Essay
Panic Over Children's Rights

J Neville Turner*

Ah Hin Teoh is not the most desirable foreigner ever to have arrived in Australia. Yet he will go down in history as a hero. He was a Malaysian who came to Perth in May, 1988. He was granted a temporary entry permit. He had only been here two months when he married the Australian de facto wife of his brother, whom he had previously met in Malaysia! Whether he loved her or not, he was keen on staying in Australia, and this marriage to an Australian citizen would have enabled him to do this.

Indeed seven months after his marriage he applied for a grant of resident status. Unfortunately, his wife was a heroin addict, and to support her addiction, Ah Hin had imported heroin from Malaysia. He was convicted and sentenced to six years' imprisonment in November, 1990. In the meantime, he and his wife had managed to give birth to three children! His wife already had three others from previous relationships. The six children all lived together in a blended family.

In July 1991, the Department of Immigration ordered his deportation, on the ground that he was not of good character. He appealed to the Federal Court, to no avail.[1] But he appealed again. This time he won. It was held by the Full Court of the Federal Court that his deportation was invalid, because the Department had not considered the interests of the six children. Specifically, the Department had failed to take into account the *UN Convention on the Rights of the Child (Convention).*

* President, Oz Child: Children Australia Inc. [150 Albert Road, South Melbourne]; Senior Lecturer in Law, Monash University.

1 *Teoh v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 121 ALR 436 (Federal Court).

And the High Court of Australia (by a four to one majority) confirmed that decision, dismissing the Department's appeal. Mr Ah Hin Teoh had a 'legitimate expectation' that the *Convention* would be taken into account.[2]

The key article of the *Convention* which applied to *Teoh's* case is Article 3:

> "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".

Article 9 was also regarded as significant. It had not been given weight to by the Department. This article provides that [countries] shall ... "ensure that a child shall not be separated from his or her parents against their will".

The Convention's Significance

The highest court in Australia thus ruled that the UN *Convention* is highly significant to all Australians who deal with children. In effect, it provided guidelines which Australian children have a right to expect will be followed. And so it should be! The *Convention on the Rights of the Child* is a multilateral treaty, now ratified by over 180 countries of the world. It is the most important social instrument since the *Declaration of Man*. It has a beautiful and poetic rubric. It should be known by every teacher, every social worker, every lawyer, every health professional and every parent, and above all it should be taught to every child. Every household should possess a copy.

Compliance in Australia

But what is the situation at present? The *Convention* contains 41 Articles giving rights to children. In my opinion, *every single article is being breached one way or another in Australia*. And, if there was any doubt on this, Oz Child's 1995 publication, *Profile of Young Australians — Fact, Figures and*

---

[2] *Minister for Immigration, Local Government and Ethnic Affairs v Teoh* (1995) 128 ALR 353 High Court of Australia ('*Teoh*') "Ratification by Australia of an international Convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a Convention is a positive statement by the Executive Government of the country to the world and to the Australian people that the Executive Government and its agencies will act in accordance with the Convention." per Mason CJ and Deane J (1995) 128 ALR 353, 365.

Issues,[3] proclaims it with the most graphic examples. The *Convention* is hardly known to most Australians. This itself is a breach, for Article 42 requires the media to disseminate information about it. Yet there is no newspaper for children, and no national newspaper has a regular children's section. Women's issues get more than adequate coverage in the press. But not children's!

When I was in the USA last year, I noticed that every day the *Chicago Tribune* contained a Children's Section, consisting of four pages — written for children, by children. This is surely the model to be followed.

But the situation is even worse. For the euphoria engendered among children's advocates by the High Court's decision has been dissipated by an extraordinary move by the Federal Government. No sooner had the decision been handed down when the then Attorney-General and the Minister for Foreign Affairs issued a joint statement indicating that it would be reversed by legislation.[4]

This announcement baldly read:

> "We state, on behalf of the Government, that entering into an international treaty is not reason for raising any expectation that government decision-makers will act in accordance with the treaty if the relevant provisions of that treaty have not been enacted into domestic Australian law".

It added that the Government intended to legislate to reinforce this statement by introducing legislation into Parliament later in the session. And indeed a bill was introduced, the *Administrative Decisions (Effect of International Instruments) Bill* 1995.[5] It purports to be effective retrospectively from 10th May 1995. The legislation is surely a manifest derogation from the classic doctrine of the separation of powers. It negates the effect of a judgment based on carefully considered reasoning. The purported reasons for the Statement — that the High Court's decision would mean that decision-makers would be required to take into account over 920 treaties — was expressly considered by the court itself.[6] This argument was rejected, on the persuasive ground that only those treaties relevant to the issue could reasonably be expected to be known by the decision-maker. When all is said and done, if a senior member of the Department

---

[3] P Boss, S Edwards and S Pitman, *Profile of Young Australians — Facts, Figures and Issues* Oz Child: Melbourne, Churchill Livingstone, 1995 (*The Profile*).

[4] Joint statement by the Minister for Foreign Affairs, Senator Gareth Evans, and the Attorney-General, Michael Lavarch, Attorney-General's Department, Central Office, Canberra, 10 May 1995. See also Ministerial Statement by the Attorney-General, 8 June 1995.

[5] Presented by the Attorney-General and read a first time in the House of Representatives on 3 June 1995. For a discussion on the manner by which Australia enters into treaties, see *Treaties and the External Affairs Power* Discussion Paper, Senate Legal and Constitution References Committee, Canberra, 1995.

[6] "Particular conventions will generally have an impact on particular decision-makers and often no great practical difficulties will arise in giving effect to the principles which they acknowledge" *Teoh* (1995) 128 ALR 353 at 373 per Toohey J.

of Immigration pleaded ignorance of a Convention so pertinent to families as the *UN Convention on the Rights of the Child*, he or she would not be fit for office!

In reality, the Government has shown itself to be a bad loser. Its affront to the judiciary is deplorable in itself. The suspicion that the Government is opposed to children's rights is heightened by a document from the Attorney-General's Department entitled 'Legal Practice Briefing'[7] in which it is stated:

> "The *Teoh* decision shows that the broad language of a treaty such as the Rights of the Child Convention can be given a wider interpretation and application than might have been envisaged when the decision to the treaty was taken."

This statement in effect is tantamount to an admission that the Government ratified the Convention thinking that it was a harmless document without any real clout.

In an article written shortly after the ratification of the *Convention*, I indicated that I considered that the impact of the *Convention* might have been under-rated.[8] Events have shown that the judiciary has appreciated its profound significance. This is especially so in the case of the Family Court of Australia, whose Chief Justice (Nicholson CJ) has constantly championed the cause of children by sedulous reference to the *Convention*.[9] The High Court of Australia has followed the Family Court's lead.[10]

It is disturbing that, notwithstanding the Government's blatant attempt to emasculate the High Court's authority, most journalistic commentary has been favourable.[11] The one clear exception is that splendid advocate for children, Moira Rayner. On 2nd May 1995, condemning the Government's renunciation of *Teoh*, she wrote in anger:

> "Will the rights and needs of children *ever, ever* be given more than lip- service? There is no point at all in acknowledging children's rights if they can be safely ignored."[12]

The Government's *volte face* is an affront to Australia's children. It demonstrates a total lack of commitment to the Plan of Action agreed upon at

---

7 *Legal Practice Briefing*, No 18, Canberra, ACT: Office of Legal Information and Publishing, 24 April 1995.

8 J N Turner, "The Rights of the Child under the UN Convention", (1992) 66 *Law Institute Journal* 38.

9 See, for example, *Re Marion* (1992) FLC 92–293 Full Court of Family Court of Australia.

10 See *Secretary, Department of Health and Community Services v J M B and S M B* (1992) 175 CLR 218 (appeal in *Re Marion* allowed); *Teoh* above, n 2. For a comment, see P Parkinson, "Children's Rights and Doctors' Immunities", (1992) 6 *Australian Journal Family Law* 101.

11 See for examples P McGuiness, *The Age* 2 May 1995; *The Age* 12 May 1995, 17 Editorial 'Read Before Signing'; *The Australian* 25 September 1995, 8 Editorial 'High Court's Teoh Judgment'.

12 M Rayner, 'It Ain't Justice When Children's Rights Can be Ignored' *The Age*, 22 May 1995, 12.

the New York World Summit for Children in September 1990 — which heralded the ratification of the *Child Convention*.

This deplorable lack of concern is further demonstrated by the Federal Government's failure to comply with its primary obligation under the *Convention* itself. *Article 44* requires States Parties to submit a report on progress to the UN Monitoring Committee in Geneva, within two years after ratification. To its shame, the Australian Government did not release its report until December 1995 — nearly five years after the *Convention* had been ratified.[13]

Perhaps it is no wonder that the Federal Government has hesitated. For, it seems to me, it has little to be proud of. Nor have State Governments (who are bound by the terms of the *Convention*). Such progress as has been made in the implementation of the *Convention* has come from the Courts, and from non-government organisations.

The Government's report, as might be expected, paints a rosy picture. The truth is otherwise. *The Profile of Young Australians* demonstrates that every article of the *Convention* is being breached somewhere in Australia. A recently published *Issues Paper*, prepared by the Human Rights and Equal Opportunity Commission and the Australian Law Reform Commission confirms it.[14]

I propose in this essay to demonstrate the extent to which Australian children are being betrayed by non-compliance.

Articles Set Out

Let us look at the articles one by one, in numerical order. Of the 41 'substantive' articles, the first (*Article 1*) defines a child to be a person under the age of 18. Children under this age are intended to enjoy the special protection of the law. Yet even this fundamental protection is denied to young people in Victoria, and in some other States. For the *Children and Young Persons Act* 1989 (Vic) applies only to those under 17.[15] In other words, in some States of Australia the special jurisdiction of the Children's Court is denied to 17 year olds.[16] Could there be a more blatant breach than that?[17]

---

[13] *Australia's Report under the Convention on the Rights of the Child*, Canberra: Attorney-General's Department, 1995.

[14] *Human Rights Equal Opportunity Commission and Australian Law Reform Commission — Issues Paper 18*, "Speaking for Ourselves: Children and the Legal Process", Sydney, March 1996. The Issues Paper was published after my article had been drafted, but several references to it appear in this article.

[15] Section 3 defines a child as a person who is under the age of 17 years.

[16] Unless an alleged offender now aged 17 or over was under the age of 17 at the time of the alleged offence, see above, n 15 at s 3c — definition of a 'child' (a).

[17] For a full description of the age limitations in each State and Territory (which vary enormously), see above n 14 at chapter 8.

Article 2 proscribes any form of discrimination against children on a variety of grounds. In my 1992 article, I referred to legal discrimination against ex-nuptial children caused by unsatisfactory laws.[18] Nothing has been done since to alleviate the lot of the 25% of Australian children born outside marriage.[19] Nor can it be said that racial discrimination against children has ceased. A survey of children in a multi-cultural school in Westall, Victoria, revealed that two-thirds of the children had been the victims of racial abuse.[20] And *The Profile* has confirmed that young Aborigines are marginalised and suffer enormous disadvantages in the areas of health, education and job opportunities.[21] The recent attempt by the Victorian Government to close a school ideally suited to Aboriginal children was thwarted by a courageous campaign, which ultimately succeeded in the Supreme Court of Victoria.[22] But the initial action surely demonstrated a cruel indifference to Koori children.

Perhaps the key article in the *Convention* is *Article 3*, which requires the best interests of the child to be 'a primary consideration' in all matters. This principle seems axiomatic. Yet a recent report on damage to foetuses has expressly stated that a parent's interest should prevail over that of the child.[23] Inasmuch as this represents the *existing* law, it is clearly a breach of the *Convention*. Unfortunately, some feminists have given credence to the primacy of women's rights, when they argue for the 'right' of a woman to have a child outside marriage — especially when they refer to a lesbian's *right* to give birth.[24] It is difficult to imagine any situation when deliberately bringing a child into the world without a father-figure could be of benefit to a child.[25] The *Convention* demands that a child's rights be given *primacy over the interests of all other persons at all times.*

Article 4 unequivocally states that *all* Governments are obliged to take measures to give effect to the rights recognised by the *Convention*. In some circles, it has been argued that State Governments are not bound by the *Convention*. This is a manifestly erroneous interpretation.[26] That *Article 4*

---

[18] See above, n 8.

[19] In short, status of children legislation was passed in the 1970s throughout Australia, purporting to eliminate all discrimination against ex-nuptial children. My article seeks to demonstrate the imperfection of this legislation.

[20] J Neville Turner, "Schoolchildren's Perception of Their Rights" (1993) 18, 4 *Children Australia* 28.

[21] *The Profile*, above n 3.

[22] *Northlands School* case (1995) Supreme Court of Victoria, unreported. For comment, see *Directions in Education* No 5, April 1995.

[23] J Seymour, *Fetal Welfare and the Law*, Report of an Enquiry commissioned by Australian Medical Association *et al*, Canberra, Medical Association, 1994.

[24] See, for example, C Chinkin in J Harvey, U Dolgopol and S Castell-McGregor, *Implementing the UN Convention on the Rights of the Child in Australia* SA Children's Interest Bureau 1993, 46.

[25] An excellent illustration of this is reported in *The Weekend Australian* 10–11 February 1996, 'The Parent Trap', where a lesbian mother sought child support from her former lover.

[26] See M Kirby, "Impact of United Nations Treaties on Domestic Human Rights Law" Conference presentation, La Trobe University, Melbourne, 3 July 1995.

is being breached by the Federal Government is *ipso facto* made plain by its attitude to the *Teoh* case.

Article 5 is a statement which gives a complete answer to those misguided critics who regard the *Convention* as a charter for recalcitrant brats. It states unequivocally that the primary responsibility for bringing up and guiding children lies with parents and, where local custom so dictates, members of the extended family or community. But the article also indicates that the manner of upbringing should be consistent with the evolving capacities of children. It is this aspect of the *Convention* that is consistently ignored. Setting an arbitrary age at which majority is obtained, and decreeing that until that age parental consent to important medical procedures, for instance, surgical operations, is not merely necessary but binding, is a classic example of the law's heavy-handed contempt for the burgeoning maturity of young people. The restrictions on political franchise for young people may, perhaps, be defended on the grounds that intelligence tests for political consciousness may not be practical — although there is little doubt that many informed young people have a greater awareness and political maturity than many middle-aged and elderly adults. The common law's restrictions on capacity to contract — a branch of law riddled with anomalies, inconsistencies and anachronisms — are incompatible with an appreciation of the 'evolving capacities' of children.[27]

Article 6 grants children an 'inherent right to life' and requires that States Parties shall ensure to the maximum extent possible the survival and development of children. It is arguable that this Article implicitly renders the *Convention* applicable to children *en ventre sa mère*. For it is impossible to guarantee life, survival and development of a child who is abused or neglected in the womb. Indeed, it would seem that the article would otherwise be otiose, save for exhorting States not to murder children. The foetus was included in the *travaux préparatoires* of the Convention. But in order to avoid contentious debate on the morality of abortion, which might have thwarted the adoption of the *Convention* by the General Assembly of the United Nations, the Working Committee reluctantly limited the definition of 'child' to those born alive.[28]

Australian law has gradually developed a jurisprudence which recognises that a foetus has attributes of personality. Certainly a duty of care is owed to a foetus by third parties. The question must eventually be raised, whether a foetus has legal status. The law's development will, it is

---

[27] For full discussion on the manner in which children are subject to arbitrary restrictions, especially as consumers, see above n 14, at 113.

[28] For the history of the drafting of the Convention and its application to Australia, see P Alston and G Brennan, *The UN Children's Convention and Australia*, Canberra: Centre for International and Public Law, Australian National University, 1991. See also G Van Beuren, *The International Law on the Rights of the Child*, The Netherlands: Martinus Nijhoff, Dordrecht, 1995.

submitted, be retarded if credence is given to a recent report which baldly states that adults' rights (and, especially, parental rights) should prevail over those of neo-nates.[29] In effect, this Report intimates that pregnant mothers might take illicit drugs or engage in harmful activity with impunity.[30] Moreover, the Report suggests that medical practitioners should owe no legal duty in respect of foetuses.[31]

Article 6(2) raises the question whether the lives of Australian infants are being protected to the maximum extent. On this, *The Profile* raises grave doubts. While infant mortality in general has decreased (7 out of 1000), that of Aboriginal children is disturbingly high (24/1000).[32] Koori children are prone to Sudden Infant Death Syndrome, and a disproportionately high percentage are born with congenital abnormalities.[33]

If a wide interpretation of *Article 6* is adopted, there must be concern for the degree of sexual activity without contraceptive protection practised among Australian youth.[34] Australia has the sixth highest rate of adolescent suicide in the world.[35] And Australia is deficient in the immunisation of children against measles, mumps and other preventable diseases.[36] Needless to say, Koori children are the most vulnerable to these diseases.[37]

Article 7, inter alia, gives a child a right to a name. I have pointed out previously that European countries deny parents the absolute right to foist an inappropriate name on a child.[38] While there are several cases in the Family Court of Australia where the significance of a name to a child's self-esteem and wholeness of personality has been perceived,[39] in general Australian law continues to regard this issue as trivial.[40] In Australia, for the most part, children can have their names changed without their consent.

Article 8 provides another important right — that of *identity*. This right has been specifically given to adoptees by recent legislation providing for identifying information as to their natural birth-parents to be made

---

29 J Seymour, above n 23 at 204.

30 Above n 23 at chapter 7. That this is no academic problem is illustrated in H Carter 'Syphilis Still a Risk for Babies', *Herald Sun* 18 March 1996.

31 J Seymour, above n 23 at chapter 9.

32 The Profile, above n 3 at 98–100. See also J Durrant, "Aboriginal Children and the UN Convention on the Rights of the Child" (1993) 18,1 *Children Australia* 9.

33 *The Profile*, above, n 3, at 100. See also G Brewer and P Swain, *Where Rights are Wronged* Notting Hill, Victoria: National Children's Bureau of Australia, 1993.

34 *The Profile*, above, n 3, at 106–7.

35 *The Profile*, above, n 3, at 106.

36 *The Profile*, above, n 3, at 120–123.

37 *The Profile*, above, n 3, at 117–120.

38 J Neville Turner, above, n 8, at 43.

39 *In the Marriage of Palmer (R J) and Chapman (A L)* (1978) 34 FLR 405; *In the Marriage of Putrino and Jackson* (1978) FLC 90-441. See F Bates, "Changing Children's Names — A Comparative Review of Recent Developments" (1978) 3 *Reports of Family Law* (2d) 367.

40 An exception is s 56(2) *Adoption Act* 1984 (Vic).

available to them.[41] But this legislation usually does not grant children under 18 the right to identifying information unless their adoptive parents and their birth-parents consent.[42] To that extent, it does not comply with the *Convention*.

A more serious breach of *Article 8*, however, is the continued acceptance of the secrecy given to donors of semen in Artificial Insemination programs. To some extent, Victoria has addressed this issue in the *Infertility Treatment Act* 1995 (Vic).[43]

But unlike the adoption legislation, this Act is not retrospective.[44] So children conceived before 1995 by artificial methods of reproduction are discriminated against. This clearly is a breach of the *Convention*.

Surrogate motherhood, whether for 'commercial' (ie for a consideration) or so-called 'altruistic' reasons, cannot be justified in any circumstances. It is certain to lead to an identity crisis when the child ascertains that he or she has two mothers. It is astonishing that responsible persons continue to advocate for its legalisation.[45] The new Victorian legislation, by not providing a penalty for taking part in an 'altruistic' surrogacy arrangement, does not go far enough to comply with *Article 8*.[46] Moreover, surrogacy breaches *Article 35*, which proscribes the sale or traffic in children.[47] Lamentably, some Australian jurisdictions do permit so-called altruistic surrogacy. There are reports that residents of other states, which ban it, are indulging in 'forum-shopping'.[48]

Article 9 was that principally relied on in the *Teoh* case. This most important article gives a complete answer to a popular criticism of the *Convention*, that it is 'anti-family'.[49] And indeed the *Teoh* case itself demonstrated that the *Convention* may be used to *preserve* a family. By providing that children shall not be separated from parents against their will, save when competent authorities decide that it is in their best interest, the *Convention* clearly proclaims that a child has a *prima facie* right to be brought

---

41 For the details of the legislation of each State and Territory, see P Boss, *Adoption Australia — A Comparative Study of Australian Adoption Legislation and Policy*, Victoria: National Children's Bureau Of Australia Inc, 1992.

42 See, for example, s 94 *Adoption Act* 1984, (Vic). See also J Neville Turner, "Review of the Adoption Information Act 1990 (NSW), July 1992" (1993) 19 *Monash University Law Review* 343.

43 Part 7, Division 1, *Infertility Treatment Act* 1995 (Vic).

44 Above, n 43, at s 2.

45 See, for example, P Singer, 'De Facto Discrimination', *The Melbourne Weekly*, 15–21 February 1994.

46 Sections 59–61 *Infertility Treatment Act* 1995 (Vic). Section 59 provides penalties in relation to commercial surrogacy arrangements. Section 61 merely provides that 'a surrogacy agreement is void'.

47 Below, at .

48 H Carter, 'New Hope on Surrogate Babies' *Herald Sun* 5 March 1996, referring to Victorian couples travelling to ACT.

49 See, for example, V Renkema, "A Threat to Family Privacy" (1989) 10 *The Australian Family* 1. For further references to attacks on the *Convention* see M Oslowski and B Tsamenyi, *An Australian Family Law Perspective on the Convention on the Rights of the Child*, Tasmania: Unitas Law Press, 1993, 2.

up in a loving family. It should also be noted that *Article 9(2)* requires that all interested parties (including the child) shall be given the opportunity to participate in proceedings and make their views known. It was denial of this right that was the gravamen of the Department of Immigration's handling of Mr Teoh's application.

Article 10 relates to applications by children and parents, separated by circumstances, for permission to enter or leave a country for the purpose of re-unification. Such applications must be humanely considered. Insofar as this article concerns children, it will be noted below that there are grave concerns as to whether it is being complied with.[50]

Article 11 requires countries to combat the illicit transfer and non-return of children abroad. Although Australia has ratified the *Hague Convention on Child Abduction*, the *Gillespie* case,[51] in which the father, a Malaysian Prince, was able to snatch a child from the custody of his separated wife, and smuggle it to Malaysia, reveals that Australia is still deficient in its policing of child abduction. Moreover, the failure of the Australian Government to pursue political steps to secure the *return* of this child to Mrs Gillespie was a lamentable non-compliance with this Article. Australia seems to be incapable of concluding an extradition treaty with Malaysia so as to fulfil the precept of *Article 11(2)*. It is also to be doubted whether the primary object of the *Hague Convention* is being given full effect by Australian Courts.[52]

Article 12 is the Centre-point of the Convention. It provides a right to a child to express a view on any matter directly or indirectly affecting him or her. The child's view must be given due weight in accordance with his or her age and maturity. This is the most significant right accorded to children by the *Convention*. It has the profoundest implications. *Article 12(2)* is particularly important for the legal profession:

> "The child shall . . . 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".

It is pleasing to report that, thanks to the judiciary, this article has had considerable impact. It is the basis of the famous High Court case, *Re Marion*,[53] in which it was decided that a child was required to consent to a non-therapeutic operation, and that, if the child was not capable of making an informed decision, the consent of the parents was insufficient. In such a case, the consent of the Family Court, exercising its *parens*

---

[50] Refer to Article 22.

[51] This *cause célèbre* was widely reported in the press. The mother, Mrs Jacqueline Gillespie, has failed in all subsequent attempts to regain custody of the children, or access to them.

[52] In several recent cases, children abducted from foreign countries even those with whom Australia had entered into an agreement have *not* been returned. See, for example, *Re Bassi* (1994) FLC 92–465.

[53] Above, n 10.

patriae jurisdiction, was necessary. The full extent of this revivification of the *parens patriae* notion has not yet been realised. It will require further elucidation in case law. Nevertheless, the High Court of Australia, by adopting the dissenting judgment of Nicholson CJ in the Full Court of the Family Court,[54] which was directly based on *Article 12* of the *Convention*, has placed serious limitations on the inappropriate exercise of parental authority over children.

The Family Court must also be warmly congratulated for applying the precept of *Article 12(2)* to the question of separate representation of children in custody/access cases. The occasions when representation should be accorded to a child have been considerably expanded by *Re K.*[55] And there are signs that this decision is having the practical effect of increasing the Legal Aid budgets for children's lawyers.[56] Nevertheless, Australia has a long way to go before it reaches the New Zealand position — where children are provided with representation in every case where their parents divorce.[57] It will be particularly necessary to set up children's legal services when the *Family Law Reform Act* 1995 comes into force. For this legislation encourages settlement of custody/access (renamed 'residence/contact') by parenting plans, counselling and other alternative methods of resolution. It is important to ensure that the child be a party to any consensual arrangements negotiated by the parties.[58]

But while considerable progress has been made by the Family Court in translating *Article 12* into reality, it cannot be said that its importance has been perceived in the rest of the community. Children are still rarely represented in case conferences with regard to alternative care arrangements.[59] Children are still expelled from school without a hearing.[60] Indeed the new powers given to school principals by Victorian legislation have increased the likelihood of arbitrary expulsion.[61] A recent case in Queensland highlights the possibility of over-reaction to juvenile misbehaviour.[62] The deprivation of an education is a breach of

---

54 Above, n 9.

55 (1994) FLC 92–461.

56 Cf, M Rayner, "Rights of the Child and the Child's Best Interests: Separate Representation after *Re* K" (July 1995) 15 *Interesting* 10. Separate representation has increased from 334 in 1991–92 to 3564 in 1994–95: Legal Aid Yearbooks and Quarterly Statistic Bulletins.

57 M Rayner, above n 56.

58 Note that the Federal Government's recent Justice Statement provides for the establishment of advocacy services for children and young persons. *Oz Child* has recently established a children's legal service, an initiative also taken by Mallee Family Care, Mildura.

59 In May 1995, *Oz Child* was able to provide legal representation for a foster-child whose future was being considered. It appears that the lawyer's appearance caused surprise at the case conference. It was unprecedented.

60 J Taylor, *School Exclusions: Student Perspectives on the Process*, Sydney: National Children's Youth Law Centre, 1995.

61 A protocol prepared for Victorian schools has expressly denied a child the right to representation by a lawyer or other paid advocates.

62 *Herald Sun* 10 June 95. Six children who killed mutton birds were expelled from school and banned by the Queensland Department of Education from every high school in Queensland.

Article 28,[63] and expulsion from school is likely to lead a child to anti-social behaviour as well as stigmatising him or her for life.

Article 12(2) requires the establishment of children's legal centres, the education of specialist children's lawyers and a much greater sensitivity to children's needs and visions. In effect, European countries are far more advanced than Australia in this regard.[64] In the UK, for example, the *Children Act* 1989 has revolutionised attitudes to children's lawyering.[65] Some solicitors' offices now have toy-rooms![66] Most European civil law countries have long provided specialist advocates and bureaux to protect children.[67]

Article 13 contains another important right — freedom of expression. A corollary of this is that children, as they mature, should feel that their views have influence. The *National Children and Youth Law Centre* has indeed suggested that children of sufficient maturity should have the vote long before the age of 18.[68] Whatever one's views on this, it is undeniable that Australian children's opinions are less influential than in other countries. In New Zealand, as in many European countries, there is a Children's Ombudsman, or Commissioner, whose role, amongst other things, is to project the opinions of children. Until such an appointment is made in Australia, mere lip-service is being paid to *Article 13*.

Oz Child has established a Young Persons' Sub-Committee, whose chairperson is a member of the Board of Management. So far as I am aware, this is the first Australian Non-government Organisation caring for children that has taken this step. The views of these young people are proving to be mature, and sometimes more conservative than those of many adults. Their appreciation of empowerment is notable.

Article 14 provides a child with a right to freedom of thought, conscience and religion. Regrettably, several cases which have reached the Family Court, as well as publicised instances in the Press, have revealed insidious manipulation of children's thought-processes by extremist religious cults. It is certain that many Australian parents seek to dominate their children's choice of religious practice, long into adolescence.

Article 15 is also susceptible to gross breaches. It provides a right for children to meet together. Yet there are frequent instances of harassment by police and others of children who congregate in shopping centres or other public places. Indeed, it would be fair to say that many Australian

---

[63] See below. See also "School Exclusion in NSW — a Travesty of Justice", (August 1995) 3 *Rights Now* 3, 1.

[64] J Neville Turner, "Legal Representation of Children — a Blueprint" (1992) 66 *Law Institute Journal* 288. See also P King and I Young, *The Child as Client — a Handbook for Solicitors Who Represent Children*, Bristol: Jordon and Sons Ltd, 1992.

[65] Above, n 64.

[66] P King and I Young, above n 64.

[67] J Neville Turner, above n 64.

[68] (1995) 3,1 *Rights Now*. See also R Ludbrook, *Should Children Have the Right to Vote?*, Sydney: National Children's and Youth Law Centre, 1995.

adults possess a fear of young people who meet together. Police are not unknown to use extra-legal methods to disperse them. It is a well-documented phenomenon.

Article 16 is striking. It provides children with a right of privacy. This Article extends to correspondence, and also applies to attacks on the child's honour and reputation. It would be interesting to learn how children themselves perceive compliance with this Article. *Oz Child's* research tends to suggest that girls, especially, do not enjoy a great deal of privacy.[69] With regard to the delicate issue of contraception, *Gillick's* case in the House of Lords[70] (approved and applied by the High Court of Australia in *Re Marion*[71]) clearly demands that medical practitioners respect a girl's confidentiality to the extent of not revealing the matter to her parents. *Gillick's* case expressly held that a girl of sufficient age and maturity was entitled to contraceptive advice and, presumably to appropriate contraceptive methods. One wonders whether the medical profession pays heed to this right.

Article 17 is directed to the obligations of the mass media to children. Its aim is to ensure that children are well-informed in a manner which promotes their social, spiritual and moral well-being, and their physical and mental health. I have already noted the paucity of any material on children (and especially material written *by* children) in Australian newspapers. A more specific breach is that of subsection (d) of this Article, which enjoins the mass media to have regard to the linguistic needs of children of minority groups. Notwithstanding encouraging developments in primary school with regard to second language learning,[72] there is little evidence that children whose native language is not English are catered for by the mass media. The TV station, Special Broadcasting Station (SBS) and Ethnic Radio stations are splendid institutions. But one wonders whether the monolinguistic assumptions that English is *the* international language of the world are not based on an ideology of cultural assimilation rather than on a factual comparative analysis. The current excess of Francophobia and the media's support for the enforced abandonment of ethnic names of soccer teams (a matter of great pain to many immigrant groups) suggest a lack of journalistic commitment to *Article 17(d)*.

Article 18 is an unequivocal affirmation of the *prima facie* presumption that parents are the most appropriate persons to bring up children. It is to be noted that the Article sedulously avoids the words, 'parental rights'. Parenting is the *responsibility* of parents. *Article 18(3)*, however, places a duty on the State to ensure that all children of working parents have the right to benefit from child-care services and facilities. This Article seems

[69] *The Profile*, above n 3, at 167, for examples of breaches of *Article 16*.
[70] *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112.
[71] Above, n 10.
[72] *The Profile*, above n 3, at 236–238.

to have had some impact. The requirement for professional child care organisations and individuals to be accredited has undoubtedly improved standards, some would say dramatically.[73] Indeed, in the last decade, there has been a four-fold increase in the number of approved child care places.[74] Nevertheless, it has been estimated that more than one-quarter of Australia's child-care workers have less than one year's experience in the industry.[75]

It is undeniable that not all the many children whose parents are obliged, or choose, to work enjoy the benefits of the highest quality of child care during the day. 'Latch-key' children still exist in abundance in Australia.[76] And it is disturbing to note that 12000 Australian children below the age of four are in the care of their siblings.[77] *Article 18* is being honoured in its breach.

Article 19 is one of the most crucial articles in the Convention. It addresses child abuse. A child has a right to be protected from abuse at the hands of his or her parent[78] or other person who has the care of the child. And the State has a duty to take *all* appropriate measures to protect the child from such abuse.

Until 1992, it could have been said unequivocally that the State of Victoria was in flagrant breach of this article. For Victoria had not even legislated for the mandatory reporting of abuse. Following the Daniel Valerio tragedy, legislation was somewhat hastily passed.[79] But it is still not completely in force. It can, in any event, be criticised on several counts. First, it is limited to physical and sexual abuse — and thus excludes the well-recognised categories of emotional abuse and neglect. Secondly, its piecemeal proclamation means that several professionals dealing frequently with children are not yet mandated.[80] Thirdly, it could be argued that the categories of persons chosen to be mandated is insufficiently wide — certainly compared to certain other Australian jurisdictions.[81] Fourthly, inadequate resources have been made available to ensure that mandated reports are properly investigated.[82] Fifthly, police reluctance to prosecute, the heavy burden of proof and an enduring reluctance to believe the

---

73 *The Profile*, above n 3, at 91.

74 Report of National Child Care Association, 1995.

75 *The Profile*, above n 3, at 77.

76 *The Profile*, above n 3, at 86 *et seq*, where the euphemism, 'self-care', is preferred to the more dramatic and appropriate metaphor. 8 to 10% of primary schoolchildren are thought to come home to an empty house.

77 *The Profile*, above n 3, at 86.

78 Nine out of every 10 child killings in Australia are committed by parents. *Study of 126 Child Homicides*, Canberra: Australian Institute of Criminology, 1993.

79 Section 64A *Children and Young Persons Act* 1989 (Vic).

80 As of October 1995, only the following professions had been mandated: doctors, nurses, psychiatrists, teachers and police.

81 In the Northern Territory, *every person* is mandated!

82 M Pirie, 'Delays in Hearings Put Child at Risk', *Herald Sun* 29 March 1996; K Nancarrow, 'System Failing to Check Kids at Risk', *Sunday Age* 3 March 1996.

testimony of children result in a scandalously poor rate of convictions of offenders.[83]

As far as the rest of Australia is concerned, two jurisdictions, WA and the ACT, have still not taken the minimum step required to comply with *Article 19*. These jurisdictions adamantly refuse to pass mandatory reporting laws. Accordingly, children in WA and Canberra do not enjoy the protection, such as it is, of compulsory reporting laws which govern the remainder of Australia. Can there be any argument that this is a form of discrimination?

But there is an even more fundamental practice which cruelly militates against Australian children. For, throughout Australia, parents and others *in loco parentis* have a licence to use violence on children. The perpetuation of corporal punishment in *schools*, including Government schools in some States,[84] is an indefensible barbarity by anyone's standards in 1996. The apparent support of corporal punishment by *parents*, expressed in the common law's vague and capricious shibboleth, 'moderate chastisement', has been strongly criticised by the National Child Protection Agency.[85] Smacking and other forms of corporal punishment of children are illegal in six European countries.[86] Yet the former Federal Minister of Family Services, Senator Crowley, disowned the advice to follow suit given by the Agency.[87] As long as children are allowed to be bullied by grown-ups, so long will a culture of violence prevail in the world.

It is highly disturbing that one in seven children is bullied each week in schools, with relative impunity.[88] Bullying of boys is usually physical. Girls use more subtle methods of ostracism.[89]

The imperatives of *Article 19* are simply being ignored. The most insidious brutalities to children are being perpetuated, sanctioned by the indifference of the law.

Article 20 deals with alternative care for children whose best interest demand that they should not remain in their parents' home. This Article demonstrates a child's right to be protected from *bad* parenting. To care for a son or daughter is not an absolute right. It is a responsibility.

---

[83] J Neville Turner, "The Unthinkable Reality — Sexual Abuse of Children" (1994) 68 *Law Institute Journal* 356; F Bates, "Can We Accept the Acceptable? Evidence and Procedure in Child Sexual Abuse Cases in Recent Australian Law" (1992) 17 *Children Australia* 13.

[84] R Ludbrook, *The Child's Right to Bodily Integrity*, Sydney: National Children's and Youth Law Centre, 1995. New South Wales, alone of Australian States, has recently *restricted*, but not abolished, the right of teachers to use corporal punishment, *Education Reform Amendment (School Discipline) Act* 1995 (NSW).

[85] *The Legal and Social Aspects of the Physical Punishment of Children*, Canberra: National Child Protection Council, 1995.

[86] Sweden, Denmark, Finland, Norway, Austria and Cyprus.

[87] *Herald Sun* 10 June 1995, 'It is not the Federal Government's role to impose laws on smacking'.

[88] *The Profile*, above n 3, at 177. See also, *Herald Sun* 20 October 1995, 'Time to Change Boys'; S Watkins, 'Half State's Students are Bullied, Survey Finds', *Age* 5 March 1996.

[89] S Powell, 'Girl Bullies — More Deadly than the Male', *The Australian* 8 November 1995.

It is my belief that child care practice in Victoria and perhaps other states has embraced a philosophy of maintaining the family at all costs with rather too much enthusiasm.[90] In this, it is encouraged by the precept to the Children's Court of the *Children and Young Persons Act* 1989, not to seek a protection order that has the effect of removing a child from the custody of his or her parent.[91]

I am not by any means decrying programmes designed to support families and keep them together. But, for example, the reluctance of Adoption Courts to dispense with parental consent — and indeed a general anti-adoption stance of many social workers — is totally incompatible with *Article 21*, which expressly mentions adoption as a form of appropriate alternative care.[92]

Foster-care has gradually overtaken institutionalisation as the most common form of temporary substitute care, and this accords with the orientation of *Article 20*. Yet there is still quite a high rate of institutionalisation in some States.[93] The legal problems associated with foster-care have been rather neglected in academic literature. They are formidable.[94] Foster-carers perform an incredibly onerous task, and are very vulnerable. They are among Australia's unsung heroes and heroines.

Article 21 deals specifically with adoption, and in particular with inter-country adoption. I have argued in detail elsewhere that this Article is not being satisfactorily complied with, especially in Victoria, where would-be adopters face enormous difficulties.[95] To my mind these stem from a widespread suspicion of inter-country adoption. This is completely unjustified in the light of both *Article 21* of the *Convention on the Rights of the Child*, and of the *Hague Convention on Inter-Country Adoption*.

Article 22 is designed to protect refugee children. Despite Australia's generally good record, it is doubtful whether it can be truthfully said that all the children of the brave people who flee repressive regimes for Australian shores have received 'appropriate protection and humanitarian assistance', in accordance with this Article. Accounts of hostile reception, especially in Western Australia, suggest the contrary. Nicholson CJ, of the

---

[90] For a journalistic expression of this view, Terry Lane, 'Saving the Children', *Sunday Age* 3 March 1996.

[91] Section 86(2) *Children and Young Persons Act* 1989 (Vic), suggests that separation of the child from his or her parent should be very exceptional. In practice, this is the case.

[92] J Neville Turner, "Adoption or Anti-Adoption" (1995) 2 *James Cook University Law Review* 43.

[93] For a survey of alternative care in Australia, see B Szwarc, *Changing Particular Care: A National Survey of Non-Governmental Substitute Care in Australia*, Melbourne: National Children's Bureau of Australia, 1992.

[94] J Neville Turner, "Foster-Care — Its Legal Problems" (1989) 14 *Australian Child and Family Welfare* 16.

[95] J Neville Turner, "Why Don't You Take More of Our Children?" (1995) 69 *Law Institute Journal* 559.

Family Court of Australia, has lamented the primitive conditions in which many refugee children are kept for long periods.[96]

Article 23 is another article which seems to be being complied with in a haphazard, and perhaps inhumane, way. It deals with children with disabilities. The current philosophy of deinstitutionalisation certainly accords with the spirit of the Article — to promote self-reliance and facilitate the child's active participation in the community. But *Article 23(2)* recognises the right of a disabled child to *special* care. Deinstitutionalising children in inappropriate situations, and without back-up services, is an affront to them. Deinstitutionalisation should never be viewed as a cost-saving exercise. Recent reaction by the parents of children at Kew Cottages (the largest residential home in Victoria for children (and adults) with severe disabilities) suggests that this is not the case in all instances.[97]

The increase in the number of children with mental disabilities attending mainstream schools has occasioned criticism that many teachers are insensitive to their needs.[98] As a result, some children have been summarily expelled, even as young as six years old.

On the whole, one must query whether *Article 23* has guaranteed a satisfactory integration into the educational system of all the estimated 56000 Australian schoolchildren with a disability.

Article 24 is an all-embracing Article, enjoining countries to provide the highest attainable standards of health for children. A full discussion of the state of health of Australian children would justify a book in itself. Indeed, there is a lengthy chapter on Health in *The Profile*.[99] It presents a disturbing picture, especially if, by the term, 'health', the wide definition of the World Health Organisation is accepted: "The state of complete, mental and social well being, and not merely the absence of disease or injury."

Amongst other things, the dire state of many Aboriginal children, the high incidence of youth suicide, the prevalence of junk foods (contrary to *Article 24(2)(c)*), and the number of overweight young people,[100] should give rise to concern.

One clause which certainly is being breached is *Article 24(3)* which requires the abolition of traditional practices prejudicial to the health of children. Female circumcision seems to be being effectively proscribed by State legislation.[101] Male circumcision, however, despite the pain it has

---

[96] Oz Child Seminar, *Children Now*, 19 July 1995, reported in *The Australian* 20 July 1995. See also M Rayner, 'Nobody's Child Deserves to Grow Up Behind Razor Wire' *The Age* 24 July 1995.

[97] *The Age*, 27 October 1995. This sentence was written before the news of the fire at Kew Cottages, in which 9 residents died, see *The Age*, 10 April 1996.

[98] *The Profile*, above n 3, at 255.

[99] *The Profile*, above n 3, at Chapter 6.

[100] K Nancarrow, 'The Changing Shape of Aussie Children', *Sunday Age* 17 March 1996.

[101] For example, *Statutes Amendment (Female Genital Mutilation and Child Protection) Bill* 1995 (SA).

caused to thousands of non-consenting children, is still widely practised in Australia.[102] As long as this barbarity continues, *Article 24(3)* is being flagrantly ignored.

Article 25 requires periodic review of children placed in care, protection or treatment. Victoria has taken steps to accord this right to wards of State, by requiring annual reviews of placement.[103] Nevertheless, there is no room for complacency when large numbers of children remain in care throughout their minority — often, indeed, in multiple placement. Many children still remain in limbo. It is submitted that the 'permanent care' order[104] which is now frequently made in Victoria is unsatisfactory, in that it gives a plausible respectability to what in effect is an indefinite foster-placement without the security of adoption.

Article 26 requires governments to pay appropriate social security to every child in need. In an article produced shortly after the *Convention* was ratified by Australia, Professor Terry Carney queried whether *Article 26* was being satisfactorily complied with.[105] *The Profile* acknowledges that improvements have been made, in particular the new Parenting Allowance.[106] Nevertheless, the position is disturbing, with a large disparity in levels of wealth in Australia resulting in approximately half-a-million children living below the Henderson poverty line. Particularly disturbing is that 30% of these live in single parent families.[107]

Article 27 places primary financial responsibility for the upbringing of children on their parents. *Article 27(4)* is particularly significant for lawyers. It requires the State to take measures for the recovery of maintenance from the parents. The Australian Child Support Scheme has ensured the collection of approximately 70% of moneys due from separated non-custodians, which, it is claimed, is the highest collection rate in the world.[108] But the Child Support Scheme is far from perfect. Indeed it discriminates against children born before 1989, who cannot avail themselves of administrative assessment and collection. A recent report has criticised no fewer than 40 aspects of the Scheme.[109] From the point of a child of

---

[102] See the Newsletters of a recently formed association, NO CIRC, which claims that after USA, Australia is the second country with the most widespread incidence of male circumcision. See also J Neville Turner, "Circumcised boys may sue", *Journal Health Law Update* No 4, 23/2/96; A Quigley, 'Circumcise Warning to Parents', *Herald Sun* 13 March 1996.

[103] Section 106(2) *Children and Young Persons Act* 1989, (Vic).

[104] Above n 103, at s112.

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

[106] *The Profile*, above n 3, at Chapter 4. See also Chapter 12, for a disturbing account of youth unemployment.

[107] *The Profile*, above n 3, at 46.

[108] J Bowen, *The Child Support Scheme, Child Support Agency* 1994. But it could be that this figure claimed by the Agency, is inflated, by including moneys collected under agreements made by parents. See *Report on the Child Support Scheme*, Joint Select Committee on Certain Family Law Issues, 1995.

[109] Above, n 108.

separated parents, the Scheme's main drawback is that maintenance is dependent on his or her mother's willingness to pursue it. The child does not have an independent right to seek support, or a right to separate representation. This is contrary to *Article 12* of the *Convention*.

The Child Support Scheme is clearly an improvement on past practice. Yet it cannot be regarded as a satisfactory implementation of *Article 27(4)*.

Article 28 is another comprehensive one — it deals with the right of a child to an *education*, and sets out certain requirements of countries towards ensuring that all children have equal opportunities. This Article is being breached in several significant particulars, especially in Victoria. The requirement of a 'voluntary' payment by parents levied by many Government schools is a flagrant breach of *Article 28(1)*, which enjoins *free* primary education and that 'general and vocational' secondary education be available and accessible to every child.[110] Taken in conjunction with *Article 29*, which states that one of the purposes of education is the development of respect for the natural environment, the reported denial of school excursions, etc to Victorian children whose parents cannot afford this iniquitous levy is manifestly a breach of the *Convention*.

Article 28(2) requires that school discipline be administered in a manner consistent with the child's human dignity. As I have argued above, both corporal punishment and summary expulsion are inconsistent with this mandate.[111]

Article 29 is a poetic and inspirational attempt to ensure that a child is educated in a spirit of tolerance, and understanding, and with a respect for civilisations different from his or her own. It would be desirable for every school to treat the Article as its mission statement. Regrettably, few children (and even fewer teachers) are aware of the provisions of this Convention. This Article is worthy of being learned by heart. A recent suggestion by the Victorian Premier, that school cadetship be reintroduced, hardly exemplifies the spirit of this Article.[112]

Article 30 also emphasises tolerance. Children of minorities, and indigenous children must not be denied the right to full enjoyment of their own cultures. This Article was initially breached by the Victorian Government when it closed the Northlands Secondary College, thus depriving several Koori children of an education relevant to their Aboriginal heritage, at the same time as preparing them for participation in 'mainstream' Australian activity. Fortunately, the Equal Opportunity Board rectified the matter, albeit that the Supreme Court of Victoria amended its order.[113]

---

[110] S McKay, 'Schooling Has Its Costs', *The Age* 7 February 1996; A Messina, 'Labor Calls for Voluntary School Fees Inquiry', *The Age* 8 February 1996.

[111] Above, at 82–83.

[112] Such a system exists in one Victorian school — Melbourne High School; Mr Julian Knight, the Hoddle Street assassin, was a member!

[113] Above, at 77.

I have argued above that this important Article is being treated in a rather lukewarm and uncommitted fashion, with regard to the learning of foreign languages, and the history and geography of other cultures.

Article 31 is an article of the utmost importance, which has not received the serious attention that it deserves. It provides a child with a right to rest, leisure and play and a right to participate in cultural life and the arts. It has been argued in some circles that this is an ancillary article — a cultural right of a lesser order, than say, the right to life or the right to an education. I cannot subscribe to that view. First of all, this Article, as I see it, is saying that a child has a *right to be a child.* Creative play is as fundamental to child's upbringing as is education. Sport and physical education are essential to a child's health and well-being. Literature, music and the plastic arts are the cultural heritage of every civilisation and the *sine qua non* of a balanced human-being. And leisure is a corrective to the assertiveness of modern society.

If these arguments have substance, *Article 31* assumes a principal part in the hierarchy of children's rights.

Undoubtedly, this Article is being most unsatisfactorily followed in Australia. I have written elsewhere about breaches of this Article.[114] Most flagrant, as I see it, is the devaluation of sport and physical education in school curricula.[115] Likewise, music instruction seems to be regarded as an optional extra in many Government schools. *The Profile* provides clear evidence that there are many playgrounds with dangerous and unsafe equipment, which cause children injuries.[116] And many television programmes watched by children are harmful and unenlightening.[117]

Article 32 provides that children should not be exploited economically. The Article's chief purport is to proscribe harmful employment, or, in appropriate circumstances, regulate it. Of course, child labour abounds in many Third World countries. But, even in Australia, children are employed in shops, as newspaper boys and in fast food stores. The new Victorian *Equal Opportunity Act* 1995 permits employers to pay lower wages to employees under 21, for the same work.[118] *Article 32* is not being vigilantly monitored. While work experience is no doubt valuable for adolescent children, the use of children as cheap labour, to the detriment of their educational potential, is an insufferable exploitation.[119]

---

[114] J Neville Turner, "The United Nations Convention on the Rights of the Child: The Right to Play and Leisure", (1995) 42 *ACHPER Healthy Lifestyles Journal* 17. See also *The Profile, above* n 3, at chapter 10 'Recreation' which was written by the author.

[115] Above, n 114. *Physical and Sport Education: A Report by the Senate Standing committee on Environment, Recreation and the Arts,* Canberra: Australian Government Publishing service, 1992. Parliamentary Paper (Australian Parliament) 1992, No. 531.

[116] *The Profile,* above n 3, at Chapter 10 'Recreation'.

[117] Above, n 116.

[118] Section 27 *Equal Opportunity Act* 1995 (Vic).

[119] "See What's In It for Young People", (February 1996) 4 *Rights Now,* No 1.

Article 33 is designed to protect children from using or trafficking in drugs. If recent reports of a rampant drug trade in Melbourne's western suburbs are accurate, much remains to be done to prevent illicit drugs from coming into the hands of children. The reported use of children as carriers is so heinous that it defies credibility.[120] It is doubtful that the plan prepared by the Victorian Premier's Drug Advisory Council will result in the alleviation of these problems. Indeed, the suggested decriminalisation of marijuana appears expressly calculated to increase children's use of that drug.[121]

Article 34 specifically seeks to protect children from sexual exploitation. It was in compliance with the mandate of this Article that the Federal Parliament passed the *Child Sex Tourism Act* 1994. So far as I am aware, there has not yet been one successful prosecution under this Act, which seems to be perceived as a paper tiger. Yet the *Convention* specifically enjoins the taking of 'national bilateral and multi-lateral measures' to end child prostitution. The international law complexities and the supposed difficulties of sustaining prosecutions under this Act seem to me to have been exaggerated. There seems to be a lack of commitment towards the enforcement of this ameliorative legislation.

Nor would it appear that the elimination of child pornography has been a high priority with Australian legislatures and law enforcement agencies.

Article 35 proscribes the abduction and trafficking in children. While Australia has taken decisive steps in the preventing abduction by non-custodians, by ratifying the *Hague Convention on Child Abduction*, the *Gillespie* case and others manifest a lack of full commitment to the implementation of this aspect of *Article 35*.[122] I have argued elsewhere that surrogate motherhood by artificial means is a form of trafficking.[123]

Article 36 is a catch-all article, proscribing all other forms of child exploitation. I have utilised this Article on one occasion to seek to force the Victorian Government to legislate against the sale of war toys in showbags at the Melbourne Show.[124] It is a protean article, which could be used on occasions to embarrass would-be exploiters of the innocence of children. Unfortunately, it seems to be little used.

Article 37 deals with the punishment and incarceration of children. Its first mandate is that no child shall be subjected to torture or other cruel, inhuman or degrading punishment. It is submitted that corporal punishment of children, especially in schools, breaches this Article.[125] *Articles*

---

[120] *The Sunday Age* 2 August 1995.
[121] N Brady, 'Revealed: Radical Drugs Plan', *The Age* 11 April 1996.
[122] Above, n 121.
[123] Above, at 80.
[124] This intervention was not successful, possibly because the relevant Minister in Victoria was unaware of the existence of the *UN Convention on the Rights of the Child*!
[125] Above, at 86, for a discussion of corporal punishment.

37(2), (3) and *(4)* deal with the rights of children who have been arrested, or sentenced, or otherwise detained. Combined with *Article 40*, these provisions call into question the administration of juvenile justice in Australia. There is little doubt that Aboriginal children in Australia have been treated abominably by the juvenile justice system.[126] Perhaps the worst breach of the whole *Convention* was committed by Western Australia when, in 1992, it passed legislation mandating courts to sentence a second juvenile offender to 18 months' imprisonment.[127] This was flagrantly in contravention of *Article 37(2)* which provides that:

> "the ... imprisonment of a child ... shall be used only as a measure of last resort and for the shortest appropriate period of time."

This legislation was manifestly directed at Aboriginal children, who are grossly over-represented in places of juvenile detention. Yet, despite widespread criticism, it still remains on the statute-book.

Article 37(4) states that every child deprived of liberty shall have the *right* (sic) to prompt access to legal or other assistance. This surely means that the police, or other apprehenders of children such as train inspectors, are obliged to provide legal representation before questioning children. They are also obliged to bring an arrested child to court as soon as possible.

Several studies have confirmed that police methods do not comprehend such practices.[128] Indeed, there are well-documented incidences of harsh treatment of arrested children, several of whom have been driven to suicide.[129]

Article 38, which deals with armed conflicts, might appear to be inapplicable to Australia. Certainly, children under 15 do not take part in hostilities. Nor are they recruited into the armed forces. But it could perhaps be argued that the mandate of *Article 38(4)*, 'to take all feasible measures to ensure protection and care of children who are affected by an armed conflict,' requires a more generous attitude to applications for refugee status, and to the adoption of children who are the victims of the many wars raging in the world. It can hardly be said that Australia is generous in its foreign aid to Third World countries ravaged by war.[130]

---

[126] See, for example, A Freiburg, R Fox and M Hogan, "Procedural Justice in Sentencing Australian Juveniles" (1989) 15 *Monash University Law Review* 279; G Luke and C Cunneen, *Aboriginal Over-Representation and Discretionary Decisions in the NSW Juvenile Justice System*, Sydney: Juvenile Advisory Council of NSW, 1995.

[127] *Juvenile Act*, 1992 (WA). See now, *Young Offenders Act* 1994 (WA).

[128] H Blagg and M Wilkie, *Young People and Police Powers*, Sydney: Australian Youth Foundation, 1995.

[129] C Alder et al, *Perception of the Treatment of Juveniles in the Legal System*, Canberra: National Youth Affairs Research Scheme, 1992.

[130] Australia gives 0.33% of GNP in foreign aid, less than half the OECD countries: Refer to *The Age* 29 February 1996, editorial, 'A Vote for the World's Poor'.

Presently, an Optional Protocol is being prepared, seeking to amend *Article 38*, so as to raise the age from 15 to 18.[131] If this succeeds, Australia will be in breach of it, for the minimum age for recruitment in each of the navy, army and air force is below 18.[132]

Article 39 requires a country to take measures to promote the recovery of a child who is the victim of neglect or abuse — in an environment which fosters the health, self-respect and dignity of the child. A positive example of a compliance with this Article, perhaps, is the acquisition by Oz Child of a coastal property in Inverloch which is used as a holiday home for abused children and other disadvantaged children. With the love of devoted carers, such children respond resiliently and joyfully to the beautiful environment.

Article 40 is a wide-ranging and comprehensive one, requiring in effect, that all the safeguards afforded to adult defendants in a criminal trial be applied to accused juveniles. The subject of Juvenile Justice, and the tension between the 'justice' and 'welfare' models, would justify a separate book in itself. (And, of course, such books exist in abundance.)[133] The sum total of Australian scholarship seems to be that there are wide discrepancies between States, and indeed between localities, in the compliance with even the most fundamental precepts of this Article.[134] An example of this is the fragmented approach to intervention. It can hardly be said that this complies with *Article 40(3)(b)*: "States parties shall seek to promote ... measures for dealing with such children without resorting to judicial proceedings." It is also doubtful whether the framers of *Article 40(3)(a)*, in referring to 'the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law', would be happy with a law which permits a 13 year old boy to be subjected to the full rigour of a Supreme Court trial, even if his alleged offence was manslaughter.[135]

---

[131] C Sidoti, "Child Welfare — A Global Human Rights Issue", Asia-Pacific Regional Conference of International Forum for Child Welfare, Somerville Community Services Inc, Casuarina, NT, 26/3/96.

[132] Above, n 131. See also C Forbes, 'Lobbies Declare War on Youth Recruitment', *Weekend Australian* 10–11 February 1996.

[133] See for example, F Gale, N Naffine and J Wundersitz (eds), *Juvenile Justice: Debating the Issues*, Sydney: Allen & Unwin, 1993; C Cunneen and R White, *Juvenile Justice: An Australian Perspective*, Melbourne: Oxford University Press, 1995; F Gale, R Bailey-Harris and J Wundersitz, *Aboriginal Youth and the Criminal Justice System: The Injustice of Justice?*, Cambridge: Cambridge University Press, 1990; J Seymour, *Dealing with Young Offenders*, Sydney: Law Book Company, 1988; I O'Connor and P Sweetapple, *Children in Justice*, Melbourne: Longman Cheshire, 1988.

[134] 'Speaking for Ourselves', above n 14, at chapters 8 and 9, devotes no fewer than 30 pages to issues of criminal law and sentencing of children. It raises a multitude of queries as to whether current laws and practices comply with the *UN Convention* and the Beijing Rules (UN Standard Minimum Rules for the Administration of Juvenile Justice, 1995).

[135] See *The Age*, 28 August 1995, for an account of such a trial, which resulted in an acquittal.

Conclusion

By any standards, Australia has been lukewarm in its implementation of the *UN Convention on the Rights of the Child.*

When, eventually, the Australian Government's Report, is monitored by the Committee in Geneva, this country may expect some embarrassingly critical comment. What is particularly alarming is the high degree of indifference shown by Governments in Australia for translating the precepts of the *Convention* into Australian law. And perhaps even more disturbing is the high degree of ignorance of the *Convention* by a significant number of Australians who deal with children.

There is no doubt that we are still an adult-oriented society.