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# Response to Question on Notice from Senator Andrew Bartlett Senate Legal and Constitutional Committee Inquiry into the provisions of the *Family Law Amendment (Shared Parental Responsibility) Bill*

**Are there any legal principles involved in the status of children?**

The Convention on the Rights of the Child ("the Convention") sets out the fundamental principles which should underpin the status of children in society and in particular the legal system. This includes enunciation of children's rights to express their views and to be heard in decision-making processes that affect them (Article 12).

The Convention was ratified by Australia on 17 December 1991.

The Human Rights and Equal Opportunity Commission gave the following summary of the status of the Convention in Australian law in its report, *A Last Report? Inquiry into Children in Immigration Detention*:

> "Under Australian law a treaty only becomes a 'direct source of individual rights and obligations' when it is directly incorporated by legislation. …
>
> > *While the CRC, ICCPR and the Refugee Convention have not been directly incorporated into Australian law in their entirety, certain provisions of those treaties are reflected in domestic legislation. … [D]omestic legislation, much of it State legislation, can be said to mirror the intent of international conventions without referring directly to them. For instance, all States have child protection laws which reflect the obligation to protect children from abuse in article 19 of the CRC, but do not necessarily refer specifically to the CRC. The provisions of the Family Law Act 1975 (Cth) relating to children also mirror rights and principles established by the CRC."*[1]

The principles have begun to be incorporated into Australian case law through decisions such as *Marion's Case*[2], *H v W*[3] and other cases.

For example, in *Marion's Case* it was held that a minor is capable of giving a valid consent to medical treatment when he or she has a sufficient understanding and intelligence to enable him or her to understand fully what is proposed. The High Court held that: "*parental rights… exist only so long as they are needed for the protection of the person and property of the child*".

[1] Section 4.2.
[2] (1992) 175 CLR 218.
[3] (1995) 126 FLR 159 at 199-200.

**Are children seen as having separate legal rights of their own?**

Children have rights and obligations and this is acknowledged in many laws. They participate in and have a legal status in Australian society in many areas, including as participants in state and territory legal processes (eg as witnesses).

The Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission prepared a report entitled, "Seen and Heard: Priority for Children in the Legal Process" which canvassed in detail the involvement of children in the legal system and their status within that system. A number of recommendations arose out of that Inquiry; a number of which have not been implemented. In Chapter 17 of the Report, the Commission canvasses children's involvement in family law proceedings. The Commission recommended that:

> "Children should be informed about their options for participation in family law proceedings. The information should relate to the availability of counselling and their options for more direct participation in family law proceedings including their rights to seek legal advice or initiate proceedings."

**Does the Family Law Amendment (Shared Parental Responsibility) Bill clash with the Convention?**

Yes, in our view it does.

The *Family Law Reform Act 1995* (Cth) inserted into the *Family Law Act 1975* (Cth) a new Part VII relating to children which reflects the wording of the Convention and, in particular, replaced the 'welfare of the child' test with the 'best interests of the child' test.

Article 3 of the Convention explicitly states:

> "In all actions concerning children, whether undertaken by … courts of law, administrative bodies or legislative bodies, the best interests of the child shall be a primary consideration."

The High Court has not yet determined the specific question of whether the amendments actually implement the Convention or merely reflect its wording.

However, the proposed relegation of a child's views to being an "additional consideration" in the criteria for determining what is in the child's best interests in s60CC of the Bill is inconsistent with Article 9 (right to be heard in relation to decision concerning a child's residency) and Article 12 (a child's right to participate and be heard).

In particular, article 12 says that:

> "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."

By making the child's views a secondary consideration in determination of their best interests, the views of children who may have a high level of maturity and definite opinions on how they would like to conduct their living arrangements and relationships with their parents will tend to

be overridden by the primary considerations in s60CC. As such, s60CC restricts the court's discretion to give appropriate weight to a child's views in line with their age and maturity.

In 1997 and again in 2005 the United Nations Committee on the Rights of the Child expressed concern as to the measures taken to ensure that rights under the Convention are enforceable in Australian law. Its 2005 Concluding Observations to Australia's Report on implementation of the Convention on the Rights of the Child, noted the Committee's concern that the views of the child are not always sufficiently taken into account in judicial and administrative proceedings affecting the child. The Committee, referring to the current family law reform process, recommended that:

> "…in the Family Law reform the right of the child to express views in all matters affecting him/her be expressly provided…"[4]

In addition, the introduction of unqualified criteria in s60CC that are *not*, in fact, always best for children - ie the meaningful relationship primary consideration (s60CC(2)(a)) and the facilitating relationship secondary consideration (s60CC(3)(c), arguably derogates from the primacy of the best interests of the child and conflicts with Article 3 of the Convention.

Finally, for the reasons given in our initial written submission, we believe that the legislation as currently drafted is likely to further undermine the safety of children. This is due in particular to the likely impact of:

- the two-tiered structure of s60CC and the consequent effect on the primary considerations (that they may effectively cancel each other out) – see pp5-6;
- the new facilitating relationship additional consideration – see pp6-7;
- the provision requiring costs orders to be made where 'false allegations' are knowingly made – see pp9-10;
- the objective definition of family violence – see pp10-11;
- the new Division 11 – see pp12-14.

This could be argued to be contrary to article 19 of the Convention which says that:

> "States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child."

**WOMEN'S LEGAL SERVICES AUSTRALIA**
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[4] Paragraph 30.