



Australian
Human Rights
Commission

everyone, everywhere, everyday

How human rights can promote the wellbeing of children in Australia

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The Hon Catherine Branson QC

ARACY Conference, 2 September 2009

I would like to begin by acknowledging the traditional owners of the land on which we meet, the Wurundjeri People of the Kulin Nation, and pay my respects to their elders past and present.

20th anniversary of Convention on the Rights of the Child

This year, as we all know, the international community celebrates the twentieth anniversary of the adoption by the United Nations General Assembly of the Convention on the Rights of the Child. The Committee on the Rights of the Child and the Office of the United Nations High Commissioner for Human Rights are marking this anniversary with a celebration, the theme of which will be “Dignity, Development and Dialogue”.

In discussing children’s rights today, I am going to borrow the themes of development and dialogue as these seem to be the two main challenges in this area which Australia faces now and will face into the future. Children’s right to development is far from being realised to the maximum extent possible. Additionally, I believe we lack adequate institutional mechanisms for encouraging effective participation by children in the decisions that affect them.

The international comparisons contained in the ARACY Report Card on the Wellbeing of Young Australians make it plain that we should aspire to do much better so far as children’s rights are concerned. This year’s Report Card reveals that Australia ranks 20th out of 27 OECD nations for infant mortality, with the infant mortality rate for Indigenous Australians more than double the non-Indigenous rate. Substantiated incidents of child abuse and neglect have more than doubled over the past ten years. Our statutory child protection systems are unable to cope.¹ These, as I hope to explain, are human rights issues.

On 30 April 2009, the Council of Australian Governments (COAG) endorsed the first *National Framework for Protecting Australia’s Children*. The Framework recognises that our approach needs to change: ‘Australia needs to move from seeing ‘protecting children’ merely as a response to abuse and neglect to one of promoting the safety and wellbeing of children.’²

I could not agree more.

We, as a nation, must take *positive* measures to promote the safety and wellbeing of our children. We are far from doing all that we can in this area. As Professor Fiona Stanley has so accurately observed, we must wake up; ‘the future health and wellbeing of this country depends on all of us taking this very seriously’.

So, how can we do better? Today I wish to make the case that it is through a child rights framework that we can best improve outcomes for young Australians. Human rights provide a clear and accountable framework for promoting child wellbeing. Human rights outline the minimum standards necessary to ensure the wellbeing of

¹ Council of Australian Governments (COAG), *National Framework for Protecting Australia’s Children* (2009), pp 5-6. At http://www.coag.gov.au/coag_meeting_outcomes/2009-04-30/docs/child_protection_framework.pdf (viewed 10 August 2009).

² COAG, above, p 7.

children – the right to an adequate standard of living, the right to health care, the right to education, the right to family life, the right to protection from violence, and the right to participate in one's culture. Indeed, all of the indicators in the ARACY Report Card are associated with a protected human right. This illustrates the very close relationship between human rights and child wellbeing, and the breadth of coverage of wellbeing themes that human rights have to offer.

Children's rights are not simply civil and political but also economic, social and cultural. Looking at the wellbeing of children through a human rights framework involves a departure from the traditional welfare model of imposed solutions; instead, a human rights framework aims to empower and engage children, their families and communities, in the creation of solutions for them. A human rights framework recognises not simply a need for, but also an *entitlement* to, a fair life chance for all Australian children. For this to be achieved, Australia's approach to improving the wellbeing of children needs to be interdisciplinary and requires multi-sectoral coordination.³

A child-rights-based approach to the well-being of children is underpinned by four paramount principles, which are enshrined in the Convention. Though the language of the Convention may not be familiar to everyone, I suspect that the ideas behind the Articles of the Convention are like 'old friends' to most people in this audience. These principles are:

- **Non-discrimination in the applicability of children's rights** (Article 2) – Every child should be able to enjoy their rights free of discrimination. This applies to every child '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'.⁴
- **The primacy of the consideration of the child's best interests** (Article 4) – When the public authorities make decisions which affect children, the best interests of children must be a primary consideration. This principle applies to decisions by courts of law, administrative authorities, legislative bodies and both public and private social-welfare institutions.⁵
- **The child's right to survival and development** (Article 6(1)) – The right to survival and development is an integral aspect of the right to life, and should be ensured 'to the maximum extent possible'. In this context, 'development' is to be interpreted in a broad sense, referring to not only physical health but also mental, emotional, cognitive, social and cultural development.
- **The child's right to participation in decision-making** (Article 12) – Children should be free to have opinions on all matters affecting them, and those opinions should be given due weight 'in accordance with the age and maturity of

³ Child Rights Coalition, *Submission to the National Human Rights Consultation*, 15 June 2009, p 5.

⁴ Convention on the Rights of the Child, Art 2.

⁵ United Nations High Commissioner for Human Rights, Fact Sheet No. 10 (Rev.1), *The Rights of the Child* (1997), p 2. At <http://www.ohchr.org/Documents/Publications/FactSheet10rev.1en.pdf> (viewed 10 August 2009).

the child'.⁶ In other words, children have the right to be heard and to have their views taken seriously, including in any judicial or administrative proceedings affecting them.

These principles should inform any approach Australia takes to protecting the best interests of our children. These are, I suggest, the very principles that, once implemented, will promote children's wellbeing.

It is interesting to note that in a recent study which asked children and young people across New South Wales what well-being means to them,⁷ children themselves identified themes that they saw as fundamental to their idea of well-being. These included:

- having 'agency', such as involvement in decision-making
- feeling safe
- having a sense of self and belonging
- and having enough material and economic resources to provide them with opportunities for cultural life and social interaction.

You would be right in thinking that these sound very like a child's rights to development and participation.

To explore more fully how a human rights approach can promote the wellbeing of children, I will now discuss the themes of 'development' and 'dialogue' in greater detail.

Development

Let me turn first to development.

As a signatory to the Convention on the Rights of the Child, Australia has a responsibility to provide the services necessary for children's survival and physical, mental, spiritual and social development.⁸

'Development' in human rights terms is a very broad concept. Article 6 of the CRC – the child's right to life and to maximum survival and development – has been identified by the Committee on the Rights of the Child as a general principle relevant to the implementation of the whole Convention.⁹ But I would like to focus on two specific issues which are particularly topical in Australia – the Indigenous child's right to development, and the need for human rights education in Australia.

a) The Indigenous child's right to development

⁶ Convention on the Rights of the Child, Art 6.

⁷ NSW Commission for Children & Young People and Social Justice and Social Change Research Centre, *Ask the Children: Well-being* (2007). At http://www.kids.nsw.gov.au/uploads/documents/ATC_wellbeing.pdf (viewed 1 September 2009).

⁸ Convention on the Rights of the Child, Arts 6, 27.

⁹ UNICEF, *Implementation Handbook for the Convention on the Rights of the Child* (2002), p 106.

The notion of ‘development’ is not simply about the preparation of the child for adulthood; it is about providing optimal conditions for the child’s life now.¹⁰ These optimal conditions necessarily include the fulfillment of a child’s rights to healthcare, education and freedom from violence – all of which are denied to many children in Australia – but Indigenous children in particular.

The latest Productivity Commission report on Indigenous disadvantage¹¹ reveals that we have made little progress in closing the gap between Indigenous and non-Indigenous Australians in key areas like health and education. Rates of ear disease and hearing problems for Indigenous children are three times those of non-Indigenous children.¹² This impacts not only on their health but also on their education. It seems that deafness in some Indigenous children is being confused with intellectual impairment.¹³ Another difficulty affecting educational outcomes for some Indigenous children is that of limited fluency in the English language. This is not an easy issue to address. The experts don’t all agree about the wisdom of mandating the use of English in schools. There is evidence that that eliminating bilingual education does not support good learning outcomes and that bilingual students do *better* in English reading literacy than students from English language only schools in their regions.¹⁴ There is also evidence that fluency in more than one language has flow-on benefits for intellectual development generally.¹⁵

Turning to child abuse, it is tragic that an Indigenous child is six times more likely to be involved with the statutory child protection system than a non-Indigenous child.¹⁶ We should recognise to the fullest extent possible the right of all children to maintain a connection to their family, community and culture. A human rights analysis indicates that while the protection and wellbeing of children must remain the over-riding concern, early intervention and support for families to enable them to remain together where possible should be a key priority.¹⁷ Statutory intervention should be a last resort.

Overcoming Indigenous disadvantage, and thereby ensuring Indigenous children’s right to development, is one of Australia’s greatest and most pressing challenges.

¹⁰ UNICEF, *Implementation Handbook for the Convention on the Rights of the Child* (2002), p 103.

¹¹ Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2009* (2009). At <http://www.pc.gov.au/gsp/reports/indigenous/keyindicators2009> (viewed 13 August 2009).

¹² Prime Minister of Australia, ‘\$58.3m boost for Indigenous eye and ear health’, Media Release, 26 February 2009.

¹³ Judith Gould, speech pathologist, cited in J. Ferrari, ‘Diagnosis wrong for students’ in *The Australian*, 17 August 2009.

¹⁴ ‘Calma backs bilingual education in NT’, *The Age*, 17 November 2008. At <http://news.theage.com.au/national/calma-backs-bilingual-education-in-nt-20081117-6990.html> (viewed 26 August 2009).

¹⁵ Talani Research Institute, *Two languages spoken here*. At: www.raisingchildren.net.au/articles/two_languages_spoken_here.html (viewed 26 August 2009).

¹⁶ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007* (2007), p 116. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport07/pdf/sjr_2007.pdf (viewed 12 August 2009).

¹⁷ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007* (2007), p 116. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport07/pdf/sjr_2007.pdf (viewed 12 August 2009).

The key to meeting the challenge is, I suggest, a human rights-based action plan, the essential elements of which are: Indigenous participation, support for Indigenous community initiatives and networks, human rights education, government action, and robust accountability and monitoring.¹⁸ The United Nations *Declaration on the Rights of Indigenous Peoples* provides a comprehensive framework for Indigenous rights protection. The Australian Government has accepted that it is bound to consider the *Declaration* in all its dealings with Indigenous Australians.¹⁹

Support for Indigenous community initiatives is one element of a human rights-based action plan that I would like to see receive greater attention than it currently does. As the Aboriginal and Torres Strait Islander Social Justice Commissioner has observed, 'The most successful programs are those that are developed by and for the community, as they promote self determination and respond to individual community needs.'²⁰ This is the experience of other countries like Canada and South Africa as well. Already, there are Indigenous community-led initiatives to combat family violence and abuse. For example, the 'Safe Families' program run by Tangentyere Council in Alice Springs provides culturally appropriate interventions and accommodation for children at risk of, or escaping from, family violence; it provides a 'holistic, community centred Indigenous response to child abuse'²¹ and keeps the children out of the child protection system. Initiatives such as this work because they empower and engage people to create their own solution. They promote the wellbeing of Indigenous children because they seek to maintain the children's connection with family, community and culture. In short, it is an example of a human rights-based approach to the wellbeing of children.

b) Human rights education

The other important issue relating to development is education, including human rights education. As the recent National Consultation on Human Rights has revealed, Australia is in pressing need of a national human rights education strategy. No child's development is complete without an education in both their human rights and their corresponding responsibilities to respect the rights of others. Human rights education should be included in the curricula of all primary and secondary schools in every Australian state and territory, perhaps as part of a broader civics education program. During workshops conducted by the Australian Human Rights Commission to promote involvement in the National Human Rights Consultation, children and young people themselves identified human rights education as a key measure to better protection of human rights in Australia.

¹⁸ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending family violence and abuse in Aboriginal and Torres Strait Islander communities: Key issues* (2006), pp 5-6.

¹⁹ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2008* (2008), p 30. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport08/downloads/SJR_2008_full.pdf (viewed 12 August 2009).

²⁰ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007* (2007), p 189. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport07/pdf/sjr_2007.pdf (viewed 12 August 2009).

²¹ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007* (2007), p 133. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport07/pdf/sjr_2007.pdf (viewed 12 August 2009).

Dialogue

Let me turn now to Dialogue. By dialogue I mean the effective exchange of ideas between young people and decision-makers. As I mentioned earlier, Article 12 of the Convention recognises the right of all children to express their views and have these views taken into account in all matters affecting them.²²

For this reason, dialogue is important to every article of the Convention and, in turn, every aspect of ensuring a child's wellbeing. Dialogue is vital to ascertaining what is in a child's best interests and it is necessary for the realisation of children's right to development. Indeed, unless the views of young people are given due weight in accordance with their age and maturity they are not being treated as rights-holders in the true sense.

If I were asked to identify just one area where it would be useful for young people to be heard, I would draw attention to technology. It is plain that young people use and understand technology quite differently from most older Australians. This is an exceedingly important social phenomenon. It affects what and how young people learn, how they socialise, how they communicate, how they find their amusement, how their perceptions of the world are formed. In human rights terms, it affects their well-being and their development. It is also, I suggest, critical to the exercise of their right to freedom of speech and their right to freedom of assembly. How Australia understands, talks about and regulates technology, including the use of the internet, is thus a matter of vital importance to young people. They have a right to have their views heard on this issue.

As a nation, it seems to me, we still have some way to go in order to realise this right of the child to be heard. We are yet to put mechanisms in place to institutionalise child participation at all levels and in all areas of public decision-making.

The 1997 Report by the Australian Law Reform Commission and HREOC, *Seen and Heard*, identified 'a consistent failure' by legal institutions systematically to include and consult with and listen to young people about matters that directly affected them.²³ Many of the report's recommendations have not been adopted;²⁴ if they had, the recent ARACY Report Card on the Well Being of Young Australians might have been different. For instance, it was recommended that HREOC be resourced to establish a specialist children's rights unit to undertake broad, national systemic advocacy on behalf of children. This has not occurred.

The *Seen and Heard* report also considered that there was a need for systemic advocacy in relation to child and youth affairs.²⁵ A systemic advocacy role could be fulfilled by a Commissioner for Children and Young People. COAG's *National*

²² Convention on the Rights of the Child, Art 12.

²³ Human Rights and Equal Opportunity Commission and Australian Law Reform Commission, *Seen and Heard: priority for children in legal processes*, Report of the National Inquiry into Children and the Legal Process (1997), ALRC 84, para 1.30.

²⁴ J McDougall, T Overall and P Henley, 'Seen and Heard revisited' (2008) Issue 92 *Reform* 9, 10.

²⁵ Human Rights and Equal Opportunity Commission and the Australian Law Reform Commission, *Seen and Heard: priority for children in legal processes*, Report of the National Inquiry into Children and the Legal Process (1997), ALRC 84, para 7.2.

Framework for Protecting Australia's Children has flagged that the Government is considering the possibility of a national Children's Commissioner.

The Australian Human Rights Commission supports the creation of an office of Australian Children's Commissioner and maintains that an Australian Children's Commissioner should have functions grounded in Australia's extremely broad human rights obligations to children and young people.

There have been efforts at the national, state and local levels to involve children and young people in policy-making. However, there is a perception that these have been largely tokenistic.

A survey of young people conducted by the Victorian Equal Opportunity and Human Rights Commission in 2008 found young people were generally dissatisfied with their experiences of participating in government processes. Many felt that they were 'ticking a "youth participation" box' rather than being active agents of change because often the agendas on which their views were sought had already been pre-determined.²⁶

This view was also reiterated by some of the young people who participated in workshops run by the Australian Human Rights Commission to encourage involvement in the National Human Rights Consultation. We were told that even when young people are asked what they think, adults do not seem to take their views into account when making decisions affecting them. Should this be correct, this would amount to a failure to give their views due weight, as required under article 12 of the CRC

It is necessary to recognise, however, some positive examples of youth participation.

A recent example of ad hoc youth participation was the Youth 2020 Summit, held in April 2008 in the lead-up to the Australia 2020 Summit. One hundred diverse young people, aged 15 to 24 years, from around Australia, put their heads together and developed ideas and proposals for the future of our country.

However, we need more than ad hoc measures. As the Committee on the Rights of the Child has emphasised, we need to provide ongoing, systemic opportunities for young people to contribute to policy on issues that affect them. Specifically, the Committee has recommended the establishment of 'child-focused and child-sensitive bodies, structures and activities – children's rights units at the heart of Government, ministers for children, inter-ministerial committees on children, parliamentary committees, child impact analysis, children's budgets and "state of children's rights" reports, NGO coalitions on children's rights, children's ombudspersons and children's rights commissioners and so on.²⁷ Some of these structures and activities are already in place, particularly at the state level. At the federal level, we are beginning

²⁶ Youthlaw, Submission to the National Human Rights Consultation Committee, 15 June 2009, pp 33-34.

²⁷ Committee on the Rights of the Child, *General Comment No. 5 – General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)* (2003) UN Doc CRC/GC/2003/5, para 9. At http://www.unhcr.org/refworld/category_LEGAL_CRC,,,4538834f11,0.html (viewed 10 August 2009).

to witness an emergence of more of these measures, including more efforts to implement participative mechanisms.

For example, the Office for Youth within the Department of Education, Employment and Workplace Relations, establishment in September 2008, aims to ensure coordination of youth policy across the whole of government and ‘to create and promote opportunities for the engagement and greater participation of young people in Australian society.’²⁸ This initiative was long overdue.²⁹ I note also that in October of last year, the Government launched the Australian Youth Forum, ‘to engage young people and the youth sector in ongoing public discussion and to facilitate their input into policy and decision making’ about issues affecting them.³⁰

Equally important is data collection and monitoring. To this end, the Office for Youth planned to produce in the first year of its operation (which, incidentally, ends this month) a State of Australia’s Young People Report, to capture how young Australians are faring.

Though it is early days and we are yet to see how effective these measures will be, these are all positive developments. To borrow the words of the Committee on the Rights of the Child:

their emergence at the least indicates a change in the perception of the child’s place in society, a willingness to give higher political priority to children and an increasing sensitivity to the impact of governance on children and their human rights.³¹

Conclusion

Let us continue to give higher political priority to children by adopting a comprehensive child-rights-based policy framework which implements Australia’s obligations under the Convention on the Rights of the Child, and provides a blueprint for the promotion of children’s wellbeing. There is no higher priority than our children, and I believe that it is by respecting their human rights that we will succeed in achieving their best interests and improving their wellbeing.

²⁸ Department of Prime Minister and Cabinet, Commonwealth of Australia, *Responding to the Australia 2020 Summit* (2009), p 120. At http://www.australia2020.gov.au/docs/government_response/2020_summit_response_full.pdf (viewed 7 August 2009).

²⁹ One of the recommendations of the *Seen and Heard* report of 1997 was that an Office for Children be established (albeit within the Department of Prime Minister and Cabinet): Human Rights and Equal Opportunity Commission and Australian Law Reform Commission, *Seen and Heard: priority for children in legal processes*, Report of the National Inquiry into Children and the Legal Process (1997), ALRC 84, Appendix D, para 3.

³⁰ Department of Prime Minister and Cabinet, Commonwealth of Australia, *Responding to the Australia 2020 Summit* (2009), pp 120, 136. At http://www.australia2020.gov.au/docs/government_response/2020_summit_response_full.pdf (viewed 7 August 2009).

³¹ Committee on the Rights of the Child, *General Comment No. 5 – General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)* (2003) UN Doc CRC/GC/2003/5, para 10. At http://www.unhcr.org/refworld/category_LEGAL_CRC...4538834f11,0.html (viewed 10 August 2009).