

A SUBMISSION TO

The Joint Standing Committee on Treaties
Inquiry into the
United Nations Convention on the
Rights of the Child in Australia

Terms of Reference:

- (1) The domestic ramifications of Australia having ratified the Convention
- (3) the difficulties and concerns arising from the implementation in its current form

BACKGROUND

In 1990, at about the time the United Nations Convention on the Rights of the Child (the Convention) was signed by the Australian Government there was widespread community concern about a number of its Articles which were seen by individual parent, parent and family organisations and others as a threat to parents' rights and responsibilities and likely to drive a wedge between parents and their children leading to fragmentation of families.

As a consequence of this concern many thousands of petitions were made to both the House of Representatives and the Senate urging that the Convention not be ratified or that ratification be delayed or that certain rights and responsibilities of parents be reserved.

NOT ONE petition was lodged in support of ratification.

The Coalition in Opposition moved a motion in the House of Representatives calling for reservations to be made to the Convention to uphold the primacy of the family and protect the rights and responsibilities of parents. On 7 November 1990 the Justice Minister, Senator Tate assured the Senate "When the Australian Government ratifies the Convention one would find that understandings as to the pre-eminent role of the family would be acknowledged. It would be surprising were that not the case."

Notwithstanding the community concern, some 45,000 petitions, the unresolved motion in the House of Representatives and Senator Tate's assurances, the Convention was ratified in the week before Christmas 1990 without reservations to protect parents' rights and responsibilities or support for the family.

In a media release, 18/12/90, the Attorney General, Mr Michael Duffy and the Minister for Foreign Affairs, Senator Gareth Evans assured the nation, in our view erroneously (some may say falsely) that "Article 5 of the Convention requires countries to ensure that parents are able to discharge their responsibilities, rights and duties to direct and guide their children in the exercise of the child's rights. Under the rules of treaty interpretation all other articles must be interpreted so as to remain consistent with this article."

What they failed to say was that the only responsibility, right or duty accorded to parents by Article 5 is "...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 recognised in the present Convention." (our emphasis).

It is difficult not to conclude that the statement by Mr Duffy and Senator Evans was nothing more than pure sophism; at best it was naive. As will be shown later there is a sound legal view that Article 5 is of no effect when considering other Articles of concern to parents, eg. Articles 12-16.

THE CONVENTION IN PRACTICE

Our members vouch for many reports where child/parent conflict has developed and continued, sometimes with disastrous results, as children recite their 'UN Rights' as taught to them at school. Our members reports are backed up by many media stories and letters. A copy of the most recent letter appearing today is attached.

The disastrous results referred to include young teenagers leaving home, supported in their decision by the Federal Government's Young Homeless Allowance without, our members and others report, proper investigation as to whether the child is at risk of abuse and without any follow up responsibility or concern as to how the allowance is expended.

THE OFFENDING ARTICLES

As was foreshadowed, prior to ratification of the Convention, Articles 12- 16 inclusive have proven to be a most serious intrusion into parents rights, responsibilities and duties towards their children.

Article 12 provides, among other things, that the child shall have the opportunity to be heard in any judicial and administrative proceedings affecting the child. Joining together both judicial and administrative proceedings is a device to enable the child to enforce the rights expressed in Articles 13- 16 in proceedings against the child's parents.

There is no express right for parents to be heard in such proceedings.

Article 13 denies the right, responsibility and duty of parents to guide, monitor and supervise the kinds of information and ideas to which their child may have access. The right of the child is unfettered (regardless of frontiers) and information and ideas may be accessed in any form whatsoever.

In other words whilst the criminal law protects a child from physical abuse there is no way parents can safeguard their child's mind from abuse if the child chooses otherwise.

Any restrictions which exist in the Article are those which are provided by law and are necessary. Clearly this leaves it open for a Government body or official NOT the parents to decide whether or not a restriction is necessary presumable regardless of the law.

Article 14 removes from parents the right, responsibility and duty to require observance of the moral and ethical values which they prescribe for their children.

The Article ensures the "right of the child to freedom of thought, conscience and religion." The right of parents to provide direction is to be respected. This right cannot be enforced and parents cannot therefore require children to embrace a particular religion or set of values according to the parents' conscience. The parents' right is quite meaningless.

Article 15 prevents parents from exercising their rights, responsibilities and duties for the physical and moral welfare of their child, by determining and approving the company which their child may keep. The Article

recognises the unfettered right of the child to freedom of association and to freedom of peaceful assembly.

Article 16 states “No child shall be subjected to arbitrary or unlawful interference with his or her privacy etc...” The use of the word ‘arbitrary’ allows children to resist intrusion by parents into anything which children consider private to them. This includes what goes on in their bedroom or medical treatment which they might seek without the knowledge or permission of parents.

Clearly the rights, responsibilities and duties of parents to supervise the activities and the health and welfare of their children are negated by this Article.

We have restricted our comments on these ‘offending Articles’ to the utmost brevity as no doubt other submissions will go into great detail about the practical effect of these. In summary and practise Articles 12-16 provide a legal framework in which, no matter how physically or morally damaging it might be to them, children can read, watch or think anything they choose, may form their own consciences and embrace whatever religion or religious cult they desire and keep whatever company they wish and obtain medical treatment such as pregnancy termination all protected by complete privacy.

What should be the inalienable right of parents to make subjective judgements about what is in the best interests of their children is nowhere protected in the Convention.

When conflict arises between parent and child, because parents seek to exercise their judgement as to what is in the best interest of their child and the child sees this as an infringement of his or her rights, the child can leave home and obtain the support of the Government to do so through the Young Homeless Allowance.

Supporters of the Convention have sought to defend it by arguing that Article 5 and the Preamble give parents adequate rights. This however is not so as the Preamble is of no effect and as alluded to earlier we argue that Article 5 is of no effect when considering Articles 12-16. We quoted Melbourne Barrister and Queen’s Council Charles Francis* “A careful examination of the wording of Article 5 coupled with the normal canons of legal interpretation suggest, however, that Article 5 is of very little value at all. Because Articles 12-16 appear after Article 5 in the Convention (and not before it) insofar as their provisions appear to be inconsistent with the provisions of Article 5 they override it.”

ARTICLES 28 & 29 recognise the right of a child to education and agree the direction that the education should take including that education provided “shall conform to such minimum standards as may be laid down by the State.”

In Australia much education is provided by the non-government system (Independent Schools). Should the minimum standards laid down by the State be on a ‘curriculum’ basis it is conceivable that the curriculum might include subjects and values which are not acceptable to some or all of the education providers in the non-government system. This is an example of how a Convention, worded in general terms, may not be appropriate to the accepted customs of an individual country.

Indigenous Children. The existence of the Convention has not resulted in remedying the appalling conditions in which many indigenous children live nor has it ensure that the parents of these children or the Government are held responsible for these conditions. It will not be the existence of the Convention which will lead to the correction of

this situation.

Protection for the Unborn Child. The Convention gives no protection for the unborn child. No nation, which values the sacredness of human life should be party to a Convention which does not respect the rights of the unborn child.

Finally much of the wording is vague and ambiguous and is a source of difficulty not only in how it is to be interpreted but also, who is to interpret it. Examples are “the views of the child being given due weight in accordance with the age and maturity of the child.” (Article 12); “in a manner consistent with the evolving capacities of the child.” (Article 14).

Terms of Reference

(5) the need for a mechanism to promote, monitor and report compliance and to implement public consultation processes;

Article 44 obliges Australia to submit a report on progress and compliance initially after two years and then each 5 years to a Committee on the Rights of the Child (established under Article 43).

Australian Law should be made by Australians, for Australians, in the Australian and State Parliaments and monitored and enforced by Australians.

It is inimical to the philosophy of the Australian Constitution that Australia should submit its domestic laws and the observance of them to non elected, non democratic, non government organisations such as the Committee on the Rights of the Child.

Australia is a party to this Convention through the mechanisms of what many learned people regard as the misuse of the external affairs power of the Constitution, it being signed by Executive action.

At the time of a properly informed public and Parliament, in our view, would have seen it rejected in its present form.

RECOMMENDATIONS

The Council for the National Interest in Western Australia RECOMMENDS:

- (1) that Australia now denounces the Convention by written notification to the Secretary General of the United Nations. (Article 52);
- (2) that during the twelve months for such notification of denunciation to take effect, the Commonwealth, State and Territory Governments develop and adopt a ‘Charter of Family Rights and Responsibilities’;
- (3) that such Charter will provide adequate protection for children, including the unborn, but will enshrine the inalienable right of parents to be primarily responsible for the upbringing of their children and the

formulation of the values in the home no less than those which are accepted as community standards;

- (4) that Federal, State and Territory Laws are reviewed and, where necessary, are amended or enacted to give statutory backing to the Charter;
- (5) that, recognising that children are an integral part of families and that the stronger the family unit the better served will be the interests of children, Federal, State and Territory Governments adopt and implement the concept of a Family Impact Statement, against which, all legislative or regulatory action and administrative decisions, which affect the family, will be tested before implementation.

CONCLUSION

We can see no reason why the Joint Standing Committee, and for that matter, the Government and the Opposition, would not want to restore the primacy of the family and to protect the rights and responsibilities of parents; hence the above recommendations.

We have contemplated an alternative absolute minimal position which would require the Government to legislate to ensure that the Convention was administered in such a way as safeguards the primary and inalienable rights of parents, in particular where these rights concern representation (Article 12), education (Article 13, 28 and 29), religion (Article 14), freedom of association (Article 15) and privacy (Article 16).

Our conclusion however is that the wording of the Convention is too vague and ambiguous for this to be successfully attempted.

For and on behalf of the
Council for the National Interest
Western Australian Committee

Denis J Whitely
Executive Director
3 April 1997

*Charles Francis, Address to the Human Life International Conference (...)