# ADDITIONAL COMMENTS

# ON THE UNITED NATIONS

# CONVENTION ON THE RIGHTS OF THE CHILD

**BY**

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**CONTENTS**


| | |
|---|---|
| **EXECUTIVE SUMMARY** | **463** |
| **INTRODUCTION** | **465** |
| **DEVELOPMENT OF CROC** | **465** |
| **FAMILY – THE FUNDAMENTAL UNIT OF SOCIETY** | **466** |
| **CHILD RIGHTS** | **469** |
| **THE NEED FOR CLARIFICATION** | **473** |
| **VAGUENESS & AMBIGUITY** | **477** |
| **CORPORAL PUNISHMENT** | **478** |
| **REPRODUCTIVE TECHNOLOGY** | **481** |
| **ABORTION** | **482** |
| **THE TEOH DECISION** | **483** |
| **THE PROLIFERATION OF TREATIES AND INCONSISTENCIES** | **485** |
| **NON-ACCOUNTABILITY BY THE UNITED NATIONS** | **487** |
| **SUMMARY** | **491** |

## EXECUTIVE SUMMARY

> "If adopted, the Convention would create scope for bitter disputes between children and their parents, and hence opportunities for public servants and courts to step into family affairs 'to protect children's rights'." [1]

So said Barry Maley, Senior Fellow at the Centre for Independent Studies in commenting on the United Nations Convention on the Rights of the Child which Australia ratified in 1990 (CROC).

The overwhelming and genuine community concern at the impact and potential impact of the Convention on the Rights of the Child (CROC) on the family unit (society's fundamental unit) cannot be ignored by this parliament.

The development of the CROC and its ratification by Australia is a case study in policy elitism and disregard for the democratic process.

The suggestions made by the undersigned are reasonable, appropriate and definitely in the spirit of Australia's democratic ethos.

The family unit is the fundamental unit of society, best capable of socialising and developing our children into mature, responsible citizens of the future.

Whilst CROC can be interpreted in a sensible and beneficial way, its gross ambiguities allow for interpretations which would undermine and place the family unit at the behest of the prevailing social welfare dogmas of the time.

If there is one thing that the anecdotal accounts in *"Bringing them Home"* [2] highlights, it is the complete incapacity of the latest social welfare fad to substitute for the family unit in the raising of children. With all its faults, a functional family unit is still the best environment for the raising of children. As such the opportunity for the State to interfere ought to be limited to the glaring examples of abuse and neglect.

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1 *The Australian*, 10/11/97, pg 11

2 National Inquiry into the Separation of Aboriginal and Torres Strait Islands Children from Their Families, April 1997

Policy development should concentrate on general family matters and issues. Healthy families, by and large, produce healthy children and in turn, healthy societies.

Rather than concentrating on the alleged rights of children, the CROC should have concentrated on family and the particular special needs of those children who have the misfortune of being without a family structure.

Children rarely need protection from family. More readily they need protection from society, and someone to champion their cause when they are wards of the State.

As Dame Enid Lyons said in her maiden speech to the parliament:

> "The foundation of a Nation's greatness is in the homes of its people."

Nothing has changed. Government policy ought to be directed toward the family and the children with the misfortune of not having a family to call their own.

**We support the proposal that a declaration be formulated to interpret the actual meaning of the CROC in the Australian context. The fact that this needs to be done speaks sufficiently eloquently about the inadequacies of the CROC.**

However, we believe the Australian Government ought to be proactive in international fora to effect much needed alterations to the CROC. Whilst many proponents will disingenuously assert that the CROC is the most ratified convention ever, they conveniently overlook the fact that it is subject to weighty reservations and declarations by a significant number of signatory countries.

The need for many of these reservations would be obviated if the international community were to revisit the CROC.

We suggest such a revisitation ought to be undertaken in a two step process and actively initiated and pursued by the Government.

**Firstly, Australia should denounce the CROC and give the requisite twelve months notice. In giving that notice, Australia should make it clear that its purpose in doing so is to enable it to re-sign the very day after the renunciation takes effect with**

**reservations protecting the traditional role of the family and rejecting the concept of the "autonomous child". This action will alert the international community to the genuine concerns which the Australian people have with the CROC.**

**Secondly, Australia should agitate for substantial amendments to the CROC to clearly spell out the pre-eminent role of the family and the rejection of the "autonomous child" concept.**

## INTRODUCTION

1. The executive government in Australia has the power to enter into international treaties, conventions and agreements.

2. Pursuant to that power, the then Labor government ratified the CROC. This was done without a formal vote of the parliament or detailed public consideration.

3. There was considerable community disquiet at Australia's ratification of CROC. In excess of 43 000 signatures were tabled in the parliament expressing concern.

4. The high handed dismissal of these concerns did not and does not allay the Australian community's concerns.

## DEVELOPMENT OF THE CROC

5. The development of CROC was left in the hands of a few. Its processes were deficient. This is best described by Mr Brian Burdekin at pages 1287 and 1288 of the transcript where he says:

> "One of the reasons there are so many defects in this Convention I have to tell you, and it may be relevant to your deliberations and recommendations, is that many governments did not take it seriously. I got there in about year seven. The negotiations had been going on for seven years with a group of NGOs and a hand full of governments turning up in the room in any given year. Governments were not interested. They did not take it seriously.
>
> There were virtually no provisions in the Convention until two or three years before we finished drafting it relating to families, the

> role of parents, the protection of families. Perhaps that may strike you as ludicrous, but if you get a group of NGOs concerned with children's rights and protection of children, they tend to focus an instrument on children." [3]

6. The possibility of a convention dealing with children, not mentioning the fundamental importance of parents and the family, is unthinkable. It highlights the social and intellectual vacuum in which the Convention was considered for the overwhelming majority of its gestation.

7. The useful insight of Mr Burdekin provides the reasons for the tokenistic acknowledgment of parents and family in the CROC. It was simply included to make the document saleable, rather than to change the underlying philosophy of it.

8. **We believe that the consideration of a Convention on the Rights of the Child is misguided when it is not in the all embracing/ overarching context of the family.**

9. A convention on the rights of the family would have been a more appropriate pursuit. In the past, human rights conventions have dealt with the rights of individuals as against the power of the State. This convention, for the first time, seeks to not only deal with the power of the State, but also interfere in familial relationships.

## FAMILY - THE FUNDAMENTAL UNIT OF SOCIETY

10. The separate compartmentalisation of children in the social and bureaucratic context gives credence to the "autonomous child" concept and deals with them as individual entities and not as part of a family unit which is so fundamentally important to them.

11. Comments such as those referred to in paragraph 7.1 of the report is indicative of the quite non-sensical rhetoric employed by "CROC advocates". Ms Rayner asserted that:

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[3] Hansard, Joint Standing Committee on Treaties, 5/8/97, pgs 1287-8

> "Unless the well being of children is adopted as a national strategy then Australia will continue to be embarrassed by that fact." [4]

12. It clearly is within the soul and moral framework of the vast majority of Australians to seek to pursue the well being of children. It can be pursued without the need for further bureaucratic layering as proposed through a national strategy.

13. The well being of children in Australia is such that it would clearly be one of the favoured places, if not the favoured country, in the world for children to be brought up.

14. Whilst the Australian community is aware of problems, and dealing with those problems, in relation to some children within its society, the vast majority of Australian children are very blessed with the circumstances in which they are able to mature. The education system, the health system, the transport system, and the support systems clearly are of a very high standard in comparison to other countries of the world.

15. To suggest that we have to develop some bureaucratic national strategy for fear of being internationally embarrassed is in itself an embarrassing proposition.

16. If "CROC advocates" were to truly believe that the family is the fundamental unit of society, rather than simply paying lip service to that self evident fact, then it is bizarre to say the least as to why in their submissions there has been such a dearth of pro-family policies. If there were this commitment to the family as the fundamental unit of society, then government strategies for the protection of the family should have been at the very top of the agenda.

17. However, it appears that the support for the family as the fundamental unit of society is, as stated earlier, simply tokenistic and has not been promoted in any practical way by the supporters of the CROC.

18. As the Committee was told:

> "... absent the family we are in big trouble. In my view the evidence is crystal clear. The State is very poor at providing care

[4] F N Rayner Submission No. 223, pg 3

> and affection, love and attention, the things which are most fundamental to the development of any child." [5]

19. The best thing that could possibly be done for children would be to seek to enhance the functionalilty of their families.

20. If the CROC were to be about concerning itself only with children that do not have functional families and are wards of the State, then the arguments would be very different. However, that differentiation has not been made by the vast majority of submissions, other than by Mr Burdekin who posed:

> " ... what about the children who do not have families?" [6]

21. The State has a special responsibility in the circumstances where the children do not have a parent or family to look after them, and in those circumstances the State has an obligation to become the legal guardian of those children. These children need to be protected.

22. A chilling reminder of the consequences of the failure of families to children was provided in the following:

> "Forgive me for giving you one more example: what was frightening ... was that I found in areas like the so-called Frankston to Melbourne growth corridor where almost 80 per cent of children live in households where the adult male was not the biological parent of the child. In those areas the incidents of sexual and physical abuse of children went up 500 to 600 per cent. You do not need to be Einstein to work out what the effect of dysfunctional families/substitute care givers, so-called, is on children when you see that." [7]

23. Funding for organisations such as John Smith's V*alue for Life* seminars, ought to be a top priority to instil in our young values which will assist them for the rest of their lives. The fact that this program goes unfunded is regretted.

24. Government policies which might assist a parent to remain home with a child, especially in its early formative years, would

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5 Hansard, Joint Standing Committee on Treaties, 5/8/97, pg 1286

6 Ibid, page 1292

7 Ibid, page 1298

be of great assistance to the development of Australia's children.

25. The devastating statistics at 7.44 of the report, indicates that Australia would be better served in seeking to care for the 12 000-plus children under care and protection orders in Australia, rather than meddle over unimportant issues within functional family units.

26. Whilst it is recognised that child care is an important facility and high quality care ought to be provided, we believe that the best sort of care that a child can be provided with is from its parent or extended family.

## CHILD RIGHTS

27. There are two broad strands of child rights. The first is the right to care and protection against neglect, abuse, hunger etc. The other strand is that of individual personality rights.

28. There appears to be no opposition to the first strand of rights. Indeed, they are wholeheartedly supported. And so, where they are referred to in the CROC, there is overwhelming community support. Those Articles reaffirm established United Nations commitments to improving the lot of the children of the world.

29. It is the second strand which many learned people oppose. The second strand incorporates a concept referred to as "the autonomous child". These rights are based on individual personality rights which include for adults such rights as freedom of speech, religion, association, assembly and privacy.

30. These two strands have been summarised by Professor Hafen[8] as the "protection rights" and the "choice rights".

> "Choice rights ... grant individuals the authority to make affirmative and legally binding decisions, such as voting, marrying, making contracts, exercising religious preferences, or choosing whether and how to be educated. The very concept of minority status, reflected in statutes in every United States jurisdiction, denies underage children independent choices on such matters.

[8] Hansard International Law Journal, Spring 1996, Vol 37, No. 2, pg 449

> This denial is not a way of discriminating against children, but is a way of **protecting them,** and society from the long term consequences of a child's immature choices, and from exploitation by those who will take advantage of a child's unique vulnerability.
>
> To confer the full range of choice rights on a child is also to confer the burdens and responsibilities of adult legal status, which necessarily removes the protection rights of childhood.
>
> 'One cannot have the freedom to live where and as one chooses and still demand parental support; one may not deliberately enter into contracts and yet insist that they be voidable' for lack of contractual capacity."[9]

31. Submissions were received advocating that legislation was necessary if children are to enforce their "legal" right to make decisions once they are "competent to do so". [10] The impact on the family and the children would be as predictable as it would be profound. However, it stands to reason that will of a necessity, differ between families and between children within families and the circumstances of families. It is therefore ludicrous to suggest that government could somehow monitor the parents in this regard and limit parental influence and seek to come to conclusions on a better foundation than the family.

32. Most parents will exercise supervision in a manner consistent with the child's evolving capacity.

33. In a submission we were told that the chairman of a school council of a South Australian independent school, which until a few years ago conducted routine bag searches to check for tobacco, marijuana and other forbidden items, advised that teachers are no longer allowed to conduct such searches because of students' alleged right to privacy. [11]

34. The not surprising result is that both tobacco and marijuana use is becoming more common and blatant. In later life, the children will not thank the school council for allowing them the alleged right to privacy when they are suffering the devastating

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9 Prof Bruce C Hafen and Jonathan O Hafen, Abandoning Children to their Autonomy - The United Nations Convention on the Rights of the Child, Harvard International Law Journal, Vol 37, No. 2, pgs 449-461

10 Youth Advocacy Centre Inc. Submission No. 149, pg 5

11 Festival of Light submission

health consequences of the tobacco, marijuana and other forbidden substances.

35. If a child is neglected or abused, then it is appropriate and proper for the State to intervene. But the family unit and its internal dealings are matters that are not traditionally within the province of the State, unless a serious adverse finding against the functioning of the family has been made.

36. The proposition was put to the Committee that if an adult hits another adult for the same reasons (as corporal punishment) they would be charged with assault and further went on to make the point that children deserve the same level of protection as adults. [12]

37. This is taking the concept of the "autonomous child" to its ludicrous conclusion. Because if that is to be the case, then are we to treat children like adults in every other respect? Will we make them criminally liable from a very early age? Will we force them to go to school? Will we disallow them from obtaining a drivers licence before a particular age or not allow them to vote? Will police charges with criminal sanctions follow from every unauthorised visit to the family's cookie jar? If the argument is that children ought to be treated the same as adults, the results would of course be ludicrous.

38. As Professor Hafen observes:

> "The new adult willingness to defer to children's preferences has occurred in the absence of empirical evidence demonstrating that today's children actually possess greater capacity to assume the risks and responsibilities of making autonomous choices. Moreover, no one has yet shown that reducing the paternalistic direction that adults have traditionally given to children, translates into greater benefits or greater autonomous capacity for children, because children need protection against their own immaturity as well as against exploitation by others.
>
> They also need affirmative tutoring that develops the intellectual, psychological and other capacities toward actual independent autonomy." [13]

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12 Submission No. 304, pg 3

13 Hafen and Hafen op cit, pg 478

39. Professor Coons puts it this way:

> "The inescapable limit on children's freedom is not nearly an artefact of politics. It is a fact of nature. Even if one held liberty to be the sole concern, there would remain a practical, inseparable and permanent obstacle to liberation. Children are small, weak and inexperienced; adults are big, strong and initiated. One may liberate children from the law of man, but the law of nature is beyond repeal. There is no way to send an eight year old out of the sovereignty of the family and into the world of liberty. For, he will be there introduced to a new sovereignty of one kind or another.
>
> It may be a regime of want, ignorance and general oppression; it may be one of delightful gratification. The ring-master could be Fagin or Mary Poppins. Whatever the reality, it will be created by people with more power and by the elements. Children - at least small children - will not be liberated; they will be dominated."

40. It may well be asked, whose interests are being served by "liberation" and "autonomy" theories for children? Some of the adults who want to liberate children seem motivated not primarily by children's actual interests, but by their own interests. Some ideological, and some that merely serve adult convenience.

41. The debate takes place between and amongst adults. The decisions are made by adults. If children were genuinely consulted in relation to these matters, would they vote for having a parent at home rather than being put in a child care centre?

42. The self-appointed child rights advocates are unable to offer any proof that they in fact speak for and on behalf of children, let alone for their ultimate best interests.

43. No matter how well intentioned, governments and their public servants cannot bring up children. Only the parents can do that. There is no evidence to suggest that someone has discovered that children can care for themselves and do not need guidance. Children are inherently dependent.

44. Impersonal government bureaucrats cannot bring a coherent value system to children, only parents can.

45. But with the introduction of "choice" and "autonomy" as concepts, and the actual wording of the CROC, there is the potential for a new standard for State intervention in families.

> "Two Australian lawyers, for example, believe that under the CROC, parental child rearing rights are 'subject to external scrutiny' and 'may be overridden' when 'the parents are not acting in the best interests of the child, or where the parents are unreasonably attempting to impose their views upon mature minors who have the capacity to make their own decisions'. This interpretation is consistent with the CROC's apparent intent to place children and parents on the same plane as co-autonomous persons in their relationship with the State.
>
> To the extent that the CROC encourages such interpretations, its ambiguity, or its conscious design, risks creating a new and lower threshold for State intervention in intact families". [14]

## THE NEED FOR CLARIFICATION

46. It is against such interpretations that we believe that children and families ought to be protected.

47. The terminology employed by the learned writers quoted by Hafen above (in paragraph 45) highlights some of the anti-family interpretations of the CROC.

48. For all its faults, the family unit is still the best carer and protector for children.

49. Concerns as expressed by Hafen have been dismissed by proponents of the CROC in language unfortunately typical of the CROC advocates. What we frequently encountered in the committee was a view that anyone who opposed the CROC needed educating, and those who supported the CROC obviously were fully appraised of the detail. This dismissive approach fails to address the very real concerns expressed by both mainstream political parties.

50. Labor Minister for Justice, Senator the Hon Michael Tate, in answer to a question about the CROC said:

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[14] Ibid, pg 464

> "As to the role of the Holy See and its note accompanying the accession of the Holy See to the Convention, it is true that it indicated its understanding of the Convention as requiring the preeminent role of the family to be properly recognised. That accords very much with the Australian Government's position. I anticipate that when the Australian Government ratifies the Convention, should it do so, one would find that those same understandings as to the preeminent role of the family would be acknowledged." [15]

51. Similarly, the Liberal Party expressed concerns about the CROC. The Federal Council of the Liberal Party on 25th October 1990 opposed ratification of the Convention. This vote was greeted with loud applause. The Leader of the Government in the Senate, Senator the Hon Robert Hill, then Shadow Minister for Foreign Affairs, issued a media release saying:

> "The Government has failed to make reservations on ratification about the need to respect the rights and responsibilities of parents towards their children in key areas".

Senator Hill went on to say:

> "The Convention fails to properly recognise the rights and responsibilities of parents regarding the educational, physical, social and moral development of their children."

52. These concerns of course are hardly surprising, given the content of the Universal Declaration of Human Rights 1948, and in particular Article 26(3) and Article 18(4) which state:

> "Parents have a prior right to choose the kind of education that shall be given to their children"

and:

> "States undertake to have respect for the liberty of parents ... to ensure the religious and moral education of their children in conformity with their convictions."

53. A former Labor House of Representatives member, Mr Lindsay, expressed similar concern along with many other members of parliament.

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15 Senate Hansard, 7/11/90, pg 3619

54. Despite these mainstream concerns, the Joint Standing Committee on Treaties witnessed the CROC advocates patronisingly and aggressively denigrating those who were concerned about the role of the family. Two examples will suffice.

55. The Queensland Commissioner for Children, Mr Alford, who said:

> "There may be a tendency, in presenting 'The Rights of the Child Convention' and manifesting its adherence in society, for it to be seen or mischievously construed as being in conflict with the rights of parents, thus creating an unfortunate dichotomy."[16]

56. Given Mr Alford's comments about "mischievously construed" he was asked:

> "Are you aware of any groups within the community that are concerned about the rights of parents in relation to the Convention?
>
> Mr Alford - Not specifically." [17]

Given the concerns outlived in paragraphs 50-55 this response was quite astonishing.

57. Mr Alford was then asked for an example of an organisation which was mischievously construing the Convention. The question was asked:

> "Your submission is making the assertion 'or mischievously construed'. I would have thought you would have had at least one example to proffer to the committee of an organisation or group that is engaged in this mischievous behaviour.
>
> Mr Alford - No.
>
> Question - No such example?
>
> Mr Alford - I have no example." [18]

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16 Submission to Joint Standing Committee on Treaties inquiry into the status of the United Nations Convention on the Rights of the Child in Australia, April 1997, by Children's Commission of Queensland

17 Hansard Joint Standing Committee on Treaties, 1/5/97, pg 235

18 Ibid, pg 236

58. Allegations are so easily made, but when put to the test, not a single shred of evidence was provided to support it. However, such strident commentary as "mischievously construed" if not designed to, undoubtedly does have the effect of silencing those that do hold genuine concerns about the CROC.

59. Another example is that of Judge H H Jackson who made this comment:

> "The importance of these issues should not be distracted by the fundamental misunderstandings held by many vocal and well meaning but misinformed individuals as to the relationship between the Convention and family structures." [19]

60. To volunteer a submission in a politically charged issue is, with respect to His Honour, unwise and does his judicial office no credit. For His Honour to suggest that people such as Hon Andrew Peacock; the Government Leader in the Senate, Senator the Hon Robert Hill; and the Attorney-General, Hon Darryl Williams QC, amongst others, are "misinformed individuals" is a description that we reject.

61. Such patronising and dismissive criticism is unfortunately symptomatic of the CROC advocates. Their refusal to acquaint themselves with the genuine concern of Australian families is to be regretted.

62. Barry Maley, a Senior Fellow at the Centre for Independent Studies, and Director of its *Taking Children Seriously* research program, said:

> "If adopted, the Convention would create scope for bitter disputes between children and their parents, and hence opportunities for public servants and courts to step into family affairs 'to protect children's rights'. ... the Convention in short is riddled with inconsistencies and vagueness that would make it a legal nightmare if it became Australian law." [20]

63. Are we to believe that Mr Maley is similarly misinformed? The refusal of advocates for the CROC to even countenance the possibility of there being room for improvement or clarification

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19 Submission No. 16 contained in submissions Vol. 1 at pg 62

20 The Australian, 10/11/97, pg 11

of the CROC bears all the signs of zealotry and none of the signs of considered deliberation.

## VAGUENESS AND AMBIGUITY

64. Concern over the interpretation of the CROC cannot be so flippantly and patronisingly dismissed. Indeed, two witnesses, both supportive of the CROC, used it to come to completely different conclusions.

65. The Jewish community as represented by the Executive Council of Australian Jewry supported the CROC. [21]

66. Yet, an academic strenuously asserted that infant circumcision was a barbaric practice and in breach of the Convention. [22]

67. Embarrassingly contrary views also emanate from different United Nations bodies interpreting the CROC. This further highlights the need for clarification.

68. In the report at paragraphs 8.175 and 8.178 we have an interesting contradiction. The actual United Nations High Commissioner for Refugees told the committee that Australia's:

> "Port Headland facility is acceptable ..." [23]

69. However, the United Nations Association of Australia sought to judge Australia more harshly than the United Nations High Commissioner, and claimed that the Port Headland detention centre was in breach of Articles 31 and 37(b) which recognised the right to recreation and cultural activities, and that children should not be deprived of liberty unlawfully or arbitrarily. [24]

70. The United Nations High Commissioner undoubtedly has the benefit of judging the Port Headland facility in relation to similar facilities elsewhere in the world.

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21 Hansard Joint Standing Committee on Treaties, 5/8/97, at pg 1219

22 Hansard Joint Standing Committee on Treaties, 5.8/97, pg 1423 at 1428

23 Mr Assidi, Hansard Joint Standing Committee on Treaties, 28/4/97, pg 108

24 The United Nations Association of Australia, submission No. 38, pg 5

71. That such starkly conflicting interpretations can be placed on the one set of words, reflects adversely on the CROC and highlights the need for a detailed declaratory statement by the Government and the need for fundamental amendment to the CROC itself.

72. Supporters of the CROC claim that it would bring Australia into disrepute if we were to seek to change or amend the CROC. This is unfortunately typical of the arguments that are raised. Rather than deal with the issues, they hide behind the United Nations apron of alleged international reaction.

73. We trust that Australia's reason and rationale for wishing to effect such important changes to the CROC, as have been discussed, would be welcomed by the families and their democratically elected representatives in those countries who share a similar ethos to ours. Indeed it is hard to imagine any population group that would not be supportive of the sorts of changes that are being proposed by us.

74. We support the view expressed by Professor Hafen that Australia de-ratify and re-ratify the Convention with reservations in relation to the child autonomy aspects. [25]

75. It would be to Australia's international credit and would be seen as a sign of our maturity if we had the strength of national character to take a fresh look at the CROC, expose its considerable flaws and suggest constructive and workable amendments.

## CORPORAL PUNISHMENT

76. Whilst the Labor Government promised the Australian people that nothing had changed with Australia's ratification of the CROC, and that all our laws were in harmony with the CROC, there is developing (albeit contrived), a line of argument suggesting that corporal punishment is not allowed under the CROC.

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[25] Hansard Joint Standing Committee on Treaties, 17/4/98, pg 1569

77. In a singularly unimpressive article *The CROC and Physical Punishment* (19/10/97), a member of the United Nations committee on the CROC, Judith Karp, made the following comments:

> "Physical punishment is a form of violation of the human dignity of the child. The infliction of violence on a person against his or her will is considered a criminal assault and a civil tort. The right to personal and mental integrity is not age dependent. Physical punishment endangers and violates this right ... as well as the right to privacy in its wider meaning ...[26]
>
> ... it is a reflection of disrespect to the child as an autonomous human being and is therefore humiliating, degrading and mentally abusive ...[27]
>
> Expressions such as 'moderate punishment', 'reasonable chastisement', or 'non excessive force or harshness' should be avoided because they lack the precision and clarity, and leave room for discretion which is liable to lead to physical or mental abuse, maltreatment or even to cruel and inhuman treatment ... [28]
>
> The bid to combat the physical punishment, sexual abuse, exploitation and ill treatment of children should include the family ...[29]
>
> ... ending physical punishment is not simply one option among many subject to the political will of governments. It is an obligation undertaken by the States' parties to the Convention ..." [30]

78. The high handed and anti democratic stance of Judith Karp is unfortunately indicative of the dogmatic attitude of the United Nations committee. It also highlights why it is inappropriate for Australia to submit such fundamental areas as parental rights for consideration by United Nations officials.

79. In an article in the *Sunday Mail* (Adelaide) headed, "Despair by unruly kids", we are told:

> "A generation of unruly children is driving parents and teachers to despair and creating illiteracy and suicidal tendencies among young people according to the experts. Specialists blame part of the

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26 Ibid, pg 3
27 Ibid, pg 4
28 Ibid, pg 6
29 Ibid, pg 8
30 Ibid, pg 11

> problem on the amount of freedom given to young people at home. They describe it as 'household democracy gone wild'." [31]

80. The moderate use of physical force is a right of parents and a legitimate exercise of religious freedom. The common law of Australia has long recognised that moderate corporal punishment may be administered by parents to their children. [32]

81. Dr Michael G Haines and Simon Fisher submitted:

> "This right, it must be emphasised, is not exerciseable at the whim of the parents but for the child's benefit." [33]

82. It was interesting that those who sought to argue against corporal punishment often in the next breath would talk about the acceptance of traditional forms of justice for our Aboriginal community. The fact that traditional forms of justice clearly involve a form of corporal punishment, indeed wounding, seems to escape them. It was not seen as an anomaly.

83. The apparent theme is that the indigenous community has traditional forms of punishment, whereas the non-indigenous community does not. Clearly, corporal punishment has been a traditional form of family discipline, and community discipline for centuries in most if not all communities.

84. Given the overwhelming use of corporal punishment within the family unit, both traditionally and around the world, it is our strong view that the social engineering being pursued by the United Nations Committee on the Rights of the Child and others ought to be specifically rejected.

85. Parental rights to discipline the child should be explicitly affirmed and not ambiguously implied in the Convention. [34]

86. The National Council of Women of Tasmania did not condone any form of child abuse, but commented that parents may administer reasonable physical punishment in the child's best interest in appropriate circumstances. [35]

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31 *Sunday Mail* (Adelaide), 10/11/96, pg 15

32 See R v Terry 1955, VLR at 114

33 Submission "A Matter of Priority - Children and the Legal Process", pg 5

34 See Lo, submission No. 641, pg 1

35 See National Council of Women of Tasmania, submission No. 52, pg 6-7

87. It is interesting to note that the issue of corporal punishment was not determined by the Convention. Yet, the CROC advocates in their "developmental" interpretation are now asserting this to be the case. The need for clarification is essential, especially in the face of "innovative" interpretations which do violence to the initial drafting and underlying intent.

## REPRODUCTIVE TECHNOLOGY - ADULT RIGHTS OR CHILDRENS' RIGHTS?

88. Reproductive technologies should be limited so that the parents can be easily identified. As the John Plunkett Centre for Ethics in Health Care submitted:

> "Anonymous donation of sperm and ova mean that children born as a result of donor gametes will forever be denied one of the most crucial components in their sense of identity: knowledge of their biological parents." [36]

89. Artificial reproductive technology which is used for women in same sex relationships will have future consequences for the children. Whose rights ought to prevail? We say the childrens' rights.

90. Failure to provide such artificial reproductive technology to these women has led to payment for damages being awarded, albeit that the rights of any child who is born as a result of that artificial reproductive technology to know its parents was not considered by the tribunal awarding the damages.

91. This is a clear case of the so-called provision of "rights" being provided to individuals as individuals, as opposed to the wider context being considered leading to perverse results.

92. And as a result the call by the Caroline Chisholm Centre for Health Ethics, as quoted at paragraph 4.242 is supported by us:

> "Children should not be legally denied the right to know, love and be loved by their own genetic parents. Many adopted parents yearn to know their own biological parents, whose non involvement in

[36] Submission No. 160, pg 4-5

> their lives brings them suffering. Hence we believe natural justice requires legal access to reproductive technology be restricted to married or stable heterosexual couples. This may require changes in the Sex Discrimination and Equal Opportunity Acts."

93. This comment also highlights the theme that we are seeking to impress upon the parliament and the community in these additional comments. If one looks at isolation on the rights of an individual or a child, perverse and stupid results can result because a whole of society approach has not been taken.

## ABORTION

94. A strident rejection of corporal punishment by the CROC advocates is ironic when juxtaposed to their position on abortion. As Dr Michael G Haines and Simon Fisher have so persuasively argued in their submission:

> "It is ironic that while the paper pontificates about corporal punishment, it ignores the tragic abuse of the rights of unborn children in Australia. Why does such a vulnerable group escape attention? The broader picture and cannons of human rights law demand that such an important group be protected." [37]

95. These comments were made in the context of the United Nations committee's recommendations concerning corporal punishment in Australia. Yet 80 000 to 100 000 unborn children are aborted each year in our country.

96. It is interesting to note that the International Covenant on Civil and Political Rights requires that a sentence of death shall not be imposed for crimes committed by persons below 18 years of age and shall not be carried out on pregnant women. Why is it that the international community has said that one cannot execute a woman whilst she is pregnant? Surely it must be on the basis that the innocent are not to die along with the guilty as so poignantly stated by Drs Flemming and Haines. [38]

97. Further, the Convention on the Rights of the Child specifically states:

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[37] Ibid, pg 9

[38] Submission by J I Flemming and M G Haines at pg 11

> "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'."

98. Unfortunately, many of the CROC advocates are not concerned to consider the specific rights of children before birth.

99. We believe that the most fundamental right that a child can be given is the right to life. If it is cut off prematurely simply for the convenience of the person carrying the child, then the rights of the unborn child are completely negated.

100. It would have also been of interest if the United Nations committee considering Australia's compliance with the Convention were to have considered the issue of abortion, and more particularly the views of such social engineers as Peter Singer and Helga Kuhse who are on the public record as saying that it ought to be legal to not only abort unborn children who are allegedly "malformed". Further, these so-called bio ethicists have been pursuing the argument that such children could also be killed within the first three months of life if malformed.

## THE TEOH DECISION

101. Throughout the hearings those supportive of the CROC hailed the TEOH decision of the High Court. [39]

102. This decision asserted that there was a "legitimate expectation" by Australians that government would take into account its treaty obligations in administrative decision making.

103. The "legitimate expectation" argument espoused by the Court was one that, with respect to their Honours, seems contrived. The then Senator Evans, in discussing the CROC in the Senate, stated quite clearly that Australia's laws were in tune with the CROC and nothing would need or would change domestically because of our ratification of the CROC.

104. > "Ratification simply means that Australia is a state party to the Convention. It does not change the law in Australia one jot or

[39] (1995) 128 ALR 353

> tittle. If the law in Australia is to be changed, that must be by way of an action in the parliaments of the Australian people. That is a most important matter to emphasise in relation to this Convention on the Rights of the Child." [40]

105. The Government in its report under the Convention on the Rights of the Child, December 1995, stated that it did not propose to implement the Convention on the Rights of the Child by enacting the Convention as domestic law because the general approach was to ensure that domestic legislation, policies and practices, comply with the Convention prior to ratification.

106. Both those comments clearly indicate that the Federal Labor Government at the time was of the view that its ratification of the CROC would have no domestic impact. Further, that all legislation within Australia was in harmony with the Convention. However, the Teoh decision has clearly debunked that view.

107. On the basis of such a senior minister, indeed the Minister for Foreign Affairs, giving such assurances to the Senate and thereby the people of Australia, it is hard to make out the argument that somebody like Mr Teoh (who undoubtedly would not have been aware of the CROC in any event) would have laboured under the expectation of such a legitimate expectation.

108. Even if Mr Teoh had been aware of the signing of the Convention, it would stand to reason that he would also have been aware of the public utterances of Senator Evans as the Foreign Affairs spokesman for the Government indicating that such a legitimate expectation as determined by the High Court was in fact completely ill founded.

109. The other bizarre element of the Teoh case is, that Mr Teoh was appealing a decision of the Federal Court requiring that he be deported from Australia for drug offences involving heroin.

110. The High Court ruled that the officials should have considered the best interests of Mr Teoh's child/children in making their determination.

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[40] See paragraph 5.48 of report

111. Even if the individual interests of Mr Teoh's child/children were not taken into account, it would be undisputably within the best interests of all Australian children, and indeed adults, for somebody who engages in heroin transactions to be deported from the country if they are not citizens.

112. The perverse potential outcome of the Teoh case is that somebody who peddles in drugs may well be able to stay within Australia on the basis of the best interests of his children.

## THE PROLIFERATION OF TREATIES AND INCONSISTENCIES

113. In recent times there has been a genuine concern amongst Australians at the proliferation of the number of treaties Australia is entering.

114. A problem with the treaty making process is that there does not seem to be an appropriate oversight to ensure that treaties do not conflict with each other.

115. The primary rule in relation to legislation is that the latter legislation prevails over the former. If that is the case, then it is to be regretted that the Articles in the CROC would prevail over the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights in the areas where they might conflict.

116. Parental rights as outlined in those international documents are well placed in such basic and fundamental human rights documents. Further, it is clear that those parental rights are exerciseable for the benefit of the children, not for the parents. The role undertaken by parents in nurturing their children is for the benefit of children and to promote stable family life.

117. As Haines and Fisher say:

> "The State, no matter how well intentioned and well motivated, cannot supplant the natural parenting role that only parents can discharge within the confines of the family unit as the natural and

> fundamental unit of society. All the State should do, we submit, is to enhance the functionality of the family unit." [41]

118. Traditionally the State does retain a supervisory role and will intervene, but only to protect children at risk. Such intervention traditionally has only been in situations where the children are in genuine physical or psychological danger. [42]

119. The learned authors go on to point out that parents' rights to educate children according to their own moral code are well recognised. For example, Article 26(3) of the Universal Declaration of Human Rights 1948 which states:

> "Parents have a prior right to choose the kind of education that shall be given to their children".

120. Article 18(4) of the International Covenant on Civil and Political Rights 1966 is more explicit. It provides that:

> "States undertake to have respect for the liberty of parents ... to ensure the religious and moral education of their children in conformity with <u>their convictions</u>" (emphasis added).

121. The authors continue by pointing out that this right has been universally recognised not only by the United Nations but by other important human rights conventions, for example, Article XII of the American Declaration of the Rights and Duties of Man 1948, and Article 2 of the First Protocol to the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms 1950.

122. Further, they make the point:

> "The primary reason for the establishment of a religious school (whether they are Muslim, Jewish or Christian), is to allow parents to educate their children in an environment consistent with their moral beliefs." [43]

123. The learned authors go on to develop the issues surrounding other important parental rights, such as those of freedom of thought, conscience and religion.

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41 Haines and Fisher, op cit pg 7

42 Ibid.

43 Ibid, pg 8

124. Their indisputable thesis is that CROC clearly undermines those parental rights acknowledged in previous human rights documents.

125. Given that the CROC is such a fundamental departure from the previous human rights documents of the world, and given that the CROC is the latter document, it will prevail over the former.

126. It is therefore absolutely essential and critical that the Government not only provide a declaration, but attend to renouncing the CROC and to re-ratification on the basis of substantial reservations, taking into account the matters raised in these additional comments.

127. Substantial amendments to the CROC will also need to be achieved through Australian government agitation in the international community.

## NON-ACCOUNTABILITY BY THE UNITED NATIONS

128. One of the more "interesting" witnesses was the CROC's chairperson who indicated that the people on the United Nations Committee are independent of their governments and:

> " ... are totally accountable only to the children of the world." (emphasis added). [44]

129. As a result, they are a law unto themselves and simply hide behind the unsubstantiated assertion that they are representing children when the real "needs" of children as perceived by children are not necessarily known. And indeed the childhood wishes of children may not necessarily be within their long term best interests.

130. It is very convenient to establish oneself as being only accountable to the children of the world when clearly the children are neither mature enough to respond, criticise or have an input, nor have the facilities to do so. The Committee is neither chosen nor funded by the children of the world.

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[44] Hansard, Joint Standing Committee on Treaties, 3/9/97, pg 1524

131. Even if the facilities and structures were there, it is a convenient side-stepping of the United Nations Committee's responsibility to the parents of the world through their governments to try to indicate that they are only accountable to the children of the world.

132. It is this unrepresentative mantra so fully embraced by the United Nations Committee which makes it vitally important that the interpretations that can be placed on the CROC are so restricted that such fanciful notions cannot have any domestic impact on Australia's most fundamental unit of its society.

133. Another indication of the attitude of those involved with the CROC is highlighted in the summary record of the 403rd meeting of the Committee on the Rights of the Child in its sixteenth session held at the Palais des Nations, Geneva, on Wednesday 24th September 1997.

134. On page 7 of that summary, the chairman of the committee is quoted at paragraph 13 as follows:

> "In reply to the question raised by the chairperson, he (Mr Taylor) said that the committee had had as many as 1 500 submissions from non governmental organisations, and that indicated that they played an important role in the consultative process. He hoped that the joint committee's report, as well as the report on the committee's own deliberations, would help to dispel any remaining misconceptions about the Convention's significance."

135. It is our view that it would have been more fruitful to in fact address the actual issues, rather than to talk about dispelling misconceptions.

136. Indeed, the whole attitude of the committee was shown later on at paragraph 49 where Mrs Ouedraogo is reported as saying:

> "Referring to Mr Taylor's statement, asked what difficulties of understanding had been encountered with regard to the Convention and how it was considered that they might be overcome. Perhaps an <u>extensive campaign</u> to create awareness of the principles and concepts underlying the Convention might be useful." (emphasis added).

137. Once again, the difficulties with the Convention are seen as simply being overcome by an extensive campaign rather than dealing with the issues and acknowledging the faults with the CROC..

138. Mrs Karp at paragraph 50 is quoted as saying:

> "She was concerned that sectors of public opinion in Australia considered the Convention to represent an intrusion into family life and a threat to family values ..."

139. She then goes on to quote certain preambular paragraphs and aspects of the Convention. However, that attitude seems to be in stark contrast with the article that she wrote, referred to previously.

140. In a similar summary record of the 404th meeting, the issue of corporal punishment was raised. The Australian delegation must have indicated the fact that Australian opinion polls are supportive of corporal punishment.

141. We then hear from Mrs Karp at paragraph 10 in dealing with the issue of corporal punishment in a similar view as in her article referred to earlier and expressing a view which is clearly incorrect, given that:

> "An analysis of the preparatory work carried out prior to the drafting of the Convention would indicate that the use of moderate and reasonable corporal punishment in the event of breaches of discipline was not contrary to Article 28 of the Convention. As for Article 19 of the Convention, its aim was to protect children against all forms of physical or mental violence, injury or abuse; it mentioned neither punishment nor discipline.
>
> If the drafters of the Convention had intended to forbid all forms of corporal punishment, they would have expressly said so in that Article" (so said Mr Moss at paragraph 19).

142. And it is therefore this quite disingenuous interpretation being placed on the Convention by the United Nations Committee on the Rights of the Child, such as Mrs Karp has placed on it, that requires the Convention to be completely clarified so that CROC advocates cannot put their own personal spin on the

interpretation in complete disregard of the preparatory work and the rationale behind certain clauses of the Convention.

143. Rather than having to educate the citizenry in Australia, it appears as though Mrs Karp should be educated in relation to the basis on which the Convention came into being.

144. Irrespective of which interpretation is correct, it is vital that it be clarified for the benefit of all.

145. In the same summary (the 404th) at paragraph 11, the chairperson disingenuously asks:

> "It was her understanding that the opinion polls which indicated that a certain percentage of the population was in favour of corporal punishment relied solely on consultation of adults. She would like to know whether any studies devoted to corporal punishment within the family had been carried out among children."

146. This quite disingenuous request begs the question as to how many children sat around the drafting table when the Convention on the Rights of the Child was actually formulated? One also has to ask how many of these alleged rights are actually being sought by children? Are children actually seeking child care, or if they were consulted, would they be wishing for one of their parents to be at home with them?

147. And it further begs the question that if children are old enough to make such a determination in relation to their discipline and upbringing, then where would one draw the line as to their right to make self determining decisions? Our society clearly has drawn certain age classifications when children can make decisions for themselves and become adults.

148. Mrs Ouedraogo also shows her priorities when at paragraph 12 she believed that the Federal authorities should abolish the practice of corporal punishment and then goes on to ask about situations such as rape or incest. The perverted sense of priority in these discussions seem to indicate that the question of corporal punishment ranks higher than issues of rape or incest.

149. Australia would do well to seek a substantial overhaul of the Convention itself and the representatives on the committee to ensure that they are more reflective of society at large.

## SUMMARY

150. **Where the thrust of the CROC is about protecting children, it is positively accepted by us.**

151. **However, those Articles of the CROC which undermine the family and the parental rights that have been accepted in previous human rights documents, need to be amended to rid the CROC of those unfortunate sections for the benefit of Australian children. We call on the Australian Government to initiate such changes for the benefit of the children of the whole world.**

152. **We reject the proposal for an Office for Children. To seek to deal with the issues of children in isolation from the family unit is to court disaster and to ignore the order of nature.**

153. **Appointment of a person charged with the oversight of the care provided by the State to children, or refocussing existing structures within the State's care, is an initiative we would support.**

154. **The Government would do well in its commitment to the children of Australia to fund such programs as *Values for Life* seminars which in recent times has been analysed by the Australian Council for Educational Research and was provided with an excellent evaluation.**

155. The possibility of providing values education to approximately 800 000 young people over a three year period as is being proposed by John Smith and Associates, Care and Communication Concern, is a practical and useful step to assist the young people of this country.

156. Rather than spending hundreds of thousands of dollars in preparing reports and flying delegations to Geneva to report to

an unrepresentative group, it would be a better use of taxpayer's money for such funds to be devoted to organisations that are genuinely devoted and will provide actual benefits to real young people.

157. **An Office of Family ought to be established, and the Government ought to pursue policies that are family friendly.**

158. The overwhelming evidence is that functional families will help ensure well adjusted, well protected children. Our failure to look after families in the past few decades has already led to the unfortunate circumstances in which so many of Australia's youth find themselves.

159. Our strong recommendation is for a whole of government approach to the concerns and needs of families. Children would be the clear winners.

**ERIC ABETZ**
**Liberal Senator for Tasmania**

**HON PETER MCGAURAN, MHR**
**National Member for Gippsland**

**WILLIAM O'CHEE**
**National Senator for Queensland**