

# CHAPTER 1

## INTRODUCTION

### Introduction

1.1 With the trend to globalisation in recent years, the role of international law in Australia and the relevance of international institutions has increased significantly. The increase in global interaction has also increased the recognition of problems on a global scale which need to be addressed at both the national and international levels.

1.2 Treaties may be multilateral or bilateral and reflect agreements between national governments and the need for a cooperative international approach to many problems. The matters dealt with in treaties have expanded and may cover areas such as defence, trade, the environment, social services, technological exchanges and human rights. They provide an opportunity for Australia to participate in international standard setting and to advance Australia's national interest in various areas. For these reasons, Australia has been politically active in the international sphere and in the development of international law.

1.3 There is concern in the Australian community that entering into international treaties diminishes Australia's sovereignty.<sup>1</sup> However, it was argued that while the ratification of treaties may influence Australia's actions domestically and internationally, Australia does not forego its sovereignty to an international body.<sup>2</sup> The former Attorney-General, the Hon Michael Lavarch MP, commented that the action of entering into a treaty, rather than being an attack upon sovereignty, was in fact a sovereign choice of Australia to enter into such arrangements.<sup>3</sup>

1.4 The Human Rights Commissioner was of the view that the *Convention on the Rights of the Child* is a statement of the Australian Government's voluntary commitment to exercise its national sovereignty on behalf of the Australian nation which is more concerned about promises to the Australian people than

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1 Twenty three per cent of the submissions to the Inquiry raised the loss of sovereignty as a concern.

2 Department of Foreign Affairs and Trade, *Australia and International Treaty Making Information Kit*, June 1997, p. 8

3 Lavarch M, Attorney-General, Questions Without Notice, Treaties, *House of Representatives Hansard*, 9 June 1994, p. 1845

promises to anybody else.<sup>4</sup> Save the Children Australia argued that it is not a case of the international community trying to dictate to Australia, treaties such as the *Convention on the Rights of the Child* are really about moral pressure.<sup>5</sup>

## Australia's treaty making process

1.5 In Australia, the Executive has the Constitutional power to sign and ratify treaties that may impact on the activities of the Commonwealth, State and Territory governments. Accordingly, decisions made in relation to the negotiating position, determination of objectives, operating parameters and whether to sign or ratify are made by the relevant Minister or by Cabinet.<sup>6</sup> In recent years there has been increasing concern expressed about the lack of parliamentary scrutiny of the treaty making process which culminated in a number of inquiries at a Federal level.

1.6 In April 1995 the States and Territories *Position Paper on Reform of the Treaties Process* recommended a number of improvements to the consultation process on treaties. In June 1996 the Council of Australian Governments (COAG) agreed to the establishment of the Treaties Council and a revised set of *Principles and Procedures for Commonwealth-State Consultation on Treaties* and noted the reforms announced by the Government on 2 May 1996.<sup>7</sup>

1.7 At the time COAG was considering the recommendations put forward by the States and Territories, the Senate Legal and Constitutional References Committee was conducting its inquiry into the treaty making process which culminated in the *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* Report being tabled on 29 November 1995.<sup>8</sup> The *Convention on the Rights of the Child* was used extensively as an example in the Senate Committee's Report.<sup>9</sup> The Report proposed some far-reaching reforms, including: the tabling of treaties before ratification to allow greater parliamentary scrutiny; the establishment of a treaties council; the preparation of treaty impact statements; increased consultation; and public scrutiny to

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4 Sidoti, Transcript of Evidence, 5 August 1997, p. 1187

5 Rose, Transcript of Evidence, 10 July 1997, p. 979

6 Department of Foreign Affairs and Trade, *op cit*, p. 9

7 *ibid*, p. 5

8 Senate Legal and Constitutional References Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, Senate Printing Unit, Canberra, November 1995

9 *ibid*, p. 121

enhance the democratic input into the process.<sup>10</sup> In the March 1996 election, the Coalition Parties, the Australian Greens and the Australian Democrats included improvements to the treaty making process in their election platforms.<sup>11</sup>

1.8 In May 1996, the Government announced a number of initiatives to improve the treaty making process including, the tabling of all treaties for 15 sitting days before the Government takes binding action (except on urgent or some sensitive treaties), the tabling of a National Interest Analysis and the establishment of the Joint Standing Committee on Treaties (JSCT) to inquire into the treaties tabled and other matters referred to it. If the implementation of treaties requires legislation, there is further opportunity for debate in Parliament. There were also improvements to the consultation processes and information disseminated in relation to treaties being considered. There has also been a move to include key stakeholders in delegations participating in treaty negotiations.<sup>12</sup>

1.9 These reforms were intended to directly address some of the criticisms of the treaty making process that were present at the time when the *Convention on the Rights of the Child* was ratified. Accordingly, in line with the joint resolution of both Houses in respect to extant treaties, the JSCT decided unanimously to inquire into the Convention and the community concerns about its implementation, notwithstanding its ratification in 1990.

## **Influence of conventions in Australia**

1.10 At the time the *Convention on the Rights of the Child* was ratified, treaties were not considered to form part of the domestic law unless legislated. If it was considered necessary to introduce legislation to meet the obligations under a treaty, this was usually done prior to ratification as passage through Parliament is not guaranteed. It was argued by some, however, that ratification of a treaty was a positive statement by the Executive to the international and

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10 *ibid*, pp. 8-19; Campbell, Transcript of Evidence, 28 April 1997, p. 18

11 National Party of Australia, Policy Platform, p. 2; Australian Democrats, *Taking a Stand on Human Rights A Foreign Affairs Statement from the Australian Democrats*, February 1996, p. 4; Australian Greens, *Policy, Democracy*, 16 May 1997, p. 5

12 Department of Foreign Affairs and Trade, *op cit*, p. 10

Australian communities that administrative decisions would accord with the terms of the treaty.<sup>13</sup>

1.11 Professor Kolosov, the Deputy Chairman of the United Nations Committee on the Rights of the Child, stated that the 1993 Vienna Conference on Human Rights recognised unanimously that the promotion of and respect for human rights is no longer a domestic affair but the international community as a whole is interested in the activities of the individual states and that there is a common responsibility for human rights.<sup>14</sup> Dr Tobin cautioned, however, that Australia should not automatically treat international conventions as repositories of law capable of overriding Australian legislation although they may mark out significant moral truths and clarify moral realities and progress.<sup>15</sup>

1.12 In Australia, conventions can be used as an aid to statutory interpretation, as an influence on the development of common law and as an influence on administrative law.<sup>16</sup> Recent cases such as *Mabo v Queensland (No. 2)*,<sup>17</sup> *Dietrich v The Queen*<sup>18</sup> and *Minister for Immigration and Ethnic Affairs v Teoh*<sup>19</sup> commented on the relevance of treaties. In the *Teoh* case, Justices Mason and Deane found that the fact that a convention has not been incorporated into domestic law did not mean that its ratification holds no significance for Australian law.<sup>20</sup>

In that case the Court decided that ratification of a treaty gave rise to a 'legitimate expectation' that administrative decision-makers would act consistently with the terms of the treaty even if those terms had not been legislated into domestic Australian law. If the decision maker proposed to make a decision inconsistent with that legitimate expectation, the court held that procedural fairness required that the person affected be given notice and an adequate opportunity to reply.<sup>21</sup>

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13 Beltz C (1995) 'The Teoh Case: Human Rights - What do Australians expect from the Government?' *Human Rights Defender* June 1995, 2, p. 11 cited in National Children's and Youth Law Centre, Submission No. 321, Annexure 2, p. 9

14 Kolosov, Transcript of Evidence, 3 September 1997, p. 1534

15 Tobin, Transcript of Evidence, 5 August 1997, p. 1159

16 International Law Teachers, The University of Melbourne, Submission No. 188, p. 3

17 *Mabo v Queensland (No. 2)* (1992) 175 CLR 1

18 *Dietrich v The Queen* (1992) 177 CLR 292

19 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273

20 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353, p. 363

21 Department of Foreign Affairs and Trade, *op cit*, p. 14

1.13 On 10 May 1995, the Labor Government issued an Executive Statement setting aside the 'legitimate expectations' and introduced the Administrative Decisions (Effect of International Instruments) Bill 1995 to overcome the problems raised by the Court's decision. However, this lapsed with the prorogation of Parliament. On 25 February 1997, the Coalition Government issued a Joint Statement noting that it is the role of the Australian Parliament to implement our treaty obligations by changing Australian legislation and reiterating the view that ratification of a treaty does not give rise to 'legitimate expectations' in administrative law.<sup>22</sup> The Administrative Decisions (Effect of International Instruments) Bill 1997 remains before Parliament.

1.14 Subsequent to the *Teoh* case, the applicant has been able to remain in Australia, notwithstanding his criminal record for a number of serious drug offences. Since that decision in 1995, some deportation cases have taken this decision into account allowing the parent to remain in Australia in the best interests of the children.<sup>23</sup> In other cases, however, it was decided that on balance, in considering the best interests of the child and the welfare of the community, that in the light of the applicants criminal record, there was insufficient justification to prevent deportation.<sup>24</sup>

1.15 It was argued that it is difficult to reconcile the Government's response to the *Teoh* decision with the commitment under the Convention to 'undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised'.<sup>25</sup> Concern was also expressed that the legislation may also invalidate a number of other pieces of legislation which depend on the treaty's power for their validity.<sup>26</sup>

## Federal and State and Territory jurisdictions

1.16 Under the Constitution, legislative, executive and judicial powers are shared by the Federal and State and Territory governments. The Constitution provides specified powers for the Federal Government while the others such as children, education, employment, public health, housing and general criminal

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22 Downer A and Williams D, Joint Statement The Minister for Foreign Affairs and the Attorney General and Minister for Justice *The Effect of Treaties in Administrative Decision-Making*, 25 February 1997, pp. 1-2

23 For example *Lam v. Minister for Immigration and Multicultural Affairs* No. N96/364 AAT No. 11936; *Vaitaiki v Minister for Immigration and Ethnic Affairs* No. NG 542 of 1997 FED No. 5/98

24 For example *Salameh v. Minister for Immigration and Ethnic Affairs* No. NG 889 of 1995; *Omar v Department of Immigration and Multicultural Affairs* No. VG 569 of 1997

25 International Law Teachers, The University of Melbourne, Submission No. 188, p. S 1293

26 Rayner, Transcript of Evidence, 29 September 1997, p. 1560

law fall within the jurisdictions of the States and Territories. The Federal Government can exert some influence over these matters through its financial powers.

1.17 When a country which has a Federal system ratifies a convention then it applies to all levels of government. For this reason there have been a number of occasions such as the *International Covenant on Civil and Political Rights 1966*, where Australia has used Federal clauses in regard to respective Constitutional powers and arrangements between the States and Territories and the Commonwealth.<sup>27</sup> As signatory to the *Convention on the Rights of the Child* it is the responsibility of the Commonwealth Government to ensure that legislation and policy comply with the Convention. In situations where a State or Territory is unwilling to amend the relevant legislation, the Commonwealth may consider passing its own legislation.<sup>28</sup>

1.18 These matters are decided, where possible, in a cooperative manner and there are a number of avenues for consultation with the States and Territories. Consultation mechanisms include the Treaties Council which is an adjunct to COAG and comprises the Prime Minister, Premiers and Chief Ministers. The Commonwealth-State Standing Committee on Treaties comprising departmental representatives from the States, Territories and the Commonwealth, also plays a valuable role.

1.19 Concern has been expressed at the potential impact of international treaties by the Commonwealth using its external affairs power to encroach on the jurisdictions of the States and Territories.<sup>29</sup> It has been suggested that over time, the Commonwealth has gradually eroded the powers of the States, and in the area of international treaties this has been done by application of Section 51 of the Constitution.<sup>30</sup> However, just prior to the ratification of the *Convention on the Rights of the Child*, the then Minister for Foreign Affairs, Gareth Evans, told the Senate that:

... at the moment the Government's judgement is that no Australian law is in contravention of the provisions of this particular convention. The utility of the convention is not in order to give the Government any additional legislative

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27 *International Covenant on Civil and Political Rights*, United Nations Treaties Series Volume 999, p. 178

28 Department of Foreign Affairs and Trade, *op cit*, p. 15

29 Todd, Submission No. 1, p. S 2; Endeavour Forum, Submission No. 8, p. S 26; Craigslea Branch, National Party of Australia, Submission No. 9, p. S 32; Boyd, Transcript Evidence, 9 July 1997, p. 905

30 Senate Legal and Constitutional Affairs Reference Committee, *op cit*, p. 107

authority it may have lacked at the Federal level to do things which are not being done at the State level.<sup>31</sup>

1.20 Minister Evans also stated that there was no single area of existing State law that was in any significant way at risk by the provisions of the Convention.<sup>32</sup> Nonetheless, the Western Australian Government remained concerned about any possibility of the Commonwealth using the external affairs power to implement the elements of this Convention.<sup>33</sup>

1.21 The Attorney-General's Department expressed the view that the Commonwealth has very little responsibility for the direct implementation of the Convention.<sup>34</sup> They added that while the Convention contained obligations for Australia which potentially gave rise to Federal Constitutional power to enact legislation under the Convention, it did not mean that it had to be used.<sup>35</sup> Further, the Convention did not give the Commonwealth the legislative power to enact legislation with regard to children *per se* and that legislation would have to be relevant to Australia's obligations under the Convention.<sup>36</sup>

1.22 In relation to the matters embodied in the *Convention on the Rights of the Child*, the Commonwealth Government has power relating to marriage, divorce, and in relation there to parental rights, custody and guardianship of minors (with the exception of State welfare legislation), benefits to students, social security payments to families and young people, and aboriginal affairs. The Commonwealth does not have specific power in relation to education, employment, public health, housing, general criminal law, child welfare and child protection. The Commonwealth, however, does retain the capacity to direct expenditure in these areas under Section 96 of the Australian Constitution and thereby has indirect power to influence State and Territory policy direction.

1.23 Therefore, the majority of policy areas which impact on children fall under the jurisdictions of the Australian States and Territories which have resulted in a complex array of legislation and policies determining how services for children are delivered. These differ from State to State. The *Convention on the Rights of the Child* has not been incorporated into Federal legislation as the

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31 Evans G, Minister for Foreign Affairs and Trade, Questions Without Notice, Draft Convention on the Rights of the Child, *Senate Hansard*, 22 November 1989, p. 3030

32 Evans G, *Estimates Committee Hansard*, Committee B, Department of Foreign Affairs and Trade, 11 September 1990, pp. 46-47

33 Ashford, Transcript of Evidence, 3 July 1997, p. 530

34 Jackson, Transcript of Evidence, 28 April 1997, p. 9

35 Campbell, Transcript of Evidence, 28 April 1997, p. 16

36 *ibid*

previous Government was of the opinion that domestic laws and policies were congruent with the Convention.<sup>37</sup>

1.24 The States, Territories and the Commonwealth cooperate on a range of matters to develop a consistent approach. There are a number of intergovernmental initiatives including: the 1993 Australian Youth Policy; the Family Court has protocols with State and Territory welfare agencies and children's or youth courts; income support; protocols between Commonwealth and State and Territory welfare agencies; Standing Committee of Attorneys-General; Standing Committee of Social Welfare Administrators; and Ministerial Council on Education, Employment, Training and Youth Affairs. There is also a National Campaign against Violence and Crime and a National Child Abuse Prevention Strategy. There are also a number of non-government initiatives including the Australian Youth Policy and Action Committee, Australia Youth Foundation, and Australian Association of Young People in Care.<sup>38</sup>

1.25 The Human Rights and Equal Opportunity Commissioner believed that there is a need for greater Commonwealth leadership in the development of national standards, coordination of policy development, monitoring of the service provision and other matters affecting children.<sup>39</sup> The Ethnic Child Care, Family and Community Services Cooperative Ltd also commented that a comprehensive plan of action was needed to implement the Convention on a long term basis which should be developed in partnership with all the stakeholders.<sup>40</sup>

1.26 The Youth Action and Policy Association supported a whole of government approach in the provision of services for young people.<sup>41</sup> The Committee was given examples of services that 'fall through the cracks' and it was suggested that Australian children should not have fewer rights in any jurisdiction in this country.<sup>42</sup> It was also argued that bureaucrats and government departments hold considerable power in decision making and policy making. Because they are making determinations on matters such as social welfare, education, health, the legal system, refugees and immigration, a coordinated approach is therefore important.

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37 *Australia's Report under the Convention on the Rights of the Child*, December 1995, p. 2

38 Human Rights and Equal Opportunity Commission, Submission No. 336, p. S 1891

39 *ibid*, p. S 1869A

40 Ethnic Child Care, Family and Community Services Co-operative Ltd, Submission No. 125, p. S 664

41 Morey, Transcript of Evidence, 9 May 1997, p. 364

42 Barnardos Australia, Submission No. 101, p. S 486; Burdekin, Transcript of Evidence, 5 August 1997, p. 1286



1.27 Another concern expressed was that the Federal Government would use federalism as an excuse for not insisting that the States and Territories uphold the international human rights obligations.<sup>43</sup> The Australian Early Childhood Association commented that if the political will is absent, then the federal structure becomes a convenient excuse for inaction.<sup>44</sup> The Federal system, however, provides an opportunity for increased discussion on areas of difference, can lead to the implementation of best practice models through the participation of a number of States and Territories and enables approaches to be developed that are adaptable and appropriate to regional circumstances.

## Convention on the Rights of the Child

1.28 The *Convention on the Rights of the Child* stemmed from earlier declarations including the League of Nations Declaration of Geneva 1924 to protect children from exploitation and hardship. The United Nations Declaration on the Rights of the Child 1959 was motivated by a desire to protect children from the horrors of wars and forced conscription; starvation, poverty and easily preventable disease; working under exploitative and hazardous conditions; becoming child refugees; the traffic and sale of children; and from becoming homeless children.

1.29 The 1978 draft *Convention on the Rights of the Child* sought to make the principles in the Declaration binding and to draw together the rights that were expressed in disparate documents, such as the *Universal Declaration on Human Rights 1948* (UDHR). The International Bill of Human Rights is a series of documents which include the UDHR, the *International Covenant on Economic, Social and Cultural Rights 1966* and the *International Covenant on Civil and Political Rights 1966* (ICCPR) and the two optional protocols to the ICCPR.<sup>45</sup> The *Convention on the Rights of the Child* was designed to draw together certain basic rights that apply to everyone and to address children's need for care and protection. There is a significant controversy as to whether all of the rights are appropriate for children.<sup>46</sup>

1.30 Although many of the rights contained in the Convention are to be found in these human rights documents, the United Nations recognised the need for a

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43 Central Land Council, Submission No. 399, p. S 2233

44 Australian Early Childhood Association, Submission No. 394, p. S 2211

45 Tonti-Filippini, Fleming, Fisher, Krohn and Coghlan, Submission No. 187, p. S 1262

46 See Hafen B and Hafen J (1996) 'Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child', *Harvard International Law Journal* 37 (2): 449-491

specific instrument to provide special safeguards for the care of children because of their physical and mental immaturity, particularly for those children living in exceptionally difficult conditions. It was submitted that these rights did not arise because of the Convention but they are human rights and the Convention summarises those rights in relation to children.<sup>47</sup>

1.31 The Convention like all other human rights treaties is a political compromise. The debates and politics involved in drafting the Convention are recorded in the *Travaux Preparatoire*,<sup>48</sup> or records of the working groups.

1.32 The Convention encompasses the 'best interests of the child' as a primary consideration and seeks to protect children, to promote their well being and to ensure that they have an appropriate place in society. The Convention recognises the civil, cultural, economic, political and social rights of children including health, education, an adequate standard of living, and the child's own culture, religion and language. It asserts young peoples' rights to form and express their own views, thoughts, conscience and religion, privacy and freedom of association and peaceful assembly.

1.33 The Convention also aims to protect children from economic exploitation and from performing hazardous work; sexual exploitation including the use of children in pornography or prostitution; abduction, and the sale of and trafficking of children. It covers many forms of physical or mental violence, injury or abuse, neglect, maltreatment or exploitation, including sexual abuse, torture, capital punishment or life imprisonment without the possibility of release. There are now two protocols to the Convention being developed, one dealing with sexual exploitation of children and the other dealing with children participating in armed conflict.

1.34 The Convention was adopted by the United Nations General Assembly on 20 November 1989 and came into force on 2 September 1990. The Convention has been signed by 191 State Parties, far more than for any other human rights treaty and only three nations are yet to make their full commitment. However, a substantial proportion of countries ratifying the Convention have placed a wide range of reservations and declarations on a number of the Articles. Owing to the overwhelming level of ratification, and the widespread use of the Convention by children's rights groups and non-

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47 National Children's and Youth Law Centre, Submission No. 321, p. S 1775; Burnside, Submission No. 94, p. S 454

48 Detrick S (1992) *The United Nations Convention on the Rights of the Child: A Guide to the Travaux Preparatoires* Martinus Nijhoff Publishers

government organisations (NGOs), it is considered by many to be an international accord on the rights of the child.

1.35 Australia signed the *Convention on the Rights of the Child* on 22 August 1990, and it was ratified on 17 December 1990. It came into effect for Australia on 16 January 1991. On 22 December 1992, the Attorney-General made the Convention an international instrument within the terms of the *Human Rights and Equal Opportunity Commission Act 1986* pursuant to Section 47(1). This replaced the 1959 *Declaration on the Rights of the Child* which Australia had previously included as a schedule to the former *Human Rights Commission Act 1981*. This does not make the Convention part of Australian domestic law, however, breaches can be reported to the Commission.<sup>49</sup>

1.36 At the time of ratification, the Convention aroused significant misgivings within some sections of the Australian community as it did in some other countries. These groups and individuals believed that the Convention gave children and governments too many rights, thereby inhibiting parents' rights to raise their family in the way they believed to be most appropriate. The then Government argued strongly that, as Australia interpreted the Convention, the rights and role of the parents were not diminished:

No caring parent or guardian need be remotely concerned that the Convention on the Rights of the Child will in any way diminish his or her traditional role. The Convention clearly recognises the family as the fundamental unit of society. It does have regard, of course, to the responsibility of governments to safeguard the welfare of children where parents or others responsible fail to do so.<sup>50</sup>

1.37 Australia was instrumental in having Article 5 which refers to the responsibilities, rights and duties of parents, inserted into the Convention.<sup>51</sup> Mr Burdekin expressed his concern that up to three years before the Convention was finalised, there were virtually no provisions encompassing the role of parents and the protection of families.<sup>52</sup> Ms Dolgopol commented that the NGOs had unsuccessfully attempted to have articles inserted which related to families and the rights of parents.<sup>53</sup>

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49 Hall, *House of Representatives Hansard*, 1 September 1993, p. 699

50 Evans, *Estimates Committee Hansard*, Committee SFA, 11 September 1990, p. 50

51 Detrick S (Ed) (1992) *op cit*, pp. 157-162

52 Burdekin, Transcript of Evidence, 5 August 1997, pp. 1287-8

53 Dolgopol, Transcript of Evidence, 17 April 1998, p. 1568

1.38 Ms Evatt submitted that in relation to the principle of States' responsibility, the question of whether a State is accountable for violations at the hands of private individuals has not been resolved, other than in situations where the rights of individuals are being violated on an extensive scale, in which case the State is required to take action.<sup>54</sup>

1.39 Another area of concern was the lack of consultation with the community prior to ratification although adequate consultations appeared to have occurred with State and Territory governments throughout the 10 years it took to draft the Convention. There was at least one representative from the States and Territories on the Australian delegation and there was a 'fair level' of consultation on the issues referred back to Australia.<sup>55</sup> From 1980 onwards the Convention was on the agenda of the Standing Committee of Attorneys-General and Australian delegates attended all of the sessions of the Convention's drafting committee.<sup>56</sup> The States were supportive of ratification but raised concerns about the interpretation of the Convention in relation to the separate imprisonment of juveniles, the abortion issue, juvenile employment laws and the potential for Commonwealth legislative power to override State laws in reliance of the Convention.<sup>57</sup>

1.40 As evidence of the lack of consultation at the community level, a number of members of Parliament commented on the extent of concern in their electorates.<sup>58</sup> There have been 70 petitions carrying 9197 signatures tabled in the Senate and 172 petitions with a total of 34 443 signatures tabled in the House of Representatives relating to the Convention. Of these:

- 57 petitions (17 225 signatures) called for more debate or a referendum;
- 85 petitions (7912 signatures) called for amendments or reservations;
- 71 petitions (15 487 signatures) opposed ratification; and
- 29 petitions (3016 signatures) requesting the disallowance of the Convention being made an international instrument under the

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54 Evatt, Transcript of Evidence, 17 April 1998, p. 1566. Ms Evatt was a former Chief Judge of the Family Court of Australia, former Commissioner in the Human Rights and Equal Opportunity Commission, and is currently a Member of the United Nations Human Rights Committee.

55 Dolgopol, Transcript of Evidence, 4 July 1997, p. 662

56 Human Rights and Equal Opportunity Commission, Submission No. 336, p. S 1875

57 Bolkus, *Senate Hansard*, 10 May 1995, p. 225

58 For example Charles, *House of Representatives Hansard*, 1 September 1993, p. 705; Duffy, *House of Representatives Hansard*, 17 October 1990, p. 3051; Ronaldson, *House of Representatives Hansard*, 8 November 1990, p. 3577

Commonwealth's *Human Rights and Equal Opportunity Commission Act 1992*.

1.41 There were major concerns expressed in the community that the Convention could be interpreted as allowing governments to interfere in family matters such as the removal of children from families; the rights of children, particularly those in relation to the right to be heard, access to information, freedom to choose their own religion, education, association and peaceful assembly; and the use of capacity-based criteria instead of age-based criteria in determining the child's maturity.

### **Australia's interpretation of the Convention**

1.42 The Regional Office of the United Nations High Commissioner for Refugees commented that every word and letter of international conventions are negotiated, often over a long period of time until a consensus emerges.<sup>59</sup> For this reason Conventions arising from compromise do not perfectly suit any country but that is their nature.<sup>60</sup> Although the general principles of a Convention may be articulated in a clear and comprehensible manner, there is neither one understanding of the nature of the right or a single valid method of achieving recognition of the rights.<sup>61</sup>

1.43 Professor Triggs submitted that in interpreting international treaties the overall intention must be considered rather than a 'line-by-line, narrow, strict approach'.<sup>62</sup> It was suggested that conventions should be used as a framework and a document for dialogue which needs to be interpreted within the Australian context.<sup>63</sup>

1.44 Mr Kaye argued that the difficulties of vagueness are also in our common law such as in terms of the law of negligence and the definition of 'a reasonable person'. He added that principles such as the 'best interests of the child' present

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59 Assadi, Transcript of Evidence, 28 April 1997, p. 107

60 *ibid*

61 Dolgopoulou (1993) 'The Convention on the Rights of the Child as Part of International System for the Protection of Human Rights', in Harvey J Dolgopoulou and Castell-McGregor S (Eds) *Implementing the UN Convention on the Rights of the Child in Australia*, Children's Interests Bureau South Australia, p. 69

62 Triggs, Transcript of Evidence, 10 July 1997, p. 1020

63 Redman, Transcript of Evidence, 4 July 1997, p. 735; Ford, Transcript of Evidence, 9 July 1997, p. 848; Alford, Transcript of Evidence, 1 May 1997, p. 232

the same problems but have the advantage that they can be adapted in different situations.<sup>64</sup>

1.45 Others argued that this broadness was a particular failing of human rights treaties in general because of the level of abstraction needed to encompass an international spectrum of situations which can lead to vague terminology. It was suggested that interpreting many of the articles becomes a minefield because the Convention is couched in such vague language.<sup>65</sup> In situations where the interpretation of treaties resulted in changes to the common law which Government believes adversely or incorrectly applied the intent of the treaty, legislation may be introduced to clarify the Governments intention at the time of ratification as exemplified in the Administrative Decisions (International Instruments) Bills subsequent to the *Teoh* case.

1.46 It was suggested that with the *Convention on the Rights of the Child* the articles are badly worded and ambiguous and therefore open to different interpretations, and may have the effect of overriding the legitimate rights of parents and destroying the autonomy of the family.<sup>66</sup> Mr Francis expressed the view that much of the Convention is ambiguous and the meaning of many sections need to be clarified.<sup>67</sup>

1.47 Mr Burdekin argued that one of the reasons there are so many defects in this Convention is that many governments did not take it seriously.<sup>68</sup> Professor Hafen also suggested that the international community was uncritical in the area of human rights allowing some of the 'least popular and least substantial ideas' to be adopted in uncritical forums without public, academic or practical scrutiny and to be unveiled as international norms.<sup>69</sup> Further, concern was also expressed by some groups that the Convention is a major departure from the original Declaration on the Rights of the Child 1959 and that the Convention is an inferior document because there is less emphasis on the family as the basic and natural unit of society.<sup>70</sup>

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64 Kaye, Transcript of Evidence, 4 August 1997, pp. 1085-6

65 Francis, Submission No. 3, p. S 10

66 Niven, Submission No. 4, p. S 13; Smyth, Transcript of Evidence, 4 August 1997, p. 1098

67 Francis, Transcript of Evidence, 10 July 1997, p. 1046

68 Burdekin, Transcript of Evidence, 5 August 1997, p. 1287

69 Hafen, Transcript of Evidence, 9 May 1997, p. 346

70 For example, Santamaria, Transcript of Evidence, 9 July 1997, p. 894; Nile, Transcript of Evidence, 5 August 1997, p. 1217

1.48 Some argued that the broadness of terms within the Convention allowed for a deliberate or accidental misreading of the articles to form the basis of an unjust or unfair law. However, Judge Jackson expressed the view that any document approached in an antagonistic and literal way by taking sentences and phrases out of context, can be made to mean almost anything.<sup>71</sup> Professor Kolosov has conceded that there may be different interpretations.<sup>72</sup> The Nambucca Valley Christian Community School believed that the Articles are capable of reasonable interpretations which would satisfy most parents, but there are no guarantees that there will be a reasonable interpretation.<sup>73</sup>

1.49 It was also argued that human rights conventions need to be broad to encompass a vast range of aspects in different countries. They also need to be weakly couched to be accepted by fiercely independent States Parties, and to contain little in the way of enforcement to allow governments to tailor it to their particular needs and their level of willingness to comply. The opaque, vague language enables States Parties a 'margin of appreciation' to translate conventions into their own domestic law.<sup>74</sup>

1.50 At the time of ratification the then Australian Government believed that Article 5 was sufficient to protect parents' rights as countries are required to ensure that parents are able to discharge their responsibilities, rights and duties to direct and guide their children in the exercise of the various rights formulated in the Convention.<sup>75</sup>

1.51 The then Opposition sought reservations on Articles 12 to 16 and 28.<sup>76</sup> Senator Hill also expressed the view that the Convention does not give adequate recognition to the rights and duties of parents with respect to the education as well as the physical, social and moral development of their children, as did the earlier United Nations documents.<sup>77</sup> After the ratification, Senator Hill reiterated the Coalition's disappointment that the Government

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71 Jackson, Transcript of Evidence, 3 July 1997, p. 590

72 Kolosov, Transcript of Evidence, 3 September 1997, p. 1531

73 Nambucca Valley Christian Community School, Submission No. 197, p. S 1353

74 Charlesworth, Transcript of Evidence, 29 April 1997, p. 177

75 Tate M, Minister for Justice and Consumer Affairs, Questions Without Notice, United Nations Convention on the Rights of the Child, *Senate Hansard*, 18 December 1990, p. 5863

76 Peacock A United Nations Convention on the Rights of the Child, *House of Representatives Hansard*, 21 February 1991, pp. 1078-9

77 Hill R, Adjournment United Nations Convention on the Rights of the Child, *Senate Hansard*, 7 November 1990, p. 3675

failed to make reservations about the need to respect the rights and responsibilities of parents towards their children in key areas.<sup>78</sup>

1.52 In September 1993, the Liberal Party was reported to remain concerned that the Convention was seen, 'rightly or wrongly', as a threat to parental rights and the viability of the family as the principal unit in society.<sup>79</sup> There was also concern expressed that as the Convention now stands, children may be able to divorce their parents or sue their parents for spanking them, or legally prevent their parents from entering their bedroom.<sup>80</sup>

1.53 Professor Kolosov, Deputy Chairman of the Committee on the Rights of the Child, stated that legally binding interpretations are made by the States Parties themselves and that only interpretations adopted by a two-thirds majority of the signatories will be legally binding on all States Parties. Otherwise, all other interpretations are of an academic nature.<sup>81</sup> As a result, it is up to Australia as a nation to interpret and implement the articles of the Convention in the Australian context.

## Background to the Inquiry

1.54 The *Convention on the Rights of the Child* has now been signed by 191 States. As the world's most widely adopted human rights treaty it brings the weight of international attention on countries who fail to act within the spirit of the Convention. Australia has a unique relationship with the Convention. The Australian delegation to the drafting of the Convention pushed for the inclusion of important principles such as the place of the family and the notion of the 'evolving capacities' of the child. Article 5, one of the Articles that provides an overall framework for the Convention, was inserted on Australia's insistence.<sup>82</sup> Australia has also been outspoken in championing the Convention, and has lobbied for its signature and ratification by all states of the United Nations.

1.55 Since the *Convention on the Rights of the Child* was ratified, there have been a number of ongoing issues raised which prompted the Joint Standing

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78 Hill R, National Committee on Violence, Government's Response, *Senate Hansard*, 20 December 1990, p. 6151

79 'Sue worry over child laws' *Herald Sun*, 26 September 1993, p. 14

80 *ibid*

81 Kolosov, Transcript of Evidence, 3 September 1997, p. 1531

82 Detrick S (Ed) (1992) *op cit*, pp. 157-162; Alston P, 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights', in Alston P, (ed) *The Best Interests of the Child*, UNICEF, Clarendon Press, Oxford, 1994, p. 11



Committee on Treaties to inquire into the status of implementation of the Convention in Australia. These include the lack of consultation directly with the community prior to ratification; the continuing concerns within some sections of the community in relation to the potential infringement of parental rights; some perceptions of a lack of progress in improving the lot of Australia's children; the legislative implications of some recent court decisions; and community concerns about the impact of the Convention on Australia's sovereignty.

1.56 There had also been a number of reports in the media about the need for a children's commissioner, child abuse and neglect, paedophilia, problems with the health, welfare and education of Aboriginal children, abortion, services for disabled children, juvenile justice and family court issues, and refugee and asylum seeking children. These reports indicated a lack of consistency and national coordination as well a number of more specific areas where there are substantial inadequacies in the current levels of service provision for Australian children.