PROOF

COMMONWEALTH OF AUSTRALIA

JOINT STANDING COMMITTEE ON TREATIES

Reference: UN Convention on the Rights of the Child

SYDNEY

Friday, 17 April 1998

PROOF HANSARD REPORT

CANBERRA

JOINT STANDING COMMITTEE ON TREATIES

Members:

Mr Taylor (Chairman)

Mr McClelland (Deputy Chairman)

Senator Abetz	Mr Adams
Senator Bourne	Mr Bartlett
Senator Coonan	Mr Laurie Ferguson
Senator Cooney	Mr Hardgrave
Senator Murphy	Ms Jeanes
Senator O'Chee	Mr McGauran
Senator Reynolds	Mr Tony Smith

For inquiry into and report on:

1. the domestic ramifications of Australia having ratified the Convention;

2. Federal and State progress in complying with the Convention;

3. the difficulties and concerns arising from implementation in its current form;

4. possible inconsistencies between domestic jurisdictions and the need for agreed national standards;

5. the need for a mechanism to promote, monitor and report publicly on compliance and to implement public consultation processes;

6. the adequacy of the administrative, legislative and legal infrastructure in addressing the needs of children;

7. the adequacy of programs and services of special importance to children; and

8. any further action required in relation to the Convention.

WITNESSES

JOINT STANDING COMMITTEE ON TREATIES

UN Convention on the Rights of the Child

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Present

Senator Coonan (Acting Chair)

Senator Abetz	Mr Bartlett
	Mr Laurie Ferguson
	Mr Hardgrave
	Ms Jeanes
	Mr Tony Smith

Committee met at 4.06 p.m.

Senator Coonan took the chair.

DOLGOLPOL, Ms Ustinia, 79 McLauchlan Road, Windsor Gardens, South Australia 5087

EVATT, Ms Elizabeth Andreas, 67 Brown Street, Paddington, New South Wales 2021

HAFEN, Professor Bruce, First Counsellor, Pacific Area Presidency, The Church of Jesus Christ of Latter Day Saints, PO Box 350, Carlingford, New South Wales 2118

ACTING CHAIR (Senator Coonan)—I declare open the public hearing of the inquiry into the status in Australia of the United Nations Convention on the Rights of the Child. I would like to welcome Ms Ustinia Dolgolpol, Ms Justice Evatt and Professor Bruce Hafen. All of you have appeared before the committee before. In what capacity do you appear before the committee today?

Ms Dolgolpol—I understand mine is a personal appearance today.

Ms Evatt—I appear in my personal capacity.

Professor Hafen—I also appear in my personal capacity.

ACTING CHAIR—I will ask each of you to make a brief opening statement before I open the discussion to questions from the committee.

Prof. Hafen—Thank you. I welcome this opportunity to meet with you. I have submitted a written statement that I trust you all have received. That is my statement to you today, and I simply want to repeat what I say at the beginning of that statement and that is that I commend the committee for taking this work so seriously. This is not an easy task and you have a lot of other work to do. My viewpoint is a simple one: you have an opportunity to put Australia on the map internationally and do a favour for a world that, I think, does not understand what the children's rights convention intends and what it potentially does. So I consider this to be a significant opportunity and I welcome the chance to talk about it.

ACTING CHAIR—Do you wish to add anything further?

Prof. Hafen—I would simply say that, in preparing my statement, I tried to respond to Justice Evatt's comments on my work which you had asked her to provide for you. I acknowledge her capacity and background and found, as I read her work, that she and I share many common views about family law, as it has traditionally been known. The format in which I have written was to respond to the points she had raised as I thought that might be more helpful to the committee than starting from some more general frame of reference.

ACTING CHAIR—Thank you.

Ms Evatt—As Professor Hafen has just said, I was invited by this committee to provide written comment on an article written by him and also in respect of his evidence to this committee. He has now responded in writing. We are probably going to go round in circles. I would like to make a statement if I have the leave of the committee to do so.

ACTING CHAIR—Yes, please proceed.

Ms Evatt—I feel that there are misconceptions being presented about the Convention on the Rights of the Child. I understand that the thrust of Professor Hafen's submission is to ask this committee to recommend that Australia denounce the convention, which I would regard as an extremely serious and totally unwarranted step. I consider that this convention is a moderately drafted convention, as one would expect from a document that is essentially drafted by the representatives of governments. I can go into the process of drafting conventions if you want to.

The convention provides a framework of principles for the protection of children and the protection of the rights of children. It tackles some extremely difficult questions. The most difficult one relates to that three-way tension: the tension between the child (the child is the centre of needs and rights); the parent (the parent has both duties and rights in regard to children); and the state (which has obligations both to parents and to children). It is not an equation; it is a triangle. Inevitably, when you have that kind of triangle, there are tensions. They have to be resolved in the context of specific problems; they have to be resolved at the level of principle. At the level of principle, I think this convention does a very good job of trying to resolve those issues. I am looking particularly at article 5 when I say that, but there are other provisions.

I would like to say a couple of words about what it means for Australia to be a party to this convention. Despite the Teoh case, which I will not go into the details of, there is no way that any child in Australia can enforce any provision of this convention directly in the courts of Australia. Indeed, the convention itself does not require that Australia provide that kind of remedy to a child. By contrast, the Covenant on Civil and Political Rights, article 2, paragraph (3), requires that any person whose rights or freedoms under the covenant are violated have an effective remedy—the right to a remedy to be determined by competent, judicial, administrative or legislative authorities. That is the contrast. The obligation under the Convention on the Rights of the Child on the state is to ensure that those rights are enjoyed by children, not to provide remedies. There is one provision for remedy in the Convention on the Rights of the Child under article 37D. This is the habeas corpus remedy. Of course it is available to children as it is to everyone. The child also has that right under article 9(4) of the international covenant.

So what I am saying is that Australia has no obligation to provide legal remedies under the convention. It is not directly enforceable. But, if Australia fulfils its obligations fully, it should be a part of our law where it is necessary for the law to reflect its principles, or it should be part of our policies and practices where that is called for; so

each provision in the convention has to be assessed to see if it is adequately reflected in our laws, procedures and policies, and, if not, legislation or policies or programs may be necessary. That is the point at which Australia, along with every other country that is a party, has to resolve this three-way tension between the three elements: the child, the parent and the state. The principles are there in the covenant to allow those problems to be resolved.

There is another issue I think the committee should be aware of, and that is the principle of state responsibility. It is important in regard to this convention, because one of the most serious and difficult issues to face is whether the state is accountable under the convention for every infringement or every violation of a child's right when that violation occurs not at the hands of the state but at the hands of a private individual. This is a question of international law; there is authority on it. I must admit that I am not a complete authority on the international law of state responsibility; Ms Dolgolpol probably knows a lot more about it than I do. But there is authority for it.

The extent of the states' responsibility for private acts is an uncertain, unchartered area; it has not been finally resolved. At the most you can say that, when faced with a situation where it is clear that rights of individuals are being violated on an extensive scale, it is the responsibility of the state; the state must do something to prevent that occurring.

That is how we say a state may have responsibility for violence against women where that is an extensive phenomenon. A state that does nothing to prevent that kind of abuse may be found accountable for the violation of the woman's right to her personal security. If the state takes steps to prevent or punish domestic violence, then it has discharged its responsibility as far as that goes.

What I have just talked of there can be transferred to children. If there is a situation of abuse of children, then obviously the state is responsible for taking measures to stop it. If there is extensive abuse brought to light—and I do not mean by an individual but a pattern of abuse—the state must do something about that.

Let us look at a particular situation. There is cause for some thought here. I will only be a few more moments; I do not want to take up all of your time.

ACTING CHAIR—We will have a quorum problem very soon, and we need to give you the questions.

Ms Evatt—I will move to it very quickly. Take the situation of military service. You have to establish at what age a person is liable for military service. If it is under the age of 18, as it is in many, many countries—and the convention does not prohibit that—when can that child claim to be exempt from service on the ground of conscientious objection? Is the child's own belief relevant to that? I will say no more. That is just one

of the problems that arise.

ACTING CHAIR—Thank you. Ms Dolgolpol, we are very pressed for time. If you wish to make a statement, could you do so very quickly?

Ms Dolgolpol—I do wish to. Madam Chair, I have a number of comments, and perhaps I will have a chance to come back to them or be allowed to make a further written personal submission.

I think there has been a misapprehension on the part of members of the committee. Clearly, I have not read all of the submissions, only some of the written ones made to the committee. I think the history of how the convention came to be negotiated, including the provisions of articles 13 to 16, has not been clearly stated. I would like to read into the record—because I think it will inform today's debate—an excerpt from the report of the working group on a draft convention on the rights of the child.

ACTING CHAIR—How long is it?

Ms Dolgolpol—It is only three paragraphs; it is not very long.

Senator ABETZ—Could I move that it simply be incorporated?

Ms Dolgolpol—No, because it will inform our discussion today, and I think the members need to hear what it says before they put their questions—and, Madam Chair, I do not understand why I am being interrupted at this stage, when I have hardly had a chance to say anything.

ACTING CHAIR—If you are going to read the three paragraphs, and limit it to that, please do so quickly.

Ms Dolgolpol—Yes. But I would like to say where the document is from. It is the 1988 report of the working group that drafted the convention on the rights of the child.

Senator ABETZ—Where is that contained?

Ms Dolgolpol—It is a record from the Commission on Human Rights, and I would be more than happy to supply the entire document to the committee and to note the pages.

ACTING CHAIR—We will ask for that, yes, if we could.

Ms Dolgolpol—They are records that I brought with me, but they are now also obtainable on the Internet. At the point numbered 7 quater, which was introduced by the delegate of the United States of America, it states:

The States Parties to the present Convention recognize the right of the child not to be subjected to arbitrary or unlawful interference with his or her right to privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

This is one of the rights that has been the subject of some discussion in this committee about privacy issues. It further states:

In introducing that proposal, the representative of the United States of America stated that children not only had the right to expect certain benefits from their Governments; they also had civil and political rights to protect them from abusive action of their Governments. These rights are largely the same as those enjoyed by adults, although it is generally recognized that children do not have the right to vote. While children might need direction and guidance from parents or legal guardians in the exercise of these rights, this does not affect the content of the rights themselves. The United States proposal was intended to complete the process already begun by the working group of incorporating provisions from the International Covenant on Civil and Political Rights into the draft convention. The proposal reflects the recognition contained in the International Covenant that the ability of all individuals to exercise civil and political rights is not absolute, but is subject to certain limited restrictions that may be imposed by States. The proposal was designed to incorporate into the draft convention the right to freedom of expression, the right to freedom of association and to peaceful assembly, and certain privacy rights as elaborated in the International Covenant. The representative of the United States reminded the working group that these rights protect children from action of the State, and would not affect the legitimate rights of parents or legal guardians to provide direction and guidance to children.

37.The idea of including civil and political rights in the draft convention to reinforce the protection of children was strongly supported by several participants.

I might add here that my own personal notes from that time indicate that Australia was a strong supporter. It continues:

However, the legitimate rights of parents and tutors should be safeguarded, the balance between rights of children and rights of the family should be preserved and the wording of the article should be in line with the Covenants.

So the discussion that has taken place to suggest that these are somehow novel rights and were not taken from the covenant I think is clearly answered by that submission. In a previous 1982 and then 1983 discussion, the representative of the United States of America made clear that, in introducing his proposal for a right to freedom of conscious thought and religion, he was taking that right directly from the covenant and intended that that right should apply to children.

ACTING CHAIR—Thank you for putting that in context. What I propose to do is to try and be reasonably even about how each person will get an opportunity to answer questions. I perhaps will start with Senator Abetz. I invite each questioner to refer to the evidence and perhaps ask each of the witnesses whether they want to comment, if that is how you wish to proceed.

Ms JEANES—Madam Chair, could we just explain to the people appearing before us why we have the quorum problem, the time problem? Because there is a lot of us here, it would appear that we do not have a quorum problem, unless it was explained.

ACTING CHAIR—The quorum problem is that Mr Ferguson has to go, and there has to be a certain representation from each the parties; there has to be both government and non-government representation. That is the reason.

Senator ABETZ—Professor Hafen, it was suggested in Ms Evatt's introduction that you were supporting the denouncing of the convention. As I read your answer, you were suggesting deratifying and a re-ratification, which I think is important to put on the record. You go on to tell us about an NGO by the name of Family Voice that would be prepared to assist in taking these steps and complying with established UN procedures. Would you be able to take on notice giving us that further detail so that we can follow that up?

Prof. Hafen—Thank you. I appreciate the question because, as my paper shows—and perhaps Justice Evatt had not read my paper—I have never proposed that this group or anyone else denounce the entire convention. I think the majority of the language, the majority of the intent—so much about this convention—is worth while; it is needed. My concerns have been focused on the extent to which the convention moves toward child autonomy. I have stated that to the committee before and I will not repeat it, but I appreciate the opportunity for the clarification.

When I say I would recommend that you deratify, it is in order to simply reratify, excluding the particularly troublesome provisions which we are identifying quite specifically. That would leave Australia on record as having favoured the bulk of what is there, including a number of new items which provide for additional protections for children. As my paper states, my concern is the extent to which the convention moves from protection of children to creating choices for children unsupervised by parents, when children are still of an age where they need that supervision under traditional definitions of minority status.

In answer to the other part of your question, the group to which I refer is a group organised just within the last year or so. Upon recognising that what we have seen in this convention has also occurred in some others, this group was organised at my own law school. I am no longer there; I am here in Australia, having retired from my work as a law professor. I wrote the piece you have seen in the *Harvard International Law Journal* just months before I left the law school to come here.

My colleagues who are still there have become very active in this area. They are the ones who have helped me to find some of these materials. I have student research assistants who have helped. I am aware of their interest in trying to help with anything like that. They are the ones who call themselves Family Voice, and they are a registered

NGO.

Senator ABETZ—Can you pass on their details to the secretariat in due course?

Prof. Hafen—Yes, of course.

Senator ABETZ—I would be interested in following that up. I understand that Ms Evatt suggested that you opposed any state intervention in the family. That is not your position?

Prof. Hafen—No.

Senator ABETZ—It is just a question of where you draw the line?

Prof. Hafen—No. As I say in my paper and as I have said in my introduction here, as I read her comments I find that my view about family law—having taught and written in that field for a quarter of a century—is much like hers; that is, traditionally, there are intervention standards allowing the state to intervene when children need protection from abuse, neglect, when there is a custody dispute, even when children reach some level of serious difficulty or incorrigibility themselves. It is an extreme degree.

Those are the traditional standards that have allowed intervention. I believe that is a very important thing for states to be able to do. It is reflected in our traditional family laws. I have never questioned whether the basic principles that are found in those laws in most of the democratic countries are sound. I think they are sound.

But arguments about changing intervention standards have tended to be very complicated and difficult. There is a great deal of literature. The American Bar Association had a special working group on whether intervention should be made easier or more difficult. That subject is a massive one. I guess that is why it troubles me to see the possibility that intervention standards could be changed or could be subject to change by the introduction of new phrases and terms that seem to change the assumptions without the analysis that ought to be required.

Senator ABETZ—Ms Evatt, in your submission to us of 19 June where you discuss the phrase ‘autonomous child’, the assertion is made that, basically, Professor Hafen only got that phrase or terminology from a publications catalogue of the UN. You then conclude that that is not a proper basis for an argument as to the law embodied in the convention itself.

I trust that you have read Professor Hafen’s response to that where he quotes Cynthia Cohen and Nigel Cantwell—if not amongst others, at least those two. Do you concede that Professor Hafen does have a bit more to his armoury rather than just a UN catalogue publication to which you have sort of dismissively referred?

Ms Evatt—I do not concede the point at all because I do not consider that that is the way this convention should be looked at.

Senator ABETZ—Others have said that there is a difference—

Ms Evatt—Where are they? I am sorry, I have lost the point there.

Senator ABETZ—There is a difference in how you would argue that the convention be interpreted and I understand that—

Ms Evatt—What page is that in the submission?

Senator ABETZ—On pages 3 and 4 Professor Hafen says, for example, that Cynthia Price Cohen talks about:

. . . creating "an important addition to human rights jurisprudence" in the form of "individual personality rights" for children, a concept that includes such adult-style civil rights as "speech, religion, association, assembly and the right to privacy." She calls this a "totally new right."

This flies in the face of saying that it is just rewording the established situation. On page 4 Nigel Cantwell of Defence for Children International is also quoted. We can argue whether their interpretation is right or wrong, and I suppose that is what we are dealing with, but at the end of the day I am putting to you that Professor Hafen has more to his armoury than suggested by how you have just dismissively dealt with the matter by saying, 'That was just a UN catalogue.' The Defence for Children International spokesman has said the same.

Ms Evatt—I would want to look for authority in the travaux preparatoires or in the writings of reputed international lawyers on this subject. I am not going to deny that other people may have said what is quoted here. How could I deny it? I do not deny that.

Prof. Hafen—Senator, I did not want to load you down with too much paper. I have referred to pages 457 through 461 of my article in the *Harvard International Law Journal* and the footnoting there is extremely extensive with some quotations from the book Justice Evatt just asked about. That is where Nigel Cantwell did his work. One of the most substantial sources I found in my research where I ran across Cynthia Cohen's work was a publication by the American Bar Association Committee on Children. They pulled together a large number of essays and articles on various features of the convention. I have tried to summarise in my notes, which are much too lengthy to be talked about here, the views of those who submitted. I would guess that there are 20 or 30 different essays in this book and I would consider the American Bar Association a pretty reputable source. It is clear that everyone who analysed the convention and submitted materials published in that book believed that the convention includes new rights for children. That is where I found the phrasing about autonomy and about protecting children from any invasion of their autonomy. I would like that foundation to be clearly known to you.

ACTING CHAIR—Ms Dolgopol wants to make a comment.

Ms Dolgopol—Having been present for five years during the drafting of the convention and knowing the author of the article that Professor Hafen refers to, I can say that I am afraid Ms Cohen was not an international lawyer nor did she have any background in international human rights before she started this exercise. That was my very reason for reading into the record the travaux preparatoires. Justice Evatt points out that, unlike the law in the Australia where you have to interpret a statute on its face, when you are interpreting an article from an international instrument you are supposed to go back to the travaux preparatoires to understand the content. What I just read to the committee was part of the travaux preparatoires explaining the United States view as it introduced those particular articles for the convention.

There have been numerous international studies and there is something at the basis of the convention that this committee needs to keep in mind. The history of rights in the United States is very different from the history of rights in Australia and in continental Europe. Australia has a very different history. Politically it has always been amazingly active in the international sphere and in the development of international law. The United States has been a much more isolationist country and has in fact refused to ratify the vast majority of the international human rights instruments. It is only a party to the Covenant on Civil and Political Rights and, I think, the convention against torture. It is not a party to the convention on the elimination of racial discrimination. It is not a party to the genocide convention. It is not a party to the Convention on the Elimination of Discrimination Against Women.

Senator ABETZ—Was Ms Cohen involved in developing the CRC?

Ms Dolgolpol—Not these rights. She was not involved. She was involved as a representative of an organisation called Human Rights Internet which was the only US based NGO of a group of 40 NGOs. She was not involved in those provisions. It was a United States delegation. There is a bit of history to this: the United States introduced this on purpose to get at the Soviet Union. That was very clear. As you look at the records, there is a continuing debate from 1982 onwards between the United States and the Soviet Union, with the United States saying, ‘We want civil and political rights in this convention,’ and the Soviet Union saying, ‘No. This convention should be about economic, social and cultural rights.’

In fact, it was a delegate of China that objected most strenuously to the inclusion of civil and political rights in this convention. They went on and on about it. Of course, we were getting to the point where students in China were beginning to demonstrate. In the year before the Tiananmen massacre the delegation of China stood in this committee and said, ‘Children should not be given a right to freedom of speech and freedom of association.’ So the history of the development of these things involves the US pushing in an effort to get at the then Soviet Union.

Ms Evatt—May I respond very briefly; I have not responded to what he last said. There are only two countries that have not ratified this convention. The other one is Somalia, which does not have a government able to ratify it.

The other point I want to make is that I personally am concerned with the proper interpretation and application of this convention in Australia and in other countries rather than engaging in what I do not see as a very fruitful debate about who said what—unless it is relevant to that interpretation.

Senator ABETZ—With respect, Ms Evatt, this is a parliamentary committee and we will ask whatever questions we like.

Ms Evatt—Of course you may. I respect that. I just want to tell you where I am coming from. That is all.

Senator ABETZ—Ms Cohen was involved in the development of the CRC. What aspects of it was she involved in? Are you saying that only those involved in international law who were involved in the development of the CRC are clothed with some degree of authority to comment on what it actually means?

Ms Dolgolpol—No, I am not saying that.

Senator ABETZ—It appears that Ms Cohen has walked away, having been actively involved in its development, with a misconception as to what she is supporting.

Ms Dolgolpol—All of us would be aware that there are people in life who write and publicise themselves a lot, whether or not they are the prime movers. When people write things you need to be careful about assuming that they in fact were a prime mover and that they are not in fact reporting on the efforts of other people. Perhaps many of the other groups that were involved were also too busy in other human rights work to continue to discuss and to go on and to push their own barrow. There has been a concern expressed about that in many quarters with respect to those articles.

There has also been concern expressed in many quarters where people are involved about whether those articles are an accurate interpretation of what happened. Ms Cohen was involved in an NGO group called the Informal Ad Hoc Group on the Drafting of the Convention on the Rights of the Child, a group to which I also belonged. I was one of the founding members. That group did look at articles of the convention. It did talk about what it thought were useful provisions. In my personal submission I will point out an article that that group wanted in on the rights of the family which, unfortunately, did not show up. That article gave far more recognition to family issues than we actually have, to some extent. It is unfortunate the way some of the wording took place in the convention because it—

Senator ABETZ—Have you got that wording? It may be of great assistance to us.

Ms Dolgolpol—I will read to you from the NGO document published in 1984; I will hold it up so that you can see that it is the original copy of the official document from the consultation to the NGO working group.

ACTING CHAIR—May we have a copy?

Ms Dolgolpol—Yes.

Senator ABETZ—Can that section be incorporated?

ACTING CHAIR—Is it the wish of the committee that that section of the document be incorporated in the transcript of evidence? There being no objection, it is so ordered.

The section of the document read as follows—

Article dealing with the importance and role of the family

(proposed new article)

Although different aspects of the importance of the role of the family are dealt with in various articles, it was felt that the fundamental significance of the parent-child relationship justifies the inclusion of an article devoted solely to this issue. If such an article were to be included, it was felt that its most appropriate position would be immediately preceding the article on social security and standard of living.

1. The protection of the child's interests cannot be dissociated from the protection of the child's natural family.

2. The responsibility of parents is to do everything in their power to ensure their children's well-being and harmonious development. Parents shall participate in all decision-making and orientation with regard to their children's education and future.

3. The States Parties to the present Convention undertake to recognize, support and protect the family unit in every way to enable it to carry out its function as provider of the most suitable environment for the child's emotional, physical, moral and social development.

Mr LAURIE FERGUSON—Not knowing all of these authors, are these people essentially children's advocates? This is more of a polemic contribution than a lot of them—is that what you are saying?

Ms Dolgolpol—There were people like Geraldine Van Bueren, who has actually written a major international treatise on the rights of the child, who were lawyers. She represented Amnesty International. I work for the International Commission of Jurists as a legal officer, having come from the United States with a law degree where I practised law and worked as an associate to a Federal Court judge. Ms Cohen was a recent law graduate, a mature aged student who had a particular interest but no background in international law and had never worked internationally before, unlike many of the other participants who have worked consistently at the United Nations and have a strong background. There were almost 30 organisations which participated in this group, and when the committee has a copy, you can see it.

Mr LAURIE FERGUSON—You have said she does not have the skills and the knowledge et cetera. She has put forward a view which I have not read. Are there lawyers who subsequently attacked her view of what had happened? Are there any articles which address that?

Ms Dolgolpol—There are people who have put forward and written extensively about the fact that the rights in the convention have come from the Covenant on Civil and Political Rights. It is not necessary to attack someone personally. All you need do is state what you see as the relevant—

Mr LAURIE FERGUSON—I did not say personal attacks. You are disputing her analysis of things; you might be accurate. What I am trying to get at is: did anyone at that time—not in 1998—say, 'Look, you have exaggerated what happened et cetera in an article?'

Ms Dolgolpol—I personally have not done a search and so I cannot answer your question.

ACTING CHAIR—Thank you.

Prof. Hafen—It could sound to the committee that there is some controversy here about whether the US is involved in this sort of thing or is sitting it out, because here is the US—as Ms Dolgolpol is telling us—as the chief sponsor of the provisions that we consider the most controversial regarding the civil autonomy oriented rights of children, and yet the US is not ratifying. So is the US in this, or isn't it? I want to just say this about the US view: I lived through the children's liberation movement. I began practising law in 1967 and began teaching it in the early 1970s, and I got interested in the field. I saw the liberationist ideology at work. I saw the tensions and I was intrigued by what someone said about children representing the Achilles heel of liberal ideology—that is, if

you are going to liberate everybody, how do you liberate those who do not have capacity, namely children? It was a fascinating issue; it was a problem that emerged in the US; it was in the courts; it was in the law journals. Constitutional rights were given to children. It was a very lively time.

What I found, in being immersed in the development of that period, was that many of the ideas that were put forward during that era by academics and by political activists, were introduced in legislative halls and court cases. Finally, over a period of nearly 20 years, the commonsense view prevailed, which was: this is just going too far; children have limitations that are built in, and we cannot adopt it. But those ideas that I first saw in the early 1970s in the academic literature and then in the legislative proposals and court cases, and some of the same people, showed up in Geneva saying the same things. One of the reasons I knew what they meant is that I had been reading their work for a long time. They would say things such as, 'Kids are people too, and the constitutional rights of children should be equated with those of adults.' I had never heard of the Convention on the Rights of the Child until a Japanese law professor came to me not very many years ago after the convention had already been adopted. I had gone off to deal with administrative responsibilities. He came to me, having read my earlier work, and said, 'What is this all about? You're an American lawyer; it looks like this came from the US.' So I began reading the convention, and it all had such a familiar ring. I have heard all this before.

You may be interested to know that Hilary Clinton was one of the most articulate—and I say the word with all respect—advocates of the view in a piece she published in the *Harvard Education Review* in the early 1970s when her name was Hilary Rodham. She was not married. Her view was that the presumptions of the law should be reversed and that each child should be presumed to have legal capacity until it was demonstrated otherwise in a particular case. I found that so fascinating, so out of harmony with the mainstream American law, that I invited her to come to a symposium where she and I participated and so on. That view was never taken seriously in the courts, but it is there in writing. The people who were involved in the organisations with which she was involved had all carried on, and I think her view reflects a kind of academic ideology that had its moment like a little comet and then it burnt out and now some of that language, in very subtle ways, by people who still carry the torch and are committed to it passionately and want to see the ideas develop, has shown up here. So, it is not just what Cynthia Cohen says, and it is not just what this article says; there is a whole history of the development of ideas here—philosophically and legally.

Mr BARTLETT—I will just return to point 3 of Professor Hafen's supplementary submission, and that is about the potential for the convention to lower the threshold for state intervention into intact families, and I would ask each of the three of you to comment on this. Where there is a conflict of understanding between parent and child as to the evolving capacities of the child and what constitutes the best interests of the child, particularly with reference to articles 12 to 16, who actually decides and, more

specifically, does the convention in your view in any way lower the threshold so that it gives the state a greater chance to intervene and decide what is in the best interests of the child? If so, how does the convention do that? If not, why doesn't it?

Prof. Hafen—As stated in my submission to you, and developed more completely in the published article we have been talking about, I do not think that it is entirely clear that the convention seeks to lower the threshold. The problem is that the convention states that the best interests of the child shall always prevail and so on. One of the citations I have given you is two Australian lawyers who have reached the conclusion, by interpreting the convention, that when parents are unreasonable as distinguished from abusive or neglectful, that could trigger external scrutiny as they call it. The specific point is whether the best interests standard is to be considered by a judicial body or a child ombudsman or someone else after intervention has been triggered by such traditional grounds as allegations of neglect and abuse, abandonment or custody change, or whether unreasonable conduct could trigger the intervention.

Two Australian lawyers have concluded that it does change the standard. The literature that I referred to from the American Bar Association publication thinks that is not correct. They say that is over interpreting, but my point is it is susceptible to that interpretation because it uses the language that it does. My concern is that it is such a fundamental problem that it ought to be made clear there is no intent to change this threshold for intervention. As it now stands, it is susceptible to that interpretation.

Ms Evatt—There will be some people who think that it, as you might say, lowers the threshold; there will be others who think that it does not. But that question has to be answered for Australia within our own legal system and structures, and it will be ultimately up to those who apply welfare law or family law to make up their own minds about what Australian law itself provides in that regard, because the convention itself is not part of Australian law. It has to be reflected in Australian law and I take it that, because we have ratified it, the government thinks that it is reflected in our existing Commonwealth family law and state welfare laws.

Mr BARTLETT—Is it possible, in your opinion, that it could be interpreted that way by those perhaps not making law but those applying law as they understand it at the moment, in welfare areas for instance?

Ms Evatt—They have to apply their own laws. They do not apply the convention. They apply their own laws and those laws will obviously say that the best interest of the child is the overriding consideration, and that is something that will be developed within the context of the Australian society, its values and outlooks. The convention does not change that.

Mr BARTLETT—Isn't it possible, though, that the convention would change their interpretation of the way existing law is to be applied?

Ms Evatt—I do not see how it could because it uses the same kind of language that we use in our own laws. The best interests of the child shall be a primary consideration. One has to have regard to the role of parents in guiding children in the exercise of rights. One has to have regard to the child itself—the views of the child. That is a perfectly normal standard that we apply every day in Australian courts. There is no problem about that. The fact that the child is recognised as having freedom of expression, privacy, religion and so forth that have been referred to is already guaranteed under the Covenant on Civil and Political Rights for children. What this convention does is to make it clear that, in the exercise of those rights, the child has the guidance of its family, its guardians and parents. It is fairly conservative really when you look at it that way. You could interpret it up or you could, if you wanted, if you could find another way to look at it, interpret it down, but it will be for our institutions to do so, as is appropriate in our society.

Ms Dolgolpol—Can I just add that the convention in this regard is no different from the common law of Australia. The committee will be familiar with the decision in re Gillick from England. In fact, the involving capacity standard in the Convention on the Rights of the Child was actually taken from the Gillick judgment. That is where it starts.

Mr TONY SMITH—But that does not have general application to our law.

Ms Dolgolpol—The next statement I would like to make is that, when you look at the Marion case, JWB and SMB, you have four judges of the High Court of Australia who made an exclusive statement that the Gillick case should now be considered to be part of the common law of Australia. I would like to quote from Deane, which answers another part of the question that was put to me. The following quote is from Deane's judgment in the Marion case:

> The effect of the foregoing is that the extent of the legal capacity of a young person to make decisions for herself or himself is not susceptible of precise abstract definition. Pending the attainment of full adulthood, legal capacity varies—

and I would like to note that that decision makes clear that young people in Australia or children in Australia are full citizens when it comes to legal rights; I do not have that quote at hand, but I can find it—

> according to the gravity of the particular matter and the maturity and understanding of the particular young person. Conversely, the authority of parents with respect to a young person of less than eighteen years is limited, controlled and varying. It is limited to what is in the interests of the welfare of the young person.

That is Deane of our High Court saying what is the law for Australia. I would also like to note that, in that same case, the High Court of Australia warned people of looking at US constitutional and rights provisions in looking at Australian law and said:

The constitutional bases mentioned at times in the United States cases differ from our own, as does the social and legal history of that country, particularly with regard to the widespread acceptance in North America—

this is referring to sterilisation of young people—

during the early part of this century of the theory of eugenics.

This is our High Court warning us about taking and just pulling things out of the United States without looking at the social and legal context of Australia.

Mr TONY SMITH—Was it one judge saying that?

Ms Dolgolpol—That is the joint judgment of Mason, Dawson, Toohey and Gaudron.

Mr HARDGRAVE—Mr Chairman, I have three very quick questions for each of the witnesses. Ms Dolgolpol, I guess—especially after what you have just said—what was intended can sometimes be open to many interpretations.

Ms Dolgolpol—I think that is right. Just as our courts interpret statutes the parliament has written—and I suspect it sometimes surprises you as to what they say.

Mr HARDGRAVE—Professor Hafen, Ms Dolgolpol made the comment before that individual states maintain a right to codify, if you like, the children's rights. Based on our particular societal standards, perhaps that points more to a failure of Australian governments to take up the challenge to correctly codify those rights rather than a failure of the convention itself.

Prof. Hafen—I am not quite sure where you are going?

Mr HARDGRAVE—Who is to blame if there is an attempt by a young person to take their parents to court for going into their bedroom? Is it the people who drafted the convention or the failure of the government here to take up its opportunity to codify the rights?

Prof. Hafen—I do not think any codification is necessary. The common law approaches to those problems are embedded in the whole concept of minority status and the rights involved with parents. That is well recognised in all the developed countries, so it is not that something needs to be done to put that in some code as that has been around a long, long time. The question is whether that is being changed.

I would like to point out, with regard to the Gillick case, that there is a case like that in the United States. Cases dealing with contraception and abortion are very difficult and when you hear language like that as the rationale for a very specific problem—like

the right of a child to obtain an abortion or contraceptives without parental consent—I want to remind the committee that to my knowledge those rules have not been extended to general application the way they would be in the convention. It is one thing to have broad language from a case; it is another to say, 'Broad language supporting what?' My view would be supporting an exception to the general common law rule that, because of the children's minority status, they do not have the capacity to exercise rights. There will be exceptions: consent to medical treatment, a hysterectomy, a blood transfusion—the cases that have challenged parental rights in those circumstances are interesting ones but they are exceptional ones.

Mr HARDGRAVE—Justice Evatt, Professor Hafen has acknowledged in his response to your critique of his earlier evidence that there are essentially two different agendas operating within the convention, which seems like a fair enough analogy. There is no doubt that we all have some strong views about the need to protect children. But the sticking point seems to be those couple of articles relating to these autonomous rights. That seems a fair enough concept—to break the convention into those two rough groups and, from this committee's point of view, to view the convention in that sort of light—don't you think?

Ms Evatt—First of all, I say that all the rights under the convention are qualified by article 5, which states they apply 'in a manner consistent with the evolving capacities of the child'. I would like to add to something you said: we also recognise children as having criminal responsibility at a certain age. That is another point that needs to be borne in mind. Whether a child could take a parent to court for an invasion of privacy will depend entirely on whether anything in our law at present would allow that to happen. Certainly the state under this convention would, I think, have very slight obligation, if any, to provide such a law that would allow that unless the invasion of privacy was seen as abusive of the interests of the child. Of course, in that case, it is covered by normal principles.

Mr HARDGRAVE—Then it falls into the protective rights category using Professor Hafen's—

Ms Evatt—Exactly. That is right. I think that one can get overexcited about that if one is afraid to see these rights considered because they may be rights asserted against parents. That really is not possible unless the parent is abusing rights in such a way that anyone would expect the state to intervene.

Mr HARDGRAVE—I am concerned that there are cross-purposes that need to be unfolded in this whole thing. The cross-threads between protective rights versus autonomy rights need to be devolved a little further. We need to actually accept that the protective rights aspects of the convention must be viewed, and perhaps a critique of Australia's performance in that regard looked at, whilst the autonomy rights need to be better codified by Australia's governments so that misinterpretations which seem to exist in the

community about this convention can be ironed out.

Ms Evatt—But there are important issues here because this convention is the one convention that has been ratified by nearly every country in the world—with those two exceptions. A lot of us see this convention as very important because of these guarantees that it has got—of freedom of expression and so forth—because in some countries it is only in respect of children that the government has undertaken to respect these rights. Yet you and I know that there is no way that a child can exercise freedom of expression, freedom of thought and conscience, freedom of association. A child cannot exercise those rights in a country unless it does so as part of the whole community exercising those rights. That is why those rights are terribly important. China is a party to this convention. It is not a party to the Covenant on Civil and Political Rights and yet it understands that this right has to be enjoyed by children as part of the community—subject, as I have said, to the guidance of parents.

These things need quite serious thought. It is not as simple as saying it is an autonomy right or another kind of right. I myself do not think you can classify the rights in that way to any great advantage.

Ms JEANES—I think that you answered the question that Kerry Bartlett asked Professor Hafen and yourself and that I wanted to ask. But I would like to ask Ms Dolgolpol: do you see any scope at all—in Australia's ratification of the convention—for interference in the relationship between children and parents that is not already in state laws? In my work, every day I see situations where children should be removed from their families or should have some form of intervention, but the resource restrictions on state governments, who are the welfare agencies in Australia, are such that they cannot do so. So I already see a problem in that we do not have adequate state intervention where it should occur. Is there anything in the convention that would further impose, I suppose, upon the relationship between parents and their children that does not already exist?

Ms Dolgolpol—No. Looking very carefully at the decisions of the High Court of Australia, I think it has been clear, as I indicated, that all actions within the Australian context are supposed to fulfil the notion of the best interests of the child. It certainly was never the intent of the drafters of the convention, it is certainly not the intent of those who work in the area of children's rights and interests in Australia to intervene in families between children and their parents or guardians, except in the sorts of cases that you point out where there is abuse or neglect. I think that the point that Justice Evatt makes is an important one that a child has a right to a supportive family environment and that there is an obligation on the state to assist parents in that. There is an obligation on the state to help parents by providing greater resources to them. As anyone who has worked in the area of abuse and neglect will know, many parents act in ways that are abusive or neglectful out of stress. If we actually provided additional resources to them as parents, we would not have that sort of situation. In fact, the major focus on the convention is on that sort of idea.

It is also important to remember that there are issues in the government response to the questions posed by the committee. One of the things the government noted was that there had been some problems with respect to discrimination—whether on the basis of race or on the grounds of disability—in various jurisdictions within Australia. If a child has no right to free speech, how do you even begin to know that there is that sort of discrimination against them? Because, in theory, if they have no right to free speech, the school can control what they are allowed to say about what happens to them on the school grounds. That is not a situation anyone would be happy about. I think you need to be careful about the way you interpret rights and Justice Evatt's point about the relationship of these rights. These conventions are negotiated in a global context.

People were well aware that the Kurds were being persecuted—that they were not allowed to teach their religion to their children and that they were not allowed to perform their religious ceremonies in their own language. When you look at that right to freedom of religion, that is the sort of situation people are looking at. When you look at the right to freedom of expression, people were well aware that children and young people in South Africa had demonstrated against apartheid, and it was their demonstrations in South Africa that focused the world's mind on how awful the system of apartheid was—the fact that you had children who were being shot and killed in a country because they could not get access to a fair and equal education. Those were the sorts of things that people had in mind as they negotiated this convention and looked at those sorts of rights. They were never intended, and they are not now intended, to interfere in the day-to-day relationship between parents and children.

Ms JEANES—Basically, if Australia took its obligations under the convention more seriously it would provide more resources to assist parents to raise their children?

Ms Dolgolpol—That is exactly right.

Ms Evatt—Up until 18, I think it is.

ACTING CHAIR—Professor Hafen, would you like to make a comment about that?

Prof. Hafen—Yes, I have a couple of comments. I hope the committee is noticing what is being said here when Justice Evatt quotes article 5 and says 'in a manner consistent with the evolving capacities of the child'. As I stated in my written submission to you, that is not a general rule of law anywhere in any family law system of which I am aware. The Gillick case is an exception to the normal pattern of family life because of the kinds of circumstances that we referred to earlier. The generalisation that the CRC will limit parental rights according to the evolving capacities of the child is a very vivid demonstration to me of what a dramatic departure this language is from traditional patterns of family life. I would like to register my general concern about the effect of this in seeing that children should have freedom of expression.

My fundamental concern is in the title of my article: 'Abandoning children to their autonomy'. In developed countries the pattern with children's liberation has been for parents to be so afraid that they might interfere with some child's rights that they do not provide the nurturing that children need. Historically, no less a figure than John Stuart Mill, whose piece on liberty is a classic on the whole issue of human rights, said, 'We are not talking here about children. What children need is to be taught the capacity for freedom of expression.' So, to declare that they are free because we have passed a law, who is going to decide when their capacity has reached the point that they are free to express themselves? Then there is a withdrawal by parents, by educational institutions and by child nurturers from the process of developing the next generation, without which you do not have a free society. So to just liberate everybody implies a withdrawal of the nurturing, protecting, guiding and sustenance that children need so that they have something to say when they are free to express themselves.

That is a pattern that has been around since the enlightenment, and it was not until the 1970s that somebody said that kids ought to be free too. Of course, they should be free. Look at the commitments our societies have given to freeing them with education and parental guidance. That is how you free them. You do not free them by just saying, 'Say whatever you have to say. Whether you go to school or not and whether you are subject to other forms of nurturance and development is not our concern any more because we are so happy with the ideology that everybody is free.' That is the problem that I hope you see in its general context.

Ms Dolgolpol—I am afraid that Professor Hafen's statement about the law in Australia is not totally accurate. This is McHugh, again, in JWB and SMB:

> In other cases, the courts have recognized the ability of mature children to make decisions concerning their own affairs. In an era in which many children over the age of fourteen leave home, support themselves, and enter into commercial dealings and de facto and sexual relationships, the courts could hardly do otherwise.

That is the common law of Australia. I think Professor Hafen misunderstood before that I was actually reading from an Australian High Court case and not referring to—

Mr TONY SMITH—Excuse me, that is one judge talking and that is not the ratio of the decision.

Ms Evatt—Could I make a comment here.

ACTING CHAIR—Yes.

Ms Evatt—I want to say that I see no inconsistency whatsoever with calling for a society in which people, including children, are not restrained unreasonably by the state from expressing themselves—freedom of expression. I see nothing inconsistent between that and a society in which children are given appropriate nurturing and guidance. The two

things are not incompatible.

To add to what Tina has just said: in regard to questions of parental access under family law, children are recognised as having an evolving capacity, certainly by the age of 14. But no age is fixed for the purpose of giving consent to sexual relationships. As I have said in regard to criminal responsibility, the question of evolving capacity was also at one time a part of the law—I am not sure if it still is. A child would be responsible if it knew right from wrong in certain situations.

Ms JEANES—Isn't the evolving capacity taken into consideration in custody cases?

Ms Evatt—Yes, of course it is taken into account. If a child is seen as able to express a view, that view will be given whatever weight is appropriate according to the age and maturity and understanding of the child. Its best interests have to come into the picture as well. It is not in the best interests of a child to be regarded as having no capacity at all up to the age of 18 and then be expected to be a fully grown adult at that age. Our normal life tells us that we all evolve; even at my age I am still evolving in my understanding of the world.

Prof. Hafen—I have a clarification. As my submission to you states, the idea of evolving capacity is reflected in age limits for various things. So let us not get confused. If we point out that a child under this age has the right to do X, that does not mean they have the right to do Y. I am not sure what the age is for children to enter into contracts. In Australia there are differing ages for driving or whatever it might be.

The concern I have with the concept of evolving capacity, as it has been developed in the children's liberation literature and as it has been advanced in the US and as it will be advanced when this phrase is well entrenched across the world, is the tendency towards individualised determinations of maturity. That has been attempted in the US in the context of a minor's abortion right. The language of the CRC seems to me to promote individualised determinations of capacity rather than age limits. Age limits are objective and fixed. On the individual child's maturity, what kind of administrative machinery would it take to make decisions about whether a child should be freed from compulsory education laws or has the capacity to drive a vehicle or enter into a contract? As long as evolving capacity is what it has been historically and is reflected in age limits depending on categories of experience, that is fine; that has always been there.

My point is that the CRC is introducing a concept that involves individual subjective determinations. That has been tried in certain places and it has been a very difficult experience because judges tend to defer to the child's preferences. They are not going to decide whether a child is mature enough to have an abortion. The research shows that they just defer to the child's choice. That is where the phrase has shown up and where it is likely to go.

Ms JEANES—Isn't that the place where such decisions should be made if they cannot be made otherwise—in a court room?

Prof. Hafen—Historically the decision was made by parents. What is going on here is a subtle shift from parents determining when a child has the capacity to do this or that to someone other than a parent making that decision. That is a very fundamental dimension of what I called the autonomy based philosophy of the CRC. Instead of parents determining when the child is free to make his or her own choice it will be a judge, an ombudsman or the child himself.

Ms JEANES—Is that necessarily always a bad thing? Why should a female—we are talking about abortion—one day before her 18th birthday have her parents make the decision for her and then suddenly turn 18 and be able to make the decision for herself? If there is a conflict within the family, surely in such a serious situation a court is the appropriate place for the decision to be made.

Prof. Hafen—I cite that example only because there was an attempt made in American law to establish a rule that a mature minor could make her own choice but the judge was supposed to decide if she was mature. The field research after that law was passed demonstrated that of 1,500 young women who came to ask judges for a determination of their maturity, all 1,500 were found to be mature enough because the judges simply were not going to get involved in making that decision for them.

Ms JEANES—I would have thought that seemed entirely appropriate.

Prof. Hafen—Right, but not because they are mature, but because nobody is going to decide a question like that, especially in a context like abortion.

Mr TONY SMITH—What was left off Ms Evatt's comment about article 5 was appropriate—

Mr LAURIE FERGUSON—Chair, I do have to leave. Is there any procedure or process we could follow to keep it going?

ACTING CHAIR—Yes, there is one and that is that, without a quorum, we lose parliamentary privilege, so it is appropriate that everyone who speaks once the quorum goes is aware of the fact that such statements are no longer protected by privilege. My inclination would be to allow this to continue so long as everybody feels comfortable. If there is any witness who does not feel comfortable, please say so, or if there is any aspect of any part of evidence that you would prefer not to go on the record, please also mention it to me.

I am reminded by the secretariat that what I actually need to have recorded is that each of you understand what it means by not being covered by parliamentary privilege. I

assume everybody does but, so that the *Hansard* will record that, could I ask each of you to say that you understand the implications of what I have said?

Prof. Hafen—I am not entirely sure.

ACTING CHAIR—You understand the concept of privilege and that, with respect to what you say in here, you cannot be sued and you cannot—

Prof. Hafen—Oh, that is what I would have assumed. I did not know you were into things so legalistic.

ACTING CHAIR—It is a very important part of privilege. If we do not have parliamentary privilege, it is appropriate that there be an understanding.

Prof. Hafen—I understand.

Ms Evatt—Yes, I fully understand and I will be accountable for whatever I say.

Ms Dolgolpol—Yes, I do understand.

ACTING CHAIR—Thank you.

Mr TONY SMITH—What I was going to add to the comment that was made about evolving capacity is that people—and, with respect, Ms Evatt, you left this off—forget about appropriate direction and guidance. Who determines what is appropriate in that equation? That is another element to the question. First of all, there is a question of evolving capacity and, secondly, a question as to who determines what is appropriate. Is it an outside body that determines that? I would argue that it is capable of meaning that.

Ms Evatt—What is appropriate will depend on the situation in which you find yourself, what kind of issue is at stake and what age the child is. This is a statement of principle, and you have to look at the context in which the question could arise. I am just searching my mind to see if I can find a particular context. Did you have one in mind yourself?

Mr TONY SMITH—I mean that what it does is that it admits, does it not, of another body—a state, a court or somebody—saying in any dispute between parents that the direction that the parent has given is not appropriate in all of the circumstances and the guidance that has been given is not guidance in all of the circumstances.

Ms Evatt—In a situation where that can arise; this is the statement of principle. It is not clear to me that there would be many situations where a court would be actually called upon to deal with this. But, for example, the question of Gillick is an example, isn't it? In that case, the court decided it was not applying the convention, but it decided that

the issue was one that the evolving capacity of the child enabled the child to decide for itself and it was not bound by the guidance of the parent in that case. In another situation, the court may say, 'Well, the child is claiming X or Y, I am not quite sure what, but in this case the parent is the one to choose.'

Mr TONY SMITH—I suppose the point is that, because there is a general provision that admits of an interpretation that is capable of argument a particular way—namely, that a third party could determine what is appropriate—then, because it is capable of being interpreted that way, it has the effect of potentially intruding into the delicate relationship between parents and children.

Ms Evatt—The intrusion will already be there in what you are talking about.

Mr TONY SMITH—Yes, that is said, but again there is a measure that then has to be adopted and somebody has to determine that.

Ms Evatt—This principle is not part of Australian law. The courts in this country will apply our laws only as they are.

Mr TONY SMITH—I understand that. You mentioned that before in relation to article 12, and I am going to come to that shortly. Maybe you did not mention article 12 specifically, but I had article 12 in mind.

Ms Evatt—Yes, I did.

Mr TONY SMITH—The problem is that states parties are required to embody the convention in their law.

Ms Evatt—Not as such.

Mr TONY SMITH—The evidence we have received is that once you have ratified the convention then there is an obligation to implement the convention. You only implement the convention by embodying the principles and concepts into your law.

Ms Evatt—Or ensuring that they are already embodied.

Mr TONY SMITH—Yes. Taking you up in relation to your comment that there is no way a child can enforce certain provisions, et cetera, article 12 is quite clearly capable of that interpretation. Article 12(2) says that states parties shall assure to the child who is capable of forming his or her own views and so forth that they will be given due weight and that a child shall, in particular, be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child. So arguably, and I am only saying arguably, article 12(2) does give a child locus standi in a dispute with its parents over whether or not the child should have a right to consult the Queensland Children's

Commissioner, for example, about the age of consent. If the parent says, 'No, you can't,' that child—let us say the child is 12 years of age—can arguably say, 'My view, I believe, should be heard and article 12(2) does give me locus standi to argue that my view can be heard.' All of that is capable of allowing the state to intrude into that delicate relationship between parents and children.

Ms Evatt—The child could not invoke article 12 in an Australian court as the basis for the exercise of any right.

Mr TONY SMITH—I am aware of that.

Ms Evatt—But in any issue in a court or administrative proceeding which affected the child the ordinary principles of natural justice would require that the child or the child's representative be heard. Whether it be the child directly or the child's representative would be for the tribunal or court to decide, having regard to the age and maturity of the child.

Mr TONY SMITH—I would argue that, if one is going to adhere to the fact that the principles should be implemented, article 12(1) should be in some way implemented into Australian law. Article 12(2) then gives the child, likewise, the right to be heard. It can point to article 12(1) in whatever legislation it appears—the right to express an opinion—and then gives that child an opportunity to, in effect, possibly obtain a mandatory injunction to allow the child to give its opinion on the age of consent to, for example, the Queensland Children's Commissioner against the wishes of the parent.

Ms Evatt—If the law of Queensland allows the child to approach the Children's Commissioner, as I feel sure that it probably does, then the child should certainly be able to do so.

Mr TONY SMITH—Against the wishes of the parent?

Ms Evatt—Article 12 is one of the most important provisions in this convention. This is the one that allows a child who is capable of forming his or her own views the right to express those views. That is what it is about and for a child that is in a potentially abusive situation from its parents, it is so important that that child should have access to an independent third person.

Mr TONY SMITH—I am not talking about abusive positions, I am not talking about extreme positions; I am talking about a philosophy argument here. A 12-year-old child who is starting to be influenced by whatever influences outside—sex education, whatever—says to his or her parent, 'Look, I have a view about age of consent. I think it should be lowered and I wish to express that view to the Children's Commissioner of Queensland,' and the parent says, 'No, you can't, because you are too young.' Potentially, that provision would permit a child to overrule its parents. It has the capability or the

capacity of doing that, does it not?

Ms Evatt—Are you talking about a judicial or administrative proceeding here?

Mr TONY SMITH—Yes.

Ms Evatt—I did not understand that from what you just said. Is there is a procedure affecting this particular child? I thought you were talking about a submission to a body. That is a different thing.

Mr TONY SMITH—No. There are two steps. If the child wishes to approach, wishes to have its views heard on a particular subject and is denied that by the parent, then arguably a court could overrule the parent and permit the child to do that in the circumstances that I have posited.

Ms Evatt—Are you talking about making a submission to an inquiry?

Mr TONY SMITH—Anything. It doesn't matter—a child wanting to approach the Children's Commissioner to discuss such matters as the age of consent.

Ms Evatt—But it is fundamental that a child should be able to write a letter to somebody. This is a fundamental right that we all have.

Mr TONY SMITH—I am talking about physically approaching and giving his or her point of view about that issue.

Ms Evatt—I certainly hope that the children in Australia are free to express their opinions.

Mr TONY SMITH—On that topic against the wishes of the parent?

Ms Evatt—But the child has an opinion and may express the opinion.

Mr TONY SMITH—But this is the point you see. If the parent does not believe the child is old enough to do that and ought not to do that, then you are saying that the child should be able to override the parent, are you?

Ms Evatt—I am saying the child, if it is capable of forming his or her own views, should be free to express its views on matters affecting the child. That is article 12. This is a matter affecting the child and proceedings affecting the child. I think that what I was referring to a moment ago was the freedom of expression. That is article 13. That is a different provision.

Mr TONY SMITH—I think you have probably answered the question. I want to

come back to some of your evidence in a second, but I first want to ask Ms Dolgolpol a question or two. You mentioned earlier Cynthia Price Cohen's experience as a lawyer. Do you recall giving evidence on 4 July 1997 to this committee?

Ms Dolgolpol—I do recall giving evidence. I could not have sworn to you that that was the date, but since you have the *Hansard* I will agree that was the date.

Mr TONY SMITH—If you recall, and I will refer to the passage, I said to you:

Ms Dolgolpol, have you practised law?

You said:

Yes, I have.

I said:

For a lengthy period at the private bar?

And you said:

Yes, I have.

I then said:

Where?

And you said:

In both the United States and Australia. I worked for a judge in the United States.

Do you recall giving that evidence?

Ms Dolgolpol—You have the *Hansard*; I must have said exactly those words. No, I do not actually recall saying it, but I will believe you. I recall the general thrust of it. Do I recall those precise words? No. Do I believe you that you were reading from the *Hansard*? Yes.

Mr TONY SMITH—So you accept that what I am saying is a true account of your evidence?

Ms Dolgolpol—I accept that you are reading from the *Hansard*, yes.

Mr TONY SMITH—And you supplied to the committee a curriculum vitae, did you not, in which you detailed your employment record? Is that so?

Ms Dolgolpol—Yes, I did.

Mr TONY SMITH—You were a tutor at the University of New York at Buffalo from 1976 until 1977—is that right?

Ms Dolgolpol—While I was a law student, yes, during my final year of law school.

Mr TONY SMITH—Then you were an associate—this is what you mentioned in your evidence—to Judge John T. Elfvin from 1977 to 1979.

Ms Dolgolpol—That is correct.

Mr TONY SMITH—Then you worked for a firm called Damon, Morey Sawyer and Moot as an attorney in Buffalo, New York from 1979 until 1982?

Ms Dolgolpol—Yes.

Mr TONY SMITH—What month in 1979, by the way?

Ms Dolgolpol—I would have graduated in May. I think I had two weeks off after graduating from law school, so I would have started some time in June. That is my recollection of a period quite a considerable time ago.

Mr TONY SMITH—Yes, and you completed work there in what month in 1982?

Ms Dolgolpol—I left for Geneva at the end of May, so presumably it was right at the beginning of May 1982.

Mr TONY SMITH—Thank you. You describe yourself as an attorney. What were you doing there?

Ms Dolgolpol—I did corporate litigation there. I did some white collar crime, but I did mostly commercial litigation involving tort law and contract law.

Mr TONY SMITH—So you were just out of law school, just finishing your degree?

Ms Dolgolpol—No, I had worked for a judge for two years.

Mr TONY SMITH—But you did some corporate litigation—what, instructing counsel?

Ms Dolgolpol—Law practice in the United States is very different from here. We

do not have that division of solicitor and barrister, so I actually did courtroom work as well as the lawyer work. It is a very different process. I actually did appear in court to argue what would be called applications here and I did sit, along with more senior counsel, in trials. I undertook the taking of depositions on my own, and I did some worker health and safety work on my own as a trial work.

Mr TONY SMITH—I take it you did not conduct any trials on your own as counsel?

Ms Dolgolpol—In the workers' compensation field, yes, I did. But in commercial litigation, no, I did not.

Mr TONY SMITH—Thank you. Were those worker's compensation cases dealt with before a specific tribunal?

Ms Dolgolpol—Yes, they were. There is a workers' compensation tribunal in the New York State.

Mr TONY SMITH—Not before a judge and jury.

Ms Dolgolpol—I would not want to be held to say that that is the exact name, but there is a tribunal. As you can see, it has been many years since I have actually been in that practice and I do not know whether it has changed names in the meantime.

Mr TONY SMITH—You went on from there to work as the director for the Centre for the Independence of Judges and Lawyers in Geneva. Presumably, that did not involve work as a barrister, a solicitor or an attorney, appearing in cases?

Ms Dolgolpol—Yes, that is correct—I would say the skills, but yes.

ACTING CHAIR—Was that policy work?

Ms Dolgolpol—It was a number of things. We developed some of the international instruments. I worked very closely with the Canadian delegation in getting through the UN basic principles on the independence of the judiciary, so that it involved working on international instruments. I participated with the Council of Ministers in the drafting of the European convention against torture. The International Commission of Jurists, by the way, is only one of two organisations that are allowed to sit in the meetings of the Council of Ministers and participate in that work. I organised meetings in Africa and Asia with the equivalent of High Court judges, attorneys-general and practising senior members of the profession about issues concerning the independence of judges and lawyers. I would have been responsible for giving speeches to various organisations, as well as collecting information about the violations against the independence of judges and lawyers throughout the world, and edited a bulletin.

Mr TONY SMITH—Obviously, you would not regard that as private practice as a lawyer, would you?

Ms Dolgolpol—No, it was not private practice.

Mr TONY SMITH—You returned to—

ACTING CHAIR—Ms Dolgolpol, perhaps you should be shown the transcript if you are going to rely on the precise words.

Ms Dolgolpol—So far I have not had a problem. If I have a problem, I will take a look at it.

Mr TONY SMITH—I presume you returned to Australia and to Fisher Jeffries, Solicitor?

Ms Dolgolpol—Other than a visit, I had not previously lived in Australia.

Mr TONY SMITH—And you worked as a salaried solicitor for that firm?

Ms Dolgolpol—Yes, I did.

Mr TONY SMITH—From 1987 to 1989?

Ms Dolgolpol—Yes, I did.

Mr TONY SMITH—You then became a lecturer at various law schools and are currently tenured at Flinders University, is that so?

Ms Dolgopol—Where I am a senior lecturer, yes.

Mr TONY SMITH—Would you describe that employment history as a lengthy period at the private bar in both the United States and Australia?

Ms Dolgopol—Obviously four or five years is probably not a lengthy period. I honestly do not remember your question at the time as including the word 'lengthy'. If that is what the *Hansard* reflects, then that must have been your question at the time. I understood you to be asking me whether I had ever practised at the private bar and to that I would have had to say yes. If you would like me to say that it is not lengthy in terms of having practised for 10 or 20 years, I will admit that I did not practise for 10 or 20 years at the private bar.

Mr TONY SMITH—And your only practice at the private bar which could remotely be regarded as private practice would be as an attorney doing the odd workers'

compensation case before a tribunal?

Ms Dolgopol—Except that South Australia does not have a divided bar either. If that is what you meant I did not understand you; perhaps it is a difference in culture. I did not understand you to mean whether I was in bar in terms of being in chambers. If that is what you meant, I would have given you a very different answer. What I understood you to be meaning by 'private practice' was whether I worked in private practice as opposed to government practice; as opposed to working for an organisation or some sort of public institute.

Mr TONY SMITH—I think you have answered that. In relation to the previous occasion, you were asked some questions by me and I pointed out to you that you were footnoted in an article by a particular author as saying, and I quote:

. . . when read together—

meaning these articles, and I will refer to them in a moment—
it becomes clear that the drafters of the Convention envisage that there will come a moment in the child's life when it is for the child, not the care provider, to determine how to exercise the child's rights?

Do you remember that question being asked?

Ms Dolgopol—Yes.

Mr TONY SMITH—Do you remember your answer?

Ms Dolgopol—I do not remember the context of my answer. In the context of our discussion I remember making the point that I did not believe that the courts would intervene in the relationship. I provided a further written submission to the committee clarifying what I understood you to be asking and suggesting that I felt we were actually talking at cross-purposes during that exchange.

Mr TONY SMITH—I will quote what you said. You said, in response to my putting that to you:

Someone has said that. I have never actually said that and I would never actually say that. I think that is . . .

And then I said:

So that is a wrong interpretation?

And you said:

In fact, I have never written very much of anything on issues about freedom of religion. The article I have given to you is about children's access to justice and separate representation, and that is most of what I have in fact written on in this particular area. As a parent myself, I just . . .

And then I said:

Can I just refer to the reference for that.

And I cite the reference in that seminar paper which is:

Dolgopol U. International Law—How It Can and Does Protect Children's Rights, SA Children's Interests Bureau Seminar paper, pp. 8-9.

Your response to that is:

That is not what I said in that seminar paper.

And I then said:

We do not have that here though, do we?

And you said:

I have a copy of it. If you would like it, I am happy to provide it to you. I did not say that and would not say that.

Now I would like you to have a look at this document please. Have you got a copy of the seminar paper that I am referring to?

Ms Dolgopol—No, I do not have a copy in front of me. If you are going to ask me if those are the words then—

Mr TONY SMITH—You will see at page 8, and I quote the following at the last full paragraph:

When these articles are read together it becomes clear the drafters of the Convention envisage that there will come a moment in the child's life when it is for the child, not the care provider, to determine how to exercise the child's rights.

Do you agree that you wrote that in that article?

Ms Dolgolpol—Yes, I do.

Mr TONY SMITH—Thank you. In relation to a couple of other matters, I presume all of you have looked at the key points for discussion, which are numbered 1 to

8. Have you got a copy of that? There is not time, obviously, to get a response to all of that. I would request, through you, Madam Chair—

ACTING CHAIR—Perhaps I could take it up here and say that, for our long-suffering *Hansard* operators also, we are going to have to wind the session up. Obviously, some members have not had the opportunity to explore matters they wished to. Those matters are referred to in the key points for discussion which I understand—having not previously been involved—have been circulated to each of you. Could I ask that, by reference to these key points for discussion, any further comments that anyone at the table wishes to make be made in response by 11 May. If any senators or members wish to address any specific questions, we would be very grateful if you would not mind responding.

Mr TONY SMITH—In relation to that, I was particularly interested in what Ms Evatt or Ms Dolgolpol had to say about those particular questions.

Ms Evatt—Which questions?

Mr TONY SMITH—Questions 1 to 8.

Ms Evatt—I see.

Mr TONY SMITH—In relation to the last passage of your article in response to Professor Hafen's evidence, Ms Evatt, you say in the last few sentences:

> Most people as adults, it can be argued, would not choose to have been given, as children, the autonomy to make decisions which would have frustrated their basic and developmental interests. The Convention recognises this in the "best interests" principle, as does Australian law and policy. In his arguments in relation to children's autonomy, Professor Hafen appears not to understand the balance which is thus struck by the Convention between children's autonomy rights and their right to the fulfilment of their long term developmental needs.

I have two questions: firstly, I would like you to explain to me how you say Professor Hafen does not appear to understand that; secondly, are you—by saying 'children's autonomy'—accepting the autonomy principle to which he refers?

Ms Evatt—The meaning there is children's autonomy rights as propounded by the article to which this particular piece of work is a response. The point that is being made here is that the best interests of children incorporate the idea that it is not in the interests of a child to be allowed to totally run free without guidance. That is where article 5 comes in. That qualifies, of course, all the rights we were talking about: the parental guidance and the best interests of the child, which have to be looked at. The child does not determine its own best interests. At some time a parent or an outside body may say, 'Well, it is in this child's best interests to be autonomous now, because the child is maturing in this area.' But in other aspects they may say, 'No, the child must exercise the

right in accordance with parental guidance and direction.' It is the crossover point that you come to for every child in regard to every issue.

Mr TONY SMITH—Professor Hafen, do you want to add anything to that?

Prof. Hafen—I was quite fascinated by Justice Evatt's recognition that as a child she would wish that she could have been protected against premature expressions of autonomy. I remember when my six-year-old was so disappointed he could not vote. He thought he was capable of forming his own view.

We all see, in a kind of commonsense way, in discussions like this that children lack capacity and they develop to the point that they gain it. I would just say that in general the children's rights convention shifts the ground in favour of an earlier—the earliest possible—time for children to make those decisions for themselves. It seems to shift toward allowing the state, earlier than we have traditionally allowed it, to intervene in order to let children make those decisions. That seems to be the general thrust of the convention. We can argue about specific points, but that general thrust, I think, is clear. It does not come out of any documented evidence that all of that is in the best interests of the world's children.

ACTING CHAIR—Could you put any further questions in writing?

Mr TONY SMITH—I will put them on notice.

ACTING CHAIR—Or if any comment comes out of that please feel free to put it to us. I am now in some difficulty. Due to the loss of a quorum, none of today's proceedings are able to be published yet. There will be a motion that the proceedings be published on the next occasion that the committee meets and has a quorum. It only remains for me to thank each of you, most sincerely, for joining in this discussion today. My sincere apologies that we were constrained by time. I am sure nobody feels that they have had an adequate opportunity to say what they wanted to say. Please feel free to put anything further to us that you wish to. Each of your views are very carefully considered, let me assure you of that. We are very grateful to have this input. Finally, thank you very much to *Hansard*. Thank you for bearing with us. That is also much appreciated.

Committee adjourned at 5.47 p.m.