

Children's Rights

Shifting Conceptions, Exploring Possibilities and Honouring Obligations

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1 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('CRC').

2 Committee on the Rights of the Child, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia*, UN Doc CRC/C/AUS/CO/5-6 (1 November 2019) ('CRC Observations').

3 *Ibid* [4].

4 CRC (n 1) art 44(6).

5 See Australian Child Rights Taskforce, *Protecting Australian Children: The Australian Child Rights Taskforce*, (Web Page) <<http://www.childrights.org.au/about-us/what-we-do/>>.

6 See, eg, *About the National Children's Commissioner*, Australian Human Rights Commission (Web Page, 9 May 2019) <<https://humanrights.gov.au/our-work/about-national-childrens-commissioner>>.

7 *CRC Observations* (n 2) [13]–[14].

The United Nations *Convention on the Rights on the Child* ('CRC')¹ celebrated its 30th anniversary on 17 November 2019. Just two months earlier the Committee on the Rights of the Child, the body of independent experts responsible for overseeing the implementation of the convention, issued its concluding observations of Australia.² The findings were not as favourable as many Australians might have expected. Indeed, the Committee urged the Australian Government to adopt urgent measures with respect to violence against children, mental health, the impact of climate change, the treatment of refugee children and the treatment of Indigenous children within the youth justice system.³ But few Australians would have been aware of these recommendations, as they received virtually no coverage in any media outlet and despite a legal obligation to do so, they were not made widely available to the public by the Government.⁴

This is not to say that children's rights are invisible in Australia. On the contrary, groups within civil society, like the Australian Child Rights Taskforce,⁵ and the Commissioners for Children and Young People, which can now be found in every state, territory and at the federal level, continue to champion the importance and relevance of children's rights.⁶ However, there remains a profound lack of understanding about the convention and children's rights at all levels of Australian society. This point was stressed by the Committee when it called upon the Federal Government to strengthen its awareness-raising programmes on the Convention ... in training programmes for all professionals working with or for children, including all law enforcement officials, teachers, health personnel, social workers and personnel of childcare institutions, as well as State and local government officials.⁷

The aim of this paper is to make a modest contribution to addressing the knowledge gap that exists with respect to the *CRC* in Australia. It seeks to do this in two parts. First, by explaining what it means to adopt a rights-based approach to matters involving children and how this approach differs from the traditional welfare approach. Second, by demonstrating the relevance of the convention in three contexts: litigation; policy design; and service delivery in matters concerning children.

I From Welfare to Rights

Historically, children were quite literally viewed as the property of their parents under the Roman doctrine, *patria potestas*. Social practices and courts maintained this proprietary conception of childhood. This is illustrated in the late 19th century English decision of *Re Agar Ellis*, where the presiding judge warned that any move by a court to override 'the natural jurisdiction' of a father over his child

‘would be really to set aside the whole course and order of nature, and it seems to me it would disturb the very foundation of family life’.⁸

Fortunately, this proprietary conception of children no longer dominates policy and legal frameworks concerning children.⁹ In fact, from around the turn of the 20th century, there was a shift to what is often referred to as a welfare-based approach to matters concerning children. The fundamental principle underpinning this approach was the idea that a child’s best interests, rather than their parents’, must be the paramount (or primary) consideration in all matters affecting the child.¹⁰ The welfare-based approach was also informed by a conception of children as vulnerable and in need of protection.¹¹ As such, they should be entitled to special protections relative to other groups in society. These sentiments can be seen in the precursors to the *CRC*, namely the 1924 and 1959 Declarations on the Rights of the Child.¹² However, notably absent from these Declarations was any recognition of children’s capacities or any entitlement to express their views on matters affecting them. In short, children were to be seen but not to be heard.

A rights-based approach disrupts this old adage because it requires that children not only be seen, but that they also be heard, listened to, and taken seriously. The *CRC* provides a framework for a rights-based approach. Children’s vulnerability is still recognised under the *CRC* and provides a basis for their special treatment and special rights.¹³ However, the inclusion of civil and political rights in the *CRC*, in particular art 12, represents not only a significant departure from the traditional welfare-based approach but also provides a key plank of what is often referred to as a rights-based approach for children.¹⁴ Article 12 provides that ‘[s]tate 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 to be given due weight in accordance with the age and maturity of the child.’

A rights-based approach demands a shift from silencing children to actively creating ways to facilitate their voice and participation in matters affecting them. It requires a recognition that children’s capacities are constantly evolving and that as this occurs children will increasingly possess insight and expertise into matters affecting them. It anticipates and demands a far more active role for children in the development of laws, policies and processes that are designed to ensure the effective enjoyment of their rights under the convention.

The differences between the traditional welfare approach and a rights-based approach are summarised in the table below.

Welfare-based Approach	Rights-based Approach
Victims and passive recipients of assistance	More than victims and potential agents and collaborators
Vulnerable and in need of protection	Protection necessary but capacity for supported decision making
Incompetent and incapable	Evolving capacities
Entirely dependent on adults’ welfare/beneficence	Capacity for resilience and independence and interdependence with adults
Lacking in expertise	Possessing (relevant and relative) expertise
Object of intervention	Subject with entitlements under the convention
Do not require access to information about circumstances	Require access to appropriate information about circumstances
Silenced (seen but not heard)	Active participants (seen, heard, listened to and taken seriously)
Deficits based approach	Strengths based approach

Under a rights-based approach, the conception of a child is very different to that adopted under a welfare approach. Although the vulnerability of children is recognised under both models, under a rights-based approach children are not defined by their vulnerabilities.¹⁵ A rights-based approach also demands that all actions and measures with respect to children must be informed by their rights as recognised under the convention.¹⁶ Actions to assist children cannot be dependent

8 (1883) 24 Ch D 317, 329, 336.
9 John Tobin, ‘The Development of Children’s Rights’ in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (LexisNexis Butterworths, 2nd ed, 2016) ch 2; John Tobin ‘Justifying Children’s Rights’ (2013) *International Journal of Children’s Rights* 1, 16.
10 *Ibid.*
11 *Ibid.*
12 *Geneva Declaration on the Rights of the Child*, League of Nations, opened for signature 26 September 1924; *Declaration of the Rights of the Child*, GA Res 1386(XIV), 14th sess, UN Doc A/RES/1386 (20 November 1959).
13 John Tobin, ‘Understanding Children’s Rights: A Vision Beyond Vulnerability’ (2015) 84(2) *Nordic Journal of Human Rights* 155, 155.
14 John Tobin, ‘The Development of Children’s Rights’ (n 9).
15 *Ibid.*
16 Committee on the Rights of the Child, *General Comment No 21 (2017) on Children in Street Situations*, UN Doc CRC/C/GC/21 (21 June 2017) [11].

- 17 'UN Treaty Database', *United Nations* (Web Page) < https://tbinetnet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC&Lang=en >.
- 18 *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, UN Doc A/RES/66/138 (14 April 2014).
- 19 See *Royal Women's Hospital v Medical Practitioners Board of Victoria* (2006) 15 VR 22, 39 [75]–[77].
- 20 See *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.
- 21 See *Re Minister for Immigration and Multi-cultural Affairs* (2003) 214 CLR 1; Matthew Groves, 'International Law, Administrative Powers and Human Rights: The Legacy of Teoh' in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia* (Hart Publishing, 2019) ch 6.
- 22 See, eg, *Murad v Assistant Minister for Immigration and Border Protection* (2017) 250 FCR 510, 518 [28]; *SZRTN v Minister for Immigration and Border Protection* [2014] FCAFC 129, [32]–[33], [39].
- 23 *Re Jamie* (2013) 278 FLR 155; *Re Kelvin* (2017) 327 FLR 15.
- 24 *Blaze v Grady* [2015] 54 Fam LR 172, 17 [101].
- 25 *State Central Authority v Castillo* [2015] FamCA 792, [247].
- 26 *Bernieres v Dhopal* [2015] 53 Fam LR 547, 562–3 [106]–[112].
- 27 *DPP (Vic) v TY [No 3]* (2007) 18 VR 241, 245 [51]. See also *Re Tracey* [2011] NSWLR 261, 265–6 [15], cited in *Re Kerry (No 2)* [2012] NSWCA 127, [34]–[35], where Spigelman CJ affirming that the provisions of Convention were 'capable of being relevant to the exercise of the discretion' reposed in the court.
- 28 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 8(3).
- 29 In practice the treatment of human rights treaties via the process of pre legislative has not always been rigorous. See generally: George Williams and Daniel Reynolds 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2015) 41 *Monash University Law Review* 470, 474–75; Adam Fletcher, *Australia's Human Rights Scrutiny Regime: Democratic Masterstroke or Mere Window Dressing?* (Melbourne University Press, 2018) ch 4.
- 30 *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, 13 November 2014) 6.
- 31 *Royal Commission into the Protection and Detention of Children in the Northern Territory* (Final Report vol. 1, 17 November 2017) 199–201.
- 32 See e.g., Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Immigration Detention 2014* (Report, 11 November 2014) <https://human-rights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf>; Human Rights and Equal Opportunity Commission of Australia, *A Last Resort? National Inquiry into Children in Immigration Detention* (Report, 2004).
- 33 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Donor Conception Practices in Australia* (Report, 10 February 2011) [2.11].
- 34 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Surrogacy Matters: Inquiry into the Regulatory and Legislative Aspects of International and Domestic Surrogacy Arrangements* (Report, 16 April 2016) [1.101]–[1.121].

on charity, discretion or goodwill. On the contrary, under a rights-based approach, a wide range of interests such as life, liberty, health and education are elevated to the status of a right, which in turn creates an obligation to respect, protect and fulfil these rights for children.

II Using a Rights-Based Approach in Practice

Litigation

The *CRC*, which was ratified by Australia on 17 December 1990,¹⁷ has not been fully incorporated into domestic law. As such, like other international human rights treaties to which Australia is a party, but have yet to be incorporated into domestic law, there is no direct cause of action under domestic law for a child if their rights have been violated.¹⁸ At the international level, an Optional Protocol was adopted in 2011 which allows children to make complaints to the Committee on the Rights of the Child when their rights have been violated. However, Australia is not a party to this Optional Protocol.

This does not mean that the *CRC* has no relevance within the courts in Australia. There are still the fundamental principles regarding the status of ratified international human rights treaties namely, that such treaties can be used to assist in resolving an ambiguity with respect to the interpretation of legislation; to assist in the development of the common law; or when exercising judicial discretion.¹⁹ The High Court used Australia's ratification of the *CRC* to develop what is known as the principle of legitimate expectation.²⁰ Although the status of this principle notion is shaky,²¹ it is still routinely employed as a principle of procedural fairness in immigration proceedings, which threaten the best interests of the child.²²

There are also opportunities to use the *CRC* in the Family Court of Australia, which has maintained an engagement with the convention when resolving disputes across a range of matters including gender dysphoria;²³ arrangements for shared parenting;²⁴ child abduction;²⁵ and declarations of parentage.²⁶ At the state level, engagement with the *CRC* is more sporadic, but creative advocates have on occasion been able to persuade receptive judges as to the relevance of the convention. For example, Justice Bell of the Victorian Supreme Court referred to the convention when exercising his judicial discretion regarding the sentence to be imposed on a 14-year-old boy found guilty of murder. He explained that he

would take Art 40(1) of the Convention into account, for two essential reasons: on becoming a party, Australia signified its respect for the fundamental human rights that the Convention expresses; and I think the exercise of the sentencing discretion will be the better for it. In practical terms, the main significance of considering this matter will be to supply a further basis for, and to reinforce the existing principle of, giving primary emphasis to youth and rehabilitation as a mitigating factor when sentencing children.²⁷

Policy Design

There is an obligation under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) for federal legislative proposals to be scrutinized against all human rights treaties to which Australia is a party, including the *CRC*, before a bill affecting children's rights can be submitted to Parliament.²⁸ Therefore, in theory the *CRC* should play an active role in the development of legislation that is designed to give effect to policies concerning children.²⁹ Moreover, there is nothing to prevent the convention from being used to shape and influence the design of policies for children at the federal, state and local government levels. The willingness to do so very much depends upon the knowledge and understanding of the convention among the advocates and policy makers responsible for the development of policies concerning children.

There is certainly evidence that the *CRC* is often taken into account in inquiries, such as the Royal Commission on Institutional Child Sexual Abuse³⁰ and the Royal Commission on Juvenile Justice and Child Protection in the Northern Territory.³¹ The Australian Human Rights Commission has conducted two inquiries on the detention of refugee children and the impact of this practice on children's rights under the *CRC*.³² There have also been numerous Senate inquiries on issues such as donor conception³³ and surrogacy³⁴ where the convention and children's rights have been raised. The extent to which the convention is treated seriously within

these debates varies greatly. But there is no doubt that there is an opportunity to draw upon the convention and the general comments of the Committee, which cover a vast range of matters ranging from youth justice,³⁵ to the rights of children with a disability,³⁶ when developing policies that affect children in Australia.

Service Delivery

One aspect of children's rights which is often overlooked is its consequences for the delivery of services for children and young people. Under the traditional welfare model, children are seen as passive and vulnerable and therefore in need of the assistance of adults with the relevant expertise. This problem with this model is that there is a risk that children's views and voices will not be taken into account in the delivery of services that are designed for their benefit. Take for example, the results of a study conducted a few years ago by the Australian Institute for Family Studies with respect to the hopeful expectations that children had of their lawyers: 'Zoe explained: 'I was really happy, and I thought ... yay, finally he was gonna be on our side'; Lachlan added: 'Before, I guess I thought it was beneficial because ... I would actually have my views portrayed in some way, which has to be a starter.' Sadly, these expectations did not always align with the experience of children:

Well, kind of, like, they weren't listening to anything we were saying.

Like, they didn't care. [Hannah]

It was all pretty bad ... Probably that she just didn't listen. Like, she would ask us questions and we'd tell her, but then she just didn't care what we said. And she ignored what we said. [Samantha]³⁷

This inability to listen to children is consistent with the features of a welfare-based conception, as the vulnerability of children is highlighted but their capacity for agency, collaboration and expertise is overlooked. Experts who adopt such an approach, whether they are lawyers, social workers or health professionals, may be happy to 'save' and 'protect' children, but they may overlook their obligation to empower and respect them. In contrast, a rights-based approach to service delivery recognises the relative vulnerability of children but also recognizes their capacity and expertise. It demands a service model that focuses on the creation of systems that allow children to express their views; that provide them with relevant and age appropriate information; that treat their views seriously; and enables the creation of partnerships rather than paternalism.

III Conclusion: The Need to Shift Conceptions

A survey undertaken by the Valuing Children Initiative in 2016 found that 'looking after children' was ranked ninth out of ten issues of importance to adults in Australia.³⁸ More concerning still were the survey results of the five most commonly selected words used by adults to describe children: spoilt (57%); fortunate (47%); lazy (45%); selfish (44%) and vulnerable (38%).³⁹ These findings suggest that many Australian adults hold a conception of children that is vastly different to that offered under the *CRC*.

Thus, the challenge moving forward is twofold. First to persuade adults that children need not and must not be characterised through such a negative lens; that an alternative conception of children exists in which they are competent, resilient, and entitled to have their views heard and taken seriously in all matters affecting them. The second challenge is to persuade policy makers, advocates, and all other professionals working with children as to the relevance of children's rights in the context of litigation, policy design and service delivery. Australia currently remains short of where its needs to be in terms of fulfilling its international obligations under the *CRC*. Indeed, a survey undertaken by the National Commissioner for Children and Young People found that the rights which 'least ring true for children' were:

1. I can have a say about things that are important to me;
2. I am treated fairly; and
3. I can get accurate information when I need it.⁴⁰

The challenge and indeed obligation now for all adults is to ensure that no more Australian children experience such a profound sense of disappointment in their ability to enjoy the rights to which they are entitled under the convention.

35 Committee on the Rights of the Child, *General Comment No 24 (2019) on Children's Rights in the Child Justice System*, UN Doc CRC/C/GC/24 (18 September 2019).

36 Committee on the Rights of the Child, *General Comment No 9 (2006): The Rights of Children with Disabilities*, UN Doc CRC/C/GC/9 (27 February 2007).

37 Rae Kaspiew et al, *Independent Children's Lawyer Study: Final Report* (Report, June 2014) 133, 135, 136.

38 Kate Whelan, *Australians Attitudes to Children: The Valuing Children Initiative Benchmark Survey* (Report, 19 July 2016) 9. The highest ranked issues included management of the economy, a fair taxation system and housing affordability.

39 *Ibid* 6.

40 National Children's Commissioner, *Children's Rights Report 2019: In their Own Right* (Report, 19 March 2020) 62.