

**THE NON-GOVERNMENT REPORT**  
ON THE IMPLEMENTATION OF THE UNITED NATIONS CONVENTION ON THE

# RIGHTS OF THE CHILD

I N A U S T R A L I A



May 2005



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For ease of cross-referencing, this report adopts the structure and heading style of the Australian Government's *Combined Second and Third Reports*.

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- Patmalar Ambikapathy (Previous Commissioner for Children Tasmania)
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- Arthur Cheng
- Child Rights Working Group under the auspices of the Australian Council for International Development comprised of representatives from the Australian Council for International Development, Amnesty International Australia, Baptist World Aid, CCF Australia, Child Wise, Christian Blind Mission International, Oxfam CAA, Plan Australia, Save the Children, TEAR, UNICEF, World Vision Australia
- Donor Conception Support Group of Australia Inc.
- Inner West Aboriginal Community Company - Youth United for our Future
- Amanda Kerslake

- Law Institute Victoria
- Gwenn Murray
- National Association for Prevention of Child Abuse and Neglect (NAPCAN)
- New South Wales Youth Sector Consultation organised by the Youth Justice Coalition (YJC) and the Youth Action and Policy Association (YAPA) incorporating contributions from Association of Children's Welfare Agencies (ACWA); Bankstown Multicultural Youth Service; Barnardo's Australia; Cellblock; CREATE; Defence for Children International (Australia); Fairfield Migrant Resource Centre; Illawarra Legal Centre; The Junction Works Inc.; Macarthur Legal Centre; Marrickville Legal Centre; National Children's and Youth Law Centre; New South Wales Ombudsman; New South Wales Commission for Children & Young People; Redfern Waterloo Street Team: Redfern Legal Centre; Shopfront Youth Legal Centre; South Sydney Youth Service; University of Western Sydney; Wirringa Baiya Aboriginal Women's Legal Service; YAPA.
- New South Wales Commission for Children & Young People, Young People's Reference Group.
- Queensland Consultation organised by the Youth Affairs Network of Queensland (YANQ) and the CROC Working Party – incorporating contributions from: First Contact Youth Corporation, ATSI Youth Coalitions, YANQ, Young Workers Advisory Service, Queensland Deaf Society, Bravehearts, Youth Advocacy Centre, Deception Bay Community Youth Program, Legal Aid Queensland, Youth Justice Coalition, Sisters Inside, Queensland Advocacy Incorporated, ATSIWALS, Logan Youth Legal Service and YFS (Logan City) Inc.
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- Larissa Scott (Advocacy Officer, UNICEF Australia)
- Southern Communities Advocacy Legal & Education Service (SCALES)/Anna Copeland
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- Consultation sessions in Victoria were organised by the Youth Affairs Council of Victoria and Youthlaw and involved two main groups. The first involved 23 representatives from the child, youth and family sectors who worked in direct service or policy advocacy roles including state schools, community childcare, residential care, courts, multicultural, homelessness, early childhood, juvenile justice and foster care. The second involved 20 representatives from the legal sector representing community legal centres, Legal Aid, private practice, legal academia, courts and legal and social rights policy.
- Western Young People's Independent Network
- Youth Coalition of the Australian Capital Territory

- Youth Legal Service Inc. Western Australia
- Youth Network of Tasmania and the Commissioner for Children Tasmania, Mr David Fanning consultation incorporating contributions from young people and those who work with young people, including members of the Tasmanian Youth Consultative Committee and participants at the Develop, Empower, Network, Inspire, Motivate 2004 Youth Participation Conference
- Youthlaw

The staff and volunteers of the National Children's and Youth Law Centre and the volunteers from Defence for Children International Australia compiled this report.

## ABOUT NCYLC AND DCI AUSTRALIA

### **The National Children's and Youth Law Centre**

The National Children's and Youth Law Centre (NCYLC) is an independent non-profit community legal centre incorporated in New South Wales and enjoying charitable status. It was established in 1993 with the aim of working to improve conditions and opportunities for the children and young people of Australia with an emphasis on law reform and legal advocacy.

From its inception the NCYLC has promoted the Convention on the Rights of the Child (the Convention) and makes reference to it in all its submissions and published discussion papers. The NCYLC had input into Australia's first report under the Convention by contributing to the Government report.

### **Defence for Children International (Australia)**

The Defence for Children International (DCI) is a global chain of children's rights agencies recognised by the United Nations. The Convention sets out principles, such as the rights of children to protection, provision, promotion and participation and these guide the actions and campaigns conducted by DCI.

DCI Australia is the local link in the DCI network and is a national organisation independent of government and reliant on subscriptions and donations. It has no core funding and no paid staff and apart from some specifically funded projects in the past, all activities are undertaken by volunteers from within DCI Australia ranks.

## SUMMARY

This non-government report to the United Nations Committee on the Rights of the Child responds to the Australian Government's *Combined Second and Third Reports* and makes recommendations to further Australia's compliance with the United Nations Convention on the Rights of the Child. This report was prepared by the National Children's and Youth Law Centre and Defence for Children International (Australia) following consultations with a wide range of people working with children and young people in Australia across many sectors as well as some participation and input from children and young people themselves.

It is now 15 years since Australia ratified the convention and nearly ten years since the Australian Government presented its first periodic report to the Committee (December 1995). Defence for Children International (Australia) presented the first non-government report to the committee in 1996.

Australia has made some advances, and there are numerous examples of governments and communities developing programs and projects that provide support for children and their families. But the lack of an effective national commitment to the Convention, a national Commissioner for Children, and a national plan of action for children inhibits the development of a national collaborative process to evaluate, share information, learn lessons and promote best practice.

The non-government sector shares the Committee's concern that Australia's ratification of the Convention on the Rights of the Child does not give rise to legitimate expectations that an administrative decision will be made in conformity with the requirements of the Convention. Under the present constitutional arrangements, unless the Australian Government explicitly enacts legislation to implement its obligations under an international treaty such as the UN Convention on the Rights of the Child, the only effect of the Convention is indirect, for example, by affecting the way a court may interpret the law about procedural fairness in relation to the doctrine of natural justice. The Australian Government has shown little interest in developing a domestic human rights regime to implement its human rights obligations under international law, and has little economic or political incentive to do so in the present circumstances.

The non-government sector is concerned that the Australian Government was initially tardy, and now seems inclined to retreat from its commitment to the Convention and other international human rights vehicles. Given the lack of any constitutional or statutory bill of rights or other domestic regime for giving local effect to the Convention, the other important uses of the Convention are educational and bench-marking. The deliberations of the Committee on the Rights of the Child will provide an important reminder to all governments in Australia that children have survival, protection, development and participatory rights and the publication of its findings will provide a significant rallying point and yardstick for children's advocates.

While the Australian Government's report outlines numerous positive examples of policy initiatives and programs, it falls well short in providing substantial evidence of accountability or review and evaluation. The gaps and priorities for action are clear - the substandard living conditions of Indigenous children equivalent in many cases to conditions more commonly seen in developing countries remains Australia's greatest shame. Despite increasing awareness of the importance of self-determination, the Australian community continues to repeat the mistakes of previous generations, and to make new ones. Despite Australia's wealth, Indigenous children are not receiving effective health care or education, and they are many times over-represented in the child protection, out-of-home care and juvenile justice systems. The Federal Government has failed to explain why Indigenous children, when compared with their non-Indigenous peers, do not have the benefits of the excellence of education, health and welfare that the non-Indigenous community takes for granted.

The Federal Government has failed to explain why it persists in a policy of arbitrary immigration detention of children in adult prisons for long periods of time in clearly damaging circumstances. This and the survival of mandatory sentencing in Western Australia criminal justice indicate that Australia fails to maintain a commitment to the use of detention as a measure of last resort.

A consistent theme in the submissions to, and from the consultations for this report, was a very great concern about the ad hoc service delivery for children and their communities, and a failure to achieve systemic change and greater equity and equality of opportunity. Increasing numbers of children are identified as abused or neglected, or homeless, but for many, being identified in this way does not solve their problems or meet their needs. There is a shortfall in the delivery of services for the most vulnerable children in a country which is wealthy in world terms. Many children with a disability, mental health problems or subjected to violence or experiencing homelessness are not getting the help they need to ensure healthy development.

While there have been a number of developments in relation to children's participation, there are significant restrictions and tokenistic or manipulative processes in some important areas of children's and young people's involvement in society. Some Australian children and young people are still subject to discrimination and are not yet treated with respect by the education, health care, justice and social security systems.

This report and the recommendations it contains address the areas of non-government concern, following the structure of the Australian Government report, and point to the need for systemic and specific changes to improve Australia's compliance with the Convention.

## RECOMMENDATIONS

**We commend this report to the UN Committee on the Rights of the Child and make the following recommendations:**

### THEME I - GENERAL MEASURES OF IMPLEMENTATION

#### **A IMPLEMENTATION OF THE CONVENTION ON THE RIGHTS OF THE CHILD (Article 4)**

1. Each State, Territory and the Federal Government should establish a Children and Young People's Commission as an independent statutory authority. The Commission would provide the monitoring mechanisms identified by the Committee on the Rights of the Child in paragraph 9 of its Concluding Observations.
2. That Australia develop a National Agenda for Children and National Action Plan, with specific goals, strategies and guaranteed resources, that specifically addresses the implementation of the Convention across States, Territories and the Commonwealth.
3. As part of an education strategy from a National Agenda for Children, the Human Rights and Equal Opportunity Commission should be sufficiently resourced to mount a national community education campaign to foster understanding of the Convention as proposed by the Committee on the Rights of the Child in paragraph 10 of its Concluding Observations.
4. To ensure the ongoing implementation of the Convention, that Australia adopt the recommendations identified by the Committee on the Rights of the Child in paragraphs 27 and 28 of its Concluding Observations to support the participation and expression of children in daily life.
5. That Australia's international aid program adopts the recommendations identified by the Committee on the Rights of the Child in paragraph 25 of its Concluding Observations to use the Convention as a framework.
6. As identified by the Committee on the Rights of the Child (paragraph 7) of its Concluding Observations, that Australia develop and enact mechanisms for the protection of rights under the Convention in all domestic jurisdictions and to create and implement the legitimate expectation that administrative decisions will be made in compliance with the Convention.

### THEME II – DEFINITION OF THE CHILD (ARTICLE 1)

7. That the Queensland Government immediately pass a regulation to include 17-year-olds in the juvenile justice system.

### THEME III – GENERAL PRINCIPLES

#### **A PRINCIPLE OF NON-DISCRIMINATION (Article 2)**

8. That State, Territory and Federal Governments review relevant anti-discrimination legislation to ensure that the right to freedom from age discrimination in all areas of life is protected.
9. That the Federal Government review and repeal exemptions currently included in the Age Discrimination Act 2004 (Commonwealth) that permit age discrimination across a vast range of areas and conduct an education program specifically targeted at children
10. That States and Territories give urgent consideration to revising the relevant education and anti-discrimination Acts to require that private schools be subject to State and Commonwealth anti-discrimination legislation.



## **D RESPECT FOR THE VIEWS OF THE CHILD (Article 12)**

### **Children and the Legal System - Family Law Proceedings**

11. That there be a rebuttable presumption that for all children whose parents are engaged in disputes about contact and residency in family law, a separate representative is appointed.
12. Implement the major recommendations of the Australian Law Reform Commission in relation to children's representation in family law proceedings.<sup>1</sup>
13. That the Family Law Act 1975 fully protect the 'best interests' of the child by giving priority to children's physical safety, well-being and need to be protected from violence over and above considerations such as shared parental responsibility

### **Children and the Right to Vote**

14. That a multi-party committee, with significant representation of children from a variety of age and cultural groups, be established to consider the ramifications of lowering the voting age and suggesting an appropriate age at which children should be able to vote.

## **THEME IV - CIVIL RIGHTS AND FREEDOMS**

### **B PRESERVATION OF IDENTITY (Article 8)**

#### **Loss of Citizenship**

15. That all Australian governments takes steps to establish a national integrated births, deaths and marriage notification database.
16. That on request all young people be given their first set of documents birth certificate free of any charges or levies.
17. That on request all young people be given a passport free of any charges or levies.

#### **Indigenous children and Young People**

18. That all Australian governments acknowledge their role and responsibility in respect to the "stolen generation" and the injuries that the people subject to that policy suffered in respect to their loss of identity, name, culture, language and family, and that appropriate reparations are made.
19. That all Australian governments acknowledge and take all necessary steps to implement the recommendations of the Committee on the Rights of the Child on its Day of General Discussion on the Rights of Indigenous Children.
20. That all Australian governments take the necessary immediate steps to rectify the significant disadvantage facing our Indigenous communities, including the following:
  - (a) urgently allocate additional funding to Indigenous health.
  - (b) implement policies and action plans to ensure immediately available and accessible health care for all Indigenous people.
  - (c) address the violations of Indigenous people's right to housing and address discrimination in the administration of public housing.
  - (d) abolish the tendering out of Indigenous legal services.

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<sup>1</sup> See the full text of the Recommendations at 274-85.

- (e) develop national principles and action plans for culturally appropriate child protection
- (f) where out-of-home placement is necessary, ensure Indigenous children and young people are placed in Indigenous care.
- (g) focus on preventive programs to reduce the over representation of Indigenous people in the criminal justice system and of Indigenous children/young people in the juvenile justice system.
- (h) offer greater access to diversionary programs within the juvenile justice system.
- (i) provide cultural awareness training for all working in the juvenile justice system.
- (j) ensure the use of interpreters when required in the juvenile justice system.
- (k) consult with National Network of Indigenous Women's Legal Services and other Indigenous organisations to find an alternative solution to penalty-based welfare/benefit provision.
- (l) ensure meaningful participation of Indigenous peoples in decision-making at all levels of government.

21. That the Government implement the recommendations from the 1997 Bringing Them Home Report.

#### **D FREEDOM OF ASSOCIATION AND PEACEFUL ASSEMBLY (Article15)**

22. That consistent with the concern of the Committee expressed in paragraph 16 of its Concluding Observations, all Australian governments remove policies, legislation, regulation and by-laws that establish local curfews and other restrictions on the freedom of association and right of assembly of children and young people particularly in public spaces.
23. That all Australian governments ensure that the public health issue of solvent abuse, particularly by indigenous children, is addressed by means other than policing by the criminal law.

#### **Anti-terrorism Legislation**

24. That the Federal and State Anti-Terrorism laws be amended so that:
- (a) children under 18 cannot be detained and questioned by ASIO or other relevant police authorities unless they are suspected of having committed a relevant offence.
  - (b) children under 18 are given access to legal advice and an independent support person when being interviewed by ASIO or other relevant police authorities.
  - (c) covert search warrants that include property belonging to children cannot be issued.
  - (d) children under 18 are permitted to discuss with family and other support people what has occurred during questioning by ASIO or other relevant police authorities if so questioned.
  - (e) adequate independent complaints mechanisms are established and made accessible to children.

#### **E PROTECTION OF PRIVACY**

25. That the Queensland Government immediately repeal the "naming orders" provisions in the Juvenile Justice Act 1996.
26. That all Australian governments develop policies and practices (including for schools, training centres and detention centres) to ensure that the privacy of all children and young people is protected under the Federal Government's privacy legislation.

27. That all funding contracts of Australian governments for the provision of services including for education, care and protection of children and young people specify requirements that provide for the protection of children under the Federal Government's privacy legislation.

## **G THE RIGHT NOT TO BE SUBJECTED TO TORTURE OR OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (Article 37(A))**

### **Female Genital Mutilation**

28. That the Federal Government investigates the extent of female genital mutilation (including by sending daughters overseas for the procedure) in Australia and develop and implement necessary information strategies to prevent the practices.

### **Corporal Punishment**

29. That, consistent with the recommendations of the Committee outlined in paragraph 26 of its Concluding Observations, all Australian governments take appropriate measures to prohibit corporal punishment in private schools.

30. That, consistent with the recommendations of the Committee outlined in paragraph 26 of its Concluding Observations, all Australian governments take appropriate measures to prohibit corporal punishment at home.

### **Children and Young People in Juvenile Justice Detention**

31. Noting the concerns expressed by the Committee on the Rights of the Child in paragraph 22 of its Concluding Observations that legislation enshrining mandatory sentencing in Western Australia be immediately repealed.

### **School Bullying**

32. That all Schools of Education in universities include pre-service training for teachers, directed specifically at bullying and related conflict resolution.

33. That schools are required by the Department of Education to carry out periodic surveys among students, staff and parents to discover more about the sorts of peer relations being fostered by the school. These surveys – in accordance with Article 17 – would allow students the opportunity to express their views and describe their experiences.

34. That research is funded to explore the nature of peer relations among children and young people in order to assist children and young people in the development of skills in dealing with bullying and harassment and in peer support mechanisms.

### **Sterilisation of Children and Young People with a Disability**

35. That Australian governments develop uniform national legislation that is protective of children and young people with disability in relation to sterilisation procedures; that is consistent in the law and procedure across jurisdictions; and that protects children and young people taken outside Australia, expressly for the purpose of undergoing sterilisation procedures.

## **THEME V - FAMILY ENVIRONMENT AND ALTERNATIVE CARE**

36. That more subsidised places be funded to provide child care services for disadvantaged children and those at risk.

### **I ABUSE AND NEGLECT**

37. That all Australian governments work together to develop a national coordinated approach to service delivery and monitoring and evaluation of services for vulnerable children and their families.

## **Indigenous Children and Young People**

38. That, given the over-representation of Indigenous children and young people in the child protection and out-of-home care systems, the Government prioritise working with, and continue to work with Indigenous community leaders, agencies and communities to establish a range of best practice solutions for Indigenous children and young people.

## **Domestic violence and services to children**

39. That programs such as the Magellan and Columbus programs in the Family Courts be expanded nationally and that state and territory child protection services be required and adequately resourced to be involved in these programs.
40. That all Australian governments support in the development of policy and practice that as a general principle in the delivery of community services particularly in relation to the provision of housing and support from domestic violence programs, children and young people should be recognised as clients in their own right and entitled to access services.

## **J PERIODIC REVIEW OF PLACEMENT**

41. That an audit of the care and circumstances of all children placed in care, including children with a disability and in voluntary care, be conducted in each state.
42. That a nationally consistent approach be developed to ensure that all children placed in care have a periodic review of their treatment and all other circumstances relevant to their placement.
43. That all Australian governments be required to report on these measures on a regular basis as part of the Productivity Commission's report on government services.

## **THEME VI – BASIC HEALTH AND WELFARE**

### **A THE RIGHT TO LIFE, SURVIVAL AND DEVELOPMENT (Article 6)**

44. That there be significant investment in school and day-care nutritional education and physical activity.
45. That legislation be implemented to limit advertising and marketing of “junk” foodstuffs to children
46. That Government direct increased resources to evidence-based actions to prevent injury of Indigenous children and children from low socio-economic backgrounds, particularly those from rural areas.
47. That Government make dramatic improvement to the poor health of Indigenous Australian children an urgent national priority in terms of policy, resources and programs and a reason to remove obstacles to collaboration and effectiveness across all areas of Government activity.
48. That Government seek to share the responsibility with Indigenous people, health providers, across governments and government agencies, acknowledging that empowerment and self-determination of Indigenous Australians is necessary to achieve lasting improvement.
49. That Government acknowledge that a major cause of child ill-health is malnutrition of children who live in remote Indigenous communities, and target nutrition programs to such children.
50. That Government actively support research/intervention programs such as those being trialled in the Northern Territory (i.e. ‘Strong Women, Strong Babies, Strong Culture Program’) and other creative and locally-tailored evidence-based interventions that may effectively improve the health of children.

51. That the Government implement the recommendations of the National Aboriginal Community Controlled Health Organisation report, "What's Needed to Improve Child Health in the Aboriginal and Torres Strait Islander Population".
52. That all Australian governments develop and implement social and economic policies that address the continuing health inequalities in Australian children.
53. That all levels of Government collaborate and cooperate to provide satisfactory solutions to the whole problem of child poverty and its associated health problems.
54. That all Australian governments address the specific needs of children of imprisoned parents and of children in detention.
55. That all Australian governments target resources for research and effective interventions for suicide prevention in indigenous communities, amongst rural and remote-living children and homeless youth to ensure the trend of decreasing rates of youth suicide continues.
56. That Australia ensures a nationally consistent approach to the collection of data on childhood disability using internationally accepted definitions of 'disability' and the Convention definition of childhood that ensures the collection of appropriate data about disability in children who are Indigenous, from culturally and linguistically diverse backgrounds, and living in rural and remote locations.
57. That a nationally consistent approach be developed to the provision and timely replacement of aids, equipment and technical assistance to all children with disabilities without un reasonable restrictions or eligibility requirements and that do not discriminate according to age, impairment or geographic location.
58. That a nationally consistent approach in out-of-home care and child protection data collection be developed to include a disability identifier.
59. That particular attention is given to equitable distribution of adequate respite for parents of children with disabilities especially carers who are disadvantaged by ethnicity, Indigenous status and remote location
60. That there be a national program of mental health services for children and young people, especially services for children in rural and remote areas and culturally appropriate services for indigenous children that have regard to:
  - (a) the need for specific in-patient units for young people with acute mental illnesses.
  - (b) education programs on mental health, self-harm and suicide prevention, particularly in rural and remote areas.
  - (c) specialist training for child and adolescent mental health practitioners.
  - (d) improved provision of GP mental health services for children and young people.
61. That there be a continued commitment to school-based counselling and referral services.
62. That drug and alcohol issues in children and young people be continually monitored.
63. That health intervention for all mental illness (including substance misuse) be premised on harm minimisation.
64. That the prescription of psychotropic medications to children be constantly reviewed and guidelines developed.

## **D THE RIGHT TO BENEFIT FROM SOCIAL SECURITY (Article 27)**

65. That the rate of Youth Allowance match that of the adult unemployment benefit and indexed twice yearly in line as other income support payments are.
66. That the age at which 'independence' is recognised for Youth Allowance be set at 18 rather than 25.
67. That the parental income test threshold for Youth Allowance be increased to at least the Family Tax Benefit income threshold (i.e. from currently \$28,150 to FTB which is currently \$32,485) and preferably to a realistic level.
68. That no social security penalty should result in a child being left without income support.
69. That the Government remove the restriction on Special Benefit not being available to children who are full time students.

## **E THE RIGHT TO AN ADEQUATE STANDARD OF LIVING**

70. That the Supported Accommodation Assistance Program recognise children under 16 without accompanying adults as clients.
71. That a nationally coordinated approach be developed to address the needs of homeless children under 16.
72. That adequate crisis accommodation for homeless children and families be planned, founded and funded.
73. That the Government ensure that state and territory child protection systems are able to provide suitable supported accommodation for any unaccompanied homeless children under 16 within a national framework led and coordinated by the Commonwealth.
74. That the Government address the needs of homeless children with complex issues through appropriate crisis accommodation, counselling and support services.
75. That the Government increase affordable housing options for Indigenous communities, and
  - a) Ensure public housing options can cater for large family sizes and visiting family.
  - b) Resource Indigenous-specific homelessness services.
  - c) Provide culturally appropriate services for Indigenous children.
  - d) Draw on good practice service responses identified in recent studies.
  - e) Fund further research into the specialised needs of Indigenous children who are homeless and/or public place dwellers.
  - f) Address Indigenous disadvantage in health, education, welfare, the criminal justice system, cultural heritage and land rights that contributes to Indigenous homelessness.
76. That Australian governments increase government benefits for homeless children and young people.
77. That Australian governments allow flexibility for homeless people who are unable to meet activity agreements and are more adversely affected by penalties.
78. That an integrated national strategy be developed to address the disengagement of vulnerable children from schooling.

79. That program funding be increased by 40% for 2005-2010 to sustain current service levels to homeless children.
80. That homelessness policy development and service delivery be coordinated with other relevant socio-economic policy and service systems.
81. That Australian governments work together to develop a fully resourced National Homelessness Action Plan, which sets targets for the reduction of homelessness in Australia.

## **THEME VII - EDUCATION, LEISURE AND CULTURAL ACTIVITIES**

### **A EDUCATION, INCLUDING VOCATIONAL TRAINING AND GUIDANCE (ARTICLES 28 AND 29)**

#### **Indigenous Education**

82. That the State, Territory and Federal governments address the complex problems which prevent Indigenous children and young people from achieving excellence in education in an holistic framework which recognises the principles of self-determination.
83. That the State and Territory and Federal Governments undertake inquiry to explain and address the unacceptably high suspension rates of Indigenous children and young people from school.

#### **Children with Disabilities**

84. That all Australian governments develop and implement programs which ensure effective access to and receipt of education for all children with disabilities.
85. That particular attention be given to ensuring equitable opportunities for girls and young women with disabilities in education, training and employment programs.
86. That particular attention be given to ensuring transition to further education and training and/or employment opportunities for young people with disabilities.
87. That all Australian governments fund more programs that enable disadvantaged children to access sport, play and recreation.

## **THEME VIII - SPECIAL PROTECTION MEASURES**

### **A CHILDREN IN SITUATIONS OF EMERGENCY**

88. That all Australian governments implement the recommendations of the Human Rights and Equal Opportunity Commission Report 'A Last Resort?'

and in particular.

89. Recommendation 2 that Australia's immigration detention laws should be amended, as a matter of urgency, to comply with the Convention on the Rights of the Child. In particular, the new laws should incorporate the following minimum features:
  - (a) There should be a presumption against the detention of children for immigration purposes.
  - (b) A court or independent tribunal should assess whether there is a need to detain children for immigration purposes within 72 hours of any initial detention (for example for the purposes of health, identity or security checks).
  - (c) There should be prompt and periodic review by a court of the legality of continuing detention of children for immigration purposes.

- (d) All courts and independent tribunals should be guided by the following principles:
- i. detention of children must be a measure of last resort and for the shortest appropriate period of time.
  - ii. the best interests of the child must be a primary consideration.
  - iii. the preservation of family unity.
  - iv. special protection and assistance for unaccompanied children.
- b. Bridging visa regulations for unauthorised arrivals should be amended so as to provide a readily available mechanism for the release of children and their parents.

## **B CHILDREN AND THE ADMINISTRATION OF JUVENILE JUSTICE**

90. That all Australian Governments review and implement as necessary the recommendations of the joint Human Rights and Equal Opportunity Commission and Australian Law Reform Commission Report (1997) *Seen and Heard: Priority for children in the Legal Process*.
91. That Recommendation 196 of the joint ALRC/HREOC report *Seen and Heard* that the age at which a child reaches adulthood for the purposes of the criminal law should be 18 years in all jurisdictions is endorsed.
92. That the New South Wales Government return the Kariong Juvenile Detention Centre to the status of a juvenile detention centre under the management of the Department of Juvenile Justice while it detains children under the age of 18 years and ensures that it operates in accord with Australia's international obligations and standards for the administration of juvenile justice.
93. That the Australian Government withdraws its reservation to compliance with Article 37 (c) of the Convention on the Rights of the Child.
94. That the Northern Territory Government immediately establish a juvenile justice system that accords with the principles of the Convention.
95. That Australian governments cease using the infringement system and financial penalties to prosecute children for offences, and ensure that all offences are dealt with under a juvenile justice system in accordance with the Convention that promotes diversionary options.

### **Indigenous People in the Juvenile Justice System**

96. That research be undertaken consistent with the Committee's recommendations to determine the reasons for the disproportionately high rates of incarceration of Indigenous young people, including whether the attitudes of law enforcement officers may have an impact, and the impact of legislation such as public space and mandatory sentencing.
97. That long-term funding and support be given to Indigenous Community Justice models particularly in rural and remote communities.

### **Diversion**

98. That national research be undertaken to consider the effectiveness of diversionary practices, process and programs.



## **Children and Young People with Disability and Juvenile Justice**

99. That Australian governments develop comprehensive social support programs and service systems to prevent the circumstances that contribute to children with disability from entering the juvenile justice system.

## **C CHILDREN IN SITUATIONS OF EXPLOITATION, INCLUDING RECOVERY AND SOCIAL REINTEGRATION (Article 39)**

### **1 Economic Exploitation, including Child Labour**

100. Noting the concern expressed by the Committee at Paragraph 11 of its Concluding Observations that the Australian Government conduct a national inquiry into child labour in Australia, encompassing comprehensive research, debate and consultation with health and welfare professionals, industry bodies, and key stakeholders, including children.

101. Following such an inquiry, that Australian Governments enact or amend legislation affecting child workers to ensure compliance with the Convention. In particular, enact or amend legislation to:

- (a) provide for a minimum age for admission to employment, with possible exceptions for small amounts of light work, entertainment, and employment in a family business.
- (b) prohibit or restrict the employment of children in particular work or industries that are inherently hazardous or harmful for children.
- (c) regulate the hours and conditions of child employment.
- (d) provide special occupational health and safety protection for child workers by imposing specific obligations on employers/supervisors of children in relation to hazard identification, risk assessment and risk reduction, covering matters such as occupational health and safety training and supervision.
- (e) establish a specialised and adequately resourced body/ies to be specifically responsible for children and young people at work.

102. That all Australian Governments in addressing discrimination on the basis of age commit to replacing age-based rates of pay with competency-based rates of pay.

### **2 Sexual Exploitation and Sexual Abuse (Article 34)**

103. That all Australian governments develop child-friendly approaches for child witnesses in child sexual assault prosecutions following the lead of Western Australia.

## **D CHILDREN BELONGING TO A MINORITY OR INDIGENOUS GROUP (Article 30)**

104. That recommendations 43 and 44 of NISATSIC which address the negotiation of national legislation to establish a framework for negotiating agreements with Aboriginal and Torres Strait Islander communities with respect to the needs of their children be implemented.

105. That enjoyment of cultural rights under Article 30 is a prerequisite to, and integral to, Aboriginal and Torres Strait Islander children enjoying all their rights under CROC. To address the complex problems which prevent Indigenous children from enjoying their rights, primary decision-making responsibility for the design, delivery, financial management and evaluation of all services provided to Indigenous children and families must be transferred to Indigenous communities.

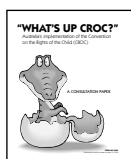
## HOW THIS REPORT WAS WRITTEN

### UNICEF Australia Taskforce on Child Rights

In 1998 a group of peak non-government organisations convened as the UNICEF Australia Taskforce on Child Rights (the Taskforce) chaired by Justice Einfeld. The purpose of the taskforce was to assist the Australian Government in the preparation of its second report on the Convention to the Committee. Some members of the Taskforce raised concerns about the process and the Government's responsiveness to the non-government contributions and criticisms.

### Decision to prepare a separate Non-government Report

As a result of the concerns raised by members of the Taskforce, the NCYLC and DCI made a decision to jointly coordinate the preparation of a separate Australian non-government report to be presented to the Committee.



### Consultation Process – "What's up CROC?"

As part of the preparation of the non-government report, the National Children's and Youth Law Centre and Defence for Children International (Australia) published two key documents in February 2004, a Consultation paper and a Background Briefing paper. These papers identified the relevant Articles of the Convention, highlighted issues arising under the Convention in relation to Australia, and detailed aspects of the Government report and the concerns noted by the Committee about Australia.

A number of people provided specialist knowledge in the development of the consultation materials in areas such as immigration, education, disability and care and protection.

The consultation papers were made available both in hard copy and electronically via a 'CROC' website launched by the National Children's and Youth Law Centre in March 2004.

Consultations were conducted with a wide variety of people in South Australia, Tasmania, Queensland, New South Wales and Victoria. These were organised by National Steering Committee members in conjunction with locally based non-government organisations. Further consultations were conducted with a range of individuals and organisations throughout Australia, in person, by telephone, by email, both directly and auspiced through other agencies.

### Submissions

National Children's and Youth Law Centre and DCI-Australia received many submissions responding to the CROC consultation materials from individuals, agencies and working groups. These addressed a range of issues including immigration law, child protection, Indigenous children and family law.

### National Steering Committee

At the end of 2003 a National Steering Committee was established with representatives from community legal centres and youth peak bodies from each state and territory. This committee conducted monthly teleconference meetings from late 2003 through to the completion of the report.

The main role of the National Steering Committee was to provide support, guidance and feedback to National Children's and Youth Law Centre and DCI-Australia about the performance of the states and territories in implementing the rights contained in the Convention. This included facilitating local consultations or roundtables, reviewing current laws, policies and practices, compiling submission materials, disseminating information to key stakeholders and reviewing and commenting on the report. The Steering Committee will continue to monitor compliance of the Convention, in an ongoing manner in relation to individual work with children and young people.

## **National Advisory Group**

A National Advisory Group was established comprising people recognised within the Australian community as having made important contributions in a range of fields that are highly relevant to the lives of Australian children. The primary role of members of the National Advisory Group was to review the draft version of the report to ensure that the current issues and barriers faced by a diversity of children and young people throughout Australia were reflected in the report to the best extent possible, and that the status and experiences of Australian children were accurately portrayed.

## **Youth Participation**

We received individual submissions from a small number of young people and some of the consultation submissions incorporated contributions from children and young people. The National Children's and Youth Law Centre also launched an interactive electronic survey on their CROC website to encourage young people to provide comments about civil rights and freedoms and youth participation.

The New South Wales Commission for Children and Young People made a submission to this report prepared by the Commission's Young People's Reference Group. The reference group is comprised of 12 young people aged from 12 to 18 years. This submission was provided in a DVD format.

## **Limitations**

Compiling a report that accurately reflects the experiences of all Australian children and young people is a huge task, particularly in light of our geographic and cultural diversity and our federal structure. Comprehensive consultation with children and young people would have assisted with this process, but the lack of resources in the preparation of this report meant that we were not able to facilitate a comprehensive consultation with representative groups.

## **Writing the Report**

The writing of the report involved staff and volunteers at the National Children's and Youth Law Centre and DCI-Australia compiling and editing submission contributions and research findings. We were also very fortunate to have the generous assistance of people with specialised knowledge who wrote chapters on key areas, which were either incorporated into the final report or annexed as specific issue chapters to the report.

### **Structure of this Report**

For ease of reference, this report adopts the structure and heading style of the Australian Government's *Combined Second and Third Reports*.



# THEME I

## GENERAL MEASURES OF IMPLEMENTATION OF THE PROVISIONS OF THE CONVENTION

### A IMPLEMENTATION OF THE RIGHTS OF THE CHILD (ARTICLE 4)

#### Coordination of policies and monitoring mechanisms for children

The Committee's 1997 *Concluding Observations* expressed concern about "the absence of a comprehensive policy for children at the federal level" and "the lack of monitoring mechanisms at federal and local levels" (paragraph 7). The Committee recommended that Australia "create a federal body responsible for drawing up programs and policies for the implementation of the Convention and monitoring their implementation" (paragraph 24).

Some seven years later, Australia still lacks a comprehensive strategy to realise the rights of the child and does not have a national body to develop, coordinate or monitor law and policy in this area. While the establishment of a Federal Minister for Children and Youth Affairs was a step forward, this position was downgraded<sup>2</sup> to a Parliamentary Secretary for Children and Youth Affairs (under the Minister for Family and Community Services) in late 2004.<sup>3</sup> The establishment of Families Australia<sup>4</sup> and the Australian Council on Children and Parenting<sup>5</sup> provide a national focus on child-family-related issues. There is no indication that either of these bodies are bound to comply with and promote the articles of the Convention.

The Federal Government's recently revised "National Action Plan" for human rights also fails in this respect. The plan fails adequately to identify positive measures for the future, and to address human rights issues that impact on children and young people, such as mandatory sentencing and children in immigration detention.<sup>6</sup>

While it is acknowledged that the Human Rights and Equal Opportunity Commission (HREOC) plays an important role in promoting and monitoring compliance with the Convention, there is no specialist Commissioner within HREOC dedicated to child rights. Substantial cuts to HREOC's funding over the past 10 years have also reduced HREOC's work-force by about one third, severely affecting its capacity for effective response across individual complaints, education, public inquiry and policy work. Furthermore, the Convention does not have the force of domestic law and HREOC's powers are only recommendatory in the event that a breach is found.

Additionally, in 2003 the Government introduced the Australian Human Rights Commission Legislation Bill 2003 (the Bill). One of the provisions of that Bill gave the Attorney-General the power to veto a decision of HREOC to intervene in legal proceedings. The intervention power is a particularly important role for HREOC to play. As such, it should not be limited by the political considerations of the Attorney General who represents the Federal Government. This is particularly so in circumstances where HREOC may intervene in a matter in which a Federal Government Minister is a party and may also be presenting submissions, which oppose that Minister. It is essential that HREOC should have an independent right to intervene in court proceedings without the requirement of the Attorney General's consent.

While the Bill ultimately did not proceed, due to strong objection by human rights groups and the community, it is again evidence of the Federal Government's lack of interest in the protection of human rights in Australia. In addition, there are fears in the community that after 1 July 2005, when the Government will have a majority in the Senate, bills such as this will be re-introduced, effectively diminishing the protection of human rights in Australia.<sup>7</sup>

<sup>2</sup> Parliamentary secretaries assist Ministers who are responsible for the administration of government departments: See House of Representatives Infosheet: *The Australian System of Government* No. 20, April 2002 at p. 2, <http://www.aph.gov.au/house/info/infosheets/is20.pdf>, accessed 6 January 2005.

<sup>3</sup> See Bo'sher, L (December 2004) Parliamentary Secretary for Children and Youth Affairs, *Australian Children's Rights News*, No. 38 at p. 20.

<sup>4</sup> [www.familiesaustralia.org.au](http://www.familiesaustralia.org.au) "Families Australia is funded through the Department of Family and Community Services (FaCS), and is the first national non-government peak body specifically concerned with family-related issues".

<sup>5</sup> <http://www.facs.gov.au/internet/facsinternet.nsf/Family/accap-nav.htm#1>

<sup>6</sup> Children are addressed as part of the Federal Government's commitment to "Supporting the Family": *Australian Government, Australia's National Framework for Human Rights – National Action Plan* (December 2004) at pp. 53-58.

<sup>7</sup> Australian Non-governmental Organisations Submission to CERD, January 2005, p. 16.

In 1997, the Committee also expressed concern over the Government's statement that Australia's entry into treaties does not give rise to a legitimate expectation that administrative decisions will be made in conformity with those treaties (paragraph 7). As indicated in the *Combined Second and Third Reports*, the Australian Government continues to hold and express this view, showing little commitment to implement the Convention.

The Convention has been found by the highest court in Australia to have no domestic effect, even where the indefinite detention of children in immigration facilities is in apparent breach of state and territory child protection legislation but is also an apparent breach of the Convention obligation to protect a child from cruel treatment if not torture. The children in question were subsequently temporarily released from detention with strangers, then forcibly removed from their school and deported to Pakistan. The effect of the absence of any constitutional or statutory power where recognition of Australia's international human rights recognition was stark and endures.

### **Children's Commissions - the call for a National Commissioner for Children and Young People**

The establishment of an 'independent of Government' National Commissioner for Children and Young People in Australia is the first and primary recommendation of this report. Such a body could provide the direct, integrated, and national strategy to promote children's rights in Australia that this report shows is clearly needed. A National Commissioner would have particular carriage of matters related to areas such as Indigenous children, family law, immigration, and other federal jurisdictional issues such as childcare.

The establishment of a National Commissioner for Children and Young People has had a significant level of support in the non-government community.<sup>8</sup> It should be noted that Australia's first alternative report made a similar recommendation. This attracted the support of the Committee in its *Concluding Observations*. Despite the Committee's comment and the efforts of the non-government sector to profile the campaign, the Federal Government has remained silent on the proposal.<sup>9</sup>

The establishment of Commissioners for Children and Young People in New South Wales, Queensland and Tasmania is welcomed. So too is the proposal by both the Western Australian and Australian Capital Territory Governments to establish similar Commissions in their jurisdiction.<sup>10</sup> The existing Commissioners have promoted the Convention and both the New South Wales and Queensland Commissioners have responsibility to monitor and review new laws but not federal laws or the effects of state laws inter-jurisdictionally. In Queensland, the role and function of the Commission has been broadened to incorporate the functions of a Child Guardian for children in out-of-home care.

However, none of the existing state Commission have all the functional and structural requirements that make for an independent and influential champion for children's rights. For example, none have statutory responsibilities in relation to the Convention and only the Queensland legislation<sup>11</sup> includes any reference to children's rights.<sup>12</sup> Victoria, the Northern Territory, South Australia and the Australian Capital Territory do not yet have Commissioners for Children.<sup>13</sup>

<sup>8</sup> NCYLC received over 50 submissions in support of the proposal in response to a discussion paper released in 1994. A number of submissions to this process also noted that other common law countries such as Scotland, New Zealand, Wales and Northern Ireland now all have Commissioners for Children.

<sup>9</sup> The Australian Labor Party committed before the 2004 election to establishing a National Commissioner for Children and Young People.

<sup>10</sup> The Western Australian State Government reversed its position and announced the establishment of a Commission on 20 May 2004. Support for the proposal was expressed in the submission from Youth Legal Service Inc., Western Australia. The establishment of a Commissioner for Children and Young People in the ACT was recommended by the ACT Legislative Standing Committee on Community Services and Social Equity, Report of the Inquiry into the Rights, Interests and Well-being of Children and Young People in the ACT (August 2003) and is supported by the Youth Coalition of the ACT.

<sup>11</sup> The two main functions of the New South Wales Commission as outlined in the legislation are "to promote the participation of children in the making of decisions that affect their lives and to encourage government and non-government agencies to seek the participation of children appropriate to their age and maturity" and "to promote and monitor the overall safety, welfare and well-being of children". The Tasmanian legislation outlines the role of the Commission to "promote the health, welfare, care, protection and development of children". The legislation creating the Queensland Commission does not specifically refer to the Convention but rather the "underlying principles" for the legislation to contain language that echoes the Convention."

<sup>12</sup> Concern in relation to this was noted in the submission from the Queensland Youth Sector at paragraph 1.1.

<sup>13</sup> Roundtable participants in Victoria overwhelmingly supported the call for a Victorian Children and Young People's Commission to raise awareness of the Convention and monitor its implementation in government, non-government and private sectors. See the coalition at: [www.yacvic.org.au/coalition](http://www.yacvic.org.au/coalition).

## International aid

Many development programs funded by Australia directly and indirectly benefit children. However, the lack of specific information in the Government's report indicates that the Australian Government does not explicitly target the rights and needs of children in its aid program, nor does it systematically evaluate its achievement in these areas.<sup>14</sup> The Australian aid program has not adopted a rights-based approach to development, which, in the context of children, would specifically incorporate the articles of the Convention into aid strategies and evaluation.

While the non-government sector welcomes the Government's recognition of their work in overseas development, aid delivered through NGOs amounts to only a small proportion (around 5%) of the Australian aid program. The bulk is implemented through private contractors, with little if any explicit attention given to the promotion of children's rights. In addition, while some progress has been made, Australian NGOs working in international development are still to develop consistent standards for the promotion of children's rights in their programs. The cooperation of the Australian aid program in this process would be welcomed.

## B MAKING THE PRINCIPLES AND PROVISIONS OF THE CONVENTION WIDELY KNOWN (ARTICLE 42)

The Committee's 1997 *Concluding Observations* expressed regret over the apparent "lack of adequate understanding in some quarters of the community of the principles of the Convention, as well as its holistic and interrelated approach, and the importance that the Convention places on the role of the family" (paragraph 10). It recommended that awareness-raising campaigns on the Convention be conducted, and suggested that the Convention be disseminated also in languages that are used by Indigenous people and by persons from non-English-speaking backgrounds. The Committee also suggested that the rights of the child be incorporated in school curricula and recommended that the Convention be incorporated in the training provided to law enforcement

officials, judicial personnel, teachers, social workers, caregivers and medical personnel.

## National Committee on Human Rights Education

This report welcomes the establishment of the National Committee on Human Rights Education (NCHR), and in particular, its Citizen of Humanity Project (aimed at promoting an understanding of the Universal Declaration on Human Rights Education in schools). However, it should be noted that the NCHR has not yet directed specific attention to the Convention. Furthermore, while submissions expressed support for human rights education programs in schools, it is recommended that "consideration be given to how such information is provided to children and young people who are homeless and who are not in mainstream school systems, and particularly children and young people with a disability".<sup>15</sup> To ensure that the work of the NCHR can continue and expand to address these concerns, we recommend that the Government provide further support to this body.

## Websites for youth

The Government's Youth Portal is currently under review but similar information for youth can be found on the website, "the Source". The site also contains a link to the National Children's and Youth Law Centre's website which provides easily accessible information on the Convention. This report acknowledges the Federal Attorney-General's office for its assistance with the creation of the National Children's and Youth Law Centre website and the LAWMAIL email advice service for children and young people on legal issues.

## Human Rights and Equal Opportunity Commission (HREOC)

While we recognise the important work of HREOC in disseminating information about the Convention, substantial funding cuts since 1996 and the lack of a specialist Commissioner on children's rights have severely limited HREOC's ability to fulfil its educational role.

## Children's Commissions

This report commends the work of the three Commissioners for Children in making the Convention more widely known through their publications, websites and submissions.

<sup>14</sup> Observations on Australia's international aid program drawn from the submission from the Child Rights Working Group of the Australian Council for International Development.

<sup>15</sup> Submission from the Youth Coalition of the ACT.

However, a number of submissions raised concerns about the public's understanding of the Convention. Members of the Victorian non-government community noted "continuing resistance to [the Convention], confusion about what it means and how [the Convention] can and should be implemented". The submission from the Youth Coalition of the ACT also drew attention to the widely-held sentiment that "children and young people do not have a good understanding of the law and their rights, compromising their ability to navigate the legal and other systems". The establishment of Commissions for Children across all states and territories to educate the public about the Convention would go some way to addressing this issue.

### Other initiatives mentioned in the Government's Report

While the other steps mentioned in the Government's report<sup>16</sup> are not dismissed, they indicate a rather haphazard approach to education on the Convention, rather than the "integrated approach" recommended by the Committee in 1997. For instance, in accordance with the Committee's previous recommendations, we would encourage a nationally consistent and comprehensive approach to professional training to ensure that all employees working with children and young people gain an understanding of the principles and provisions of the Convention. We would also recommend that the Government fund a comprehensive awareness-raising campaign on the Convention and ensure that it is disseminated in languages other than English. To our knowledge, this has not occurred.

## C MAKING THE REPORT WIDELY AVAILABLE (ARTICLE 44)

The Committee recommended that Australian Government's first report and the Committee's *Concluding Observations* be published and widely distributed to generate debate and awareness of the Convention and its implementation and monitoring within the Government, the Parliament and the general public, including concerned non-government organisations (paragraph 35).

Taking into account Australia's population and the considerable number of government and non-government organizations in the country working with children, it is concerning that only 1200 copies of Australia's first report were printed and distributed. The fact that individuals and organisations had to purchase copies of the report also

limited its accessibility. The Government's report also indicates that the Committee's *Concluding Observations* on Australia's first report were not circulated outside the government sector. Although they are now available on the Attorney General's website, it is our view that the Government should have circulated them to relevant persons and organisations (including educational institutions).

Furthermore, while the Australian Government's *Combined Second and Third Reports* are available on the internet and hard copies are available on request, the existence of this report has not been widely publicised. The report should be forwarded as a matter of course to all major non-government organizations and the existence and availability of the report should be publicised. Child-friendly summaries of the report would also assist Australia in its general implementation of the Convention, and would assist children and young people to understand the Convention, their rights and, importantly, the Australian Federal Government's performance against the Convention.

### Recommendations

- Each State, Territory and the Federal Government should establish a Children and Young People's Commission as an independent statutory authority. An essential function of the Commission would be to provide the monitoring mechanisms identified by the Committee on the Rights of the Child in paragraph 9 of its *Concluding Observations*.
- That Australia develop a National Agenda for Children, with specific goals, strategies and guaranteed resources, that specifically addresses the implementation of the Convention across states, territories and the Commonwealth.
- As part of an education strategy related to a National Agenda for Children, the Human Rights and Equal Opportunity Commission should be adequately resourced to mount a national community education campaign to foster understanding of the Convention as proposed by the Committee on the Rights of the Child in paragraph 10 of its *Concluding Observations*.

<sup>16</sup> The appointment of a Chair in Human Rights Education at a Western Australian University and the professional training on the Convention given to New South Wales police officers and South Australian youth mental health workers, mentioned at page 14 of the Government's *Combined Second and Third Reports*.



- To ensure the ongoing implementation of the Convention, that Australia adopt the recommendations identified by the Committee on the Rights of the Child in paragraphs 27 and 28 of its Concluding Observations to support the participation and expression of children in daily life.
- That Australia's international aid program adopts the Committee's recommendations in its Concluding Observations (paragraph 25) to use the Convention as a framework for providing aid.
- That Australia develop and enact mechanisms for the protection of rights under the Convention in all domestic jurisdictions and to create and implement the legitimate expectation that administrative decisions will be made in compliance with the Convention (as recommended by the Committee in paragraph 7 of its Concluding Observations).

## THEME II

# DEFINITION OF THE CHILD (ARTICLE 1)

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### B DEPRIVATION OF LIBERTY AND IMPRISONMENT

The participants in the Queensland consultation raised concern that under section 6 of the *Juvenile Justice Act* (Qld) 1992, a “person of 17 years who commits an offence ... will not be taken to have committed the offence as a child in a subsequent proceeding of the offence”.

The Act sets out the special procedures and protections applicable to young people who are alleged to have contravened the criminal law. Many of the provisions in the Act are compliant with the Convention. However, all 17-year-olds in Queensland who are accused of criminal offences are not afforded these protections. This is clearly in contravention of the Convention.

The Act contemplates the inclusion of 17-year-olds in the juvenile justice system and has done since its original passage. It allows for the definition of “child” to be amended (to include a person who has not yet attained the age of 18) simply by the passage of a regulation. However, successive governments have failed to address the continued breach.<sup>17</sup>

In Victoria (while outside the scope of the timing of this report), the recent enactment of the *Children and Young Persons (Age Jurisdiction) Act (Vic)* 2004 means that as of 1 July 2005, a child will be defined as a person who is under the age of 18 years. This amendment brings Victoria into compliance with the Convention in relation to criminal offences committed by children. Despite this, in the state’s care and protection system, 17-year-olds are still not considered children for whom the Children’s Court can make an order to ensure his/her safety and welfare.

#### **Recommendation**

- That the Queensland Government immediately pass a regulation to include 17-year-olds in the juvenile justice system.

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<sup>17</sup> From Queensland CROC submission (#22) at pp. 2-3.

# THEME III

## GENERAL PRINCIPLES

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### A PRINCIPLE OF NON-DISCRIMINATION (ARTICLE 2)

The Committee's 1997 *Concluding Observations* expressed concern that the general principles of the Convention, particularly those relating to non-discrimination, were not being fully applied in Australia (paragraph 12).

The Australian Government's *Combined Second and Third Reports* cites measures which are presented as addressing this concern. This report examines some of these claims and the concerns about the persistence of discrimination in Australia.

#### The persistence of discrimination in Australia

Discrimination persists in Australia for children and young people generally, and for certain groups in particular.

In the consultation process for this report, former Prime Minister The Hon. Malcolm Fraser commented on the "rebirth of discrimination", drawing particular attention to the detention of asylum seekers and the Government's new anti-terrorism legislation:<sup>18</sup>

*"If the failed asylum seekers were white farmers from Zimbabwe, or Caucasians from South Africa, they would not be held in detention centres for up to four or five years - virtually incommunicado and often without access to the law. Because they have come from places which we do not understand, and also because they are Muslim, the Government has been able to persuade people that they are somehow different, somehow wrong, somehow illegal. Therefore none of us are really concerned about it - partly because we believe it is a set of circumstances, which will not apply to ourselves.*

*But once discrimination begins, it does not stand still. It spreads. It grows. It was asylum seekers and it was children of asylum seekers; it was sometimes unaccompanied children, who were held in jail without reasonable, just, 'due process'.*

*Terrorists, suspected terrorists, people linked with terrorism, people who may know something but who don't know they know something about terrorism - fall into another category which governments are able to discriminate against without too much concern."*

The discrimination suffered by child asylum refugees and asylum seekers is discussed in more detail in *Theme VIII – Special Protection Measures. Australia's anti-terrorism legislation is also examined in Theme IV – Civil Rights and Freedoms.*

#### Non-discrimination and Equality: the Situation of Indigenous Children in Australia – RIGHTS ALERT!

The systemic discrimination faced by Aboriginal and Torres Strait Islander children is further indication that Australia has failed to implement effectively Article 2 of the Convention. Participants in the national consultation for this report commented strongly on the various facets of Indigenous disadvantage, such as:

- the significant over-representation of Aboriginal and Torres Strait Islander children and young people in the juvenile justice system;
- the significant over-representation of Aboriginal and Torres Strait Islander children and young people in the care and protection system;
- the poor health and access to health services suffered by Indigenous children.<sup>19</sup>

The extent of Indigenous disadvantage was also made clear by the Aboriginal Social Justice Commissioner in the Submission to the Committee's *Day of General Discussion on the Rights of Indigenous Children*.<sup>20</sup>

The three main concerns of the Social Justice Commissioner about the current position of the Federal Government in relation to Indigenous people were:

- The absence of an appropriate framework for establishing benchmarks and targets, with identifiable timeframes for achieving improvements;
- The continued failure to consult with Indigenous people;

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<sup>18</sup> CROC Submission from the Hon. Malcolm Fraser.

<sup>19</sup> For example, Victorian CROC submission, Queensland CROC submission.

<sup>20</sup> 19 September 2003.

- The limited recognition by the Government of the unique status of Indigenous Australians and the limited role Indigenous communities have in setting the priorities for their own peoples.

The Social Justice Commissioner noted that, contrary to the current trend with non-Indigenous Australians, whose population is rapidly ageing, Indigenous Australians are facing increased growth in the young age group. The focus of governments in Australia, however, has been to place a greater emphasis on addressing the impact of an ageing population.

The ability of Indigenous children to enjoy the rights set forth in the Convention is discussed throughout this report and in *Theme VIII – Special Protection Measures*.

### Age of consent

The discrimination faced by gay and lesbian young people was raised during the consultation process for this report. Queensland participants, for instance, drew attention to the age of consent under the *Criminal Code* (Qld). The Code makes all sexual contact with a person under the age of 16 illegal, with one exception - anal intercourse, for which the age of consent is 18 years of age. The law is expressed without any reference to gender. However, advocates are concerned at the level of ignorance in the community about the law and the level of community belief that homosexuals have a different age of consent.

### Action against racial and religious discrimination

The exemptions from anti-discrimination legislation which currently exist in the sphere of education are a concern also in light of Article 2:

- There is a general exception to the education provisions in the Commonwealth *Sex Discrimination Act 1984* for educational institutions established for religious purposes.
- In the *Anti-Discrimination Act 1977* (New South Wales), there is an exception to the sex, transgender, marital status, disability, homosexuality and age discrimination provisions in the area of education for a “private educational authority”.
- In the *Anti-Discrimination Act 1991* (Queensland) there is an exception for non-state school authorities to discriminate on all grounds except race and impairment. Also, educational institutions for students of a particular religion or a general or specific impairment are exempt.

### Recommendations

- That State, Territory and Federal Governments review relevant anti-discrimination legislation to ensure that the right to freedom from age discrimination in all areas of life is protected.
- That the Federal Government review and repeal exemptions currently included in *Age Discrimination Act 2004* (Cth) that permit age discrimination across a vast range of areas and conduct an education program specifically targeted at children.
- That states and territories give urgent consideration to revising the relevant education and Anti-Discrimination Acts to require that private schools be subject to State and Commonwealth anti-discrimination legislation.

## B PRINCIPLE OF BEST INTERESTS OF THE CHILD (Article 3)

Australia’s implementation of Article 3 is discussed throughout this report, and in particular in relation to Australia’s treatment of child refugees and asylum seekers (see Theme VIII – Special Protection Measures).

## C RIGHT TO LIFE, SURVIVAL AND DEVELOPMENT (Article 6)

For ease of reference, this report adopts the structure of the Government’s *Combined Second and Third Reports* and addresses Australia’s implementation of the right to life, survival and development (Article 6) in Theme VI – Basic Health and Welfare.

## D RESPECT FOR THE VIEWS OF THE CHILD (Article 12)

The 1997 *Concluding Observations* expressed concern that Australia was not fully applying the general principles of the Convention in relation to respect for the views of the child. The Committee, at paragraph 26, recommended “an awareness-raising campaign on the right of the child to participate and express his/her views, in line with Article 12 of the Convention”. The Committee suggested, “special efforts be made to educate parents about the importance of children’s participation, and of dialogue between parents and children”. The Committee further recommended, “training be carried out to enhance the ability of specialists, especially care givers and those involved in the juvenile justice system, to solicit the views of the child, and help the child express these views”.

## Participation by children in government processes

In addressing these concerns, the Government's *Combined Second and Third Reports* refer to the National Youth Roundtable and a range of state and territory mechanisms to enable children and young people to participate in the development of policies, programs and services. The Government cites the Roundtable as a means of creating a direct dialogue with young Australians to ensure that their views are taken into account in policy-making. The benefits of cultivating and encouraging the participation of children and young people are well known.<sup>21</sup>

While these programs are commendable, they are not an adequate response to Australia's obligations under the Convention and they replace a system that was more effective and more acceptable to children and young people. In 1998, the Federal Government withdrew the funding of the Australian Youth Policy and Advocacy Coalition (AYPAC) the national peak youth group, which had been an effective lobby group for young people.

The current Roundtables - which replaced AYPAC - engage twice a year with 50 young people from around the country and represent only one form of formal participation. In fact, the actual participation by children – as defined by the Convention – is even more minimal than the limited 50 participants the program begins with. There were just 13 young people under the age of 18 involved in the program in 2004; the average age for participants in the program was 20 years. Concerns have also been raised about the levels of representation of young people based on geographic regions.

Even more inadequate is the representation of Indigenous children in participation methods by the Government. Although the Government's *Combined Second and Third Reports* states that the National Indigenous Leadership Group comprises "16 young Indigenous Australians aged 15-24 years", there were just three young people under 18 in the 2001/02 group, and not one young person under 18 in the subsequent two groups of 2002/03 and 2003/04.

The outcomes of the Roundtables have been questionable, with the Government implementing just 12 of the projects that have been recommended from four National Youth Roundtables.

Young people who have been involved with the Roundtable and others consulted for this Report have also expressed dissatisfaction with the National Youth Roundtable processes. There have been numerous claims of "gagging" and silencing by the Government of members of the NYR from speaking out against the Government. Ali Childs, one participant from the 2004 Roundtable said:

*"The adviser warned of repercussions for members who did not obey. We weren't to speak out against the Government. [The Advisor] said that she was under this current Government and...no matter what, she had to agree with what this Government said and that we were to do that as well".*

Other cases of suppression have been cited during informal consultations with former participants. Some of these have described the National Youth Roundtable as "a mechanism where young people are simply there for a photo opportunity for politicians and others, as a place where everyone 'wanks on their own self-importance'".

Adam Smith – former Youth Representative to the United Nations for Australia - commented in relation to criticism of the NYR:

*"My observation has been that talk of participation has never been more embraced or supported (in principle) in terms of goodwill; however, what is clearly lacking is an effective structure to enable this, with champions from a diverse range of backgrounds to support such a structure. It is a concern when State and Federal Governments encourage a collaborative approach to sustainable community development, and recognise the merits of participation but are unable to take the lead in enabling young people to become true catalysts for change".*

### Participation in government processes – Children and young people's comments

"The National Youth Round Table gives 50 young people a great opportunity - they get HEAPS from it - and many go on to do great things. However, it has only 50 members; they are short-listed by the Government, so anyone with strong political views is likely to be vetted out. The members are broken up into teams - about six to eight members in each group and their topics for working are pre-selected by the Government. Therefore, the Government is not allowing young people to have an opportunity to give advice on the issues pertinent to them.

<sup>21</sup> Moira Rayner, *Why Children's Participation is Important*. Paper presented at Children and the Law – Issues in the Asia Pacific Region. Brisbane 20-21 July 2003.

Another mistake that was made by Minister Kemp in his execution of the Roundtable process, that left people feeling conned, was his unfair censorship of the Roundtable members, who were told not to freely converse with opposition members or the media, and in addition to this the outcomes packages were suppressed for some time by his office and not made a public document. By doing this, his office made me feel like I was not being consulted to benefit young people, but merely as a means to benefit his portfolio".  
*Comment from former member.*<sup>22</sup>

The recent replacement of the Minister for Children and Young People by a Parliamentary Secretary has also reduced the focus and direct impact that children and young people can have on policy. No body within the Federal Government is now charged with ensuring the rights and interest of Australia's children and young people are addressed with the seniority and seriousness they deserve.

### Children's and Young People's Commissions

This report acknowledges the efforts of the three state Commissioners for Children and Young People in encouraging the participation of children and young people. But some states and territories do not have such bodies and there is no Commissioner at the Federal level. There is considerable potential for Commissioners for Children to facilitate the participation of children and young people in matters that affect them. In this regard, the Committee's attention is directed once again to the first recommendation of this report - the establishment of a National Commissioner for Children and Young People.

### Participation in care and protection decision-making

The Australian Government's *Combined Second and Third Reports* outlines at some length the measures taken to "ensure that there is sufficient consultation (not necessarily participation) with children in out-of-home care".

While there have been some promising developments in relation to the inclusion of participation principles in care and protection legislation, as well as state and territory government support for CREATE (the consumer advocacy association for children and young people in care), there is

as yet little evidence of an impact on practice. There is still considerable room for improvement in relation to children's legal representation in court proceedings. In addition, any consultation may appear tokenistic because there may be few, if any, options available or presented to the child and the decision may have already been made.

One case study outlined during the consultation process for this report identifies some of the issues in relation to children's rights to be heard and the need for training and accreditation for children's legal representatives:<sup>23</sup>

Alex,\* a 13-year-old who had been in care for more than six years was on a long-term order until 16. Because he had known a history of delays in getting matters settled over the years, Alex was concerned about his future. He asked his foster family that the order be extended until 18 so that he could have some security to complete his secondary education.

Alex asked if it would be possible to speak with the magistrate personally. With great difficulty and no assistance from the court or the child's representative, the foster family managed to get the necessary papers so they could be a party to the proceedings.

On the day of the hearing, they were not allowed into the pre-court conference. They were told that their presence was "unhelpful". Alex was not allowed to be present. The young person's legal representative did not even acknowledge the young person's presence or seek to clarify with the young person if he/she had any further instructions.

*\* All names in case studies in this report have been changed to preserve confidentiality.*

### Participation in school decision-making

Freedom of expression in Australian schools is one area where children and young people are increasingly seeking avenues for redress. Surveys of children over the past two decades have regularly evoked comments that adults discourage their input and fail to give weight to their opinions. While State and Territory Government education departments provide policies and procedures for Student Representative Councils (SRC) or their equivalent to be established in schools, the support and encouragement

<sup>22</sup> Submission from Reach-Out, Youth Ambassadors from the Inspire Foundation.

<sup>23</sup> In a positive first step, the Law Society in New South Wales has established a specialist accreditation process for lawyers representing children but it is voluntary and there is no accompanying designated training.

of those groups is not consistent throughout the system. It is often dependent upon the commitment of individual teachers and/or principals and short on resources. The benefits of inclusive education, especially in relation to discipline and bullying, were pointed out by Professor Vinson who chaired the inquiry into New South Wales Public Education Inquiry.<sup>24</sup> He noted, however, “the difficulty from a system point of view seems to be a lack of strategic focus and leadership rather than a shortage of ideas and resources. The challenge is to develop a coherent strategy that can bring these elements together to support a process of democratic whole-school change”.

Children often have little say in schools - the main arena where children spend much of their time - in any issues beyond the trivial.

### Children and the legal system - family law proceedings

“I don’t think children really have a fair say in a family court at all or even dispute resolutions. One of my friends had to go to court over a family issue and she wasn’t even allowed in the courtroom. How can she be judged and accounted for in the right way if she isn’t even in the courtroom? I strongly believe that children don’t get a fair go, and if they are there when a family matter is in court, they don’t get listened to anyway.”

*Alice, Age 15, Tumby Umbi New South Wales.*

In Australia, matters relating to the parenting of children after separation, such as questions of the children’s residence and contact with the other parent, are determined in accordance with the (Commonwealth) *Family Law Act 1975*. The governing principle is that the child’s best interests must be treated as the paramount consideration,<sup>25</sup> and there are provisions identifying the matters that need to be taken into account in determining what orders are most likely to be in the child’s best interests.<sup>26</sup>

The following general principles have characterised children’s involvement and participation in litigation under the *Family Law Act 1975*:

- Children have a legal right to bring proceedings themselves, although in practice this is virtually unknown.

- Children cannot be required to express their wishes.
- Children’s wishes, when known, are to be taken into account and given appropriate weight having regard to the circumstances, and to the children’s age and maturity.
- Children’s wishes, perceptions and feelings are usually conveyed to the Court by way of a family report or other evidence of a qualified and independent person who has interviewed the children. The parties and their witnesses are also entitled to give evidence about children’s wishes.
- It is possible, but rare in practice, for the judge to interview children, or for the children to give evidence directly.
- If in the circumstances of the case, the Court makes an order for the child to be separately represented, the lawyer undertaking this role is required to represent the child’s best interests rather than simply follow any relevant instructions given by the child.

### Child representatives

Australian law in this area appears to be concerned with the rights of children under Article 12. To some extent, however, the law and practice reflect continuing tensions between a protective approach to children’s rights and an approach that gives more emphasis to children’s autonomy. That tension can be seen most clearly in the continuing discussion of the extent to which child representatives in the Family Court should (as at present) represent the child’s best interests, or instead be required to act on children’s instructions.

A preliminary issue, however, is whether children are granted separate representation as a matter of right or whether this should be at the discretion of the Court. At present, the appointment of a separate representative is at the discretion of the Court, who does so with the assistance of guidelines. A rebuttable presumption in favour of appointment would arguably better serve children’s rights under Article 12.

<sup>24</sup> New South Wales Public Education Inquiry 2002.

<sup>25</sup> Section 65E.

<sup>26</sup> Notably section 68F; see also the principles and objectives set out in s60B.

The second issue is the role of the child's representative. In its 1997 Report concerning children and the Australian legal system,<sup>27</sup> the Australian Law Reform Commission noted (amongst other things) that "(m)any children feel marginalised by the imposition of best interests advocacy",<sup>28</sup> which effectively denied competent children the right to give instructions to the representative in matters directly affecting them. In the Commission's view, many children had sufficient maturity and judgment to be able to give instructions to a lawyer.<sup>29</sup> While accepting that younger children may well lack the necessary level of competence, and also that competent children may not necessarily have any wish to be so directly involved in the parenting dispute as to instruct a lawyer, the Commission was of the view that the kind of representation to be authorised by the Court should depend on the circumstances.

The latest discussion of the issues is contained in the recent (August 2004) report of the Family Law Council, *Pathways for Children: A Review of Children's Representation in Family Law*. While the Council expressed some agreement with the concerns of the Australian Law Reform Commission in relation to competent children keen to instruct a lawyer, it recommended that the current practice in the Family Court should continue and that the Act be amended to state specifically that the child representative is to act as a best interests advocate.<sup>30</sup>

### Recommendations

- That there be a rebuttable presumption that for all children whose parents are engaged in disputes about contact and residency in family law, a separate representative is appointed.
- Implement the major recommendations of the Australian Law Reform Commission in relation to children's representation in family law proceedings.<sup>31</sup>
- That the *Family Law Act* 1975 fully protect the best interests of the child by giving priority to children's physical safety, well-being and need to be protected from violence over and above considerations such as shared parental responsibility.

### Children and the right to vote

Article 12 of the Convention gives children the right to express their views freely and have their views given due weight in all matters which affect them. Article 25 of the *International Covenant on Civil and Political Rights*, to which Australia is a party, states that "every citizen shall have the right and the opportunity without unreasonable restrictions to take part in the conduct of public affairs either directly or through chosen representatives and to vote and to be elected at periodical elections which shall be by universal and equal suffrage".

The proposal has been made by young people from time to time that the voting age be lowered, but it has never been given serious consideration despite cogent evidence that children in their early to mid teenage years have the capacity to make independent political judgments on matters of public interest and on matters of particular interest to children as a class.

Children are able at age 16 to leave school, leave home, enter into a sexual relationship and undertake many other activities that involve a degree of maturity and independent judgment. Voting is a low risk activity and there are no grounds for excluding older children from the political process on the basis of their protection. Denying children the right to vote and to stand for election in federal, State and Territory and local government elections arguably amounts to discrimination on the grounds of age. It bars children from access to political power and leaves them voiceless in terms of input into the making of laws and policy decisions that may have a significant effect on their lives.<sup>32</sup>

### Recommendations

- That a multi-party committee, with significant representation of children from a variety of age and cultural groups, be established to consider the ramifications of lowering the voting age and suggesting an appropriate age at which children should be able to vote.

<sup>27</sup> Australian Law Reform Commission and Human Rights and Equal Opportunity Commission (1997) *Seen and Heard: Priority for Children in the Legal Process*, Report No 84. Canberra.

<sup>28</sup> *Ibid* at [13.56].

<sup>29</sup> *Ibid* at [13.53].

<sup>30</sup> *Ibid*, Recommendations 1 (p 26), and 7 (p 43).

<sup>31</sup> See the full text of the Recommendations at pp. 274-85.

<sup>32</sup> For further on this issue see Ludbrook R (1998) Children and the political process, *AJHR* 65; Bessant J (1996) The silent consensus- Linking citizenship and young people, *Children Australia*, 21, 45; Ludbrook R. (1995) *Should Children Have the Right to Vote?* NCYLC Discussion Paper 003/95.



# THEME IV

## CIVIL RIGHTS AND FREEDOMS

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### B PRESERVATION OF IDENTITY (ARTICLE 8)

#### Loss of citizenship

The developments outlined in the Australian Government's *Combined Second and Third Reports* are commendable and demonstrate some progress with respect to Australia's compliance with Articles 7 and 8 of the Convention.

However, the division of powers and the resulting diversity and/or confusion of laws, legal definitions and legal entitlements that arises in any federal system of government is always an issue of concern. It raises basic questions about which layer of government is responsible for providing the foundational citizenship rights that "belonging" to a nation state might be thought to confer, a process that begins with formal notification that the birth of a person has taken place.

#### Recommendations

- That all Australian governments takes steps to establish a national integrated births, deaths and marriage notification database.
- That on request all young people be given their first set of documents birth certificate free of any charges or levies.
- That on request all young people be given a passport free of any charges or levies.

#### Indigenous children and young people – RIGHTS ALERT!

The Australian Government's *Combined Second and Third Reports* acknowledged the loss of identity historically experienced by many Indigenous children. This loss was detailed in the 1997 National Inquiry into Separation of Aboriginal and Torres Strait Island children (*Bringing Them Home*).<sup>33</sup>

To "assist" Indigenous people affected by the past Government policy of forcibly removing children from their families, the Federal Government pointed to the

establishment of "link-up services to assist family reunions" and how this has improved access to Federal Government records to help Indigenous people trace family. Mention is also made of the ways certain State Governments like New South Wales are also assisting the linking-up process by actively promoting the preservation of records.

These efforts go some way towards complying with Articles 7 and 8 of the Convention in relation to the right of Indigenous children and young people to identity and the re-establishment of their identity.

However, since 1997-98, and following the release of the 1997 National Inquiry into Separation of Aboriginal and Torres Strait Island children (*Bringing Them Home*), the Federal Government has consistently refused to accept that there is an historical record of child removal policies or that there is anything in that policy record for which a formal apology is required. This stance subverts attempts by the many thousands of Australians who were subject to these policies to recover their identities, family and culture, or to seek some sign of a willingness to offer reparation or indicate by way of some formal public declaration that the Government recognises the historical and moral issues at stake.

#### Recommendations

- That all Australian governments acknowledge their role and responsibility in respect to the "stolen generation" and the injuries that the people subject to that policy suffered in respect to their loss of identity, name, culture, language and family, and that appropriate reparations are made.
- That all Australian governments acknowledge and take all necessary steps to implement the recommendations of the Committee on the Rights of the Child on its Day of General Discussion on the Rights of Indigenous Children.

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<sup>33</sup> Human Rights and Equal Opportunity Commission (April 1997) *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*.

- That all Australian governments take the necessary immediate steps to rectify the significant disadvantage facing our Indigenous communities, including the following:
  - (i) urgently allocate additional funding to Indigenous health
  - (ii) implement policies and action plans to ensure immediately available and accessible health care for all Indigenous people.
  - (iii) address the violations of Indigenous people's right to housing and address discrimination in the administration of public housing.
  - (iv) abolish the tendering out of Indigenous legal services.
  - (v) develop national principles and action plans for culturally appropriate child protection where out-of-home placement is necessary.
  - (vi) ensure Indigenous children and young people are placed in Indigenous care.
- (vii) focus on preventive programs to reduce the over-representation of Indigenous people in the criminal justice system and of Indigenous children/young people in the juvenile justice system.
  - (viii) offer greater access to diversionary programs within the juvenile justice system.
  - (ix) provide cultural awareness training for all working in the juvenile justice system.
  - (x) ensure the use of interpreters when required in the juvenile justice system.
  - (xi) consult with National Network of Indigenous Women's Legal Services and other Indigenous organisations to find an alternative solution to penalty-based welfare/benefit provision.
  - (xii) ensure meaningful participation of Indigenous peoples in decision-making at all levels of Government.
- That the Government implement the recommendations from the 1997 *Bringing Them Home Report*.

## Donor conception

A group of Australian children whose right to identity is not widely recognised are children born as a result of assisted reproductive technologies.

An estimated 37,000 children have been born in Australia using in-vitro fertilisation since the procedure was first utilised in 1980. There are currently approximately 2,000 children born in Australia each year using assisted contraception procedures. In the vast majority of cases these children are entitled only to limited information about their biological and genetic background.<sup>34</sup>

In Australia, there is no legislation providing for access to all relevant information except to children who were conceived and born in Victoria since 1998. In some other states, children are entitled to limited types of information while in other jurisdictions there are no entitlements to information at all. Additionally, children conceived or born outside of Victoria have no right to meet their genetic parents unless they obtain the written permission of the donor.

Access to information is important because it allows children to know who their biological parents are, and to have information about their health and medical background, and their genetic history. An important study by a high school student born as a result of donor conception indicates that most of the offspring of donor conception she surveyed – in one of the largest surveys of its kind - were keen to know about their 'donors'. They generally did not, as feared by some, expect any financial or emotional commitment from their donors.<sup>35</sup> The need for such information generally became an issue for them in early to mid-adolescence, well before they reached 18. In some states, children are entitled to limited types of information but in some jurisdictions there exists no entitlement to information at all.<sup>36</sup>

<sup>34</sup> Donor Conception Support Group of Australia Inc. CROC Submission, June 2004.

<sup>35</sup> Hewitt, G (2003) Missing links: Identity issues of donor conceived people. *British Journal of Fertility Counselling*, 9, 14-20. [Reprinted in *Australian Children's Rights News*, no. 34, 4-7]

<sup>36</sup> In South Australia, the South Australian – Reproductive Technology (Code of Ethical Practice) Regulations 1995 under the Reproductive Technology (Clinical Practices) Act 1988 require clinics to release any non-identifying information (including medical history information) about the donor to the donor-conceived child when they reach 16 years of age if required.

## C FREEDOM OF EXPRESSION (ARTICLE 13)

In the Australian Government's *Combined Second and Third Reports*, reference is made to a number of initiatives to encourage and enable children to access and use media such as radio, to express their views on issues of interest. Reference is also made to television programs and internet projects that offer young people and children a voice in Australia's public sphere.

While Australia takes some justified pride in the freedom of its citizens to express views that may be at odds with those of the Government or mainstream opinion, there is evidence of a reluctance to extend this freedom of thought, conscience and religion to children.

The public and private education systems of most states and territories promote the idea that their schooling systems will encourage civic education and develop a commitment and high regard for citizenship on the part of young people. In reality, the actual attitudes of departments and schools are frequently at odds with, and even subversive to, those aims.

While a significant minority of school students are politically active, the official policy of many education systems from the departmental level down to school management discourages and represses that political activity. Equally, some parents, teachers, and school principals have been supportive of young people's right to express their views, affirming the claims of young people that they are more than capable of making well-informed and responsible judgments.

Over the past few years, thousands of school-aged Australians have been part of a larger section of the population that has regularly taken to the streets in protest across Australia against:

- Racism and 'One Nation' style xenophobia (In Melbourne for example, thousands of young people attended street rallies, in Sydney also, thousands of young people attended the 'Resistance Rage Against Racism' rally held in Parramatta Park on 25 October 1998. This was part of a general 'Rock against Racism' event involving concerts as well as street marches. In response to the electoral success of the political party One Nation in Queensland in July 1998 school children in Brisbane, Gympie, Bundaberg and Rockhampton walk out of their schools to join a protest against racism).

- Anti-globalisation protests (Across Australia thousands of young Australians made up a significant part of the protests against the World Trade Organisation in Melbourne in 2001).
- During early 2003, students in New South Wales organised a number of anti-war rallies around the state. The Director-General of Education threatened any student who attended the rallies, when they should have been at school, with suspension.

The responses of politicians, education officials and school principals to such political activity revealed some strongly-held views about the right of young people to freedom of expression and to engage in political action (especially during school hours). They indicate a deep sense of unease over the fact that children and young people, not yet legally old enough to vote, had taken to the streets as part of a political process. Governments and many organisations now talk-up the need to involve young people in decision-making processes and to encourage their involvement in policy formulation through official 'Roundtable initiatives' but many politicians and policy makers disapprove of the very idea that young people should engage in political action/protest.

## D FREEDOM OF ASSOCIATION AND PEACEFUL ASSEMBLY (ARTICLE 15)

The Committee's 1997 *Concluding Observations* expressed concern about "local legislation that allows the local police to remove children and young people congregating, which is an infringement on children's civil rights, including the right to assembly" (paragraph 16).

The Australian Government's response to this concern in its *Combined Second and Third Reports* was that it is legitimate to restrict the right of children and young people to associate freely and assemble peacefully because those actions are "designed to ensure public safety and order, including the safety of children as well as to prevent children from committing crimes and becoming involved in the criminal justice system" (p. 30)

The Australian Government has not only failed to heed the concerns of the UN Committee, but over the past five years, additional federal, state and territory legislation has been introduced, increasing police powers to exclude children and young people from defined areas. This is the case in move-on, search and seizure powers, and anti-terrorism legislation.

In every state and territory in Australia, the police have the right to demand the name and address of juveniles without giving a reason. Except for the Northern Territory and Victoria, police officers in Australia can disperse and “move-on” young people if they “have a reasonable belief that the person has, or is likely to engage, in a violent act”.

These practices are discriminatory and have no demonstrable effect in limiting young people’s involvement in crime. Children and young people report being “harassed” by police exercising these powers, despite doing nothing more than assembling in groups in public spaces. This alienates young people from the police. The widespread application of these powers to young people also fails to recognise the small numbers of young people who commit crime, the reasons they do so, and the type of crime most commonly committed by young people.<sup>37</sup>

Although young offenders represent a minute proportion of crimes committed, the media has generated popular beliefs and conceptions of “moral panic” where youths are depicted as destructive, anti-social and immoral.<sup>38</sup> Statistics in New South Wales, for example, prior to the introduction of the *Young Offenders Act 1997*, tell a different story. Seven out of 10 young people appearing in a Children’s Court will never appear in a court again, and less than 25% of Children’s Court cases are offences against a person.<sup>39</sup>

The issue of young people gathering and then being moved on “in the interests of public safety” denies young people their right to meet as a group. This thinking is another example of a society not caring about the children and thinking of the worst scenario (i.e. young people are assumed to be meeting to get into mischief rather than recognising young people’s developmental need to gather together and be part of a group). Young people need to be with their peers to assist them in their developmental journey to adulthood.<sup>40</sup>

## Public space and “Move-on” powers

In the consultations with the youth sector and non-government organisations undertaken across Australia for the purposes of this report, the increase in police powers in relation to “moving-on” young people and the use of public space was the subject of critical attention and comment.

Police use of these powers unfairly affects children and young people who come together in public spaces. There are few spaces specifically designated for young people to meet in leisurely fashion that are low cost and easily accessible. As a result, public spaces such as shopping centres, malls and train stations are convenient and popular. It is common for migrant and refugee young people to gather in large groups where they can converse in their own language and feel safe and supported. Many stereotypes exist surrounding groups of young people, and especially migrant and refugee youth. Police in particular often target young migrant and refugee people. Such groups, however, are mostly not gangs and not likely to cause trouble or create violence.

Community education needs to be directed at police and specifically address the cultural issues that arise from working with migrant and refugee young people. Training should also be delivered to young people so as to empower them to assert their rights when being harassed.<sup>41</sup>

In **Queensland**, a refusal to move-on under s38 (1)(a) of the *Police Powers and Responsibilities Act 2000* constitutes a criminal offence. Police have the power to lawfully apprehend and relocate a young person without that young person having committed an offence other than being out at night.

Participants in the Queensland youth sector forum noted that the two new sets of powers given to police in Queensland in 2000 and in 2004 respectively discriminate against children and infringe upon their right to associate and assemble in public spaces.<sup>42</sup> These two powers are referred to as “*Move on*” and “*Volatile Substance Misuse*” police powers.

<sup>37</sup> Young people commit crime for a number of complex reasons including economic and emotional tensions caused by unemployment, substance abuse, family breakdown, homelessness and depression.

<sup>38</sup> White, Rob (1990) *No Space of Their Own*. Cambridge: Cambridge University Press, Chapter 5.

<sup>39</sup> Hayes, L (1999) *Getting the Balance Right: the Policing of Young People in New South Wales*. New South Wales Police Services’ paper presented at Children and Crime: Victims and Offenders, 17-18 June 1999 citing Michael Cain.

<sup>40</sup> NAPCAN Australia. Comments to NCYLC, UNCROC Consultation Paper, May 2004.

<sup>41</sup> Western Young People’s Network Victoria submission paper on Australia’s implementation of the Convention.

<sup>42</sup> Queensland CROC submission.

The first set of powers enables police to issue directions to citizens to “move-on” from certain specified public spaces, in a range of circumstances, including where “a person’s presence causes anxiety to another person reasonably arising in all the circumstances” (s38(1)(a) of the *Police Powers and Responsibilities Act 2000*). A failure by a person to move-on as directed by police is a criminal offence.

The second set of powers enables police to intervene where they believe that a person has been using a volatile substance. In the course of intervening, the police may seize paint or glue from people, and may also remove them from the public place.<sup>43</sup>

Both sets of police powers target children as they assemble socially in public space areas.

Research undertaken by the Youth Advocacy Centre (a community legal service in Brisbane) in 2000 about young people’s experience of the move-on powers found that the power is used to *limit* young people’s use of public space, not to regulate that use. The “move on” powers were enacted despite a contrary recommendation contained in a review of police powers completed by the (then named) Criminal Justice Commission in 1996.

In **Perth**, the Western Australian Government’s “Young People in Northbridge” Policy 2003 applies to a specific precinct where children under 12 cannot go after dark without a guardian, and young people aged 13 to 15 cannot be out after 10pm without a guardian.<sup>44</sup> More generally, children and young people considered to be misbehaving by Police or Department of Community Officers are also be directed to move-on, or they can be physically removed from the area.

In **Melbourne**, the capital of Victoria, there is no specific legislation requiring young people to move-on, but in practice young people on bail are excluded from the city through the imposition of exclusion zones on their bail

conditions. These conditions are mostly applied by the police. However, there are no ‘standing orders’ to guide police in their judgments about how the special conditions ought to be applied. In reality, their effect is to restrict young people’s movement and freedom of assembly as well as their access to services and social and family relations in the community.

In **Victoria**, participants at the Victorian consultation noted that young people can be targeted by authorities such as the police, transit police, public transport officers and security guards when using public space, even if they have committed no offence.<sup>45</sup> A recent survey of young people’s attitudes towards public transport found that over two-thirds (of 296) respondents felt that young people are not treated fairly by ticket inspectors because of their age.<sup>46</sup>

During the **Tasmanian** consultation for the purposes of this report, young people stated that they felt discriminated against in public places.<sup>47</sup> The group did not resent troublemakers being approached in public places, but felt that young people were targeted because of their age and image, rather than their behaviour. There was a general consensus that there needed to be more areas where young people could spend time together without being questioned or asked to move-on by security guards or police.

In shopping centres, young people in groups of three or four were often asked to separate or move-on by security guards. The Clarence City Council-run Youth Network Advisory Group had worked closely with the new owners of Eastlands shopping centres on developing their youth policies, which had greatly decreased discrimination against young people.

In **New South Wales**, amendments to the *Police and Public Safety Act* in 1998 had a disproportionate, and negative, impact on youth. The New South Wales Ombudsman monitored their implementation<sup>48</sup> and found that, in the first

<sup>43</sup> Indigenous children in some parts of Queensland are subject to more police use of these powers than other children.

<sup>44</sup> Western Australian CROC submission.

<sup>45</sup> Victorian CROC submission at 20.

<sup>46</sup> Youth Affairs Council of Victoria and Inner City Regional Youth Committee (2004). *Young People and Public Transport in the Inner City*.

<sup>47</sup> Tasmanian CROC submission.

<sup>48</sup> Report of the New South Wales Ombudsman, Policing Public Safety (Report under s 6 of the *Crimes Legislation Amendment (Police and Public Safety) Act 1998* (New South Wales)).

year after the amendments 42% of persons searched were juveniles,<sup>49</sup> with people from 15 to 19 years of age being much more likely to be stopped and searched for knives than those in any other age group.<sup>50</sup> The Ombudsman also found that 48% of persons “moved on” were aged 17 years or younger.<sup>51</sup>

### Police power to search, seize and remove

In Victoria, s 10 of the *Control of Weapons and Firearms Acts (Search Powers) Act 2003* allows police to search without warrant for prohibited weapons that they have “reasonable grounds for suspecting that a person is carrying or has in his or her possession in a public place or a non-government school a prohibited weapon, a controlled weapon or a dangerous article”. Of particular concern to participants is that ss.1 (a) states that “the fact that a person is present in a location with a high incidence of violent crime may be taken into account in determining whether there are reasonable grounds for suspecting that the person is carrying or has in his or her possession a prohibited weapon, a controlled weapon or a dangerous article”.

Participants in the Victorian consultation did not believe that it is reasonable to suspect a person is carrying a weapon on the basis they are in a “location with a high incidence of violent crime”.<sup>52</sup> This breaches the right to freedom of movement and undermines the presumption of innocent until proven guilty. Similar provisions exist in New South Wales.

Police also have authority, in Queensland and Victoria, to confiscate any suspect good and remove the young person from a public area when they believe a young person may be, or may intend to “chrome” (i.e. inhale what is referred to as a “volatile substance” such as paint or glue).

Similar legislation has also been proposed for the Northern Territory despite extensive domestic and international research that suggests that the “criminalisation” of such behaviour does not address the underlying causes of young people’s consumption of substances.

In Victoria the *Drugs, Poisons and Controlled Substances (Volatile Substances) Act 2003* (Victoria) came into effect in July 2004. The law does not criminalise the possession of

volatile substances (glue, spray paints, petrol etc). It does, however, give police power to use “reasonable force” to search, seize and detain a person under the age of 18 indefinitely if they are inhaling, or if police *suspect* they might inhale in the future, and can do so *with no maximum period of detention set*.

Unlike the power given to police to apprehend people who appear to be mentally ill and/or likely to cause harm to themselves or others, the new legislation is placed in a statute that effectively criminalises the use of certain “substances” (even though the purchase of those substances is legal). The police have power to search a young person without a warrant and to detain that person. This legislation has a “sunset clause” requiring it to be reviewed in two years. This means the legislation will have to be passed again to remain in force.

### Recommendations

- That consistent with the concern of the Committee expressed in paragraph 16 of its *Concluding Observations*, all Australian governments remove policies, legislation, regulation and by-laws that establish local curfews and other restrictions on the freedom of association and right of assembly of children and young people particularly in public spaces.
- That all Australian governments ensure that the public health issue of solvent abuse, particularly by indigenous children, be addressed by means other than policing by the criminal law.

### Anti-terrorism legislation

The introduction of new laws aimed at reinforcing the National Government’s anti-terrorist capacity (*Security Legislation Amendment (Terrorism) Act 2002* (Commonwealth), *Anti-terrorism Act (No 2) 2004* (Commonwealth) and *Anti-terrorism Act (No 3) 2004* (Commonwealth) apply to children and young people.

The law applies different rules to different groups of young people, depending on age. Those under the age of 16 cannot be apprehended or questioned by ASIO. For 16-17 year-olds, a warrant needs to be issued if ASIO believes

<sup>49</sup> Ibid 37.

<sup>50</sup> Ibid 127.

<sup>51</sup> Ibid 37.

<sup>52</sup> Victorian CROC submission at p. 20.

the person concerned has committed or is likely to commit a “terrorist act”. A parent or guardian can be contacted and asked to attend any interrogation session, unless that adult person is unacceptable to ASIO in which case someone who is acceptable can be contacted to represent the young person’s interest. If the adult representative is deemed to be “unduly disruptive” then they will be asked to leave. A 16-17 year old can be questioned for no more than two hours at a time and a warrant allows for their detention for 48 hours and can be extended to seven days.

It is also lawful under the anti-terrorist act for a 16-17 year-old to be searched as well as strip-searched. This must be done with the adult representative in the room.

The so-called anti-terrorist legislation has been criticised for the breadth of its powers and the vagueness of its definitions of the offences it seeks to prohibit or to regulate. There are a number of legitimate issues that relate to young people with respect to the anti-terrorist laws. One is the ambiguity of the language in the legislation about what constitutes a terrorist act. Secondly, laws already exist in Australia that adequately deal with the threat of terrorism, which makes the new legislation unnecessary.

### Recommendations

- That the federal and state anti-terrorism laws be amended so that:
  - (i) Children under 18 cannot be detained and questioned by ASIO or other relevant police authorities unless they are suspected of having committed a relevant offence.
  - (ii) Children under 18 are given access to legal advice and an independent support person when being interviewed by ASIO or other relevant police authorities.
  - (iii) Covert search warrants that include property belonging to children cannot be issued.
  - (iv) Children under 18 are permitted to discuss with family and other support people what has occurred during questioning by ASIO or other relevant police authorities if so questioned.
  - (v) Adequate independent complaints mechanisms are established and made accessible to children.

## E PROTECTION OF PRIVACY (ARTICLE 16)

To demonstrate compliance with Article 16, the Australian Government’s *Combined Second and Third Reports* (pp. 30-31) refers to its amendment in 2001 to the *Privacy Act 1988*. This Act establishes a requirement for many private sector as well as public sector organisations to observe the National Privacy Principles that relate to the collection of personal information *including that of children*.

The measures outlined in the Federal Government report are welcome. However, as is so often the case, there are widespread and ‘normal’ practices that breach Article 16 and largely go unregulated.

Any rights children and young people have to privacy are regularly undone in institutions such as schools. Schools share many features with military organisations and prisons with regard to the abrogation of normal ideas about privacy. It has long been common practice, for example, for female students to have their underclothes inspected to satisfy teachers that the apparel is suitable. This surveillance extends to hair, jewellery and make-up. The right to privacy is also routinely abrogated by practices such as mandatory and surprise bag and locker inspections and more recently by the placing of surveillance cameras in student toilets and change rooms.

School boarders and fully institutionalised children such as children in care and/or in juvenile detention centres routinely have their right to privacy breached with room, bag, locker, and mail ‘inspections’.<sup>53</sup>

### Naming orders

In December 2002, amendments to the *Juvenile Justice Act 1996 (Queensland)* gave Children’s Courts the power to order that the name and identity of certain young convicted offenders be made public. This appears to conflict with the principles underlying the Act, particularly those that require the court to provide for the young person’s rehabilitation and reintegration into the community. Advocates also argue that such orders are in contravention of Article 16 and encourage isolation, negative self-image and increased risk of re-offending in the community.

<sup>53</sup> See, for example, Regulation 27 of the *Children (Detention Centres) Regulation 2000* (New South Wales), see also s 23 *Juvenile Justice Regulation 1993* (Queensland).

### Recommendations

- That the Queensland Government immediately repeal the 'naming orders' provisions in the *Juvenile Justice Act 1996*.
- That all Australian governments develop policies and practices (including for schools, training centres and detention centres) to ensure that the privacy of all children and young people is protected under the Federal Government's privacy legislation.
- That all funding contracts of Australian governments for the provision of services including for education, care and protection of children and young people specify requirements that provide for the protection of children under the Federal Government's privacy legislation.

## G THE RIGHT NOT TO BE SUBJECTED TO TORTURE OR OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (ARTICLE 37(A))

### Female genital mutilation

The 1997 *Concluding Observations* expressed the Committee's concern at the continued practice of female genital mutilation in some communities, and that there is no legislation prohibiting it in any states.<sup>54</sup>

The Australian Government's *Combined Second and Third Reports* responds to the Committee's concern, explaining its opposition to the practice (p. 34). Moreover legislation in all states and territories, except Western Australia, have combined to prohibit the practice.<sup>55</sup> Educational and awareness campaigns have also been developed in a number of states to help prevent girls from being subject to genital circumcision (2003, pp. 34-35).

This is a commendable move to secure the rights and well-being of many girls and young women. Some consideration is, however, needed in relation to strategies to prevent 'underground' or 'backyard' female circumcisions. Similarly, what official action on the part of the Australian Government might be effective in responding to parents who send their daughter overseas for the "operation"?

### Recommendations

- That the Federal Government investigates the extent to which illegal female circumcision takes place in Australia as well as the incidence of sending daughters overseas for the procedure, and that based on that information strategies be developed to prevent illegal female genital mutilation and overseas "treatment".

### Corporal punishment

The Committee's 1997 *Concluding Observations* expressed concern about the lack of prohibition in local legislation of the use of corporal punishment, however light, in schools, at home and in institutions (paragraph 19).

The Australian Government's *Combined Second and Third Reports* explained that this matter was considered by the Model Criminal Code Officers Committee. This committee reported in 1998 that "at present it goes too far to criminalise a corrective smacking by a parent or guardian, so long as the force used is reasonable". In addition, the Australian Government reported that corporal punishment in Australian government schools and some non-government schools has been prohibited in New South Wales, the Australian Capital Territory, South Australia, Tasmania, Victoria and Western Australia (paragraph 187).

Queensland and the Northern Territory are absent from that list, leaving numbers of students in those states subject to corporal punishment.

While the worst excesses of violent assault in the form of corporal punishment have been outlawed in many state education systems, that is not so for the private sector. The routine expectation that young people may be lawfully subjected to emotional abuse, humiliation or other techniques of intimidation in the name of maintaining classroom control or discipline has yet to be either properly addressed or rectified.

The law of all states and territories in Australia permits the physical punishment of children by parents or carers, subject only to the degree of force used to administer that punishment being reasonable. In criminal

<sup>54</sup> Paragraph 19

<sup>55</sup> Western Australia has introduced legislation that was to be passed in 2003.



law any intentional application of force to the body of another person amounts to an assault. The ‘reasonable chastisement’ defence has wide implications for children. They do not receive the protection of the criminal law or, in many cases, domestic violence and child protection laws, in respect of assaults by a parent or carer who can show that the force used was reasonable. It gives a message to parents, carers and the community generally that hitting children is all right as long as it is not unreasonably harmful or injurious. The ‘reasonable chastisement’ defence blurs the line between reasonable physical punishment and child abuse which puts parents in an invidious position because any assessment of what is ‘reasonable’ amounts to a subjective decision on the part of the child protection authorities and the courts.

New South Wales has moved to refine, but not remove, the reasonable chastisement defence, by limiting the use of parental corporal punishment to children under 18 years and requiring that any force be reasonable having regard to the age, health, maturity or other characteristics of the child, the nature of the alleged misbehaviour or other circumstances. Force shall not be applied to the child’s head or neck and, if applied elsewhere, must cause no more than short-term harm.<sup>56</sup> It is still permissible in New South Wales to use a stick, strap or other implement to hit a child. Other forms of assault such as kicking of the buttocks, legs or body, twisting a child’s arm or stamping on the foot are still permitted. Parents are left in a state of uncertainty as to whether punishment that leaves bruising or minor lacerations can be characterised as “causing no more than short term harm”.

Much child abuse starts as an attempt by a parent or carer to discipline a child by the application of force resulting in an escalation of violence, which later clearly exceeds the bounds of reasonableness.<sup>57</sup>

## Recommendations

- That, consistent with the recommendations of the Committee outlined in paragraph 26 of its *Concluding Observations*, all Australian governments take appropriate measures to prohibit corporal punishment in private schools.
- That, consistent with the recommendations of the Committee outlined in paragraph 26 of its *Concluding Observations*, all Australian governments take appropriate measures to prohibit corporal punishment at home.

## Children and young people in juvenile justice detention

The Committee’s 1997 *Concluding Observations* expressed concern at the enactment of new legislation in two states, where a high percentage of Aboriginal people live, which provides for mandatory detention and punitive measures towards juveniles, resulting in a high percentage of Aboriginal juveniles in detention (paragraph 22).

In **Western Australia** and the **Northern Territory**, mandatory sentencing legislation was enacted in 1996 and 1997, requiring courts to apply minimum sentences of detention for people convicted of certain offences. Fortunately, the Northern Territory *Sentencing Act* has been amended with the result that all juvenile sentencing is now at the discretion of the court. However, the Western Australian legislation is still in force. The Western Australian s 401 Criminal Code, the “three strikes and you’re in” ruling applies when a person is convicted for a third time or more for a home burglary, whereupon they must be sentenced to a minimum of 12 months’ detention.

A review of s 401 Criminal Code (Western Australia)<sup>58</sup> commented that the amendments have had little impact on the incidence of crime and that 81% of persons convicted under the code were Indigenous juveniles between the ages of 14 and 17.

<sup>56</sup> *Crimes Act 1900 s 61AA* as inserted by *Crimes Amendment (Child Protection – Physical Mistreatment) Act 2001* with effect from December 2002.

<sup>57</sup> Further information on the negative effects of physical punishment see Cashmore J & de Haas N (May 1995) *Legal and Social Aspects of the Physical Punishment of Children*, Commonwealth Department of Human Services and Health; Gawlick, J, Hemming, T & Warner, K (October 2002) *Physical Punishment of Children*, Tasmania Law Reform Institute Issues Paper No 3; *Children and the Right to Bodily Integrity* National Children’s and Youth Law Centre Discussion Paper (1994).

<sup>58</sup> Review of section 401 of the Criminal Code WA, Department of Justice, Policy and Legislation Division, Government of Western Australia November 2001.

## CASE STUDY

The Western Australian Aboriginal Legal Service expressed concern that the use of detention of young children could result in them becoming entrenched in the criminal justice system on the grounds that “the more involved a young person becomes in the criminal justice system, and in particular detention, the more they learn about crime”.

The case of a young Indigenous offender who faced his first mandatory penalty aged 11 was cited as a “good example of a young person who has now become so entrenched in the criminal justice system that he will probably continue to offend for many years”.

Following the initial Repeat Offender sentence at age 11, after a period on remand in custody, this child has continued to offend. A further five “strikes”, he eventually received a 12-month detention sentence when he was 12. He re-offended on release and received another 12 months detention at age 13. Many of the offences appear to have related to the theft of money to buy food.

The Aboriginal Legal Service concluded that as a result of the Repeat Offender legislation, the child would have spent at least 500 days in detention by the age of 13 without the underlying welfare issues that caused him to steal food being addressed.<sup>59</sup>

When the current Premier of Western Australia, Geoff Gallop, was questioned about his intentions regarding the legislation if the Government were re-elected at the forthcoming state election in February 2005, he replied:

*“My Government supports the ‘three strikes’ home burglaries legislation in its current form. We do not, however, believe that widespread application of mandatory sentencing is an effective way of tackling repeat juvenile offending.”*

## Recommendations

- Noting the concerns expressed by the Committee on the Rights of the Child in paragraph 22 of its *Concluding Observations*, that legislation enshrining mandatory sentencing in Western Australia be immediately repealed.

## School bullying

The Australian Government’s *Combined Second and Third Reports* recognise that bullying in schools is a matter of “concern to the Australian community”, as it impacts on the “physical and psychological health, educational achievements and social developments of affected students”.

To demonstrate its compliance with Article 37(a), the Government’s report highlights three relatively recent Government initiatives aimed at preventing and combating bullying in schools. These initiatives involved:

- the development of a National Safe Schools Framework (NSSF) – consisting of a set of nationally agreed principles designed to promote a safe and supportive school environment;
- the *Bullying. No Way!* <http://www.bullyingnoway.com.au> website;
- a \$500,000 contribution toward a project to analyse the ongoing effectiveness of prevention strategies used in Australia. This project is anticipated to result in the creation of further resources to aid teachers, carers and parents dealing with bullying.

The National Safe Schools Framework is commended for its concise containment of many significant ideas relevant to the promotion of Article 37(a). The framework states that its guiding principles are based on an overarching vision that “All Australian schools are safe and supportive environments” – a welcome sentiment, *albeit some way from being realistic*.

The National Safe Schools Framework – although seemingly thorough in its formulation of anti-bullying practices – leaves a number of significant questions unanswered. For example, one of the “key elements” recommended in the creation of a safe and supportive school environment is “the development of active, trusting relationships”. It is a valid, but somewhat intangible proposal and emerges unburdened by any practical suggestions as to how a school might attempt to encourage such an outcome. Broad-sweeping propositions such as this need to be refined and developed for practice.

<sup>59</sup> Aboriginal Legal Service of Western Australia (Inc.) and Aboriginal and Torres Strait Islander Commission (State Policy Centre (Western Australia)). Submission to the Senate Inquiry into the Human Rights (Mandatory Sentencing for Property Offences) Bill 2000.

The final Government initiative mentioned in Australia's *Combined Second and Third Reports* under the Convention on the Rights of the Child is the \$500,000 contribution made to the ongoing analysis of prevention strategies. This resulted in the publication of Professor Ken Rigby's 'Meta-evaluation of methods to reduce bullying', which assessed the effectiveness of 13 separate programs of intervention. Rigby's outcomes vary widely, but the following themes recurred:

- That school intervention strategies were successful in reducing the incidence of bullying in schools.
- That the reduction in bullying occurred mainly among the younger students.
- That outcomes were closely related to how thoroughly the programs were implemented by the schools (Smith & Sharp, 1994).
- Any significant reductions in bullying require the participation of the entire school community.

There is little doubt that some progress has been made, but Rigby's recent study indicates clearly that bullying is still a major problem for the Australian community.

This survey found that at least one in six children in Australia reports being bullied on an average of once per week.<sup>60</sup>

In the consultation undertaken for this report, the submission from the Inspire Foundation drew on the actual experiences of young contributors, many of whom have been bullied. This submission highlighted the urgent need for greater awareness of the impact of bullying on the victim, and also on the perpetrator. In addition, Inspire Foundation calls for greater access to counsellors and increased awareness of the wider systemic causes of bullying.

Research is currently underway in Australia concerning 'youth gangs'. One part of this research involved a school questionnaire completed by 750 high school students in Perth. Early results from this research found that students reported very high levels of violence in and outside school. This was not all 'bully' violence – it included group-based violence including some gang violence. This research has found that "positive, pro-active rights-respecting strategies are the way to go if we are to address issues of youth violence".<sup>61</sup>

## CASE STUDY

Charlie's early years at his local public school were marred by the bullying actions of another young boy. At five, Charlie was the subject of repeated taunting and name-calling. At six, the bullying escalated and he was scratched, pinched and poked on a daily basis. By the age of seven, Charlie was punched in the face, kicked in the back and groin and hit with sticks repeatedly.

Complaints to the school by Charlie's parent were received with support and concern. The school responded swiftly, implementing a number of strategies designed to separate the boys. The young boy was disciplined and suspended on a number of occasions and also provided with an itinerant support worker two days a week. Despite such strategies, once left unsupervised – during lunchtimes, at sport or after school – the young boy increased his attacks. At this stage, the school admitted to Charlie "nothing else can be done".

## Recommendations

- That all Schools of Education in universities include pre-service training for teachers, directed specifically at bullying and related conflict resolution.
- That schools are required by the Department of Education to carry out periodic surveys among students, staff and parents to discover more about the sorts of peer relations being fostered by the school. These surveys – in accordance with Article 17 – would allow students the opportunity to express their views and describe their experiences.
- That research is funded to explore the nature of peer relations among children and young people to assist children and young people in the development of skills in dealing with bullying and harassment and in peer support mechanisms.

<sup>60</sup> Rigby, K (1997) What children tell us about bullying in schools, *Children Australia*, 22, 28-34.

<sup>61</sup> Discussion with Professor Rob White, School of Sociology, Social Work and Tourism, University of Tasmania. March 2005.

## Sterilisation of children and young people with disability

There is substantial anecdotal evidence that unlawful sterilisation of children and young people with disability (mostly girls) continues to occur in the absence of medical needs such as diseases of the reproductive tract.<sup>62</sup>

In August 2003, at a meeting of the Standing Committee of Australian Attorneys-General, Ministers agreed to develop a nationally consistent approach to the authorisation procedures required for the lawful sterilisation of minors with a decision-making disability.

While uniform national legislation is welcome, disability advocacy organisations<sup>63</sup> have raised concerns about the emphasis and content of the proposed legislation.<sup>64</sup> These concerns relate to:

- The primary emphasis of the discussion paper, not on the prohibition of this human rights abuse, but on the elaboration of the circumstances and principles under which it can occur. People with Disability Australia argues that non-therapeutic sterilisation of children and young people with a decision making disability is a procedure to which neither a parent, or a child, or a court or tribunal may consent.
- The lack of attention given to ensuring consistency in the law and procedure across jurisdictions, to prevent 'shopping' across these jurisdictions to allow sterilisation to be performed; and
- The lack of attention to providing children and young people taken outside Australia with the same protection as they would have within Australia.<sup>65</sup>

## Recommendation

That Australian governments develop uniform national legislation that is protective of children and young people with disability in relation to sterilisation procedures; that is consistent in the law and procedure across jurisdictions; and that protects children and young people taken outside Australia, expressly for the purpose of undergoing sterilisation procedures.

<sup>62</sup> Brady S M, Britton, J & Grover, S (2001) *The sterilisation of girls and young women in Australia: Issues and progress*. Human Rights and Equal Opportunity Commission.

<sup>63</sup> People with Disability Australia (2004) *Non-therapeutic sterilisation of minors with a decision-making disability*, submission to the NSW Attorney-General's Department; Women with Disabilities Australia & Disability Studies and Research Institute (2004) Submission to the Commonwealth and State/Territory Governments regarding Non-Therapeutic Sterilisation of Minors with a Decision-Making Disability.

<sup>64</sup> Their concerns arise in relation to the Issues Paper released in 2004 to facilitate consultation on the draft Bill and model Guidelines.

<sup>65</sup> Based on anecdotal information provided to People with Disability Australia about children and young people being taken overseas to enable sterilisation procedures to occur.

# THEME V

## FAMILY ENVIRONMENT AND ALTERNATIVE CARE

### A PARENTAL GUIDANCE (ARTICLE 5) AND

### B PARENTAL RESPONSIBILITIES (ARTICLE 18)

The initial statement in relation to Theme V in the Australian Government's *Second and Third Combined Reports* reflects a "hands-off" ideology that does not recognise the limits that many families are likely to face in managing parenthood. The report states the Government's belief that "the family, as the fundamental unit of society, should be given the greatest possible protection and assistance and that there should be intervention by the Government only if the family breaks down and fails to reach certain standards of care" continues to underpin Government action in this area" (paragraph 193).

This report's concern is that this can be an excuse for failing to offer the levels of parental support and services to children to ensure that parents have the time and skills to parent, and that parental deficits and the results of social inequality are not passed on to new generations. There are three main concerns: (1) the lack of paid maternity leave and the lack of work-family balance, (2) concerns about the quality and cost of childcare, and (3) the lack of coherence in family support policy and service delivery.

#### **Paid maternity leave**

The Committee expressed its concern about the limitations on maternity leave in its *Concluding Observations* (paragraph 17). There are still marked limitations for women in the private sector, especially for low-income women and those in casual work who are most unlikely to receive any forms of paid maternity leave. The new maternity payment of \$3000 does not incorporate any right to time off for new and casual workers and is not enough to allow low-paid workers time off.

In terms of family-friendly workplaces, the Government has already limited the capacity of awards to deal with such

provisions and the proposals being developed suggest that the current protections in industrial awards may be further diminished. This means that parents will have more difficulty in negotiating family-useful provisions, particularly if they are low-income and unskilled. Employers will primarily decide extensions of parental leave, paid leave for family reasons and flexibility of hours.

#### **Child care**

Good quality childcare can provide positive early learning experiences for young children, especially for disadvantaged children, and has long-term potential cost-benefits.<sup>66</sup> It is also a necessity for many working parents. The quality of childcare and early education is a critical factor. While high quality care can be beneficial, poor quality care can be detrimental to children. Disadvantaged children derive the greatest benefit if the quality of care is high and suffer most damage where the quality of care is low.<sup>67</sup> Children in higher income families therefore increase their advantages by access to good quality childcare and preschool services, and low-income children start school further disadvantaged.

Quality childcare services are, however, neither universally available nor affordable. Access to good formal childcare services is very limited in many areas, particularly for children under three, and often too expensive for low-income households, because fee rebates still leave substantial gap fees that they cannot afford. This means that many children in low-income families are now in informal care or a mix of arrangements where the quality of care is not ensured.

#### **Sustainable and coherent family support services**

The Federal Government and some state governments have invested in major initiatives and funding programs which include the Federal *Stronger Families and Communities Strategy*. This strategy has been allocated

<sup>66</sup> A recent large-scale review of 40 years of research "found that children who received a high-quality preschool education were more likely to succeed in school and graduate from high school than their peers who did not attend a good preschool. As a result, children who attended good preschools tended to obtain higher-paying jobs as adults, contribute more taxes, buy more as consumers, and commit fewer crimes." *Early Childhood Education for All: A Wise Investment* is online at [www.familyinitiative.org](http://www.familyinitiative.org).

<sup>67</sup> Vandell, D & Wolfe, B (2002) *Child Care Quality: Does It Matter and Does It Need to Be Improved?* Madison, WI; Institute for Research on Poverty, University of Madison-Wisconsin. Available at: <https://aspe.hhs.gov/ccquality00/ccqual.html>

\$240 million over four years, with \$20 million earmarked for projects that target Indigenous families and communities.

Programs such as these are a positive step and a welcome sign of the Government's recognition of the need to support families with children and invest in early intervention. There are, however, several concerns in relation to their integration and sustainability. Various programs at federal and state levels have been developed independently of one another, and are delivered by a range of services rather than as a coherent system of services. These programs are limited both financially and in their geographic distribution over diverse metropolitan, regional and rural areas. The sustainability of such programs is therefore a strong concern. There is no clear overall strategy about how the plethora of pilot programs will be taken to scale or even sustained in the original site if they prove to be effective.

## C SEPARATION FROM PARENTS (ARTICLE 9) AND

## F CHILDREN DEPRIVED OF THEIR FAMILY ENVIRONMENT (ARTICLE 20)

The Australian Government's *Combined Second and Third Reports* rely heavily on the material in Australia's *First Report*, and on the Aboriginal Child Placement Principle. The material referred to in the *First Report* is now outdated, with a number of states having reviewed and updated their legislation, and increasing numbers of children remaining in out-of-home care.

The Australian Government does, however, acknowledge in the Executive Summary of the *Combined Second and Third Reports* that:

... the child protection system is another area of concern. Despite extensive efforts since the Committee's consideration of Australia's initial report, including a number of reviews into the operation of child protection services in a number of states and significantly increased funding for initiatives targeted at high risk groups, the number of children in need of care and protection remains unacceptably high. (p. vii).

As at 30 June 2004, there were 21,795 children in out-of-home care across Australia; this figure is an increase of 56% over the 1996 figure (13,979 children).<sup>68</sup> Most children are in home-based care with foster carers or members of their extended family or kinship group. There are no national figures on the reasons that children are placed in out-of-home care.<sup>69</sup>

The special issues and particular concerns relating to the heavy over-representation of Indigenous children in care are outlined later in this report.

The main and continuing concerns about children and young people separated from their families in care are:

- their lack of stability and security in their placements;
- the lack of options in placing children;
- the difficulties in maintaining appropriate contact with their families;
- their poor educational performance, and
- the inadequate physical, dental and mental health service provision for these vulnerable children and young people.

These concerns have been documented in a number of formal inquiries and reports in all states. They are echoed in the consultations with people in the sector and with CREATE (the advocacy association for children and young people in care).

The policy and practice of keeping children within their family - albeit often with little support - means that many children and young people coming into care have serious and complex educational, emotional and behavioural problems. But they are often not receiving access to the services that they need. While it would be reasonable to expect that these children should have priority access to health and educational services, there are continuing difficulties in most states in coordinating service across state Government departments and ensuring access or even knowing what the need is.

<sup>68</sup> Australian Institute of Health and Welfare (AIHW) (2005) *Child Protection Australia 2003-04*. (Child Welfare Series no. 36). Canberra: AIHW.

<sup>69</sup> Australian Institute of Health and Welfare (2005), p. 41.

In relation to the education of children in out-of-home care, the *CREATE 2004 Education Report Card* stated that:

... only two states - Queensland and South Australia - indicated that they could match data between government departments on some aspects of the educational performance of children and young people in care and compare this to that of their peers. The situation remains unchanged this year. This means that most jurisdictions do not know how children and young people in care, as a group, are faring in terms of their attendance, participation and performance at school. In turn, this means that most jurisdictions have no means of identifying the impact of their policies and programs on the education of children and young people in care. This is clearly not acceptable.<sup>70</sup>

While all states have policies - but not necessarily legislation - that respect children's right to have contact with their families of origin, the relevant departments and agencies do not have the capacity to ensure that it always happens, that it includes grandparents and siblings, and is adequately supported. The greater reliance on kinship care - in New South Wales, 56% of children are placed with relatives or kin - may have benefits in terms of identity and family contact but many kinship carers receive little support and may not be adequately assessed to ensure that they are able to provide appropriate care. Australia suffers from a serious lack of options for placement, especially for children and adolescents with complex needs.

It is also clear that more effort and investment is needed to bring together systematic data, research and evaluation in relation to child protection and out-of-home care. The Australian Institute of Health and Welfare continues to rely on aggregated data from the states and territories; it does not yet have access to unit record data, which is essential for proper research and analysis. A recent audit of out-of-home care research found that there was a very low level of investment in research (\$3.9 million over the last decade) compared with over \$3 billion of expenditure over this time (i.e. only about 13 cents per \$100 of expenditure).

*"Important decisions are being made every day about the 20,000 children and young people in out-of-home care that affect their lives and those of their families. Yet the evidence to inform these decisions is not nearly as substantive as it needs to be."*<sup>71</sup>

### **Over-representation of Indigenous children in out-of-home care**

The rate of Aboriginal and Torres Strait Islander children in out-of-home care as at June 2004 was 23.7 per 1000 children compared with the rate of 3.6 per 1000 children for non-Indigenous children.<sup>72</sup> This means that Indigenous children are at least 6.5 times more likely than non-Indigenous children to be in out-of-home care. But these figures are likely to under-estimate the true extent of over-representation because an unknown number of Indigenous children within the care and protection systems of each state and territory are not identified as Indigenous.<sup>73</sup> Two recent audits concerning children on orders in Queensland and in the Australian Capital Territory, for example, found that some Indigenous children who had been wards of the state or in foster care arrangements for many years were not recorded as Indigenous.<sup>74</sup>

### **Aboriginal Child Placement Principle**

An Aboriginal child placement principle operates either in legislation or policy in all states and territories. This is a positive recognition of the importance for Indigenous children and communities of the retention of children within their culture and community. This principle requires that Indigenous children be placed in order of preference:

- first with the child's extended family;
- then, if this is not possible with the child's Indigenous community;
- then with other Indigenous people;
- and if none of the above options are possible, with a non-Indigenous carer.

<sup>70</sup> CREATE 2004 *Education Report Card* p. 47.

<sup>71</sup> Cashmore, J & Ainsworth, F (2004) *Audit of Australian Out-of-Home Care Research*. CAFWAA/ACWA: Sydney.

<sup>72</sup> Australian Institute of Health and Welfare (2005), p. 48.

<sup>73</sup> The Australian Institute of Health and Welfare (2005) warns that the data on Aboriginal and Torres Strait Islander children should be treated with care because 'The practices used to identify and record the Indigenous status of children in the child protection system vary across state and territories.' Further, research in New South Wales by Cunneen and Libesman (2002) found that there was frequently no record or identification of Indigenous status in the State Welfare Department's data base files or the Children's Court files for children whom they could identify as Indigenous.

<sup>74</sup> Murray, G (2003) *Final Report on Phase One of the Audit of Foster Carers Subject to Child Protection Notifications...Towards Child-focussed Safe and Stable Foster Care*; Murray, G (2004) *'The Territory's Children' Report on the Audit and Case Review*.

There are, however, a number of limitations in practice. First, out-of-home placement is the option of last resort and usually occurs after a significant series of interventions, and after children and their families have had involvement with the Child Welfare Department for a period of time. Frequently in Indigenous communities, the advice and involvement of families and organisations is not sought until this final stage in the process.<sup>75</sup> Second, a lack of information in departmental files means that those involved may not recognise the Indigenous status of children and therefore not invoke the Aboriginal child placement principle. Third, despite the move towards permanency planning in a number of Australian jurisdictions,<sup>76</sup> there are often inadequate resources to address the competing need of Indigenous children to grow up within their own culture.<sup>77</sup>

### Continuing government responsibility after care

While the Convention is concerned with children under the age of 18, there are good arguments for extending the remit in relation to Article 39 and the rehabilitation and recovery of children from abuse and neglect. The provision for the welfare and well-being of young people leaving state care also needs to be considered. As a group, these young people are significantly disadvantaged, and the state has a responsibility to ensure that they get off to a good start in their adult years. Despite their vulnerability, these young people are often expected to become independent earlier than other young people despite the fact that they have few social or family supports, are less likely to have completed school, to have gained employment or to have somewhere stable to live. Although young people living with their families are now leaving home later, at an average age of around 23 in Australia, there is a tendency for care authorities to leave children to 'sink or swim' after leaving care despite their greater vulnerability and lack of support.

Currently, New South Wales remains the only state to have introduced legislation and a funded system of after-care services for young people leaving care. There is some indication that the Commonwealth Government is beginning to recognise its responsibilities in this area. The Department of Family and Community Services has started

to roll-out a Transition to Independent Living Allowance (TILA) to provide financial assistance of up to \$1,000 for particularly disadvantaged care leavers, such as those who have been in care for an extended period of time. The efficiency and effectiveness of the Commonwealth allowance and the New South Wales after-care measures have not yet been assessed.

### Children of prisoners

Children whose parents are incarcerated make up another category of children whose need for contact with their parents is often not well supported. For the first time in Australia there is reliable evidence of the health impacts on children of imprisoned parents.<sup>78</sup> The estimated number of children in New South Wales experiencing parental incarceration in 2001 was 14,519 (i.e. 1% of children under 16 years). Indigenous children were 13 times more likely to lose a mother to incarceration and 9 times more likely to lose a father to incarceration. The estimate for Australia is that 38,500 children experienced parental imprisonment in 2001.

The needs of these children are largely ignored in public policy terms while governments, especially in New South Wales, expand prison populations, increasing offences and the length of sentences while ignoring the underlying health and social issues of substance abuse, poverty and mental illness. The Australian Capital Territory legislation, however, provides a positive model in requiring that the court shall have regard to "the probable effect that any sentence or order under consideration would have on any of the person's family or dependents." Further, alternatives to incarceration designed to satisfy the political demands for punishment and reparation could limit the need for separation for parents particularly from young children.

## D FAMILY REUNIFICATION (ARTICLE 10)

The Australian Government's comment under this section in the *Combined Second and Third Reports* refers to children of asylum seekers and refugees.

This issue is discussed in some detail as a principal concern of this report under *Theme VIII - Special Protection Measures (Refugee Children)*.

<sup>75</sup> Stanley, J, Tomison, A & Pocock, J (2003) Child abuse and neglect in Indigenous Australian communities. *Child Abuse Prevention Issues*, No. 19.

<sup>76</sup> New South Wales passed permanency planning legislation in 2001 and Victoria in 2002.

<sup>77</sup> In Queensland, the Government has recently clarified through legislation that the Indigenous child placement principle is subject to the paramourcy of the best interests of the child. How this will change the practice in the child protection field remains to be seen. The Commission for Children and Young People and Child Guardian in Queensland will be monitoring the use of the child placement principle by government and non-government child protection agencies in Queensland.

<sup>78</sup> Quilty, S, Levy, M H, Butler, T, Howard, K, & Barratt, A (2004) Children of prisoners: A growing public health problem. *Australian and New Zealand Journal of Public Health*, 28 (4), 339-343.



## G ADOPTION

All states and territories now have legislation and information services or information and contact registers that allow adopted people who are aged 18 years or older access to information about their origins, although the extent of these rights varies across jurisdictions.<sup>79</sup>

## I ABUSE AND NEGLECT (ARTICLE 19) INCLUDING RECOVERY AND REINTEGRATION (ARTICLE 39)

The 1997 *Concluding Observations* of the Committee raised concern over “the existence of child abuse and violence within the family” (paragraph 15) and made the following recommendation:

*“Cases of abuse and ill treatment of children, including sexual abuse within the family, should be properly investigated, sanctions applied to perpetrators and publicity given to decisions taken. Further measures should be taken with a view to ensuring the physical and psychological recovery and social reintegration of the victims of abuse, neglect, ill treatment, violence or exploitation, in accordance with Article 39 of the Convention”. (Paragraph 26)*

The Australian Government’s *Combined Second and Third Reports* acknowledges that “despite the ongoing efforts of governments and NGOs, child abuse remains a major concern in the Australian community” and that “Indigenous children remain significantly over-represented in the child protection system” (paragraph 255). The figures provided in the report do not, however, indicate the level of reporting of child abuse or the extent of over-representation of Indigenous children (see below). The most recent figures reported by the Australian Institute of Health and Welfare indicate that there were 219,384 notifications to state and territory authorities, in relation to 146,562 children. The fluctuation in the rates of substantiated notifications over the last decade and the increase in some states (eg, Queensland) probably reflects changes in reporting policies and some increased awareness and more willingness to report, particularly where there are sanctions for not reporting.

Child protection in Australia is the primary responsibility of state and territory governments, and each has separate child protection laws with different criteria for reporting, intervention and employment screening of those working

with children. The lack of standardised child protection laws makes comparisons across states somewhat difficult and also hinders the transfer of responsibility and intervention for children who move interstate.

While Australia’s *Combined Second and Third Reports* outlined various inquiries into child protection in different states and indicates an increase in real recurrent expenditure on child protection and out-of-home care services, it is clear that their child welfare systems are chronically stressed as a result of increased demand, a shortage of well trained and experienced workers and carers, outdated case management and data systems and a lack of quality placement options. There is also continuing concern that much of the increased resources are focused on the intake and investigation process rather than on providing assistance to families and children to prevent children coming into care.

There are some promising early intervention and prevention initiatives by the various state governments and the Commonwealth Government to assist families and reduce the need for formal intervention to protect children, but the effectiveness and benefits have yet to be demonstrated and may take some years to become evident. ***There is a strong need for a coordinated approach across the various levels of Government (Commonwealth, state, and local) and a continued whole-of-government effort within each state.***

### The special case of Indigenous children

The dire situation for Indigenous children is reflected in their over-representation in ‘notifications’ to child welfare departments and substantiated findings in each state and territory, and the numbers in out-of-home care outlined earlier.

Analysis by the Australian Institute of Health and Welfare based on data provided by state and territory government departments indicates that the rate of substantiated notifications<sup>80</sup> for Indigenous children compared with non-Indigenous children varied across states - from 1.5 times to nearly 10 times. Indigenous children were also more likely than non-Indigenous children to be notified for neglect than for abuse.<sup>81</sup> There are several reasons for this. First, there are cultural considerations; secondly, neglect frequently

<sup>79</sup> Australian Institute of Health and Welfare (AIHW) (2004). *Adoptions Australia 2003–04*. Canberra: AIHW.

<sup>80</sup> “After an investigation has been finalised, a notification is classified as “substantiated” or “not substantiated”. A notification will be substantiated where it is concluded after investigation that the child has been, is being or is likely to be abused, neglected or otherwise harmed. States and Territories differ somewhat in what they actually substantiate.” (Australian Institute of Health and Welfare, 2005, p. 3).

<sup>81</sup> For example, in Western Australia, 43% of all substantiated findings for Indigenous children were for neglect compared with 27% for all other children.

reflects poverty rather than an unwillingness to look after children; thirdly, there is a reluctance to report violence in Indigenous communities.<sup>82</sup>

These figures need, however, to be interpreted carefully. As indicated earlier, all these figures are likely to underestimate the actual extent of the problems for Indigenous children because departmental files often do not include information on Indigenous status.<sup>83</sup> Secondly, lower levels of over-representation in some states do not necessarily indicate a lower level of problems or need. For example, Indigenous children in Victoria were nearly 10 times more likely to be the subject of a substantiated finding of neglect or abuse in 2003–2004 compared with non-Indigenous children, whereas the comparable figure for the Northern Territory was nearly five times.<sup>84</sup> This does not necessarily mean that Indigenous children in the Northern Territory are living in less poverty or face less neglect or abuse than those in Victoria. It may mean, as Pocock (2003) argues, that “Rather than address the needs of Aboriginal and Torres Strait Islander children, the Northern Territory child protection [system] has in effect withdrawn from service provision abandoning the most impoverished children and families in Australia”.<sup>85</sup> For example, Pocock (2003) states that the Northern Territory Department of Health and Community services is failing to respond to children facing malnutrition. While the Department recorded 300 children in just three rural areas of the Northern Territory as malnourished, on the basis that they were clinically under-weight and/or stunted in their growth, they recorded only 81 children in the whole of the Northern Territory as suffering neglect. Clearly if statistics on Aboriginal and Torres Strait Islander children who are malnourished were collected for the entire Northern Territory, the numbers of neglected children would be much higher.<sup>86</sup>

Where the indices of disadvantage are enormous, it is difficult to hold individual caregivers accountable for the neglect that their children face.<sup>87</sup> Clearly, structural and systemic disadvantage, and the manner in which this impacts on Aboriginal and Torres Strait Islander children’s rights under CROC, is a responsibility that Australian governments need to address holistically and within a framework which recognises principles of self determination.<sup>88</sup> This is discussed more fully in Part VIII in relation to Article 30 and children belonging to a minority or Indigenous group.

### Recommendation - Indigenous children and young people

That, given the over-representation of Indigenous children and young people in the child protection and out-of-home care systems, the Government prioritise working with, and continue to work with Indigenous community leaders, agencies and communities to establish a range of best practice solutions for Indigenous children and young people.

### Domestic violence

The Australian Government’s *Combined Second and Third Reports* to the Committee point to the Partnerships Against Domestic Violence Program (PADV) and associated programs serving the Indigenous and non-Indigenous communities of Australia as evidence of compliance with their obligations under the Convention (p. 52).

The Australian Government’s acknowledgement of the problem and provision of resources through those programs is commended.

<sup>82</sup> Despite numerous reports documenting the high level of violence including sexual violence against Indigenous children this is not reflected in the statistics. Stanley, Tomison and Pocock (2003) provide a number of reasons including shame, fear of experiencing racism, fear of reprisals from the perpetrator, fear of the perpetrator being harmed in custody or being blamed for this, and failure on the part of authorities to respond or respond adequately to complaints (p. 5).

<sup>83</sup> A study of substantiated cases of neglect of Indigenous children in New South Wales by Cunneen and Libesman (2002) found that Indigenous children could not be identified in the Department’s database. They noted: “We initially expected to be able to analyse reasonably comprehensive data from the data base system. However many of the 1384 Department of Community Services records were incomplete. We were able to retrieve some quite limited data.” (p. 2) The New South Wales Department of Community Services was unable in 2003-2004, to provide data with respect to children under their care to the AIHS “due to ongoing implementation of the data system”. (Australian Institute of Health and Welfare, 2005).

<sup>84</sup> Australian Institute of Health and Welfare (2005) p. 21.

<sup>85</sup> Pocock, J (2003) *State of Denial: the Neglect and Abuse of Indigenous Children in the Northern Territory*. Secretariat of the National Aboriginal and Islander Child Care (SNAICC: Victoria) (p. 13).

<sup>86</sup> Op cit, p. 18

<sup>87</sup> Stanley, Tomison and Pocock (2003) p. 9.

<sup>88</sup> Libesman, T (2004) Child welfare approaches for Indigenous communities: International perspectives. *Child Abuse Prevention Issue*, Number 20 Autumn 2004. Available: <http://www.aifs.gov.au/nch/issues/issues20.html> March 2005.

Despite these efforts and the ‘multitude’ of programs to address the high rates of domestic violence in Indigenous communities,<sup>89</sup> children and young people in Australia continue to be exposed to unacceptable levels of domestic violence that is harmful to their physical, psychological and social well being. A recent Australian study found that “up to one-quarter of young people (aged 12-20 years old) in Australia have witnessed an incident of physical violence against their mother or stepmother”.<sup>90</sup>

Further, Access Economics, commissioned by the Office for the Status of Women, estimated that the overall cost of domestic violence to government and community was \$8.1 billion in 2002-2003. They also identified in this process that around 263,800 children were living with victims of domestic violence and 181,200 children witnessed domestic violence in 2002–03.<sup>91</sup> This is of great concern given the body of literature detailing the enormous impact of exposure to domestic violence on children and young people’s health and well-being.

There are four main areas of continuing concern:

- The lack of follow-up of notifications of children at risk of harm as a result of exposure to domestic violence;
- Problems in dealing with domestic violence and child abuse allegations in family law proceedings;
- Concerns for children on contact visits and;
- The lack of services for children under 12.

### **Domestic violence is a form of child abuse**

Although domestic violence is now recognised as a form of child abuse, competing demands on child protection authorities result in very few reports involving domestic violence being identified as posing high risk to the child and getting an effective response. In 18 out of the 19 cases reviewed by the NSW Child Death Review Team (2001), where the death occurred as a result of physical abuse and neglect, there was a background of domestic violence.<sup>92</sup> Concerns about the inadequacy of the child protection

system to respond adequately to matters involving domestic violence are confirmed by a study undertaken by Barnado’s Australia and the University of Sydney.<sup>93</sup> Researchers over a four-year period (1997-2001) tracked child abuse notifications in five NSW Department of Community Services (DoCS) offices following notification because of ‘exposure to domestic violence’. This study found that domestic violence was the most common reason for notifying a child but compared with cases involving other categories of abuse, domestic violence referrals were less likely to undergo an investigative assessment. When they were investigated, they were less likely to be registered. The most likely outcome for confirmed domestic violence-related child abuse was for the case to be either ‘referred’ and/or ‘closed’ with no follow-up.<sup>94</sup>

### **Allegations of abuse and violence in family law matters**

There are continuing difficulties where there are allegations of abuse or neglect in family law disputes over the residence and contact arrangements for children following their parents’ separation and divorce. As the Australian Government’s *Combined Second and Third Reports* (paragraph 260) outlines, two states have been trialling projects to expedite the process for these family law cases: the *Magellan Project* in Victoria and the *Columbus Project* in Western Australia. There are still major difficulties in other states in ensuring that these allegations are properly investigated and that there is appropriate communication between the state child protection services and the federal Family Court so that suitable orders can be made.

A recent inquiry into child custody arrangements investigated the possibility of presumption of shared (50:50) residency arrangements for children whose parents had separated.<sup>95</sup> The inquiry noted the concerns raised by many women’s groups that the current *Family Law Act 1975* is not appropriate where issues of serious risk are concerned. The submission by the National Council for Single Mothers and Their Children Inc. was quoted:

<sup>89</sup> Memmott, P, Stacy, R, Chambers, C & Keys, C (2001) *Violence in Indigenous Communities*: Full Report. Canberra: Attorney General’s Department. Available: [www.crimeprevention.gov.au/ncp/Publications/PDF/violenceIndigenous.pdf](http://www.crimeprevention.gov.au/ncp/Publications/PDF/violenceIndigenous.pdf) [2001, 20 March].

<sup>90</sup> National Crime Prevention (2000) *Young People and Domestic Violence: National Research on Young People’s Attitudes and Experiences of Domestic Violence*, Fact Sheet, Attorney General’s Department, Canberra. Available: [http://ncp.gov.au/ncp/publications/pdf/no10\\_factsheet.pdf](http://ncp.gov.au/ncp/publications/pdf/no10_factsheet.pdf) [2000, 11 May].

<sup>91</sup> Access Economics (2004) *The cost of domestic violence to the Australian economy: Part I and Part II*, Partnerships Against Domestic Violence, Office of the Status of Women, Canberra. p. vi.

<sup>92</sup> Laing, L (2003) *Domestic Violence in the Context of Child Abuse and Neglect*: Topic paper. Australian Domestic and Family Violence Clearinghouse available at [http://www.austdvclearinghouse.unsw.edu.au/topics/topics\\_pdf\\_files/child\\_protection.pdf](http://www.austdvclearinghouse.unsw.edu.au/topics/topics_pdf_files/child_protection.pdf) [March 2005]

<sup>93</sup> Irwin, J, Waugh, F & Wilkinson, M (2002) *Domestic violence and child protection: A research report*. A collaborative research project by Barnardo’s Australia and the University of Sydney. The Department of Social Work, Social Policy and Sociology, University of Sydney.

<sup>94</sup> Laing, L (2003) p. 5.

<sup>95</sup> House of Representatives Standing Committee On Family And Community Affairs (December 2003). *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation*. Canberra: The Parliament of the Commonwealth of Australia.

*We know that the Family Court does not deal with violence and abuse in a very effective manner. The Family Court itself has acknowledged that in terms of research which has been done. This has shown that, because there are Federal jurisdictions in the Family Court, and State jurisdictions in relation to child protection, there are serious gaps in the ability of the Family Court to deal with child abuse and domestic violence. Cases are not being adequately investigated and evidence is not able to be provided to the court about the extent of exposure to children of abuse.*<sup>96</sup>

As former Chief Justice of the Family Court Alastair Nicholson pointed out,

*... the real problem is an attitudinal one and nothing will change unless attitudes change. What must occur is a complete re-think of community attitudes to violence and bullying.*<sup>97</sup>

### **Exposure to violence on contact visits**

Another issue of concern is the significant number of children who are subjected to further abuse on unsupervised contact visits with the offending parent. Several studies on the establishment of contact arrangements for children between newly separated parents have shown that child abuse has been used as a tool to harm the other parent, mostly done by the father against the mother.<sup>98</sup>

The recent parliamentary inquiry suggested that Australia should follow New Zealand's lead in amending the legislation regarding custody and access disputes to ensure that children are protected from violence during contact visits.<sup>99</sup> The New Zealand Guardianship Act [s 16B (4)] states that:

*...the Family Court shall not make any order giving custody or unsupervised access to a party that has used violence against the child who is the subject of proceedings, a child of the family, or against the other party to the proceedings unless the Court is satisfied that the child will be safe while the violent party has custody of or has access to the child.*<sup>100</sup>

"I do have a concern with the contact order if one of the parents is violent. I think the child should still be able to see the parent. The reason why I think it's important for the child to see the parent is that they're family and they need to be loved by both parents and spend time with them to have a good relationship with them. The child should be with another adult when that parent sees them and that adult should not be of a violent matter. The main thing is not leave them alone in case something happens and the parent abuses the child."

*Alice Age 15 Tumby Umbi New South Wales (not her real name).*

Alice has highlighted children's wish and need to have meaningful contact with both parents, a significant concern for many children. Research in Australia confirms overseas findings that many children want more contact with their non-resident parent than they are able to have.<sup>101</sup> The Australian Government's proposal to establish Family Relationship Centres may provide a form of early intervention to assist families to resolve disputes without litigation where violence and abuse are not issues and to give more voice to children's concerns.

Submissions from domestic violence services to the latest Australian Government discussion paper on family law initiatives (*New Approach to the Family Law System* released in December 2004) have clearly voiced concerns regarding the unsuitability of Family Relationship Centres to respond to domestic violence and the lack of attention within the discussion paper about how such centres will screen for domestic violence and ensure that families are referred to the most appropriate services.

### **Services to children in relation to domestic violence**

There are still few services available to children under 12 to help them overcome the impact of violence and abuse. Indeed, the Partnerships Against Domestic Violence

<sup>96</sup> Ibid at p. 27.

<sup>97</sup> Hon Alastair Nicholson (2004) *Changes to the Family Law System – What Effect They Will Have on the Problem of Family Violence*. Northern Sydney Domestic Violence Forum. International, Federal and State. But what can we achieve locally to stop violence against women?

<sup>98</sup> Rendall, Rathus & Lynch (2000); Laing (2003) states that "the women experienced the abuse and threats to harm their children on contact as part of the pattern of coercive control which is at the core of domestic violence" (p. 6).

<sup>99</sup> House of Representatives Standing Committee on Family and Community Affairs (December 2003) op.cit at page 8.

<sup>100</sup> Busch, R. & Robertson, N. (2000) *Innovative Approaches to Child Custody and Domestic Violence in New Zealand; the Effects of Law Reform on the Discourses of Battering*, p. 275.

<sup>101</sup> Gollop, M M, Smith A B & Taylor, N J (2000) Children's involvement in custody and access arrangements after parental separation, *Child and Family Law Quarterly*, 12, 383-399; Parkinson, P, Cashmore, J & Single, J (in press). Adolescents' views on the fairness of parenting and financial arrangements after separation. *Family Court Review*.

Program meta-evaluation identified a ‘significant gap’ in services specifically targeted and available to children who have experienced domestic violence.<sup>102</sup> It noted:

*There are currently few models of intervention for children outside women’s refuges. Workers who have regular contact with children require basic skills for understanding and addressing the problems that may emerge for children living with domestic violence. In addition, the development of resources and training for workers utilising a strengths-based approach is a priority. (p. 19)*

Service providers are still reluctant to deal with children as clients in their own right. As noted in relation to homelessness (Theme VI), the Government’s Supported Accommodation and Assistance Program for homeless people does not recognise children as clients. Many of these children have become homeless as a result of domestic violence.<sup>103</sup> The Partnerships Against Domestic Violence Program (2003) meta-evaluation commented upon the limitations of this approach (p. 33), stating:

*Programmatic responses to domestic violence should recognise that children and young people are also victims of domestic violence. Ongoing recognition of children as clients in their own right in the SAAP-funded service system, and appropriate funding for a service system which provides an effective and consistent response to the specialist needs of children and young people witnessing domestic violence is required. (p. 113)*

### Recommendations

That programs such as the Magellan and Columbus programs be expanded nationally following appropriate evaluation and that State and Territory Departments of Community Services be encouraged and adequately resourced to be involved in those programs.

That all Australian governments support, and apply in policy and practice, the general principle that children and young people should be recognised as clients in their own right and entitled to access services particularly in relation to the provision of housing and support from domestic violence programs.

## J PERIODIC REVIEW OF PLACEMENT

Article 25 requires periodic review of the treatment and circumstances of children who have been placed by “competent authorities for the purposes of care, protection

or treatment of their health”. This article is important because it provides safeguards against inappropriate care and treatment, provides for proper planning, and relates to children’s right to be heard in relation to decisions that are made about their care and treatment.

The reason for removing a child from their natural family is to ensure safety from further harm. Lack of planning and review for children in foster or adoption placements, residential care and treatment puts them at risk of a range of adverse outcomes. The fact that some children are abused in care is well documented in research findings and in recent government inquiries in Australia. Audits in Queensland and the Australian Capital Territory of notifications to the departments and the files concerning children in care have revealed a number of cases of abuse in care and significant systemic problems.<sup>104</sup>

The *UNICEF Implementation Handbook* states that Article 25 is one of the most important rights for children under the Convention though it is often overlooked in reports submitted to the UN Committee. Indeed the Australian Government’s *Combined Second and Third Reports* make no reference at all to Article 25. The references to Article 25 in Australia’s *First Report*, restricted to children in out-of-home care, are now outdated, and even at the time contained marked inaccuracies. For example, the Boards of Review referred to in relation to New South Wales were never established and these sections of the legislation were never proclaimed. This Article is therefore given greater attention in this report.

There are no statistics available on the extent to which Australian states meet their obligation to regularly review the circumstances of children in care or even to ensure that all children in care have a current documented case plan. Although the number of children and young people in out-of-home care with a current case plan is one of the indicators of the effectiveness of out-of-home care services for reporting on government service delivery, at this stage no Australian state or territory government has reported on this indicator (Productivity Commission, 2005).<sup>105</sup>

<sup>102</sup> Partnerships Against Domestic Violence Program (2003) p. 11.

<sup>103</sup> Australian Institute of Health and Welfare (2004) *Homeless People in SAAP: SAAP National Data Collection Annual Report 2002-2003*. Canberra: AIHW.

<sup>104</sup> In Queensland, for example, the Forde inquiry in 1998 and the Crime and Misconduct Commission inquiry resulting in the report, *Protecting Children: An Inquiry into Abuse of Children in Foster Care*. Also, Murray, G. (2003). *Final Report on Phase One of the Audit of Foster Carers Subject to Child Protection Notifications. Towards Child-focussed Safe and Stable Foster Care*.

Inquiries in several states (Queensland, South Australia, Western Australia, New South Wales) and a systemic audit of the treatment of children in care in Queensland - following a well-publicised case of abuse in care - have consistently found that many children do not have current case plans and regular reviews. A recent South Australian study, for example, found that less than a half the children in care had their annual review completed and many did not have a current case plan.<sup>106</sup> Similarly, a small national study by the CREATE Foundation indicated that fewer than half of the 332 (156, 47%) children and young people surveyed were aware they had a case plan; 28% said that they did not have a case plan, and 25% (83) were unsure (CREATE, 2004).

In **New South Wales**, the *Children and Young Persons (Care and Protection) Act 1998* requires agencies providing care for children in court ordered out-of-home care to be accredited by the Children's Guardian. Agencies are required to conduct regular reviews of their care and treatment, and to provide for children to be heard in this process. The Office of the Children's Guardian is conducting targeted audits of the reviews but will not receive all case plans or reviews as intended in the unproclaimed sections of the Act. This audit process is still in its early days and there has been no evaluation of its effectiveness as yet but the New South Wales Department of Community Services has acknowledged that many children in care still do not have an allocated caseworker. They are therefore unlikely to have a case plan, regular reviews or to have any monitoring of their placement. Increased resources are, however, been made available to try to address these problems.

The sections of the legislation concerned with children in out-of-home care placed voluntarily by their parents, including children with disabilities, have not yet been proclaimed so there are currently no legislative requirements for the monitoring and review of these children's care.

In **Queensland**, the Child Protection Act 1999 requires that the arrangements in place for the protection of a child or young person in the custody or guardianship of the chief executive be reviewed to ensure that they are in their best

interests. The reviews must be conducted at least every six months. This provision does not cover children and young people placed voluntarily in out-of-home care.

The *Commission for Children and Young People Act 2000 (Queensland)* provides a program of community visitors who visit children and young people in a variety of institutional settings, including residential care. This has recently been extended to children in foster care and regular visits and reports are now made on a monthly basis (Salmon, 2005).<sup>107</sup> The Act also requires the involvement of children and young people in decisions and processes that affect their lives. The extensive and intensive Queensland community visitors scheme is commendable. An evaluation of its impact will be crucial in assessing its effectiveness and the participation of children and young people in the process.

In **South Australia**, S52(1) of the *Children's Protection Act* requires that a review of the circumstances of children under the Guardianship of the Minister until 18 years must be carried out at least once a year. Following the problems identified in the Layton review, the State Government established the Office of the Guardian for Children and Young People in 2004.<sup>108</sup> The Guardian has a responsibility to provide independent monitoring of the circumstances of children in out-of-home care, assess the quality of their care and advise the Minister on whether the needs of this group of children are being met. A priority focus is to be given to Aboriginal and Torres Strait Islander children and to children with disabilities.

Although significant improvements were made during 2004, the continuing shortfall in the completion of reviews required by legislation are acknowledged. Some children and young people in alternative care have not been provided with a caseworker, preventing proper case planning. The Department has made a commitment to create opportunities for children and young people to have a voice in decision-making during the annual review process and is making efforts to address issues associated with the current system.

<sup>105</sup> Steering Committee for the Review of Government Service Provision (SCRGSP) (2005) *Report on Government Services 2005*, Productivity Commission, Canberra.

<sup>106</sup> Gilbertson, R & Barber, J (2004) The systematic abrogation of practice standards in foster care. *Australian Social Work*, 57, 31-45.

<sup>107</sup> Salmon, B (2005) *Implementing a Community Visitor Program for Children in Foster Care*. Paper presented at Australian Institute of Family Studies Conference, Melbourne, February 2005.

<sup>108</sup> The Office of the Guardian and its functions are not yet established in legislation, although it is intended that legislation but a bill is currently before Parliament.

In **Tasmania**, the 1997 *Children Young Persons and their Families Act* provides for a review process when children come under the long-term guardianship of the Secretary of the Department of Health and Human Services. The previous Commissioner for Children highlighted the deficiencies in Tasmania's compliance with Article 25<sup>109</sup> and that resulted in a new protocol for managing complaints about the standard of care and investigation of allegations reports of abusing care. The Commissioner for Children and Young People and the Ombudsman monitors their effectiveness on an ad hoc basis.

The lack of any data or evaluation in any state of these measures means that there is no reliable means of knowing whether these processes are being effectively implemented and whether the causes for serious concern outlined in the various inquiries continue to exist despite some increases in resource levels.

### Recommendations

- That an audit of the care and circumstances of all children placed in care, including children with a disability and in voluntary care, be conducted in each state.
- That a nationally consistent approach be developed to ensure that all children placed in care have a periodic review of their treatment and all other circumstances relevant to their placement.
- That all Australian governments be required to report on these measures on a regular basis as part of the Productivity Commission's report on government services.

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<sup>109</sup> Patmalar Ambikatathy (2004) *The Human Rights Report on Complying to the United Nations Convention on the Rights of a Child in Tasmania* in March 2004 at pages 14, 15 and 23.

# THEME VI

## BASIC HEALTH AND WELFARE

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### A THE RIGHT TO LIFE, SURVIVAL AND DEVELOPMENT (ARTICLE 6)

This is the one Article that all world governments unequivocally support. The Australian Government's *Combined Second and Third Reports* are, however, unsatisfactorily vague.

#### Food, nutrition and infant health

The childhood nutrition and breastfeeding programs highlighted in the Government's *Combined Second and Third Reports* are successful in certain areas but there are two major areas of inadequacy the Report does not address: Indigenous child malnutrition and under-nutrition (discussed below) and the national problem of over-nutrition, overweight and obesity.<sup>110</sup> Early intervention is the most effective measure.

Obesity is a growing public health problem for Australian children. Over-nutrition and under-activity are critical factors. Between 10-15% of boys and 15-20% of girls in Australia are overweight, and the number of unhealthily overweight children has more than doubled in two decades.<sup>111</sup> Children at particular risk include those from some ethnic backgrounds (Middle Eastern and European), children of lower socio-economic status, and children in urban areas.<sup>112</sup> Obesity has many negative effects on short and long-term physical and mental health.

One factor is the way high-calorie 'fast-food' is marketed to children. This not only increases the consumption of unhealthy foods but also sets up life-long unhealthy eating behaviour and preferences.

#### Recommendations

- That there be significant investment in school and day-care nutritional education and physical activity.
- That legislation be implemented to limit advertising and marketing of "junk" foodstuffs to children

#### Injury prevention and control

The Australian Government has properly highlighted achievements in this area.<sup>113</sup> However, while the number of children injured in road accidents is going down, the number of Indigenous children injured in such accidents continues to rise.<sup>114</sup> Children from low socio-economic backgrounds are also at higher risk of traffic and other injuries.<sup>115</sup> Generally, there is still a high incidence of injury among Indigenous children.<sup>116</sup>

#### Recommendations

- That Government direct increased resources to evidence-based actions to prevent injury of Indigenous children and children from low socio-economic backgrounds, particularly those from rural areas.

#### Indigenous children - RIGHTS ALERT!

The Committee's 1997 *Concluding Observations* expressed concern at "the special problems still faced by Indigenous and Torres Strait Islander [children] with regard to their enjoyment of the same standard of living and levels of services, particularly in education and health" (paragraph 13). It encouraged Australia to take further steps to raise the health standards of this disadvantaged group (paragraph 32).

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<sup>110</sup> Paterson et al (2001) A review of the annual growth screening in Aboriginal schoolchildren in Australia, *Journal of Paediatrics and Child Health*, 37, 18-23.

<sup>111</sup> Prevalence of overweight and obesity in Australian children and adolescents, *Medical Journal of Australia*, 174, 561-4, 2001.

<sup>112</sup> Booth et al (2001) The epidemiology of overweight and obesity among Australian children and adolescents, 1995-97, *Australian and New Zealand Journal of Public Health*, 25, 162-9.

<sup>113</sup> *Australia's Combined Second and Third Reports*, paragraphs 280-284.

<sup>114</sup> Cercarelli et al (2002) Trends in road injury hospitalisation rates for Aboriginal and non-Aboriginal People in Western Australia, *Injury Prevention*, 8, 211-215.

<sup>115</sup> Turrell et al (2000) Socio-economic status and health in Australia, *Medical Journal of Australia*, 172, 434-438.

<sup>116</sup> Zubrick S R, Lawrence D M, Silburn S R, Blair E, Milroy H, Wilkes T, Eades S, D'Antoine H, Read A, Ishiguchi P, Doyle S (2004) *The Western Australian Aboriginal Child Health Survey: The Health of Aboriginal Children and Young People*. Perth: Telethon Institute for Child Health Research; Australian Bureau of Statistics (2003). *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples* (ABS cat. no. 4704.0, AIHW cat. no. IHW-6).



The ongoing inequities in health status and services of Indigenous children everywhere and all children particularly in rural and remote Australia, is one of the greatest health and social problems facing the country. The Government reports investment in research projects aimed at solutions,<sup>117</sup> but downplays the significance of the inequity.

Indigenous Australians die younger and suffer a higher burden of illness than non-Indigenous Australians and this is true for almost every type of disease for which information is available.<sup>118</sup>

### **Infant mortality**

The Government report notes that Indigenous infant mortality rates are *three times the national average*.<sup>119</sup> While there was a national reduction in mortality rates for children between 1985 and 1994, they have risen again since then, and in some areas they are continuing to rise.<sup>120</sup>

### **Growth failure and malnutrition**

Indigenous children suffer a higher rate of failure to thrive and malnutrition than non-Indigenous children.<sup>121</sup> This is a result of poverty, socio-cultural issues, inadequate access to fresh foods due to remote location, overcrowding, and chronic gastro-intestinal infections.<sup>122</sup> The mean national rate of low birth-weight and malnutrition in Aboriginal children is 13%, a rate considered to be *a nutritional emergency* by international relief agencies.<sup>123</sup>

### **Vision impairment**

Indigenous children are significantly affected by trachoma.<sup>124</sup> Australia is the only developed country in which trachoma, an easily spread infection of the eye with symptoms resembling conjunctivitis, is still a problem. The disease generally occurs in poor countries where people have limited access to water and health care.

### **Otitis media (glue ear) & hearing loss**

Indigenous children are three times more likely to have ear infections than non-Indigenous children).<sup>125</sup> Up to 90% of children living in northern Australian Indigenous communities have chronic ear problems.<sup>126</sup> Most will suffer permanent hearing loss, which has a flow-on effect to permanent hearing loss and speech, language and learning problems; these in turn lead to poor educational achievement and limited employment opportunities.<sup>127</sup> The World Health Organisation regards the rate of chronic and suppurative consequences of otitis media as “*a major public health problem*”.<sup>128</sup>

### **Chronic infections**

Indigenous children suffer a high recurrence of skin, ear, chest and gastro-intestinal infections, particularly in very isolated areas.<sup>129</sup> Chronic infections also lead to immune reactions that can cause severe renal and rheumatic heart disease, pathological processes that permanently damage and predispose children to early-onset organ failure. These Third World paediatric diseases are preventable through adequate hygiene and early treatment, yet remain endemic in Indigenous communities in Australia.

<sup>117</sup> *Australia's Combined Second and Third Reports*, p. 57.

<sup>118</sup> Australian Institute of Health and Welfare (2001) *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples*, 2001 (ABS cat. no. 4704.0, AIHW cat. no. AIHW-6).

<sup>119</sup> The National Aboriginal Community Controlled Health Organisation (2003) *What's Needed to Improve Child Health in the Aboriginal and Torres Strait Islander Population* at p. 6.

<sup>120</sup> Silva et al (1998). Excessive rates of childhood mortality in the Northern Territory, 1985-1994, *Journal of Paediatrics and Child Health*, 34, 63-8.

<sup>121</sup> National Aboriginal Community Controlled Health Organisation (2003): op cit.

<sup>122</sup> *Paediatric Handbook* 005-2006, Royal Darwin Hospital, NT Government.

<sup>123</sup> National Aboriginal Community Controlled Health Organisation (2003) *What's Needed To Improve Child Health In The Aboriginal And Torres Strait Islander Population*, p 7.

<sup>124</sup> Zubrick et al (2004) *The Western Australian Aboriginal Child Health Survey: The Health of Aboriginal Children and Young People*. Perth: Telethon Institute for Child Health Research, p. 160.

<sup>125</sup> National Aboriginal Community Controlled Health Organisation (2003). *What's Needed to Improve Child Health in the Aboriginal and Torres Strait Islander Population*, p. 8.

<sup>126</sup> Lehmann et al (2003) Benefits of swimming pools in two remote Aboriginal communities in Western Australia: Intervention study, *British Medical Journal*, 327, 415-419.

<sup>127</sup> Zubrick S et al. (2004) op. cit., p. 104.

<sup>128</sup> National Aboriginal Community Controlled Health Organisation: op. cit.; 8.

<sup>129</sup> Currie B et al (2000) Skin infections and Infestations in Aboriginal Communities in Northern Australia, *Australasian J. Dermatology*, 41, 139-143.

### **Communicable diseases**

Indigenous children are at high risk of acquiring communicable diseases such as pneumonia because of their socio-economic deprivation: non-Indigenous children are 10 times less likely to die from pneumonia than Indigenous children.<sup>130</sup> Indigenous children under five suffer a high incidence of pneumococcal infection: some of the highest rates of this disease in the world have been recorded in Central Australia.<sup>131</sup>

### **Mental health and substance abuse**

The burden of mental illness and suicide is also much greater amongst Indigenous children. The prevalence of mental health and drug and alcohol problems is increasing.<sup>132</sup> Government responses to substance abuse issues among children are affected by political sensitivities about parental responsibility and punitive/treatment responses to substance misuse generally.

### **Provision of medical assistance and access to health services**

Health problems in Indigenous children can lead to early-onset chronic disease such as renal failure,<sup>133</sup> cardiovascular disease, lung disease and cancer.<sup>134</sup> Childhood illnesses play a major causative role in high and premature death rates of Indigenous adults, and partially explain the massive discrepancy of over 20 years in life expectancy between Indigenous and non-Indigenous Australians.

Indigenous children continue to experience severely inequitable access to health services and benefits.<sup>135</sup> In many parts of rural and remote Australia, the quality of public and individual health services is well below national standards. For instance, there are only one or two Ear Nose and Throat surgeons servicing the Northern Territory, which has the highest rates of ear disease in Australia. The vast majority of Aboriginal children in northern Australia requiring surgical intervention for their chronic ear infections may never have the appropriate surgery, yet in urban areas, all such children could receive the required treatment.

The poor health of rural and remote Indigenous children is one of the most serious and urgent problems for Australia today. Without proper medical care, the poor health of these children will cripple the future of Indigenous Australians.

### **Recommendations**

- That Government make dramatic improvement to the poor health of Indigenous Australian children an urgent national priority in terms of policy, resources and programs and a reason to remove obstacles to collaboration and effectiveness across all areas of Government activity.
- That Government seek to share the responsibility with Indigenous people, health providers, across governments and government agencies, acknowledging that empowerment and self-determination of Indigenous Australians is necessary if lasting improvement is to be achieved.
- That Government acknowledge that a major cause of child ill-health is malnutrition of children who live in remote Indigenous communities, and target nutrition programs to such children.
- That Government actively support research/intervention programs such as those being trialled in the Northern Territory (i.e. *Strong Women, Strong Babies, Strong Culture Program*)<sup>136</sup> and other creative and locally-tailored evidence-based interventions that may effectively improve the health of children.
- That Government implement the recommendations of the National Aboriginal Community Controlled Health Organisation report, *What's Needed To Improve Child Health in the Aboriginal And Torres Strait Islander Population*.<sup>137</sup>

<sup>130</sup> National Aboriginal Community Controlled Health Organisation. op cit, 6.

<sup>131</sup> Federal Government of Australia: Budget 2001. *Our Path Together: Better Health for Aboriginal and Torres Strait Islander People*.

<sup>132</sup> Hunter et al (2002) Indigenous suicide in Australia, New Zealand, Canada and the United States, *Emergency Medicine*, 14, 14-23.

<sup>133</sup> Spencer J et al (2001) Low birth weight and reduced renal volume in Aboriginal children, *American Journal of Kidney Disease*, 37, 915-920.

<sup>134</sup> Condon J et al (2003) Long-term trends in cancer mortality for Indigenous Australians in the Northern Territory, *Medical Journal of Australia*, 180, 504-507.

<sup>135</sup> Zubrick S et al (2004) op. cit.

<sup>136</sup> Mackerras, D (2001) Birthweight changes in the pilot phase of the 'Strong Women Strong Babies Strong Culture' Program in the Northern Territory, *Australian and New Zealand Journal of Public Health*, 25, 34-40.

<sup>137</sup> National Aboriginal Community Controlled Health Organisation (2003). *What's Needed to Improve Child Health in the Aboriginal and Torres Strait Islander Population*, pp. 17-18.

### Children in rural and remote areas and other disadvantaged children

The Committee's 1997 *Concluding Observations* recommended that further steps be taken to raise the standards of health of disadvantaged groups, particularly children living in rural and remote areas (paragraph 32).

The Australian Government Report does not address the health standards of other disadvantaged groups such as children in families with a single parent, whose parent/s are unemployed and other families living in poverty. Children from the lowest socio-economic sectors face the highest burdens of physical and mental ill health.<sup>138</sup> The Public Health Association of Australia has estimated that one in eight Australian children come from families with inadequate income; this number is growing disproportionately.<sup>139</sup>

Another group of children with specific health challenges are children whose parent/s have been jailed. Recent research estimates that this may be 5% of all Australian children and 20% of all Indigenous children.<sup>140</sup> There is no Government recognition, state or federal, of the specific emotional, social or mental health adversities facing these children.

#### Recommendations

- That all Australian governments develop and implement social and economic policies that address the continuing health inequalities in Australian children
- That all levels of Government collaborate and cooperate to provide satisfactory solutions to the whole problem of child poverty and its associated health problems.
- That all Australian Governments address the specific needs of children of imprisoned parents.

### Youth suicide

The Australian Government's *Combined Second and Third Reports* describe a recent decrease in youth suicide in Australia, and describes the national prevention strategies that have been successful in addressing this issue. This achievement is acknowledged, and fully supported.

However, rates of youth suicide in Australia are still high in comparison with the international community and is actually increasing in two broad groups of youth: remote and rural Indigenous Australians,<sup>141</sup> and homeless adolescents.<sup>142</sup>

...we were informed that in Normanton (a remote Indigenous community in far north Queensland) 15 young people have taken their own lives in the past two years. This is a significant loss to the community of just 2000 people.<sup>143</sup>

Young rural males remain a highly over-represented group in adolescent suicide.

#### Recommendations

- That all Australian Governments target resources for research and effective interventions for suicide prevention in Indigenous communities, amongst rural and remote-living children and homeless youth to ensure the trend of decreasing rates of youth suicide continues.

### Refugee children in immigration detention

There is a large body of evidence indicating that refugee children have numerous physical and mental health problems. The report of the Human Rights and Equal Opportunity Commission *Last Resort* is essential reading in relation to the issues affecting children in immigration detention and is discussed further in *Theme VIII, Special Protection Measures*. Many of these children were suffering from Post-Traumatic Stress Disorder when they arrived in Australia. Mental illness is exacerbated in children who are

<sup>138</sup> Turrell et al (2000) Socio-economic status and health in Australia, *Medical Journal of Australia*, 172, 434-438.

<sup>139</sup> Pusey M (2002) *The Experience of Middle Australia*. Cambridge: Cambridge University Press.

<sup>140</sup> Quilty S et al (2004) Children of prisoners: A growing public health problem, *Australian and New Zealand Journal of Public Health*.

<sup>141</sup> Parker et al (2002) A study of factors affecting suicide in Aboriginal and 'other' populations in the Top End, *Australian and New Zealand Journal of Psychiatry*, 36, 404-410.

<sup>142</sup> Kamieniecki (2001) Prevalence of psychological distress and psychiatric disorders among homeless youth in Australia. *Australian and New Zealand Journal of Psychiatry*, 35, 352-358.

<sup>143</sup> From Queensland consultation.

incarcerated upon arrival to Australia in conditions in which their best interests are not a priority. This practice should cease immediately.

### Children and adolescents in juvenile justice detention

Children in juvenile justice detention have very poor health on all measures. State Governments must recognise this and provide adequate healthcare.<sup>144</sup>

## B CHILDREN WITH DISABILITIES (ARTICLE 23)

The Committee's 1997 *Concluding Observations* expressed concern at Australia's absence of a comprehensive policy for children at the federal level, the lack of monitoring mechanisms at the local and federal levels, and the disparities between the different states' legislation and practices, including budgetary allocations (paragraph 9).

The Australian Government reports several initiatives that address the rights of children with disabilities.<sup>145</sup> Our research and consultations show that further work is required if Australia is to meet its obligations under the Convention.

People with disability have welcomed the Australian Government's positive participation in the development of the Comprehensive and Integral International Convention on the Rights and Dignity of Persons with Disabilities. Through its participation, Australia has the opportunity to support the inclusion of the rights of children and young people with disability throughout the Convention, in line with the Convention on the Rights of the Child and in recognition of the specific circumstances and additional vulnerabilities that children and young people with disability

face. Such support should be based on the discussion and recommendations outlined in the Report from the national consultations about the development of the Convention conducted with people with disability in Australia.<sup>146</sup>

### A comprehensive and unified approach to disability data collection

Despite the International Classification of Functioning, Disability and Health, in Australia data collections for different purposes use different operational definitions of disability. This makes it difficult to adequately identify, acknowledge and respond to the needs of Australian children with disabilities.<sup>147</sup>

There is also an absence or scarcity of information in relation to:

- adolescents and youths with disabilities;<sup>148</sup>
- alternative care arrangements for children with disabilities;<sup>149</sup>
- Aboriginal and Torres Strait Islander children with disabilities;<sup>150</sup>
- children with disabilities from culturally and linguistically diverse backgrounds;<sup>151</sup> and
- children with disabilities living in rural and remote locations.

These omissions are unacceptable given the Committee's previous recommendation to "take further steps to raise the standards of health and education of disadvantaged groups, particularly Aboriginals, Torres Strait Islanders, new immigrants, and children living in rural and remote areas" (paragraph 25).

<sup>144</sup> Fasher et al (1997) The health of young Australians in a New South Wales juvenile justice detention centre, *Journal of Paediatrics and Child Health*, 33, 426-429.

<sup>145</sup> *Australia's Combined Second and Third Reports*, p. 59.

<sup>146</sup> People with Disability Australia Incorporated, Australian Federation of Disability Organisations, National Association of Community Legal Centres (August 2004), *Comprehensive and Integral International Convention on the Rights and Dignity of Persons with Disabilities – Report on National Consultations*.

<sup>147</sup> Australian Institute of Health and Welfare (2004a). *Children with disabilities in Australia*. (AIHW cat. no. DIS 38) Canberra: at p. 8.

<sup>148</sup> This is largely because the Australian Bureau of Statistics (ABS) uses the age of 15 as a measure of (in)dependency and thus reports on disability for children aged 0-14 years only.

<sup>149</sup> Australian Institute of Health and Welfare (2004a). *Children with disabilities in Australia*. (AIHW cat. no. DIS 38) Canberra: AIHW at p. 78.

<sup>150</sup> For example, in target surveys such as the *1998 ABS Survey of Disability, Ageing and Carers*, Indigenous people are not identified.

<sup>151</sup> Australian Institute of Health and Welfare (2004a) at p. 30.

## Recommendations

- That Australia ensures a nationally consistent approach to the collection of data on childhood disability using internationally accepted definitions of 'disability' and the Convention definition of childhood that ensures the collection of appropriate data about disability in children who are Indigenous, from culturally and linguistically diverse backgrounds, and living in rural and remote locations.

## Funds for supports, services, aids, equipment and technical assistance

Academics, researchers, and disability advocacy organisations in Australia continue to identify grave difficulties facing children with disabilities, their families and carers who need support, services, aids, equipment and technical assistance.<sup>152</sup> The difficulties include having to negotiate a 'maze' of Government grant processes, funding shortfalls in particular geographic areas or in relation to particular areas of need or particular disabilities, and problems accessing out-of-hours care.

## Recommendations

- That a nationally consistent approach be developed to the provision and timely replacement of aids, equipment and technical assistance to all children with disabilities without un reasonable restrictions or eligibility requirements and that do not discriminate according to age, impairment or geographic location.

## Education, training and employment

Our research and consultation confirms that children with disabilities still suffer discrimination in education, training and employment. This is discussed in Theme VII - Education, Leisure and Cultural Activities.

## Separation from parents

Children with disabilities are more likely than their peers without disabilities to be separated from their parents. There are two reasons for this:

- Though most parents want to care for their child themselves, a significant proportion relinquish their child's care because they cannot meet the associated demands and pressures without adequate resources and support.<sup>153,154</sup> The Australian Government funds a wide range of support services for families with children with disabilities but only about 10% of children with a disability receive them.<sup>155</sup> Respite is acknowledged internationally as a critical resource for parents of children with a disability.<sup>156</sup>
- These children are at a higher risk of neglect or maltreatment than their age peers without disabilities<sup>157</sup> and are therefore more likely to be removed from their parents by statutory child protection authorities.<sup>158</sup> The absence of a disability identifier in out-of-home care and child protection data collections means, however, that many of these children are not being identified so the size of the problem and potential solutions cannot be addressed.

<sup>152</sup> Noted in the submission arising from the Victorian CROC Roundtable coordinated by the Youth Affairs Council of Victoria and Youthlaw, incorporating contributions from representatives of both the child, youth and family sector and the legal sector. Also noted in DisAbility Services Victoria (2000). *The aspirations of people with a disability within an inclusive Victorian community*. Victorian Government Department of Human Services, Melbourne. <http://www.dhs.vic.gov.au/disability/>; School of Social Work and Social Policy, La Trobe University. (2002). *Listen to us. Supporting families with children with disabilities: Identifying service responses that impact on the risk of family Breakdown*. Victorian Government Department of Human Services, Melbourne. <http://www.dhs.vic.gov.au/disability/>

<sup>153</sup> Around 25% of families with children with severe disabilities up to the age of six years have already placed or taken action to place their child out of home. This proportion increases over time so that between the ages of 6 and 13, 42% of families have already placed or taken action to place their older children with severe disabilities out of home (Llewellyn, G, Thompson, K, Whybrow, S, & McConnell, D (2003) *Supporting Families. Family well-being and children with disabilities*. Family Support and Services Project, University of Sydney, Sydney, <http://www.afdsr.org>.)

<sup>154</sup> Llewellyn, G, McConnell, D, Thompson, K, & Whybrow, S (in press) Out-of-home placement of school-age children with disabilities, *Journal of Applied Research in Intellectual Disability*.

<sup>155</sup> Only 29,563 children with disabilities aged 0-14 years were receiving these services in the first six months of 2003 compared with 296,4000 children nationwide with a disability in this age group: Australian Institute of Health and Welfare (2004a). *Children with disabilities in Australia*. AIHW cat. no. DIS 38. Canberra: AIHW at p. 65.

<sup>156</sup> Stalker, K (Ed) (1996) *Developments in short-term care*. London: Jessica Kingsley.

<sup>157</sup> Kairys, SW, Alexander, R C, Block, R W. et al (2001). Assessment of maltreatment of children with disabilities, *Pediatrics*, 109 (2), 508-12.

<sup>158</sup> Mc Connell, D, Llewellyn, G, & Ferronato, L (2000) *Parents with a Disability and the New South Wales Children's Court*. Family Support and Services Project, University of Sydney, Sydney, <http://www.afdsr.org>.

## Recommendations

- That a nationally consistent approach in out-of-home care and child protection data collection be developed to include a disability identifier.
- That particular attention is given to equitable distribution of adequate respite for parents of children with disabilities especially carers who are disadvantaged by ethnicity, Indigenous status and remote location.

## C HEALTH AND HEALTH SERVICES (ARTICLE 24)

The 2003 Australian Government Report refers the Committee to pages 195–230 of Australia's first report. This response does not detail trends, progressions and problems that have occurred since the first report was tabled in 1995.

### Provision of medical assistance

The 2003 Australian Government Report notes progress in increasing the level of medical assistance available to children. The report does not address the following issues:

### Confidentiality and age of consent to medical treatment

There is concern that the right to confidentiality between adolescents and their healthcare practitioners is under threat. Attempts by the Federal Government in 2004 to enable parents' access to their adolescent children's medical records were not realised but the move indicates a failure to appreciate or respect the need for confidentiality between adolescents and healthcare providers.

The right of young people to access health care and treatment in confidence, without parental consent or intervention, is inadequately understood and still contested.<sup>159</sup> **It is recommended that** the legal capacity to consent to medical treatment be clarified and clearly outlined to health care providers, agencies delivering health-related services, and public servants devising such programs.

### Growing socio-economic inequalities

The 2003 Australian Government Report does not address the issue of increasing numbers of Australian children living in poverty, and the implications for children's health.

### Degradation of the Pharmaceutical Benefits Scheme (PBS)

The success of the Australian PBS in maintaining relatively low prices for pharmaceuticals has been recognised worldwide, and many countries have since adopted similar schemes. The PBS in Australia is currently threatened, with the US/Australia Free Trade Agreement and the general policy direction of the Federal Government. There is concern that further degradation of this system will increase the price of medications in Australia, reducing access to appropriate medications by children of lower socio-economic status.<sup>160</sup>

### Indigenous children

This has been addressed in the discussion on Article 6 and Indigenous children. The Government's Report fails to acknowledge the very limited access to medical services available to Indigenous children, particularly those in remote areas. The high rates of infant and child mortality amongst Indigenous communities are one aspect of this grossly inequitable position, and the report does not address the breadth and severity of the health problems faced by Indigenous children today.

### Mental health

The mental health programs described in the Australian Government's Report are commended. However, there are still marked inadequacies in terms of access to mental health services for children and young people, particularly those in rural and remote areas.<sup>161</sup> Even in the nation's capital, the Australian Capital Territory, for instance, several reports have emphasised the urgent need for a designated inpatient unit for young people with acute mental illnesses.<sup>162</sup> Young people are still placed in adult psychiatric wards, which are highly inappropriate and threaten their welfare and therapeutic outcomes,

<sup>159</sup> Noted in the submission from the Queensland Youth Sector and the New South Wales YAPA Consultation submission.

<sup>160</sup> Outterson M (2004) Free Trade in Pharmaceuticals. *Medical Journal of Australia*, 181(5), 260-1, Sept 6.

<sup>161</sup> Youth Legal Service Inc, Western Australia at 28, referring to the Youth Affairs Council of Western Australia & Young People's Health Australia (Western Australian Branch) Inc. Youth Health Forum, 29 May 2003; Submission arising from the Victorian CROC Roundtable coordinated by the Youth Affairs Council of Victoria and Youthlaw at p. 26.

<sup>162</sup> Noted in the Submission from the Youth Coalition of the Australian Capital Territory (ACT) at 12, referring to the ACT Legislative Assembly, *Report on the Inquiry into the Interests, Rights and Wellbeing of Children and Young People* (2003) at 29 – 30; The ACT Legislative Assembly Select Committee on the Status of Women in the ACT, (November 2002) at 12-13.

particularly for young women.<sup>163</sup> Tasmania also has very limited specific in-patient mental health facilities for adolescents.<sup>164</sup> There are virtually no facilities for mentally ill children in Western Australia.

There are also major concerns about the increasing prescription of anti-depressant medication, stimulant medication (for the treatment of Attention Deficit/Hyperactivity Disorder (ADHD) and other psychotropic medication.<sup>165</sup> There seems to be a strong tendency to prescribe these medications in particular areas. Western Australia, for example, leads the nation in medicating very young children for ADHD. There are concerns about the developmental consequences of long-term use of such medication to ‘treat’ young people whose behaviour is disturbing and the consent issues.

“...They organise my entire life without asking me and I don't like it. Medication too I want to have a say in. They say I need medication for ADD and I don't reckon I have it but they make me take it anyway and I'm so doped out I can't think straight”.<sup>166</sup>

The Government Report also does not address the issue of drug and alcohol use among adolescents. This is a significant and growing problem: 40% of adolescent participants in a recent national survey said they had used an illegal drug in the previous 12 months.<sup>167</sup> There are deficiencies in drug and alcohol services for young people. Tasmania, for instance, has no specific drug and alcohol rehabilitation facility for under-18-year-olds.<sup>168</sup> The Australian Government's persistence in a criminal justice rather than a health and harm minimisation approach is not assisting the provision of proper services in this area.

### **Mental health, young people and schooling**

In recent years, a national study of the mental health needs of young people concluded that 14% of school-aged children and young people have mental health problems

that are comparable in severity with problems seen in children actually attending a mental health clinic.<sup>169</sup> The scarcity of mental health “back-up” for schools - guidance for teachers in the management of behaviourally disturbed students, direct in-school treatment of students who are emotionally and mentally unwell and referral for clinical assessment and treatment where warranted - was noted in the NSW Independent Public Education Review.<sup>170</sup>

The scarcity of school services is part of a wider picture of the run-down state of mental health services generally across Australia. This problem is made worse by the very thin provision of school counseling services, which at the time of the NSW Independent Public Education Inquiry involved one school counsellor for every 1,100 students. During the Inquiry, the State Minister at the time (Mr Watkins) listened to the concerns raised by people involved with the Inquiry in relation to: (i) the absorption of the time of counsellors in documenting applications for various forms of assistance for students, particularly those living with disabilities, and (ii) the counsellors' inability to find the time to provide treatment services for young people. While the Inquiry was still in progress, the Minister authorised the employment of approximately 130 additional counsellors in the knowledge that we would recommend a doubling of their number over ten years (that is, 700 additional officers) so that the ratio would be 1:500 students. Notwithstanding the promptness of the government's action - there has been no further substantial change in the situation since the Inquiry was completed.

The limited mental health assessment and treatment afforded to school students is both a denial of their rights under the Convention and also a factor contributing to the high levels of suspension and expulsion from school (see Theme VI of this report). There are some students whose behavior is simply beyond the professional capacity of teachers to understand let alone manage. The national

<sup>163</sup> See the Legislative Assembly *Inquiry into the Interests, Rights and Wellbeing of Children and Young People*, at 29 – 30; The ACT Legislative Assembly Select Committee on the Status of Women in the ACT, (November 2002).

<sup>164</sup> Tasmanian Commissioner for Children and Young People, paragraph 6.2.

<sup>165</sup> Submission from the Youth Coalition of the ACT at paragraph 8; Submission from the Queensland Youth Sector at paragraph 3.2.2; Submission from the New South Wales YAJC Consultation; Submission from the Youth Network of Tasmania and the Commissioner for Children Tasmania Consultation. See also Sawyer et al (2004) Use of health and school-based services in Australia by young people with Attention-Deficit/Hyperactivity Disorder. *J. American Academy of Child and Adolescent Psychiatry*, 43, 1355-1363.

<sup>166</sup> Create Foundation, *In Their Own Words* at www.create.org.au at 68 and cited in the Submission from the Youth Coalition of the ACT at paragraph 8.

<sup>167</sup> Lynskey et al (1999) Prevalence of illicit drug use among youth: Results from the *Australian School Students Drug and Alcohol Survey*, *Australian New Zealand Journal of Public Health*, 23, 519-523.

<sup>168</sup> Tasmanian Commissioner's report, op. cit. at paragraph 6. 2.

<sup>169</sup> Zubrick SR, Lawrence DM, Silburn SR, Blair E, Milroy H, & Wilkes T, Eades S, D' Antoine H, Read A, Ishiguchi P, & Doyle S (2004) *The Western Australian Aboriginal Child Health Survey: The Health of Aboriginal Children and Young People*. Perth: Telethon Institute for Child Health Research; Australian Bureau of Statistics (2003). *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples* (ABS cat. no. 4704.0, AIHW cat. no. IHW-6).

<sup>170</sup> Inquiry into the Provision of Public Education in New South Wales 2002. op.cit

survey of the mental health of children and young people put the level of aggressive behaviour among young people at 5.2% (slightly higher for younger males and slightly lower for older females). The national survey concluded that the findings "...highlight the importance of social disadvantage on children and young people's mental health and wellbeing."<sup>171</sup>

**Recommendations**

- That there be a national program of mental health services for children and young people, especially services for children in rural and remote areas and culturally appropriate services for Indigenous children that have regard to:
  - (a) the need for specific in-patient units for young people with acute mental illnesses;
  - (b) education programs on mental health, self-harm and suicide prevention, particularly in rural and remote areas;<sup>172</sup>
  - (c) specialist training for child and adolescent mental health practitioners;
  - (d) improved provision of GP mental health services for children and young people;<sup>173</sup>
- That there be a continued commitment to school-based counselling and referral services;
- That drug and alcohol use by children and young people be monitored to determine the need for services;
- That health intervention for all mental illness (including substance misuse) be premised on harm minimisation;
- That the prescription of psychotropic medications to children be monitored and reviewed with a view to developing guidelines for the prescription of psychotropic medication for children.

**International cooperation and the health needs of developing countries**

While it is recognised that the Australian Government has a firm commitment to the health of children internationally, it should be noted that Australia is not doing its "fair share" to achieve the Millennium Development Goals (MDGs), which are emerging as the standard for gauging the commitment of donor and partner countries to eliminating poverty.<sup>174</sup>

The shortfalls in the 2004-5 Australian aid budget are illustrated below:

Overseas Development Assistance required to meet the MDGs:  
ACFID Aid Budget Analysis 2004-2005

	<b>Australia's fair share of costs</b>	<b>Estimate of expenditure, 2004-05</b>	<b>Shortfall</b>
Health-including reproductive health and HIV	\$736m	\$242m	<b>\$494m</b>
Water and sanitation	\$355m	\$60m	<b>\$295m</b>

**D THE RIGHT TO BENEFIT FROM SOCIAL SECURITY (ARTICLE 27)**

Pursuant to Article 26 (and Article 27) of the Convention, the Australian Government has a responsibility to provide support for parents and young people whose access to material resources does not allow them to fully enjoy their fundamental human rights.

While the Australian Government does provide assistance to low-income parents and young people, research and consultation carried out for this report has revealed flaws within Australia's social security system, which does not protect and promote the basic human rights of many children and young people to a minimal standard of a decent quality of life.

<sup>171</sup> Raphael, B (2000) *Promoting the Mental Health and Well-being of Children and Young People*, Discussion Paper: Key Principles and Directions. Canberra, National Mental Health Working Group, Department of Health and Aged Care.

<sup>172</sup> Capp et al (2001) Suicide prevention in Aboriginal Communities: Application of Community Gatekeeper Training, *Australian New Zealand Journal of Public Health*, 25, 315-321.

<sup>173</sup> Smith et al (2001) How well informed are Australian General Practitioners about adolescent suicide? Implications for primary prevention, *International Journal of Psychiatry in Medicine*, 31, 169-82.

<sup>174</sup> Drawn from the submission from the Child Rights Working Group of the Australian Council for International Development at 2.



## Children in poverty and financial hardship in Australia

According to the 2004 United Nations Development Report, Australia has the highest levels of poverty among the highly developed nations, excluding the United States.<sup>175</sup> Conservative estimates are that 145,000 young Australians aged 15-24 years were living in poverty during 2000, with half of these young people estimated to be living at home.<sup>176</sup> One in six Australian children reportedly live in a family where there is no one in paid work.<sup>177</sup>

### Government assistance to families

As the Government's *Combined Second and Third Report* notes (p. 62), people with dependent children in their care may be eligible to receive additional payments to assist with the care of those children (Family Tax Benefits A and B).

There are two significant problems with the Family Tax Benefits:

- These payments do not meet the actual living costs of children, nor do they give parents much flexibility in deciding their spending. For instance, the maximum Family Tax Benefit B payment is paid at \$114.66 per fortnight per family with the youngest child under five and \$79.94 per family with the youngest child over five.
- Families are faced with a dramatic decrease in overall family income when the youngest child turns 16. For instance, a sole parent family can lose \$146.74 per fortnight. This drastic decrease in income comes at precisely the time when the costs of raising the child are at their highest, an estimated average of \$322 per week.<sup>178</sup>

## Government assistance to young people – RIGHTS ALERT!

Youth Allowance is not mentioned in the Government's report. This is the main social security benefit for young people. It is paid to eligible full-time students aged 16-24 years, and to eligible unemployed persons aged 16-21 years who satisfy an activity test.

While the notion of youth income support is welcome, there is widespread dissatisfaction with the current system.

Firstly, there is a significant and growing gap between Youth Allowance and other social security payments such as Newstart (the payment for older unemployed persons) and pensions. For instance, while a single independent person on Youth Allowance receives \$326.50 per fortnight, a person on the Single Pension will receive \$470.70. A major contributing factor to this gap is the different methods of indexing payments. These differences are illogical and were the subject of concern during consultation:

*"... The essential costs of life are not age related. Young people do not receive discounts on food, rent, bills, petrol etc. Therefore anomalies in payment rates cannot be justified".<sup>179</sup>*

Secondly, Youth Allowance payments are grossly inadequate, regardless of any comparison – a point consistently raised in submissions to this report.<sup>180</sup> Independent full time students aged 16 to 24 receiving rent assistance are 34% below the poverty line and single dependent students aged 18 to 24 are 50% below the poverty line. Young people have reported their rate of Youth Allowance as being so low that they have "serious financial difficulties in paying for basics such as food and shelter let alone the travel costs of attending school or job interviews".<sup>181</sup>

<sup>175</sup> Poverty line based on 50% median income: United Nations Human Development Report 2004. Available online at: <http://hdr.undp.org/reports/global/2004/>. Using the Henderson Poverty line, 14% of Australians are currently living below the poverty line. This poverty measure estimates the amount of money needed to maintain a minimum standard of living.

<sup>176</sup> Mission Australia 2004, Poverty Fact Sheet: *Children and Young People in Australia*. Available at: [www.missionaustralia.com.au](http://www.missionaustralia.com.au)

<sup>177</sup> Australian Bureau of Statistics (2004, July) *Children Living Without An Employed Parent: Australian Labour Market Statistics* (cat. no. 6105.0) ABS issue.

<sup>178</sup> ACOSS (2004) *Proposal for Reform to Student Income Support*: Submission to the Senate Employment, Workplace Relations and Education References Committee's Inquiry into student income support, June 2004.

<sup>179</sup> Submission from the Victorian CROC Roundtable at p. 25.

<sup>180</sup> Submission from the Youth Network of Tasmania and the Commissioner for Children Tasmania Consultation at 13; Submission arising from the Victorian CROC Roundtable at p. 25.

<sup>181</sup> Welfare Rights Centre, Sydney, *Runaway Youth Debt – No Allowance for Youth: An Analysis of the Causes and Impact of Extensive Debt in the Youth Allowance System* (National Welfare Rights Network, October 2002) at p. 6.

Eligibility is another issue. Unless a young person meets a complicated set of criteria for ‘independence’, any Youth Allowance will be paid at a low ‘at-home’ rate assessed on the basis of the child’s parental income. A young person is recognised as an adult at 18 years of age under Australia’s laws of majority, but may be ‘dependent’ for the purpose of social security entitlements up to the age of 25.<sup>182</sup> For ‘dependent’ recipients, Youth Allowance begins to reduce once parental income rises above the very low threshold of \$28,150 per annum. This places huge financial pressure on children, whose families either cannot afford to support, or choose not to support them in post-school education or even final years of schooling. It certainly limits educational options for many young people.

### Recommendations

- That the rate of Youth Allowance match that of the adult unemployment benefit and be indexed twice yearly in line with other income support payments.
- That the age at which ‘independence’ is recognised for Youth Allowance be set at 18 rather than 25.
- That the parental income test threshold for Youth Allowance be increased to at least the Family Tax Benefit income threshold (i.e. from currently \$28,150 to FTB which is currently \$32,485) and preferably to a realistic level.

### Social Security breaches

People in receipt of Youth Allowance are required to meet an activity test (usually job seeking or study) to remain eligible for payment. If they do not meet these or administrative requirements, a penalty can be imposed. The penalty is known as a breach and reduces the payment by 18% or 24%, or results in non-payment for up to eight weeks.

Young people are far more likely to have a breach penalty imposed than older people. A recent Government taskforce into breaching has acknowledged that “the current penalties are generally unfair...”, can impose “significant hardship” on both the person and their families, and that some people are more vulnerable to breaching “through

no fault of their own”.<sup>183</sup> Many submissions and consultants for this report expressed concern about the punitive response that does not take individual circumstances into consideration and about its severe impact on young people’s ability to participate in the community and survive on welfare.<sup>184</sup>

There is no reason why a child should ever be left without income support – even if the young person incurs a “debt” to be repaid at some later date in adulthood or by a person with a maintenance obligation for the child.

### Recommendations

- That policy and practice should ensure that no social security penalty should result in a child being left without income support.

### Residence issues

Eligibility for Social Security payments generally depends on a person being a permanent resident. This means people on bridging visas or other temporary visas cannot receive any Social Security Payments.

While people who hold a Temporary Protection Visa (TPV) are eligible for a payment called Special Benefit. This benefit cannot be paid to full-time students unless they are “homeless” and a person over the age of 18 cannot receive Special Benefit if they are a full time student. This severely limits educational opportunities for holders of Temporary Protection Visas and their families.

Lastly, people arriving in Australia as permanent residents are subject to a two-year waiting period before being eligible for most Social Security Payments. A lack of access to Youth Allowance within the first two years of arrival in Australia can place young people and their families in financial hardship and limit opportunities for education.

### Recommendations

- That the Government remove the restriction on Special Benefit not being available to children who are full time students.

<sup>182</sup> Submission from the Youth Network of Tasmania and the Commissioner for Children Tasmania Consultation at p. 13.

<sup>183</sup> *Report of the Breaching Taskforce Review* December 2004, pp. 20-21.

<sup>184</sup> New South Wales Consultation.

## E THE RIGHT TO AN ADEQUATE STANDARD OF LIVING (ARTICLE 27)

### Youth homelessness

The Committee's 1997 *Concluding Observations* expressed concern "at the spread of homelessness amongst young people in Australia", and feared that "homeless children were at risk of involvement in prostitution, drug abuse, pornography and other forms of delinquency and economic exploitation" (paragraph 18).

Homelessness remains a significant human rights issue for children in Australia. While it is difficult to determine the number of homeless children in Australia, the figures that are available are disturbingly high. On census night in 2001, 36,000 children were counted as homeless.<sup>185</sup> Data based on requests for homelessness services reveal higher numbers of Australian children experiencing homelessness: *a total of 64,800 children and youth accessed a homelessness service in 2002-2003*.<sup>186</sup>

Australian children become homeless for many different and complex reasons. These reasons include:

- family violence and abuse;<sup>187</sup>
- substance misuse and health issues (particularly mental health issues);
- poverty;<sup>188</sup>

- a shortage of affordable accommodation (brought about by dramatic cuts in funding for public housing and rising costs of private housing);<sup>189</sup> and
- Aboriginality, in that Indigenous children are more likely to become homeless.<sup>190</sup>

Homelessness not only threatens a child's right to a standard of living adequate for his or her physical, mental, spiritual, moral and social development,<sup>191</sup> it is also likely to be associated with violations of other rights in the Convention, having adverse impacts on children's health,<sup>192</sup> education,<sup>193</sup> economic security,<sup>194</sup> and their relationships with family and community.<sup>195</sup> Homelessness has also been shown to place children at risk of substance abuse<sup>196</sup> and sexual exploitation.<sup>197</sup>

While this report acknowledges the efforts on the part of the Australian Government to address youth homelessness,<sup>198</sup> and the progress made by some of these initiatives,<sup>199</sup> there are significant weaknesses in the Government's response.

### The absence of a national child-focused response to homelessness

In spite of the fact that children represent the largest group of homeless people assisted by homelessness services, children under 16 who are accompanying adults are not recognised as clients in their own right by Government-

<sup>185</sup> Chamberlain C & MacKenzie D (2003) *Counting the Homeless 2001* at p. 4.

<sup>186</sup> Australian Institute of Health and Welfare (2004) *Homeless People in SAAP: SAAP National Data Collection Annual Report 2002-2003* (AIHW Cat No HOU93). Canberra: AIHW.

<sup>187</sup> Australian Institute of Health and Welfare (2004) *Children Accompanying Homeless Clients 2002-03*. A report from the SAAP National Data Collection, (Canberra: AIHW, 2004). See also RRP Consulting, *I'm looking at the future - Evaluation Report of Reconnect, Final Report*, December 2004 at 10, and Department of Family and Community Services (2003) at p. 15, Figure 2.

<sup>188</sup> See RRP Consulting (2004) at p. 10; Department of Family and Community Services (2003) at p. 15.

<sup>189</sup> See figures at Council of Social Services New South Wales, Social Policy: Housing, available on-line at <http://www.ncoss.org.au/policy/housing.html>; ACT Legislative Standing Committee on Community Services and Social Equity, *The Rights, Interests and Well-Being of Children and Young People in the ACT* (Canberra, August 2003) at paragraph 5.74.

<sup>190</sup> Australian Institute of Health and Welfare (2004) *Children Accompanying Homeless Clients, 2002-03* at xii; RRP Consulting (2004) at 10; and Department of Family and Community Services (2003) at 24.

<sup>191</sup> See, for example, Eron D, Sewell J, Horn M & Jewell F (1996) *Can We Stay Here? A Study of the Impact of Family Homelessness on Children's Health and Well-being*. Melbourne: Hanover Welfare Services.

<sup>192</sup> Department of Family and Community Services (2003) at p. 8; RRP Consulting (2004) at p. 22; Chamberlain C. and MacKenzie D. *Homeless Careers - Pathways in and out of homelessness* (Melbourne: Swinburne and RMIT Universities, 2003); AFHO, *Come inside... Meet Australia's 36,000 Homeless Children* available on-line [http://www.afho.org.au/3\\_news/come\\_inside/homeless\\_children.htm](http://www.afho.org.au/3_news/come_inside/homeless_children.htm).

<sup>193</sup> See RRP Consulting, (2004) at pp. 8, 42, 48-49, and 59; Chamberlain C & MacKenzie D (2002) *Youth Homeless: Early Intervention and Prevention* (Sydney: ACEE).

<sup>194</sup> See Chamberlain C & MacKenzie D, (2002), note 42; Meg Mundell (2003) *Homeless Young People and Unemployment*, Paper delivered at the Interface Youth Conference, Sydney, April 25,

<sup>195</sup> RRP Consulting (2004), at pp. 8, 65-66; AFHO, *Come inside... meet Australia's 36,000 Homeless Children*.

<sup>196</sup> See RRP Consulting (2004) at p. 10.

<sup>197</sup> This was commented upon by the ACT Legislative Assembly Select Committee in its Report on the *Status of Women in the ACT* (Nov 2002), and noted by the Youth Coalition of the ACT submission.

<sup>198</sup> Australia's Combined Second and Third Reports at 64-65.

<sup>199</sup> See evaluation of Reconnect RRP Consulting (2004) at 17 and the interim evaluation of the FHPP (Family Homelessness Prevention Pilots): Department of Family and Community Services (2003) at 6.

funded homelessness services (known as the Supported Accommodation Assistance Program, or 'SAAP'). The family unit is considered the client, whatever the number of children. At both a symbolic and practical level, this approach fails to recognise that homeless children have distinct and complex needs.<sup>200</sup>

### Recommendations<sup>201</sup>

- That the Supported Accommodation Assistance (SAAP) program recognise children under 16 accompanying adults as clients.
- That a nationally coordinated approach be developed to address the needs of homeless children under 16.

### A shortage of crisis accommodation for homeless children and families

A recent study has revealed that homeless services nationwide are operating to capacity, and are unable to accommodate the homeless population, many of them children. The study found that couples with children have the greatest difficulty obtaining SAAP accommodation, with 80% of couples with children turned away by the end of each day.<sup>202</sup>

### Recommendation

- That adequate crisis accommodation for homeless children and families be planned, funded and provided.

### Inappropriate service response to unaccompanied homeless children under 16

Unaccompanied homeless children under 16 are the responsibility of the child protection systems administered by the states and territories if their parents are unable or

unwilling to care for and protect them.<sup>203</sup> Such children are either not 'officially' supported or accommodated in services for homeless people aged 17 and older.<sup>204</sup> While a refuge is clearly safer than living on the streets, unaccompanied homeless children under 16 are particularly vulnerable and have specific needs that cannot be met in an environment for older young people and adults.<sup>205</sup> Homelessness services are also transitional and cannot provide young homeless children with appropriate long-term support.<sup>206</sup>

### Recommendation

- That the Government ensure that state and territory child protection systems are able to provide suitable supported accommodation for any unaccompanied homeless children under 16 within a national framework led and coordinated by the Commonwealth.

### A lack of support for children with high and complex needs

Homeless children often have high and complex needs due to a history of maltreatment and violence, drug and alcohol abuse, and mental health problems. There is a lack of appropriate accommodation and services for these children.<sup>207</sup> The needs of some of these young people – those in the out-of-home care systems – are now being recognised and some services are being developed to address them.

### Recommendation

- That the Government address the needs of homeless children with complex issues through appropriate crisis accommodation, counselling and support services.

<sup>200</sup> Noted in the submissions from the Victorian CROC Roundtable and Patmalar Ambikapathy (Previous Commissioner for Children Tasmania).

<sup>201</sup> These recommendations reflect those of Australian Federation of Homelessness Organisations (AFHO). See AFHO (2003) at p. 50.

<sup>202</sup> Ibid at xix and Fig 7.1, 7.2.

<sup>203</sup> Champion, T (2004) *A Report into Under 16's in SAAP Services*. Sydney: National Youth Coalition for Housing.

<sup>204</sup> Australian Federation of Homelessness Organisations, *Come inside ... Youth homelessness*, available at [http://www.afho.org.au/3\\_news/come\\_inside/youth.htm](http://www.afho.org.au/3_news/come_inside/youth.htm).

<sup>205</sup> AFHO *Come inside ... Youth homelessness*, note 77. Comments also received in consultation from Leisa Gibson, Policy and Research Officer for Australian Federation of Homelessness Organisations, December 2004 and Taryn Champion, Policy Officer for the Youth Accommodation Association New South Wales (YAA), January 2005.

<sup>206</sup> Comments received in consultation from Taryn Champion, Policy Officer for the Youth Accommodation Association New South Wales (YAA), January 2005.

<sup>207</sup> Submission from YJC / YAPA Consultation with the Youth Sector New South Wales; Wesley Mission, *The Faces of Homelessness*, available at <http://www.wesleymission.org.au/publications/homeless/>; Horin, Adele, "Homeless Families Left Without Refuge", *Sydney Morning Herald*, 29 October 2004; Australian Institute of Health and Welfare (2004) *Children Accompanying Homeless Clients 2002-03* at p. 9.

## The experiences of homeless Indigenous children

Indigenous children are grossly over-represented in the Australian homeless population, yet less likely to be successfully assisted by homelessness services.<sup>208</sup> While the systemic issues associated with Indigenous homelessness mean that it is difficult to tackle, research and consultation has highlighted the specific problems with current policy and service delivery and made constructive suggestions for improvement.<sup>209</sup>

### Recommendations

That Government increase affordable housing options for Indigenous communities, and

- Ensure public housing options can cater for large family sizes and visiting family.
- Resource Indigenous-specific homelessness services.
- Provide culturally appropriate services for Indigenous children.
- Draw on good practice service responses identified in recent studies.
- Fund further research into the specialised needs of Indigenous children who are homeless and/or public place dwellers. and
- Address Indigenous disadvantage in health, education, welfare, the criminal justice system, cultural heritage and land rights that contributes to Indigenous homelessness.

## A poor response from the Social Security System

Australia's social security system is failing homeless children and young people. The main concerns include the inadequacy of Government benefits for young people

(discussed above),<sup>210</sup> the difficulty of complying with activity requirements to receive government benefits,<sup>211</sup> and the insensitivity of the social security system to the issues associated with homelessness and homeless children's needs.<sup>212</sup>

The Federal Family Homelessness Prevention Pilots made some progress in this area by employing a part-time Centrelink Social Worker (CLSW) for each service.<sup>213</sup> Centrelink is also currently developing a national strategy for working with homeless people, including a homelessness-training package for its social work network. This should be built upon.

### Recommendations

- That the Australian governments increase benefits for homeless children and young people.
- That the Australian governments allow greater flexibility for homeless people who are unable to meet activity agreements and are more adversely affected by penalties.

## Disengagement from school and community

Negative school experiences of homeless children suggest that the network of state and territory educational institutions and the Federal Government's education policy fails to meet the needs of homeless children. Current homelessness services have not effectively addressed the disengagement of young people in education and/or the community.<sup>214</sup> There is potential for schools to identify children at risk of homelessness and also engage and assist children who do become homeless.

### Recommendation

- That an integrated national strategy be developed to address the disengagement of vulnerable children from schooling.

<sup>208</sup> See evaluation results, Department of Family and Community Services (2003) at 24 and RRP Consulting (2004) at p. 55.

<sup>209</sup> See AFHO (2003) at 48; Memmott, P., Long, S., Chambers, C. & Spring, F. (2003) *Categories of Indigenous 'Homeless' People and Good Practice Response to Their Needs*, Australian Housing and Urban Research Institute, Queensland Research Centre, 2003); RRP Consulting (2004) at p. 81.

<sup>210</sup> The maximum possible payment for a single person is around \$200 per week.

<sup>211</sup> Noted in the YJC/YAPA Consultation with the Youth Sector New South Wales, 1-5pm, 3rd June 2004. Also noted by Meg Mundell, Homeless Young People and Unemployment, Paper delivered at the Interface Youth Conference, Sydney, April 25, 2003.

<sup>212</sup> Mundell, M. (2003), note 96.

<sup>213</sup> Department of Community Services (2003), note 7 at 34.

<sup>214</sup> RRP Consulting (2004), note 15 at 49.

### The overarching issue – a lack of resources

At the current level of Government funding for homelessness services (SAAP), the number of homeless children is growing and their needs are not being met. The Commonwealth Government recently announced it would not increase SAAP funding for the next five-year funding cycle (ignoring the recommendations of its own National Evaluation).<sup>215</sup>

#### Recommendation

- That program funding be increased by 40% for 2005 – 2010 to sustain current service levels to homeless children.<sup>216</sup>

### The need for coordinated support services and socio-economic policy

Australia's response to homelessness is weakened by a lack of employment opportunities and community services for homeless people, and a lack of collaboration between the homelessness-specific services, child protection, and community development activities of Government.<sup>217</sup> A recent report by the Western Australian Equal Opportunity Commission into Aboriginal people's access to public housing showed that Aboriginal tenants or would-be tenants were actively disadvantaged by the policies and programs of the state housing authorities.<sup>218</sup>

Other service systems may contribute to child homelessness, through public housing evictions, imprisonment policy affecting parents entering and exiting jails, a lack of resources and supported accommodation in the mental health service system, and in the treatment of homeless children without guardians who are not supported by the child protection system.<sup>219</sup> Homelessness policy development and service delivery must be fully coordinated with other relevant services and socio-economic policy, such as housing, employment, education and training, social security and community services.<sup>220</sup>

#### Recommendations

- That homelessness policy development and service delivery be coordinated with other relevant socio-economic policy and service systems.
- That Australian governments work together to develop a fully resourced National Homelessness Action Plan, which sets targets for the reduction of homelessness in Australia.

<sup>215</sup> Noted in submission from the YJC/YAPA Consultation with the Youth Sector New South Wales.

<sup>216</sup> Based on recommendations in Australian Federation of Homelessness Organisations, "Come inside ... a future for SAAP".

<sup>217</sup> Department of Family and Community Services (2003), note 7 at 28.

<sup>218</sup> Equal Opportunity Commission of Western Australia (December 2004) *Finding a Place: Report of the Inquiry into the Existence of Discriminatory Practices in Relation to the Provision of Public Housing and Related Services to Aboriginal People in Western Australia*.

<sup>219</sup> Comments in consultation from Leisa Gibson, Policy and Research, Australian Federation of Homelessness Organisations (AFHO).

<sup>220</sup> AFHO (2003), note 70 at 48.

# THEME VII

## EDUCATION, LEISURE AND CULTURAL ACTIVITIES

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### A EDUCATION, INCLUDING VOCATIONAL TRAINING AND GUIDANCE (ARTICLES 28 AND 29)

The Australian Government's *Combined Second and Third Reports* points to its commitment to improving the literacy and numeracy skills of Australian children by setting benchmarks and measuring children's performance (paragraphs 347-350). The report fails, however, to address the much more fundamental funding and equity issues and the increasing drift to privately funded and federally subsidised non-government schools. One reason for the drift is the poor state of many public schools and the low level of resources, equipment and maintenance for public schools while the level of federal government funding for private schools, including the very wealthy private schools, has increased. This funding inequity and the decreasing accessibility to further education for children whose families cannot afford to support them and help with their fees is leading to increasing rather than decreasing equity and equality of opportunity.

#### Indigenous Education – RIGHTS ALERT!

In the 1997 *Concluding Observations*, the Committee recommended that Australia:

*“Take further steps to raise the standards of health and education of disadvantaged groups, particularly Aboriginals, Torres Strait Islanders...”*

The education of Indigenous children and young people is at a critical point in Australia. Reports covering the last 10 years have highlighted not only the challenges, deficiencies and poor performance of Indigenous young people in comparison with their non-Indigenous peers, but the evidence is clear that:

- The poor educational standards for Indigenous people contribute to their over-representation in detention centres.<sup>221</sup>

- Educational institutions are a central player in the dispossession of Aboriginal children from their families, and the continued assimilation and colonisation of Aboriginal people.<sup>222</sup>

*The National Aboriginal and Torres Strait Islander Education Policy* also identified Aboriginal students' social and economic disadvantage as a key factor leading to their educational disadvantage.<sup>223</sup> The report concluded that the relationships between the various factors affecting educational outcomes for Aboriginal students are complex in scope, dynamic in nature and challenge existing power structures within schools, TAFE campuses and the bureaucracy.

Despite the many initiatives introduced by state and territory governments over the preceding 20 years, the difficulties that have beset the education of Indigenous children and young people continue. The *2001 National Report to Parliament on Indigenous Education and Training*, while reporting some better outcomes and progress against targets for schooling sectors across Australia, also identified significant gaps in literacy and numeracy skills and attendance. A major concern was the low achievement in the early years of schooling, resulting in poor achievement in secondary and further education.<sup>224</sup>

#### Attendance

School attendance in all jurisdictions of Australia is compulsory. However, in 1999, Indigenous students were, on average, absent from school more than twice as often as other students.<sup>225</sup> These attendance rates have been confirmed in more recent reports released in 2004.<sup>226</sup> The lack of consistent statistics on school attendance across Australia has also been noted in the same report.

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<sup>221</sup> Royal Commission into Black Deaths in Custody.

<sup>222</sup> *Bringing them Home*.

<sup>223</sup> National Report 1991.

<sup>224</sup> Department of Education, Science and Training 2002.

<sup>225</sup> Australian Bureau of Statistics (1999) *National Report on Schooling in Australia*.

<sup>226</sup> *Overcoming Indigenous Disadvantage*.

## Retention rates

Retention in schools to Year 12 is considerably lower for Aboriginal students than for all students. The rate for Years 10-12 in 2003 was 36.3% for Aboriginal students compared to 68.1% for all students. Similarly, the rate for Years 7-12 in 2003 was 29.2% for Aboriginal students, nearly 36 percentage points lower than the rate of 65.0% for all students. This means that only three in ten Aboriginal students make it to Year 12.

In 2001, Indigenous people participated in post-secondary education at a similar rate to non-Indigenous people, although they had a slightly higher enrolment rate at TAFE colleges and a lower enrolment rate at universities. The proportion of Indigenous youth (aged 15-21 years) attending a tertiary institution declined between 1996 and 2001 (HREOC submission to CERD).

## Suspensions

Consultations across Australia for the purposes of this report express a growing concern for the number of Indigenous children and young people who are suspended or expelled from Government schools.<sup>227</sup> A growing body of research is revealing the disturbing trend of a disproportionate increase in the number of suspensions issued to Indigenous children and young people compared with their non-Indigenous peers. This is problematic and evidence would suggest that the increasing suspension from Government schools of Indigenous children and young people is a highly significant contributor to Indigenous children's poor performance. However, no research is available that considers the factors underlying to these trends.

The 1997 report, *Seen and Heard: Priority for Children in the Legal Process*,<sup>228</sup> noted that school disciplinary practices are a major area of disadvantage and inequality in terms of their treatment of our Indigenous youth.

In New South Wales, for example, Indigenous students are being suspended and expelled from public schools at significantly higher rates than non-Indigenous students. In 2001, Indigenous students received 14% of all short

suspensions, and 18% of all long suspensions, even though only 4.4% of all students in the state are Indigenous. There were particularly high rates of suspension among Indigenous girls in primary school. In 2001, 41% of all girls given suspensions in primary school were Indigenous.

The Report of the Review of Aboriginal Education in August 2004 took a representative sample survey of 413 schools across New South Wales, collecting suspension data for 2003.<sup>229</sup> The findings results suggest that suspensions have not only increased from the 2001 figures, but that they are increasing particularly in the early years of schooling, from Kindergarten to Year 2 and then again for Years 3-6. The rate of suspensions for Aboriginal girls is about seven to nine times the rate for non-Aboriginal girls, while the rate for males is four to six times that for non-Aboriginal boys. For long-term suspensions, the rate for Aboriginal girls is six times the rate of non-Aboriginal girls in Kindergarten to Year 2, and the rate for Aboriginal males nearly twice that for non-Aboriginal males.

The Australian Government's *Combined Second and Third Reports* point to a number of initiatives that have been proposed to address the consistent disparities. These initiatives are to be commended. However, the report fails to provide any analysis of the success or not of those programs in impacting upon Indigenous children's educational performance.

The New South Wales Review into Education in 2004 made numerous recommendations regarding the substance and delivery of educational services within the state. An overall theme emerged from those recommendations – that the solutions to poor educational performance do not depend upon the actions of education departments or institutions alone and that coordination of community, family and agencies is required within a framework which recognises self-determination.

**The call for a holistic framework that recognises self-determination as a means of addressing Indigenous disadvantage is a consistent theme from this report.**

<sup>227</sup> Western Young Peoples Network in Victoria, TAS – *External Suspensions and the Effect on Schooling, Qld Lack of Procedural Fairness*, Youth United for your Future, Workshop with Indigenous Young People in Sydney – high rates of Indigenous children suspended.

<sup>228</sup> Joint report by the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commissions.

<sup>229</sup> Review of Aboriginal Education: New South Wales Education Consultative Group Incorporated and New South Wales Department of Education and Training, August 2004.



## Recommendations

- That the State, Territory and Federal Governments together address the complex problems which prevent Indigenous children and young people from achieving excellence in education in an holistic framework which recognises the principles of self-determination.
- That the State, Territory and Federal Governments undertake an inquiry to explain and address the unacceptably high suspension rates of Indigenous children and young people from school.

## Children with disabilities

Most Australian children with disabilities who are enrolled in school attend mainstream schools (86.3%).<sup>230</sup> Considering that research has demonstrated that children with disabilities benefit from participating in mainstream educational settings,<sup>231</sup> this is a good result.

However, peak bodies of people with disabilities, and advocacy and support organisations of families and carers, have voiced concerns about the accessibility of educational institutions, the curricula and the levels of support and resources available to students.<sup>232</sup> There is also an exceptionally large number of claims lodged about discrimination in education under the *Disability Discrimination Act 1992*. Evidence substantiating these concerns and claims of discrimination is provided below:

- 84% of all children with disabilities attending ordinary classes in mainstream schools were not provided with any education support arrangements.<sup>233</sup>

- Only 32% of young people aged 15-24 years with a disability completed the final year of high school compared with 53% of young people without a disability.<sup>234</sup>
- Over half (57%) of all young people with a disability aged 20-24 years *did not* have a post-school qualification compared with 43% of their same-age peers without a disability.

Educational opportunities in turn affect employment opportunities and outcomes. According to the OECD, more than half of Australia's adults with disabilities were unemployed in the late 1990s.<sup>235</sup> Women with disabilities are particularly disadvantaged in this regard, with lower employment rates than similarly disabled males. If they are employed, they earn less than similarly disabled males.<sup>236</sup> In addition, women with disabilities are less likely than their male counterparts to receive a senior secondary and/or tertiary education.

The available statistics also suggest that only about half (54%) the children with disabilities aged 0-4 years who are eligible for childcare are actually in childcare, a service acknowledged for its contribution to child growth, learning and potential. It also allows mothers to augment family income by participation in the work force. Serious concerns about the lack of access to childcare for children with disabilities are raised in the documentary evidence produced in two reports examining the status of children with disabilities in childcare services in New South Wales.<sup>237</sup>

The Australian Government has indicated that it is committed to the adoption and implementation of standards in the area of education in accordance with subsection 31

<sup>230</sup> Australian Institute of Health and Welfare (2004a) *Children with Disabilities in Australia*.

<sup>231</sup> Foreman, P (2001) (Ed) *Integration and Inclusion in Action* (2nd ed). Sydney: Harcourt.

<sup>232</sup> Victorian submission.

<sup>233</sup> Australian Institute of Health and Welfare (2004a) *Children with Disabilities in Australia* (AIHW cat. no. DIS 38) Canberra: AIHW at p. 73.

<sup>234</sup> Australian Institute of Health and Welfare (2004b) *Australia's young people: Their health and well-being 2003* (AIHW cat. no. PHE 50) Canberra: AIHW.

<sup>235</sup> 58%: OECD (2003). *Transforming Disability into Ability. Policies to promote work and income security for disabled people*. Available at: <http://0iris.source.oecd.org.opac.library.usyd.edu.au/vl=1039659/cl=46/nw=1/rpsv/~6682/v2003n5/s1/p11>. Downloaded 13 January 2005.

<sup>236</sup> Women with Disabilities Australia (WWDA). Submission to the National Competition Policy Review of the Disability Discrimination Act (DDA) 1992, May 2003. Available from <http://www.pc.gov.au/inquiry/ddo/subs/sub139.pdf>. Downloaded 11th January 2005.

<sup>237</sup> Llewellyn, G. & Fante, M. (1999). *Young Children with Disabilities in New South Wales Children's Services*. Sydney: Office of Childcare, Department of Community Services; Llewellyn, G., McConnell, D. et al. (2004). *Parent and Worker Expectations and Experiences of Early Childhood Settings When Families Have a Disability*. A report to the Department of Disability, Ageing and Home Care, Department of Education and Training and Department of Community Services. Family Support and Services Project, University of Sydney, Sydney.

(3) or (4) of the *Disability Discrimination Act 1992*. This has the potential to ensure the educational rights of children and young people with disability. However, disability advocacy organisations and legal experts have recently raised concerns in relation to aspects of the draft Disability Standards for Education (draft Standards).<sup>238</sup>

### Recommendations

- That all Australian governments develop and implement programs that ensure effective access to and receipt of education for all children with disabilities.
- That particular attention be given to ensuring equitable opportunities for girls and young women with disabilities in education, training and employment programs.
- That particular attention be given to ensuring transition to further education and training and/or employment opportunities for young people with disabilities.

### Children at risk

There is evidence that children in care are not always offered adequate educational opportunities and, in particular, are not provided extra tuition to enable them to recover from the disruption to their education which their involvement in the care and protection system would have inevitably incurred. This concern was highlighted by a number of submissions to this process<sup>239</sup> and is one of the main concerns of CREATE, the advocacy association for children and young people in care.

## B AIMS OF EDUCATION (ARTICLE 29)

### School discipline

Australia's *Combined Second and Third Reports* deal very briefly with school discipline - an area of growing concern for children, young people, their parents and guardians.

However, the Federal Government report fails to reflect on the seriousness of the current concerns within Australian government and non-government schools.

The decision to exclude a student from a school, either temporarily or permanently, is the most serious form of discipline that a school can exercise.

Such a decision can have significant and detrimental effects on a young person's future, including their ability to acquire the personal resilience, social and labour skills required for future employment prospects. Indeed, there are demonstrable links established between school non-attendance and entry into the juvenile justice or child protection systems.

Accordingly, suspensions and expulsions should be used as a last resort and when applied, powers should not be arbitrarily exercised or abused.

### Government schools

Over the past eight years, several states and territories have reviewed and updated the procedures and principles regulating suspensions and expulsions in government schools. Most of these revised procedures reflect a growing awareness of the need to incorporate procedural fairness principles to assist students experiencing difficulties at school.

However, these procedures are still deficient and inconsistent in a number of areas relating to:

- a student's right to representation;
- arrangements for the continuing education of expelled students;
- impartiality in review processes and proper documentation and records management.

Furthermore, states and territories have overlooked in their policies, the impact of broad suspension grounds.

<sup>238</sup> Forum held on the Draft Disability Standards in Education by People with Disability Australia on 21 January 2005 in Sydney. The concerns are that essential amendments need to be made to the draft Standards before they become law, relating specifically to Part 10.4 (Protection of Public Health Exemption) and to Part 3.4 (Making Reasonable Adjustments); and a failure to amend the relevant provisions will allow the draft Standards to apply detrimentally to the interests of students with disability, when compared with the current position under the Disability Discrimination Act 1992. If the draft Standards are passed into law unamended, Australia may be in breach of its non-discrimination obligations in the area of education under the Convention on the Rights of the Child (Articles 2, 28 and 29).

<sup>239</sup> See NAPCAN submission and ACT CROC Submission.

## NEW SOUTH WALES GOVERNMENT SCHOOLS - SUSPENSIONS SNAP SHOT

New South Wales provides a useful snap shot in gaining an understanding of the use of suspension and exclusion in Australian schools.

Of more than 750,000 students attending government schools in New South Wales in 2001, approximately 41,000 were the subject of either a suspension or expulsion within that year. This is alarming given the Department of Education policy that suspension and exclusion should be used as a last resort and given that “incidents of serious violence” at schools in New South Wales are very rare. A disproportionate number of students who received long suspension were of Aboriginal or Torres Strait Islander descent.<sup>240</sup>

### Non-government schools

Non-government schools are not subject to the same rules and regulations as government schools; they are regulated on a contractual basis between the parents and each school. Private schools therefore have a great deal of leeway in the way they deal with disciplinary matters. However, current authorities suggest that it is arguable that principles of natural justice still apply to non-government schools.

The concerns expressed by parents and children in relation to non-government schools echo those in relation to government schools:

- The lack of clear accountability and regulation of non-government school authorities;
- Suspensions appear to be increasingly used in private schools as a ‘quick fix’ to any behavioural problems;
- Denying a student the opportunity to answer claims that decision-makers rely upon to justify suspensions and expulsions;
- Disparate application of punishment is another common complaint received;

- Poor information procedures for parents and students about the school’s suspension or expulsion procedures.

## C LEISURE, RECREATION AND CULTURAL ACTIVITIES

### Importance of sport, recreation and play

Sport, recreation and play are integral parts of the development of a child.<sup>241</sup> Through sport, recreation and play, children and young people learn to exercise judgment and think critically while finding solutions to problems. They promote the spirit of friendship, solidarity and fair play, teaching teamwork, self-discipline, trust, respect for others, leadership and coping skills. Essential to ensuring that children develop into responsible and caring individuals, they help young people meet the challenges they face and prepare them to assume leadership roles within their communities. Sport, recreation and play improve health both physical and mental. It teaches important life lessons about respect, leadership, teamwork, problem solving, cooperation and social interaction.<sup>242</sup>

Research shows that children who exercise are more likely to stay physically active as adults.<sup>243</sup>

Sport, recreation and play have the potential to:

- Strengthen the body and prevent disease;
- Improve learning and academic performance;
- Prepare infants for future learning;
- Prevent smoking and use of illicit drugs;
- Reduce symptoms of stress and depression;
- Reduce crime;
- Improve confidence and self-esteem.

<sup>240</sup> Gonzi & Riordan (September 2002) *Measuring and Reporting on Discipline and Student Suspensions in New South Wales Government Schools*, UTS.

<sup>241</sup> Rogers, Sayers (1988) *Play in the Lives of Children*. Washington DC: National Assoc. for the Young Children.

<sup>242</sup> Critchley, A & Schott P (2004) Spirals of strength, strengthening communities through groupwork. *Creative Times*, The Samaritans Foundation. New South Wales Australia.

<sup>243</sup> The United Nations Children’s Fund (2004) *Sport, Recreation and Play*. New York: UNICEF.

### Australia's commitment

The Australian Government's *Combined Second and Third Reports* refer to initiatives the Government has taken to ensure that children and young people have the opportunity to participate in sport, play and recreation by:

- introducing and promoting sport within schools;
- limiting the amount of homework;
- encouraging free play, and
- focusing funding on innovative programs using sport and recreational activities for crime prevention and drug and alcohol prevention.<sup>244</sup>

This is a positive move by the Australian Government as sport, recreation and play improve the quality of education by developing the whole child, not just their intellectual capacities.

### D CHILDREN'S PARTICIPATION IN SPORT, CULTURE AND LEISURE

In April 2003, the Australian Bureau of Statistics conducted a national survey to gather information on various cultural and leisure activities undertaken by children aged 5-14 years.<sup>245</sup> The survey found:

- Almost all children aged 5-14 years (99.8% or 2,641,500) were involved in at least one of the six selected leisure activities outside of school hours in the two school weeks prior to interview in April 2003.
- More than 2.5 million children (95%) used a computer and almost 1.7 million children (64%) accessed the Internet during or outside school hours in the 12 months to April 2003.
- About 1.6 million children aged 5-14 years (62%) participated outside of school hours in sport that had been organised by a school, club or association in the 12 months to April 2003.
- 29% of children aged 5-14 years (780,400 children) were involved in at least one of the four selected organised cultural activities outside of school hours in the 12 months to April 2003.

- That there has been an increase in children participating in sport and leisure activities since 2002.

### ***Every child deserves the right to play, sport and recreation***

Children have the right to participate in sport, recreation and play as in all other areas of life. Yet many children are denied the opportunity of participation because of the poverty of their families and communities, race or sex, mental health, disability or simply because their families live in rural and remote areas or in the outer areas of large cities. Yet they share the same entitlement to participate in sport no matter what their background or where they happen to live.<sup>246</sup> Equity and access is a relevant issue when considering the right for children to participate in play, recreation, culture and sport, given the high statistics of homelessness in Australia.

Sport, play and recreation are effective ways to reach children and young people who are often excluded and discriminated against.

**It is imperative that the Australian Government fund more programs that enable disadvantaged children to have significant access to sport, play and recreation.**

<sup>244</sup> *Australia's Combined Second and Third Reports* at 64-65.

<sup>245</sup> Australian Bureau of Statistics (2003) Year Book. *Australia Children's Participation in Cultural and Leisure Activities*, Australia. [www.abs.gov.au](http://www.abs.gov.au).

<sup>246</sup> The United Nations Children's Fund (UNICEF) 2004: *Sport, Recreation and Play* New York.

# THEME VIII

## SPECIAL PROTECTION MEASURES

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### A CHILDREN IN SITUATIONS OF EMERGENCY

#### Refugee children (Article 22) – RIGHTS ALERT!

The Committee's 1997 *Concluding Observations* expressed concern about the "the treatment of asylum seekers and refugees and their children. Their placement in detention centres" was a principal subject of concern (paragraph 30).

The Committee recommended that legislation and policy reform be introduced to guarantee that "no child be deprived of his/her citizenship on any ground, regardless of the status of his/her parent(s)" <sup>247</sup> and that "legislation and policy reform be introduced to guarantee that children of asylum seekers and refugees are reunified with their parents in a speedy manner" (paragraph 30).

Contrary to the position put forward in the Government's *Combined Second and Third Reports*, Australia's treatment of child refugees and asylum seekers breaches many international legal obligations under the Convention. A significant increase of "unauthorised arrivals" meant that many more children's lives have been affected by these draconian laws and policies.

We refer the Committee to the comprehensive investigation undertaken by the HREOC in relation to the complex issues of children in mandatory immigration detention<sup>248</sup>. We have provided a copy of *A Last Resort* on CD to all Committee members.

#### Refugee protection

Australia's system of 'refugee protection' breaches the fundamental right of refugee and asylum seeking children to non-discrimination in the following ways:

- Children who are deemed to hold appropriate documentation are able to apply for asylum while living in the community. Those without documentation are mandatorily detained, usually for the entire period of the refugee status determination process. <sup>249</sup>
- Refugees who arrive with travel documents are granted permanent residency, while those without travel documents are given only a Temporary Protection Visa (TPV). They must re-apply for protection after three years. This is often traumatic for the applicant.
- The differing legal status, by classification of visa, translates into different rights and benefits for children.

This system of 'refugee protection' breaches Article 22 by failing to provide refugee children with "appropriate protection and humanitarian assistance" to ensure the enjoyment of other rights in the Convention (Article 22).

Aside from the implications of mandatory detention, discussed below, refugees on Temporary Protection Visas:<sup>250</sup>

- Do not have the right to family reunification (Articles 9, 10 and 20);
- Have limited access to social security (Articles 26 and 27);
- Have limited access to disability aids (Article 23); and
- Are not entitled to financial assistance for tertiary education through the Higher Education Contribution Scheme (HECS) and must pay full fees (Article 28).

Concerns have also been raised about the lack of support available for asylum seekers on a Bridging Visa E (BVE).<sup>251</sup> Asylum seekers on a BVE have:

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<sup>247</sup> The 1997 *Concluding Observations* at paragraph 20.

<sup>248</sup> Human Rights and Equal Opportunity Commission (April 2004) *A Last Resort: The Report of the National Inquiry into Children in Immigration Detention*. Human Rights and Equal Opportunity Commission.

<sup>249</sup> Noted in Southern Communities Advocacy Legal & Education Service (SCALES), Submission to the National Children and Youth Law Centre's Alternative Report on Australia's Adherence to the Convention on the Rights of the Child (1989), (2004).

<sup>250</sup> Noted in the submission from SCALES.

<sup>251</sup> Noted in the Victorian consultation process.

- No right to work;
- No right to Medicare (universal health care);
- No right to the Asylum Seeker Assistance Scheme.<sup>252</sup>

### Placement of children in detention

Australia's detention of child refugee applicants breaches Article 37 of the Convention:

- *It is arbitrary.* It is acknowledged that the detention of unlawful non-citizens is not, in itself, arbitrary. However, Australia's non-reviewable, mandatory and prolonged detention of children is not a proportionate means to achieve a legitimate aim.<sup>253</sup>
- *It is not a measure of last resort.* The detention of all unauthorised arrivals, including children, is mandatory.
- *It is not for the shortest appropriate period of time.* Unauthorised asylum seekers, including children, are detained indefinitely for the entire refugee status determination period, which is often for many months and may be years. A family of four, including two intellectually disabled children, was recently released and granted permanent visas after being detained for four years<sup>254</sup>, and
- *It is not subject to effective independent review.* The *Migration Act 1958* (Commonwealth) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than for removal or deportation) unless the non-citizen has been granted a visa.<sup>255</sup>

### Treatment of children in detention

There is now a myriad of reports and testimonials providing an alarming depiction of the environment in Australia's immigration detention centres - images of detainees throwing themselves on razor wire; evidence

of riots, suicide, lip-sewing and other self-mutilations; and allegations of sexual assault and other forms of violence. The HREOC report on children in immigration centres, mentioned in the Government's *Combined Second and Third Reports*, has now been tabled. In addition to breaches of Article 37, noted above, the Report found that:

- Australia's mandatory detention system fails to ensure that:
  - Children are treated with humanity and respect for their inherent dignity;
  - Children seeking asylum receive appropriate assistance<sup>256</sup> to enjoy, "to the maximum extent possible", their right to development<sup>257</sup> and their right to live in "an environment which fosters the health, self-respect and dignity" of children in order to ensure recovery from past torture and trauma (Article 39).
- Children in immigration detention for long periods of time are at high risk of serious mental harm.
- At various times between 1999 and 2002, children in immigration detention were not in a position to fully enjoy the rights under Articles 19, 20, 23, 24 and 28 of the Convention.

These concerns were echoed in submissions to this Report from non-government organisations and in the report of Justice Bhagwati, and the UN Working Group on Arbitrary Detention following their visit to Australia in 2002. Justice Bhagwati concluded that both the detention of children itself, as well as the conditions under which children are kept, violated their rights under the Convention. He noted that the human rights situation in Woomera detention centre<sup>258</sup> could, in many ways, "be considered inhuman and degrading".<sup>259</sup>

<sup>252</sup> Asylum Seeker Project Hotham Mission (May 2004) *Minimum Standards of Care for Asylum Seekers in the Community*: Draft Working Paper.

<sup>253</sup> See Human Rights and Equal Opportunity Commission report, *Those who've come across the seas: Detention of Unauthorised Arrivals*, May 1998.

<sup>254</sup> The two disabled children required hospital treatment because of their experiences in detention. [http://www.ajustaustralia.com/mediareleases\\_latest\\_view.php?id=7FF7B84C-A072-1B51-591E11EC52EECFAB](http://www.ajustaustralia.com/mediareleases_latest_view.php?id=7FF7B84C-A072-1B51-591E11EC52EECFAB) accessed 15 March 2004.

<sup>255</sup> See section 196 of the *Migration Act 1958* (Cth).

<sup>256</sup> Article 22 (1).

<sup>257</sup> Article 6 (2).

<sup>258</sup> Woomera has now been closed and replaced by Baxter.

<sup>259</sup> *Ibid.*

## Alternative detention arrangements and the family environment

The alternative detention arrangements cited in the Australian Government's Report have also aroused concerns about family unity. After observing the alternative detention arrangements in Woomera,<sup>260</sup> Justice P.N. Bhagwati and the UN Working Group on Arbitrary Detention noted that

*"[t]he fathers remained in the detention centre, and the majority of the families were depressed by the separation. For example, during the visit, taking advantage of the presence of the delegation, one of the mothers succeeded, despite the distance, in travelling on foot back to Woomera in order to be with 'the family'. According to officials at the centre, this act constitutes escape, which is punishable by five years' imprisonment."*<sup>261</sup>

## Best interests of the child

This report refutes the Government's claim that the principle of the best interests of the child is reflected in Australia's treatment of child refugees and asylum-seekers.<sup>262</sup> Three fundamental issues arise:

*Detention:* The Government states that it is in the child's best interest "to remain with their parents, family or fellow country people," and uses this principle as the justification for detaining children.<sup>263</sup> While the preservation of the family unit is essential for the best interests of the child, the devastating and enduring ramifications of detention on children should not be bargained against the principle of family unity.

*Guardianship:* In Australia, an unaccompanied minor becomes the ward of the Minister for Immigration and Multicultural and Indigenous Affairs.<sup>264</sup> A guardian should advocate for the child's best interests, but the Minister acts as the child's "detainer". This is an inherent conflict of interest.<sup>265, 266</sup>

*Independent Monitoring:* There is presently no provision for the regular independent monitoring of conditions in detention centres. This must be rectified, particularly in relation to the offshore detention centres on Christmas Island and Nauru. State government departments with

the responsibility for child protection and child welfare have no powers to intervene to protect children where they are at risk of harm from abuse and neglect in immigration detention centres.

## Recommendations<sup>267</sup>

That all Australian governments implement the recommendations of the Human Rights And Equal Opportunity Commission Report *A Last Resort?*

and in particular Recommendation 2 that "Australia's immigration detention laws should be amended, as a matter of urgency, to comply with the *Convention on the Rights of the Child*."

In particular, the new laws should incorporate the following minimum features:

- There should be a presumption against the detention of children for immigration purposes.
- A court or independent tribunal should assess whether there is a need to detain children for immigration purposes within 72 hours of any initial detention (for example for the purposes of health, identity or security checks).
- There should be prompt and periodic review by a court of the legality of continuing detention of children for immigration purposes.
- All courts and independent tribunals should be guided by the following principles:
  - detention of children must be a measure of last resort and for the shortest appropriate period of time
  - the best interests of the child must be a primary consideration
  - the preservation of family unity serves the child's best interests

<sup>260</sup> United Nations Economic and Social Council (2002) *Report of the Working Group on Arbitrary Detention. Visit to Australia* in Civil and Political Rights, including the Question of Torture and Detention.

<sup>261</sup> See note 34.

<sup>262</sup> Ibid.

<sup>263</sup> [www.minister.immi.gov.au/faq/detention.htm](http://www.minister.immi.gov.au/faq/detention.htm).

<sup>264</sup> *Immigration (Guardianship of Children) Act 1946*.

<sup>265</sup> Report of Justice P. N. Bhagwati, Regional Advisor for Asia and the Pacific of the United Nations High Commissioner for Human Rights, Mission to Australia 24 May to 2 June 2002, Human Rights and Immigration Detention in Australia.

<sup>266</sup> UNHCR Guidelines on Unaccompanied Children, paragraph 5.7.

<sup>267</sup> These recommendations are primarily adopted from the report, Human Rights and Equal Opportunity Commission, *A Last Resort? The Report on the National Inquiry into Children in Immigration Detention* (Tabled in Parliament May 2004), available on line at [http://www.hreoc.gov.au/human\\_rights/children\\_detention\\_report/index.html](http://www.hreoc.gov.au/human_rights/children_detention_report/index.html)

- unaccompanied children are owed a special duty of care, protection and assistance.
- Bridging visa regulations for unauthorised arrivals should be amended so as to provide a readily available mechanism for the release of children and their parents.”

## B CHILDREN AND THE ADMINISTRATION OF JUVENILE JUSTICE

### Indigenous children and juvenile justice

The Committee's 1997 *Concluding Observations* expressed concern “about the unjustified, disproportionately high percentage of Aboriginal children in the juvenile justice system, and that there is a tendency normally to refuse applications for bail for them. The Committee is particularly concerned at the enactment of new legislation in two states, where a high percentage of Aboriginal people live, which provides for mandatory detention and punitive measures of juveniles, thus resulting in a high percentage of Aboriginal juveniles in detention.” (paragraph 22)

At paragraph 32, the Committee stated, “there is a need for measures to address the causes of the high rate of incarceration of Aboriginal and Torres Strait Islander children. It further suggests that research be continued to identify the reasons behind this disproportionately high rate, including investigation into the possibility that attitudes of law enforcement officers towards these children because of their ethnic origin may be contributing factors.”

Recent submissions have been made to the Committee by the Aboriginal and Torres Strait Social Justice Commissioner to the Day of General Discussion on the Rights of Indigenous Children (19 September 2003) which identify the contact of Indigenous youth with the criminal justice processes as one of the most critical issues facing Indigenous Australians today.

In the Federal Government's *Combined Second and Third Reports*, the identified range of recent initiatives reflects an increasing level of attention to addressing Indigenous

juvenile justice rates at all levels of government. These measures are welcomed.

However, statistics suggest that Indigenous juveniles continue to be detained at a rate approximately 15 times higher than the non-Indigenous rate<sup>268</sup> and that Indigenous juveniles in detention comprise 43% of the total juvenile detention population despite making up less than 4% of Australia's child population.<sup>269</sup>

### Diversion schemes

The Australian Government's *Combined Second and Third Reports* refer to the diversion schemes established in various state and territory jurisdictions and notes that “effective diversion schemes for young offenders play an important role in addressing some of the factors which contribute to an over-representation of young people in the criminal justice system”.

All state and territories have some form of diversionary programs for juveniles. Diversionary schemes show excellent results in terms of recidivism and diversion from court-based orders. However, there is a limited availability of such schemes throughout Australia, particularly in rural and remote communities. Reviews of the schemes in Western Australia and the Northern Territory found some considerable anomalies, including a limited range of diversion opportunities partly due to poor infrastructure and service networks in remote communities, an absence of community based programs, and a lack of accountability and independent monitoring. The reviews also showed rates of diversion are high at the court level rather than at first instance by the police.

In a recent review of juvenile diversion in Australia,<sup>270</sup> it was noted that “conferencing at present enjoys high levels of support within the juvenile justice system.” In the same review, the fieldwork for the review found however, that juvenile justice administrators in some jurisdictions indicated common problems with: (1) proportionally very high figures of young offenders being held on remand; and (2) the high proportion of remandees with a subsequent non-custodial court disposition.<sup>271</sup>

<sup>268</sup> Australian Institute of Criminology (2001) *Persons in Juvenile Corrective Institutions 1981-2000*, AIC Canberra Table 3 and Figure 2. This over-representation rate reached as high as 17 times the non-Indigenous rate in 1997: *Australian Institute of Criminology, Australian crime – Facts and Figures 2000*, op. cit, Figure 59.

<sup>269</sup> Australian Institute of Health and Welfare and Australian Bureau of Statistics, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples 2003*, Commonwealth of Australia, Canberra 2003; 109.

<sup>270</sup> Polk, K (2003) *Juvenile Diversion in Australia: A National Review*. Paper presented at the Juvenile Justice: From Lessons of the Past to a Road Map for the Future Conference convened by the Australian Institute of Criminology in conjunction with the NSW Department of Juvenile Justice and held in Sydney, 1-2 December 2003

<sup>271</sup> *Ibid.*, p.5



Some jurisdictions have responded to this problem: for example, Victoria put into place a range of directives and services and Western Australia created special supervised bail programs. But the situation is very different in other jurisdictions.

A leading academic in this area has expressed concern that inadequate legal representation (i.e. availability, preparation time) and the attitude of some magistrates, remand is being overly used as a “holding tank” for some young people. This violates the notions of imprisonment as a last resort, the importance of diversion, the rights of young people to adequate legal assistance and proportionality under law. Additionally, concerns have been raised that remand is being used as a form of punishment, in the first instance, instead of using sentenced detention as the punishment in the second instance. Better legal representation, and education of magistrates and judges in relation to the Convention principles, as well as active monitoring of court processes and outcomes, is essential to protect the rights and well-being of young offenders.<sup>272</sup>

Additionally, with regard to conferencing, more work is needed to address the “cultural appropriateness” of approaches to restorative justice. Daly noted that it is a common misconception that conferences reflect or are based on Indigenous justice practices.<sup>273</sup> Others have also raised concerns about inadequate recognition of the concerns for self-determination among Indigenous people and the role police play in the conferencing process.<sup>274</sup>

*“The representatives from the Indigenous community expressed the view that they had no say in controlling the process, and that the current model placed too great a weight on the victim/offender relationship rather than a more balanced community approach which would divert the young offender into positive community activities. They argued that if conferencing were to be successful, local Indigenous protocols must be respected and implemented and that involvement of the traditional owners and local community resources, including extended families, is essential.”<sup>275</sup>*

Currently, however, it is difficult to establish the effectiveness of diversionary practices, processes and programs, because there is insufficient research to allow for any evidence-based assessment of either cautioning or conferencing.<sup>276</sup>

### Recommendations

- That research be undertaken consistent with the Committee’s recommendations to determine the reasons for the disproportionately high rates of incarceration of Indigenous young people, including whether the attitudes of law enforcement officers may have an impact, and the impact of legislation such as public space and mandatory sentencing.
- That long-term funding and support be given to Indigenous Community Justice models particularly in rural and remote communities.
- That research be undertaken to consider the effectiveness of diversionary practices, process and programs.

### Children and young people with disability and juvenile justice

Reports show that children with disability, particularly those with mental illness and/or intellectual disability are over-represented in the juvenile justice system,<sup>277</sup> with a recent survey indicating that the figure is as high as 80%.<sup>278</sup>

These reports link failures in the mental health, child protection, disability and community service system with the increased risk of children entering the juvenile justice system.

<sup>272</sup> Discussion with Professor Rob White, School of Sociology, Social Work and Tourism, University of Tasmania. March 2005.

<sup>273</sup> Daly, K (2001) Conferencing in Australia and New Zealand: Variations, Research Findings and Prospects,” in Morris, A and Maxwell, G. (eds) *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (pp. 59-84). Oxford: Hart Publishing.

<sup>274</sup> Polk op.cit., referring to Zellerer, E & Cuneen, C (2001) *Restorative justice, Indigenous justice, and human rights*, pp. 245-264 in Bazemore, B. & Schiff, M. (eds) *Restorative Community Justice: Repairing Harm and Transforming Communities*. Cincinnati, Ohio: Anderson Publishing.

<sup>275</sup> Ibid p.7

<sup>276</sup> Polk ibid p. 9

<sup>277</sup> Community Services Commission (1996) *The Drift of Children in Care into the Juvenile Justice System – Turning Victims into Criminals*; Human Rights and Equal Opportunity Commission (1993) *Human Rights & Mental Illness* – Report of the National Inquiry into the Human Rights of People with Mental Illness.

<sup>278</sup> NSW Department of Juvenile Justice (2003) *2003 NSW Young People in Custody Health Survey* (online at [www.djj.nsw.gov.au/pdf/publications/2003YoungPeopleInCustody.pdf](http://www.djj.nsw.gov.au/pdf/publications/2003YoungPeopleInCustody.pdf))

Once in the juvenile justice system, the emphasis is on punishment of the crime and rehabilitation rather than on appropriate assessment, intervention and support services.<sup>279</sup> Many children with disability are not even identified, which means their specific support needs are not addressed. The design of facilities and the environment can also contribute to a decreasing emotional and mental state.<sup>280</sup>

### Recommendation

That Australian governments develop comprehensive social support programs and service systems to prevent the circumstances that contribute to children with disabilities from entering the juvenile justice system.

### Kariong Juvenile Justice Centre in New South Wales

At the end of 2004, the New South Wales Legislative Council voted to establish a Select Committee on Juvenile Offenders to examine the *Juvenile Offenders Legislation Amendment Act 2004 No. 103*. The terms of reference for the Select Committee include a consideration of whether incarcerating juveniles in juvenile correctional centres achieves reduced recidivism, rehabilitation and compliance with human rights obligations.

The legislative amendments transfer responsibility for Kariong Juvenile Justice Centre from the Department of Juvenile Justice to the Department of Corrective Services and, consequently, result in juvenile correction centres being subject to the same staffing and management provisions as the adult correctional system. This means that the needs of juvenile offenders being considered in a purely corrective services framework, rather than consideration also being given to the unique requirements and increased protection they should be accorded to reflect their potential vulnerability. Similarly, the legislation does not make provision for consideration of individual needs, such as those of Indigenous offenders who represent approximately 40% of the juvenile detainee population.

The legislation also provides for the transfer of juvenile offenders throughout the correctional system without the requirement of Ministerial consent and with minimal safeguards in terms of judicial review.

When the amendments were first proposed, juvenile justice advocates in New South Wales, led by the Youth Justice Coalition, criticised the proposed legislation as being contrary to the defining principles of juvenile justice - the rehabilitation and reintegration of the juvenile offender into society. These advocates were also of the view that the legislative amendments were contrary to the principles of the Convention, in particular Articles 3, 37 and 40; the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*; and the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ("The Beijing Rules").

### Northern Territory and juvenile justice

The Northern Territory remains the only jurisdiction in Australia that has not established a system of justice for young people that is separate and distinct from the adult criminal justice system. When a child or young person is required to attend court in Alice Springs for example, they do so in a formal, adult and open court. There is no specialised judiciary and no court support schemes for young people. There are an insufficient number of workers with experience in working with juveniles. There is no juvenile task force within the police service in the Northern Territory.

Additionally, juvenile holding facilities - originally designed for short-term holding or remand for up to 4 days - are now being used to detain young people for periods of three to four weeks.

In the Northern Territory, there is no suppression of identifying information relating to a child or young person involved with the criminal justice system. Northern Territory newspapers routinely publish the names and ages of young people involved in court matters.<sup>281</sup>

### Fines

The increasing imposition of fines on young people for transport-related offences, for public order offences and other summary offences received considerable comment in consultations and submissions for the purposes of this report.

<sup>279</sup> Community Services Commission (1996) *ibid*, p. 10; Forde Implementation Monitoring Committee, (2001) Report to the Commission of Inquiry into Abuse of Children in Queensland Institutions, pp. ix-x.

<sup>280</sup> Human Rights and Equal Opportunity Commission, *op. cit.*, Volume 2, p. 636.

<sup>281</sup> Sara (2004) *Juvenile Injustice in the Northern Territory: A National Disgrace*. Alice Springs Youth Accommodation Service.

The issuing of fines is certainly on the increase in NSW for example. The procedures for recovering unpaid fines in New South Wales (NSW) are governed by the *Fines Act 1996* (New South Wales) which established the State Debt Recovery Office (the “SDRO”) and granted it extensive powers to enforce fines.

The fine amounts are often significantly higher than a court would impose and are beyond the means of most young people. Figures from the NSW Bureau of Crime Statistics and Research show that almost 463,000 infringement notices were issued in 2002 – one fine for every 14 people in NSW. About 35% of these were issued to 14 - 24 year olds but this age group represents only about 15% of the population.<sup>282</sup>

In 2002, almost 27,000 infringement notices were issued to people aged 10-17. This compares with 9,263 police cautions, 1,103 youth justice conferences and 8,547 Children’s Court appearances.<sup>283</sup>

The heavy use of infringement notices undermines the diversionary philosophy of the *Young Offenders Act* and the rehabilitative focus of the juvenile justice system in general. Unfortunately, many infringement notices are issued by officials such as transit police and council rangers, who have no power to warn or caution under the *Young Offenders Act*.<sup>284</sup>

**Recommendations**

- That all Australian governments review and implement as necessary the recommendations of the joint Human Rights & Equal Opportunity Commission and Australian Law Reform Commission Report *Seen and Heard: Priority for Children in the Legal Process* (1997).
- That Recommendation 196 of the joint ALRC/HREOC report “Seen and Heard” that the age at which a child reaches adulthood for the purposes of the criminal law should be 18 years in all jurisdictions is endorsed.
- That the New South Wales Government return the Kariong Juvenile Detention Centre to the status of a

juvenile detention centre under the management of the Department of Juvenile Justice while it detains children under the age of 18 years and ensure that it operates in accord with Australia’s international obligations standards for the administration of juvenile justice.

- That the Australian Government withdraws its reservation to compliance with Article 37 (c) of the Convention on the Rights of the Child.
- That the Northern Territory Government immediately establish a juvenile justice system that accords with the principles of the Convention.
- That Australian governments cease using the infringement system and financial penalties to prosecute children for offences, and ensure that all offences are dealt with under a juvenile justice system in accordance with the Convention that promotes diversionary options.

**C CHILDREN IN SITUATIONS OF EXPLOITATION, INCLUDING RECOVERY AND SOCIAL REINTEGRATION (ARTICLE 39)**

**Economic exploitation, including child labour (Article 32)**

The 1997 *Concluding Observations* of the Committee expressed “concern that employment legislation on the Federal level, as well as in all the states, does not specify minimum ages(s) below which children are not allowed to be employed” (paragraph 11). The Committee recommended that Australia set specific minimum age(s) for employment of children at all levels of Government; suggested that there be clear and consistent regulations on maximum allowed work hours for working children above the minimum employment age; and encouraged Australia to consider ratifying International Labour Organisation (ILO) Convention 138 (paragraph 29).

Australia’s implementation of Article 39 of the Convention still leaves much to be desired. Overall, Australia lacks legislation to specifically regulate the employment of children, including a minimum age for admission into

<sup>282</sup> According to the Australian Bureau of Statistics, 15-24 year olds comprised 14.2% of Australia’s population in 2001. The 14-24 age group was vastly over-represented when it came to public transport offences, bicycle offences, disobeying police directions, and possession of knives. Fines can range from \$49 for riding a bike without a helmet, to a whopping \$550 for carrying a knife or blade.

<sup>283</sup> NSW Bureau of Crime Statistics and Research, Recorded Crime Statistics 2002 and Criminal Court Statistics 2002.

<sup>284</sup> *Fines and Young People* (or all you need to know about the SDRO). Prepared for Children’s Legal Service Bulletin, April 2004, by Jane Sanders, Solicitor, Shopfront Youth Legal Centre.

employment and the conditions of children's employment. Australia has still not ratified the ILO Convention 138, nor ILO Convention 182.

### **Minimum age for employment**

Victoria and the Australian Capital Territory have enacted laws providing for minimum age(s) for employment. There is, however, an absence of equivalent legislation at the federal level, and in the other states and territories. This was a matter of concern in submissions to this Report.<sup>285</sup> The Queensland Young Workers' Advisory Service, for instance, noted that it receives calls from parents of children as young as 11 about the relevant employment rights and laws for their children.<sup>286</sup>

All states and territories have laws prohibiting the employment of children under school-leaving age during school hours but these laws fail to deal with the employment of young children outside school hours. In Queensland, child labour laws are currently under review by the Commission for Children and Young People and Child Guardian.

### **Hazardous and harmful employment**

Most Australian states and territories have legislation to prevent children from undertaking work that is by its nature, hazardous and harmful. However, there are, inconsistencies, ambiguities, and gaps in the protection children are afforded.

### **Regulation of the hours and conditions of employment**

Victoria and the Australian Capital Territory have enacted laws providing more specific regulation of children's employment conditions since the Committee's last *Concluding Observations*. However, children in other states and territories, and all working children over the age of 15, receive only the benefit of general industrial relations laws in relation to hours and conditions of employment.

### **Injuries at work**

While child workers receive the protection of Australia's occupational health and safety laws, there is evidence that child workers do not always receive work safety training.

They are injured and killed at work at a higher rate than adults, and are less likely to access their rights in relation to workers' compensation. For example, a review of reported cases to WorkCover in Victoria indicates that one child under 15 years old is injured at work every two weeks.

### **Bullying and harassment**

It is also evident that Australian children and young people commonly experience bullying and harassment at work. More than one in three young people surveyed by Job Watch in Victoria experienced some form of violence or bullying at work (35%), the main forms being verbal harassment (29.7%); psychological harassment (17.5%); and sexual harassment and assault (12.7%).<sup>287</sup>

### **Regulatory and educational bodies for young workers**

There is a need for effective education, monitoring and enforcement of relevant laws. Little is known about the nature and extent of child labour in Australia. Such knowledge is necessary before policy improvement and legislative reform take place.

It is recommended that a national inquiry into child labour in Australia be conducted and a specialised body responsible for the specific issue of children and young people at work (either nationally or in each state and territory) be established.

### **Youth wages**

As a separate, but related matter, it is important to note that Australia has an age-based wage system, with most industrial awards and workplace agreements providing for junior rates of pay for younger workers.<sup>288</sup> Such provisions are exempt from Australian anti-discrimination legislation. The overwhelming majority of young people and the non-government sector view these age-based rates of pay as inherently unfair, discriminatory and exploitative.<sup>289</sup>

<sup>285</sup> Submission from the Queensland Youth Sector at paragraph 8.3.1 and Patmalar Ambikapathy (Previous Commissioner for Children in Tasmania) at 25.

<sup>286</sup> Submission from the Queensland Youth Sector at paragraph 8.3.1.

<sup>287</sup> Job Watch (2004) at 1.

<sup>288</sup> HREOC (2000) at 113.

<sup>289</sup> See, for example, the submission from the Young Workers Legal Service, in conjunction with the United Trades and Labor Council of South Australia. It was also the unanimous view of youth organisations and young people in submissions to the HREOC inquiry into age discrimination that junior rates are exploitative, not protective, and should be repealed: HREOC (2000) at 114. See also New South Wales Commission for Children and Young People, *Ask the Children: Kids' Issues* (Spring 2004) at 4, available on-line at <http://www.kids.New South Wales.gov.au/ask/kidsissues.html>.

## Recommendations

- Noting the concern expressed by the Committee at paragraph 11 of its *Concluding Observations* that the Australian Government conduct a national inquiry into child labour in Australia, encompassing comprehensive research, debate and consultation with health and welfare professionals, industry bodies, and key stakeholders, including children.
- Following such an inquiry, Australian governments enact or amend legislation affecting child workers to ensure compliance with the Convention. In particular:
  - (a) to provide for a minimum age for admission to employment, with possible exceptions for small amounts of light work, entertainment, and employment in a family business;
  - (b) to prohibit or restrict the employment of children in particular work or industries that are inherently hazardous or harmful for children;
  - (c) to regulate the hours and conditions of child employment;
  - (d) to provide special occupational health and safety protection for child workers by imposing specific obligations on employers/supervisors of children in relation to hazard identification, risk assessment and risk reduction, covering matters such as occupational health and safety training and supervision;
  - (e) to establish a specialised body/ies to be specifically responsible for children and young people at work.
- That all Australian Governments in addressing discrimination on the basis of age commit to replacing age-based rates of pay with competency-based rates of pay.

## Sexual Exploitation and Sexual Abuse (Article 34)

The Committee's 1997 *Concluding Observations* recommended "that cases of abuse and ill-treatment of children, including sexual abuse within the family, should be properly investigated, sanctions applied to perpetrators and publicity given to decisions taken."

The Federal Government in its *Combined Second and Third Reports* points to changes in legislation in relation to the development of a nationally consistent approach to sex offenders' registration and provisions in state legislation to protect and support child witnesses in criminal prosecutions. The Government Report, however, omits the most significant and far-reaching provisions to protect and support child witnesses in the Western Australian legislation. In Western Australia, the child's entire testimony (evidence-in-chief, cross-examination and re-examination) is electronically recorded prior to the trial and admitted into evidence. This means that the child does not have to be present in court or even to attend at the trial, and overcomes many of the problems with delays in the prosecution process, allowing the child to get on with his or her life. In the event of a re-trial, the tape can be used again. This practice has been operating successfully in Western Australia for nearly 10 years and is generally well accepted by the legal profession, the judiciary, and by the children and families involved. Initiatives such as these are welcomed and should be trialled elsewhere.

## D CHILDREN BELONGING TO A MINORITY OR INDIGENOUS GROUP (ARTICLE 30)

Many Australian Indigenous children do not have secure housing,<sup>290</sup> live in households with incomes below the poverty line,<sup>291</sup> and are exposed to or subject to violence including sexual exploitation as a 'normal' part of daily life.<sup>292</sup> They may also be exposed to drug and alcohol abuse and become victims of addiction including the inhalation

<sup>290</sup> In 2001-02 Aboriginal and Torres Strait Islander people made up 17% of adults and unaccompanied children assisted by the joint Commonwealth-State Supported Accommodation Assistance Program (SAAP) for homeless people (ABS 2003: p. 95). The Aboriginal and Torres Strait Islander population was approximately 2% of the Australian population at the time. The ABS reports a higher proportion of Indigenous women than men and a higher proportion of Indigenous compared with non-Indigenous women seeking assistance with homelessness. The ABS identified 33% of Indigenous clients seeking emergency accommodation were women escaping family violence. (ABS 2003: p. 96). Libesman and Cunneen note that a lack of adequate housing, directly impacts on interventions by child welfare departments into Aboriginal and Torres Strait Islander children's lives. In a case file review of 80 Department of Community Services files for substantiated cases of neglect against Indigenous children they found in 66 of the 80 files reviewed families lived in emergency accommodation or a refuge and in 33 files there were periods where families could not obtain any temporary accommodation and hence were homeless.

<sup>291</sup> The unemployment rate for Indigenous people was 17.6% compared with 7.3% for all Australians as at February 2000 (ABS 2000). However this figure gives an overly optimistic picture as it does not count the additional 26% of Indigenous people who work for unemployment benefits on the Community Development Project Scheme.

<sup>292</sup> See Gordon, Hallahan & Henry (2002), Robertson Report (2000), Cunneen & Libesman (2002), Ferrante and colleagues (1996) cited in Stanely, Tomison, & Pocock (2003) suggest that Aboriginal women are 45 times more likely to be a victim of domestic violence than non-Aboriginal women.

of solvents such as petrol.<sup>293</sup> They are marginalised from mainstream health, education, child welfare and police services and do not have adequate, or in many instances any, alternative Indigenous services.<sup>294</sup>

Since 2000, there has been a commitment from all Australian governments to work through the Council of Australian Governments (COAG) to address Indigenous disadvantage.

However, in the HREOC CERD<sup>295</sup> submission regarding the COAG national reporting framework, the Social Justice Commissioner raises three major concerns:

- The lack of adequate progress in improving the socio-economic situation of Indigenous peoples;
- The lack of progress in developing action plans and benchmarks since 2000 when commitments to these processes were made;
- Non-compliance with Australia's treaty obligations to progressively realise improvements in Indigenous disadvantage.

The importance of community development and principles of self determination in addressing Aboriginal and Torres Strait Islander youth and children's rights have often been recognised, and recommendations with respect to these matters have been made, by numerous public inquiries. But these recommendations remain unimplemented.<sup>296</sup>

Policies of forced separations of Indigenous children from their families have had a major influence on the current over-representation of Aboriginal and Torres Strait Islander children in contact with state and territory child welfare departments.<sup>297</sup>

The main components of forced removal were:

- deprivation of liberty;
- deprivation of parental rights;
- abuses of power;
- breach of guardianship duties;
- violation of human rights (NISATSIC 1997: 253-266).

Indigenous children faced appalling standards of care, brutal punishments, and many children were physically and sexually abused. Legislative regimes for the forced removal of Aboriginal and Torres Strait Islander children from their families continued into the 1960s in parts of Australia (NISATSIC 1997:266).

The intergenerational effects of past removals identified by the National Inquiry include loss of parenting skills as a result of institutionalisation, behavioural problems as a result of the trauma experienced including violence, unresolved grief, depression and mental illness. The impact of past removals, together with poor socio-economic conditions, systemic racism and cultural difference between Indigenous peoples and non-Indigenous bureaucracies, combine to produce conditions which underlie contemporary removals.

Current problems with substance abuse, violence and poverty are closely tied to historical experiences of dispossession and enforced separation. They create and recreate a climate of trauma for many Aboriginal and Torres Strait Islander children.

Addressing the problems that beset Aboriginal and Torres Strait Islander communities requires a holistic approach, which facilitates and supports Indigenous communities developing and delivering their own solutions. The NISATSIC noted the importance of self-determination and

<sup>293</sup> See Inquest into the Kunmara Deaths delivered on September 6 2002 by the South Australian Coroner; Chivelli, Libesman & Cunneen (2002) pp9-10, Memmott et al (2001), Hunter, E (1990).

<sup>294</sup> For example in national audit of child abuse prevention programs carried out by the National Child Protection Clearing House only 4% of programs were developed or specifically tailored for Aboriginal and Torres Strait Islander clients (Tomison & Poole 2000).

<sup>295</sup> Australian Human Rights and Equal Opportunities Commission. Information concerning Australia and the International Convention on the Elimination of All Forms of Race Discrimination. January 2005.

<sup>296</sup> See for example the recommendations from two major Australian inquiries; the Royal Commission into Aboriginal Deaths in Custody, in particular Commissioner Elliot Johnson (1991) National Report vol 5 recommendations 62, 235, 236, 237, 238 and the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (1997) *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, Sydney recommendations 43 to 53 with particular reference to recommendation 43.

<sup>297</sup> The National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their families found that the policy of forcible separations constituted genocide within the meaning of the term in international law (NISATSIC 1997: 266).

community control with respect to decision making in the child welfare and juvenile justice areas for Indigenous children (see Recommendations below).

For the Convention provisions in relation to Indigenous children to succeed, specifically Article 30, it is essential that participating governments have a clear commitment to self-determination for Indigenous peoples.

Recommendation 33 of the *National Inquiry Into the Separation of Indigenous and Torres Strait Islander Children from their Families* requires that national legislation be negotiated and adopted between Australian Governments and key Indigenous organisations to establish a framework of negotiations for the implementation of self-determination.

Throughout the Australian Government's *Combined Second and Third Reports*, the Federal Government points to a number of initiatives in relation to health and juvenile justice diversion or "chroming" without noting that these programs are all community programs, researched, developed and initiated by Indigenous communities. They are an example of the inherent potential of self-determination to dramatically improve the lives of Indigenous young people and evidence that an all government commitment to self-determination is essential.

### **Recommendations**

That Recommendations 43 and 44 of NISATSIC which address the negotiation of national legislation to establish a framework for negotiating agreements with Aboriginal and Torres Strait Islander communities with respect to the needs of their children be implemented.

That enjoyment of cultural rights under Article 30 is a prerequisite to, and integral to, Aboriginal and Torres Strait Islander children enjoying all their rights under CROC. To address the complex problems which prevent Indigenous children from enjoying their rights, primary decision-making responsibility for the design, delivery, financial management and evaluation of all services provided to Indigenous children and families must be transferred to Indigenous communities.











DNI Defensa de los Niños Internacional  
DCI Defence for Children International (Australia)  
DEI Défense des Enfants International