

find that it was causally related to the plaintiff's condition. In the event Judge Badgery-Parker concluded on the balance of probabilities that the plaintiff was infected in March 1982, so that there had been no breach of duty on the part of the hospital.

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child rights

Bringing the world's children up to the minimum right to survive is a gargantuan task.

Canberra Times 2 February 1990, p23

Australia is likely to be a signatory State to the United Nations Convention on the Rights of the Child which was opened for adoption in January 1990 (*Canberra Times* 25 January 1990). The Convention has been described as 'an astonishingly diverse document that has bridged the world's cultural, political and economic divides' (*Canberra Times* 2 February 1991). It was first proposed by Poland in the International Year of the Child (1979) and was ten years in preparation.

Are children's rights adequately protected in Australia? The Minister for Justice, Senator Michael Tate is already on record as saying that it would be a charade for Australia to sign an international convention on the rights of children while the child mortality rate among Aborigines was so high (*Australian Financial Review* 8 September 1987).

There can be no question that, throughout the world, children's rights need protecting. Estimates of the number of children throughout the world who are homeless and abandoned vary between 80 and 100 million. More than 38 000 children die daily from lack of food, shelter or primary health care (Foster Parents Plan International) and there are more than 10 million child refugees throughout the world (*Sydney Morning Herald* 4 November 1989).

what rights does the convention recognise?
The Convention provides a principle by which children's rights can be identified — the principle of best interests. It says the best interests of children is to be the basic concern of parents and the principle followed by governments. The Convention recognizes the following rights for children:

- an adequate standard of living
- a name and a nationality
- to know and be cared for by their parents
- not to be separated from their parents against their will
- to be educated
- freedom of expression
- to express their own views freely
- to be heard in any judicial or administrative procedure
- basic civil liberties
- freedom from oppression and discrimination
- to enjoy their own culture
- protection from interference with privacy
- special assistance during international conflict and disaster
- prevention from abduction, sale or traffic
- protection from drug abuse, sexual exploitation and sexual abuse.

The Convention also covers parental rights and responsibilities. It proposes:

- the right to possess children
- the responsibility for their upbringing and development
- the responsibility to educate children and to support them.

The Convention declares that both parents have joint responsibility for their children.

children and the state. According to the Convention, the state is to assist and support parents in the performance of their responsibilities by developing institutions, facilities and services for the care of children. Children of working parents should have the right to benefit from child care services. The state should protect children from violence, abuse, neglect or exploitation while in the care of their parents. It should provide alternate care for children removed from parental care eg, fostering, adoption or institutionalisation.

deciding for themselves. ALRC President, the Honourable Justice Evatt AO, delivered a paper on children's rights and the legal regulation of families at the Institute of Family Studies Conference in Ballarat in November 1989. She observed that the Convention would stimulate interest in the question whether the autonomy of young people should be recognised by prescribing a fixed age, or by being left for determination in individual cases. She pointed out the Convention does not specify any age under 18 for the recognition of autonomy of young people. It implies that a child under 18 is regarded for the most part as under the direction and guidance of parent or state in the exercise of rights. Recent court decisions, however, tended to favour the principle that capacity to decide relates more to understanding and intelligence than reaching a prescribed age.

unemployment. Justice Evatt pointed out that the Convention does not tackle the problems associated with the unemployment of young people. It does not recognise the right to work of young people of a permitted working age.

ensuring children's rights. What is the best way of ensuring that children's rights are protected? Justice Evatt pointed out that the Convention does not provide children with a right to individual communication in the case of alleged violations. She also said:

Independent children's legal services are needed. As the Family Law Council pointed out, representing children requires

special knowledge and skills. In its report on Child Sexual Abuse the Council recommended the establishment of a separately identifiable Children's Legal Service within the Legal Aid Commission. Youth legal services can provide a nucleus of specialised lawyers who can help to educate, inform and advise young people on their rights. Western Australia, Queensland and Victoria already have youth legal services.

maintaining children's rights. Justice Evatt said the best interests of the child were the basis of the Convention, but maintaining these rights when the parents failed would be a major problem.

To make children's rights effective there should be an independent agency responsible to see that the individual rights of children can be asserted by them or on their behalf, whenever necessary. . . . possibly this could be done by a children's ombudsman. Another option would be a children's commissioner in the Human Rights Commission.

abortion. Under the Convention, states recognise that every child has the inherent right to life. However a child is defined as every human being below the age of 18 years. The Convention does not specify when, or at what stage, a foetus is to be regarded as a human being. This is a matter left to each state party to decide.

the convention and family law. Justice Evatt pointed out that the Convention requires the views of the child to be taken into account in all matters affecting it and given due weight in accordance with the age and maturity of the child. A child must be given the opportunity to be heard in any proceedings affecting the child. To make this effective, Justice Evatt proposed the following principles with respect to family law matters:

- the court should satisfy itself that the child understands the nature and implications of the proceedings
- the court should ensure that the child has every opportunity to be heard and to participate

- children's views should be given due weight in accordance with their age and maturity
- the relative powerlessness of children makes it unlikely that their right to put their views to a court will be effective unless there is a representative acting on their behalf. The Family Law Council has recommended the appointment of an Official Solicitor to put all relevant information to the court from an independent viewpoint unless the child is sufficiently mature to instruct
- while children have a right to initiate proceedings, they generally lack the knowledge necessary to do this. To make all these effective, independent children's legal services are needed to educate and advise young people on their rights and to represent them if necessary.
- an independent agency should be responsible for ensuring that the individual rights of children can be asserted by them
- independent children's legal services are needed to make legal representation of children effective
- there should be legislation providing for circumstances when young people should be recognised as able to exercise independent choice
- social security policies should ensure appropriate assistance for homeless young people and those in need of support to further their education or training
- uniform standards with respect to adoption should be introduced.

ratification and implementation. The new Convention will come into force after 20 states have ratified it. Justice Evatt pointed out that ratification by Australia will not automatically change Australian laws. In Australia there is a division of responsibilities – family law is a Commonwealth matter and welfare and adoption are for the most part State matter. Justice Evatt pointed out that the protection of children's rights cannot be made effective without the Commonwealth and the States passing special legislation and committing resources. Justice Evatt suggested that legislation may be necessary to bring Australia's laws into basic conformity with the Convention.

- family law with respect to children is not the same in all States of Australia
- a uniform age of marriage for males and females should be introduced
- the recommendations of the Family Law Council on child abuse and legal representation of children should be implemented

childhood poverty and deprivation. Each ratifying state will be required to report to a special committee established under the Convention to monitor its implementation. Justice Evatt said that, while UNICEF sees the Convention as a step towards ensuring the survival and protection and development of millions of children now leading short lives in poverty and deprivation, adequate conditions of living are not guaranteed once the Convention is ratified and implemented. This can only be achieved through international co-operation and national policies of social justice.

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children's evidence in court

I believe it's a sort of legal rule, a sort of legal tradition – for all investigating lawyers – to begin their attack from afar, with a trivial, or at least an irrelevant subject, so as to encourage, or rather, to distract the man they are cross-examining, to disarm his caution and then all at once to give him an unexpected knock-down blow with some final question.

Feodor Dostoevski *Crime and punishment*, 1866.