation of circumstances in which children are less closely supervised, exercise much greater freedom in association with increased affluence and mobility, and are seen by a 'rights' *zeitgeist* as entitled to more independence, and yet, somewhat paradoxically, as more vulnerable because the family is no longer a stable and dependable haven for children, or, when it is stable, as necessarily patriarchal, oppressive and abusive.

These changes and present trends are reflected, as we shall see, in many elements of the 'rights' movement at both a national and international level. The movement, in turn, is influencing the law and public policy to move in directions that oscillate about two, often incompatible, axes: a drive, on the one hand, to *release* children and to give them more power; and a drive, on the other hand, to develop elaborate state mechanisms for child protection and closer supervision of the family.

I will later be concerned with examining how these tendencies are working themselves out and what the consequences might be. But before doing so, it is worthwhile to consider what it is that most undisrupted, 'normal' families *do* for their children. After all, despite the fact that the proportion of children being reared outside such families has grown very significantly in this generation, with the consequences described above, about four out of five children continue to be cared for by their natural or adoptive parents. It is these children who are under-represented in the statistics on abuse, neglect, juvenile crime and delinquency, child poverty, homelessness, drug taking, educational under-achievement, and other forms of reduced well-being and

incivility among children. Why is this so?

Parents and Child Socialisation

Child well-being and successful graduation to adult competence, civility and moral reliability, require very substantial inputs of love and care, education, instruction, and guidance from competent and responsible adults. It is, of course, possible for dedicated adults who have no biological connection to a child to rear it affectionately and successfully. Adoptive parentage, other kinds of guardianship, and organised institutional or foster care in the absence of the natural parents has been the lot of a great many orphaned, adopted, abused, abandoned, or neglected children who have subsequently become effective, well-adjusted adults. Much has depended, however, upon good fortune in placement rather than the regularity of good care in circumstances where the responsible adults and institutional environments may vary widely in their commitment to the affectionate and responsible care of their charges. There are many sad stories and tragedies – such as some cases associated with the 'stolen' aboriginal children episode in Australia – that show the uncertainty of such forms of care, and the frequency with which the children exposed to them may be abused and neglected. So, history, recent research, and public inquiries confirm what most would intuitively expect: the most reliable and consistently successful arrangement for the successful rearing of children is two cooperating and committed biological or adoptive parents.

The difficulty and subtlety of the parental task in socialising children, the sustained attention and dedication required, and the need for flexible parental behaviour, is familiar to all responsible parents. In order that children can acquire competence, the habits of self-control that make for 'character' and good citizenship, and the social skills needed for successful management of relations with others, a huge amount of teaching, instructing, and modelling of behaviour falls upon the shoulders of parents. Inadequately socialised children face difficulties in life and are difficult for others to live with. They

behave badly, find it hard to suppress impulse, are often aggressive, cannot accept legitimate authority and direction, and lie to avoid unpleasant situations. Well socialised children, on the other hand, have learnt to inhibit impulses, to consider the feelings and interests of others, to control anger and aggression, to be guided by legitimate authority, to internalise truth-telling, and to have a conception of what constitutes proper behaviour in a variety of circumstances.

The conversion of a child into such a person demands that its mentors be devoted to the child's interests and be prepared to set out on a long journey of teaching, constant reiteration of do's and don'ts, judicious employment of rewards and punishments, adjustment to the needs of the particular child, and the modelling, in the mentors' own behaviour, of what they expect of the children in their care. It is, above all, the daily intimacy and constancy of interaction between children and parents in the home, and the bonds of affection between them, that make this enormous task a 'labour of love' and therefore more acceptable, and socialisation more likely to be successful. Sole parents, or separated parents, or foster parents or guardians frequently manage to do the job, but because it is then, on average, so much more difficult, the failure rate is higher, as we have seen.

We now know, more so than a few years ago, how important *both* parents are in the socialising process; not only because the job can be shared and thus made easier, but also because *each* parent has something special to contribute to the rounding of both male and female personalities. With natural fathers effectively absent from the great majority of sole parent families and blended or step-families, this is now a common deficiency in the lives of many boys and girls. A father in the home who shows respect and affection to his wife is modelling appropriate behaviour for a son and shaping the expectations of his daughter. A mother who controls her anger models such control for both sons and daughters. Daughters who have had affection and protection from their fathers are less likely to look for such things elsewhere, in premature, casual relations. For boys, the absence of their natural fathers from the home is

significantly correlated with high rates of low educational achievement, juvenile delinquency and criminality. For girls, father absence is correlated with higher incidence of out-of-wedlock births. McClanahan and Sandefur (1994: 41), who have researched the subject for several years, conclude that teenagers who have grown up in sole parent families are twice as likely to drop out of high school and twice as likely to become teenage parents.

To sum up, the first duty of adults towards children is to ensure their survival and emotional integrity by caring for them, loving them, and protecting them, simply because they are otherwise vulnerable to a variety of physical, mental, and social dangers. The constant vigilance and unremitting care and attention this requires is more likely to be delivered by their natural parents and close relatives than by anybody else. When, because of death, incompetence, cruelty, neglect, or abandonment, the natural parents fail to do their job, it is the role of the state to act as *parens patriae* and to make the best available arrangements for others to assume the guardianship role.

The second duty of adults is to prepare children for adulthood and responsible citizenship. This requires, in addition to the basic conditions of care and protection, that the children be educated, instructed, controlled, and taught to manage themselves and their relations with others. This cannot be done unless the parents enjoy a range of prerogatives in handling their children which are difficult to define because of the infinite variability of the situations that may be faced, and of the children themselves. Within households, children have to be disciplined in a variety of ways that fall short of maltreatment in order that they should internalise all kinds of rules of appropriate behaviour. Families may vary greatly in the ways in which they achieve this, and again there can be no specific programs that can be laid down for all families in advance; they need the freedom to choose their own ways of getting there.

In general, the environment that best protects children against abuse and neglect and which is most likely to ensure their general well-being and effective socialisation into respon-

sible adulthood, is the intact and substantially autonomous two-parent family, supplemented by those other institutions (schools, universities, churches, voluntary associations, work) that play their part in transforming children into effective and responsible adults. If this is so, the preservation and extension of such an environment will serve the interests of children, and of society in general, well. Whether this is compatible with defending children's rights depends upon how we conceive those rights.

Children's Rights: The Issues

Children's rights can be conceptualised in two forms:

(i) as obligations upon adults (especially parents) to care for and protect them in their vulnerability, and to educate, instruct, and socialise them as a preparation for personal competence and responsible citizenship;

(ii) as individual entitlements to the protection of the law and to certain freedoms.

For purposes of discussion, we can describe these as 'protection' rights and 'autonomy' rights.

Increasing incidence of abuse and neglect is evidence of growing adult failures of protection. We have seen that this is closely connected with important changes in family structure over the last 20-30 years. Where families are intact – in the sense that two natural or adoptive parents are caring for their children – the obligations are more likely to be adequately met. Even so, parents in both intact and separated families, and others, may fail seriously to meet their obligations to children, and the state and the law must then respond effectively by rescuing children at risk and arranging appropriate conditions or guardianship for them. But not only is discovery of abuse or neglect sometimes difficult, so also is deciding on appropriate action, and this raises difficult issues for public policy which we must later discuss.

Questions also arise about the freedom of action (or 'rights') of parents in meeting their various obligations to their children. Undue interference with, or restrictions upon, their freedom to

judge, to direct, and to control children's behaviour may undermine the parental authority necessary to act appropriately. This is especially so when there is a need to place restrictions upon children, or to punish them. The importance of preventing abuse by parents or others may clash with the need for effective parental or delegated supervision and discipline. So, we will need also to discuss the permissibility, and the limits, of parental and delegated prerogatives in these matters.

However, the central issue raised by the more radical elements of the children's rights movement is the question of 'autonomy' rights for children. This is the claim that children, as citizens, should enjoy the same fundamental freedoms as adults in a liberal democracy, and, where necessary, be able to call upon public authorities to assist them to uphold these rights – if need be, against the opposition of their parents. The content of these rights claims will become apparent when we discuss the United Nations Convention on the Rights of the Child. Their significance lies in the way in which they directly challenge the validity of the need for adult (especially parental) authority to direct and control children during their minority in the interests of making it possible to educate, instruct, and socialise them.

The need for control and direction of children is based on the presumption that, if children are to be prepared for the exercise of freedom in any meaningful and fruitful way, their autonomy must be temporarily suspended as, under adult guidance, they acquire the skills, the self-control, the understanding, the knowledge, and character that will allow freedom to be put to good use, both in a personal and a social sense. Formal rights, in the absence of such attainments, would be hollow indeed. The key issue, therefore, is to achieve the right balance between freedom or rights, on the one hand, and, on the other, maintaining the various kinds of legitimate authority without which the socialising and educational institutions of society would rapidly become ineffective, to the detriment of all, especially children themselves.

Nevertheless, influential elements of the rights movement, which seek rapid progress in the direction of greater autonomy

for children, are moving the law in that direction. We shall need to look at some recent court cases that illustrate such a movement and the way in which some judgements in superior courts are leading to the incorporation, in Australian domestic law, of elements of international conventions, especially the United Nations Convention on the Rights of the Child. So, it is to the pivotal role of this Convention that we must first turn our attention.

Chapter 2

The United Nations Convention on the Rights of the Child (UNCROC)

The Australian Constitution empowers the Commonwealth government to enter into a treaty or convention (Section 61) without the involvement of the Commonwealth Parliament, and, under the external affairs power (Section 51 (xxix)), the Commonwealth Parliament may legislate to implement within Australia a signed or ratified treaty or convention. To date, over 900 treaties and conventions have been entered into (Allars, 1995: 205).

The United Nations General Assembly has adopted many international conventions and sent them to member nations for signature and ratification. The General Assembly adopted the United Nations Convention on the Rights of the Child (UNCROC) in 1989 and it has since been signed or ratified by almost all members of the United Nations, including Australia. UNCROC followed an earlier 1959 *Declaration on the Rights of the Child* issued by the United Nations. This Declaration articulated a traditional view of child-parent relationships, and principles of care and protection of children, that are uncontroversial and widely accepted. However, UNCROC, as we shall see, enters new and more controversial territory. The Federal government ratified UNCROC in December 1990. Although President Clinton signed it in 1994, the United States Senate has not ratified it and it therefore has no standing in United States domestic law. UNCROC is a relatively long document of 54 Articles, which are reproduced in the Appendix.

Federal government ratification of an international convention, including UNCROC, does not mean that its terms automatically become part of Australian domestic law and enforceable as

such. Specific legislation under Section 51 (xxix) of the Constitution is required in order to achieve that. However, a ratified Convention may nonetheless affect Australian law in a number of ways, especially in interpreting existing law under certain circumstances, in the evolution of the common law, and through the 'legitimate expectations' that may be aroused by the act of ratification, an issue especially relevant to the *Teoh* case (*Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273:21). UNCROC has been declared a relevant international instrument under the Human Rights and Equal Opportunity Act and, accordingly, the Human Rights and Equal Opportunity Commission may invoke UNCROC when considering alleged breaches of the Act, and UNCROC may therefore play a part in shaping recommendations made by the Commission.

From its ratification by the federal government in 1990 up to the present, UNCROC has been the object of both strong support and strong objections. Objections have been raised primarily on the grounds that, if incorporated into Australian domestic law, it would create uncertainty about parental prerogatives and responsibilities by entrenching forms of independence and freedoms of action for children and thereby destabilise family life. Supporters have claimed that implementation of the Convention is a moral obligation that flows from ratification and is necessary to defend the rights of children and to give them recourse to protections of various kinds under the law.

In addition to various non-governmental organisations and individuals, two powerful voices in support of implementation of UNCROC have been the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission. In a recent joint report they devote several paragraphs to a discussion of the place of UNCROC in Australian law, and the steps which should be taken to implement UNCROC by ensuring that Australian domestic law is consistent with UNCROC's Articles (1997: 74-78). This report further observes that if any of the states and territories persist in retaining legislation that is inconsistent with UNCROC, 'the Commonwealth should use its external affairs power to ensure that UNCROC's obligations are complied

with' (1997: 78). In sum, the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission leave no doubt that, in their view, Australia is not living up to the obligations imposed by UNCROC and that steps should be taken to change Australian law in order that it should so conform, even if it means steamrolling the States into submission by using the Commonwealth's external affairs power.

The Federal Parliamentary Inquiry into the Status of the United Nations Convention on the Rights of the Child

Controversy over UNCROC and uncertainties about some of its implications led to a decision in February, 1997, by the Federal Parliamentary Committee on Treaties to inquire into the status of UNCROC. The Committee invited submissions to the inquiry and held public hearings in all states and territories. The Committee received several hundred submissions and heard 270 witnesses representing 170 organisations and individuals. The Committee submitted its Report in August, 1998 (*The Parliament of the Commonwealth of Australia, Joint Standing Committee on Treaties, 17th Report*).

This report will later be the subject of comment here, but it is necessary, in order to put the report and my commentary on it into context, to first explore in some detail what there is in UNCROC that might arouse objections to it, and what the legal ramifications are that arise from the Convention and its ratification.

The Content of UNCROC

There is much in UNCROC that is uncontroversial and which articulates a traditional and sympathetic view of the role of parents and of the need for all nations to promote the health, education and general well-being of children, their fair and humane treatment, and their protection. Article 5, for example, says, inter alia, 'States Parties shall respect the responsibilities, rights and duties of parents ... '. The Preamble acknowledges 'that the family, as the fundamental group of society and the

natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.'

Yet, as the Articles quoted below indicate, there is also much that implicitly, and sometimes directly, challenges parental prerogatives and makes them subordinate to children's freedom of action. If the family is to 'fully assume its responsibilities', questions may arise about reconciling these responsibilities with the exercise by children of their promised rights to autonomy. There is thus a potential conflict at the heart of the Convention between the claims for children's autonomy and the parental obligation of care and protection. Such obligations require corresponding authority in order to carry them out. If the protectors' use of authority were to be challenged by children demanding autonomy, which rights should prevail, and who should be the judge? If not fit parents, then who has a superior claim to judge, and on what basis?

Proponents of UNCROC have argued that fears expressed by some that the children's rights expressed in the Articles are at the expense of parental authority are unjustified. They claim that the terms of the Preamble to the Convention, and Article 3 (putting the 'best interest of the child' as a prime consideration) and Article 5 (requiring respect for 'the responsibilities, rights and duties of parents'), adequately protect parental prerogatives. But it is worth noting that Article 5 goes on to indicate that these parental rights are implicitly limited to providing, 'in a manner consistent with the evolving capacities of the child, *appropriate* direction and guidance in the exercise by the child of the rights recognized in the present Convention' (emphasis added). This mention of parental rights is thus made contingent on their being used to advance the rights of their children as later defined in UNCROC, and leaves open the possibility that such exercise might be deemed *inappropriate* by the child or somebody acting for the child, and thus challengeable at law if UNCROC were to be made law. The Convention nowhere specifies what the 'rights' of parents are, whereas, as we shall shortly see, it is highly

specific about the rights of children. There is considerable scope for uncertainty, to say the least, in determining where the balance should lie in the event of conflict between the two sets of rights.

The analysis to be offered below supports the view that UNCROC is controversial and open to criticism on four main grounds:

(i) that it promotes a radically new conception of the legal and personal autonomy of children which overrides, or is in conflict with, traditional parental prerogatives (Hafen and Hafen, 1996: 1);

(ii) that it diminishes parental powers of guidance and control of children;

(iii) that its language is highly abstract, and often vague, so that interpretation of its Articles, if they should become enforceable at law, will be uncertain and the consequences potentially dangerous;

(iv) that it is a confused mixture of 'positive' and 'negative' rights, and often of indeterminate meaning and scope (Robertson, 1997).

The Autonomous Child

UNCROC is especially notable in representing and expressing an 'equal rights' claim on behalf of children that is central to much contemporary theorising and agitation about greater independence and freedom for children. The clearest and most radical expression of these sentiments is in some key passages of Articles 12-16.

Article 12 requires that government 'shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.' And further: 'For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate

body, in a manner consistent with the procedural rules of national law.'

There are several points to note about this Article:

(i) It lacks objective criteria of competence. How is a judgement to be made about whether or not a given child is 'capable of forming his or her own views' and how is 'due weight' to be measured 'in accordance with the age and maturity of the child'? And by whom are such judgements to be made? The Article obviously envisages that this would be courts and other authorities outside the family, to whom the child may appeal if he or she believes that free expression has been denied within the family and elsewhere (for example, in school). It is inherent in the Article that separate representation of the child is envisaged. In addition, the Article seeks to substitute, for the objective criterion of age of maturity (Article 1 defines a child, for the purposes of the Convention, as every human being below the age of 18), subjective and widely variable judgements of a child's capacities. Although it is clearly the case that children do vary in the ages at which they achieve various kinds of competence and maturity, it is one thing to take this into account and exercise appropriate discretion within the home or school, but quite another thing to universalise, in the law, a process which is inherently subjective, and to commit the courts to making an indefinite succession of individual, customised, subjective judgements of maturity if petitioned to do so.

(ii) An age criterion is an objective marker signifying a child's accession to a variety of prerogatives previously unavailable and marking the formal end of parental rights of control. Insofar, then, as Article 12 attacks the principle of the age criterion by making it indeterminate and unpredictable on a subjective and individually-assessed basis, it undermines parental authority from the very beginning by making it open to constant challenge, and greatly increases the scope for interference in fit families.

(iii) In moving away from an age criterion of competency (a criterion which UNCROC elsewhere recommends – for

example, in Article 40 (3) (a)), Article 12 reiterates what has already appeared in Article 5. Article 5, as noted earlier, asks governments to 'respect the responsibilities, rights and duties of parents....to provide, *in a manner consistent with the evolving capacities of the child*, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention' (emphasis added). Some commentators on UNCROC have argued (Otlowski and Tsamenyi, 1992) that Article 5 provides an overriding protection of parental rights and that all subsequent Articles are to be read on the understanding that the requirement in Article 5 that governments 'shall respect the responsibilities, rights and duties of parents' is a primary consideration in interpreting the Convention. As they put it: 'It is one of the guiding principles in the convention, which governs how all the specific rights recognised in the convention must be interpreted and applied' (1992:142). Otlowski and Tsamenyi say later: 'This Article clearly envisages that parents may make decisions on behalf of very young children, not mature enough to make decisions for themselves, and that in respect of older children, parents may provide guidance and direction in decision-making' (1992: 142).

(iv) However, when read in conjunction, Articles 12 and 5 clearly leave open the possibility of challenge to parental decision-making authority on the grounds that the child concerned, even though a legal minor, is nevertheless mature enough to make its own decisions in relation to the matters mentioned in the Articles. The uncertainty thus created imposes powerful constraints upon 'appropriate direction and guidance' by parents, since such direction and guidance may be held to be inconsistent with 'evolving capacities', and the 'capability of forming' views 'in accordance with age and maturity', as judged by the child itself and open to possible confirmation at law by an authority, other than the parents, exercising subjective judgement. Otlowski and Tsamenyi, although staunch proponents of UNCROC, nevertheless conclude: '...the right of parents to provide

guidance and direction to their children... is clearly a qualified right which is subject to external scrutiny, and which may be overridden....' (1992: 144). And later on they acknowledge that: 'Inevitably however, the formal recognition of the rights of children does entail some tension with the rights of parents as well as bringing into question the role of the state in intervening in family relationships' (1992: 146).

(v) The second part of Article 12, dealing with the child's right 'to be heard in any judicial or administrative proceedings affecting the child,' is broad in scope in that it covers both 'judicial and administrative proceedings' affecting the child. There is clearly a case for the views of children to be heard in court proceedings that involve their interests and futures; in custody battles, for example, or in actions against the parents for neglect or abuse. But the Article goes beyond this to provide the child with independent rights and capacities, including its own representatives, in order to initiate proceedings to enforce against parents not shown to be unfit, and others, the rights expressed in the first part of Article 12, and in the following Articles 13-16. Again, Otlowski and Tsamenyi concede (1992: 150): '...such proceedings could conceivably involve the child in direct conflict with his or her parents...'. And, one might add, in circumstances where there may be no evidence whatsoever that the parents are neglectful, abusive or in any way unfit to control and direct the child. Australian family law (*Family Law Act* 1975) acknowledges the child's parents as his or her joint custodians, with the right to care for and control the child until it turns 18, unless the parents are shown to be abusive or neglectful or to have failed in their duty of care and protection. In exceptional circumstances, the court may intervene at any time to protect the 'best interests of the child,' where interpretation of 'best interests' is at the court's discretion.

Article 13 guarantees to the child rights of freedom of expression, including 'freedom to seek, receive and impart

information and ideas of all kinds regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.' This is very wide in scope and equivalent to adult rights in the matter (at least in liberal democracies). On the face of it, absolute constraints are placed on parental supervision of what a child might say, read or see. The Article implicitly assumes either that there is no possibility of damage to the best interests of a child through anything at all that he or she might see or hear or read, or that access to all materials is the overriding consideration, irrespective of the harm it might do. Nor is there any apparent concern with the damage that a child may cause others, including other children, by the exercise of such rights.

But if a child is thus made vulnerable to harm or emotional disturbance, or if the child might harm or disturb other children, and if parents have a general responsibility of child protection, how are these conflicting considerations to be resolved by parents denied any *specific* prerogatives of supervision and control that might modify the detailed and unrestricted freedoms provided to the child? The absoluteness of the children's rights here proposed, and the absence of specific reservations authorising parental discretion to supervise and direct in such matters, makes a mockery of the view that UNCROC, as a whole, protects parents' rights and responsibilities. Potentially, parents would be put in a position where they may be accused of irresponsibility if harm does arise to a child through the exercise of these rights, while being denied clear prerogatives to exercise adult judgement and to act preventively. Outside the family – in the school, for example – if Article 13 became enforceable at law, pupils could exercise rights of freedom of speech and expression in ways that could directly challenge school discipline and curricula, permit them to produce and distribute various forms of written material, to organise protests, and in various ways to challenge the school's authority and order, so that normal instruction might become difficult. This Article sits uncomfortably with Articles 28 and 29, which recommend compulsory education and the full development of children's skills and

abilities.

Article 14 requires that national governments 'shall respect the right of the child to freedom of thought, conscience and religion.' Curiously, and in contrast to Article 13, it does include some reference to parental rights and duties: 'States parties [i.e. national governments] shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her rights in a manner consistent with the evolving capacities of the child.' Two comments suggest themselves:

(i) The deliberate inclusion of a reference to parental rights and duties in this Article reinforces the significance of the omission of any such mention in the previous Article 13. It confirms the suspicion that the omission signifies a deliberate intention to deny rights of 'direction' to parents in respect of the children's rights described in Article 13.

(ii) Nevertheless, the phrase 'consistent with the evolving capacities of the child' again introduces the element of indeterminacy and subjective judgement about maturity (and hence the validity of exercise of parental 'rights and duties') discussed above in relation to Article 12. Article 14 is therefore subject to the same difficulties and objections noted there when the age criterion is abandoned.

Hafen and Hafen (1996: 470) make the important observation, in relation to Article 14:

> In this instance, as arguably in general under Article 5, the parental rights recognized by the [Convention] apparently extend only to giving parents a role in enforcing rights the [Convention] grants to the child, without recognizing an independent parental right. This approach illustrates the tendency of the [Convention's] autonomy model to view parents as trustees of the state who have only such authority and discretion as the state may grant in order to protect the child's independent rights.

If this is a reasonable construction of the thrust of UNCROC, it represents a major departure from the Australian (and American)

presumption that parental interests and prerogatives are independent of the state, and may only be interfered with upon proof of a parental failure in the duty of care and protection.

Article 15 requires participating governments to 'recognize the rights of the child to freedom of association and to freedom of peaceful assembly'. But the reference to 'the rights and duties of parents ... to provide direction to the child ... etc.' that appears in Article 14 disappears here. Again, we must ask why, and again we must infer that the omission is deliberate and significant. Its omission implies that no parental impediments or directions may be placed in the way of a child associating with whomever he or she wishes, no matter how unsuitable, or even dangerous, the parents may believe that association to be.

Article 16 provides that: 'No child 'shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation', and that the child 'has the right to the protection of the law against such inteference or attacks.' Here, too, we are dealing with rights of a most general kind, with no attempt made to indicate limits to their generality; or the part, if any, that parents may legitimately play, over the course of rearing, instructing, and directing their children, in intruding on their children's 'privacy'. The nature of parenthood is such that the role could scarcely be carried out without constant intrusions into a child's 'private' affairs.

'Unlawful' interference with privacy, etc. presumably leaves it open for national governments to define in legislation what 'unlawful' might include. Sterilisation and genital mutilation of children are obvious examples and there are no doubt many others that would fall within the general rubric of 'abuse' and 'neglect'; but it illustrates the importance of careful drafting and qualification. Questions of 'privacy' that fall short of these categories raise some obvious problems. What, for example, would constitute 'arbitrary' interference with privacy by a parent? Would decisions by parents about normal forms of medical treatment, or parental dissuasion from early sexual activity, or warnings about sexual risks and exploitation, come within the

compass of private matters from which parents could be excluded? And would the child's 'protection of the law' from 'interference' in such matters raise the possibility of the child being entitled to sue his parents (say, through a publicly-appointed advocate) on the grounds of their 'arbitrary' interference with his or her privacy in a medical matter or sexual matter? Such a suggestion may be ridiculed as fanciful. But if it is, why has not the wording of the Article removed it as a possibility when it could so easily have done so?

It is difficult to avoid concluding from the content and phrasing of this and previous Articles that children's interests are under threat, and that the primary source of the threat against which they must be protected is their own parents. Indeed, Hafen and Hafen (1996: 450) quote an official United Nations document which describes the UNCROC as promoting a 'new concept of separate rights for children with the Government accepting [the] responsibility of *protecting the child from the power of parents...*' (emphasis added).

UNCROC comprises many more Articles than those discussed above; but I have confined the discussion to them because they are those most crucial to the issue of the respective rights of parents and children, and the role, and potential role, of the state in relation to them. On closer inspection, the implications are more problematic than many defenders of UNCROC would have us believe – especially in promoting a conception of children's rights as rights of autonomous choice rather than rights to protection and preparation for adult competency and independence. In many respects, the Articles advance a statist approach which underplays, or seeks to displace, the primacy of the child-parent bond, and which enlarges the scope for child-parent disaffection and conflict.

I will later discuss these broader issues; but I wish first to touch upon one other aspect of the Convention as a whole which has not, to my knowledge, been taken up by Australian commentators, although it is a subject discussed by Robertson (1997) in a New Zealand context in relation to another United Nations convention, the International Covenant on Economic,

Social and Cultural Rights. The issue here is the way in which UNCROC mixes up 'positive' and 'negative' rights (defined below) in a confusing way which could have profound consequences if UNCROC were to be incorporated into Australian law, and which, even in the absence of incorporation, could affect the interpretation of existing law. We must digress briefly to clarify what is meant by the notions of 'positive' and 'negative' rights.

'Positive' and 'Negative' Rights

> *The transition from the negative conception of justice as defined by rules of individual conduct to a 'positive' conception which makes it a duty of 'society' to see that individuals have particular things, is often effected by stressing the* rights *of the individual. It seems that among the younger generation the welfare institutions into which they have been born have engendered a feeling that they have a claim in justice on 'society' for the provision of particular things which it is the duty of that society to provide. However strong this feeling may be, its existence does not prove that the claim has anything to do with justice, or that such claims can be satisfied in a free society* (F.A.Hayek, 1973: 101).

The inclusion of 'positive' rights or entitlements to certain economic and welfare entitlements in UNCROC extends its scope beyond civil rights for children and rights against parents, and has the potential to affect society as a whole by requiring the delivery of economic and welfare benefits (or forms of 'social justice') that would involve governments in unforeseen tax-funded expenditures and the prioritising of economic and social initiatives of an open-ended and controversial kind.

Human rights are usually understood as political and civil rights of citizens that prevent governments from interfering with such things as our personal liberty, our property, or our freedom of speech and association, except to prevent us using those liberties to harm others. Such civil and political rights are frequently described, on one hand, as 'negative' rights because they *restrain, or impose limits upon,* governments, individuals

and groups from interfering with us as we go legitimately about our business, and they apply to all citizens equally.

'Positive' human rights of a *civil* or *political* kind, on the other hand, rather than being restraining or preventive in the above sense, include such things as the right to be given a role in choosing a government, and the right to demand protection by government from the violence, fraud, or theft of others. It is a claim upon government to deliver a public good to us and are positive in that sense. They are, in principle, available to all, and one person's enjoyment of them does not preclude their being available to others.

It can be seen, therefore that both 'negative' and 'positive' civil and political rights allow individuals to shape their own lives under rules of conduct that apply equally to all, and to establish an orderly and workable social order that will enable citizens to go about their lawful personal and social activities, and to have a say in the determination of the political rules and processes that will make that possible. In both their 'negative' and 'positive' forms, these kinds of civil and political rights are intended to provide for just and peaceful social *processes and procedures*. It is not their purpose to order individual or group action for the purpose of serving *particular* interests of individuals or groups, but simply to keep the whole society ticking over in a just way, where 'justice' is conceived as fair process, rather than the seeking of particular outcomes for selected individuals or groups.

'Positive' Economic and Social Rights

'Positive' *economic* and *social* rights, on the other hand, are conceived as obligations or duties laid upon government to ensure particular economic or social outcomes for defined individuals or groups, such as welfare entitlements, subsidies of various kinds, or privileged access to economic and social benefits conferred by government. It is immediately clear that such outcomes cannot be delivered unless governments *organise* the outcomes by acquiring the resources and powers to enable them to do this – usually by devising taxes to take money

from some in order to give benefits to others, or by delivering legal privileges that benefit only defined individuals or groups, all in the name of 'social (or economic) justice,' or 'positive' social and economic rights. It is a conception of justice that does not emphasise even-handed process, but which depends upon claiming that some individuals or groups have an obligation to provide for, or deliver benefits to other particular individuals or groups (not necessarily regarded, or defined, as needy), and which requires that governments must make laws, set up organisations, and often redistribute money, for that purpose. It thus entails a high degree of direction of society and hence interference with the civil and political rights of citizens, and various forms of inequality before the law, in order to deliver what has been promised as a 'right'. As Hayek puts it (1973: 103), 'Such positive rights, however, demand as their counterpart a decision that somebody (a person or organisation) should have the duty of providing what the others are to have'.

That this is indeed the case with more than one United Nations convention is illustrated in a discussion of these matters by Robertson (1997: 7), who quotes from the Report of the UNESCO Committee on the Principles of the Rights of Men:

> If the new declaration of the rights of man is to include provision for social services, for maintenance in childhood, in old age, in incapacity or in unemployment, it becomes clear that no society can guarantee the enjoyment of such rights unless it in turn has the right to call upon and direct the productive capacities of the individuals enjoying them.

Gary Johns, former Minister in the Labor Government of Prime Minister Paul Keating similarly observes:

> Welfare rights are resource rights. They demand that political power be used to take the earnings or savings of one group for transfer to another. Such rights can divide the community into warring factions, and undermine the consensus and consent necessary to operate the system (1998: 9).

In other words, the delivery of such economic and social

rights requires extensive governmental control of 'productive capacities,' the expropriation of wealth through taxation, and the sacrifice of 'negative' civil rights to provide 'positive' economic and social rights; with the scope and duration of the latter being highly uncertain, given the historically unimpeachable evidence that destruction of civil and political rights leads inevitably to the destruction of the incentives and liberties upon which the production of the wealth to provide the positive rights depends.

Economic and Social Rights in UNCROC

When we turn to examine UNCROC from the perspective of its demands for 'positive' economic and social rights for children (and sometimes others), we find that they are scattered through the Articles.

Article 4, for example, states inter alia: 'With regard to economic, social and cultural rights, State Parties shall undertake such measures *to the maximum extent of their available resources* and, where needed, within the framework of international co-operation' (emphasis added).

Article 6 requires that States Parties 'shall ensure to the maximum extent possible the survival and development of the child.'

Article 17: States Parties 'shall ensure that the child has access to information and material from a diversity of national and international sources ... .' And, further, States Parties 'shall encourage [what does this mean?] the mass media to have regard to the linguistic needs of the child who belongs to a minority group [which ones?] or who is indigenous.'

Article 18 would make the state responsible to 'ensure the development of institutions, facilities and services for the care of children,' and: 'States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child care facilities for which they are eligible.'

Article 23, dealing with disabled children, requires that assistance for them 'shall be provided free of charge, wherever possible, taking into account the financial resources of the parents or others caring for the child ...'.

Article 24 adjures States Parties to 'recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness ...'.

Article 26: 'States Parties shall recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.'

Article 28: States Parties shall 'Make primary education compulsory and available free to all ...'.

These examples illustrate the point that 'positive' economic and social rights, unlike civil and political right which are essentially *procedural*, place an obligation upon government to provide particular benefits or services for certain individuals or groups, and in doing so, to incur substantial costs which must be borne by others in the community. There are also the unstated assumptions that unless these activities are undertaken by government, they will not be undertaken privately and voluntarily; and, further, that economic scarcity should be no barrier to the full implementation of economic and social rights. This ignores the questions of 'opportunity costs' – the economic reality that the use of finite resources for one purpose makes them unavailable for other purposes. Robertson puts the central point succinctly (1997: 9): 'Positive rights, if "delivered" by government, require rationing and require the compulsory transfer of resources from one individual to another. Negative [i.e. civil and political] rights require only the provision of services [e.g. law enforcement] equally available at all times to all.'

Implementing 'Positive' Economic and Social Rights

We need to remind ourselves that UNCROC is not simply a list of desirable aspirations or objectives for the welfare of children, and recommended to governments for their consideration. It is an international convention to which nations may subscribe, describing *rights*, and placing obligations upon subscribing or ratifying nations to commit themselves to observing them. To endorse these rights is to accept them as legitimate claims which governments or 'States Parties' are duty-bound to enforce. And

it is clear that enforcement of the 'positive' economic and social rights mentioned above would entail significant outlays of scarce resources and the priority implementation of a variety of social and economic initiatives.

It cannot be stressed too strongly that a genuine 'right' in a law-governed society is not a mere aspiration, objective or policy statement, but a claim which a citizen may press against his or her government, if necessary by taking legal action to have it enforced. If UNCROC were to be incorporated into Australian law as it stands, the 'positive' economic and social rights it dispenses could therefore be the subject of court action by a citizen who believed that he or she was being denied them; in other words, they would become legal rights. That being so, it is a very large question indeed as to *how* a court could enforce them, since, as we have seen, this would entail forcible redistribution of resources from some individuals or sectors of the community to others. If, for example, all working mothers are to have a justiciable right to child care facilities (Article 18), and a working mother can demonstrate that 'child care facilities' (whatever that phrase might mean) are not available to her, presumably a judge could order the state to provide them. Similarly, in respect of Article 24, what action by a court would be appropriate if a parent (any parent) were able to demonstrate that its child was not 'enjoying the highest attainable standard of health'?

Quite apart from the question of resources and their compulsory re-direction involved in such 'positive' rights, there are multiple questions of definition also involved which would make it impossible for a court to make sensible determinations on matters of fact. What, for example, constitutes the 'primary education' that Article 28 declares should be 'compulsory and free' for all? Moreover, any attempt to place the allocation of redistributive rights and entitlements under judicial discretion, and make them justiciable, would inevitably politicise the law by transferring politico-economic decisions from parliaments and governments to the courts.

But perhaps the most damning indictment of this confusion

and indeterminacy remains the one already mentioned, and that is the danger that the whole paraphernalia of positive economic and social rights poses to the 'negative' civil and political rights of all in requiring the appropriation of resources and the direction of the 'productive activities' (i.e. the wealth-producing activities) of citizens. Such appropriation and direction can only be undertaken if civil rights are significantly diminished:

> The relationship between negative and positive rights is a mathematical one. The imposition of positive rights cancels out negative rights. The enforcement of negative rights prevents the pursuit of positive rights, but turns out to have positive consequences (Robertson, 1997: 15).

Quite apart from the merits or otherwise of new children's rights of a civil and political kind, it is especially ironic that the program of 'positive' economic and social rights that UNCROC also includes would threaten the capacities of those closest to children to provide for and protect their long-term well-being. Those capacities depend absolutely upon the freedom of parents to go about the business of providing for children's sustenance, and their own, within the security of steady civil and political rights. If UNCROC were to be implemented as it stands, this would be a major contribution to eroding, if not destroying, those negative rights that support wealth production of various kinds, and without which the future of children is bleak indeed; a fact attested to by the generally unhappy condition of children where negative rights are not protected. The growth, over the last generation, of the numbers of parents and children now dependent upon welfare support rather than jobs indicates how far we have already gone down that road without the further impetus and legitimation of UNCROC.

This is not intended as an argument against all welfare entitlements or as denying that the state has a part to play in dealing with human emergencies, and indigence and incapacity affecting adults and children. These are questions of capacity and proportion in the face of inherently limited resources and fair treatment for all. The major point is the indiscriminate and

largely unqualified nature of the 'positive' rights examined above and the cavalier fashion in which they are presented to national governments.

UNCROC, then, is a complex mixture of 'rights' claims on behalf of children, which, if implemented, would reach far beyond questions of children's civil and political rights, and the unclear status of parental rights and responsibilities of care and protection if they were granted, to involve, also, economic and social rights of indeterminate scope and enforceability. If UNCROC were to be directly incorporated into Australian domestic law by Federal legislation under the external affairs power of the Constitution, the consequences would be profound and possibly legally chaotic, for reasons which have been indicated. But even as it stands, as a ratified international Convention, its legal implications are important, and it is to these issues that we must now turn.

Chapter 3

International Conventions, UNCROC, and Australian Law

As indicated earlier, UNCROC, as a ratified treaty or convention, does not automatically become Australian law and enforceable as such, but the High Court has ruled that the Federal parliament has the power under the external affairs clause of the Constitution to legislate to implement a ratified convention. Such power may be exercised by the Commonwealth to override state legislation, such as was done, in respect of the International Convention on Civil and Political Rights (which Australia had ratified), when the Commonwealth Government enacted the *Human Rights (Sexual Conduct) Act* 1994 overriding Tasmania's laws criminalising homosexual acts.

There is a common law presumption that Parliament does not intend to breach its treaty obligations, including international conventions, and, unless domestic law indicates clearly to the contrary, the courts must interpret domestic law in a way which is consistent with international obligations. Where domestic law may be ambiguous or indeterminate on a particular point, and where a ratified convention speaks relevantly to the point at issue, the courts may appeal to the convention in reaching an interpretation that is consistent with the international instrument and its obligations and not contrary to domestic law.

A ratified convention can therefore affect the interpretation of ambiguous domestic law. It may also affect the administration of domestic law, and some High Court, Federal Court and Family Court decisions are evidence that a body of common law is developing which could extend the reach of international conventions into domestic law, even in the absence of specific legislation.

Teoh's Case and 'Legitimate Expectations'

In recent years, the Commonwealth and the states have legislated a number of statutory reforms aimed at providing for judicial review of administrative decisions, and this has given impetus to the formation of case law in the area. A critical development in this respect is a decision by the High Court on April 7, 1995 in the matter of *Minister for Immigration and Ethnic Affairs v Teoh* (*Teoh's* case).

Teoh was a Malaysian citizen who came to Australia in 1988 on a temporary entry permit. He subsequently married an Australian citizen, who had four children by a previous marriage, and he applied for permanent residency. This application was refused on the grounds of Teoh's having been convicted of importing heroin. Teoh sought review of this administrative decision, and the review procedure and appeals finished up in the High Court, which found that ratified international conventions generate a 'legitimate expectation' that relevant terms of a ratified international convention would be taken into consideration when administrative decisions were being made, and that Teoh had been denied procedural fairness, in that his legitimate expectations had not been met by the procedure followed in his case:

> ... if a decision-maker proposes to make a decision inconsistent with a legitimate expectation, procedural fairness requires that the person affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course (Allars, 1995: 209).

In view of the fact that Teoh was the step-father of his children, and that denial of resident status would affect his relation to them and the children themselves, the particular provision of UNCROC of most importance in his case was Article 3.1, which declares: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'

The High Court found, by majority decision, that Teoh had

been denied procedural fairness because the administrative decision to deny Teoh resident status had not fulfilled Teoh's legitimate expectation that the terms of Article 3.1, which were a relevant consideration in the case, would be taken into account by the decision-maker, or, if taken into account, that the decision-maker had not warned him that he was about to make an adverse decision on his application that departed from the terms of the convention.

Allars (1995: 229) makes the general point: 'For if the legitimate expectation generated by ratification requires the administrator to warn the individual if a departure from the convention is intended, in a practical sense the administrator has to take the convention into account'.

The significance of these developments for our purposes here is that the High Court was articulating new doctrine on the significance of conventions in general for the administration of Australian law in a case that directly involved the Articles of UNCROC. It expressed the concept or doctrine of the 'legitimate expectations' of 'procedural fairness,' aroused by the Commonwealth's ratification of an international convention, whose provisions must be taken into account by administrators and tribunals making administrative decisions affecting persons before it. As Allars (1995: 204) puts it: '*Teoh's* case introduced a new, international dimension to this jurisprudential context.' And:

> Henceforth, any administrator who proposed to make a decision involving a departure from the provisions of an international treaty ratified by Australia but not incorporated into domestic law, would deny procedural fairness to an individual whose interests would be affected by the decision and who had not first been given a hearing on the issue of departure from the treaty. The decision would be void.

The High Court's judgement does not upset the principle that a convention that has not been incorporated into domestic law cannot have the force of a convention that has been so incorporated. The influence of the former (apart from its estab-

lished potential for disambiguating domestic law), so the High Court determined, is confined to its raising a legitimate expectation that its terms, where relevant to a case before the courts, must be taken to account by an administrative decision-maker; and if the decision-maker intends to make a decision at variance with the terms of the convention, then the person so affected must be informed and given the opportunity to put a case in pursuance of the terms of the convention concerned.

Since Australia has ratified some 920 international conventions and treaties, this judgement lays a heavy burden upon administrators and lawyers: 'Australian administrators must now be well informed as to Australia's international human rights obligations. Australian administrative lawyers must now also be international human rights lawyers' (Allars, 1995: 237). However, it is not relevant to our present purpose to dwell upon the enormous ramifications and potential costs of this development. What is more interesting from a legal point of view, and from the perspective of the possible impact of the ratification of international conventions by the Federal government without parliamentary scrutiny and debate, is the way in which the doctrine of 'legitimate expectations' is developing and the seeming readiness with which the High Court is embracing the role of international conventions in the evolution of the common law – in this instance, the law affecting children and families. Especially when we recall that UNCROC contains a great deal more than simply Article 3.1, the relevant article in the *Teoh* case. We can readily speculate that new cases, invoking the *Teoh* precedent, may involve some of the more controversial Articles of UNCROC that we have discussed above. If this were to become the case, we could be confronted with significant changes to family law in which the Federal Parliament has played no role, and where the changes have been brought about by the ratifying of international conventions under executive fiat, and the subsequent development of common law on this basis by the High Court and other superior courts.

In the Federal Court of Australia

A substantial part of the business of the Australian Federal Court is concerned with administrative law, including dealing with appeals from decisions by those public servants and tribunals administering Federal laws, such as the *Migration Act 1958* and the *Australian Citizenship Act 1948.*

The relevant Article from UNCROC in the *Teoh* case was 3.1, referring to the obligations upon States Parties to accept the 'best interests of the child' as a 'primary consideration' in administrative and other decisions. This same Article, and the Teoh precedent, have recently figured in a case, dealing with an appeal from a decision by the Administrative Appeals Tribunal (AAT), decided on 15 January 1998 by the Federal Court of Australia (1998). Amongst other things, the majority and minority judgements in this case suggest that there is an element of uncertainty as to the precise meaning and weight which courts should give to the requirement that an administrative decision-maker must 'take account' of terms of an international convention that are relevant to a decision that needs to be made. The relevant terms being, in this instance, 'best interests of the child' and the status of these interests as a 'primary consideration' in delivering the 'procedural fairness' that was the central issue of the *Teoh* case.

This is not the place for a detailed explication of the facts in this Federal Court case or the arguments canvassed by the Federal Court judges. I simply note the difficulty, if not the incoherence, entailed in expecting the Court, in deciding this and similar cases, to reconcile the following principles:

(i) Ratification of an international convention gives rise to a 'legitimate expectation' that 'account' must be taken of requirements or obligations of a convention which are relevant to the decision/case under consideration (in this instance to take account of the 'best interests of the child' as 'a primary consideration').

(ii) It is part of the 'legitimate expectation' that the persons involved in this particular case (and similar cases) must be

given notice if a decision should be proposed which departs from the principle that the best interests of the child (or children) were to be a primary consideration, and permitted to respond.

(iii) Observance of the foregoing must be *seen* to have been done in order to satisfy the requirements of *procedural* fairness laid down in *Teoh*.

(iv) The relevant terms of the convention are not to be treated as *substantive* rules of law applying in Australia.

Reading the judgements in this case, one is struck by the different views about whether the decision by the Administrative Appeals Tribunal that is being taken under appeal gave sufficient attention to the 'best interests' of the children concerned, and gave proper weight to this matter as a 'primary consideration' (in balancing it against the public interest issues also required to be taken to account). The majority judgements seem to treat these matters as substantive rules of law, contrary to the High Court's ruling in the *Teoh* case that they have only procedural force, by arguing the *merits* of the consideration given to this subject in the decision by the AAT.

For example, Justice Branson says (Federal Court of Australia, 1998) on page 3 of his 'Reasons for Judgment': 'I conclude, in broad agreement with Justice Burchett, that although the AAT *purported* to act on the basis that the best interests of the appellant's children were a primary consideration before it, it did not in fact, give *proper, genuine and realistic* consideration to the children's best interests' (emphasis added).

Justice Burchett, in his 'Reasons for Judgment' (Federal Court of Australia, 1998) quotes several passages where the AAT, in giving the decision now under appeal, discusses some of the facts about the children's circumstances and its views on the best interests of the children concerned, within a context where the AAT also mentions that 'other primary considerations were considered' (page 11). Justice Burchett then goes on: 'I am compelled to conclude that, not only were the children's interests not made a *primary* consideration; they were not given

adequate consideration at all' (page 13) (emphasis added).

On the other hand, on page 17 of his 'Reasons for Judgment', the third appeal judge, Justice Whitlam, in dissenting from the majority, Justices Burchett and Branson, declares: 'It is not necessary to agree with the Tribunal's findings about the children's interests but, in my opinion, it is very clear that the Tribunal has taken those interests into account' (Federal Court of Australia, 1998).

Teoh is about *procedural* justice, and, in the context of the relevance of UNCROC to the case, requires that, in accordance with the terms of UNCROC, the 'best interests' of the child must be taken into account as a primary consideration. But what sort of status does '*a* primary consideration' have, especially if it takes its place among other primary considerations? Also, UNCROC does not define what might constitute the 'best interests' of the child (nor, incidentally, does the *Family Law Act* 1975, which contains the same term). Accordingly, it is left to the discretion of the courts to determine, in particular cases, what constitutes 'best interests'. Judges are free to operationalise that phrase by making whatever decisions or arrangements in the circumstances seem to them to be appropriate.

Their views and subjective judgements may vary, and may even be contradictory. For example, one judge may believe that it is in the best interests of a child in, say, a custody battle, that the child should stay with the mother for such and such reasons; while another judge confronted with the same facts may believe that the child would be better off with the father, for other reasons; and, since there are no *objective* criteria of 'best interests' in the law against which to measure the judgements, such opposing judgements may each be legally valid. My purpose here is not to criticise the framing of the Family Law Act 1975. It may well be that leaving 'best interests' undefined and allowing case law to develop around the concept is the wisest course to follow. My aim is to point out that, in the case under discussion, the *exercise* of discretion has become not a procedural issue, but a substantive one in the context of using the terms of an international convention as a 'primary consideration'.

It would therefore seem, in the case we are discussing, that the differing majority and minority opinions revolve around two issues: (i) whether or not the Administrative Appeals Tribunal *took account* of the best interests of the children as a primary consideration, i.e met the procedural requirement; and, (ii) if it did, did it take *proper* account, i.e. meet an (undefined) substantive requirement.

All three judges seem to agree that the AAT's decision did take account of the children's best interests. On the face of it, this would seem to have met the procedural requirements established in the *Teoh* case. But the majority judgement challenged the validity of the AAT's decision on two grounds: that it did not 'give *proper, genuine and realistic* consideration to the children's best interests' (emphasis added); and that the children's best interests were not treated as a *primary* consideration – although it is not said what *would* constitute evidence of 'primariness'. In other words, the majority judgements go to the *substance* of the consideration. It is a disagreement with the way in which the AAT's legitimate discretion has been exercised; and perhaps also a disagreement with the way in which the AAT has *balanced* the consideration of the best interests of the children against the other public interest issues at stake in the case.

My purpose here is not to presume to judge the judgements and their merits in this rather lengthy and complicated case. It is simply to draw attention to three things likely to be of future significance:

(i) the difficulty of disentangling the procedural and substantive issues implicit in the *Teoh* judgement as they apply to the case described above, and the way in which some of the appeal judges have been drawn into a discussion of factual matters, and the implicit re-weighing of the competing primary considerations taken to account by the Administrative Appeals Tribunal;

(ii) the possibility that the *Teoh* judgement is not, as it has been presented, a purely procedural innovation, but must inevitably involve and affect substantive rules; and, in particular, lead to the substantive common law incorporation of at least

some parts of international conventions, including UNCROC;

(iii) the uncertainty and fluidity of the law relating to the domestic legal status of ratified international conventions.

In the Family Court of Australia

The thrust of developments in the High Court and the Federal Court about the status of international conventions in the interpretation and administration of Australian domestic law, and the fluidity revealed there, is further elaborated, at least so far as UNCROC is concerned, by recent events in the Family Court of Australia.

On 9 July 1997, the Full Court of the Family Court delivered its judgement in Brisbane in a case where a custodial mother sought permission to re-locate interstate with her children against the wishes of the children's father (*In the Matter of B and B*, Family Law Reform Act 1995, Appeal No NA 35 of 1996). The court outraged many non-custodial fathers by deciding to allow the custodial mother to move interstate with the children. Rightly or wrongly, this was seen by them (and by the Federal Attorney-General, Daryl Williams, who appeared before the court at the invitation of the Chief Justice) as giving insufficient weight to recent amendments to family law which had emphasised the rights of children of access to both parents.

However, in the fierce debate which followed, no attention was paid to an aspect of the judgement in that case which has even wider ramifications for the rights of parents and children in general. This was the court's discussion, in the course of delivering its judgement, of the place occupied by the United Nations Convention on the Rights of the Child in interpreting 'children's rights' under Australian law.

The parties before the court in this case had based part of their arguments on UNCROC and other ratified international conventions, but the Attorney-General argued before the court that this material was irrelevant under Australian law since there was no ambiguity or obscurity in the law and the relevant statutes made no mention of UNCROC.

As it turned out, this issue was not relevant to the decision that the Family Court finally made in this particular case, which was determined on other grounds. But the Family Court nevertheless believed that the principles of law and the relevance of UNCROC that had been raised during the case were of sufficient importance to warrant an extended discussion of the role, and potential role, of UNCROC and other relevant international conventions in interpreting, developing, and enforcing Australian domestic law – in this case, family law. The Court therefore devoted considerable space to arguing against the Attorney-General's submission on this question and quoted a number of authorities and precedents, including some (such as *Teoh*) which we have already discussed. Significant parts of this discussion are relevant to our interests here, and, in what follows, are quoted in order to illustrate the drift of the Family Court's thinking. An important aspect of this drift are conjectures about possible developments, and references to the way in which the terms of international conventions may influence the evolution of judge made or common law, as well as the interpretation of statute law. For example, the following extracts from the Court's discussion of the legal issues and its quotations from other sources:

(i) Further, as Einfield J pointed out in Magno's case, in *Mabo v Queensland* (1992) 107 ALR 1, Brennan J (Mason CJ and McHugh J concurring), said at p 29:-

> The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol [the First Optional Protocol of the International Covenant on the Protection of Civil and Political Rights] brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, *especially when international law declares the existence of universal human rights* (emphasis added)

(Family Court of Australia, 1997: 10.5).

(ii) The *Family Law Act* provides, in Section 43 (c), that the Family Court, in exercising its jurisdiction, should have regard to 'the need to protect the rights of children and to promote their welfare.' The Family Court judgement under discussion here comments:-

> 10.9 The Attorney-General submitted that s.43 could not be interpreted as applying to UNCROC because that Convention was not in existence at the time of the passage of s.43. He said that the Family Law Act in effect provided a code,[1] and that, while UNCROC may have provided some of the material from which the Act was drawn, it was not open to a court to look at the Convention as a whole.

(iii) 10.10 We are unconvinced by this argument for the following reasons. (Family Court, 1997: 10.10).

The judgement then goes on to summarise the historical background to UNCROC and the part played by Australian governments, and declares:

> 10.13 Against such a backdrop, it is hard to see how the Convention can be considered not to be relevant' (Family Court, 1997: 10.10, 10.13).

(iv) The judgement continues to the further conclusions:

> 10.14 Secondly, *the rights of children should not be regarded as static* and s.43 c of the Family Law Act should not be interpreted as frozen in time. The Parliament, in enacting it, clearly expected the Court to make an examination of what the rights of children are from time to time. *It is difficult, especially in light of the above extract from Australia's report to the monitoring committee on the Convention, to imagine a better starting point than a convention like UNCROC,* which has, as the High Court pointed out in Teoh's case, received almost universal international

1 [A 'code', in legal understanding, is a systematic, exhaustive, and definitive collection or statement of statute and common law pertaining to a certain area; such as a code of Criminal Law, Contract Law, etc.]

acceptance. In Australia it has been ratified and is a declared instrument appearing in the schedule to the Human Rights and Equal Opportunity Act (emphases added) (Family Court, 1997: 10.14).

(v) 10.16 Thirdly, *even if the Convention had no such recognition other than ratification and s.43 (c) did not exist, it is our view that the Court could have regard to the Convention in accordance with the principles outlined in Magno's case, Murray's case, and Teoh's case.* We do not accept the Attorney-General's submission that the Family Law Act constitutes, in effect, a code, or that s.60B is couched in such terms that it is unnecessary to look outside it. *Both the object and the principles set out therein are expressed in broad and not exclusive terms such that extrinsic assistance may be necessary or useful to interpret them.* They are statements of broad general principle, consistent with UNCROC but lacking the sort of precision that would be expected if they were intended to constitute part of a code (emphases added) (Family Court 1997: 10.16).

(vi) 10.19 Fourthly, *we consider that UNCROC must be given special significance because it is an almost universally accepted human rights instrument and thus has much greater significance for the purposes of domestic law than does an ordinary bilateral or multilateral treaty not directed at such ends.* As put by Sir Anthony Mason in his address to the Second National Conference of the Family Court of Australia (1995):

> True it is that a convention does not embody rules of international law. But the Convention on the Rights of the Child has attracted widespread international acceptance. 178 nations have acceded to it. *And why should the principle that the provisions of a ratified but unincorporated convention do not form part of the law of the land forbid judicial formulation of the common law by reference to the convention if it enjoys widespread acceptance, including acceptance*

> *by Australia.* The point of the principle is that it denies the status of domestic law to a provision in an unincorporated convention. But the provision will achieve that status if it is incorporated into domestic law by statute. *And the provision may contribute to the development of a principle of domestic law if the judges draw upon it for that purpose* (emphases added) (Family Court, 1997: 10.19).

These latter passages are illuminating, especially the last quoting the words of the former Chief Justice of the High Court, Sir Anthony Mason, in showing a clear desire to embrace UNCROC; and remarkable for attempting to justify that embrace on the ground that it is an 'almost universally accepted human rights instrument' – as if mere acceptance by others were a compelling reason for us also to accept it uncritically. This also ignores the significance of non-acceptance to date by the Senate of the United States; the reservations declared by several western European countries (e.g. Germany, Switzerland), and the Vatican, to certain Articles of UNCROC, and the emptiness of 'acceptance' by many countries renowned for the suffering of their children, their oppressiveness, and their denial of human rights.

UNCROC, The Family, and The Law

Agitation for extending certain rights to children is one aspect of a wider rights movement and 'rights talk' in Australia. This is occurring in the context of the High Court's recent discovery of 'implied rights' in the Constitution, and the parts being played by the High Court, the Federal Court, and the Family Court, via common law elaboration of the doctrine of 'legitimate expectations' and through statutory interpretation, in establishing the significance for Australian law of ratified international conventions concerned with rights, especially UNCROC.

Adding weight to these drives, at the official level, are the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission, jointly pressing for the direct and speedy incorporation into domestic law of the whole of

UNCROC, and following an absolutist path on children's rights. They speak enthusiastically of UNCROC's recognition 'that children, as members of the human family, have certain inalienable, fundamental human rights' (1997: 75), and, further, that: 'By ratifying UNCROC the Australian government has made a commitment to the children of Australia. This commitment is that in all aspects of children's involvement in society they will be treated in accordance with their fundamental human rights entitlements' (1997: 76). It is one thing to celebrate 'fundamental human rights' (what lover of freedom would not?), but to do so without attention to the reservations necessary in meeting the vital needs of children is, literally, careless.

Such stances have been supported by lawyers (some, for example, associated with Defence for Children International – Australia), by the media, and by many in political circles who believe deeply in the need for constitutional change, the entrenchment of multiple rights, both 'negative' and 'positive', and a greater role for government and its instrumentalities in 'monitoring' social action – especially within that intractable enclave of independence, the family. This theme of greater state involvement in family affairs is echoed by lawyer and former Victorian Human Rights and Equal Opportunity Commissioner, Moira Rayner. In an article commenting, inter alia, on the implications of the U.N. Convention on the Rights of the Child, she concludes: 'We must look outward to the community, which must take responsibility for ensuring that the family fulfils its proper role ... The only way in which this may be achieved well is on the basis of universal human rights for all human beings' (Rayner, 1996:53). In other words, since children are human beings they should enjoy the same rights as the adults charged with their care, and the state's role is to oversee family affairs in order to ensure this.

The role of the High Court at the pinnacle of this broad coalition advancing the 'rights' movement has been crucial and is likely to continue to be so. Law Professor Greg Craven (1997: 22) comments on these developments:

A truly fundamental factor in the emergence of the

> High Court as a judicially active exponent of individual rights has been the existence of what might be termed 'the constitutional circle'. By this is meant a broad combination of persons, pressure groups and institutions, loudly and privilegedly insistent in favour of basic constitutional change. Indeed, it would not be too unfair to say of Australia's constitutional circle that it is in favour of any constitutional change, any time, anywhere, for any reason. The circle includes a limited number of politicians, but predominantly is made up of academics, lawyers, and members of the media. The crucial point to understand about the constitutional circle is that, over the course of many years, it has been utterly thwarted in its hopes for democratic change of the Constitution. Deeply centralist, it has seen the vast majority of centrally inspired referenda fail; while profoundly attached to concepts of human rights, it was horrified to see proposals for the recognition of such rights capsize at the 1988 referendum. The result of these disappointments has been that the constitutional circle clearly and accurately recognizes that its only chance of imprinting its constitutional vision upon the shrinking flesh of the Australian people is by means of the High Court.

Craven later adds (1997: 24): 'My prediction in relation to the progressivism of individual rights, therefore, is that this process will continue and expand over the course of time. ... there is little doubt that by 2010, we will be the proud possessors of a number of other implied rights, like it or not.'

Within such an environment enthusiastic for the extension of various rights, including children's rights, scepticism about some rights proposals which conflict with prevailing conceptions of the independence of the family and those parental prerogatives tied to meeting adult responsibilities towards children may be too readily brushed aside. In the face of the various flaws identified in UNCROC, the uncritical movement of the

courts and other authorities and interests to endorse it is alarming; and caution, to say the least, is not difficult to justify.

From all of this, and from the perspective of the significance of UNCROC for children's rights in Australia, a number of conclusions can be drawn.

The High Court's discovery of *constitutionally* implied rights, with which Craven is primarily concerned, is of a piece, so far as rights are concerned, with the drift of several decisions made by The High Court, the Federal Court, and the Family Court, in recent cases we have discussed. These cases have shown that the Articles of UNCROC and other ratified international conventions may significantly affect the development of the common law and statutory interpretation in Australia. Given the freedom of Federal governments to ratify conventions by mere executive decision, this is broadly worrying to the extent that changes to the law may follow without Parliamentary scrutiny or legislative approval. But our particular concern is with UNCROC. What is now apparent is that the mood of the courts, and the views of influential bodies such as the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission, is towards establishing rights, including children's rights both 'negative' and 'positive', through common law process as illustrated above, or by formal legislative adoption of the Articles of UNCROC.

I have argued that UNCROC is a flawed document in the several respects discussed earlier, and the prospect that some of the more potentially dangerous Articles may either influence the development of the common law, or become statutorily incorporated into domestic law, is deeply worrying.

Firstly, if the essential content and thrust of UNCROC were to be incorporated into Australian law (and presumably anything less than this would not meet the obligations we have incurrred by ratifying it), this would establish a radically new conception of the legal and personal autonomy of children in ways that conflict with traditional parental prerogatives as they have been understood up to the present. If the rights proposed for children were to be granted, this would create considerable scope for

conflicts between children and responsible parents. The nub of the issue is the absolutist demand that children should have and exercise adult rights, virtually without qualification. In the words of Hafen and Hafen (1996: 1), if such a demand were to succeed, it would mean 'abandoning children to their autonomy'.

Secondly, there is no recognition of the possibility that such unqualified rights might need, to some degree, to be circumscribed to enable parents and other adults to fulfil their responsibilities to care for and protect children. Thus, the Australian organisation, Defence for Children International, in its 'Alternative Report', notes regretfully, but without grasping the real nature of the issue it is raising, that: 'The community tends to accord a high priority to the rights and duties of parents, often to the detriment of the child's right to protection and to consideration of the child's views' (1996: 17). Of course the rights of parents may be misused (as any rights may be misused), but the nub of the issue is to safeguard the importance of the parents' rights to protect their children, to uncover and prevent misuse of both parental and non-parental powers over children, and to find appropriate ways of considering the child's views. There are occasions, such as in custody proceedings, or in cases of abuse or neglect, where formal attention to a child's wishes or evidence would be appropriate. That children have rights is beyond question, but how those rights should be upheld, and by whom, when the immaturity of children prevents them acting competently in their own interests, is the critical question; and to ignore it is to abandon serious discussion. There is undoubtedly a threshold problem of deciding when a child attains sufficient maturity and capacity to speak and act in its rightful interests; but wrestling with that question is not helped by adopting, at the outset, the unqualified premise of autonomy.

Report on UNCROC by the Federal Parliamentary Committee on Treaties

Against the background of the above commentary on UNCROC and recent legal developments, we are in a position to return to the recently-submitted report commissioned by the Federal

Parliamentary Joint Standing Committee on Treaties. The Committee submitted its 17th report, dealing with the status of the United Nations Convention on the Rights of the Child, in August 1998. This 521-page report ranges widely over the many issues raised by the Convention, abstracts points from the many hundreds of submissions by individuals and organisations, summarises observations by the great many witnesses who appeared before the Committee at meetings in all states and territories, and makes 49 recommendations to the Federal Government.

I shall be concerned here with commenting only on those issues dealt with in the report, and those recommendations, that arise from the Articles of the Convention which have direct implications for the responsibilities of parents and their relations with their children, and which we have analysed at some length. The Committee's Report has little to say, however, on the related and important question of the influence of international conventions, including UNCROC, on the evolution of common law and the potential for common law decisions by our courts, influenced by the Convention, to significantly affect the internal affairs of families.

As the report makes clear, the misgivings I have expressed about some Articles of UNCROC are widely shared by a majority of the submissions to the Committee (1998: xviii). But there is also very substantial support for the Convention included in the submissions and statements by witnesses, and anxiety to see its terms implemented in domestic law.

Three members of the Parliamentary Joint Standing Committee on Treaties have authored a minority report, described as 'Additional Comments', which is appended to the main report. They concur in the view that several key Articles of the Convention undermine the family and parental rights; they dissent from the report's recommendation for the establishment of a federal Office for Children, and propose instead an Office of Family; they defend the parental right to corporal punishment; and they recommend that the Federal Government denounce the Convention and later reratify it subject to several reserva-

tions.

The majority report acknowledges, in effect, the substantial justifications for the concerns expressed about the vague nature of the rights proposed in UNCROC, and questions their appropriateness for children and their implications for questions of parental responsibilities and parental control of children.

The report declares: 'The Committee supports the principles of the Convention and believes that its implementation must recognise the family as the fundamental unit of Australian society and have due regard for the rights and responsibilities of parents as primary carers' (Report, Executive Summary, 1998: xi). As this statement suggests, the report is equivocal to the extent that it seeks, on one hand, to endorse the 'principles' of the Convention without dealing, on the other hand, with the incompatibilities of those principles (as expressed in some of the Articles) with 'the rights and responsibilities' of parents. The difficulty, of course, is that several Articles of the Convention express sentiments about the care of children that would find virtually universal endorsement, so that the 'principles' they promote are unexceptionable. But the problems arise when these are counterbalanced by other Articles, particularly Articles 12 to 16, which propose, very specifically, principles of child autonomy that would undermine the parental prerogatives and responsibilities so vital for effective care and protection.

This dilemma is an important sub-text in the body of the report and is discussed in a number of different contexts. But, in the end, it is dealt with unsatisfactorily.

The report notes, for example, that 67 of the member states ratifying the Convention have nevertheless attached reservations or declarations to their acceptance, and that Reservations are not uncommon on human rights conventions. It further notes that the Liberal Party in opposition sought reservations on Articles 12, 13, 14, 15, 16, and 28 (1998: 445, 447).

The Report refers to a suggestion by one witness before it that in order to preserve Australia's subscription to the worthwhile elements of UNCROC, while disassociating itself from those parts which were unacceptable, the Government should

first deratify the Convention and then reratify it with reservations in relation to the child autonomy concepts (1998: 445). However, the Report dismisses this suggestion on the ground that to do so 'would do significant harm to Australia's international reputation' (1998: 456). The Committee's solution to its concern 'at the extent to which Australian parents believe the Convention is anti-family' (1998: 456) is to recommend that 'the Government develop a set of declarations stating the Government's support of the family unit' (1998: 456). Accordingly the Committee's final recommendation in the Report (Recommendation 49) is:

> The Joint Standing Committee on Treaties recommends that the Government lodge declarations in relation to the controversial Articles of the *Convention on the Rights of the Child* to ensure appropriate recognition of the rights and responsibilities of parents in raising their children (1998: 457).

It is my understanding that reservations cannot be added to a convention once it has been ratified. Presumably this is not true of declarations. Even if it is, one cannot help wondering what the international and domestic legal force of such declarations would be while the Convention in its entirety continues to enjoy the status of ratification by Australia. Would they simply be declarations by the Federal Executive unsupported by legislation of any kind? If so, need this have any effect whatsoever on the continued evolution of the doctrine of 'legitimate expectations', raised by ratification of international conventions, within the common law? Perhaps, in any case, it is not inconceivable that future courts could interpret such 'declarations' as entirely consistent with an overall reading that confirmed 'autonomy rights' for children.

As we noted earlier, in the absence of specific legislation, the declaration by the executive seeking to repudiate the administrative implications of the *Teoh* decision is held by some constitutional lawyers to have no legal force.

If, as I have argued, in tune with many of the submissions to the Treaties Committee and the conclusions of the Committee-member authors of 'Additional Comments' constituting the

minority report, protection of the rights and responsibilities of parents cannot be reconciled with the children's autonomy rights proposed in UNCROC, then some of the recommendations of the report simply add to the uncertainty.

For example, in Recommendation 25 it is proposed that the role and functions of a new federal Office for Children (Recommendation 24) should 'ensure that all legislation, policies and practices support the family as the natural environment for the development and well being of children with parents having the primary role and responsibility in raising children'; while later, as part of the same recommendation, one of the Office's other functions would be to 'encourage Federal departments to incorporate the principles of the *Convention on the Rights of the Child* into their policies, programs and practices and act as a voice for children to government' (supplanting or over-ruling the parental voice?). Here again the potential incompatibility between these two parts of the recommendation is passed over. And later, within the same recommendation, a further function of the proposed Office for Children is to 'establish a mechanism for public reporting on breaches and compliance with the *Convention on the Rights of the Child.*' But, in the absence of a clear understanding of what legally enforceable obligations are imposed by the Convention, it is not obvious what a 'breach' would be.

Further, Recommendation 27 proposes that the Government 'develop a coordinated mechanism for ongoing monitoring of the implementation of the Convention'. What does 'implementation' mean here? Again, it would seem that the prior question of the precise legal status of the Convention in Australian domestic law is begged, along with the many doubts about at at least some of the Articles.

There is, of course, more to the report than I have commented on here since my intention is to concentrate on the issue of parental responsibilities versus children's autonomy. Yet one cannot pass by the rest of the report without also commenting on the extent to which the recommendations, if accepted and acted upon by the government, would create a new bureaucracy – the

proposed 'Office for Children' – whose proposed functions and powers are sometimes vaguely worded, potentially extensive and expensive in relation to any benefits, and likely to duplicate work already the responsibilities of the states.

By and large, child affairs and important aspects of children's well-being come within the purview of the states, and New South Wales, for example, has recently legislated to establish its own Commission for Children and Young People, as have other states.

Beyond the likelihood of duplication, there is the further possibility that a federal 'Office for Children' could be intrusive and pre-emptive in the hands of enthusiastic 'monitors'. In relation to the last point, one notes that among the functions proposed by the Report for a federal Office for Children are: to 'monitor programs and initiatives for compliance with the Convention'; 'to monitor performance of Australia's international obligations to children'; to 'establish a mechanism for public reporting on breaches and compliance with the *Convention on the Rights of the Child*'; and 'to encourage Federal departments to incorporate the principles of the Convention on the Rights of the Child into their policies, programs and practices and act as a voice for children to government.'

Given the Australian Law Reform Commission's past advocacy of UNCROC, it is no surprise that the report of the Standing Committee on Treaties is welcomed by its President, Mr Alan Rose, as advancing the acceptance of UNCROC and the principles it espouses. He says (1998:1):

> Australian society has come a long way from the position of just a few years ago, when the UN Convention on the Rights of the Child (CROC) was derided as *the* threat to family life and as attributing an inappropriate range of rights and responsibilities to children.
>
> The change in the discourse was very evident in the recent report of federal parliament's Joint Standing Committee on Treaties. In the Executive Summary to its 17th report, the Committee acknowledges the

> continuing confusion and concern about some aspects of the CROC. But the majority, with only three of the 16 members disagreeing, considered that to denounce the Convention would do significant harm. The Committee made a series of welcome recommendations, many of which reflect those in *Seen and Heard* [ALRC, 1997]. The ALRC particularly supports the Committee's recommendations to establish an Office for Children in the Prime Minister's portfolio. The outcome of the work of the multi-party Committee represents a new consensus on children's rights.

So, despite the existence of the objections in the minority report and the reasons given for them, and despite the misgivings about UNCROC recorded by most of the public submissions to the Committee and acknowledged in the majority report – but ultimately dismissed there for international political reasons – in Mr Rose's view we have a 'consensus'.

Chapter 4

Children's Interests and Parental Prerogatives

The major conclusion I wish to stress is that autonomy rights of the kind recommended by UNCROC are utopian and irreconcilable with the obligations of parents and others to care for, protect and socialise children in a fashion that will prepare them for the fulfilling exercise of adult rights and freedoms. Granting autonomy rights would make little contribution to the problems of abuse, neglect, and increasingly wayward behaviour by many juveniles that concern us, and could be counterproductive. These are primarily problems which arise from familial breakdown and inadequate care and supervision by adults rather than from a shortage of autonomy.

The present reality of abuse and neglect poses an immediate challenge to deal with it as effectively as we can. In what follows, I take up the deferred discussion of several issues that bedevil the task of finding a balance between protecting parental prerogatives of supervision and control whilst trying to ensure that children at risk of abuse can be promptly identified and helped. Suggesting detailed answers to such difficult questions is beyond the scope of this paper, but exploring the complexities and pitfalls can contribute to better solutions.

In such a search, the language of children's liberation may hinder rather than help. When such language is uttered and formally endorsed by international forums such as the United Nations General Assembly, it carries added authority which, as we have seen, is seized upon and disseminated not only by courts and tribunals, but also by many other interests. In some instances, the demand for autonomy rights is incorporated in pleas for machinery and the appointment of officials, such as

'Children's Commissioners', to deal with problems which have their roots not in insufficient rights or freedom but in failures of protection.

Advocacy Rights and Children's Commissioners

We thus find the rhetoric and demands of UNCROC re-appearing in a recent report prepared for the Legislative Council of the Parliament of New South Wales by its Standing Committee on Social Issues and titled *Inquiry Into Children's Advocacy:*

> The Committee considers that full recognition of the rights of children and a commitment to uphold and protect these rights is the foundation on which advocacy systems for children can be built and which will secure a just society for all its members (1996: 208).
>
> Advocacy for children is about systems and individuals recognising the rights and needs of children and young people and responding to those rights and needs. It also involves allowing children and young people to have a say in decisions that are likely to affect them (1996: vii).
>
> ... that the Premier urge the Prime Minister to create the position of Children's Commissioner within the Human Rights and Equal Opportunity Commission to ensure that the governments meet their obligations arising from the United Nations Convention on the Rights of the Child (1996: xxi).

It is interesting to note, in passing, that, in the last passage above, a state government committee seems to be inviting the federal government to use its external affairs power to 'ensure that the *governments* [read "State governments"] meet their obligations ...' (emphasis added). It is another example of the widespread agitation for the formal incorporation of UNCROC into domestic law by using federal legislation under the external affairs power to change state law. The wider point is that, although the committee's recommendations are primarily concerned with the question of providing children with access to advocates who would act on their behalf, this is seen as one

aspect of the broader push for incorporation of UNCROC into domestic legislation, and thereby extending the scope of 'advocacy rights' to include a much wider children's rights agenda.

However, on the more limited issue of effective representation and advocacy for neglected, abused and otherwise seriously disadvantaged children deprived of proper parental care and supervision, the committee of inquiry makes a number of recommendations that deserve serious consideration. It seems no less than appropriate that children lacking parental aid and support, or seriously wronged by their parents or other custodians, should be helped by the state and, where appropriate, by state-appointed advocates, to have their interests protected. To do so, of course, is to acknowledge the special vulnerability of children and their needs for protection and help; help that should be forthcoming upon *prima facie* evidence, supplied to an appropriate and available public authority by the child or others, of the inability or failure of their parents to play their protecting and caring role.

In the event, the legislation eventually prepared by the New South Wales government and passed, at the time of writing, by the New South Wales Legislative Assembly, does not go as far as the above *Inquiry* recommended. It does not include provision for a body of government-funded 'advocates' of autonomy rights, but makes provision for improving facilities for identifying and helping children in danger and who lack assistance from responsible adults, including neglectful or abusive parents.

Queensland's *Children's Commissioner and Children's Services Appeals Tribunals Act* 1996 is careful to protect the parental interest while seeking to improve facilities for protecting children. Among the several functions of the Commissioner defined under the above Act, the primary ones are:

(a) monitoring and reviewing, in collaboration with entities that deliver children's services, the provision of the services and suggesting ways of improving the services' quality, adequacy and effectiveness; and

(b) promoting practices and procedures that uphold the princi-

ple that parents or legal guardians of children have the primary responsibility for the upbringing and development of their children (from Part 2, Section 8 of the Act).

The remaining functions provided for under the Act are essentially elaborations of (a) above and, of course, subject to the important principle of parental primacy spelled out in (b). In general, the Queensland Commissioner's role is to play a monitoring and coordinating role in respect of well-established services and functions intended to protect children and to provide remedies for parental absence, inability, or failures of care and protection. It is a device for improving the efficiency of the state's traditional and legitimate role as child protector of last resort, and respecter of family independence. It is therefore unexceptionable and potentially valuable.

In other words, it strives to achieve that balance between what is owed to children in the service of their present needs and a desirable future, whilst maintaining the integrity of the 'parental rights' inseparable from child well-being in general. In terms of helping to protect children, and accomplishing the ultimate purpose of developing independent, competent and reliable adults, it compares rather favourably with UNCROC's radical demands for granting quasi-adult rights to the vulnerable, the immature and the not-yet-fully competent, whilst their dangerous and illiberal parents are patrolled by the state. If 'advocacy rights' were to be framed with UNCROC in mind, and State and Federal 'Children's Commissioners' given powers of interpretation and oversight in their implementation in order 'to meet the obligations arising from' UNCROC, the implications for parental prerogatives, and the relations between parents and their children, would be dire indeed.

Bad Parents and Child Victims

Yet sometimes parents perpetrate evils from which their children must be protected. It is a fact of life that some children – mercifully few – have bad natural mothers or fathers who can be cruel, violent and murderous. Society must do all it can to rescue children at such risk. This presents us with an agonising

problem. How can we discover children at risk, and succour and protect them, without putting a broadsword through that substantial autonomy of families which is so vital to children in general?

Unpleasant as the facts of child cruelty and murder are, they force us to confront also the difficulties faced by those public servants most closely charged with a non-parental duty to watch over children's interests whilst being circumspect about undue interference in family affairs.

Libby Purves in a recent article in the London *Times* (1997), describes some events captured by a monitoring program, set up by Professor David Southall, in the children's ward in an English hospital:

> The children's ward is darkened, quiet and warm, its peace broken only by the distant squeaking of a nurse's shoe. The small child lies in a cubicle, breathing quietly. At the bedside sits the timeless figure of a mother watching at her infant's sickbed. She reaches out to the baby and roughly flicks or slaps it awake. Then suffocates it. Or breaks its arm, or forces disinfectant into its mouth.
>
> But everything has been seen by hidden observers. Lights snap on, a nurse comes in, the damage is prevented and the harrowing process of law begins to roll: towards care orders, prosecutions, psychiatry. That baby will not grow up with its own mother now; but at least it will grow up.

The objective of this video monitoring by Professor Southall was to conduct covert observation of parents whose babies had suffered inexplicable illness. The kind of actions by parents described above were recorded more than 30 times over the last decade. Purves's article goes on to summarise Southall's observations:

> These parents, says Professor Southall, were plausible and pleasant: what he saw on the video cameras was a rapid transition to brutality which would otherwise be unbelievable. Such things are what scientists call

> 'counter-intuitive'; nobody wants to accept that smiling well-presented parents do the things recorded on Professor Southall's log. 'Hitting child on mouth ... toothbrush rammed down throat ... Mother disconnected oxygen ... swore at him ... slapped him ... flicked eyelids open ... pushed face into pillow.'

Australian readers need no reminder of the steady stream of child abuse and neglect stories, some of them entailing the most cruel and violent treatment of young children, that are read about or seen in our media.

The horror of such things, and the difficulty under ordinary circumstances of identifying such parents or other custodians and exposing and dealing with them, need no emphasis. As Purves remarks: '... if children are to be protected, somebody in the system has to have the kind of suspicious mind which accepts that awful fantasies and cruelties may lurk behind respectable facades' (1997).

Hence the agonising dilemma of the need for action to protect children as much as possible without jeopardising the privacy and independence of law-abiding, protective parents. It is a problem with no easy solution; and its nature is such that mistakes by state authorities – in both directions – are difficult to avoid. Few things arouse more public fury than the thought that children might suffer because of tardy, incompetent, or negligent behaviour by officials.

Yet recent history has shown that suspicion can sometimes lead to injustice where abuse has been falsely assumed, or where punitive actions by parents that fall short of abuse lead to official intervention.

'Help Lines' for Children

One response to calls for more help for children other than infants who are exposed to violence, abuse or neglect, has been to set up 'help lines' to give children access to third parties who can give assistance. There can be little argument with such a principle, but its implementation is not without pitfalls, as illustrated by the following two cases reported in the British

media.

In the first case, a father who slapped his 12-year-old son on the cheek was arrested and held in a cell for 15 hours after his son reported him to the police for assault. Before the case came to court, the father was forced to live away from the family home for more than two months. After a second court appearance, the father was acquitted of all charges.

In the other case, the father involved described what happened in these words (the names have been changed):

> We lived in a cul-de-sac on a pleasant estate in Berkshire – myself, my wife Sue, our daughter Ellie and our son Joe,who was then five. The road was full of young families and we were happy to let the children play with their friends as long as they came home when we asked them to.
>
> Joe was no problem, but Ellie was nine and had always been inclined to pull rank and she started staying out late. It was the summer holidays and, after several days of this she came back late for tea and we had the usual argument about when she should go to bed. She was shouting that we were being unfair not letting her go out again, that all her friends went to bed later – all the usual stuff – and I was so exasperated I told her to go to bed immediately and smacked her on the bottom.
>
> I hit her once and not particularly hard, but she was outraged. Sue told her not to be so silly, that we were fed up with this constant arguing and that she deserved the slap, but Ellie rushed upstairs in tears.
>
> We left her to cool down, but what we didn't realise was that Ellie used the upstairs phone to call a child helpline. There was a lot of hype about child abuse and the rights of children at the time, but it had never occurred to us that she might see herself as an abused child because she wasn't. We don't know what the helpline told Ellie, but her interpretation was that there was no need for parents to slap children, even

> that it is every child's right not to be smacked. Smacking, she was told, could be regarded as abuse – if that was what had happened she should tell the police.
>
> So she did. I can imagine she felt angry and she thought she could get her own back on her parents. The next thing we knew, there were two policemen at the door. Of course, because she is a girl and had been hit by her father, the situation was amplified and the police were obliged to investigate – although the way she had put it to them was that her father had been battering her.
>
> We were very lucky because the policemen talked to all of us. My wife was adamant that I had not done anything wrong and that Ellie deserved to be punished, and there were lots of tears and emotion. Then Ellie said she was sorry and the policemen said there was no need to take it any further and left us to it (*The Sunday Times*, 1996:17).

In both of these cases, the chastising parent was not fined or jailed, but it is easily imagined that other judges or policemen might have used their powers differently; and, as it is, in both cases those families will never be quite the same again. In the second case quoted above, the father goes on to describe the irrevocable and sad change in the relationship between him and his daughter and to wonder whether it contributed to the later break-up of his marriage.

It is likely that the results of a poll of public opinion on the actions taken in these instances by the children, the parents, and the authorities, would vary widely. No doubt many would be outraged by the thought of a father striking a twelve-year old son on the cheek, or slapping a nine-year old girl on the bottom; no doubt others would believe that, undesirable as such parental actions might be, the consequences were disproportionate. Some would believe that calling in the authorities, and the children's right to appeal to them, is always justified if the protection of children is to be taken seriously. Yet others might

think that such steps were too drastic in the circumstances and would tend to undermine parents' rights of control.

Effective socialisation of children is difficult, if not impossible, in the absence of adult/parental direction and control, and control requires authorised powers of control and the availability of sanctions and rewards to counter misbehaviour in the interests of internalising norms of acceptable social and interpersonal behaviour. The problem is to find a balance which permits effective control in the absence of undue force. Is physical punishment of children always and everywhere an example of undue force?

Corporal Punishment of Children

> *Corporal punishment amounts to a total lack of respect for the human being; it therefore cannot depend on the age of the human being* (from a report by the European Human Rights Commission, quoted in *Legal and Social Aspects Of The Physical Punishment Of Children*, Commonwealth Department of Human Services and Health, 1995: 78).

The dilemmas and difficulties raised by the infliction of physical punishment on children by parents or those acting *in loco parentis* in the interests of disciplining or correcting children are evident enough, and there are two main arguments against it.

The first is that it is a morally repugnant, illegitimate and unjust assault upon another human being and especially reprehensible in that it is perpetrated upon those who are least able to defend themselves. The second argument (which is really an hypothesis) is that physical punishment of children does not, as may be claimed, constitute an efficient and effective way of disciplining children in the interests or socialising and educating them; that it contributes to the development of aggressive personalities; and that other methods of control are more effective and humane. It follows, so the argument goes, that all forms of physical punishment of children by adults should be outlawed. Arguments of this kind have prevailed about physical punishment in public schools (e.g. caning) and in some

countries parental physical punishment has either been outlawed or defined restrictions placed upon its use.

The moral questions – is physical punishment always wrong, or can it be rightly used in certain circumstances? – admit no easy or unanimous answers. Both views have been strongly put; the first in terms of fundamental human, or natural, rights; and the second, so far as children are concerned, as not inherently wrong and pragmatically valuable provided there is no abuse or physical or emotional harm involved.

From the latter perspective, the crux of the issue is whether mild, undamaging corporal punishment – for example, open-hand spanking or smacking on the legs or bottom with a disciplinary purpose, and which could not be construed as violence or an assault because it would lack the 'evil intent' which some courts have found to be essential to assault (Commonwealth Department of Human Services and Health, 1995: 27) – has a useful and humane place in adult control and supervision of children. If corporal punishment has a legitimate but restricted place, the presumption is that it would only be administered by parents or guardians and those acting under parental consent and delegation.

Such reflections have acquired urgency in the context of a proposal by the Law Reform Commission that State Attorneys-General consider the formulation of a uniform law to treat corporal punishment of children, other than a slap with the open hand, as a criminal assault. The suggestion prompted a spate of articles and letters in the daily press (e. g. *The Australian*, 1998a, 1998b) arguing both for and against the proposal and largely drawing upon one or other of the arguments summarised above.

Surveys have shown that the overwhelming majority of Australian adults (between 80-90%) endorse the legitimacy and occasional necessity of such mild physical punishment of misbehaving children by their parents, or those *in loco parentis* if they have the consent of the parents (Commonwealth Department of Human Services and Health, 1995: 55-56). This points to the widespread belief that parents and those authorised to assume a parental role have a responsibility to administer reasonable

chastisement if it is merited, and that such punishment is effective in disciplining children and controlling misbehaviour. It seems reasonable to infer that the respondents are drawing upon their experience as both children and parents in reaching that conclusion. There is evidence of declining resort to physical punishment (Commonwealth Department of Health and Human Services, 1995: 2). For most parents, it would seem, physical punishment of children is rarely random or capricious and is almost invariably tied to 'pulling them up' sharply and immediately with the intention of teaching an understanding of acceptably social, or safe, behaviour.

Research evidence and expert opinion on physical punishment and its effectiveness is mixed. In what follows, the main findings of the comprehensive discussion paper, 'Legal and Social Aspects of the Physical Punishment of Children,' by the Commonwealth Department of Human Services and Health (1995: 82-112), are summarised.

Some studies show that frequent smacking may be counterproductive. But selective and infrequent spanking or smacking is not necessarily contra-indicated and can be effective. Most experts would agree that the form and context of punishment are important. A substantial body of opinion is consistent with the common sense view of most parents that a slap with the hand for a naughty child, or one whose behaviour is endangering itself, may sometimes be the best immediate course of action under certain circumstances (Commonwealth Department of Human Services and Health, 1995: 83-93). However, *reliance* on physical punishment, to the exclusion of other measures, such as warning, explaining, withdrawal of affection, etc., may lead to less compliance and lagging development.

Evidence from surveys indicates that slaps with the hand on legs or bottom are the common forms of physical punishment and peak in the critical 'socialising' period between 18 months and 4 years of age. As children get older, physical punishment declines noticeably. Evidence suggests, further, that most parents would agree with the experts that severe and frequent punishment is morally wrong, counterproductive, conducive to

aggressiveness as children grow up, and an admission of parental failure. They would also agree with the experts that physical punishment should be accompanied by an explanation to the child of the reasons for it. Indeed, this seems to be a crucial element in the internalised accretion of generalised rules of proper conduct and considerate behaviour, and that 'children themselves believe that the combination of reasoning and some power assertion works best' (Commonwealth Department of Human Services and Health, 1995: 86). Severe and frequent punishment, on the other hand, although it may induce situational compliance, is associated with failure to *internalise* moral rules, with reduced likelihood to resist temptations without external constraints, with less willingness to confess and accept responsibility, with greater aggressiveness, and with increased likelihood of delinquency.

In sum, there is virtual unanimity to be found in expert opinion and evidence that harsh or frequent punishment – quite apart from its moral repugnance – is less effective, and even counterproductive, in the development of desirable personal and social conduct, and is psychologically damaging. On the other hand, there is support by some experts, and more widely by the population in general, for the view that infrequent, mild punishment, accompanied by explanation and reasoning, and less frequently resorted to as children get older, has a useful role in discipline and control, has no harmful consequences, is not inherently wrong, and should remain a parental option. Those parents and others who totally oppose physical punishment on either, or both, moral and effectiveness grounds, are not left resourceless, however, in matters of discipline and shaping of desirable child conduct. There are many other means – reasoning, explanation, expressed disapproval, shaming, withdrawal of privileges, approval and rewards for desirable conduct, and so on – available to them, and the evidence is that they are effective if used consistently and firmly in socialising young children.

In a carefully constructed empirical study of alternative methods of parental discipline, Larzelere and Merenda (1994) concluded that:

> The effectiveness of a carefully prescribed spanking as a backup for time out [e.g. confining a child to its room] has been demonstrated only for children from 2 to 6 years of age (1994: 487).

This is consistent with parental practice which, as noted earlier, is marked by rapidly declining resort to physical punishment of children older than four. They also make the interesting observation in respect of discipline training programs for parents, that:

> Parenting programs that do not incorporate [negative] consequences [e.g. spanking] need to instruct parents to be particularly firm in using alternative types of discipline responses, such as reasoning. Otherwise trainers are in danger of fostering *nattering*, an increasing frequency of verbal complaints to the child, which in turn are frequently ignored. Frequent parental nattering is a predictor of delinquency (1994: 487).

It is sometimes argued that there is a causal relationship between the incidence of smacking and child abuse. However, both the incidence of child abuse, and violence by juveniles, have risen noticeably over recent years (Australian Institute of Health and Welfare, 1996: 41; New South Wales Department of Juvenile Justice, 1993/94: 9) as moderate corporal punishment has become less widely accepted by Australians and abandoned by some public school authorities (Commonwealth Department of Human Services and Health, 1995: 75). This clearly indicates that growing child abuse is not the result of a more punitive environment in the ordinary home or school; although it is consistent with the view, although not proof of it, that deteriorating juvenile behaviour may be in some part due to lack of discipline. Moreover, there is evidence that abusive and neglectful parents present completely different behavioural and emotional profiles compared to parents who only occasionally resort to mild, disciplinary smacking.

The real issue is one of considerate, involved and effective parenting, and the conditions that underlie it. The well-being of children, and their moral and behavioural development, depend

upon effective parenting which in turn depends upon a judicious blend of loving care, consistency, and moderate discipline. In allowing a place for spanking as a means of discipline, Larzelere and Merenda emphasise, in the study referred to earlier, that there are many aspects to effective parenting:

> The implications of this study need to be placed in their appropriate context. The focus has been only on discipline responses to misbehaviour. Positive parenting in other contexts is probably at least as important. Other research has shown that sensitivity and responsiveness to infant initiatives predict a secure attachment ... and that parental affection, clear expectations, reinforcement of appropriate behaviour, granting of age-appropriate autonomy, and skill development all predict positive child outcomes (1994: 487).

The general conclusion to be drawn concerning the effectiveness and usefulness of physical punishment is that, under circumscribed conditions that eschew harshness and frequency of punishment, which accompany mildness with explanation of the reasons for punishment, which take the age of the child into account, and which maintain affectionate relationships, there are good reasons for retaining it in the repertoire of parental options in the socialising and instruction of their children.

But what should be done about those parents who may punish more frequently but whose conduct falls short of abuse justifying intervention? An issue that is often raised in this context is agitation for government-sponsored 'education of the community' about physical punishment. Yet there is evidence that such a process of education and change is already under way within the community. Public attitudes and behaviour in respect of physical punishment have changed noticeably in the last 50 years or so and the change is continuing. Although the overwhelming majority wish to retain the right to punish, they believe increasingly in more discriminating and less frequent employment of physical punishment (Commonwealth Department of Human Services and Health, 1995: 58-60, 75).

Information and expert advice about the use of alternative methods of dealing with misbehaviour is commonly to hand in the public domain and through the media. The views of child development experts find ready outlets in the newspapers, journals and magazines. The Commonwealth Department of Human Services and Health quotes De Mause (1995: 5) as finding a gradual evolution towards progressive improvement in parental treatment of children: 'there seems to be evidence of visible improvement in every period in the West.' Perhaps this conclusion should be qualified in the light of increasing evidence of child abuse and neglect by confining it to those parents conscientiously concerned about doing their best by their children. For that majority, this evolutionary process may be expected to continue and unnecessary punishment that falls short of violence or abuse to steadily decrease.

'Acceptable' and 'Reasonable' Punishment

As already indicated, there are those who believe that any form of physical punishment of children is absolutely wrong, an infringement of their fundamental human rights and constitutes an assault that simply cannot be tolerated. For others – who would be willing to accept that mild and infrequent punishment for disciplinary purposes is sometimes justified – the occurrence of severe, unnecessary or unduly frequent punishment is an injustice to children and an infringement of their rights which cannot be allowed to 'evolve' into disappearance, but must be dealt with at once. For them, the obvious conclusion is that 'acceptable' or 'reasonable' punishment must be closely defined by statute law. That this latter position enjoys support is evidenced by the present move to change the law by banning any form of corporal punishment except a slap by the open hand.

At the present time, the common law sanctions reasonable and moderate physical punishment of children in the interests of 'lawful correction' by parents and other authorised persons *in loco parentis*. A body of case law on the subject already exists, and in some states the common law defence of 'lawful

correction' has been incorporated in statutes.

The common law position, as quoted from Halsbury's *Laws of England* by the Commonwealth Department of Human Services and Health (1995: 14), is:

> An act is not an assault if it is done in the course of the lawful correction of a child by its parents or of a pupil by its teacher, provided that the correction is reasonable and moderate considering the age and health of the child and administered with a proper instrument, and in the case of a female in a decent manner.

Although subject to some qualification by statute and public policy in some States and Territories (Commonwealth Department of Human Services and Health, 1995: 53-4), this doctrine includes those (such as teachers) who exercise 'lawful control' and who carry delegated parental authority *in loco parentis*. But 'an older brother has no right to strike a younger brother for being impudent since he is not *in loco parentis*' (Commonwealth Department of Human Services and Health, 1995: 22).

In 1997, the Honourable Alan Corbett sponsored a 'Crimes Amendment (Child Punishment) Bill' before the New South Wales Parliament which attempted to define what constitutes 'reasonable force' by a parent or person acting for a parent in disciplining or controlling a child (defined as any person under 18 years of age). It proposed that:

> ... the application of physical force is not reasonable if:
> (a) the force is applied to any part of the body above the shoulders of the child, or
> (b) the force is applied by any means other than an open hand, or
> (c) the force inflicts actual bodily harm.

On the face of it, this seems to be a sensible formulation. However, the fact that case law within the common law does not yield a universal, common-sense standard of 'reasonableness' in physical correction with a degree of specificity that could be applied with certainty in all circumstances warns against the difficulty of trying to formulate one for incorporation in statute. This point is also made by those who wish to retain the right of

reasonable corporal punishment by parents. As Antonia Feitz has put it:

> The proposal to restrict parents to using an open hand is not only a gross interference in family life, it is plain stupid. A man's open hand might be a harsher punishment than a woman's smack with a wooden spoon (*The Australian*, 1998a).

The problem of defining acceptable or reasonable punishment in the interests of 'lawful correction' of children is a difficult one. We are confronted with two principles which, one suspects, attract almost universal support:

(i) there must be limits to the disciplinary methods available to parents; and

(ii) parents must be empowered to exercise discipline in carrying out their responsibilities for socialising their children and shaping acceptable and considerate behaviour.

The state must therefore, where possible, prevent and punish disciplinary behaviour which goes beyond the limits. Nevertheless, given the infinite variability, and sometimes urgency, of the situations parents may face in rearing and socialising their children, they must be allowed a degree of flexibility and discretion in determining disciplinary measures, within the limits. But how are those limits to be determined, and how is the dilemma to be resolved?

There are two dangers: that the state will accrue new powers, and use them to the detriment of the proper exercise of parental responsibilities, with unwelcome consequences for children's development and society in general; or that parents will misuse their powers and discretion unless closely supervised by the state.

A recent case in Britain has provoked considerable debate around the issues being raised here. In 1994, a stepfather was accused of beating his nine-year old son occasioning actual bodily harm and prosecuted. The natural father appealed to the European Court of Human Rights which found, in September 1998, that the stepfather's actions were a breach of the boy's human rights protected by Article 3 of the European Human

Rights Convention and awarded damages of 10,000 pounds against the British Government and costs of 20,000 pounds. The European Court made no finding on the boy's further claim that his treatment constituted a breach of his right to a private life under Article 8.

This finding by the European Court was followed by demands that the British Government act swiftly to bring British law – which is essentially the common law right of 'reasonable correction' by parents – into conformity with much of European law that forbids physical punishment. In commenting on such demands, the British Health Minister, Mr Paul Boateng, is reported as saying (*The Daily Telegraph*, 1998):

> We are determined to ensure that our laws protect children against abuse. But let me make one thing clear; we are equally determined to ensure that nothing undermines a parent's right to discipline a child within a caring and loving environment.

The Minister's Labour Party Colleague, Mr David Hinchcliffe, added: 'I don't think we can get into law a definition that can be applied by people in child protection that is half way between smacking and not smacking' (*The Daily Telegraph*, 1998). A British newspaper columnist, Melanie Phillips, offers her view that: 'The European Court of Human Rights was invented to protect individuals from the state. Now it is being used to direct the state to interfere with people's lives' (*The Sunday Times*, 1998).

So, our dilemmas in this country are not unique, and we share with other countries the task of charting a course that will be protective both of children and the reasonable actions of their parents.

As I have tried consistently to argue here, we must begin with the rebuttable presumption that in general parents, above all others, including state functionaries, will deal better with their children than anybody else. If we begin with the contrary presumption that parents as a class are not to be trusted in this way, it follows that the state should take full responsibility for children and exercise traditional parental prerogatives right from

the beginning. As things stand at the moment (with some shakiness), our traditions, and their encapsulation in the common law, confirm the presumption of parental trustworthiness, but make provision for the state to act when there is proof of untrustworthiness in particular cases.

The common law of 'lawful correction' by 'reasonable' means passes the resolution of the dilemma involved here over to the courts for judges and juries to decide in the light of the infinitely variable facts of particular cases. Limits are thus placed upon parental discretion in punishment and provision is made for parents to be answerable before the law if they misuse the trust they enjoy.

The danger is that impatience with the common law and the slow development of case law will lead to formulations of statute law – such as those proposed above by the Honourable Alan Corbett – that might allow some cases of genuine abuse or violence to fall outside the net that would be caught by the common law, while catching trivial transgressions and imposing disproportionate penalties.

The common law system we already have in place is responsive to, and deliberative upon, changing community standards. That mechanism depends upon case by case determinations that take account of the infinite variety of circumstance while safeguarding the vital principle of parental option entailed in the notion of 'lawful correction.' We should not lightly agree to displacement of the common law process which protects 'reasonableness' and flexibility, and which allows scope for dealing with unpredictable and exceptional circumstances. This would be a loss for which there seems to be no compensating benefit. The irony is that it would make no contribution whatever to the problem of genuine child abuse, which seems to be the animating motive for present moves for statutory initiatives.

Dealing With Abuse and Neglect

A large body of research evidence indicates that the major underlying cause of abuse and neglect of children is fragmenting

family life and the detachment of increasing numbers of children from the sustained care and supervision of two cooperating natural or adoptive parents as they are being reared to adulthood. For similar reasons, but with the added complications of homelessness, inadequate schooling, and youth unemployment, a significant proportion of adolescents lead, bleak, empty and self-destructive lives that endanger themselves and others. Against such a background and the declining well-being of children that it represents, agitation for autonomy rights is a distraction from such urgent concerns, and may even exacerbate them.

The causes of the deterioration of family life are many and complex. They are to be found in the economic, social, and cultural changes of the last 30 years or more (Maley, 1996a, 1996b). In a number of areas, there is scope for new policies and recovery that will go beyond palliatives and emergency handling of the symptoms of breakdown. They include:

- taxation policies that give adequate recognition to the costs of raising children:
- welfare policies which cease subsidising divorce, separation, out-of-wedlock births, and sole parenting;
- family law which encourages spousal commitment and promise-keeping, and enduring marriages;
- labour market, wages, education, and welfare policies which effectively tackle unemployment to offer working futures for school-leavers and, in combination with the measures outlined above, the breaking of the present cycle which is creating a self-perpetuating underclass, whereby the child casualties of the present system become the adult vehicles of its continuance into the future

It is ironic, at a time when major causes of declining well-being of children are to be found in family fragmentation and negligent schooling, that a children's autonomy movement should arise whose potential effects would be to drive parents and children further apart by denying fit parents (and those acting on their behalf) clear authority to instruct and direct

children for whom the law makes them responsible. There are too many situations already where children are left to their own devices, with unwelcome results. Two key recommendations are that:

- national and state policies should support, rather than place in doubt, the rights and responsibilities of fit parents in managing and socialising their children;
- the deeper causes of family fragmentation, which range across the issues mentioned above, should be urgently addressed, because the situation is continuing to deteriorate.

Responsibility for dealing with immediate problems of child abuse and neglect and improper punishment, rests with the Australian States. The need here is for speedy detection and appropriate response by public authorities, while treading the delicate path between doing so without unnecessary interference and heavy handedness with families. Unfortunately, effective action of this kind is in danger of being muddied by tying it to the irrelevant issue of children's autonomy rights as expressed in UNCROC. The more practical path would be to:

- review the machinery of detection, response, and shelter, and then
- allocate sufficient resources for the purpose until attention to the more fundamental causes identified above begins to take effect in reducing the call upon services and resources.

Conclusion

The fundamental rights of children are to enjoy to the practicable maximum the conditions that will help them to become free, educated, considerate, law-abiding, emotionally and physically healthy adults. Their immaturity and vulnerability during their minority require that the process of acquiring the skills, knowledge, social practices, and maturity that will enable them to enjoy adult liberties must be supervised and directed by adults. In ordinary circumstances, the adults who carry the pre-eminent responsibility in managing this process are their parents and legal guardians. Responsibilities cannot be truly or legitimately carried out unless those who bear them have the authority to do so. To avoid conflictual impasse, it follows that children must be denied some rights enjoyed by the adults who are responsible for caring for them. Granted that there can always be reasonable argument, at the margins, about the ages and stages at which children begin to enjoy adult rights, this is the bottom line and the principle of parental authority must be defended.

The United Nations Convention on the Rights of the Child has assumed considerable importance because, as I have argued, it articulates principles of child autonomy that push beyond the margins in ways that would threaten the kinds of fundamental rights of children I have mentioned above by seriously compromising the parental authorities necessary for their attainment.

Children clearly vary in the rate, and extent, of achievement of the various competencies that mark adulthood. This depends upon their own natural endowments, the education and instruction they have received from parents and others, and their own assimilation of experience. There would be few parents who do not take these variables into account in the ways in which they deal with their children, especially in granting appropriate freedoms and responsibilities as they develop. Their intimate

knowledge of their charges puts them in a better position to make such discriminating judgements than courts and children's commissioners, such as UNCROC and others now propose. It would therefore be more realistic to retain a universal, legal age of majority (and there can be argument about where it should be struck) than formally to legislate to give, or withhold, rights on the basis of the highly indeterminate and subjectively-judged criterion of 'due weight in accordance with the age and maturity of the child.'

The perspective from which we should consider agitation for children's autonomy is the effects which rights of autonomy would have on the internal life and functions of the family, and hence on the family's responsibility and capacity to care for, protect, and instruct its children. I have argued that such rights (as expressed in UNCROC) would undermine parental prerogatives and the authority necessary for adequately managing children and preparing them for adulthood and social living. Children would suffer because they could be authorised (even encouraged) to struggle against their parents, and more easily, immaturely and incompetently to follow paths in defiance of their parents that would work against their own interests. All would be losers, including the wider society. The dependency of children is a stubborn, 'natural' fact and problem to which the 'natural' family has always been the answer. Measures which could reduce or handicap the parental response to their children's needs, while increasing the child's dependency upon the state and its functionaries, are a course from which we should hastily withdraw.

Schneiderman (1995: 178), in discussing the family, argues:

> The family is a functional social unity that has proved itself throughout history; as with any group, it is subject to degradation. This does not mean that the family will be or should be as it was; as a human institution it has undergone change and improvement through trial and error. Its form and practice are neither fixed immutably nor subject to infinite variation.

> Far too often idealistic political thinkers promote the destruction of the family without having any idea of what that would entail or what would take its place. Some have set out to destroy capitalism by undermining the family. Others have decided that shame culture is the ultimate enemy, and that the best course is to abolish filial piety.

And later he comments (1995: 180): 'Both the Chinese and the American Cultural Revolutions showed in different ways that destroying the institution of the family by discrediting parental authority leads to social horrors. Systematic exposure of each and every flaw in each and every family exacerbates the very difficulties it purports to solve'.

This is not, nor is it intended by Schneiderman to be, an argument for ignoring the abuse of children within families, or oppressiveness, or violence within families, or neglect within families. The point is to preserve the family, and the functions and authorities necessary for caring for and raising children, whilst dealing with the dysfunctional elements and their deeper causes.

Nor is this an argument for stasis or reaction. It is an argument for more thought, steady repair, caution, and resistance to those calling for immediate and drastic action that might plunge us into unpredictable and dangerous courses from which recovery would be difficult, and perhaps impossible.

Australian family life is already much less stable than it used to be, and among the consequences have been impoverished material and emotional lives for many children. The movements discussed in this paper are adding weight and momentum to the forces of instability. Regrettably, the courts and the law, upon which we normally depend for steadiness and certainty, have in some instances played a leading role in promoting rapid change and uncertainty. They have been abetted by flaws in the political process which have allowed Federal governments to ratify, at will and without the necessity for scrutiny by the people's parliamentary representatives, international conventions that are now having a powerful effect upon domestic law, and whose

future influence is unpredictable but likely also to be destabilising.

The family that supports itself, that does its best by its children, that instructs them and talks with them, that argues about the events of the day, that shows respect and tolerance within itself, is the indispensable centre of the nation. The strength and substantial independence of family life is vital to a liberal and vigorous democracy and to the development of children into law-abiding, competent and productive citizens. But the family needs the support of wise, democratic legislators. What we often see instead is their indifference, and sometimes complicity, as the ordinary home is deconstructed and replaced by a caricature in which it appears as an arena of oppression, requiring, as the remedy, that its children should be 'abandoned to their autonomy.'

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Appendix

The Convention on the Rights of the Child

Adopted by the United Nations General Assembly on 20 November 1989 and entered into force on 2 September 1990.

Preamble

The States Parties to the present Convention

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

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

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

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

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

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family

environment, in an atmosphere of happiness, love and understanding.

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

Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration on the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economics, Social and Cultural Rights (in particular article 10) and in the Statutes and relevant instruments of specialized agencies and international organisations concerned with the welfare of children.

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

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

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

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

Recognizing the importance of international co-operation for improving the living conditions of children in every country, in

particular in the developing countries.
Have agreed as follows:

Article 1

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

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff as well as competent supervision.

Article 4

States Parties shall undertake all appropriate legislative, administrative, and other measures, for the implementation of the rights

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

Article 5

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

Article 6

1. States Parties recognized that every child has the inherent right to life
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
2. States Parties shall ensure the implementation of these rights in accordance with their natural law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to speedily re-establishing his or her identity.

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in particular cases such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.
3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.
4. Where such separation results from any action initiated by a States Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in custody of the State) of one or both parents or the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 10

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

of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 2, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (*ordre public*), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

Article 11

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

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 13

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
   (a) For respect of the rights or reputation of others; or
   (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Article 14

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

Article 15

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

Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks.

Article 17

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her

social, spiritual and moral well-being and physical and mental health. To this end, States Parties shall:

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

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

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

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

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

Article 18

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.
2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, faculties and services for the care of children.
3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse,

neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

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

Article 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
2. States Parties shall in accordance with their national laws ensure alternative care for such a child.
3. Such care could include, *inter alia*, foster placement, *kafalah* of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 21

States Parties which recognise and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

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

(b) Recognise that inter-country adoption may be considered

as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;

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

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

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

Article 22

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.
2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organisations or non-government organisations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded to the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

Article 23

1. States Parties recognise that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance, and facilitate the child's active participation in the community.
2. States Parties recognise the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.
3. Recognising the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.
4. States Parties shall promote, in the spirit of international co-operation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.

Article 24

1. States Parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or

her right of access to such health care services.

2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:
   (a) To diminish infant and child mortality;
   (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
   (c) To combat disease and malnutrition, including within the framework of primary health care, through, *inter alia*, the application of readily available technology and through the provision of adequate nutritious food and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;
   (d) To ensure appropriate pre-natal and post-natal health care for mothers;
   (e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breast-feeding, hygiene and environmental sanitation and the prevention of accidents;
   (f) To develop preventive health care, guidance for parents, and family planning, education and services.
3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health care of children.
4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realisation of the right recognised in the present article. In this regard, particular account shall be taken of the needs of developing countries.

Article 25

States Parties recognise the right of a child who has been placed by the competent authorities for the purposes of care, protection, or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

Article 26

1. States Parties shall recognise for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realisation of this right in accordance with their national law.
2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as other considerations relevant to an application for the benefits made by or on behalf of the child.

Article 27

1. States Parties recognise the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.
3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.
4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

Article 28

1. States Parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

(a) Make primary education compulsory and available free to all;

(b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;

(c) Make higher education accessible to all on the basis of capacity by every appropriate means;

(d) Make educational and vocational information and guidance available and accessible to all children;

(e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.
3. States Parties shall promote and encourage international co-operation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

Article 29

1. States Parties agree that the education of the child shall be directed to:

(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;

(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

(c) The development of respect for the child's parents, his or her cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

(e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.

Article 31

1. States Parties recognise the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.
2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

Article 32

1. States Parties recognise the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.
2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant

provisions of other international instruments, States Parties shall in particular:

(a) Provide for a minimum age or minimum ages for admissions for employment;

(b) Provide for appropriate regulation of the hours and conditions of employment;

(c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

Article 33

States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

Article 34

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

(a) The inducement or coercion of a child to engage in any unlawful sexual activity;

(b) The exploitative use of children in prostitution or other unlawful sexual practices;

(c) The exploitative use of children in pornographic performances and materials.

Article 35

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, sale of or traffic in children for any purpose or in any form.

Article 36

States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

Article 37

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither

capital punishment nor life imprisonment without possible release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her own liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to promote access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 38

1. States Parties undertake to respect and ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities
3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavor to give priority to those who are oldest.
4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed

conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

Article 39

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other for of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Article 40

1. States Parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

   (a) No child shall be alleged as, be accused of, or recognised as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

   (b) Every Child alleged as or accused of having infringed the penal law has at least the following guarantees:

   (i) To be presumed innocent until proven guilty according to law;

   (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate through his or her parents or legal guardian, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

   (iii) To have the matter determined without delay by a

competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interests of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law, and in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Article 41

Nothing in the present Convention shall affect any provisions

which are more conuctive to the realisation of the rights of the child and which may be contained in:

(a) The law of a State Party; or

(b) International law in force for that State.

PART II

Article 42

States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

Article 43

1. For the purpose of examining the progress made by States Parties in achieving the realisation of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided.
2. The Committee shall consist of ten experts of high moral standing and recognised competence in the field covered by this Convention. The members of the Committee shall be elected by States Parties for among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems.
3. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.
4. The initial election to the Committee shall be held no later than six months after the date of the entry into force of the present Convention and thereafter every second year. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to States Parties inviting them to submit their nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating States Parties which have nominated them, and shall submit it to the States Parties to the present Convention.

5. The elections shall be held at meetings of States Parties convened by the Secretary-General at United Nations Headquarters. At those meetings, for which two-thirds of States Parties shall constitute a quorum, the persons elected to the committee shall be those who obtained the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.
6. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if denominated. The term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting.
7. If a member of the committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party which nominated the member shall appoint another expert from among its nationals to serve for the remainder of the term, subject to the approval of the committee.
8. The Committee shall establish its own rules of procedure.
9. The Committee shall elect its officers for a period of two years.
10. The meetings of the Committee shall normally be held at the United Nations Headquarters or at any other convenient place as determined by the Committee. The Committee shall normally meet annually. The duration of the meetings of the Committee shall be determined, and reviewed, if necessary, by a meeting of the States Parties to the present Convention, subject to the approval of the General Assembly.
11. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.
12. With the approval of the General Assembly, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide.

Article 44

1. States Parties undertake to submit to the Committee, through

the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognised herein and on the progress made on the enjoyment of those rights:

(a) Within two years of the entry into force of the Convention for the State Party concerned;

(b) Thereafter every five years.

2. Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree of fulfillment of the obligations under in present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned.
3. A State Party which has submitted a comprehensible initial report to the Committee need not in its subsequent reports submitted in accordance with paragraph 1(b) of the present article, repeat basic information previously provided.
4. The Committee may request from States Parties further information relevant to the implementation of the Convention.
5. The Committee shall submit to the General Assembly, through the Economic and Social Council, every two years, reports on its activities.
6. States Parties shall make their reports widely available to the public in their own countries.

Article 45

In order to foster the effective implementation of the Convention and to encourage international co-operation in the field covered by the Convention:

(a) The specialised agencies, the United Nations Children's Fund and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialised agencies, the United Nations Children's Fund and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates.

The Committee may invite the specialised agencies, the United Nations Children's Fund and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;

(b) The Committee shall transmit, as it may consider appropriate, to the specialised agencies, the United Nations Children's Fund and other competent bodies, any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance along with the Committee's observations and suggestions, if any, on these requests or indications;

(c) The Committee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the rights of the child;

(d) The Committee may make suggestions and general recommendations based on information received pursuant to articles 44 and 45 of the present Convention. Such suggestions and general recommendations shall be transmitted to any State Party concerned and reported to the General Assembly, together with comments, if any, from the States Parties.

PART III

Article 46

The present Convention shall be open for signature by all States.

Article 47

The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 48

The present Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 49

1. The present Convention shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying or acceding to the Convention after

the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification or accession.

Article 50

1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties, with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly of approval.
2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by two-thirds majority of States Parties.
3. When an amendment enters into force, it shall be binding on those States Parties which have accepted it, other States Parties still being bound by the provisions of the present Convention and any earlier amendments which they have accepted.

Article 51

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.
2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.
3. Reservations may be withdrawn at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall then inform all States. Such notification shall take effect on the date on which it is received by the Secretary-General.

Article 52

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

Article 53

The Secretary-General of the United Nations is designated as the depositary of the present Convention.

Article 54

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are authentic, shall be deposited with the Secretary-General of the United Nations.

In witness thereof the undersigned plenipotentiaries, being authorised thereto by their respective Governments, have signed the present Convention.

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