

## Chapter 2

# The Development of Children's Rights

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### Introduction

**2.1** In 1973, Hillary Rodham, as she then was, proclaimed that 'children's rights' was a slogan in search of a definition.<sup>2</sup> This chapter attempts to provide some guidance with respect to this search. Importantly, it does not seek to present an exhaustive examination of the idea of children's rights. It does, however, seek to engage with three critical questions that underpin most discussions concerning children's rights:

1. Should children have rights?
2. What rights do children have under the law in Australia?
3. What does it mean to adopt a 'rights-based' approach with respect to matters concerning children?

With respect to the first question, it will be argued that this threshold question remains extremely contentious among academic commentators, policy makers and the general public, especially parents. It is not necessary to examine in detail the depth and complexity of this debate here, as many other commentators have already undertaken this task.<sup>3</sup> Rather, it is sufficient to outline relatively briefly the competing arguments in

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2. H Rodham, 'Children Under the Law' (1973) 43 *Harvard Educational Review* 487 at 487.

3. See, for example, J Tobin, 'Justifying Children's Rights' (2013) 21 *International Journal of Children's Rights* 395; D Reynaert, M Bouverne-De Bie and S Vandeveld, 'Between "Believers" and "Opponents": Critical Discussions on Children's Rights' (2012) 20 *International Journal of Children's Rights* 155 at 159; M Freeman, 'Why It Remains Important to Take Children's Rights Seriously' (2007) 15 *International Journal of Children's Rights* 5; D Archard, *Children: Rights and Childhood*, 2nd ed., Routledge, London, 2004, p. 218; M Guggenheim, *What's Wrong with Children's Rights*, Harvard University Press, Cambridge, 2005; R Dixon and M Nussbaum, 'Children's Rights and a Capabilities Approach: The Question of Special Priority' (2012) 97 *Cornell Law Review* 549 at 553; L Ferguson, 'Not Merely Rights for Children but Children's Rights: The Theory Gap and the Assumption of the Importance of

## 2.1 Children and the Law in Australia

order to identify the general contours of the debate. The conclusion to be drawn is that much of the opposition to the notion of children as rights bearers is framed around misunderstandings as to the meaning of human rights. As a consequence, on balance there exists a strong legal, moral and political rationale to advance the use of human rights as a vehicle to address the needs of children.

The answer to the second question underscores the conflicted nature of the debate in relation to the first question. At the international level, the remarkable consensus around the question of whether children should have rights resulted in the adoption of the United Nations Convention on the Rights of the Child (CRC) in 1989 — a treaty that imposes binding legal obligations on its 196 States Parties. Indeed, the USA is the only state not to have ratified the CRC. However, domestic implementation of these obligations has not reflected the ostensible commitment given by states when they ratified the CRC, and Australia is no exception in this regard. Although there is evidence of a trend to recognise the rights of children within the legal systems of some states,<sup>4</sup> Australia has remained obstinate in its refusal to implement the CRC. This is not to say that children do not have any rights in Australia, and the CRC has informed the development of aspects of legislation and policy within some jurisdictions in Australia. On balance, however, there remains a limited and piecemeal approach to the use of the CRC and the notion of children as rights bearers as the benchmark against which to develop, implement and monitor laws and policies affecting children.

This potential to use the CRC in a comprehensive manner has inspired what is increasingly referred to as the use of a 'rights-based' approach to matters dealing with children. The substantive meaning of this catch phrase, however, remains somewhat elusive.<sup>5</sup> As a result, the third section of this chapter is dedicated to identifying the various features and principles that can be said to inform a rights-based approach. Such a discussion represents an attempt to respond to the observation of Guggenheim that the children's rights movement has made little progress in developing a cogent conceptual position.<sup>6</sup> It aims to create awareness and stimulate debate around the underlying principles of such an approach and, in doing so, demonstrate that the slogan is no longer in search of a definition.

## Should children have rights?

**2.2** Historically, children were never endowed with notions of individual liberty or rights. Under Roman law, the doctrine of *patria potestas* (paternal power) effectively

entitled a father '[not only] to all the service and all the acquisitions of his child much as those of his slave but he had the same absolute control over his person.'<sup>7</sup> In Stuart Mill's seminal work *On Liberty* (first published in 1859) was only prepared to extend liberty 'to human beings in the maturity of their years' and disqualified from its exercise 'children and young persons below that age which the law may fix as to manhood and womanhood'.<sup>8</sup> Moreover, the courts for many years were determined to preserve this social order.<sup>9</sup>

Over the course of the 20th century, the idea of children as rights bearers gradually began to emerge. Numerous factors contributed to this development at both the international and national levels,<sup>11</sup> the cumulative effect of which was to 'focus specifically on the plight of children as individuals in their own right rather than as the property of one or other of their parents'.<sup>12</sup> At the international level, for example, 'reactions for the plight of exploited working children, horror at the sexual exploitation of children and especially its suspected cross border dimensions'<sup>13</sup> led the International Labour Organization to adopt various minimum age standards in 1919, which stimulated an awareness of the link between children's needs and their rights. A decade later, in 1929, the League of Nations responded to the humanitarian crisis and suffering experienced by children during World War I and the subsequent years, adopted the Declaration on the Rights of the Child. Although couched largely in welfarist terms, this declaration has been identified as formal establishment of an international movement for children's rights.<sup>14</sup>

**2.3** The subsequent years saw relatively little special attention given to the rights of children at the international level. The provisions of the Universal Declaration of Human Rights (1948) and the subsequent covenants, the International Covenant on Civil and Political Rights (1966) (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR), all extended to children. However, a few provisions of these instruments were concerned with the special circumstances of children. But it was the Declaration on the Rights of the Child, adopted by the United Nations in 1959, which 'gave a broad imprimatur to the concept of children's rights per se'.<sup>15</sup> This Declaration, as with its like-titled predecessor from 1924,

7. J. Hadley, *Introduction to Roman Law*, 1991, pp. 119–21, as cited in B. Garner (ed.), *Black's Dictionary*, 7th ed., West Group, St Paul, 1999, p. 1188.

8. The full text of Mill's work can be found at [www.serendipity.li/ismill/on\\_lib.html](http://www.serendipity.li/ismill/on_lib.html) (accessed December 2007).

9. See, for example, Bowen LJ in the late-19th-century English decision *Re Agar-Ellis* (1883) 24 Ch 1 at 336, where he warned that any move by a court to override 'the natural jurisdiction' of a father in 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'.

10. See generally, P. Alston, J. Tobin and M. Darrow, *Laying the Foundations for Children's Rights: An Independent Study of Some Key Legal and Institutional Aspects of the Impact of the Convention on the Rights of the Child*, UNICEF Innocenti Research Centre, Florence, 2005, pp. 1–8.

11. See generally, Guggenheim, *What's Wrong with Children's Rights*, note 3 above, pp. 5–15; Eekelaar, *Emergence of Children's Rights*, note 3 above.

12. Alston, Tobin and Darrow, *Laying the Foundations for Children's Rights*, note 10 above, p. 3.

13. *Ibid.*, p. 3.

14. *Ibid.*, p. 4.

15. *Ibid.*, p. 5.

365 at 366–7; J. Eekelaar, 'The Emergence of Children's Rights' (1986) 6 *Oxford Journal of Legal Studies* 161.

4. See J. Tobin, 'Increasingly Seen and Heard: The Constitutional Recognition of Children's Rights' (2005) 21 *South African Journal on Human Rights* 86.

5. For a more detailed discussion, see J. Tobin, 'Understanding a Human Rights Based Approach to Matters Involving Children: Conceptual Foundations and Strategic Considerations' in A. Invernizzi and J. Williams (eds), *The Human Rights of Children: From Visions to Implementation*, Ashgate, Farnham, 2011, pp. 61–98; J. Tobin, 'Beyond the Supermarket Shelf: Using a Rights Based Approach to Address Children's Health Needs' (2006) 14 *International Journal of Children's Rights* 275.

had significant limitations, especially with respect to its tendency to emphasise the protection and safety of children and omit any civil and political participatory or autonomy rights. This deficiency was not rectified until the adoption of the CRC in 1989, after a 10-year drafting process, which marked the full transformation, and complete emergence, of the idea of children as rights bearers at the international level.

Importantly, these international developments were not occurring in isolation from events within the domestic realm. Indeed, the emergence of an international consensus around the idea of children's rights was fuelled and enabled by an increasing acceptance of the idea at the domestic level. Over the course of the 20th century, a number of assumptions with respect to the status and standing of children were dismantled. Studies with respect to the abuse of children revealed that the cause of such suffering was often at the hands of parents and guardians, thereby debunking the myth of natural parental affection.<sup>16</sup> The work of psychologists demonstrated that children were more active thinkers than had previously been thought. As a consequence, political scientists began to question the social construction of childhood at a time of unprecedented social change, when the language of rights was being used to transform the experiences and entitlements of women and various racial groups.<sup>17</sup> Lawyers also started to advance calls to liberate children from the denial of their rights because of their status as children and, perhaps more importantly, courts began to listen to such calls.<sup>18</sup> Decisions such as *Tinker v Des Moines Independent Community School District*<sup>19</sup> and *Re Gault*,<sup>20</sup> which were delivered by the United States Supreme Court, and the House of Lords judgment in *Gillick v West Norfolk and Wisbech Area Health Authority*<sup>21</sup> heralded judicial acknowledgment that the language of rights had a legitimate role to play in advancing the interests of children.

**2.4** In the years following, many groups have embraced children's rights as a tool for both academic analysis and advocacy at the international and domestic levels.<sup>22</sup> However, this trend has been uneven and is certainly unmatched at the institutional, policy and academic levels, where there exists a level of resistance, scepticism and

16. See, for example, C Kempe and R Helfer (eds), *Helping the Battered Child and His Family*, Lippincott, Philadelphia, 1972.

17. See, for example, B Gross and R Gross (eds), *The Children's Rights Movement: Overcoming the Oppression of Young People*, Anchor Books, New York, 1977.

18. See Guggenheim, *What's Wrong with Children's Rights*, note 3 above, pp. 8–12.

19. 393 US 503 (1969) (the United States Supreme Court famously declared, in its assessment as to the validity of a restriction on the wearing of armbands by students in protest against the Vietnam War, that '[s]tudents in school as well as out of school are "persons" under our Constitution').

20. 387 US 1 (1967) (the United States Supreme Court held that children were entitled to due process rights in criminal proceedings).

21. [1986] 1 AC 112 (the House of Lords held that parental rights were recognised by the law only as long as they were needed for the protection of the child, and such rights yielded to the child's right to make their own decisions when they reached a sufficient understanding and intelligence to be capable of making up their own mind. Thus, on the facts, a girl under 16 did not, merely by reason of her age, lack legal capacity to consent to contraceptive advice and treatment by a doctor). See also *Secretary, Department of Health and Community Services (NT) v JWB and SMB (Marion's case)* (1992) 175 CLR 218; 106 ALR 385.

22. Within the Australian context, see, for example, M Jones and LA Basser Marks (eds), *Children on the March: The Rights of Australian Children*, Document Publications, Sydney, 2001; V Bunker (ed.), *Children*

uncertainty about the utility of rights for children. This debate is detailed and complex.<sup>23</sup> It is sufficient here, however, to outline the principal arguments of concern advanced in opposition to the relevance of children's rights.

1. Rights for children are unnecessary because adults have the best interests of children at heart.<sup>24</sup>
2. Childhood can be seen as a 'golden age of innocence' in which there is no need for children to have rights, as they should be spared the burden of the concomitant responsibilities.
3. Rights are individualistic and only serve to undermine the family structure by creating an adversarial climate and legitimising intervention by the state within the family.<sup>25</sup>
4. The enjoyment of rights is contingent upon the capacity to exercise those rights and as children lack capacity or competency they should not be entitled to rights.<sup>26</sup>
5. Rights are excessively legalistic<sup>27</sup> and do not operate to challenge the structures and processes that undermine or threaten children's needs. Alternative models, therefore, provide a more appropriate political and moral paradigm by which to respond to children's needs. These models include a focus on the obligations of parents, teachers and other persons involved in children's lives,<sup>28</sup> or an ethic of care that would emphasise responsibilities over rights and provide a more effective response to children's needs.<sup>29</sup>
6. Rights are invariably ill defined and vague.<sup>30</sup>
7. The autonomy of children is misguided as their dependence is a reality.<sup>31</sup> Moreover, the liberation of children is a dangerous objective that raises the very real risk of harm to children.<sup>32</sup>

Most of these criticisms are based on either an idealised vision as to the reality of children's lives or a misunderstanding as to the role and content of the various rights that have been attributed to children under the CRC. First, the majority of parents may

23. See Tobin, 'Justifying Rights for Children', note 3 above; Tobin, 'Understanding a Human Rights Based Approach to Matters Involving Children', note 5 above at 61.

24. See, for example, Joint Standing Committee on Treaties, *United Nations Convention on the Rights of the Child*, 17th Report, Commonwealth of Australia, Canberra, 1998; 'Additional Comments by Senators Abetz, McGauran and O'Chee.

25. Guggenheim, *What's Wrong with Children's Rights*, note 3 above, pp. 13–14.

26. L Purdy, *In Their Best Interest? The Case against Equal Rights for Children*, Cornell University Press, New York, 1992.

27. M King, 'Children's Rights as Communication: Reflections on Autopoietic Theory and the United Nations Convention' (1994) 57 *Modern Law Review* 385; M King and C Piper, *How the Law Thinks about Children*, 2nd ed., Ashgate, Aldershot, 1995.

28. O'Neill, 'Children's Rights and Children's Lives' (1988) 98 *Ethics* 445.

29. B Arnell, 'Becoming Versus Being: A Critical Analysis of the Child in Liberal Theory' in D Archard and C MacLeod (eds), *The Moral and Political Status of Children*, Oxford University Press, Oxford, 2002, p. 70.

30. Joint Standing Committee on Treaties, *United Nations Convention on the Rights of the Child*, note 24 above, p. ix.

31. Guggenheim, *What's Wrong with Children's Rights*, note 3 above, pp. 13–14.

32. Joint Standing Committee on Treaties, *United Nations Convention on the Rights of the Child*, note 24 above, p. ix.

have their children's best interests at heart, but the evidence demonstrates that this is not always the case.<sup>33</sup> Moreover, as Chapter 6 demonstrates, for far too many children the ideal of a golden age of childhood is an elusive dream.<sup>34</sup>

**2.5** In relation to the claim that the individualistic nature of rights operates to fragment families, it is true that rights are recognised as individual entitlements, but their enjoyment and realisation does not occur in isolation, and the CRC adopts a relational rather than an individualistic conception of rights.<sup>35</sup> The family structure and the role of parents are critical in securing this process.<sup>36</sup> Intervention within the family may be permitted under the CRC, but it is not an elective option to be exercised by states at whim. Rather, it is only permitted when parents fail to secure the best interests of their children.

With respect to the issue of capacity, this is not a precondition for the recognition of the human rights of any person, including a child — such entitlements are granted to all persons by virtue of their humanity.<sup>37</sup> In response to the emphasis placed on law under a human rights paradigm, the law may be an imperfect tool for social regulation, but it remains accepted as the dominant means by which to achieve this end, despite its limitations. Finally, the demand for autonomy associated with the call to recognise rights for children should not be equated with a denial of a period of dependence for children or a claim to complete liberation. On the contrary, the model advanced under the CRC advances an evolving rather than absolute notion of autonomy for children, which reflects their age and level of maturity.<sup>38</sup>

**2.6** The value of children's rights as a response to children's needs is, therefore, linked to the capacity of this discourse to: elevate the status of children; render them visible; recognise their evolving capacity as active agents rather than passive subjects dependent upon welfare and benevolence; recognise their human dignity; and legitimise their claims and entitlements and demand accountability from those who are responsible for the realisation of these goals. As Freeman explains in his strong defence of children's rights, '[r]ights then are also a resource; they offer reasoned argument. They support a strong moral case' and they 'offer fora for action'.<sup>39</sup>

33. P Pinheiro, *Rights of the Child: Report of the Independent Expert for the United Nations Study on Violence against Children*, UN Doc A/61/299, 29 August 2006, [38]–[47].

34. See also UNICEF Office of Research, *Children of the Recession: The Impact of the Economic Crisis on Child Well-Being in Rich Countries*, Innocenti Report Card 12, Florence, 2014; P Davidson and R Evans, *Poverty in Australia 2014*, 4th ed., Australian Council of Social Service, Strawberry Hills, 2014 (noting that nearly 18 per cent of children were living below the poverty line in Australia in 2014).

35. See J Tobin, 'Understanding Children's Rights: A Vision Beyond Vulnerability' (2015) 84 *Nordic Journal of International Law* 155.

36. See J Tobin, 'Fixed Concepts but Changing Conceptions: Understanding the Relationship between Children and Parents under the CRC' in M Ruck (ed.), *Handbook of Children's Rights: Global and Multidisciplinary Perspectives*, Routledge, Abingdon, forthcoming 2017.

37. For a more detailed discussion, see Tobin, 'Justifying Children's Rights', note 3 above at 9.

38. See CRC Arts 5 and 12. See also G Lansdown, *The Evolving Capacities of Children*, UNICEF, Innocenti

## What rights do children have?

**2.7** In Australia, the answer to the question of what rights children have depends upon the jurisdiction that is the subject of the inquiry. When Australia ratified the CRC in 1990, as a matter of international law each person under the age of 18 became entitled to all of the rights set out under the CRC. Moreover, Australia accepted an obligation in good faith to take all appropriate measures to secure the effective enjoyment of those rights within domestic law.<sup>40</sup> In practice, the efforts to fulfil this obligation have been, at best, piecemeal and in some instances, most notably with respect to the treatment of child refugees, significantly short of what is required under the CRC.<sup>41</sup> Some aspects of the CRC have arguably informed the development of various aspects of the Australian legal system. This is evident, for example, in some aspects of the Family Law Act 1975 (Cth).<sup>42</sup> However, as outlined in 1997 in the report by the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*,<sup>43</sup> and the Senate Inquiry into the CRC in 1998,<sup>44</sup> there were significant gaps in the protection of children's rights. Despite the passage of time, the continued existence of these gaps has been confirmed by:

1. a preliminary review of the extent to which the recommendations of the *Seen and Heard* report have been adopted;<sup>45</sup> and
2. the concluding observations of the Committee on the Rights of the Child (Committee) in 2012 with respect to Australia's reports on its progress in relation to implementation of the CRC.<sup>46</sup>

As a party to the CRC, Australia is required to submit a report to the Committee every five years in which Australia outlines the measures it has taken to implement its obligations under the CRC. In turn, the Committee prepares a set of concluding observations in which it evaluates Australia's performance. In its most recent set of observations for Australia, in 2012, the Committee expressed its concern with respect to a range of issues, including: Australia's efforts to raise awareness of children's rights; the treatment of Indigenous and refugee children; the failure to prohibit corporal punishment of children; the lack of measures to enable children's effective participation especially in schools; the abuse and neglect of children in institutional care; and the

40. Vienna Convention on the Law of Treaties Art 26: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'.

41. Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention*, 2014.

42. See, for example, Family Law Act 1975 (Cth) s 60B(4), as inserted by Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 (Cth) Sch 1 cl 13.

43. Report 84, November 1997.

44. Joint Standing Committee on Treaties, *United Nations Convention on the Rights of the Child*, note 24 above, [9.101].

45. National Children's and Youth Law Centre and YouthLaw, *Preliminary Review of the Implementation Status of the Seen and Heard Report*, Discussion Paper 9, November 2007.

46. Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Concluding Observations: Australia*, UN Doc CRC/C/AUS/CO4, 28

quality of health care for children in rural communities.<sup>47</sup> Under international law, Australia is obliged to take measures in good faith to address the concerns of the Committee. In practice, however, the recommendations of the Committee cannot be enforced by any coercive mechanism, and Australia can (and often does) effectively ignore the recommendations without any legal consequence.

In 2011, a third optional protocol to the CRC (OP3) was adopted by the United Nations General Assembly, which came into force in 2014.<sup>48</sup> This protocol allows children to lodge a complaint with the Committee when their rights under the CRC have been violated. Australia, however, is yet to ratify this protocol which means that children within Australia cannot lodge such a complaint.

Despite Australia's failure to implement fully the CRC and/or ratify OP3, the CRC remains relevant in at least five important respects:

1. It has been declared a relevant international instrument for the purposes of the Australian Human Rights Commission Act 1986 (Cth) (AHRC Act), which means that it informs the mandate of the Australian Human Rights Commission (AHRC) to monitor, receive complaints and undertake inquiries with respect to the protection and promotion of human rights under the federal system. For example, this provided the basis for the AHRC's two inquiries into the immigration detention of children.<sup>49</sup>
2. In 2013, a National Children's Commissioner was appointed, whose mandate includes the promotion and protection of children's rights consistent with the CRC (AHRC Act s 46MB). This has enabled the Commissioner to prepare reports based on the rights of children under the CRC, which have addressed issues such as discrimination against children, children's privacy rights, early childhood education and care, and protection against self-harm and suicidal behaviour for adolescents.<sup>50</sup>
3. In 2011, the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) established two processes that envision a role for the CRC. The first was the creation of the Parliamentary Joint Committee on Human Rights, whose mandate includes examination of Bills and existing statutes in light of Australia's obligations under a number of international instruments including the CRC (s 7). The second was a requirement that every Bill submitted to the Commonwealth Parliament be accompanied by a statement of compatibility outlining the

47. Ibid. See also the earlier observations of the Committee: CRC/C/15/Add. 79 (21 October 1997) and CRC/C/15/Add. 268 (20 October 2005).

48. Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure. There are two other optional protocols to which Australia is a party: Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography; and Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.

49. Australian Human Rights Commission, *The Forgotten Children*, note 41 above; Human Rights and Equal Opportunity Commission, *A Last Resort? National Inquiry into Children in Immigration Detention*, 2004.

extent to which the provisions of the Bill comply with Australia's obligations under various human rights treaties, including the CRC (s 8). Neither of these processes allows for the provisions of the CRC to bind the Commonwealth Parliament, and the identification of an inconsistency with the CRC has *no impact* on the validity of an existing Act or Bill. That said, both processes create the potential for the provisions of the CRC to have a more explicit and formal role in the drafting of and debate surrounding Commonwealth legislation, both within the relevant government departments and the Parliament itself.<sup>51</sup> The adoption of the Charter of Human Rights and Responsibilities Act 2006 in Victoria and the Human Rights Act 2004 in the Australian Capital Territory provide an independent source of rights for children within those jurisdictions. Each regime extends the rights protected under the relevant enactments to all persons, including children, and contains special provisions for the protection of children's rights.<sup>52</sup> The system for the protection of rights under these instruments is complex. For present purposes it is sufficient to note that like the federal system, the Victorian and Australian Capital Territory systems require new Bills to be accompanied by a statement of compatibility outlining the extent to which the proposed legislation complies with the rights under the relevant Act. Public authorities are also required to give proper consideration to, and act compatibly with, the relevant rights. Thus policy makers, public authorities and parliamentarians are required to engage with the idea of children as rights bearers.

In terms of judicial protection of rights, the Australian Capital Territory scheme provides an explicit cause of action against a public authority (s 40C) for a violation of an individual's rights which is also available to children. However, as yet<sup>53</sup> there is no separate cause of action under the Victorian Charter. That said, courts in Victoria have still had cause to consider the relevance of children's rights under the Charter when interpreting the obligations of the state in the context of its obligations under other legislation regarding, for example, the rights of children in child protection proceedings.<sup>54</sup> This possibility arises by

51. See A. Byrnes, 'The Human Rights (Parliamentary Scrutiny) Act 2011 and The Work Of The Parliamentary Joint Committee on Human Rights: Bright Light, But What Impact?' (March 2015) (copy on file with author); S. Rajanayagam 'Does Parliament Do Enough? Evaluating Statements of Compatibility under the Human Rights (Parliamentary Scrutiny) Act' (2015) 38 *University of New South Wales Law Journal* 1046.

52. For example, with respect to the Victorian Charter on Human Rights and Responsibilities, see Charter of Human Rights and Responsibilities Act 2006 (Vic) ss 17, 23, 24(3) and 25(3); Human Rights Act 2004 (ACT) ss 11, 19, 20, 21(3) and 22(3).

53. The 2015 review of the Charter recommended the adoption of such a measure. M. Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006*, State of Victoria, 2015, Recommendation 27. But it remains to be seen whether the Victorian Government adopts this recommendation.

54. See, for example, *Secretary, Department of Human Services v Sanding* (2011) 36 VR 221; [2011] VSC 42 (discussing the right to a fair hearing and the best interests of a child); *A and B v Children's Court (Vic)*



virtue of s 32(1), which requires that: 'So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'. Moreover, when performing this function there remains scope for policy makers, lawyers, judges and parliamentarians to draw upon international instruments such as the CRC to interpret the rights under the Victorian and Australian Capital Territory human rights schemes and general legislation. This possibility arises under the Victorian Charter, for example, as a result of s 32(2) which provides that: 'International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision'.<sup>55</sup>

4. The CRC (and indeed other international treaties that provide rights for children, such as the ICCPR and ICESCR) can be used to inform the accepted principles of judicial interpretation with respect to the status of ratified yet unincorporated treaties. These principles allow for the CRC to play a role in: the interpretation of legislation where there is an ambiguity; the development of the common law; the application of the principle of legitimate expectation; and the exercise of judicial discretion. It is within these contexts that courts in Australia have on occasions made recourse to the CRC. This has occurred most frequently within the Family Court, where judges have drawn on the CRC to assist them in their interpretation of the Family Law Act 1975 (Cth).<sup>56</sup> Judges have also made recourse to the CRC within other contexts, such as the sentencing of juveniles<sup>57</sup> and immigration proceedings.<sup>58</sup> That said, the opportunities for using the CRC in judicial proceedings within Australia are still yet to be fully explored.<sup>59</sup>

5. Finally, policy makers at the federal, state/territory and local government levels can elect to use the CRC and the idea of children's rights to inform the development of policies concerning children. At the federal level, for example, the CRC has been explicitly affirmed in contexts such as the *National Framework for Protecting Australia's Children 2009–2020*,<sup>60</sup> the *National Standards for*

55. See also Human Rights Act 2004 s 31(1).

56. The role of the CRC in the Family Court was heavily influenced by its former Chief Justice, Alastair Nicholson. See M Kirby, 'Chief Justice Nicholson, Australian Family Law and International Human Rights' (2004) 5 *Melbourne Journal of International Law* 221. This influence was maintained by his successor, Chief Justice Bryant: see, for example, *Re Jamie* (2013) 278 FLR 155; [2013] FamCAFC 110 (examining the issue of a child's capacity to consent to gender reassignment in light of the provisions under the CRC).

57. See, for example, *Director of Public Prosecutions v TY* (No. 3) (2007) 18 VR 241; [2007] VSC 489 per Bell J.

58. See, for example, *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; 128 ALR 353; [1995] HCA 20.

59. For a more detailed examination of this issue, see J Tobin 'Judging the Judges: Are They Adopting the Rights Approach in Matters Involving Children' (2009) 33 *Melbourne Journal of International Law* 579.

*Out-of-Home Care*,<sup>61</sup> the *Early Years Learning Framework for Australia*,<sup>62</sup> and *Australia's National Plan of Action against the Commercial Sexual Exploitation of Children*.<sup>63</sup> It has influenced the content of legislative schemes such as the Family Law Act,<sup>64</sup> featured in the Senate Inquiry into donor conception issues,<sup>65</sup> been part of the terms of reference for the Royal Commission into Institutional Responses to Child Sexual Abuse,<sup>66</sup> and has also influenced the work of bodies such as the Australian Institute of Family Studies<sup>67</sup> and the Family Law Council of Australia.<sup>68</sup>

## What does it mean to adopt a rights-based approach to matters involving children?

2.8 There are increasing calls for the adoption of a rights-based approach with respect to children's needs. This catch cry is common at the international level<sup>69</sup> and it is also heard within Australia, especially in Victoria with the adoption of the Charter of Human Rights and Responsibilities Act 2006. This trend invites an assessment and discussion of what it actually means to adopt a rights-based approach.<sup>70</sup> There is a need to move beyond the vague generalisations, analytical confusion<sup>71</sup> and rhetoric that often characterise the calls and implementation of such an approach, and identify some of its key underlying features. For the purposes of this section it is suggested

61. Department of Families, Housing, Community Services and Indigenous Affairs, *An Outline of National Standards for Out-of-Home Care*, Commonwealth of Australia, July 2011, pp. 2, 6.

62. Department of Education, Employment and Workplace Relations, *Belonging, Being & Becoming: The Early Years Learning Framework for Australia*, Commonwealth of Australia, 2009, p. 5.

63. Department of Family and Community Services, *Tomorrow's Children: Australia's National Plan of Action against the Commercial Sexual Exploitation of Children*, Commonwealth of Australia, 2000, p. 6.

64. Family Law Act 1975 s 60B(4), as inserted by Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 Sch 1 cl 13.

65. Legal and Constitutional Affairs References Committee, *Donor Conception Practices in Australia*, Commonwealth of Australia, February 2011.

66. See Royal Commission into Institutional Responses to Child Sexual Abuse, *Terms of Reference*, 2014, [www.childabuseroyalcommission.gov.au/about-us/terms-of-reference](http://www.childabuseroyalcommission.gov.au/about-us/terms-of-reference) (accessed 13 February 2016).

67. See, for example, R Kaspiew et al, Australian Institute of Family Studies, *Independent Children's Lawyers Study*, Final Report, 2nd ed., Commonwealth of Australia, June 2014.

68. See, for example, Family Law Council, *Report on Parentage and the Family Law Act*, Commonwealth of Australia, December 2013; Family Law Council, *Interim Report on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems (Terms 1 and 2)*, Commonwealth of Australia, June 2015.

69. See, for example, UNICEF, *Human Rights for Children and Women: How UNICEF Helps Make Them a Reality*, New York, 1999; Save the Children, *Child Rights Programming: How to Apply Rights-Based Approaches to Programming*, 2nd ed., 2006. See also UNICEF, *Global Evaluation of the Application of the Human Rights-Based Approach to UNICEF Programming*, Final Report — Vol. 1, March 2012.

70. For a more detailed discussion of this approach, see Tobin, 'Understanding a Human Rights Based Approach to Matters Involving Children', note 5 above; Tobin, 'Beyond the Supermarket Shelf', note 5 above.

71. M Ignatieff, 'Moral Globalisation and its Discontent', Presentation at a Conference on Human Rights, Instituto für Public Policy Research, London, 26 November 2002 cited in J Dineen, *Disorder*

that there are at least 10 such features. Clearly this number is not fixed and some commentators will identify more elements, while others will identify less. The point to stress here is that a rights-based approach cannot be reduced to a simple catch cry. Rather, it exists as a complex set of ideas and principles that have their foundations in international human rights standards, principally the CRC, and provides the potential to act as a useful tool for addressing children's needs.

### The need to recognise that children have rights

**2.9** A precondition to the adoption of a rights-based approach is an acceptance that children have rights. As outlined above, the utility and relevance of children's rights as a strategy to address children's needs remains a subject of debate. However, at the international level, at least from a legal perspective, this issue has effectively been resolved in favour of the affirmation of children's rights as a legitimate concept. The evidence to support this view is the almost universal ratification of the CRC. At the same time, it is important to recognise that the proposition that children have rights as a matter of international law is not sufficient to advance a rights-based approach. Rather, what is required is a commitment to accepting the utility of recognising children's rights as not simply a legal concept, but also an ethical and political framework by which to advance the needs and interests of children by all appropriate means, including measures to protect these rights.

Within Australia there remains a reluctance to embrace such an approach. Take, for example, the following comments of Gummow J of the High Court of Australia in a 2004 case concerning the detention of asylum-seeking children:

The starting point is the proposition that, at common law, a right of a parent or parents to custody of children who had not reached the age of discretion (14 for boys and 16 for girls) incorporates a 'right of possession' of the child which includes the right to exercise physical control over that child.<sup>72</sup>

Such a proprietary view of children contrasts sharply with the image of children articulated by Nicholson CJ and O'Ryan J of the Family Court of Australia in *B v Minister for Immigration and Multicultural and Indigenous Affairs*,<sup>73</sup> where they declared that:

It is quite apparent that under our law children are entitled to be treated as individuals and not as the property of or appendages of their parents. They are entitled to the same rights and protections at common law and under the Constitution as adults subject to Australian law.

Although the view of Nicholson CJ and O'Ryan J is consistent with the construction of children under the CRC, it could not be said to represent the dominant understanding of children within Australian society. Indeed, in the inquiry into the implementation of the CRC by the Joint Standing Committee of Treaties in 1998, 'fifty one per cent of the submissions opposed the Convention'.<sup>74</sup> Advocacy bodies may well invoke the rights

of children as a tool to advance their cause, but for many Australians this concept still remains deeply controversial. This is reflected in the propensity of our political leaders to use children as photo opportunities, but their failure to champion their rights.<sup>75</sup>

**2.10** It is true that political leaders may invoke the rights of children in the context of specific issues, but such appropriations are invariably inappropriate and are often used to disguise an alternative agenda. For example, the former Prime Minister, John Howard, was prepared to oppose the extension of assisted conception procedures to single women and lesbian couples on the basis that '[t]his issue primarily involves the fundamental right of a child within our society to have the reasonable expectation ... of the care and affection of both a mother and a father'.<sup>76</sup> This claim was made despite the absence of any such right under international law<sup>77</sup> and the existence of an overwhelming body of evidence that same-sex parenting presents no harm to the development of children.<sup>78</sup>

Ultimately, a genuine commitment to the CRC requires more than the selective use of the rhetoric of children's rights to advance a particular ideological or political position. It requires an acceptance of the idea that children have rights, an understanding of the substantive content of these rights, and a commitment to adopt practical measures to protect and promote the rights of children. The first of these involves the need to bring children's rights into the mainstream in all matters that affect them.

### Mainstreaming children's rights

**2.11** 'Mainstreaming' has become a fairly common theme with respect to any discussion of human rights. This practice involves

the process of assessing the human rights implications of any planned action including legislation, policies or programs, in all areas and at all levels. It is a strategy for making human rights an integral dimension of the design, implementation, monitoring and evaluation of policies and programs in political, economic and social spheres.<sup>79</sup>

These steps form the basis of 'the human rights-based approach'.<sup>80</sup>

75. A Nicholson, 'Australia's Children: Does the Law Offer Them Sufficient Protection?', The 21st Lionel Murphy Memorial Lecture, Sydney, 28 November 2007.

76. Office of the Prime Minister, *Amendment to the Sex Discrimination Act 1984 (Cth)*, media release, 1 August 2000.

77. *McBain v Victoria* (2000) 99 FCR 116; 177 ALR 320; [2000] FCA 1009 per Sundberg J. See J Tobin and R McNair, 'Public International Law and the Regulation of Private Spaces: Does the Convention on the Rights of the Child Impose an Obligation on States to Allow Gay and Lesbian Couples to Adopt?' (2009) 23 *International Journal of Law, Policy and the Family* 110.

78. See Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption*, Final Report, March 2007, pp. 30–4, 204–15.

79. United Nations Secretary General, *Renewing the United Nations: A Programme for Reform*, UN Doc A/51/950, 14 July 1997.

80. *The Human Rights-Based Approach: Statement of Common Understanding*, Inter-Agency Workshop on

72. *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1; 210 ALR 369; [2004] HCA 49 at [157].

73. (2003) 199 ALR 604; 30 Fam LR 181; [2003] FamCA 451 at [383].

74. *Talking Out Loud: Communications and the National Children's Advocacy Centre*.

The term 'mainstreaming', when used in the context of children's rights, stresses the need to make children visible and integrated rather than marginalised, isolated or ignored within all debates concerning matters that affect them. At present, far too many debates tend to adopt the latter approach. The opinions of Lord Birkenhead and Baroness Hale of Richmond of the House of Lords in *R (Williamson) v Secretary of State for Education and Employment*<sup>81</sup> provide a good illustration of these competing approaches. The case involved a claim by parents that a ban on corporal punishment within schools was a violation of their rights to discipline their children in accordance with their religious beliefs. Lord Birkenhead conceived of the issue primarily as one that involved the resolution of the competing interests between the parents and the state. In contrast, Baroness Hale declared:

My Lords, this is, and has always been, a case about children, their rights and the rights of their parents and teachers. Yet there has been no one here or in the courts below to speak on behalf of the children. No litigation friend has been appointed to consider the rights of the pupils involved separately from those of the adults. No non-governmental organisation, such as the Children's Rights Alliance, has intervened to argue a case on behalf of children as a whole. The battle has been fought on ground selected by the adults. This has clouded and over-complicated what should have been a simple issue.<sup>82</sup>

The contrast could not be more striking. One law lord rendered the rights of children completely invisible in his analysis, while the other ensured that their rights were integrated into the analysis of an issue that directly impacted upon their rights. In adopting such an approach, Baroness Hale was able to recognise that children are not merely objects of concern, but subjects with rights.

**2.12** Importantly, the mainstreaming of children rights is not intended to displace all other considerations. The 'children first' slogan so commonly used by governments<sup>83</sup> and advocates for children is a highly problematic model that does not reflect a rights-based approach. As Cantwell explains, it places children 'on a kind of "more equal than others" pedestal', which reflects a 'charity based approach to children, where sentimentality over children's vulnerability leads to facile "separate" responses: never mind human rights let's help children'.<sup>84</sup> In contrast, the mainstreaming of children's rights recognises that children have special needs by virtue of their status as children, which must be given special attention lest they remain invisible and marginalised. So, for example, the European Court of Human Rights has held the United Kingdom to be in violation of its obligation to ensure the right to a fair trial on the basis that its trial procedures remain too 'adult-centric' and do not sufficiently accommodate the special circumstances of juvenile offenders.<sup>85</sup>

81. *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246; [2005] UKHL 15.  
82. *Ibid* at [71].

83. See, for example, S Garbutt, *Ministerial Statement — Putting Victoria's Children First*, Parliamentary Debates, Legislative Assembly, 4 June 2003.

84. N Cantwell, 'Is the Rights Based Approach the Right Approach?', Paper delivered at the Defence for Children International (DCI) International Symposium, Geneva, 22 November 2004.

85. *See, for example, United States v. Williams*, 170 F.3d 1100 (10th Cir. 2000).

The mainstreaming of children's rights also requires that the enjoyment of these rights must be addressed in conjunction with the rights and needs of other groups within a society via 'the visible integration of children in policy making',<sup>86</sup> rather than in isolation, competition or as an 'add on'.<sup>87</sup> *S v M*,<sup>88</sup> a decision of the South African Constitutional Court, emphasised the need for such an approach when dealing with the means by which the rights of children must be taken into account when a court is giving consideration to the imprisonment of their primary caregiver. Rather than treating the children as merely another 'circumstance' in the sentencing process, Sachs J declared that sufficient independent and informed attention must be given to the impact on children of sending their primary caregiver to prison.<sup>89</sup> He recognised that the sentencing process must remain a balancing exercise, but stressed the need to ensure that consideration of the best interests of children must be genuine rather than dismissive or perfunctory,<sup>90</sup> and must be based on evidence concerning the manner in which the child stands to be affected.<sup>91</sup>

## Universally accepted normative standards provide the foundation of a rights-based approach

**2.13** Numerous discourses are invoked to address children's needs. Within the realm of public health, for example, there remains a marked preference for equity-based approaches,<sup>92</sup> and the concept of children's 'well-being' is increasingly being used in a range of contexts.<sup>93</sup> A welfare, or 'child-saving', model (see Chapter 1) still dominates much of the agenda for organisations working with children, especially those seeking to raise funds to alleviate the situation of children in crisis. Although such models may offer strategies to deal with children, they differ from a rights-based approach in that they can make no claim to an accepted normative foundation. Achieving respect for human rights is a fundamental purpose of the United Nations and an objective to which all member states, including Australia, have pledged their support, both individually and cooperatively: United Nations Charter Arts 1(3), 55 and 56. This common commitment is further strengthened by the Universal Declaration on Human Rights and several human rights treaties, the most relevant with respect to children being the CRC.

86. Committee on the Rights of the Child, *General Comment No 4 — Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, UN Doc CRC/GC/2003/4, 1 July 2003, [47].  
87. E Williams, 'Small Hands, Big Voices? Children's Participation in Policy Change in India' (2005) 36(1) *IDS Bulletin* 82 at 83.

88. (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC) (26 September 2007).

89. *Ibid* at [48].

90. *Ibid* at [46].

91. *Ibid* at [67].

92. See, for example, C Victoria et al, 'Applying an Equity Lens to Child Health and Mortality: More of the Same is Not Enough' (2003) 362 *The Lancet* 233; T Evans et al (eds), *Challenging Inequities in Health: From Ethics to Action*, Oxford University Press, New York, 2001.



International human rights law, therefore, provides the normative framework to guide the design, implementation and evaluation of policies and processes affecting children by identifying the entitlements to which all children are eligible by virtue of their status as human beings.<sup>94</sup> The realisation of these entitlements is not to be dependent upon the discretion or benevolence of states that have voluntarily undertaken a legal obligation to secure their realisation.<sup>95</sup> *Accountability* of states is, therefore, a key feature of a child rights-based approach. This contrasts sharply with traditional welfare and protective models for dealing with children, which view them as objects of discretionary intervention dependent upon the goodwill and charity of others, rather than subjects with entitlements.

### CRC provides core standards of a rights-based approach for children

**2.14** Children are the beneficiaries of the rights articulated under all the international human rights treaties by virtue of their status as human beings. Moreover, the ICCPR,<sup>96</sup> ICESCR<sup>97</sup> and the Convention on the Rights of Persons with Disabilities<sup>98</sup> all have provisions that deal explicitly with children. However, as the CRC represents an international treaty that was designed specifically to protect and promote the rights of children, it 'has become the international standard against which to measure legislation and policies'<sup>99</sup> in relation to matters which affect children.

It has been suggested that the CRC is not sufficiently comprehensive<sup>100</sup> — a view arguably confirmed by the adoption of two optional protocols to supplement the perceived deficiencies of the CRC in the areas of armed conflict and the sale, trafficking, prostitution of, and pornography involving, children. But putting to one side this debate as to the appropriate scope of the CRC, it is uncontroversial to suggest that it still offers an impressive and extensive catalogue of rights which can be arranged into three categories:

1. rights of general application which apply to all children, such as the rights to life (Art 6); name, nationality and identity (Arts 7 and 8); education (Arts 28 and 29); health (Art 24); freedom of expression (Art 13); and protection against torture (Art 37);
2. rights which apply to children in specific circumstances, such as children subject to adoption (Art 21); criminal justice proceedings (Art 40); children seeking refugee status (Art 22); armed conflict (Art 38); exploitative child labour (Art 32); and children deprived of their family environment (Art 20); and

94. See, for example, CRC Art 2(1): 'State parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind ...'

95. Vienna Convention on the Law of Treaties Art 26.

96. See Arts 10(3), 14(4), 23(4) and 24.

97. See Art 10.

98. See Arts 3(h), 4(3), 7, 8(2)(b), 16(5), 18(2), 23, 24(2), 24(3) and 25(b).

99. *S v M* (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC) (26 September 2007) at [16] per Sachs J.

3. rights which apply to children with specific characteristics, such as Indigenous children or children from minority groups (Art 30) and children with disabilities (Art 23).

**2.15** The content and meaning of many of these rights can be informed by existing jurisprudence, especially in the context of well-established civil and political rights. It is true that the development of a child-centred interpretation of such rights remains in its embryonic stages and is an evolving process.<sup>101</sup> It must also be conceded that the precise parameters of many economic and social rights remain far from resolved. This is not to say that such rights are inherently indeterminate and vague. Rather, that significant work is still required to provide many economic and social rights with an operative definition.

Importantly, this process is enhanced by the work of domestic courts such as the South African Constitutional Court, which has examined a child's right to health and housing within the context of the South African Constitution.<sup>102</sup> The various committees responsible for monitoring the implementation of the international human rights treaties — especially the Committee on the Rights of the Child and the Committee on Economic, Social and Cultural Rights — also play a role with their issuing of regular general comments that guide states as to the nature of their obligations with respect to the relevant rights. Thus, for example, the Committee on the Rights of the Child has issued general comments with respect to juvenile justice, children with disabilities, corporal punishment, early childhood, unaccompanied children, children's right to health, the best interests principle, children's right to participation and the aims of education.<sup>103</sup>

**2.16** Two general themes emerge from the work of the committees with respect to the understanding of the obligations of states under the various human rights standards. First, there is a preference for what is sometimes referred to as a tripartite typology of obligations:

1. an obligation to respect, which requires states to refrain from measures that will interfere with the enjoyment of a right;
2. an obligation to protect, which requires states to take all reasonable measures to ensure that a non-state actor does not interfere with the enjoyment of a right; and
3. an obligation to fulfil, which requires states to take all effective measures to ensure the full realisation of the right.

Second, the effectiveness of the measures adopted by a state are generally assessed according to four qualitative criteria: availability, accessibility, acceptability and quality.

101. See for example, A Macdonald, *The Rights of the Child: Law and Practice*, Family Law, Bristol, 2011; J Fortin, *Children's Rights and the Developing Law*, 3rd ed., Cambridge University Press, Cambridge, 2009; R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of the Child*, 3rd ed., UNICEF, Geneva, 2007.

102. See *Government of the Republic of South Africa v Grootboom* (CCT 11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000); *Minister of Health v Treatment Action Campaign* (No. 2) (CCT 8/02) [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033 (5 July 2002).

103. Available online at United Nations Human Rights Office of the High Commissioner, *Committee on*

To take just one example, the Committee on the Rights of the Child has interpreted these requirements in the context of adolescent health to mean:

1. availability — primary health care should include services sensitive to the needs of adolescents with special attention given to sexual and reproductive health and mental health;
2. accessibility — health facilities, goods and services should be known and easily accessible (economically, physically and socially) to all adolescents, without discrimination; confidentiality should be guaranteed when necessary;
3. acceptability — while fully respecting the provisions and principles of the CRC, all health facilities, goods and services should respect cultural values, be gender sensitive, be respectful of medical ethics and be acceptable to both adolescents and the communities in which they live;
4. quality — health services and goods should be scientifically and medically appropriate, which requires personnel trained to care for adolescents, adequate facilities and scientifically accepted methods.<sup>104</sup>

### The three general principles of a rights-based approach *Interdependence and indivisibility*

**2.17** Commentators have identified various principles that inform a general human rights-based approach to programming. UNICEF, for its part, has identified three guiding principles that underlie such an approach to matters dealing with children.<sup>105</sup> The first is the notion of interdependence and indivisibility of all human rights, which is drawn from the Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights in 1993.<sup>106</sup>

The terms 'interdependence' and 'indivisibility', which are invariably used interchangeably, assert that the realisation of a specific right cannot be divorced from the realisation of the other rights to which children are entitled. In the context of juvenile justice, for example, there is limited value in the provision of a system that complies with the requirements of Art 40 of the CRC (with-respect to children who are subject to criminal justice proceedings) if these children are denied the right to an effective education, appropriate health care and an adequate standard of living that is free from abuse and violence. In the context of the right to health, there is limited value in the provision of health care centres for children if the privacy of their medical records cannot be ensured. In the context of the education of Indigenous children or children from minority groups, the value of such education is diminished if it is unaccompanied by measures to protect the cultural and linguistic traditions of such children. In the context of violence against children, there is limited value in prosecuting the offenders if the victims of such

violence do not have access to counselling and assistance to facilitate their recovery and social reintegration.

The principle that all rights are interdependent and indivisible, therefore, acts to dilute the artificiality of the distinction and historical antagonism between civil and political rights on the one hand, and economic, social and cultural rights on the other. To say that rights are indivisible not only provides recognition of their interdependence, but also dismantles any claims to there being a hierarchy of rights. It thus affirms the equal status of all human rights and the need to adopt a holistic, or whole-of-child, response to ensure their realisation.

### Accountability

**2.18** Accountability is recognised as a fundamental principle of a human rights-based approach. It arises from the fact that:

States voluntarily acknowledge and accept obligations when they ratify human rights treaties. In doing so they agree to implement these treaties and to be accountable for meeting the rights and providing for the needs of the people within their jurisdiction.<sup>107</sup>

The principle of accountability, therefore, demands that children be recognised as subjects with entitlements that states are obliged to secure on their behalf. This obligation is generic to all human rights and, as outlined above, is generally considered to consist of three distinct duties: an obligation to respect, an obligation to protect, and an obligation to fulfil.

An examination of the right to life can be used to illustrate the operation of these three duties. The obligation to respect life requires states to refrain from any measures that would interfere with a child's life. The obligation to protect requires that states must take all measures to protect children against a violation of their right to life by non-state actors. For example, in the case of *Osman v United Kingdom*,<sup>108</sup> the European Court of Human Rights accepted that the right to life 'may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual ...'.<sup>109</sup> Moreover, in applying this test in the subsequent case of *Z v United Kingdom*,<sup>110</sup> the European Court of Human Rights found that the failure of the state to intervene and offer protection, in circumstances where the harm suffered by five children in the care of their mother reached the threshold for inhuman and degrading treatment, was a violation of the prohibition against such treatment.

The obligation to fulfil requires states to take active measures, including legislative, administrative, budgetary, judicial, social and educational measures to facilitate, provide and promote the full realisation of children's rights.<sup>111</sup> The Human Rights Committee has explained that in the context of the right to life, this requires states to

107. UNICEF, *Human Rights for Children and Women*, note 69 above, p. 5.

108. (1998) 5 BHRC 293, 29 EHRR 245.

109. *Ibid* at [115].

110. *Ibid* at [115].

104. Committee on the Rights of the Child, *General Comment 4*, note 86 above, [41].

105. UNICEF, *Human Rights for Children and Women*, note 69 above, pp. 5–7.

take measures to diminish infant mortality.<sup>112</sup> Moreover, when this same duty is applied in the context of protective care, it leads to the result that a regime to remove a child from the care of his or her parents, where this is necessary to secure the child's best interests, is insufficient to secure a child's right to life. Rather, preventive measures to assist the parents of a child must be made available and be accessible so as to maximise the capacity of the parents to care for the child.<sup>113</sup>

### Universality

**2.19** The notion of universality, which is intrinsic to international human rights law, is identified by UNICEF as the third foundational principle of a child rights-based approach.<sup>114</sup> It is premised on the principle expressed in Art 1 of the Universal Declaration on Human Rights that 'all human beings are born free and equal in dignity and rights', which translates into a requirement that all children at all times are endowed with the same rights that are universally applicable. This concept of dignity is linked to the 'Kantian moral philosophy that affirms the inherent worth of human beings'.<sup>115</sup> It demands that children are never to be seen simply as a means to an end, but as an end in themselves. Importantly, such an approach rejects the construction of children as social capital, which is often used to justify investment and action to assist children in various contexts, such as early childhood intervention and the provision of education. For example, an early version of the Conceptual Framework for the World Bank's investment in children and young people was based on the argument that 'it is economically efficient to invest in the early years'.<sup>116</sup> In contrast, a rights-based approach demands the provision of early childhood services and educational opportunities because children have a right to such entitlements irrespective of any prospective economic benefits.

This idea of the inherent dignity and value of every child also underlies international insistence that corporal punishment and the sterilisation of children with an intellectual disability are never to be permitted. With respect to corporal punishment, for example, the Committee of the Rights of the Child has recommended that Australia '[t]ake all appropriate measures to explicitly prohibit corporal punishment in homes, in public and private schools, detention centres and alternative care settings in all states and territories'.<sup>117</sup> In relation to sterilisation, the United Nations Convention on the

112. Human Rights Committee, 'General Comment No 6 — Article 6 (Sixteenth Session, 1982)', *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.1 at 6, 29 July 1994 at [5].

113. See CRC Arts 18, 19, 24 and 27; Committee on the Rights of the Child, 'Day of General Discussion' on Violence Against Children within the Family and in Schools, 28 September 2001 in Convention on the Rights of the Child, *Report of the Twenty-Eighth Session*, UN Doc CRC/C/111, 28 November 2001, [728].

114. UNICEF, *Human Rights for Children and Women*, note 69 above, p. 6.

115. S Liebenberg, 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 *South African Journal of Human Rights* 1 at 6.

116. World Bank, *Children and Youth: Conceptual Framework*, December 2004.

117. Committee on the Rights of the Child for Australia, *Concluding Observations: Australia*, note 112 above, at 10.

Rights of Persons with Disabilities requires states to protect the rights of persons with disabilities, including children, to retain their fertility on an equal basis with others.<sup>118</sup> The Committee on the Rights of the Child has also recommended that Australia

[e]nact non-discriminatory legislation that prohibits non-therapeutic sterilization of all children, regardless of disability; and to ensure that when sterilization which is strictly carried out on therapeutic grounds does occur, that this be subject to the free and informed consent of children, including those with disabilities.<sup>119</sup>

The principles of universality and individual dignity also stress the need to secure the individual rights of every individual child and not simply children as a class. As Santos Pais explains:

while it is important to improve the situation of children as a group, it is essential to go beyond good averages of a high rate of progress ... [and] ... consider the specific reality of those children who have not been affected by the wave of general progress, who have remained invisible or forgotten and who are becoming increasingly vulnerable and marginalised.<sup>120</sup>

The challenge, therefore, is to recognise the need to identify and respond to the individual needs of every child rather than become preoccupied with generalist approaches that simply set targets or indicators with respect to the treatment of children.

### The four specific principles of a children's rights-based approach

**2.20** In addition to the three guiding principles of a rights-based approach, which are drawn from international human rights law generally, there are four articles under the CRC that have been identified by the Committee as the general principles of a child rights-based approach.<sup>121</sup> They are the principle of non-discrimination; the requirement that the best interests of children must be a primary consideration in all matters affecting them; the right to survival and development; and the right to participation.

### Non-discrimination

**2.21** Non-discrimination is a fundamental norm of international human rights law and is included in Art 2 of the CRC, which provides that:

States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion,

*Punishment*, UN Doc CRC/C/GC8, 2 March 2007, [7]: 'The Committee has repeatedly made clear in its concluding observations that the use of corporal punishment does not respect the inherent dignity of the child ...'

118. Convention on the Rights of Persons with Disabilities Art 23(c).

119. Committee on the Rights of the Child, *Concluding Observations: Australia*, note 46 above, [58(f)].

120. M Santos Pais, *A Human Rights Conceptual Framework for UNICEF*, Innocenti Essays No 9, UNICEF International Child Development Centre, Florence, 1999, pp. 8–9.

121. Committee on the Rights of the Child, *General Comment No 5 — General Measures of Implementation*

political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

This provision requires that children's rights shall not be nullified or hindered by any distinction, exclusion, restriction or preference based on any ground, irrespective of whether such an effect was intended.<sup>122</sup> At the same time, it does not require identical treatment of children<sup>123</sup> and demands that States Parties must sometimes 'take affirmative action in order to diminish or eliminate conditions which cause or perpetuate discrimination'.<sup>124</sup> Of particular concern to the Committee are Indigenous children within Australia (see Chapter 13),<sup>125</sup> and the Committee has recommended that Australia 'evaluate disparities in the enjoyment by children of their rights and on the basis of that evaluation undertake the necessary steps to prevent and combat discriminatory disparities'.<sup>126</sup>

### Best interests

**2.22** Article 3(1) of the CRC requires that the best interests of the child must be a primary consideration in all actions concerning children. It is an obligation that extends to all actions undertaken by 'public or private social welfare institutions, courts of law, administrative authorities or legislative bodies'. According to the Committee, this obligation demands a child-impact assessment and evaluation with respect to all legislation and policy development to determine the impact of any proposed law, policy or budgetary allocation on children's rights.<sup>127</sup>

Although the best interests principle is firmly entrenched within the CRC and various domestic legislative regimes,<sup>128</sup> it has been the subject of repeated criticism on the grounds of its alleged indeterminacy and inherent subjectivity.<sup>129</sup> Such criticisms, however, suffer from the common problem of reading the articles of the CRC in isolation. While the best interests principle remains a fluid and flexible concept, it is not unfettered. Rather, it remains informed and constrained by the rights and principles provided for under the CRC.<sup>130</sup>

122. Human Rights Committee, 'General Comment No 18 – Non-Discrimination (Thirty-Seventh Session, 1989)', *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.6 at 146, 12 May 2003 at [6].

123. *Ibid* at [12].

124. *Ibid* at [10].

125. Committee on the Rights of the Child, *Concluding Observations: Australia*, note 46 above, [29].

126. *Ibid*, [30].

127. Committee on the Rights of the Child, *General Comment No 5*, note 121 above, [45]. See also Committee on the Rights of the Child, *General Comment No 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration*, UN Doc CRC/C/GC/14, 29 May 2013, [35], [99].

128. See, for example, Family Law Act 1975 (Cth) Pt VII Div 1 Subdiv BA; Children, Youth and Families Act 2005 (Vic) s 10.

129. For a discussion of this principle, see Committee on the Rights of the Child, *General Comment No 14*, note 127 above; J Eekelaar, 'The Role of the Best Interests Principle in Decisions Affecting Children and Decisions About Children' (2015) 23 *International Journal of Children's Rights* 3; Tobin, 'Justifying Children's Rights', note 3 above at 22–3.

130. Committee on the Rights of the Child, *General Comment No 14*, note 127 above, [32]; P Alston and

It is important to note that the scope of the best interests principle extends beyond the specific articles of the CRC. This independent sphere of operation, however, is not to be appropriated in such a way as to coincide conveniently with, or justify the personal whims, preferences and prejudices of, individuals who invoke the best interests principle to serve their own agendas. Unfortunately, such an approach is all too common. Thus, for example, the move in 2003 to amend the Family Law Act 1975 (Cth) to create a presumption of 50/50 shared physical care<sup>131</sup> and the subsequent, though somewhat different, amendments aimed at promoting shared parenting<sup>132</sup> were couched as being necessary to secure the child's best interests, as were the measures of the then Liberal Government's 'intervention' in the Northern Territory in 2006–07: see Chapter 13. In each of these contexts, an assessment of the best interests of children should have been informed by the empirical evidence, rather than the subjective interpretation, or calculated misappropriation of this principle, by those seeking to pursue their own agendas under the guise of children's best interests. If such an approach had been adopted, it would have revealed that the Family Law Act amendments may well expose children to greater risk of harm,<sup>133</sup> while the report of Wild and Anderson, *Little Children are Sacred*,<sup>134</sup> suggested that a far more consultative, holistic and culturally sensitive approach than the 'intervention' was required if the best interests of Indigenous children were to be secured.

Importantly, the requirement that children's best interests must be taken into consideration in all matters affecting them is not necessarily designed to displace all other legitimate considerations. Although States Parties carry a heavy onus to justify any actions or omissions that will be contrary to children's best interests, children's best interests are not the only consideration or even the paramount consideration relevant in decision-making.<sup>135</sup> Thus, the insistence by the Committee that children 'should be placed at the centre of the response to the [HIV/AIDS] pandemic'<sup>136</sup> does not mean that their interests must be the sole and overriding consideration. It does, however, operate to recalibrate the balancing process and make visible the interests of children, which historically have been subsumed under those of adults, or ignored or devalued. Examples of attempts to adopt such an approach can be seen in the report of

131. Standing Committee on Family and Community Affairs, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation*, Commonwealth of Australia, Canberra, December 2003.

132. See, for example, the new 'primary considerations' set out in s 60CC(2) of the Family Law Act 1975 (Cth), and the new presumption of equal shared parental responsibility set out in s 61DA. For further discussion of these provisions, see Chapter 16.

133. Nicholson, 'Australia's Children', note 75 above.

134. P Anderson and R Wild, *Ampe Akelyernemane Meke Mekarle, 'Little Children are Sacred': Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse*, Northern Territory Government, Darwin, 2007.

135. However, note the discussion of the treatment of the best interests of children in family law decision making in Chapter 16.

the Victorian Law Reform Commission on Sexual Offences<sup>137</sup> and the reference of the Australian Law Reform Commission on Privacy,<sup>138</sup> both of which dedicated significant attention to children.

### Survival and development

**2.23** The right to survival and development under Art 6(1) of the CRC is an umbrella concept of direct relevance to all the rights to which children are entitled. The Committee has explained that it expects 'States to interpret "development" in the broadest sense as an holistic concept, embracing the child's physical, mental, spiritual, moral, psychological and social development'.<sup>139</sup> In isolation, the notion of development can suffer from the same indeterminacy or subjectivity critique that is often directed at the best interests principle. But, like the best interests principle, a child's development, while a flexible concept, must be informed by, and assessed by reference to, the other rights and their underlying values as listed in the CRC, and the empirical data rather than subjective assessments of decision-makers.

The Aboriginal and Torres Strait Islander Child Placement Principles<sup>140</sup> provide an illustration of the requirements imposed by the right to survival and development. The removal of an Aboriginal or Torres Strait Islander child from his or her parents may well be necessary to secure the physical and emotional well-being of the child. However, a failure to give any consideration as to how to protect and develop the cultural, spiritual and linguistic aspects of the child's identity in the determination of the appropriate placement would compromise the child's effective enjoyment of the right to survival and development. To take another example, an education program that made no provision for children to have unstructured free time may well satisfy the right to education under Art 32 and the obligation to facilitate the intellectual development of a child, but it would compromise the right to play under Art 31 and impede the recognised development benefits to children associated with play and leisure time.

### Participation

**2.24** Traditionally, and in many contemporary settings, especially within the law, children have remained seen and not heard. A rights-based approach seeks not only to dismantle this paradigm and give children a voice, but demands that

137. Victorian Law Reform Commission, *Sexual Offences*, Final Report, July 2004, ch 5.

138. Australian Law Reform Commission, DP 72 *Review of Australian Privacy Law*, discussion paper, September 2007, Vol. 3, Pt I.

139. Committee on the Rights of the Child, *General Comment No 5*, note 121 above, [12].

140. By way of background, see generally, Human Rights and Equal Opportunity Commission, *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, Commonwealth of Australia, 1997, Pt 6, ch 21; R Monohan, Department of Human Services, *Aboriginal Child Placement Principle Guide for Child Protection and Care Workers*, State of Victoria, August 2002; C Tilbury, *Aboriginal and Torres Strait Islander Child Placement Principle: Aims and Core Elements*, Secretariat of National Aboriginal and Islander Child Care, June 2013; Children,

the views of children have an impact on decisions regarding matters affecting them. Importantly, this impact is not necessarily determinative. Rather, due consideration must be given to a child's views in light of his or her age and level of maturity.<sup>141</sup>

Australian courts and the Australian legal system have increasingly recognised the need to listen to the views of children in matters that directly affect them.<sup>142</sup> However, the Committee has recommended that Australia 'promote the meaningful and empowered participation of all children, at all levels of government and within the family, community, and schools, including within student council bodies — with particular attention to children in vulnerable situations'.<sup>143</sup>

Although Art 12 of the CRC underscores the principle of participation, it should not be interpreted in isolation from other articles under the CRC and exists as part of a package of rights that together form what is often referred to as a 'right to participation'.<sup>144</sup> Especially relevant in this context are the rights for freedom of expression (Art 13), freedom of thought, conscience and religion (Art 14) and freedom of association (Art 15).<sup>145</sup>

The emphasis placed on the autonomy of a child under Art 12 is often seen to be in potential conflict with the priority accorded to the welfare of a child by the best interests principle under Art 3.<sup>146</sup> But it is wrong to treat the relationship between these two fundamental principles in such binary terms, and the objective is to ensure an appropriate balance between the autonomy of a child and the protection of his or her physical and mental integrity.<sup>147</sup> This process has been described by Bekelaar as dynamic 'self-determinism'<sup>148</sup> and, according to Morrow, requires 'not the straightforward delegation of decision making to children but rather enabling children to make decisions in controlled conditions the overall intention being to enhance their

141. CRC Art 12. For a detailed examination of this provision, see Committee on the Rights of the Child, *General Comment No 12 — The Right of the Child to Be Heard*, UN Doc CRC/C/GC/12, 20 July 2009.

142. See, P Parkinson and J Cashmore, *The Voice of a Child in Family Law Disputes*, Oxford University Press, Oxford, 2008; Family Law Act 1975 (Cth) s 60CD.

143. Committee on the Rights of the Child, *Concluding Observations: Australia*, note 46 above, [34].

144. Committee on the Rights of the Child, *General Comment No 12*, note 141 above, [2]–[3]; UNICEF, *The State of the World's Children 2003*, New York, 2002, pp. 24–5.

145. Other articles of the CRC that are often interpreted to require the participation of children include:

Art 9 (proceedings to separate a child from his or her parents); Art 17 (access to the media); Art 21 (adoption procedures); Art 23 (the obligation to facilitate the active participation of disabled children in society); Art 29(1) (development of a child's personality, talents, mental and physical abilities); and Art 40(2) (participation in juvenile justice proceedings).

146. M Freeman, 'Whither Children: Protection, Participation, Autonomy?' (1994) 22 *Maritoba Law Journal* 307 at 319–20; N Thomas and C O'Kane, 'When Children's Wishes and Feelings Clash with Their "Best Interests"' (1998) 6 *International Journal of Children's Rights* 137.

147. Committee on the Rights of the Child, *General Comment No 12*, note 141 above, [74].

148. J Eekelaar, 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism' in P Alston (ed.), *The Best Interests of the Child: Reconciling Culture and Human Rights*, Clarendon



capacities for mature well founded choices'.<sup>149</sup> Thus the Committee has explained that the relationship between the two provisions must be seen as 'complementary'.<sup>150</sup>

### The implementation of a rights-based approach is a process

**2.25** The conceptual understanding and practical use of human rights standards are invariably limited to their normative value. In other words, human rights are generally conceived of as an end point, with an exclusive focus placed on an investigation as to whether that point has been achieved. This is an important inquiry; however, it is unnecessarily restrictive and fails to appreciate the instrumental role of human rights in shaping the means or process by which that end point is to be achieved.

Although there is no consensus as to the specific steps required in this process,<sup>151</sup> as a minimum, the general and specific principles outlined above must inform the process. It is, therefore, buttressed by the notions of interdependence and indivisibility, accountability, universality, non-discrimination, the best interests of the child, survival and development, and participation. In terms of practical steps, the first stage of a human rights-based approach must be to undertake an evaluation and identification of children's needs by reference to their rights. This inquiry has to be linked to an identification of the various factors — social, cultural, economic, geographic, political, environmental and personal — that undermine the realisation of these rights. The collection of such data must then be used to develop a comprehensive strategy using all necessary measures — legislative, administrative, economic, educational and other social measures — to build the capacities of the people responsible for the realisation of children's rights and the elimination or minimisation of the various structural, social and institutional factors that have impeded this objective.

Many states, including Australia, are often prepared to draft policies and practices that have been designed to realise children's rights — initiatives that have been welcomed by the Committee.<sup>152</sup> However, such measures are insufficient and must be accompanied by a genuine and committed effort to implement the relevant strategies and ensure they remain subject to monitoring and evaluation in accordance with the content of the relevant normative standards. It is within this context that the Committee has recommended that Australia

consider establishing a technical body or mechanism, with adequate human, technical and financial resources, for advising the Council of Australian Governments on the coherence of the policies and strategies of its entities and ministries responsible for the implementation of the Convention throughout its territory.<sup>153</sup>

149. V Morrow, 'We Are People Too': Children's and Young People's Perspectives in Children's Rights and Decision-Making in England' (1999) 7 *International Journal of Children's Rights* 149 at 166.

150. Committee on the Rights of the Child, *General Comment No 14*, note 127 above, [43].

151. See, for example, Save the Children, *Child Rights Programming*, note 69 above; *The Human Rights-Based Approach*, note 78 above.

## The implementation of a rights-based approach must be multi-sectoral and interdisciplinary

**2.26** As a discourse, human rights — and by implication children's rights — have a reputation for being excessively legalistic. However, as the above discussion demonstrates, the effective implementation of a rights-based approach requires a much more holistic approach, involving a consultative and participatory process in which the views and interests of all relevant actors — governments, academics, professionals, community groups, religious leaders, parents and children — must be taken into account. As a consequence, a rights-based approach demands both a multi-sectoral and an interdisciplinary response. Sole or excessive reliance upon a legal response will prove to be ineffective. Thus, for example, the adoption of legislative measures with respect to child protection will never of itself remedy the deficiencies in a child protection system if insufficient resources are allocated to provide the appropriate services and supports that children and their families require beyond the courtroom. Similarly, the criminalisation of a practice such as female genital cutting may outlaw this practice within the Australian community, but it is unlikely to deter those groups that insist upon this practice and is only likely to serve to drive it underground. To take another example, the criminal justice setting may place an emphasis on rehabilitation and eschew detention in favour of social reintegration, but such an approach will be of limited value if there are inappropriate or inadequate education, housing and health services to assist a young offender in his or her reintegration efforts.

## The implementation of a rights-based approach must be culturally sensitive and locally owned

**2.27** International human rights are invariably subject to the criticism that they seek to impose universal standards that reflect and prioritise Western values at the expense of non-Western values. Children's rights are certainly not immune from such accusations.<sup>154</sup> A discussion of the cultural relativist debate is not necessary here.<sup>155</sup> Rather, it is sufficient to make the following observations. First, there is always the risk that human rights — and, indeed, children's rights — can be used to impose agendas and values that are inappropriate and ineffective in responding to the specific cultural needs of children. However, the requirement of participation, which is a critical feature of a genuine rights-based approach, demands that the implementation of a rights-based approach must be sensitive to, informed by and reflect the cultural needs and interests of children.

As a consequence, although human rights are universal, a degree of flexibility is granted to states in the implementation of measures to secure children's rights in recognition of the need to accommodate cultural differences. A global one-size-fits-all approach is, therefore, not appropriate. At the same time, this flexibility does not allow

154. V Pupavac, 'The Infantilization of the South and the UN Convention on the Rights of the Child' (1998) 3 *Human Rights Law Review* 3; S Harris-Short, 'Listening to "the Other": The Convention on the Rights of the Child' (2001) 3 *International Journal of Human Rights* 1, note 204.

for cultural or traditional practices to be invoked as a defence to violations of children's rights. Indeed, the CRC demands under Art 24(3) that 'States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children'.

However, the process and measures required for the elimination of such practices are not to be imposed or defined exclusively by reference to the values and expectations of those in a position of power. On the contrary, a rights-based approach favours collaboration and consultation rather than the imposition of hegemonic strategies to address the violations of children's rights. Strategic partnerships both between states and within states at the local, regional and national level are critical to this process, which must be participatory in design, implementation and evaluation and locally owned if it is to be effective and sustainable.

The intervention of the Federal Government in the Northern Territory in 2006–7 provides a vivid illustration of these principles, albeit by way of bad practice. The report of Wild and Anderson, *Little Children are Sacred*,<sup>156</sup> confirmed the existence of widespread sexual abuse of children within Aboriginal communities. In response, the Federal Government adopted a strategy that failed to incorporate any of the recommendations of this report. Indeed, it designed an approach without any genuine consultation with Aboriginal people, despite the recommendations of Wild and Anderson that such a measure was of 'critical importance'.<sup>157</sup>

### A rights-based approach requires the reallocation of power and resources

**2.28** Ultimately, the adoption of a rights-based approach as a paradigm to address children's diverse and special needs is about the reallocation of resources and power within communities. International law concedes that the realisation of economic and social rights is progressive and subject to the availability of resources. As a consequence, states are quick to justify their failure to secure the enjoyment of rights as a product of their limited resources. The Committee, however, has stressed that when allocating resources, '[t]he budget process should ensure that the rights of boys and girls are a primary consideration and realize necessary public spending to respect, promote, protect and fulfil those rights at national and sub-national levels'.<sup>158</sup>

Despite such a plea, in practice the political process will invariably determine the way in which scarce resources are allocated, laws are made, and policies and procedures are designed and implemented. A rights-based approach requires the recognition of this reality and a preparedness to challenge, dismantle and reconfigure existing power relations and structures within the communities where the decisions affecting children's rights are made. It is an ambitious task and not easily achieved, especially

<sup>156</sup> Anderson and Wild, *Little Children are Sacred*, note 134 above.

<sup>157</sup> Ibid. Recommendation 1.

given the reluctance to embrace the notion of children as rights bearers. It must begin, however, by reorienting the terms of the debate towards the normative standards to which all children are universally entitled.

## Conclusion

**2.29** A few years ago the former United Nations High Commissioner for Human Rights, Louise Arbour, declared that:

Today global awareness of human rights including children's rights is at an all time high ... The Convention has brought about an understanding that children are not the property of parents or guardians, not objects of necessity or goodwill but are rights holders ...<sup>159</sup>

Awareness of the concept of children's rights may well be greater today than at any other time in history, but it is wrong to assume that this has translated into the understanding of children as asserted by the former High Commissioner. The reality remains far removed from the ideal in most countries and Australia is no exception.

Although the idea of children as rights bearers remains contested and the full realisation of these rights is yet to be achieved, the act of granting children human rights confers on them the right to claim their legitimate entitlements and, in doing so, reconceptualises the power relationship between children, adults and the state. Importantly, it does not privilege children to the exclusion of all other interests within society — a child's best interests are in most circumstances only to be a primary rather than the overriding consideration.<sup>160</sup> Such an approach does, however, demand that children can no longer be ignored, devalued or marginalised in legal, policy and social debates. Nor can the rationale with respect to action for children be based on their potential as social capital.

A rights-based approach, therefore, demands a new way of thinking that challenges and threatens existing social structures and power relations. It is about confronting the marginalisation, paternalism and benevolence that has characterised their treatment; recognising their dignity, entitlements, capacity and evolving autonomy; accepting social responsibility and burden sharing in relation to the realisation of their entitlements; and creating participatory, sustainable and empowering processes to ensure the realisation of their rights which have been accepted by the Australian Government upon its ratification of the CRC.

<sup>159</sup> L. Arbour, 'Happy Birthday!' in J. Connors, J. Zermatten and A. Panayotidis (eds), *18 Candles: The Convention on the Rights of the Child Reaches Majority*, Institut International des Droits de L'Enfant, Sion, 2007, p. 7.

<sup>160</sup> See *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166; [2011] UKSC 4 (finding that a child's rights did not automatically trump other considerations within the context of

## Further reading

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**The following journals will provide further useful articles:**

*International Journal of Children's Rights*  
*International Journal of Law, Policy and the Family*

## Chapter 3

# The 'Child' In Utero and Ex Utero<sup>1</sup>

Pam Stewart and Anita Stuhmcke

## Introduction

**3.1** At common law, a human being does not attain legal rights<sup>2</sup> or legal 'personhood' until he or she has been 'born alive'. A legal person does not exist until a child is born and living independently of its mother.<sup>3</sup> It follows, therefore, that an unborn child cannot have the legal rights that are afforded to 'legal persons'.

This traditional assumption permeates the common law — both civil and criminal. But its allure lies in its simplicity rather than its accuracy; and in part it is a legal fiction that hides both the pragmatism of the common law in finding exceptions to the general rule and the growing legislative intervention that is changing both the legal functions of creating rights and affording protection to the unborn child, embryo or fetus.<sup>4</sup>

The classification of the fetus in law has always been a work of legal fiction, as recognised in 1989 by the Supreme Court of Canada in *Tremblay v Daigle*:<sup>5</sup>

The tasks of properly classifying a foetus in law and in science are different pursuits. Ascribing personhood to a foetus in law is a fundamentally normative task. It results in the

1. This chapter is based on an article written by the authors entitled 'Legal Pragmatism and the Pre-birth Continuum: An Absence of Unifying Principle' (2007) 15(2) *Journal of Law and Medicine* 272. Significant parts of the article are reproduced with permission of the Lawbook Co, part of Thomson Legal & Regulatory Ltd: <http://www.thomson.com.au> (accessed 5 August 2016). For further discussion of all the areas covered in that article which could not be covered in this chapter (eg immigration, contracts, family law, infertility statutes, ethical regulation of fetal tissue transplants, sport and social security law), please see the published article.
2. This chapter does not cover other 'non-legal' developments, such as professional position papers: see AMA, *Maternal Decision-Making* — 2013, [www.ama.com.au](http://www.ama.com.au) (accessed 5 August 2016) or commissioned reports such as J Seymour, *Fetal Welfare and the Law*, A Report Commissioned by the Australian Medical Association 1995.
3. *Paton v British Pregnancy Advisory Service Trustees* [1979] 1 QB 276, cited with approval in *Attorney-General (Qld) (Ex Rel Kerr) v T* (1983) 46 ALR 275 at 277 per Gibbs CJ.
4. Terminology in this field is difficult, due both to potential emotional 'bias' and the lack of scientific/legal/moral/religious agreement. For these reasons, this chapter will use a combination of terms such as 'unborn child', 'embryo' and 'fetus', except where the terms are defined in particular areas of law.