

**ELECTRONIC VERSION**

**IN THE BEST INTERESTS OF THE CHILD:  
THE CHILD PROTECTION BILL 1998**

**LEGISLATION BULLETIN NO 2/99**

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<b>DATE OF INTRODUCTION:</b>	10 November 1998
<b>PORTFOLIO:</b>	Families, Youth and Community Care
<b>HANSARD REFERENCE SECOND READING:</b>	Weekly Hansard, 10 November 1998, p 2850-2852.

## 1. INTRODUCTION

The current Queensland legislation dealing with the protection of children, the *Children's Services Act* (Qld), dates back to 1965. Since that time, significant changes have occurred in the way government policy on child protection is practised around the world: the result of a more detailed understanding of the nature of child abuse and neglect and what responses constitute the best ways for the community and government to deal with it. The Child Protection Bill 1998 (Qld) will replace the current Act and, in the Minister's words, will "*provide a modern legislative framework for the State to ensure the protection of children in a way which recognises the interests, rights and responsibilities of all concerned*".<sup>1</sup>

This Bill is similar in its approach, to that of the other States and Territories around Australia, all of which also attempt to reflect the principles espoused by the United Nations Convention on the Rights of the Child (UNCROC). These principles are seen by many as appropriate guidelines for the protection of children.

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<sup>1</sup> Hon AM Bligh MLA, Minister for Families, Youth and Community Care and Minister for Disability Services, Second Reading Speech, *Queensland Parliamentary Debates*, 10 November 1998, p 2850.

The proposals contained in the Child Protection Bill do not affect the role currently played by the Queensland Children's Commissioner in overseeing the delivery of services to children and their treatment within the child protection system.

Please note that, in this paper, any references to a **child** also includes young persons up to the age of 18 years in all Australian States and Territories. Reference to Tasmanian legislation is to the *Children, Young Persons and their Families Act 1997* (Tas). This Act has not yet come into force, due to budgetary considerations, but the relevant department in that State is attempting to work within the parameters of the new Act until it does so. Hence, it is considered more relevant to this discussion to be considering the provisions of that new Act.

## 2. TRENDS IN CHILD PROTECTION

Recent developments in child protection policy reflect a change in emphasis from a reactive system focused on the "*forensic investigation of suspected child maltreatment*"<sup>2</sup> to the use of more preventive policies and family support services **to assist the family to protect their child**. This has also been accompanied by the development of children's rights-based approaches to their protection. However, these two trends may conflict with each other and, thus, strategies and frameworks in this area reflect the aim of those involved to create a system which attempts to balance these competing concerns.

The movement toward a 'family-support' approach appears to have developed from research undertaken on the issues surrounding the causes of child maltreatment. In the UK, in particular, services were becoming aware that many reports of suspected child maltreatment were being labelled as such when they more often than not involved families who were simply suffering other problems, such as, "*financial or housing difficulties, an incapacitated caregiver, or serious stress problems*".<sup>3</sup> The issue became one of providing sufficient services to these families and whether that would prevent the child and family from being subjected to the intrusion of traditional child protection agencies and services.

Research on child protection has also revealed evidence about the factors involved in the nature of child maltreatment. The nature of these factors gives an indication of why there has been this change in emphasis in child protection. They generally

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<sup>2</sup> AM Tomison, "Child Protection towards 2000' revisited: Trends in Child Protection' in *Changing Families, Challenging Future*, Conference Papers, 25-27 November 1998, p 1 at <http://www.aifs.org.au/external/institute/afrc6papers/tomison.html>.

<sup>3</sup> Tomison, p 1.

relate to the dynamics of the family involved and the environment that the families find themselves in,<sup>4</sup> such as the following:

- 1) *Family dysfunction (including a lack of cohesion or adaptability)*
- 2) *Marital Dissatisfaction (particularly a risk factor for sexual abuse)*
- 3) *Social isolation*
- 4) *Poor quality parent-child relationship*
- 5) *Parental absence/Presence of step-father (particularly a risk factor for sexual abuse)*
- 6) *Perpetrator psychopathology (their personal attributes)*
  - *violence*
  - *poor impulse control (a particularly important influence on both physical and sexual abuse)*
  - *parenting skills deficit*
  - *substance abuse*
- 7) *Structural explanations*
  - *patriarchy*
  - *low socio-economic status (Note - This may increase the risk of child maltreatment, although it can be found at all levels)*
  - *family characteristics (dysfunction; parental absence)*
  - *lack of social support*
- 8) *Individual characteristics of the child.*<sup>5</sup>

Thus, the provision of family support services may act to address some of the underlying factors of child abuse and neglect.

The 'family support model' is also designed to achieve "*greater levels of parental cooperation and, subsequently, a better outcome for the children and families*".<sup>6</sup> It aims to help the child and family without further stigmatising or traumatising them through "*inappropriate or unnecessary protective investigations*".<sup>7</sup> It is hoped that families will be more "*likely to accept assistance*"<sup>8</sup> where they do not feel threatened by the possibility of the imminent removal of their child.

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<sup>4</sup> Daryl Higgins and Marita McCabe, 'The 'Child Maltreatment: Risk and Protection' Model - Evidence for a New Approach to Maltreatment Research', *Changing Families, Challenging Futures*, Conference Papers, 25-27 November 1998, p 3 at <http://www.aifs.org.au/external/institute/afrc6papers/higgins.html>.

<sup>5</sup> Higgins and McCabe, pp 3-4.

<sup>6</sup> Tomison, p 2.

<sup>7</sup> Tomison, p 2.

<sup>8</sup> Tomison, p 2.

A 'family-support' model for child protection, despite care being taken to ensure any decisions or actions are in the best interests of the child, contains the risk that workers may pay more attention to family needs rather than to the child's right to protection.<sup>9</sup> This is because this approach asks officers to see any harm caused to the child in the wider context of the family situation. Concerns have been expressed that this new philosophy has caused officers to allow "*children [to remain] with their family longer than appropriate*",<sup>10</sup> thereby, exposing the child to further harm or risk of harm, in a desire not to cause further damage to the child by removing them from their family. To be effective, however, a 'family-support' model requires that sufficient support services are available to provide the assistance that families need to be able to adequately care for their child and to avoid serious intervention.

The rights-based approach is not entirely without conflicts either. The problem for those attempting to articulate the rights of children is that they must do so in the knowledge that many of these children are simply not mature enough to exercise these rights fully or at all.<sup>11</sup> Children's rights may conflict with the rights of their parents, both as parents and individuals, and this is problematic because parents are the people who are primarily responsible for the care of the child. The United Nations Convention on the Rights of the Child (UNCROC), and recent reforms to Australian child protection legislation in response, reflect an attempt to balance the desire of the State and community to provide protection to children to ensure their safety and a recognition that often the way to do this is to ensure that the child's rights are protected. A way to balance these concerns is to recognise that implied in children's rights is a responsibility on adults to ensure that any action taken is in the child's best interests.<sup>12</sup> However, a children's rights approach can be effective in

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<sup>9</sup> AM Tomison, 'Child Protection Towards 2000: Commentary', *Child Abuse Prevention*, Australian Institute of Family Studies, 4(2), September 1996, pp 1-3 referred to in Tomison, 1998, p 3.

<sup>10</sup> Mr Justice Fogarty, *Protective Services for Children in Victoria*, Victoria. Department of Community Services, Melbourne, 1993, pp 86-87.

<sup>11</sup> Claire Breen, 'The United Nations Convention on the Rights of the Child: Is A Rights Based Approach Right for the Child?', *University of Nottingham Student Human Rights Law Centre Newsletter*, 2(1), October 1996, p 1, at <http://www.nottingham.ac.uk/law/hrlc/hrnews/oct96/child.htm>.

<sup>12</sup> Breen, p 3.

giving children “a status and a stake in the argument about issues affecting them”.<sup>13</sup> As Smith states:

*A rights framework assists in clarifying ... competing demands and dilemmas. This assists the community in determining priorities of competing interests, and helps child protection staff to design and implement services accordingly.*<sup>14</sup>

This may help make the system more effective and responsive.

Thus, the Child Protection Bill 1998 (Qld) aims to endorse these changes in philosophy regarding child protection and attempts to balance all the competing concerns of those involved.

### **3. KEY PRINCIPLES UNDERLYING THIS BILL**

#### **3.1 GENERAL**

The primary responsibility for raising a child rests with the family. Where the family is unable or unwilling to provide adequate care and protection to a child, an intervention should take place to ensure their safety. The State may be best positioned to fulfil this role. All action must take place in ‘the best interests of the child’. Therefore, the central aim of child protection measures is to strike a balance between allowing children to grow up within a family environment, which is generally considered to be the best environment for their development, and the State taking action in the best interests of the child with any intervention being as least disruptive as possible. The preferred way to do this is through providing support to the family. This is to “ensure the protection of children in a way which recognises the interests, rights and responsibilities of all concerned”.<sup>15</sup>

#### **3.2 UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD**

An important element in the development of child protection practices has been UNCROC which attempts to identify the rights and responsibilities of those involved in the child protection system (See **Appendix A** for a copy of the Convention). Jones states that the Convention appears to be concerned with what

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<sup>13</sup> Melinda Jones and Lee Ann Bassar Marks, ‘Mediating Rights: Children, Parents And State’, *Australian Journal of Human Rights*, Australian Human Rights Information Centre, 2(2), Autumn 1996, p 313.

<sup>14</sup> Greg Smith, ‘Rights and Advocacy: A Framework for Child Protection Services’ in *The Practice of Child Protection: Australian Approaches*, eds Gillian Calvert Adrian Ford and Patrick Parkinson, Hale & Iremonger, Sydney, 1992, p 174-175.

<sup>15</sup> Hon AM Bligh MLA, p 2850.

Van Beuren terms the 4 “P’s”:

- *the participation of children in decisions which affect their own destiny;*
- *the protection of children against discrimination and all forms of neglect and exploitation;*
- *the prevention of harm to children; and*
- *the provision of assistance for their basic needs.*<sup>16</sup>

Australia ratified this Convention on 17 December 1990 and it came into force in this country on the 16 January 1991.<sup>17</sup> The Convention, and issues relating to how it might be implemented in Australia, were investigated by the Commonwealth Joint Standing Committee on Treaties which reported to that Parliament in 1998.<sup>18</sup> There were 49 recommendations made. Jones summarises these recommendations stating that the Committee’s Report stressed that “*the central aim of protecting the rights of children need[s] to be balanced against the rights of parents who are still central to the well-being and guidance of their children*”.<sup>19</sup> She goes on to say that the Committee acknowledged “*the family as the fundamental unit of society and the role of parents as central to the lives of their children*”,<sup>20</sup> as does UNCROC in its preamble, and that the Committee recommended that “*the Convention should be implemented in such a way that the parents and the family unit are supported*”.<sup>21</sup>

### 3.3 THE CHILD PROTECTION BILL 1998 (QLD)

The principles underlying the new Queensland Bill state that “*every child has a right to protection from harm*” and that “*the welfare and best interests of the child are paramount*” (clause 5(a), (b)). The Bill further establishes the responsibility of the State to intervene to protect children while recognising that the primary responsibility for the care and protection of children rests with the family

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<sup>16</sup> Melinda Jones, ‘Myths & Facts Concerning the Convention on the Rights of the Child in Australia’, *Changing Families, Challenging Futures*, Conference Papers, 25-27 November, 1998, p 1 at <http://www.aifs.org.au/external/institute/afrc6papers/jones.html> referring to G Van Beuren, *The International Law on the Rights of the Child*, Martinus Nijhoff Dordrecht, 1995.

<sup>17</sup> Jones, p 11.

<sup>18</sup> See Australia. Joint Standing Committee on Treaties, *Report of the Joint Standing Committee on Treaties Inquiry into the Status of the UN Convention on the Rights of the Child*, AGPS, Canberra, 1998.

<sup>19</sup> Jones, p 3.

<sup>20</sup> Jones, p 3.

<sup>21</sup> Jones, p 3.

(**clause 5(f), (d), respectively**). The principles clarify how these competing factors should be balanced, that is, always in the best interests of the child.

### 3.4 OTHER STATES AND TERRITORIES

All other Australian States and Territories include the same principles, in their legislation, which govern the administration of their child protection systems. The term “*paramount consideration*” is used by the ACT, NSW, SA, Victoria and the new Tasmanian legislation.<sup>22</sup> The Northern Territory legislation states that the system should take action that is in the best interests of the child.<sup>23</sup> These Acts also reinforce the current philosophy that child protection should be as least intrusive as possible in the lives of the children and families involved.<sup>24</sup> The Northern Territory Act states that the system should “*maintain and develop family relationships which are in the best interests of the child*”<sup>25</sup> and the ACT Act refers to the “*need to strengthen and preserve the relationship between the child, their parents and other family members ... [and] ... the desirability of leaving the child in their own home*”.<sup>26</sup>

### 3.5 ALTERNATIVES

The Queensland Parliamentary Committee for the Scrutiny of Legislation has pointed out that the phrase used in the Queensland Bill, that “*the welfare and best interests of the child are paramount*” (**clause 5 (b)**), is not consistent with that of the Convention. They are concerned that the proposed principle may mean that no issues can come into consideration in any action or decision, under the Bill, other than the ‘best interests of the child’.<sup>27</sup> They point out that the UN Convention uses

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<sup>22</sup> *Children’s Services Act 1986* (ACT), s 5(4); *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 9(a); *Children’s Protection Act 1993* (SA), s 4(1); *Children and Young Persons Act 1989* (Vic), s 87(1)(h); *Children, Young Persons and their Families Act 1997* (Tas), s 8(2)(a).

<sup>23</sup> *Community Welfare Act 1996* (NT), s 9.

<sup>24</sup> *Children’s Services Act 1986* (ACT), s 5(3)(b), (c); *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 9(d); *Children’s Protection Act 1993* (SA), s 4(2)(d); *Children and Young Persons Act 1989* (Vic), s 87(1)(a); *Children, Young Persons and their Families Act 1997* (Tas), s 8(2)(b)(iv), (vii).

<sup>25</sup> *Community Welfare Act 1996* (NT), s 9.

<sup>26</sup> *Children’s Services Act 1986* (ACT), s 5(3)(a), (b); *Children’s Protection Act 1993* (SA), s 4(2)(b).

<sup>27</sup> Queensland. Parliament. Scrutiny of Legislation Committee, *Alert Digest No 11*, Brisbane, 1998, p 3.

the phrase “*primary consideration*” (**Article 3**). They have suggested that either the Bill be changed to:

- use ‘*primary consideration*’ rather than ‘*the best interests of the child being paramount*’; or
- include a caveat after the word ‘*paramount*’ to indicate that other rights are also to be taken into consideration.<sup>28</sup>

The Minister’s response to this concern is that “*it is the intention of the legislation that, when conflict arises [between the best interests of the child and the rights of the parents], the welfare of the child is to be the decision-maker’s primary consideration, and not simply one of a number of considerations*”.<sup>29</sup>

Most jurisdictions in Australia, including the Federal Government in the *Family Law Act 1975* (Cth), use the term “*paramount consideration*”.<sup>30</sup> The addition of the word ‘*consideration*’ could be used to indicate that the best interests of the child is one of many matters to be taken into account, but that it will be the final determining factor as to action taken. The South Australian and new Tasmanian Acts establish that the best interests of the child is the “*paramount consideration*” in decisions and actions taken to protect the child but then list other matters that are termed for “*serious consideration*”.<sup>31</sup> These include the need for the State to strengthen and support families to ensure that children do not become at risk. Perhaps, the term “*paramount*” is used to emphasise that, under this new model of ‘family support’ child protection, the interests and rights of the child are not to be ignored.

## 4. “CHILDREN IN NEED OF CARE AND PROTECTION”

### 4.1 GENERAL

This is an important question to consider because it defines which children will be brought within the child protection system and how such a definition is affected by

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<sup>28</sup> Queensland. Scrutiny of Legislation Committee, *Alert Digest No 11*, pp 3-4.

<sup>29</sup> Queensland. Parliament. Scrutiny of Legislation Committee, *Alert Digest No 1*, Brisbane, 1999, p 33 and Appendix A, p 1.

<sup>30</sup> *Family Law Act 1975* (Cth), s 64(1)(a); *Children’s Services Act 1986* (ACT), s 5(4); *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 9(a); *Children and Young Persons Act 1989* (Vic), s 87(1)(h), (1A); *Children’s Protection Act 1993* (SA), s 4(1)(a); *Children, Young Persons and their Families Act 1997* (Tas), s 8(2)(a).

<sup>31</sup> *Children’s Protection Act 1993* (SA), s 4(1)(b); *Children, Young Persons and their Families Act 1997* (Tas), s 8(2)(b).

the underlying principles of the new Bill. The UN Convention states in **Article 19** that:

*State Parties shall take all appropriate ... measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.*

The proposed definition in the Queensland Bill focuses on the harm, of a significant nature, which the child has suffered, is suffering or is at risk of suffering, no matter how it is caused (**clause 9**). This is a change from the previous Act. The focus now is on the child's actual safety rather than any judgements made by child protection workers about the family situations considered appropriate for a child to be raised in.<sup>32</sup> This new definition may also be more effective in identifying those families who need assistance to provide protection for their child. The aim of the 'family support' approach is

*to develop stricter thresholds for child protection intervention and service provision, such that only those families judged to be truly 'in need' (that is, where there is evidence of 'significant harm') enter the system, [are] fully investigated and receive [the needed] services.<sup>33</sup>*

This is because research was revealing:

*that significant resources were utilised in the investigatory process, resources [which could have been] better spent in the provision of support to families 'in need', given that a high proportion of reported cases were subsequently not substantiated as 'child maltreatment'.<sup>34</sup>*

## 4.2 THE CHILD PROTECTION BILL 1998 (QLD)

The Queensland Bill provides that action can be taken by the Department where a child is perceived to be "**in need of protection**". This consists of two elements:

- That the child has suffered, is suffering, or, is at an unacceptable risk of suffering, harm; and
- That the parents of the child are unable or unwilling to provide the child with protection from that harm (**clause 10**).

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<sup>32</sup> *Children's Services Act 1965* (Qld), s 46.

<sup>33</sup> Tomison, p 3.

<sup>34</sup> C Wattam, 'Can filtering processes be rationalised?' in *Child Protection and Family Support: Tensions, Contradictions and Possibilities*, ed N Parton, Routledge, London, 1997 referred to in Tomison, p 4.

The Bill defines “**harm**” as an injury or other detrimental effect of a significant nature to the child’s well-being (**clause 9**). This could include, for example, physical, psychological or emotional abuse, neglect, sexual abuse or exploitation, or self-harming behaviour (**clause 9(2), (3)**). An “*unacceptable risk of harm*” could include where there is evidence that another child was considered in danger in the care of a person and that, therefore, a child currently in that person’s care is also in danger, or where the child has been abandoned by their parent(s).<sup>35</sup>

The Queensland Scrutiny of Legislation Committee points out that this is a very broad definition of harm. The Committee makes this point because the proposed definition will affect the scope of the powers conferred onto Departmental officers and the court to intervene in the lives of families.<sup>36</sup> This is important because one of the principles of the Bill is that intervention should be as least intrusive as possible. Because the cause of harm in this proposed definition is immaterial, even though certain potential causes are given, the Scrutiny of Legislation Committee argues that there are some cases, which may come under the proposed definition, that would not be within the ability of parents to prevent and that, therefore, there would not be a sufficient reason for the child to be taken into care. This could include, for example, where the injury is due to poverty or a road accident.<sup>37</sup>

The Minister argues, in reply, that this definition is appropriate because limitations exist in the Bill which would limit court orders being made in situations where “*children are harmed through unavoidable accidents or life circumstances, such as playground accidents, road trauma or childhood diseases*”.<sup>38</sup> These limitations include that a care and protection order is only made by a court where “*the level of harm [to the child] must be significant*”.<sup>39</sup> The court also may only make such an order where:

- *the order is ‘appropriate and desirable for the child’s protection’. ... ;*
- *and ‘the child’s protection is unlikely to be ensured by an order ... on less intrusive terms’.*<sup>40</sup>

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<sup>35</sup> Explanatory Notes, Child Protection Bill 1998 (Qld), p 11.

<sup>36</sup> Queensland. Parliament. Scrutiny of Legislation Committee, *Alert Digest No 11*, p 4.

<sup>37</sup> Queensland. Parliament. Scrutiny of Legislation Committee, *Alert Digest No 11*, p 4.

<sup>38</sup> Queensland. Parliament. Scrutiny of Legislation Committee, *Alert Digest No 1*, p 34 and Appendix A, p 1.

<sup>39</sup> Queensland. Parliament. Scrutiny of Legislation Committee, *Alert Digest No 1*, p 34 and Appendix A, p 2.

<sup>40</sup> Queensland. Parliament. Scrutiny of Legislation Committee, *Alert Digest No 1*, p 34 and Appendix A, p 2.

The Minister also points out that all action, taken by officers under this Act, will be governed by the principles outlined in **clause 5** of the Bill, especially **(b), (c), (d), (e) and (f)**. The Minister, in addition, argues that this Bill attempts to move

*... away from an emphasis upon parental blame when deciding about a child's need for protection. Its focus is upon whether a child needs the intervention of the State to be protected, not upon a limited list of circumstances in which parents are not providing for the child's needs. The statement that 'it is immaterial how the harm is caused' emphasises that, whatever the reason for the parents being unable to protect the child, the child has a right to that protection. ... In the context of a Bill such as this which emphasises working in a family-focused way, it is considered counter-productive to have a definition of 'child in need of protection' which focuses upon parental failings rather than the child's unmet needs.<sup>41</sup>*

Relevant, here, is the provision in the NSW Act that states, that while the failure of parents to provide for their child's basic needs is a ground for the child being considered in need of care, such a decision is not to be made solely on the basis of the parents' disability or poverty.<sup>42</sup>

### 4.3 OTHER STATES AND TERRITORIES

Although definitions vary between jurisdictions, the Australian Institute of Health and Welfare provides a summary. A child can be considered "**in need of care and protection**" if the child:

- *...is being or is likely to be abused or neglected and other ways of working with the family have been exhausted;*
- *the child has been abandoned;*
- *adequate provision is not being made for the child's care;*
- *there is an irretrievable breakdown in the relationship between the child and his or her parent(s); or*
- *there are other particular child-related factors, such as physical or behavioural difficulties or psychiatrically diagnosed emotional problems.<sup>43</sup>*

In addition, where a child is suffering or is at risk of suffering significant harm, including physical injury, sexual abuse, emotional or psychological harm, or a

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<sup>41</sup> Queensland. Parliament. Scrutiny of Legislation Committee, *Alert Digest No 1*, pp 34-35 and Appendix A, p 1.

<sup>42</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 71(2).

<sup>43</sup> Australian Institute of Health and Welfare, p 24.

developmental impairment, all the States and Territories consider that the child is in need of care and protection.<sup>44</sup>

The Northern Territory provides a very detailed definition of “**harm**”.<sup>45</sup> The Northern Territory legislation states that

*a child shall be taken to have suffered maltreatment where -*

- a) he has suffered a physical injury causing temporary or permanent disfigurement or serious pain or has suffered impairment of a bodily function or the normal reserve or flexibility of a bodily function, inflicted or allowed to be inflicted by a parent, guardian or person having the custody of him or where there is substantial risk of suffering such an injury or impairment;*
- b) he has suffered serious emotional or intellectual impairment evidenced by severe psychological or social malfunctioning measured by the commonly accepted standards of the community to which he belongs, because of his physical surroundings, nutritional or other deprivation, or the emotional or social environment in which he is living or where there is a substantial risk that such surroundings, deprivation or environment will cause such emotional or intellectual impairment; or*
- c) he has suffered serious physical impairment evidenced by severe bodily malfunctioning, because of his physical surroundings, nutritional or other deprivation, or the emotional or social environment in which he is living or where there is substantial risk that such surroundings, deprivation or environment will cause such impairment ....*

However, such a detailed definition may not be so easily or clearly understood and, therefore, may not provide clear instructions to child protection officers. Several jurisdictions explicitly include as in need of care and protection those children, who have been abandoned, or whose parents are dead or incapacitated in some way so as to not be able to care for their child.<sup>46</sup> Victoria and New South Wales indicate that a failure to adequately provide for the care of a child could include a failure to seek medical attention for that child whose health then is significantly harmed as a

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<sup>44</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 23(c), (e); *Children and Young Persons Act 1989* (Vic), s 63(c), (d), (e), (f); *Children, Young Persons and their Families Act 1997* (Tas), s 4 (c)(vi); *Children’s Protection Act 1993* (SA), s 6(1), (2)(a); *Child Welfare Act 1947* (WA), s 4(i), (k); *Children’s Services Act 1986* (ACT), s 71(1)(a), (b), (c); *Community Welfare Act 1996* (NT), s 4(2)(c), (d), (3).

<sup>45</sup> *Community Welfare Act 1996* (NT), s 4(3).

<sup>46</sup> *Children and Young Persons Act 1989* (Vic), s 63(a), (b); *Children, Young Persons and their Families Act 1997* (Tas), s 4(c)(v); *Children’s Protection Act 1993* (SA), s 6(2)(c)(iii); *Child Welfare 1947* (WA), s 4(a); *Children’s Services Act 1986* (ACT), s 71(1)(e); *Community Welfare Act 1996* (NT), s 4(2)(c).

result.<sup>47</sup> The proposed definition of “**harm**” in the Child Protection Bill 1998 (Qld) may be sufficiently wide enough to cover this situation. A lack of adequate provision for the care of the child may also include not being able or willing to adequately supervise and control the child (SA and Tasmania),<sup>48</sup> where the child is persistently absent from school without a satisfactory explanation or where it is likely to lead to their harm (SA, ACT),<sup>49</sup> where the parent is not able or willing to prevent others doing harm to the child (Victoria, WA and Tasmania)<sup>50</sup> or where the child’s self-harming behaviour cannot be, or is not, stopped by the parent (ACT, NT).<sup>51</sup> Neglect generally means where the parent is not able or willing to adequately care for the child, or their basic needs are not being met.

An “irretrievable breakdown” in the parent-child relationship is evidenced by a “*serious incompatibility*” between parent and child (ACT), where there is a “*serious and persistent conflict*” (NSW) or where there are “*irreconcilable differences*” (Victoria).<sup>52</sup>

NSW considers a child “**at risk**” where, because of domestic violence in the home, the child is at risk of “*serious physical or psychological harm*”.<sup>53</sup> SA and Tasmania indicate that where a person who resides with the child (and, in Tasmanian legislation, who has frequent contact with the child), threatens to kill or injure the child and there is a reasonable likelihood that it will occur, then the child is in need of protection.<sup>54</sup> Both States also consider a child in need of care and protection where the person the child resides with (and, in Tasmania legislation, who has frequent contact with the child) has abused or neglected another child and

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<sup>47</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 23(b); *Children and Young Persons Act 1989* (Vic), s 63(f).

<sup>48</sup> *Children’s Protection Act 1993* (SA), s 6(2)(c); *Children, Young Persons and their Families Act 1997* (Tas), s 4(c)(ii).

<sup>49</sup> *Children’s Protection Act 1993* (SA), s 6(2)(d); *Children’s Services Act 1986* (ACT), s 71(1)(g).

<sup>50</sup> *Children and Young Persons Act 1989* (Vic), s 63(c), (d), (e); *Children, Young Persons and their Families Act 1997* (Tas), s 4(c)(vi).

<sup>51</sup> *Children’s Services Act 1986* (ACT), s 71(1)(d); *Community Welfare Act 1996* (NT), s 4(2)(d).

<sup>52</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW), Chapter 7, Part 1; *Children and Young Persons Act 1989* (Vic), ss 71 & 84; *Children’s Services Act 1986* (ACT), s 71(1)(f).

<sup>53</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 23(d).

<sup>54</sup> *Children’s Protection Act 1993* (SA), s 6(2)(a)(i); *Children, Young Persons and their Families Act 1997* (Tas), s 4(b)(i).

it is reasonably likely that it will occur with this child.<sup>55</sup> This situation is indirectly covered by the Queensland Bill because it is the harm, or threat of, to the child that is covered under the Queensland definition rather than how, or by whom, it was caused.<sup>56</sup>

South Australia and the Northern Territory legislation states that a female child needs protection where she is at risk of female genital mutilation.<sup>57</sup>

It is also important to point out that, under the 1998 NSW Act, there are different definitions that apply at different stages of the child protection process. At the initial investigatory stage, prior to the assessment and investigation process, action is taken where a child is “*at risk of harm*” and then at the stage of seeking a court order for the protection of the child, decisions as to whether to proceed depend on whether the “*child is in need of care and protection*”.<sup>58</sup> This may be a means of more accurately targeting support services and ensuring only appropriate intervention.

## 5. DEPARTMENTAL PROCEDURE

### 5.1 BACKGROUND

Children are often traumatised by abuse and neglect. This trauma can also be exacerbated “*by insensitive, neglectful or exploitative practices*” within agencies established to help them.<sup>59</sup> The phrase ‘systems abuse’ is used to describe this concern and may include children in care experiencing various placements and being, therefore, deprived of stable environments.<sup>60</sup> Evidence suggests that children in out-of-home care do not achieve the same level of education as the average child and that they are insufficiently assisted in becoming independent adults.<sup>61</sup> Some research has also indicated “*that children in care are significantly more likely to come into adverse contact with the juvenile justice system than other children*”.<sup>62</sup>

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<sup>55</sup> *Children’s Protection Act 1993* (SA), s 6(2)(a)(ii); *Children, Young Persons and their Families Act 1997* (Tas), s 4(b)(ii).

<sup>56</sup> Explanatory Notes, Child Protection Bill 1998 (Qld), p 11.

<sup>57</sup> *Children’s Protection Act 1993* (SA), s 26B; *Community Welfare Act 1996* (NT), s 4(3)(e).

<sup>58</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW), ss 23 & 71.

<sup>59</sup> Australian Law Reform Commission, p 422.

<sup>60</sup> Australian Law Reform Commission, pp 424.

<sup>61</sup> Australian Law Reform Commission, pp 456-457.

<sup>62</sup> Australian Law Reform Commission, p 425.

Under the UN Convention, States must “provide effective procedures for the prevention of abuse and identification, treatment and follow-up of allegations of abuse”.<sup>63</sup> They must also provide appropriate alternative care for children who are removed from their family environment.<sup>64</sup> The system used to protect individual children includes:

- Receiving reports of suspected harm to children;
- Investigating these reports and assessing the child’s need for protection; and
- If a child needs protection, determining what level of intervention is required to ensure the child’s safety.

The Queensland Bill states that any action taken by officers must be at the least intrusive level which is compatible with ensuring the child’s protection.<sup>65</sup>

## 5.2 REPORTING AND INITIAL ACTION

The proposed Bill requires the Director-General of the Department of Families, Youth and Community Care to respond to reports of harm to children (**clause 14(1)(a)**). When an allegation does not relate to significant harm, “other action” may be taken (**clause 14(1)(b)**). This may include the “provision of protective advice to assist the notifier respond to the family’s needs”.<sup>66</sup> Where a possible criminal offence is involved, it must be reported by the Department to the police (**clause 14(2)**). Most Australian States and Territories allow a person, who, on reasonable grounds, suspects that a child has suffered or is at risk of suffering abuse or neglect, to report the suspicion to the authorities.<sup>67</sup>

The next step involves the Department or Police who, as soon as practicable, after completing an initial assessment of the notification, determine, if they believe on reasonable grounds, that the child is in need of care and protection. If this is the

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<sup>63</sup> Australian Law Reform Commission, p 426; See also **Articles 19(2), 25**.

<sup>64</sup> Australian Law Reform Commission, p 426; See also **Article 20**.

<sup>65</sup> Hon AM Bligh MLA, p 2851.

<sup>66</sup> Explanatory Notes, p 13.

<sup>67</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 24; *Children and Young Persons Act 1989* (Vic), s 64(1); *Children, Young Persons and their Families Act 1997* (Tas), s 13; *Children’s Protection Act 1993* (SA), s12; *Children’s Services Act 1986* (ACT), s 103; *Community Welfare Act 1996* (NT), s 14.

case, they must take necessary action to protect the child.<sup>68</sup> If the threat or risk of harm is immediate or urgent, Departmental or Police officers are entitled to enter the premises they reasonably believe the child is in, without a warrant, to search for the child and take the child into emergency custody.<sup>69</sup> Where a Departmental or Police officer exercises these powers of entry, they must record the full details of such action in an information register which will be maintained by their Department (**clause 16(4)**). If this is not an urgent case, the officer may complete a further investigation to adequately assess what action needs to be taken to protect the child.

Where the child is taken into the custody of the Department, the officer must apply for validation of their action from the Courts to continue the investigation. Under the proposed Bill, the officer must apply for a judicial order within 8 hours of taking the child into custody (**clause 18**). In NSW, this must be at the first reasonable opportunity but no later than the next sitting day of the Children's Court.<sup>70</sup> The Victorian Act provides that the child must be brought before the court, as soon as practicable, and within one working day, or before a bail justice, within 24 hours.<sup>71</sup> In the ACT, the Magistrate is notified by the Department where any initial action is taken, including taking a child into custody. The Magistrate can authorise a further detention of up to 7 days but, if the Magistrate does not act within 48 hours of this notification by the Department, the child must be released from custody.<sup>72</sup> In SA, the officer has until the end of the next working day, unless the SA Youth Court allows a further custody for the purposes of making an assessment of the child's situation.<sup>73</sup> The NT can hold the child in a safe place for no longer than 48 hours. An application must then be made to a Justice of the Peace for a holding order for

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<sup>68</sup> Child Protection Bill 1998 (Qld), **Clause 14**; *Children and Young Persons (Care and Protection) Act 1998* (NSW), ss 30, 34; *Children and Young Persons Act 1989* (Vic), s 66; *Children, Young Persons and their Families Act 1997* (Tas), s 17; *Children's Protection Act 1993* (SA), s 14; *Children's Services Act 1986* (ACT), s 73; *Community Welfare Act 1996* (NT), s 10.

<sup>69</sup> Child Protection Bill 1998 (Qld), **Clauses 16, 18**; *Children and Young Persons (Care and Protection) Act 1998* (NSW), ss 43, 44; *Children and Young Persons Act 1989* (Vic), ss 68, 69; *Children, Young Persons and their Families Act 1997* (Tas), s 97 (only with a warrant) (but see also s 13); *Children's Protection Act 1993* (SA), s 16; *Child Welfare Act 1947* (WA), s 29; *Children's Services Act 1986* (ACT), Part XI, Div 1; *Community Welfare Act 1996* (NT), ss 11, 17.

<sup>70</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 45.

<sup>71</sup> *Children and Young Persons Act 1989* (Vic), s 69(4), (5).

<sup>72</sup> *Children's Services Act 1986* (ACT), s 76.

<sup>73</sup> *Children's Protection Act 1993* (SA), s 18.

up to a further 14 days.<sup>74</sup> In Tasmania, the child can be held for up to 120 hours, but only under a warrant for an assessment, unless there is a grant of interim custody by the court.<sup>75</sup>

In the Queensland Bill, a parent, guardian of the child or a person nominated by the child to be notified, should be notified of any actions taken, in relation to the child, as soon as practicable, if it is in the best interests of the child to do so and does not affect their safety and well-being (**clause 20**).

### 5.3 INVESTIGATING ALLEGED HARM

As a result of an investigation, the Department will decide whether there are reasonable grounds to believe that the child has been abused or neglected (that is, the case is ‘substantiated’) or that the child may be ‘at risk’ of abuse or neglect and, if so, whether the child is in need of the Department’s protection, or the family is in need of assistance.

Under the Child Protection Bill 1998 (Qld), where allegations of serious abuse have been made and it is considered in the best interests of the child that there be contact between the child and investigators before parents are informed of the notification, Police and Departmental officers can have contact with the child at school, a child care centre or family day care in order to investigate the report (**clause 17**). Where a Departmental or Police officer exercises these powers to visit a child, they must record the full details of such action in an information register which will be maintained by their Department (**clause 17(6)**). The Departmental officer can then seek a temporary assessment order from a magistrate to have a short period of time to investigate and assess the report of harm. This order is for a maximum of 3 days but can only be extended to the next business day where a court order will be sought (**clauses 25-31**). If a longer period is required, the officer can seek a court assessment order from the Children’s Court. The order can be for a period of up to four weeks (**clauses 38-46**).

In the ACT, it is the role of the Community Advocate to make appropriate inquiries into the circumstances of the child. However, in general, these assessments are usually undertaken by specialist teams or panels of persons with expertise in the area.<sup>76</sup> SA and Tasmania allow for four weeks to complete this process, Victoria

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<sup>74</sup> *Community Welfare Act 1996* (NT), s 11.

<sup>75</sup> *Children, Young Persons and their Families Act 1997* (Tas), s 21.

<sup>76</sup> *Children’s Services Act 1986* (ACT); s 13, *Community Advocate Act 1991* (ACT), s 76.

allows 21 days, NSW allows 14 days, and the Northern Territory, 2 months.<sup>77</sup> It is considered important that matters are dealt with as soon as practicable so that the disruption to the child is kept to a minimum. The Court can order that during this period, the child can either remain in the custody of the Department or under the custody of their parents. An extension of this period is allowed where an attempt to resolve the matter by an alternative dispute resolution process is considered appropriate without the need to impose an order on the family. The development of a care plan to deal with the matter can also be prepared during this stage.<sup>78</sup>

## 5.4 ALTERNATIVE DISPUTE RESOLUTION

### 5.4.1 General

The Australian Law Reform Commission dealt with this issue in its 1997 report. They indicated that, in general, the laws around Australia provide that after an investigation, the relevant family services department will assess the situation of the child and family, determine whether any intervention is required and, if so, decide what intervention is required, including an application for the court ordered care and protection of a child. They go on to say that:

*The decision whether to make a care and protection application [often] depends on the immediate willingness [of the child's parents or guardians] to cooperate with the department's provision of services, the resources available to the department and an assessment of whether the child would be safe in the family.*<sup>79</sup>

There are two styles of Alternative Dispute Resolution options available to families. One is that of a Family Group Conference and the other is a Pre-Hearing Conference. Family Group Conferencing derives from a New Zealand model.<sup>80</sup> It allows the extended family of the child a chance to be involved and gives children, young people and their extended families substantially increased responsibility in decision-making. The conference is mandatory once an investigation determines

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<sup>77</sup> *Children's Protection Act 1993 (SA)*, s 21(2); *Children, Young Persons and their Families Act 1997 (Tas)*, s 22; *Children and Young Persons Act 1989 (Vic)*, ss 73, 75; *Children and Young Persons (Care and Protection) Act 1998 (NSW)*, s 46; *Community Welfare Act 1996 (NT)*, s 17.

<sup>78</sup> *Children and Young Persons (Care and Protection) Act 1998 (NSW)*, s 38.

<sup>79</sup> Australian Law Reform Commission, p 436.

<sup>80</sup> Australian Law Reform Commission, p 437. See also Robert Troedson, *Family Conferencing: A Community Approach to Juvenile Justice*, Research Bulletin 6/96, Queensland Parliamentary Library.

the child appears to be in need of care and protection.<sup>81</sup> As the ALRC points out:

*The conference itself has three stages. First, the professionals who have investigated the allegations detail the information that they have received and members of the extended family are given the opportunity to ask questions or correct factual errors. Next, the family discusses, in private if they wish, their response to the information and whether they think the child is in need of care and protection and then decides on a plan to ensure that the child receives that care and protection (at this point, the family also discuss with the professional various services that may be offered or available.) Finally, the family's plan is conveyed to the professionals, who may agree to it or request modifications. If the result of the conference is a plan that is acceptable to both the family and the professionals involved, it is formally recorded and subject to implementation by all concerned.*<sup>82</sup>

The Victorian government submission to the ALRC Inquiry noted that conferencing

*... plays an important role in maintaining children at home, or within their extended family network. While not necessarily diverting matters from court action, Family Group Conferencing increases the likelihood of these processes being settled by consent.*<sup>83</sup>

Victoria has also a system of Pre-Hearing Conferences. These conferences generally only involve the parties to the dispute and are mandatory for the parents and representatives of the Department.<sup>84</sup> The court may order that the child, other relatives and/or an ethnic community representative attend this conference but only the parents and the child may be represented.<sup>85</sup> The aim of this type of conference is for the parents and the Department to negotiate a voluntary agreement about the care and protection of the child.

The ALRC concluded that these options allow the family, and in some cases, the extended family or other community members to be involved in reaching a cooperative solution to the protection of the child.<sup>86</sup> This may allow intervention to be as least intrusive as the child's protection needs warrant.

On the other hand, the Commission, and others, have concerns that these processes pressure vulnerable families into negotiation with social workers and that this

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<sup>81</sup> Australian Law Reform Commission, p 437.

<sup>82</sup> Australian Law Reform Commission, p 437.

<sup>83</sup> Victorian Government, *IP Submission 213*, quoted in Australian Law Reform Commission, p 438.

<sup>84</sup> Australian Law Reform Commission, p 438, *Children and Young Persons Act 1989* (Vic), s 82A.

<sup>85</sup> *Children and Young Persons Act 1989* (Vic), s 82A.

<sup>86</sup> Australian Law Reform Commission, p 438.

dynamic may result in limited contact between, or even separation of, parents and children being the likely outcome.<sup>87</sup> Concerns were also expressed that “*the vulnerability of some family members within violent and abusive families may mean that dynamics in conferences could hamper appropriate resolutions*”.<sup>88</sup> As the Commission’s report states, there is a “... *potential [in conferencing schemes] to mask the inequality of the parties by a veneer of participation*”.<sup>89</sup> They recommended appropriate training for conference conveners and access to legal advice for family members before these conferences.<sup>90</sup> The Commission was also concerned that the conference convener may be unable to protect the child or, if unaware of negative family dynamics, may involve the child in discussions, with an allegedly abusive parent or with family members who may intimidate or blame the child for ‘disrupting’ the family, and, thus, further traumatise the child.<sup>91</sup> However, the Report confirmed the importance of allowing children to have their views and best interests made clear when conference participants are making decisions about their future. Therefore, measures need to be taken during this stage to ensure that the child is fully informed and protected from further trauma.

#### **5.4.2 The Child Protection Bill 1998 (Qld)**

According to the Minister, under the proposed Child Protection Act, officers will proceed with a “*preference*” for working “*cooperatively with families to protect children*”.<sup>92</sup>

**Clause 57** states that, before the court makes an order for the protection of a child, a Family Meeting must have been held to consider ways to meet the child’s needs and, if the application for an order is to be contested, a court ordered Pre-Hearing Conference must be held. A Family Meeting would be similar to a Family Group Conference.

The Court can adjourn an application and make interim orders for the protection of the child and for the holding of a Family Meeting or a Pre-Hearing Conference (**clauses 63-66**).

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<sup>87</sup> Australian Law Reform Commission, p 439.

<sup>88</sup> Australian Law Reform Commission, p 439.

<sup>89</sup> PA Swain, ‘Letting the Family Decide: Family Group Conferences and Pre-Hearing Conferences in Victoria’s Child Protection System’, *Alternative Dispute Resolution Journal*, Vol 7, 1996, p 233 quoted at Australian Law Reform Commission, p 439.

<sup>90</sup> Australian Law Reform Commission, p 440-441.

<sup>91</sup> Australian Law Reform Commission, p 439.

<sup>92</sup> Hon AM Bligh MLA, p 2851.

With respect to Pre-Hearing Conferences, the Registrar will appoint a chairperson and convene the conference to be held as soon as practicable after the interim order is made (**clause 66**). The attendance of the parties, except the child, is compulsory. The child may however attend (**clause 67(1), (2)**). If the child is Aboriginal or Torres Strait Islander, then an Aboriginal and Torres Strait Islander Child Care Agency officer must attend (**clause 66(4)**). The parties may have legal representation (**clause 66(3)**).

### 5.4.3 Other States and Territories

In Victoria, Family Group Conferencing was established following a successful pilot program. Family Group Conferences may be convened prior to an application for a protection order being made to the Court.<sup>93</sup> The Victorian scheme is not legislatively based, whereas, a similar arrangement in South Australia is provided for in their child protection legislation.<sup>94</sup> A South Australian 'Family Care Conference' must be convened before an application for a care and protection order is made to the courts, unless there are special circumstances that require otherwise. A Care and Protection Co-ordinator is allocated to assist the family to make decisions about the child's care.<sup>95</sup> Family Group Conferences are also provided for in the Tasmanian legislation.<sup>96</sup> A facilitator is assigned but time is allowed for the family to discuss matters in private if they wish.<sup>97</sup> NSW has introduced Preliminary Conferencing with a Court Registrar to deal with disputes between the parties and the ACT provides for Child Care Conferences to be held between the parties.<sup>98</sup>

## 6. COURT PROCEDURES/ORDERS

### 6.1 GENERAL

It is important, when considering the orders able to be made by the Court, to understand what is meant by 'custody' and 'guardianship' in the proposed legislation. "**Custody**" means the right and responsibility for the daily care and

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<sup>93</sup> Australian Law Reform Commission, p 437.

<sup>94</sup> *Children's Protection Act 1993* (SA), Part 5, Div 1.

<sup>95</sup> *Children's Protection Act 1993* (SA), s 29.

<sup>96</sup> *Children, Young Persons and their Families Act 1997* (Tas), Part 5, Div 1.

<sup>97</sup> *Children, Young Persons and their Families Act 1997* (Tas), s 34.

<sup>98</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 65; *Children's Services Act 1986* (ACT), s 82(2B).

control of the child and the right and responsibility to make decisions regarding this care and control (**clause 12**). “**Guardianship**” means the custody of the child, plus the right and responsibility for the long-term care of the child and the right and responsibility to make decisions in these matters (**clause 13**).

Most jurisdictions provide the following custody and/or guardianship options:

- *undertakings or recognisances by parents or children, with no supervision;*
- *supervision by the Department with or without undertakings;*
- *custody orders to other relatives or appropriate people;*
- *custody orders to the Minister or Department;*
- *guardianship to the Minister or Department.*<sup>99</sup>

Where the child is living away from their parents, access provisions are also provided for in the order.

WA has avoided developing a range of non-guardianship orders. Informal work takes place with the family of the child at risk, without recourse to court orders, until a guardianship order is considered necessary. The ALRC questioned whether this method provided sufficient flexibility when dealing with the needs of the child.<sup>100</sup>

## 6.2 THE CHILD PROTECTION BILL 1998 (QLD)

Where a Queensland child needs protection and voluntary options have not been possible nor appropriate, under the proposed legislation, an officer of the Department can apply for a care and protection order (**clause 57**). These can include one or more of the following:

- (a) directing a parent to do or refrain from doing something related to the child’s protection;
- (b) directing a parent not to have contact, or to have supervised contact only, with their child;
- (c) supervising of the child’s protection by the Director-General for a period not exceeding 12 months;
- (d) granting protective custody to the Director-General or member of child’s family for up to 2 years;
- (e) granting short term guardianship to the Director-General for up to 2 years;  
or
- (f) granting long term guardianship to the Director-General, a member of the child’s family or to a non-relative until the child is 18 years (**clause 58**).

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<sup>99</sup> Australian Law Reform Commission, pp 444-445.

<sup>100</sup> Australian Law Reform Commission, p 445.

Custody and guardianship orders, except those that are long term, may be for up to two years, with the possibility of an extension (**clauses 59 & 61**).

A long-term protection order may be granted where:

- (a) no parent is able or willing to protect the child within the foreseeable future; and
- (b) the child's long term emotional well-being will be best met by making such an order (**clause 57(3)**).

There are provisions for periodic reviews of these orders. For all orders (except those for the long term), the Director-General must assist the family to meet the protective needs of the child and have regular contact with the family (**clause 70**). Where the order is for the custody or guardianship of the child, there is to be a review of arrangements at least every six months (**clause 85**).

### **6.3 OTHER STATES AND TERRITORIES**

Most of the orders provided for in other States and Territories are for a 12 month period except where long term or permanent guardianship is given to the Director-General or Minister. A permanent guardianship order is valid until the child or young person turns 18. Mostly, these orders are made only where the court is satisfied that it is the only way to ensure the child would receive suitable care. In Tasmania, orders for undertakings, custody orders and short-term guardianship orders, can be extended from the 12 month period to a total period of 3 years.<sup>101</sup> NSW also provides for orders to ensure that support services are provided to the child and family. Such orders can only be made with the consent of the provider of that service. Compulsory assistance orders are also available to provide intensive responses, by the Department, to protect a child from suicide or life-threatening or seriously self-destructive behaviour. In NSW, a care plan must be submitted before any final orders are made.<sup>102</sup>

Most States and Territories also provide for permanent guardianship orders to be periodically reviewed to see if the measures still meet the best interests of the child. For example, in the ACT, the Community Advocate must apply for a review at least two months before the expiration of each twelve month period after the final making of an order;<sup>103</sup> in SA, there must be at least one review a year, in Tasmania, at least

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<sup>101</sup> *Children, Young Persons and their Families Act 1997* (Tas), s 44.

<sup>102</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW), ss 74 & 124-125 & 78, respectively.

<sup>103</sup> *Children's Services Act 1986* (ACT), s 89.

once a year in the first three years and at least once every two years after that, and in the Northern Territory, such orders must be reviewed every two years.<sup>104</sup>

## 7. PROVISIONS RELATING TO ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN

### 7.1 OVER-REPRESENTATION OF INDIGENOUS CHILDREN IN THE CHILD PROTECTION SYSTEM

A continuing concern of those involved in child protection is the over-representation of indigenous children in the system. They are over-represented in substantiations of child abuse and neglect, are much more likely to be placed on a care and protection order than other children who come before the courts, and are over-represented in out-of-home care.<sup>105</sup> The most common child protection concern is neglect<sup>106</sup> and factors considered to contribute to this over-representation included:

- *high rates of poverty and unemployment;*
- *high incidence of single-parent families;*
- *cultural differences in child-rearing practices;*
- *high incidence of alcoholism; and*
- *lack of access or ability to access appropriate support services.*<sup>107</sup>

Research also indicated that “*a range of health, housing and education needs contributed to Indigenous children coming into protective orders*”.<sup>108</sup> A 1995 Report, for the Queensland Department of Families, Youth and Community Care, concluded that the additional provision of services “*might have prevented a protective order being required*” to provide for the care of the child in many cases.<sup>109</sup> The primary reason given for the failure to access support services by indigenous families was because these services were unavailable to their community.<sup>110</sup>

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<sup>104</sup> *Children’s Protection Act 1993 (SA)*, s 52; *Children, Young Persons and their Families Act 1997 (Tas)*, s 71; *Community Welfare Act 1996 (NT)*, s 49.

<sup>105</sup> Australian Institute of Health and Welfare, *Child Protection Australia 1996-97*, Canberra, 1998, p 1-2.

<sup>106</sup> Australian Institute of Health and Welfare, p 19.

<sup>107</sup> Australian Institute of Health and Welfare, p 18.

<sup>108</sup> Queensland. Department of Families, Youth and Community Care, *Indigenous Children on Protective Orders in Queensland, 1995: Research Report*, Brisbane, 1997, p 6.

<sup>109</sup> Queensland. Department of Families, Youth and Community Care, 1997, p 6.

<sup>110</sup> Queensland. Department of Families, Youth and Community Care, 1997, p 6.

## 7.2 ABORIGINAL CHILD PLACEMENT PRINCIPLE

The UN Convention states that:

*State Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference (Article 8).*

The Australian Law Reform Commission has pointed out that legislative recognition of an Aboriginal Child Placement Principle would ensure compliance with UNCROC in this regard. It would also ensure such principles were adhered to by Government Departments involved in child protection.<sup>111</sup>

### 7.2.1 The Child Protection Bill 1998 (Qld)

The Child Protection Bill 1998 (Qld) entrenches the Child Placement Principle in legislation and requires that Departmental officers must consult with an appropriate agency or community representatives when making decisions about Aboriginal and Torres Strait Islander children and must take into account the child's need to maintain their cultural identity (**clause 6(1), 5(g)(ii)**).

The Department of Families, Youth and Community Care 1995 Report noted that, of the matters they had investigated,

*... in 83% of cases an Aboriginal or Torres Strait Islander person or agency was involved in decisions regarding the current placement, usually immediate or extended family or an Aboriginal and Islander Child Care Agency. ...[In] 58% of cases an Aboriginal and Islander Child Care Agency or an Aboriginal or Torres Strait Islander agency or elder was consulted and agreed that the placement was suitable.*<sup>112</sup>

This Bill provides that:

- Decisions in relation to an Aboriginal and Torres Strait Islander child are only made under this Act after there has been consultation with a recognised Aboriginal and Torres Strait Islander agency, unless the matter is urgent and it is not practicable to contact an appropriate agency;
- The department and the court must consider the Aboriginal traditions and Islander customs of the child and his/her family whenever any action is taken under this Act;

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<sup>111</sup> Australian Law Reform Commission (with the Human Rights and Equal Opportunity Commission), *Seen and Heard: Priority for Children in the Legal Process - Report No. 84*, AGPS, Canberra, 1997, p 458.

<sup>112</sup> Queensland. Department of Families, Youth and Community Care, 1997, p 37.

- The department and court must also consider the general principle that Aboriginal and Torres Strait Islander children should be cared for within their own communities; and
- All consultations, family meetings etc should be conducted in a place and in a way that is culturally appropriate (**clause 6**).

The Child Placement Principle sets out an order of priority with respect to out-of-home placements of Aboriginal and Torres Strait Islander children as follows:

- (i) With a member of the child's extended family;
- (ii) With a member of the same community or language group as the child;
- (iii) With another Aboriginal or Torres Strait Islander person who is compatible with the child's community or language group; and then
- (iv) With another Aboriginal person or Torres Strait Islander (**clause 80(4)**).

### 7.2.2 Other States And Territories

NSW and the Northern Territory have similar provisions to those proposed in Queensland,<sup>113</sup> although the NSW law does seem to indicate that the involvement of Aboriginal people in this process will be one of participating with as much “*self-determination*” as possible.<sup>114</sup> Queensland refers to consultation. However, what occurs in practice may be a matter of what procedures are developed to meet these requirements rather than the language of the Act itself. The Child Placement Principle applicable in NSW is fairly similar in content to the Queensland Principle. SA and Tasmania set out that, in terms of out-of-home care, there should be consultation with an Aboriginal and Torres Strait Islander Child Care Agency and that, as a general principle, children from this background should remain within the Aboriginal and Torres Strait Islander community.<sup>115</sup> The ACT provides for a child in out-of-home care to maintain contact with their family and the Victorian legislation makes provision for consultation with Aboriginal Child Care Agencies.<sup>116</sup>

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<sup>113</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 13(1); *Community Welfare Act 1996* (NT), s 69.

<sup>114</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 11(1).

<sup>115</sup> *Children's Protection Act 1993* (SA), s 5(1), (2); *Children, Young Persons and their Families Act 1997* (Tas), s 9.

<sup>116</sup> *Children's Services Act 1986* (ACT), s 5(3)(a); *Children and Young Persons Act 1989* (Vic), s 6.

## **8. ADDITIONAL RIGHTS AND RESPONSIBILITIES OF THOSE IN THE CARE SYSTEM**

Parties to UNCROC must provide, to children in out-of-home care, a “*standard of living adequate for the child’s physical, mental, spiritual, moral and special development*”(Article 27).

The ALRC also argued that children deserve assistance to ensure that their life opportunities were not reduced by the intervention of the State.<sup>117</sup>

### **8.1 THE CHILD PROTECTION BILL 1998 (QLD)**

#### **8.1.1 Responsibilities of the Director-General under the Child Protection Bill**

Where the child is under any care orders, the orders must be explained to the parents and the child in a way that is appropriate to their age and capacity. They must also be advised of their appeal rights (**clause 60; Schedule 1, (e)** (that is, the Charter). The Director-General is also required to inform parents where their child is placed, unless that would put the child at risk (**clauses 82 & 83**). Importantly, the Director-General is also responsible for ensuring that children in long term care are provided with help in the transition from care to independence (**Schedule 1, (k)**).

#### **8.1.2 Responsibilities of Parents/Care Providers**

Where the Director-General is required to supervise the child, the child’s carers must provide the Director-General with information about where the child is living and allow for contact with the child (**clause 76 & 77**).

#### **8.1.3 The Charter of Rights of Children in Care**

The Director-General must inform children of the Charter and its effect, and ensure that it is complied with (**clause 71**).

The Queensland Parliament’s Scrutiny of Legislation Committee has pointed out that the Charter, as it stands in the Queensland Bill, is different from that recommended by the Australian Law Reform Commission and sought explanation

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<sup>117</sup> Australian Law Reform Commission, p 430.

from the Minister.<sup>118</sup> According to the Minister,

*[t]he two recommendations from the [Australian Law Reform Commission] report not specifically included in the Charter contained in the Child Protection Bill are:*

- *accommodation in the least restrictive placement commensurate with the child's best interests and wishes; and*
- *an appropriate amount of spending money.*

The Minister goes on to say that

*[t]he concept of 'restrictive' placements is more relevant to children subject to juvenile justice legislation than those children in care under the administration of this Bill. There is no provision under the Bill for placements to be 'restrictive' at all, and introducing the concept of 'least restrictive' in the Charter is therefore viewed as counter-productive.*<sup>119</sup>

With regards to the recommendation for a provision in the Charter allowing a child to receive an appropriate amount of spending money, the Minister states that this recommendation

*... is not of the same tenure as other rights outlined in the Charter. Most children in care are provided with pocket money at an appropriate age, and may be provided other financial assistance as they move towards independence. Some children in care live with families where they and the other children of the family have other appropriate arrangements rather than receiving pocket money".*<sup>120</sup>

However, "*the comments of the Committee will be considered in the context of the Department's responsibility to ensure the financial well-being of children in care*".<sup>121</sup>

The Charter in the Bill provides for the following rights (See also **Appendix B**):

- (a) a safe living environment;
- (b) the provision of care that best meets the needs of the child and is the most culturally appropriate;
- (c) the ability of the child to maintain relationships with their family and community;

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<sup>118</sup> Queensland. Parliament. Scrutiny of Legislation Committee, *Alert Digest No 11*, p 5.

<sup>119</sup> Queensland. Parliament. Scrutiny of Legislation Committee, *Alert Digest No 1*, p 35 and Appendix A, p 2.

<sup>120</sup> Queensland. Parliament. Scrutiny of Legislation Committee, *Alert Digest No 1*, p 35 and Appendix A, pp 2-3.

<sup>121</sup> Queensland. Parliament. Scrutiny of Legislation Committee, *Alert Digest No 1*, p 35 and Appendix A, p 3.

- (d) the right of the child to be consulted about, and able to take part in, the making of decisions affecting their life to the extent appropriate for their age and capacity;
- (e) the provision of information about decisions and plans concerning the child's future with regard to their age and ability to understand;
- (f) privacy;
- (g) the regular review of their care arrangements where in a long term care situation;
- (h) access to necessary dental, medical and therapeutic services;
- (i) access to appropriate education;
- (j) access to job training opportunities and help finding appropriate employment; and
- (k) appropriate help during the transition from care to independence (**Schedule 1**).

#### 8.1.4 Standards of Care

There are also Standards of Care to be provided to children in care (**See Appendix C**). They are that:

- there must be a respect of the child's dignity and rights;
- the child's physical, emotional and material needs must be met;
- the child's cultural and ethnic needs are to be met;
- any special needs must be met, that is, where the child has a disability; and
- there is a prohibition on the use of corporal punishment or that which "*humiliates, frightens or threatens the child in a way that is likely to cause emotional harm*" (**clause 123(2)**). This is because children in care are especially vulnerable to this type of punishment and, thus, the prohibition (**clause 123**).

In order to ensure these Standards are met by those responsible for the child in out-of-home care, the Child Protection Bill 1998 (Qld) provides for an approval system of care services and providers. The Director-General will be prohibited from granting the application for a licence unless satisfied that the organisation, and those persons managing and providing the services, are suitable (**clause 127**). The approval of care providers will only occur where the applicant is suitable to be a care provider and all adult members of their household are suitable to associate on a daily basis with the child (**clause 134**). In deciding whether persons are "**suitable**", the Director-General may consider certain criteria, including their ability to meet the stated Standards and can take into account information about a person's criminal history, domestic violence history and traffic offence history (**clause 143**). The duration of the licence for care services is for 3 years (**clause 129**). Approval of care providers is for 12 months and then for two years (**clause 136**). All other Australian

jurisdictions have similar mechanisms for ensuring the protection of children in out-of-home care.

## 8.2 OTHER STATES AND TERRITORIES

The South Australian Charter for Children in Care is generally similar to that proposed by this Bill. It does appear to also provide for ensuring that the opportunities and support available to children in care most closely reflects that which would be available to any other child, especially explicitly recognising how difficult growing up can be. This can also be seen in the provision that offers the same social and leisure opportunities to children in care as are available to other children. The child, upon leaving care, is also able to read their own file. Any personal information will only be shared, where the reasons for such an exchange are important, and after the matter has been discussed with the child.<sup>122</sup>

In Victoria, the Minister may issue directions relating to the standard of services to be provided and take steps to ensure they are complied with. A case plan in respect of a child must be prepared within 6 weeks after the court has made a supervision order, a supervised custody order or a custody or guardianship to the Secretary of the Department order.<sup>123</sup>

In NSW, when an application is made for the removal of a child from their parents, the Director-General must present a care plan to the Court before final orders are made.<sup>124</sup> In addition, where there is a realistic possibility of the child being restored to the parents, the Director-General must set out a plan to achieve this.<sup>125</sup> Within twelve months after the commencement of the NSW Act (which was in December 1998), the Minister must prepare a Charter of Rights for all children in out-of-home care.<sup>126</sup> The Minister is to provide or arrange such assistance for children of and above 15 years who leave out-of-home care, until they reach the age of 25 years, as the Minister considers necessary for their “*safety, welfare and well-*

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<sup>122</sup> South Australia. Department of Family and Community Services, Future Echoes (SA Branch of the Australian Association of Young People in Care) and the South Australian Office for Families and Children, *Commitments in Care: A Charter for Children and Young People in Care*, Adelaide, July 1997, pp 7-8.

<sup>123</sup> *Children and Young Persons Act 1989* (Vic), ss 59, 120.

<sup>124</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 78.

<sup>125</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 83.

<sup>126</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 162(2).

being”.<sup>127</sup> On leaving, or after having left care, a child is entitled to access personal information held by the Department which relates to themselves.<sup>128</sup>

Where the Director in the ACT considers it proper to do so, he or she may arrange for the provision of financial assistance on such terms and conditions as the Director thinks fit, to a person who is a ward or was at any time a ward.<sup>129</sup> The ACT also provides for a Visitor to check on the child and hear from them any complaints about their care.<sup>130</sup>

In the Northern Territory, where a child is in the care of the Minister, the Minister “shall cause an authorised person to visit the child ... at least once every two months”.<sup>131</sup> In WA, children should be visited every six months by a Departmental officer.<sup>132</sup>

Provisions also exist in other Australian jurisdictions to ensure the adequacy of facilities for children in out-of-home care.<sup>133</sup>

## 9. ENFORCEMENT OF THE BILL

### 9.1 BACKGROUND

The various Acts around Australia provide for certain offences and provide powers to officials to ensure the enforcement of the Act. Of particular importance, especially for the public confidence in the system, are the confidentiality provisions.

According to the Australian Institute of Health and Welfare, in all Australian jurisdictions, a large proportion of investigations were not substantiated, that is, there was no reasonable cause to believe that the child was being or was likely to be, abused or neglected. In Queensland in 1996, 45% of finalised investigations were found to be unsubstantiated.<sup>134</sup> The likelihood of a finalised investigation being

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<sup>127</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 165.

<sup>128</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 168.

<sup>129</sup> *Children’s Services Act 1986* (ACT), s 115.

<sup>130</sup> *Children’s Services Act 1986* (ACT), s 19B.

<sup>131</sup> *Community Welfare Act 1996* (NT), s 53.

<sup>132</sup> *Child Welfare Act 1947* (WA), s 64.

<sup>133</sup> For example, *Children and Young Persons (Care and Protection) Act 1998* (NSW), Chapter 12, Part 3; *Child Services Act 1996* (Vic); *Child Welfare Act 1947* (WA), Part III & Part VIII; *Community Welfare Act 1996* (NT), Part X, Div, 1.

<sup>134</sup> Australian Institute of Health and Welfare, p 14.

substantiated varied due to the source of the notification. Notifications from anonymous callers, friends and neighbours and other relatives were the least likely to be substantiated.<sup>135</sup> A relatively high proportion of notifications from the child, who was the subject of abuse and neglect, the police, social workers and school personnel were substantiated.

## 9.2 THE CHILD PROTECTION BILL 1998 (QLD)

Under the new Bill, it will be an offence to reveal the identity of any person who notifies the Director-General of their concern for the safety of the child (**clause 180(2)**). However, this information may be made available to a court hearing where the court gives leave (**clause 180(3)**). **Clause 22** states that notifiers are protected from legal liability where they **honestly** inform the Department of their suspicions. They do not breach any code of professional ethics or conduct by doing so. The Bill prohibits publication of any identifying information about any child who:

- 1) *is or has been subject to an investigation under this Bill about an allegation of harm;*
  - 2) *is in the Director-General's custody or guardianship;*
  - 3) *is under an order; or*
  - 4) *has been harmed or is at risk of harm from a parent or family member.*
- (**clause 183**).

The publication of any information about a child who is a victim or witness in a court proceeding regarding the alleged committal of a sexual offence is prohibited (**clause 187**). A court may order the prohibition of identifying information about a child in any other court proceedings relating to offences against the child or of which the child is a witness (**clause 187**).

The Queensland Parliamentary Scrutiny of Legislation Committee points out that there does not appear to be any sanction in the Bill for those who do not act honestly in making such allegations. The Committee recommended that the Minister consider amending the Bill to provide means by which those who make accusations dishonestly, may be exposed to legal liability.<sup>136</sup> In response, the

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<sup>135</sup> Australian Institute of Health and Welfare, p 20.

<sup>136</sup> Queensland. Parliament. Scrutiny of Legislation Committee, *Alert Digest No 11*, p 6.

Minister states that

*[t]he making of reports which are known to the notifier to be false is, in the experience of the DFYCC, a fairly rare occurrence. In the overall interests of children, sanctions against persons making dishonest complaints are not emphasised because to do so would have the effect of dissuading many honest notifiers who were (though needlessly) anxious about the possibility of prosecution if their concern proved unfounded. This would have the effect of reducing the likelihood of concerns about children being reported by the public.*

However, the comment is made that the “*issues raised by the Committee about the making of allegations which are knowingly false, are worthy of further consideration. Information will be sought from other jurisdictions in this regard and [the Minister] will consider the matter further*”.<sup>137</sup>

In addition, **clause 92** allows information to be obtained which may be relevant to a recommendation or decision about a person’s suitability to be granted custody or guardianship of a child under a child protection order; that is, relevant information from police, which includes information about charges laid, as well as convictions pertaining to criminal matters and domestic violence history and about certain traffic violations. This is to ensure that all the relevant information is available to assess a person’s suitability. The Government Departments that hold this information, must comply with any request from the Director of the Department of Families, Youth and Community Care (**clause 92(3)**). This clause also proposes to ensure police records of interview and statements with regard to certain offences, such as offences against the person (including sexual assault), illegal drug-taking or dealing, and certain offences, under this Bill relating to the unauthorised removal of a child from custody, are made available to the Minister, upon request, to make this decision (**clause 92**).

The Scrutiny of Legislation Committee points out that information provided, by police records of interview or statements made in relation to allegations of the above offences, may not have been tested in a court and the person implicated may not have had a chance to answer such allegations.<sup>138</sup> Therefore, the Committee argues that to rely on such information, when making decisions about the suitability of a person to care for a child, does not respect the rights of that person. With

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<sup>137</sup> Queensland. Parliament. Scrutiny of Legislation Committee, *Alert Digest No 1*, p 37 and Appendix A, p 4. With respect to this issue, several jurisdictions have enacted legislative provisions in their child protection Acts containing sanctions which can be used against persons who make “*false statements*” in certain situations. These provisions may extend to cover a situation such as that discussed by the Committee. See *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 253; *Children, Young Persons and their Families Act 1997* (Tas), s 102; *Children’s Services Act 1986* (ACT), s 141.

<sup>138</sup> Queensland. Parliament. Scrutiny of Legislation Committee, *Alert Digest No 11*, p 12.

respect to this concern, the Minister points out that:

*[t]he criminal history of a parent, care provider applicant or other person seeking custody or guardianship of a child is only one piece of information considered in assessing the suitability of that person. A criminal history will not automatically exclude anyone from being able to have custody or guardianship of a child. National guidelines have been developed to assist in the interpretation of criminal history information provided for purposes related to a child's protection.*

*When considering the suitability of a person to have custody or guardianship of a child it is considered part of the Department's duty of care as custodian or guardian to use all relevant information. The increased checking requirements are in line with national trends in this regard to ensure that children are not cared for by persons who might pose a risk to them.*

*Careprovider applicants are required to provide their signed permission before a criminal history check is carried out. Any information about a criminal conviction or charge obtained from the police check is discussed confidentially with the applicant who is given the opportunity to respond. A careprovider applicant who is not considered suitable because of their criminal history has a right of appeal against this decision.<sup>139</sup>*

### 9.3 OTHER STATES AND TERRITORIES

All States and Territories provide the same protection for notifiers of abuse, where they have acted in good faith, as in the proposed Bill.<sup>140</sup> The NSW Act also contains a provision that states that the Minister can direct a prescribed body, for example, the Police Service, a government department or public authority, to furnish the Minister “*with information relating to the safety, welfare and well-being of a particular child ...*”.<sup>141</sup> This provision overrides any confidentiality provisions in any other relevant Act or law.<sup>142</sup> This is similar to the proposed position in Queensland. However, the Queensland Bill outlines precisely what matters are considered relevant to determining the suitability of persons who will have the custody or guardianship of children.

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<sup>139</sup> Queensland. Parliament. Scrutiny of Legislation Committee, *Alert Digest No 1*, pp 42-43 and Appendix A, p 8.

<sup>140</sup> Child Protection Bill 1998 (Qld), **Clause 22**; *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 29; *Children and Young Persons Act 1989* (Vic), s 64; *Children, Young Persons and their Families Act 1997* (Tas), s 15; *Children's Protection Act 1993* (SA), s 12.

<sup>141</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 248.

<sup>142</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 248.

## 10. CHILD REPRESENTATION/ADVOCACY

### 10.1 BACKGROUND

**Article 12** of UNCROC states that member countries

*shall assure to the child who is capable of forming his or her own views the right to express those views freely on all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*

A common complaint to the 1997 ALRC inquiry was that children do not understand the care and protection process. In the survey conducted by the Inquiry, of those young people who indicated that they had been involved in welfare proceedings, 46% said they had not understood the proceedings and 71% stated they had not had the opportunity to have a say in the proceedings.<sup>143</sup>

### 10.2 THE CHILD PROTECTION BILL 1998 (QLD)

In order to properly determine the interests of the child, there should be a process by which, not only is the child's voice heard but, the child's interests are independently advocated. There is a question to be answered here, however. Is the advocate to be a mouthpiece for the child's views on the matter or be an independent advocate for the best interests of the child? All action taken under the Queensland Bill must take into account the views of the child (**clause 5**). **Clause 107** states that the Bill provides for children to be separately represented by a lawyer if the child opposes the application or if the child's parents are contesting the application for the order.

### 10.3 OTHER AUSTRALIAN STATES AND TERRITORIES

Other Australian States and Territories also provide that a child has the opportunity to express his or her views on the issues before the court.<sup>144</sup> Children can be provided with legal representation.<sup>145</sup> The child can make an informed decision to

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<sup>143</sup> Australian Law Reform Commission, p 447.

<sup>144</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 9; *Children and Young Persons Act 1989* (Vic), s 20; *Children, Young Persons and their Families Act 1997* (Tas), ss 8(4), 56; *Children's Protection Act 1993* (SA), s 4(3); *Children's Services Act 1986* (ACT), s 93(7).

<sup>145</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 99; *Children and Young Persons Act 1989* (Vic), s 20; *Children, Young Persons and their Families Act 1997*

waive this right; a decision which the court can override, if it considers that to do so is in the best interests of the child.<sup>146</sup> The legal representative may, for example, ensure the child's views are heard in an appropriate way, that all relevant evidence is brought before the court and make proposals to the court that are in the child's best interests.<sup>147</sup> The child may also be provided with other representatives including a next friend, a separate representative, a guardian ad litem or an interpreter.<sup>148</sup> The court must also ensure that the child understands the process by providing the child with adequate information and assistance<sup>149</sup> to be able to participate in this process which could have such a significant effect on their lives.

## 11. CONCLUSION

With the Child Protection Bill 1998 (Qld), the Queensland Government aims to provide a legislative framework that will provide for the protection of children while recognising that to do so effectively means balancing the competing rights and interests of those involved in the process. This includes ensuring that, by protecting the rights of the child, the rights of others, in particular, those of the parents or guardians, are also respected. Further, by providing assistance to the child's family, where appropriate, the State will ensure the protection of the child. Under this new legislative regime, the preference of the Department will be for attempting to gain the voluntary agreement of the child's guardians to any proposals for action to protect the child. Therefore, the Departmental practices, developed to ensure success for the parties in reaching voluntary agreements for the protection of a child, will be of central importance to ensuring the overall framework, proposed by this Bill, works effectively to protect the children of this State.

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(Tas), s 59; *Children's Protection Act 1993* (SA), s 48; *Children's Services Act 1986* (ACT), s 167.

<sup>146</sup> *Children, Young Persons and their Families Act 1997* (Tas), s 59; *Children's Protection Act 1993* (SA), s 48.

<sup>147</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 99; *Children's Protection Act 1993* (SA), s 48.

<sup>148</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW), ss 99, 100; *Children and Young Persons Act 1989* (Vic), ss 20, 22; *Children, Young Persons and their Families Act 1997* (Tas), s 59; *Children's Services Act 1986* (ACT), s 166.

<sup>149</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 10; *Children's Services Act 1986* (ACT), s 6.

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- *Community Welfare Act 1996*

### Vic

- *Child Services Act 1996*
- *Children and Young Persons Act 1989*

### SA

- *Children's Protection Act 1993*

### Tas

- *Children, Young Persons and their Families Act 1997*

### WA

- *Child Welfare Act 1947*

## **APPENDIX A - CONVENTION ON THE RIGHTS OF THE CHILD**

**Ratified by Australia on 17 December 1990 and came into force in Australia on  
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### **UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS**

#### **Convention on the Rights of the Child**

**Adopted and opened for signature, ratification and accession by General Assembly**

**resolution 44/25**

**of 20 November 1989**

***entry into force 2 September 1990, in accordance with article 49***

#### ***Preamble***

The States Parties to the present Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children, '

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth",

Recalling the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) ; and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict,

Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration,

Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child,

Recognizing the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries, Have agreed as follows:

## **PART I**

### ***Article 1***

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

### ***Article 2***

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

***Article 3***

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

***Article 4***

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

***Article 5***

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

***Article 6***

1. States Parties recognize that every child has the inherent right to life.

2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

***Article 7***

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

### **Article 8**

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

### **Article 9**

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

### **Article 10**

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under

article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (*ordre public*), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

***Article 11***

1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.
2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

***Article 12***

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

***Article 13***

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.
2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others; or
  - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

***Article 14***

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

#### **Article 15**

1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.

2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

#### **Article 16**

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

2. The child has the right to the protection of the law against such interference or attacks.

#### **Article 17**

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health. To this end, States Parties shall:

- (a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;
- (b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;
- (c) Encourage the production and dissemination of children's books;
- (d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;
- (e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.

#### **Article 18**

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the

upbringing and development of the child. The best interests of the child will be their basic concern.

2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

### ***Article 19***

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

### ***Article 20***

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

### ***Article 21***

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

- (b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
- (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
- (d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;
- (e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

### **Article 22**

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.
2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

### **Article 23**

1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.
2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.
3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and

recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development

4. States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.

#### ***Article 24***

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

(a) To diminish infant and child mortality;

(b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;

(c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;

(d) To ensure appropriate pre-natal and post-natal health care for mothers;

(e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;

(f) To develop preventive health care, guidance for parents and family planning education and services.

3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

**Article 25**

States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

**Article 26**

1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.
2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

**Article 27**

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.
3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.
4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

**Article 28**

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
  - (a) Make primary education compulsory and available free to all;
  - (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;

(c) Make higher education accessible to all on the basis of capacity by every appropriate means;

(d) Make educational and vocational information and guidance available and accessible to all children;

(e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

#### ***Article 29***

1. States Parties agree that the education of the child shall be directed to:

(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;

(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

(e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

#### ***Article 30***

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the

right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

### **Article 31**

1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.

2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

### **Article 32**

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

- (a) Provide for a minimum age or minimum ages for admission to employment;
- (b) Provide for appropriate regulation of the hours and conditions of employment;
- (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

### **Article 33**

States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

### **Article 34**

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.

### **Article 35**

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

**Article 36**

States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

**Article 37**

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

**Article 38**

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.

2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.

4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

**Article 39**

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or

abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

***Article 40***

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings. 3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being

and proportionate both to their circumstances and the offence.

#### ***Article 41***

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:

(a) The law of a State party; or

(b) International law in force for that State.

## **PART II**

#### ***Article 42***

States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

#### ***Article 43***

1. For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided.

2. The Committee shall consist of ten experts of high moral standing and recognized competence in the field covered by this Convention. The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems.

3. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.

4. The initial election to the Committee shall be held no later than six months after the date of the entry into force of the present Convention and thereafter every second year. At least

four months before the date of each election, the Secretary-General of the United Nations shall address a letter to States Parties inviting them to submit their nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating States Parties which have nominated them, and shall submit it to the States Parties to the present Convention.

5. The elections shall be held at meetings of States Parties convened by the Secretary-General at United Nations Headquarters. At those meetings, for which two thirds of States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

6. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. The term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting.

7. If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party which nominated the member shall appoint another expert from among its nationals to serve for the remainder of the term, subject to the approval of the Committee.

8. The Committee shall establish its own rules of procedure.

9. The Committee shall elect its officers for a period of two years.

10. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee. The Committee shall normally meet annually. The duration of the meetings of the Committee shall be determined, and reviewed, if necessary, by a meeting of the States Parties to the present Convention, subject to the approval of the General Assembly.

11. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.

12. With the approval of the General Assembly, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide.

#### ***Article 44***

1. States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights:

- (a) Within two years of the entry into force of the Convention for the State Party concerned;
- (b) Thereafter every five years.

2. Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned.
3. A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1 (b) of the present article, repeat basic information previously provided.
4. The Committee may request from States Parties further information relevant to the implementation of the Convention.
5. The Committee shall submit to the General Assembly, through the Economic and Social Council, every two years, reports on its activities.
6. States Parties shall make their reports widely available to the public in their own countries.

#### **Article 45**

In order to foster the effective implementation of the Convention and to encourage international co-operation in the field covered by the Convention:

- (a) The specialized agencies, the United Nations Children's Fund, and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialized agencies, the United Nations Children's Fund and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite the specialized agencies, the United Nations Children's Fund, and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;
- (b) The Committee shall transmit, as it may consider appropriate, to the specialized agencies, the United Nations Children's Fund and other competent bodies, any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications;
- (c) The Committee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the rights of the child;
- (d) The Committee may make suggestions and general recommendations based on information received pursuant to articles 44 and 45 of the present Convention. Such suggestions and general recommendations shall be transmitted to any State Party concerned and reported to the General Assembly, together with comments, if any, from States Parties.

### **PART III**

#### ***Article 46***

The present Convention shall be open for signature by all States.

#### ***Article 47***

The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

#### ***Article 48***

The present Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

#### ***Article 49***

1. The present Convention shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification or accession.

#### ***Article 50***

1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties, with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly for approval.

2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of States Parties.

3. When an amendment enters into force, it shall be binding on those States Parties which have accepted it, other States Parties still being bound by the provisions of the present Convention and any earlier amendments which they have accepted.

#### ***Article 51***

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.

2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.

3. Reservations may be withdrawn at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall then inform all States. Such notification shall take effect on the date on which it is received by the Secretary-General

**Article 52**

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

**Article 53**

The Secretary-General of the United Nations is designated as the depositary of the present Convention.

**Article 54**

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations. IN WITNESS THEREOF the undersigned plenipotentiaries, being duly authorized thereto by their respective governments, have signed the present Convention.

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Geneva, Switzerland

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## APPENDIX B - CHILD PROTECTION BILL 1998 (QLD) - CHARTER OF RIGHTS FOR A CHILD IN CARE

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### SCHEDULE 1

#### CHARTER OF RIGHTS FOR A CHILD IN CARE

Section 71

**Because—**

The Parliament recognises the State has responsibilities for a child in need of protection who is in the custody or under the guardianship of the chief executive under this Act,

**this Act establishes the following rights for the child—**

- (a) to be provided with a safe living environment;
- (b) to be placed in care that best meets the child's needs and is most culturally appropriate;
- (c) to maintain relationships with the child's family and community;
- (d) to be consulted about, and to take part in making, decisions affecting the child's life (having regard to the child's age or ability to understand), particularly decisions about where the child is living, contact with the child's family and the child's health and schooling;
- (e) to be given information about decisions and plans concerning the child's future and personal history, having regard to the child's age or ability to understand;
- (f) to privacy, including, for example, in relation to the child's personal information;
- (g) if the child is under the long-term guardianship of the chief executive, to regular review of the child's care arrangements;
- (h) to have access to dental, medical and therapeutic services, necessary to meet the child's needs;
- (i) to have access to education appropriate to the child's age and development;
- (j) to have access to job training opportunities and help in finding appropriate employment;
- (k) to receive appropriate help with the transition from being a child in care to independence, including, for example, help about housing, access to income support and training and education.

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## APPENDIX C - CHILD PROTECTION BILL 1998 (QLD) - REGULATION OF CARE

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### CHAPTER 5—REGULATION OF CARE

#### PART 1—STANDARDS OF CARE

##### Statement of standards

**123.(1)** The chief executive must take reasonable steps to ensure a child who, for the purposes of this Act, is placed in the care of an approved care provider, licensed care service or departmental care service, is cared for in a way that meets the following standards (the “**statement of standards**”)—

- (a) the child’s dignity and rights will be respected at all times;
- (b) the child’s needs for physical care will be met, including adequate food, clothing and shelter;
- (c) the child will receive emotional care that allows him or her to experience being cared about and valued and that contributes to the child’s positive self-regard;
- (d) the child’s needs relating to his or her culture and ethnic grouping will be met;
- (e) the child’s material needs relating to his or her schooling, physical and mental stimulation, recreation and general living will be met;
- (f) the child will receive education, training or employment opportunities relevant to the child’s age and ability;
- (g) the child will receive positive guidance when necessary to help him or her to change inappropriate behaviour;
- (h) the child will receive dental, medical and therapeutic services necessary to meet his or her needs;
- (i) the child will be given the opportunity to participate in positive social and recreational activities appropriate to his or her developmental level and age;
- (j) the child will be encouraged to maintain family and other significant personal relationships;
- (k) if the child has a disability—the child will receive care and help appropriate to the child’s special needs.

(2) For subsection (1)(g), techniques for managing the child's behaviour must not include corporal punishment or punishment that humiliates, frightens or threatens the child in a way that is likely to cause emotional harm.

(3) For subsection (1)(j), if the chief executive has custody or guardianship of the child, the child's carer must act in accordance with the chief executive's reasonable directions.

(4) The application of the standards to the child's care must take into account what is reasonable having regard to—

(a) the length of time the child is in the care of the carer or care service; and

(b) the child's age and development.

## **APPENDIX D - CHILDREN'S RIGHTS - THE BATTLE OF THE SUBMISSIONS**

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### **ABC Radio National Transcripts:**

#### **The Law Report**

**Tuesday 12 May 1998**

#### **Children's Rights - The Battle of the Submissions**

WHILE ALL CARE IS TAKEN WITH THIS TRANSCRIPT, 100% ACCURACY CANNOT BE

GUARANTEED.

Susanna Lobez: Today we ... look at a debate over the Convention on the Rights of the Child. Does it abandon children to their autonomy?

The Convention on the Rights of the Child was adopted by the UN in 1989 and has since been ratified by every country except Somalia and the United States. It impacts on Australian laws, both State and Federal, regarding age limits, parental rights, and childrens' rights to expression, media access, privacy, religion and more.

Elizabeth Evatt is a member of the United Nations Human Rights Committee. A keen advocate for a Children's Commissioner, or Ombudsman, she made a submission to the Parliamentary Committee on Treaties. This sparked a 'battle of the submissions', over whether the Convention extends the notion of child autonomy and rights too far. At the core of this battle is an important distinction between choice rights and protection rights for children.

Elizabeth Evatt explains.

Elizabeth Evatt: Well protection rights means that the State may intervene to protect a child who may be in an abusive situation, either in the family or from other causes. It also means to provide the child

with the care, education and welfare that it needs as it's growing up, and in that regard the Convention says the State should support the parents in their role of caring for the child.

The other kind of right is rather like the civil and political kind of right. These are rights which every human being has and they're normally exercisable against interference by the State: the right to freedom of expression, freedom of opinion, freedom of religion and that kind of right. And what the Convention is saying is that the State should not interfere or

restrict unduly the exercise of those rights by any person, whether they be an adult or a child. Of course reasonable restrictions, legal restrictions, can be imposed on some rights and we would probably all agree that in regard to access to information and material, there may be some appropriate restrictions in regard to children which don't apply to adults, such as the way films are classified, or literature, magazines and so on.

Susanna Lobez: Elizabeth Evatt's opponent in this 'battle of the submissions' is Bruce Hafen, former Vice Chancellor and Law Professor at Brigham Young University in the US. Currently he resides in Australia as General Authority of the Church of Jesus Christ of Latter Day Saints.

Bruce Hafen applauds the Joint Standing Committee on Treaties for re-examining the Convention. He believes Australia should lead the way in a reconsideration of the Treaty, being alert to what he sees as its dangers.

In particular, Hafen argues the Convention gives children a plethora of choice rights unprecedented in law and discredited in the US legal system. He is concerned the Convention creates new rights and obligations snuck in by the back door of international law, without appropriate public debate.

Bruce Hafen: The kiddy libber movement which started in the US in the '70s, kind of played itself out in the '70s and '80s in the US. The courts and legislatures never bought the idea there that the child is an autonomous legal being who should have the same kinds of rights as adults. The risk of abandoning children to their autonomy is that we undermine their own long-term development. It's so ironic to me that in the name of giving children rights, that we actually send parents the message that they should leave their children alone. We undermine parental commitments to children at the very time when society needs to strengthen that commitment. Children need child care, they need education, they need the development of autonomous capacity and to short circuit that process by legally granting, rather than teaching autonomous capacity, just ignores reality about education and child development so we abandon children to a mere illusion of real autonomy.

Susanna Lobez: So for instance, children need some kind of discipline framework and teaching about society, but they probably wouldn't choose it themselves?

Bruce Hafen: Right, because they lack the material to evaluate it. The category you mentioned earlier is the most helpful one and that's the distinction between protection rights and choice rights. It's my view that the countries that have approved the UN Convention haven't focused on the choice rights dimension, and they include the evolving capacity of the individual child for a whole range of choices. This would include access to information, media information, choices about religion, the choice of whether to be educated, how to express oneself, access to what kind of literature, all of this calls into question the right of parents to direct the upbringing of their children. Are they going to do this now, or are we going to defer to the child's preferences about how the child is raised.

And then the further concern I have is the basis for State intervention. Are we lowering the threshold so that the State can intervene even when parents are not abusive or neglectful but the child makes the argument that the parental conduct is unreasonable or not in the child's interest. For example, the right of the State to intervene in an intact family. Australian law

and American law have established principles that protect against intervention until parents have been abusive or neglectful, or unless the child is incorrigible. But the UN Convention contains language that's susceptible to the interpretation that the State could be invited to intervene in a dispute between parents and children when it appears that the parents have been acting unreasonably,

they aren't acting in the child's interest, whatever that means, and there's no guidance in the Convention about who's supposed to make that decision.

Another illustration of the same phenomenon is that the UN Convention states that children should be allowed to make their own decisions when consistent with the evolving capacity of the child. Well that's an idea that has never been in either Australian or American law as a general proposition. It has been referred to in the exceptional cases of abortion and contraception but to adopt that as a general rule is new, it's untested and so to adopt that as international norms is to make a mistake in terms of actual experience.

Susanna Lobez: Your concern is that there is no-one under the Convention who is specified to determine whether the parents' behaviour is reasonable, whether the child's maturity is sufficient that justifies them making this or that choice, whether or not there's a justification for State intervention, that these are all uncertain?

Bruce Hafen: That's right, and there's no guidance in the Convention to make those determinations. So who's going to decide? That's a question that isn't outlined.

Susanna Lobez: Well the Family Court would surely leap in and say, 'Well we've been very, very good at determining what's in a child's best interests over the last several years.'

Bruce Hafen: Well what I'd like to point out is that under both Australian and American law for many years, State intervention was the first step, that was the first issue in a legal determination. That is, have parents been abusive or neglectful or is there a dispute over the custody of children that would trigger State intervention? Or is there some very unusual medical risk such as sterilisation or someone about to die if they don't get a transfusion.

Susanna Lobez: Still that threshold.

Bruce Hafen: Yes. Those are the extreme categories that have justified intervention. Once the extreme category is there and intervention is undertaken, then the test for what we do with the child once the court has intervened, is what's in the child's best interest? But we have never had an American or Australian law or any other developed system, best interest of the child as a standard for intervention in the first place. That is, to just look at an intact family where the parents aren't abusive or neglectful, there's no fundamental right of a child at stake for a child to go to a Children's Commissioner and say 'I think what my parents are asking me to do is unreasonable and it's not in my interest, and I have a voice now under the UN Convention, and I just have different attitudes about lifestyle, and I'd like a little help here.' There have been cases of that kind in the US that have been tested, and the cases really haven't made it into the whole developed concept of the autonomous child because that's not in children's interests, it's not in the parents' interest, everybody loses when children are liberated across the board.

Susanna Lobez: So how does Elizabeth Evatt react to Professor Hafen's assertion that these choice or autonomy rights are a new creation of the Treaty and a cause for concern?

Elizabeth Evatt: Well all I can say about that is that the Convention has been around for some years, it's been ratified by every State in the world with the exception of the United States and Somalia. These concerns don't seem to have been raised widely other than by Professor Hafen, and the Article 5 of the Convention makes it clear that in the exercise of rights, the child will be guided by the appropriate direction and guidance of the family or parents in a manner consistent with the evolving capacities of the child.

We should encourage the ability of a growing child to make wise and independent choices for itself, we should encourage that. But not where that would risk the other needs and development needs of the child. You can't throw away the long-term welfare of the child to pander to some immediate whims.

Susanna Lobez: But Bruce Hafen certainly is suspicious of the Convention, and his concerns are being taken seriously by the Parliamentary Committee on Treaties. It seems that his main fear is that the Convention would in effect lower the present threshold for State intervention into intact families, in other words, usually the State has to wait for an event of abuse or neglect before the Family Court or the Department of Community Services can somehow step in.

Elizabeth Evatt: Well the way the State would intervene in a family is normally to protect the child, and the way that it intervenes in Australia is a matter governed by the law of Australia which will intervene to protect the child in accordance with the best interests of the child. That's the principle of our law.

For example, the State requires the child to have education. That may be seen by some as interfering with the right of the parent, but we say that is justifiable because the child must have education. If the parents don't provide appropriate medical treatment for the child, the State may also intervene to protect the child. So this concept of intervention is not a new one, it's a question of whether it's been extended into new areas and that's a matter which will be governed by Australian law within the principles of the Convention. And our law doesn't provide for the State to intervene other than to promote the best interests of the child to promote the child's needs, welfare and care. It's a difficult issue for a court in an individual case, but we have the principles there to guide us and to balance out parental interests, children's rights and interests and State responsibility.

The way the result would be arrived at would be in the context of our law and our society. So I see no ground for a suspicion here.

Susanna Lobez: I often fear that our law doesn't go far enough, and perhaps even the Convention doesn't go far enough to protect children from parents' neglect, abuse, disinterest or ignorance. Parents don't have a duty of care as such under our law, do they?

Elizabeth Evatt: Well one could argue that we don't have in some cases, sufficient intervention to protect the interests of children, but this is a highly debatable issue. What really concerns me is that we don't have the right mechanisms in Australia to ensure that the principles of the Convention themselves are fully implemented by both State and Federal

authorities. We've gone quite a long way in Family Law and Child Welfare Law, but I seem to think that there are a lot of unanswered questions here, and no-one has the responsible role; there's no Children's Commission or Ombudsman or so forth to make sure that in every way we comply with the obligation to put the interest of the child as a primary consideration and to interfere in abusive situations.

Susanna Lobez: Elizabeth Evatt, and before her, Bruce Hafen in the debate about how much autonomy children should have at law.

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