The UN Convention on the Rights of the Child: Tracing Australia's Implementation of the Provisions Relating to Family Relations

Rita Shackel

1 Introduction

The United Nations Convention on the Rights of the Child (UNCRC – the Convention) was adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989 and entered into force on 2 September 1990, in accordance with Article 49. The UNCRC is the first legally binding international instrument to incorporate the full range of human rights – civil, cultural, economic, political and social rights.[1] The Convention is premised on the view that 'childhood is entitled to special care and assistance' and 'the child, by reason of his/[her] physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth'.[2] Currently 194 states are parties to the Convention with 140 signatories,[3] it is the most widely (and rapidly) ratified treaty in history,[4] and only three member states have not ratified it – the United States, Somalia and South Sudan.

Australia signed and ratified the Convention in 1990. Australia's only reservation to the Convention is with respect to Article 37. Although accepting the general principles of Article 37, in relation 'to the second sentence of paragraph (c), the obligation to separate children from adults in prison is accepted only to the extent

[1] UNICEF at <http://www.unicef.org/crc>.

[2] Preamble.

[3] See https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-11&chapter=4&lang=en.

[4] UN News Centre, 'UN issues call on Member States to ratify convention on rights of the child' at http://www.un.org/apps/news/story.asp?NewsID=45894&Cr=children&Cr1=rights#.UlgxaLyKyuQ, 43.

R. Shackel (✉)
Sydney Law School, The University of Sydney,
Law School Building F10, Eastern Avenue, Camperdown, NSW 2006, Australia
e-mail: rita.shackel@sydney.edu.au

© Springer International Publishing Switzerland 2016

O. Cvejić Jančić (ed.), *The Rights of the Child in a Changing World*,
Ius Comparatum - Global Studies in Comparative Law 13,
DOI 10.1007/978-3-319-23189-1_2

that such imprisonment is considered by the responsible authorities to be feasible and consistent with the obligation that children be able to maintain contact with their families, having regard to the geography and demography of Australia'.[5] Australia's ratification therefore is reserved to the extent that it is unable to comply with the obligation imposed by article 37(c). The Committee on the Rights of the Child (CRC) has repeatedly urged Australia to reconsider this reservation[6] on the basis that it 'is unnecessary since there appears to be no contradiction between the logic behind it and the provisions of article 37(c) of the Convention'.[7] Namely, that the concerns expressed by Australia in its reservation are well addressed by article 37(c), 'which provides that every child deprived of liberty shall be separated from adults "unless it is considered in the best interests of the child not to do so" and that the child "shall have the right to maintain contact with his or her family"'.[8] The Australian Government has undertaken to explore possible withdrawal of this reservation with its states and territories,[9] but action is still wanting.

The UNCRC consists of 54 provisions in its entirety. This report examines Australia's efforts over the last 23 years in implementation of provisions in the Convention that relate more specifically to family relations and family law matters and the results that have been achieved. Section 2 of the report begins by examining the definition of child under Australian law. Section 3 then lays out the framework for protection of children's rights in Australia. Section 4 examines the application and implementation of the best interests principle, particularly in family-related laws and policies in Australia. Section 5 discusses implementation of the child's right to be heard in family-related matters in Australia. Section 6 of the report examines Australia's implementation of a child's right to know about his or her origins. Here three key areas are examined: registration of birth, presumptions and rebuttal of parentage, and a child's right to access information relating to genetic origins. Section 7 examines the framework in Australia for protection of a child's rights in adoption processes. Section 8 briefly examines a child's right to freedom of religion within the specific context of school education. Section 9 discusses Australia's protection of children against physical punishment. Section 10 examines provisions under Australian family law that regulate parental responsibility. Section 11 discusses a child's right to medical consent. Section 12 examines a child's right to change name. Section 13 examines the rights of children in employment in Australia. Section 14 discusses a child's obligations towards his or her parent. Section 15 of the report concludes.

The Convention recognises the centrality of the family unit in children's well-being '[r]ecognizing that the child, for the full and harmonious development of his

[5] Status of Ratification, Reservations and Declarations, Convention on the Rights of the Child (as at 13-1-2013) at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en.

[6] CRC/C/AUS/CO/4 (28 August 2012), [10].

[7] CRC/C/AUS/CO/4 (28 August 2012), [9].

[8] Ibid.

[9] CRC/C/AUS/4 (14 June 2011), [6].

or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding'.[10] Further the Convention recognises that 'the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community'.[11]

2 Definition of 'Child' Under Australian Laws

Core to the Convention and its implementation is its application to the person as a 'child'. Article 1 of the UNCRC defines a child as 'every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier'.

Under Australian laws a child is generally deemed to be a person under the age of 18 years. At age 18 a person is no longer a minor in Australia and is generally considered an adult thereafter. For example, the eligibility age for voting in Australia is 18 years.[12] The legal age for purchasing alcohol[13] and tobacco[14] in every Australian state and territory is also 18 years. However, the threshold age of a child varies under different legislative provisions and for different purposes ranging variously from under 14 to under 18 years of age. For example, the *Children and Young Persons* (*Care and Protection*) *Act 1988* (NSW)[15] defines a child (except in Chapter 13)[16]

[10] Preamble.

[11] Preamble.

[12] *Commonwealth Electoral Act 1918* (Cth) s93(1).

[13] *Liquor Act 2007* (NSW) s 117(1), *Liquor Licensing Act 1997* (SA) s110, *Liquor Control Reform Act 1998* (Vic) s119, *Liquor Control Act 1988* (WA) s121, *Liquor Act 1992* (Qld) s155A, *Liquor Act 2010* (ACT) s112, *Liquor Licensing Act 1990* (Tas) s70.

[14] *Public Health* (*Tobacco*) *Act 2008* (NSW) s22, *Tobacco Act 1987* (Vic) s12, *Tobacco and Other Smoking Products Act 1998* (Qld) s10, *Tobacco Products Regulation Act 1997* (SA) s38A, *Public Health Act 1997* (Tas) s64, *Tobacco Control Act 2006* (WA) s6, *Tobacco Act 1927* (ACT) s14.

[15] Pursuant to Section 8, the objects of the Act are to provide:

(a) That children and young persons receive such care and protection as is necessary for their safety, welfare and well-being, having regard to the capacity of their parents or other persons responsible for them
(b) That all institutions, services and facilities responsible for the care and protection of children and young persons provide an environment for them that is free of violence and exploitation and provide services that foster their health, developmental needs, spirituality, self-respect and dignity
(c) That appropriate assistance is rendered to parents and other persons responsible for children and young persons in the performance of their child-rearing responsibilities in order to promote a safe and nurturing environment

[16] Chapter 13 of the Act deals with Children's Employment, and s221 defines a child variously as under the age of 15 or 16 for different purposes.

'as a person under the age of 16 years'.[17] The legal age of consent to sexual activity varies between 16 and 17 years across different Australian jurisdictions,[18] and a child aged less than 14 years is deemed to lack criminal responsibility in all Australian jurisdictions.[19] In most Australian states a child turning 18 years of age is tried as an adult and in an adult court. In Queensland though, for the purposes of the *Juvenile Justice Act 1992*, which is concerned with children who have or are alleged to have committed an offence, a child is a person who has not turned 17 years of age.[20] Accordingly, in Queensland a 17-year-old is treated as an adult in the criminal justice system. It is difficult to justify this different treatment of juveniles in Queensland, compared to other Australian states, particularly as it runs contrary to international standards.[21]

Some Australian legislation defines the age of a child only for specific purposes. For example, under the *Family Law Act* 1975 (Cth), a child is defined as a person under 18 years of age only for the purpose of parenting orders[22]; otherwise, the definition of a child within the Act more generally is not provided.

As a signatory to the UNCR, it may be inferred that in the absence of explicit definition of a child, the default age is 18 years as defined in the Convention.

As the examples provided above suggest, there is scope for greater harmonisation of status as a child across jurisdictions in Australia and in different domains of children's lives, as is the case also for some other States Parties. Variable thresholds in defining childhood arguably permit flexibility in relation to how children may be protected in society and their lives regulated and enable greater recognition of children's diverse needs, particularly, as children mature and develop through adolescence into adulthood. However, ambiguity about status as a child and differing definitions of a 'child' may also lead to policies and laws that treat children inconsistently and which may potentially engender contradictory notions of childhood and the needs of children within a society. The concept of 'youth' as a transition between childhood and adulthood is equally unstable. For example, youth supervision orders and youth attendance orders in Victoria cannot extend beyond the offender's twenty-first birthday, suggesting that this is the upper limit of the Act's understanding of youth,[23] whereas the Australian Institute of Health and Welfare,

[17] Section 3 Definitions.

[18] *Crimes Act 1900* (ACT) s55 (16 years), *Crimes Act 1900* (NSW) s66C (16 years), *Act 1983* (NT) s127 (16 years), *Criminal Code Act 1899* (s208 and s215) (the age of consent for anal sex is 18 years and for all other sexual acts is 16 years), *Criminal Law Consolidation Act 1935* (SA) s49 (17 years), *Criminal Code Act 1924* (Tas) (s124) (17 years), *Crimes Act 1958* (Vic) s45 (16 years), *Criminal Code Act Compilation Act 1913* (WA) s321 (16 years).

[19] This is a rebuttable presumption for children aged 10 to under 14 in all jurisdictions: *Crimes Act 1914* (Cth) s4N *2002* (ACT) s26, *Criminal Code* (NT) s38(2), *Criminal Code Act 1899* (Qld) s29(2), *Criminal Code Act 1924* (Tas) s18(2), *Criminal Code Act Compilation Act 1913* (WA) s29 and Common law *doli incapax* (NSW, Victoria and SA).

[20] Schedule 4.

[21] CRC/C/AUS/CO/4 (28 August 2012), [82–83].

[22] Section 3 Definitions. See also Subdivision E of Division 6 of Part VII.

[23] *Children, Youth and Families Act 2005* (VIC) s387; s397.

which studies the provision of health and well-being services to youth, defines this demographic as those aged between 12 and 24 years old. Similarly, the Youth Health Service in South Australia provides free health services to individuals between 12 and 25 years old.[24]

Arguably, generally then in Australia, as is also seen in many jurisdictions around the world, the special status accorded to young people is expanding at least into the third decade of life. The United Nations defines 'youth' as persons falling between the ages of 15 and 24 years.[25] The Australian Government's National Youth Week targets young people aged 12–25 years old,[26] and in order to be eligible for Youth Allowance in Australia, you must be between the ages of 16 and 24 years old.[27]

3 Framework for Protection of the Rights of the Child in Australia

There is no single instrument in Australia that is specifically devoted to the rights of the child. A federal system of government in Australia means that many of the rights covered by the UNCRC fall within the purview of state and territory responsibility. The CRC has expressed concern 'that there continues to be no comprehensive child rights Act at the national level [in Australia] giving full and direct effect to the Convention'.[28] In practice, children living in some parts of Australia may not always be treated equally or have their rights duly recognised relative to other children living in different parts of Australia, where law and policies may be more progressive.

Victoria[29] and the Australian Capital Territory (ACT)[30] are the only two jurisdictions in Australia that have enacted specific human rights legislation applicable to all citizens. In both these jurisdictions the legislation explicitly refers to the child as a rights bearer. Section 17(2) of the Victorian Charter recognises that '[e]very child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child'. The child's right to be protected is not framed in the ACT legislation by the best interests principle, as in the Victorian Charter, but more generally, Section 11(2) of the Act simply states that

[24] Government of South Australia, 'Youth Health Service', *Women's and Children's Health Network*, available at http://cyh.com/SubContent.aspx?p=223.

[25] United Nations, 'Definition of Youth', *United Nations Youth Fact Sheet* available at http://www.un.org/esa/socdev/documents/youth/fact-sheets/youth-definition.pdf.

[26] Australian, State, Territory and Local Government Initiative, 'National Youth Week' available at http://youthweek.com.

[27] Department of Human Services, 'Youth Allowance Eligibility' available at http://www.humanservices.gov.au/customer/services/centrelink/youth-allowance.

[28] CRC/C/AUS/CO/4 (28 August 2012), [11].

[29] *The* Victorian Charter *of Human Rights and Responsibilities Act 2006.*

[30] *The Human Rights Act 2004.*

'[e]very child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind'.[31] Sections 23 and 20 of the Victorian and ACT legislation, respectively, specifically protect the rights of the child in the criminal process. Protection in this context is important, and the criminal justice system must demonstrate a heightened sensitivity to the vulnerability of children that come into contact with it. Kelly Richards' study on the rate at which juvenile offenders in Australia are remanded suggests that there has been a substantial increase in the proportion of juvenile detainees being remanded, which is concerning for efforts towards ensuring that detainment is a last resort for juveniles.[32] In 2014, the Queensland Government removed the sentencing principle for juvenile offenders that detention should be used as a last resort and also removed limitations on publishing identifying information about youth offenders.[33]

More generally, children's rights are also protected in Australia by a range of specific legislative provisions, for example, child protection, consumer, education and family law legislation. Furthermore, Australian children are generally protected in most aspects of public life against discrimination on the grounds of race, sex, disability and age, by anti-discrimination legislation at the federal and state level.[34] For example, a disabled child can rely upon Section 22 of the *Disability Discrimination Act 1992* (Cth) to ensure that they are provided equal access to educational institutions.[35]

Despite the existence of a range of legislative provisions that seek to promote recognition and protection of the rights of the child in Australia, albeit at times in a somewhat limited way, the absence of a comprehensive child rights Act at a national level in Australia continues to raise concerns of 'fragmentation and inconsistencies in the implementation of child rights…with children in similar situations being subject to variations in the fulfilment of their rights depending on the state or territory in which they reside'.[36] Unfortunately, although enactment of the UNCRC through special statute is highly desirable, many nation parties like Australia have not taken this course of action.

---

[31] Section 11 in providing examples of distinction or discrimination refers to 'race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth, disability or other status'.

[32] Kelly Richards, 'Trends in Juvenile Detention in Australia' (2011) *Australian Institute of Criminology*: *Trends and Issues in Crime and Criminal Justice* No. 416, 5.

[33] *Youth Justice and Other Legislation Amendment Act 2014* (Qld).

[34] At a federal level, see *Australian Human Rights Commission Act 1986*, *Age Discrimination Act 2004*, *Racial Discrimination Act 1975* and *Sex Discrimination Act 1984*. State and territory anti-discrimination laws: *Australian Capital Territory Discrimination Act 1991* (ACT), *New South Wales Anti-Discrimination Act 1977* (NSW), *Northern Territory Anti-Discrimination Act 1996* (NT), *Queensland Anti-Discrimination Act 1991* (QLD), *South Australia Equal Opportunity Act 1984* (SA), *Tasmania Anti-Discrimination Act 1998* (TAS), *Victoria Equal Opportunity Act 1995* (VIC) and *Western Australia Equal Opportunity Act 1984* (WA).

[35] See also, for example, *Age Discrimination Act 2004* (Cth) s 14–15.

[36] CRC/C/AUS/CO/4 (28 August 2012), [11].

Aboriginal children have been identified as one group of Australian children that continue to experience persistent, systemic and structural discrimination[37] and violation of many of their rights. For example, Aboriginal children are overrepresented in the juvenile justice system – the likelihood of detention is at a rate 24 times higher than their non-Aboriginal counterparts.[38] Aboriginal children are also more likely to have contact with the child protection system; out-of-home placements for Aboriginal children are at a rate almost ten times greater than that for non-Aboriginal children.[39]

A comprehensive and coordinated approach to children's rights in Australia would benefit all children in Australia but especially disadvantaged children who often do not have an adequate participatory voice and who more often experience rights' violations including Aboriginal children, children with disabilities[40] and children from non-English speaking backgrounds or ethnic minorities.[41]

It is hoped that with Australia's appointment of its first National Children's Commissioner in 2013,[42] a more unified and national voice in advocating for the rights of all Australian children will be provided over time. However, as cautioned by the CRC, appropriate measures should accompany this appointment to ensure that the National Children's Commissioner is provided with adequate resources for the office to effectively function and fulfil its mandate.[43] Since the Commissioner's appointment in March 2013, significant community consultation with a focus on engagement with children has been undertaken. The Commissioner's *Children's Rights Report* laid out a number of issues that continue to require government action and will be monitored by the Commissioner on an ongoing basis.[44]

Australia in meeting its obligations under the UNCRC should strive for greater coordination in policies, law reform and resource allocation across all jurisdictions,

[37] Child Rights Taskforce. 'Listen to Children'. *Child Rights NGO Report Australia* (May 2011) available at http://www2.ohchr.org/english/bodies/crc/crcs60.htm, 4. See also, generally, Harris, M. and Gartland, G. 'Children of the Intervention: Aboriginal Children Living in the Northern Territory'. *A Submission to the UN Committee on the Rights of the Child* (June 2011) available at http://www2.ohchr.org/english/bodies/crc/crcs60.htm; National Aboriginal and Torres Strait Islander Legal Services. Shadow Report to the Committee on the Rights of the Child Regarding the Review of Australia (July 2011) available at http://www2.ohchr.org/english/bodies/crc/crcs60.htm.

[38] Ibid.

[39] Ibid.

[40] See, for example, generally, International Disability Alliance, *IDA Recommendations for* Concluding Observations, CRC 60th Session available at http://www2.ohchr.org/english/bodies/crc/crcs60.htm.

[41] Child Rights Taskforce. 'Listen to Children'. *Child Rights NGO Report Australia* (May 2011) available at http://www2.ohchr.org/english/bodies/crc/crcs60.htm, 4–6.

[42] See at http://www.humanrights.gov.au/our-work/childrens-rights/about-childrens-rights.

[43] CRC/C/AUS/CO/4 (28 August 2012), [17–18].

[44] National Children's Commissioner, *Children's Rights Report 2013* (November 2013) Australia Human Rights Commission 36.

so as to ensure that the rights of all Australian children are recognised and protected equally.

4 Implementation of the Best Interests Principle

Article 3(1) of the Convention provides that '[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.

The best interests of the child (BIC) is the key guiding principle in most legislation in Australia at both federal and state levels that relates to children. For example, child protection legislation in every Australian jurisdiction identifies the paramount importance of the BIC,[45] and each jurisdiction provides guidelines on how such decisions should be reached.[46] However, legislative protection alone seems to have been insufficient in fulfilling this right.[47]

In the context of family law more specifically, the *Family Law Act 1975* (Cth) (the FLA) requires that the BIC is a core consideration in decisions affecting children. Section 60B of the FLA states that the objects of Part VII (Children) are to ensure that the best interests of children are met by:

(a) Ensuring that children have the benefit of both of their parents having meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child
(b) Protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence
(c) Ensuring that children receive adequate and proper parenting to help them achieve their full potential
(d) Ensuring that parents fulfil their duties and meet their responsibilities, concerning the care, welfare and development of their children

Section 60CA of the FLA requires that the court in deciding whether to make a particular parenting order in relation to a child must have regard to the BIC as the paramount consideration. Section 60CC of the FLA requires the court, in determining what is in the child's best interests, to consider certain primary considerations

[45] *Children and Young People Act 2008* (ACT), *Children and Young Persons* (Care *and Protection*) *Act 1998* (NSW), *Care and Protection Children Act 2007* (NT), *Child Protection Act 1999* (Qld), *Children's Protection Act 1993* (SA), *Children, Young Persons and their Families Act 1997* (Tas), *Children, Youth and Families Act 2005* (Vic), *Children and Community Services Act 2004* (WA).

[46] Holzer, P. and Lamont, A. (2009). 'Australian Child Protection Legislation'. Resource Sheet No. 14 (AIFS) available at: http://www.aifs.gov.au/nch/pubs/sheets/rs14/rs14.html.

[47] Child Rights Taskforce. 'Listen to Children'. *Child Rights NGO Report Australia* (May 2011) available at http://www2.ohchr.org/english/bodies/crc/crcs60.htm, 6.

(subsection (2)) and additional considerations (subsection (3)). The primary considerations are:

(a) The benefit to the child of having a meaningful relationship with both of the child's parents
(b) The need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence

Greater weight is to be accorded to the considerations set out in paragraph (2)(b).[48]

Numerous additional considerations must also be taken into account by the court,[49] amongst these are any views expressed by the child,[50] the nature of the relationship between the child and parents and others,[51] the capacity of the child's parents and of any other person to provide for the needs of the child including emotional and intellectual needs,[52] the extent to which each parent has fulfilled or failed to fulfil parental obligations to maintain the child,[53] the likely effect on the child of any change in circumstances[54] and the attitude to the child and to the responsibilities of parenthood, demonstrated by each of the child's parents.[55]

Courts in Australia including the High Court of Australia have also considered the BIC principle in numerous contexts through common law principles and doctrine, for example, *Cattanach v Melchior* [2003] HCA 38 (16 July 2003) (wrongful birth case) and *Secretary*, *Department of Health and Community Services v JWB and SMB* (Marion's case) (1992) 175 CLR 218 (concerning sterilisation).[56] In *Cattanach v Melchior* (2003) the High Court considered whether the unintended birth of a child as a result of medical negligence in the performance of or advice pertaining to a sterilisation procedure should give rise to actionable damages on the part of the parents of that child. The High Court assumed that the fact of the child's birth could not be considered a legal wrong for this purpose; however, the costs of raising and maintaining that child could be recovered.[57] The court considered various factors as relevant to whether the child would be impacted adversely by the allowance of this type of claim. Concern was raised as to whether a child would feel devalued in knowing that their parents had sued for the damage associated with and caused by their birth.[58] This was weighed against the child's interest in the alleviation of their parent's financial hardship.[59]

[48] Paragraph (2A).
[49] Paragraph (3).
[50] Paragraph (3)(a).
[51] Paragraph (3)(b).
[52] Paragraph (3)(f).
[53] Paragraph (ca).
[54] Paragraph (d).
[55] Paragraph (i).
[56] Cited in CRC/C/AUS/4 (4 June 2011), [70].
[57] Cattanach v Melchior (2003) 215 CLR 1, 31-2, 39, 57, 107.
[58] Ibid. 56, 92, 93, 124, 127-8, 139.
[59] Ibid. 75, 144.

In the context of considering whether medical procedures are in the best interests of a child, the law will place a value on protecting the child's bodily integrity and dignity.[60] The medical procedure at issue in Marion's case was the sterilisation of a disabled child. The majority considered that this procedure would only be in the best interests of the child if it furthered the child's welfare and if alternative, less invasive procedures had already failed or were likely to be unsuccessful.[61] The child's welfare in this context was construed as meaning more than simply convenience.[62] When authorising medical procedures as being in the best interests of the child, the court must be cautious because of the irreversibility of the procedure and the 'significant risk of a wrong decision being made'.[63] The court said that ordinarily the best interests of the child would coincide with the wishes of the parents.[64] In this case the 'best interest' test was criticised by Justice Brennan as being void of predictable and consistent content.[65]

A key concern raised by the CRC with respect to Australia's approach to the BIC is that the principle is not 'appropriately integrated and consistently applied in all legislative, administrative and judicial proceedings and in policies, programmes and projects relevant to and with an impact on children'.[66] This is similarly a concern for many States Parties. A particular concern raised for Australia is application of the best interests principle to child asylum seekers, refugee and immigration detention situations.[67] Accordingly the CRC has encouraged Australia to develop procedures and criteria to provide guidance for determining the best interests of the child in every area and to disseminate them to public and private social welfare institutions, courts of law, administrative authorities and legislative bodies. The legal reasoning of all judicial and administrative judgments and decisions should also be based on this principle, specifying the criteria used in the individual assessment of the best interests of the child.[68]

As this discussion highlights, implementation of the best interests principle represents another area where greater harmonisation of approach and application should be pursued in Australia in order to more effectively protect children's interests and their well-being.

---

[60] *Secretary*, *Department of Health and Community Services v J.W.B and S.M.B* (1992) 175 CLR 218, 232, 253, 265-9, 309-10.

[61] Ibid. 259.

[62] Ibid. 260.

[63] Ibid. 250.

[64] Ibid. 260.

[65] Ibid. 270-1.

[66] CRC/C/AUS/CO/4 (28 August 2012), [31].

[67] CRC/C/AUS/CO/4 (28 August 2012), [31]. See also Child Rights Taskforce. 'Listen to Children'. *Child Rights NGO Report Australia* (May 2011) available at http://www2.ohchr.org/english/bodies/crc/crcs60.htm, 6.

[68] CRC/C/AUS/CO/4 (28 August 2012), [32].

5 Implementation of the Right to Express the Views Freely in All Matters Affecting the Child

Article 12 of the UNCRC recognises that children who are capable of forming their own views have a right to express those views freely in all matters affecting them and accordingly should be 'provided the opportunity to be heard in any judicial and administrative proceedings'. Moreover, Article 13 recognises a child's right 'to freedom of expression'.

A child's right to be heard in proceedings that affect the child is reflected in numerous legislative provisions in Australia both at federal and state levels and in varied contexts. For example, child protection legislation in every jurisdiction in Australia makes provision for a child's view or wishes to be expressed either directly or indirectly in such proceedings.[69] A key cornerstone in most of these provisions is recognition and support of the individual child's needs, level of maturity and his or her abilities. Accordingly, most provisions require the court or other person to provide the child with sufficient information to permit the child to express his or her views or wishes and to meaningfully participate in the decision-making process.

A key consideration in affording a child the opportunity to express his or her view in judicial or administrative proceedings is balancing such opportunity against the potential for distress to the child. In the context of family law proceedings, paragraph 60CC(3)(a) of the *Family Law Act* requires the court to consider any views expressed by a child in deciding whether to make a particular parenting order in relation to the child. Section 60CD of the Act deals with how the court informs itself of views expressed by a child, such means including by way of report to the court,[70] by appointment of an independent children's lawyer[71] or by any other means the court deems appropriate.[72] The Act makes clear however that the child's right to participate is voluntary and that '[n]othing in [the Act] permits the court or any person to require the child to express his or her views in relation to any matter'.[73] There is no age requirement specified in the Act with respect to a child's participation in proceedings; rather, the child's maturity and level of understanding is a factor that the court is to consider in determining the weight that it should give to the child's views.[74] The Act thus encourages consultation between the court and the child in making decisions in such proceedings. It is widely recognised that Australian family law processes 'have made considerable efforts to allow children's voices to

[69] *Children, Youth & Families Act 2005* (Vic) s11; *Children and Young People Act 2008* (ACT) s352; *Child Protection Act 1999* (Qld) s5E; *Children and Young Persons* (*Care and Protection*) *Act* 1998 (NSW) s10; *Care and Protection Children Act 2007* (NT) s11; *Children's Protection Act 1993* (SA) s4; *Children, Young Persons and their Families Act 1997* (Tas) s56; *Children and Community Services Act 2004* (WA) s10.

[70] Section 60CD(2)(a) pursuant to subsection 62G(2).

[71] Section 60CD(2)(b).

[72] Section 60CD(2)(c).

[73] Section 60CE.

[74] Paragraph 60CC(3)(a).

be heard both in the court process and in cases that are resolved without court intervention'.[75] However, concerns remain in Australia regarding 'inadequate fora for taking into account the views of children who are below the age of 15 and/or of Aboriginal or Torres Strait Islander descent'[76] specifically within the context of family law and welfare matters as well as more generally.

6 The Right of the Child to Know About His/Her Origin

Article 7 of the UNCRC recognises the right of the child to have from birth a name and 'to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents'.

6.1 Registration of Birth

All Australian states and territories require a child to be registered at birth. Entering a person's name as a parent of a child in a register of births or equivalent gives rise to a presumption of parentage.[77]

Evidence suggests that many indigenous Australians however are not registered at birth, and even if they are, they often experience difficulty in accessing their birth certificate.[78] Procedural barriers to registration including difficulties arising from poor literacy levels have been identified as a common problem.[79] It is quite clear that more can be done to streamline birth registration processes in Australia and remove barriers such as fees associated with obtaining copies of a birth certificate, particularly, for disadvantaged Australians such as indigenous Australians. A lack of access to one's birth certificate may start a 'vicious cycle' that prevents access to numerous other key facilities including education and health services and which precludes a person from obtaining a driver's licence and passport.[80]

---

[75] Child Rights Taskforce. 'Listen to Children'. *Child Rights NGO Report Australia* (May 2011) available at http://www2.ohchr.org/english/bodies/crc/crcs60.htm, 8

[76] CRC/C/AUS/CO/4 (28 August 2012), [33].

[77] Family Law Act (Cth) s69R.

[78] See, generally, Castan Centre for Human Rights Law, Monash University. *Shadow Report to the UN Committee on the Rights of the Child Regarding Australia's Compliance with Article 7 of the Convention of the Rights of the Child* (22 June 2011) available at http://www2.ohchr.org/english/bodies/crc/crcs60.htm.

[79] Ibid.

[80] Ibid.

6.2 Presumptions and Rebuttals of Parentage

Under the *Family Law Act 1975* (Cth), a child born to a woman whilst she is married is generally presumed to be a child of the woman and her husband.[81] The FLA also presumes parentage arising from a woman's cohabitation.[82] Under the FLA such presumptions are rebuttable pursuant to Section 69U. This section does not explicitly state who has standing to make such rebuttal; however, by virtue of Section 69C(2), it seems that proceedings relating to parentage may be initiated by the child, either or both of the child's parents, a grandparent of the child or any other person concerned with the care, welfare or development of the child. No distinction is drawn here under the FLA, as between children born in and outside of marriage. The position under state and territory legislation is similar to that under the FLA.[83]

In the case of a child conceived through medical assistance, the child's mother and her husband are generally presumed to be the parents of the child (assuming the husband consented to the procedure).[84] The woman and man need not be married but must be living together in a bona fide domestic relationship. This presumption is generally rebuttable by the child, parent or anyone who has a proper interest in such a determination.[85]

Thus under Australian law, a child, whether born in or out of a marriage or through assisted technology, may generally rebut parentage of either his or her mother or father as registered at birth or as otherwise presumed at law.

[81] Family Law Act (Cth) s69P.

[82] Family Law Act 1975 (Cth) s69Q. Additionally parentage may be presumed by a court's finding of such (s69S) or execution of an instrument acknowledging paternity (s69T).

[83] See *Status of Children Act* (NT), *Status of Children Act 1996* (NSW), *Status of Children Act 1974* (Vic), *Parentage Act 2004* (ACT), *Status of Children Act 1978* (Qld), *Family Relationships Act 1975* (SA), *Status of Children Act 1974* (Tas) and Family Court *Act 1997* (WA). Some jurisdictions also have specific provisions that deal with presumptions of parentage in the context of intestacy.

[84] *Status of Children Act 1978* (Qld) ss14-17, *Status of Children Act 1974* (Tas) Part III, *Status of Children Act 1974* (Vic) Parts II, *Family Law Relationships Act 1975* (SA) Part 2A, *Status of Children Act 1996* (NSW) s14, *Status of Children Act* (NT) Part IIIA, Family Law Act 1975 (Cth) s60H.

[85] *Status of Children Act 1978* (Qld) s 10, *Status of Children Act 1974* (Tas) s10, *Status of Children Act 1974* (Vic) s10, *Family Law Relationships Act 1975* (SA) s9, *Status of Children Act 1996* (NSW) Division 3.

6.3 *Right to Access Information Relating to Genetic Origins*

6.3.1 Children Conceived Through Biomedical Assistance

The position in Australia in relation to a child's right to access genetic or donor information where the child is born of assisted reproductive technology (ART)[86] varies between jurisdictions. Only four states in Australia (Victoria, NSW, WA and SA) have legislation that specifically regulates ART and the rights of persons conceived using such technology to know their genetic origins.[87] In South Australia, donor offspring have a right to access non-identifying information about donors once they reach the age of 16.[88] Identifying information is only accessible by the conceived person with donor consent. In Victoria children born of donor gametes have a right to access identifying information, but generally, only after they reach the age of 18 or before, with the consent of their parent/guardian.[89] Similarly, in NSW a child conceived of ART may access donor-identifying information upon turning 18 years of age.[90] No provision is made in the NSW legislation for disclosure of any information to a nonadult donor offspring. Western Australia is the only Australian jurisdiction that recognises a child's right (at age 16) to identifying donor information.[91] The child here however is required to have undertaken approved counselling.[92] NSW, Victoria, SA and WA all require certain information to be recorded prior to use of the donor gametes so as to protect and enable the future accessibility of such data.

In Australian jurisdictions where there is no legislation in place that regulates ART and the right of access to information about donor gametes, the National Health and Medical Research Council (NHMRC) ART guidelines provide direction.[93] The NHMRC guidelines recognise the right of a person born of ART to have access to information regarding their genetic parents[94] and prohibit the use of

[86] Assisted reproductive technology is the application of laboratory or clinical technology to gametes (human egg or sperm) and/or embryos for the purposes of reproduction: NHMRC at http://www.nhmrc.gov.au/health-ethics/australian-health-ethics-committee-ahec/assisted-reproductive-technology-art/assisted.

[87] *Assisted Reproductive Treatment Act 2008* (Vic), Assisted Reproductive Technology *Act 2007* (NSW) (the NSW legislation is currently under review), *Assisted Reproductive Treatment Act 1988* (SA), *Western Australian Human Reproductive Technology Act 1991*(*WA*).

[88] *Reproductive Technology* (*Code of Ethical Clinical Practice*) *Regulations 1995* (SA) cl 31(2).

[89] *Assisted Reproductive Treatment Act 2008* (Vic) s59.

[90] Assisted Reproductive Technology *Act 2007* (NSW) s37.

[91] *Western Australian Human Reproductive Technology Act 1991*(WA) s49(2d).

[92] *Western Australian Human Reproductive Technology Act 1991*(WA) s49(2d).

[93] NHMRC, 'Ethical Guidelines on the use of assisted reproductive technology in clinical practice and research' (2007) (ART Guidelines) available at: http://www.nhmrc.gov.au/_files_nhmrc/publications/attachments/e78.pdf.

[94] NHMRC, 'Ethical Guidelines on the use of assisted reproductive technology in clinical practice and research' (2007) (ART Guidelines), paragraph 6.1.

donated gametes in reproductive technologies, unless the donor has consented to the release of identifying information about himself or herself to the persons conceived using his or her gametes.[95]

Importantly although the NHMRC guidelines and the legislation in Victoria, NSW, WA and SA recognise the right of a person conceived of ART to know their genetic parents, there is no requirement that a parent disclose to a person so born that they were conceived by ART. This lack of a duty of disclosure essentially renders 'any access to identifying information [a]s inconsequential if parents do not inform their children that they are donor conceived and entitled to [such information]'.[96]

What is thus clearly lacking in Australia is a mechanism that recognises a child's right to know that they have been conceived through biomedical assistance (or at least a rigorous and standardised process such as counselling that encourages and facilitates such disclosure as appropriate) and thereafter to be able to access identifying and non-identifying information as a matter of right when the child has 'acquired sufficient maturity to appreciate the significance of the request'.[97]

6.3.2 Adopted Children

All Australian jurisdictions have provisions that permit adopted children on turning 18 (16 in NT) to access certain identifying and non-identifying information, where available, about their birth parent.[98] The position however varies between jurisdictions. Most Australian jurisdictions also have provisions for children under 18 years of age to access birth information, but generally the consent of adoptive parents is required,[99] and in some states consent from both adoptive and birth parents may also be necessary depending on the circumstances and information that are sought to be obtained.[100] In Western Australia, however, an adoptee under 18 years of age may apply for access to adoption information in their own right.[101]

---

[95] NHMRC, 'Ethical Guidelines on the use of assisted reproductive technology in clinical practice and research' (2007) (ART Guidelines) paragraph 6.1.

[96] Schneller, E.A. 'The rights of donor inseminated children to know their genetic origins in Australia'. (2005) 19 *Australian Journal of Family Law* 222 (accessed via LexisNexis).

[97] NHMRC, 'Ethical Guidelines on the use of assisted reproductive technology in clinical practice and research' (2007) (ART Guidelines), paragraph 6.11.

[98] Adoption *Act 1988* (Tas) Section 82, *Adoption of Children Act* (NT) Section 64, *Adoption Act 1988* (SA) Section 27, *Adoption Act 1984* (Vic) Section 93, *Adoption Act 2009* (Qld) Part 11, *Adoption Act 2000* (NSW) Section 133C, *Adoption Act 1993* (ACT) Part 5.

[99] Adoption *Act 1988* (Tas) Section 81, *Adoption of Children Act* (ACT) Section 64 (children under 16), *Adoption Act 2000* (NSW) s 133C, *Adoption Act 2009* (Qld) Section 256, *Adoption Act 1984* (Vic) Section 94, *Adoption Act 1993* (ACT) Section 68.

[100] Adoption *Act 1988* (SA) Section 27A.

[101] Adoptions *Act 1994* (WA) Part 4.

There is a clear need for harmonisation of provisions in Australia relating to a child's access to information about adoption, based on the child's best interests and recognition that withholding such information from an adopted child may adversely impact on the child's psychological and emotional well-being.[102]

7 Rights of a Child in Adoption

Adoption in Australia including intercountry adoptions is a state, not federal, responsibility, so legislation varies across different jurisdictions.[103] The best interests of the child or young person is a paramount consideration in adoption decisions in all Australian jurisdictions.[104] The NSW *Adoption Act 2000* as in most other states and territories takes a broad approach to the BIC requiring that in making a decision about the adoption of a child, the decision-maker must (as far as is practicable or appropriate) have regard to the BIC 'both in childhood and later life'.[105] Every state and territory in Australia recognises the importance of 'consulting with the child or young person throughout the adoption process and, wherever possible, taking the child's or young person's views into account'[106] with regard to the child's age or ability to understand.

Australian states and territories however are split on whether a child must consent to the adoption. In NSW, NT, SA and WA, a court must not make an order for adoption of a child aged 12–18 years capable of giving consent unless the child consents.[107] However, in these jurisdictions the court may of itself dispense

[102] Richard Chisholm, 'Information Rights and Donor Conception: Lessons from Adoption?' (2012) 19 *Journal of Law and Medicine* 722 and Brooke Skinner-Drawz et al., 'The Role of Adoption Communicative Openness in Information Seeking Among Adoptees From Adolescence to Emerging Adulthood' (2011) 11 *Journal of Family Communication* 181.

[103] Adoption *Act 2000* (NSW), *Adoption Act 1993* (ACT), *Adoption Act 2009* (Qld), *Adoption Act* 1988 (Tas), *Adoption of Children Act* (NT), *Adoption Act* 1988 (SA), *Adoption Act 1994* (WA), *Adoption Act 1984* (Vic).

[104] Adoption *Act 2000* (NSW) s8(1)(a), *Adoption Act 1993* (ACT) s4(a) and 5, *Adoption Act 2009* (Qld) s6(1), *Adoption of Children Act* (NT) s8, *Adoption Act 1988* (Tas) s8, *Adoption Act* 1988 (SA) s7, *Adoption Act 1994* (WA) s3, *Adoption Act 1984* (Vic) s9.

[105] Adoption *Act 2000* (NSW) s8(1)(a), *Adoption Act 2009* (Qld) s6(1) and 9.

[106] Adoption *Act 1993* (ACT) s4(e) and 35B. See also *Adoption Act 2000* (NSW) ss8 and 9, *Adoption of Children Act* (NT) Section 10(1), *Adoption Act 2009* (Qld) Section 44 and 179, *Adoption Act 1984* (Vic) Section 14, *Adoption Act 1988* (Tas) Section 23, *Adoption Act* 1988 (SA) Section 8A and *Adoption Act 1994* (WA) Section 134.

[107] Adoption *Act 2000* (NSW) Section 55(1), *Adoption of Children Act* (NT) Section 10(2), *Adoption Act* 1988 (SA) Section 16 and *Adoption Act 1994* (WA) Section 17. Consent of the child is not required in the ACT: *Adoption Act 1993* (ACT) Section 28 nor does the Qld, Tas and Vic legislation make mention of the need for the child's consent.

with this requirement.[108] For example, in NSW the *Adoption Act 2000* pursuant to Section 55 requires that:

1. The court must not make an adoption order in relation to a child who is 12 or more but less than 18 years of age and who is capable of giving consent unless:
   (a) The child has been counselled as required by Section 63.
   (b) The counsellor has certified that the child understands the effect of signing the instrument of consent (as required by Section 61).
   (c) The child consents to his or her adoption by the prospective adoptive parent or parents, or the court dispenses with the requirement for consent.
2. The court may make an adoption order in relation to such a child who is incapable of giving consent if the court is satisfied that the circumstances are exceptional and that it would be in the best interests of the child to make the order.

The eligibility requirements for overseas adoptions are different in each Australian state and territory[109] and may include criteria concerning partner relationship status, age, citizenship and health. Actual adoption procedures vary depending on the country and category under which the adoption takes place. Generally procedures for adoption involve prospective parents being allocated a child from the overseas country through their state or territory adoption authority; if accepted, they may lodge an adoption visa application for the child; the child is required to undergo medical checks; the adoption is finalised in the overseas country; a visa granting permanent residence to the child is granted and appears in the child's foreign passport.[110]

Although adoption is a state responsibility, the Australian Government, through the Attorney-General's Department, has the responsibility for managing existing adoption programmes and negotiating new programmes with other countries.[111]

There is clearly a need for greater harmonisation across Australia in relation to legislative provisions relating to adoption, particularly, in relation to a child's consent in such matters.[112] Also consistent national eligibility requirements and procedures for overseas adoptions that provide uniformity throughout Australia would assist in removing any impetus for 'forum shopping'.

---

[108] Adoption *Act 2000* (NSW) Section 55(1)(c) and (2), *Adoption of Children Act* (NT) Section 10(2), *Adoption Act* 1988 (SA) Section 18 and *Adoption Act 1994* (WA) Section 24.

[109] Adoption *Act 1993* (ACT) Part 4A; *Adoption of Children Act* (NT) Section 10(2)(b); *Adoption Act 1988* (Tas) Part II, Division 5; *Adoption Act 1994* (WA) Part 3, Division II; *Adoption Act 2000* (NSW) Chapter 5, Part 2; *Adoption Act 2009* (Qld) Part 9. Division 3; *Adoption Act 1984* (Vic) Part IVA; *Adoption Act 1988* (SA) Division 3.

[110] See generally http://www.immi.gov.au/media/fact-sheets/36adopting.htm.

[111] See generally http://www.immi.gov.au/media/fact-sheets/36adopting.htm.

[112] CRC/C/AUS/CO/4 (28 August 2012), [53–54].

8 The Right of the Child to Freedom of Thought, Conscience and Religion

Article 14 of the UNCRC recognises 'the right of the child to freedom of thought, conscience and religion' subject 'only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others'.

There is legal provision for religious education in government schools in all states and territories in Australia.[113] Such religious instruction is not obligatory but optional for students. However, under the current scheme, schools are obliged to permit volunteers from religious organisations to teach weekly classes, generally up to 1 h, to students choosing this instruction (generally through parental/guardian decision-making).[114] Legislation in Australia provides for two types of religious education: general religious education and denominational religious education. The latter form of religious education has dominated religious instruction in Australian state schools. Calls have been made in Australia to revisit the appropriateness of such provisions in secular schools, but the issue is yet to be well argued.

9 Protection of Child Against Physical Punishment

Article 19 of the UNCRC requires that 'appropriate legislative, administrative, social and educational measures' be undertaken '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'.

The position with respect to corporal punishment and discipline of children in Australia varies between jurisdictions. In the context of schooling, the Australian Government has stated it does not endorse corporal punishment as an approach to developing values and respect in students and has legislated that the National Safe Schools Framework now be implemented in every Australian school.[115] This Framework consists 'of a set of nationally agreed principles for a safe and supportive school environment. It includes appropriate responses which schools can adopt to address issues of bullying, violence, harassment, and child abuse and neglect'.[116] Some Australian states have explicitly banned the use of corporal

[113] Rossiter, G. 'Religious education in government schools in Australia' available at: http://203.10.46.30/ren/reflag/iarfchap.html.

[114] See, for example, *Education* (*General Provisions*) *Act 2006* (Qld) Section 76(1), (5) and (6).

[115] CRC/C/AUS/4 at 18.

[116] Ibid.

punishment in schools,[117] but in other states, it remains unclear whether this ban also extends to nongovernment schools.[118] This is a problem in terms of universal protection of children against corporal punishment as over one million Australian school students attend nongovernment schools, which is just over half the number of students at government schools.[119]

In relation to physical punishment by parents, it remains lawful in all Australian jurisdictions for parents to use reasonable corporal punishment to discipline their children.[120] In some jurisdictions the lawfulness of physical punishment of a child by a parent is provided for by legislation,[121] whilst in others it is permitted by the common law.[122]

The position in Australia therefore with respect to the physical punishment of children in schools, institutional settings and within the home is that physical punishment remains lawful in certain circumstances on the basis of 'reasonable chastisement'. As recommended by the CRC, Australia should '[t]ake all appropriate measures to explicitly prohibit corporal punishment in homes, in public and private schools, detention centres and alternative care settings in all states and territories'.[123]

10 Deprivation of Parental Responsibility

Under Part VII (Children) of the *Family Law Act 1975* (Cth), parental responsibility is understood to mean 'all the duties, powers, responsibilities and authority which, by law, parents have in relation to children'.[124] Each of the parents of a child under

[117] Education Act 1990 (NSW) s35 and s47(h), *Education Amendment Act 1999* (Tas) s82A, *Education and Training Reform Act 2006* (Vic) s2.6.60 and s4.3.1(6)(a) and *School Education Regulations 2000* (WA) (only applies to government schools).

[118] For example, in the ACT the purpose of the *Education* (*Amendment*) *Act 2004* was to ban punishment in 'all schools'. Although the Act does not explicitly state that it relates to both government and nongovernment schools, the interpretation is that it applies to both school systems: Holzer, P. and Lamont, A. (2010). 'Corporal Punishment: Key Issues'. *NCPC Resource Sheet* (AIFS) available at http://www.aifs.gov.au/nch/pubs/sheets/rs19/rs19.html. See also *Education General Provisions Regulation Act 2006* (Qld) and *Education* (*Amendment*) *Act 1991* (SA).

[119] Australian Bureau of Statistics, 'Schools Australia 2013' ABS 4221.0, available at http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4221.0main+features42013.

[120] Holzer, P. and Lamont, A. (2010). 'Corporal Punishment: Key Issues'. *NCPC Resource Sheet* (AIFS) available at: http://www.aifs.gov.au/nch/pubs/sheets/rs19/rs19.html.

[121] See, e.g. *Crimes Act 1900* (*NSW*) s61AA, Criminal Code *Act* (NT) s 27, *Criminal Code Act 1899* (Qld) s280, *Criminal Code Act 1924* (Tas) s50 and *Criminal Code Act 1913* (WA) s 257.

[122] For example, the ACT, SA and Vic.

[123] CRC/C/AUS/CO/4 at 10. See also Bernadette Saunders and Chris Goddard, 'Some Australian Children's Perceptions of Physical Punishment in Childhood' (2008) 22 *Children & Society* 405 and Seunghee Han, 'Corporal Punishment and Student Outcomes in Rural Schools' (2014) 13 *Educational Research for Police and Practice* 221.

[124] Section 61B.

18 years of age has parental responsibility for the child.[125] However, parenting orders may (either expressly or by necessary intendment) diminish or take away all or some aspects of parental responsibility of a parent for their child.[126] The scope of parental responsibility conferred for a child on a person will be determined by the extent to which a parenting order 'confers on the person duties, powers, responsibilities or authority in relation to the child'.[127] The court in making a parenting order 'must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child'.[128] However, consistent with the requirements of Article 19(1) of the UNCRC, the presumption does not apply if there are reasonable grounds to believe that a parent of the child (or a person who lives with a parent of the child) has engaged in abuse of the child or another child in the parent's family or perpetrated family violence.[129] Moreover, the presumption of equal shared parental responsibility may be rebutted by evidence that 'satisfies the court that it would not be in the best interests of the child for the child's parents to have equal shared parental responsibility for the child'.[130] As against other countries the law in Australia with respect to deprivation of parental responsibility seems well developed in protection of children's right to life, survival and development.

11 A Child's Right to Medical Consent

A child's right to give or refuse medical consent in Australia is variously governed by a mix of common law and legislation in the different jurisdictions. Generally speaking, parents and children in Australia hold concurrent rights to refuse or consent to a child's medical treatment, consistent with recognition of a child's increasing competency in decision-making as the child moves towards adulthood.[131] A court may override the decision of a competent child and/or their parent in relation to giving or refusing medical consent by application of the best interests principle.

In NSW the *Minors* (*Property and Contracts*) *Act 1970* provides that a child aged 14 years or over may consent to his/her medical or dental treatment. Pursuant to Section 49 of the Act, the consent of the minor will be effective in terms of defending an action for assault or battery relating to the treatment. This Act however does not provide guidance on situations of conflict in consent to medical treatment

[125] Section 61C.

[126] Section 61D.

[127] Section 61D(1).

[128] Section 61DA(1).

[129] Section 61DA(2).

[130] Section 61DA(4).

[131] High Court of Australia in *Secretary*, *Department of Health and Community Services v JWB and SMB* (Marion's case) (1992) 175 CLR 218 approving *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112.

between a child and his or her parents. In South Australia the *Consent toMedical Treatment and Palliative Care Act 1995* provides that a child aged 16 years of age or over can consent to medical and dental treatment 'as validly and effectively as an adult'. Section 12 of the Act permits a medical practitioner to administer medical treatment in circumstances where the child consents and the medical practitioner is of the opinion 'that the child is capable of understanding the nature, consequences and risks of the treatment and that the treatment is in the best interest of the child's health and well-being'[132] and 'that opinion is supported by the written opinion of at least one other medical practitioner who personally examines the child before the treatment is commenced'.[133]

The child's right to independent consent in medical treatment and interventions whilst well developed in Australia against international standards could be harmonised more nationally.

12 A Child's Right to Change Name

In Australia the law applicable to a child's right to formally change name (i.e. from that recorded on their birth certificate) is state and territory based.[134] Generally a child who is aged under 18 will, unless they have previously been married, require the consent of at least one parent to change their name, and usually consent from both parents is required, exceptions typically include where only one parent is recorded on the birth certificate, the other parent has died or a court orders such change of name. In the case of a child aged 12 years or older (or in the case of South Australia, a child old enough to understand the implications of a change in name), most Australian jurisdictions require the child to consent to a change in name. In most Australian jurisdictions application for change of name of a minor must be lodged by a parent or legal guardian with the appropriate registry of Births, Deaths and Marriages or equivalent government office.[135]

---

[132] Section 12(b)(i).

[133] Section 12(b)(ii).

[134] Births, Deaths and Marriages Registration Act 1997 (ACT); Births, Deaths and Marriages Registration Act 1995 (NSW); Births, Deaths and Marriages Registration Act 2003 (Qld); Births, Deaths and Marriages Registration Act (NT); Births, Deaths and Marriages Registration Act 1996 (SA); Births, Deaths and Marriages Registration Act 1999 (Tas); Births, Deaths and Marriages Registration Act 1996 (Vic); Births, Deaths and Marriages Registration Act 1998 (WA).

[135] See generally http://www.bdm.vic.gov.au/home/change+of+name/change+your+childs+name/, http://www.bdm.nsw.gov.au/bdm_con.html, http://www.qld.gov.au/law/births-deaths-marriages-and-divorces/changing-your-name/changing-your-childs-name/, http://www.justice.tas.gov.au/bdm/changeofname/howtoregister, http://www.cbs.sa.gov.au/assets/files/change_name_child.pdf, http://www.nt.gov.au/justice/bdm/births_deaths_marriages/other/reg_name.shtml, http://www.ors.act.gov.au/community/births_deaths_and_marriages#I%20want%20to%20change%20my%20child%27s%20name and http://www.bdm.dotag.wa.gov.au/H/how_to_register_a_child_s_change_of_name.aspx?uid=4090-9458-2925-3474.

13 Rights and Protection of Children in Employment

In protecting the child against economic exploitation and other types of hazards and harm, Article 32 para (a) of the UNCRC requires States Parties to provide for a minimum age for children's admission to employment.

In Australia the employment of children is governed by a number of different federal, state and territory laws.[136] Most states and territories in Australia have legislation that regulates the minimum conditions of employment for children including the type of work children can undertake and the hours that children may work. For example, in Victoria children can be employed for a maximum of three hours per day during school term and up to six hours a day, and 30 hours a week, during school holidays. Moreover children can only be employed between 6.00 am and 9.00 pm and must receive a 30-minute break every three hours.[137] Moreover, children are only permitted to engage in 'light work' which is not likely to be harmful to a child's health, safety or moral and material welfare.[138] The ACT regulations provide examples of light work which includes going on errands, casual work in and around a private home, work related to sporting activities, clerical work, work as a cashier, gardening, taking care of children in a private home and providing entertainment, e.g. singing, dancing, musical instrument playing, performing on radio, television or film, modelling and a photographic subject.[139] Most states and territories in Australia have comparable laws of child employment.

Generally in Australia, children are prohibited from working when employment would prevent them from attending school within the mandatory school age. In the NT and ACT, the minimum school leaving age is 15 years, and in NSW, Victoria, Queensland, SA, Western Australia and Tasmania, students must stay at school until they have completed Year 10 and have attained at least 15 years of age and thereafter must be in some type of education, vocational training or employment until aged 17. However, children and young people in Australia are generally permitted to be employed part-time outside of school hours with various forms of regulation from 10 to 11 years of age upwards. For example, in Victoria the minimum age for employment generally is 13 years; however, children aged at least 11 can deliver newspapers and other types of advertising material or make deliveries for a registered pharmacist.[140] Moreover there is no minimum age in Victoria for employment of a child in a family business or in the entertainment industry. In most Australian

[136] Industrial relations (Child Employment) Act 2006 (NSW), Children and Young Persons (Care and protection) Act 1998 (NSW), Child Employment Act 2003 (Vic), Child Employment Act 2006 (Qld), Children and Community Services Act 2004 (WA), Children and Young People Act (ACT).

[137] See generally http://www.workplaceinfo.com.au/resources/employment-topics-a-z/child-employment-laws.

[138] Ibid.

[139] Children and Young People Regulation 2009 (ACT): cited at http://www.workplaceinfo.com.au/resources/employment-topics-a-z/child-employment-laws.

[140] See generally http://www.workplaceinfo.com.au/resources/employment-topics-a-z/child-employment-laws.

jurisdictions children aged under 15 years must obtain parental consent for employment. Australian law as regards children's employment is generally assessed against international standards, well developed in protecting children from unsafe and unfair working conditions, including wages, minimum age at which children are first allowed to work, types of employment that children can engage in and in balancing children's rights in decisions about employment with the need for parental consent.

14 Obligation of Child Towards Parents

With a number of countries introducing laws and policies that seek to regulate the duties and responsibilities of a child (generally as an adult) towards his or her parents, this issue is of increasing relevance globally.[141] In Australia the relevance of this issue is made even clearer when considered against the changed backdrop of contemporary family and community life.[142] Australia today like many countries has a rapidly ageing population[143]; family breakdown is increasing with one in three marriages ending in divorce and the rate of marriages having markedly fallen in recent decades.[144] Moreover, evidence suggests that elderly Australians are increasingly the victims of abuse and neglect including within their own home.[145] The structure and lifestyle of families in Australia have changed, as have familial relationships. Nevertheless, the fundamental importance of family in community well-being continues to be widely recognised:

> The interconnection of families with their communities is a fundamental building block of strong and resilient societies.
>
> .
>
> .
>
> .
>
> Resilience requires support from within and beyond families, tailored to the needs of individual, family and community circumstances.[146]

---

[141] See generally F Russo, 'Caring for Aging Parents: Should there be a Law? *Time* (Health & Family), 22 July 2013 available at http://healthland.time.com/2013/07/22/caring-for-aging-parents-should-there-be-a-law/.

[142] Hayes, A., Qu, L., Weston, R. and Baxter, J. (2011) 'Families in Australia 2011: Sticking together in good and tough times' (AIFS, Report for National Families Week, March 2011) available at ww.aifs.gov.au/institute/pubs/factssheets/2011/fw2011/fw2011a.html..

[143] Ibid.

[144] Ibid.

[145] Kurrie, S. and Naughtin, G (2008). 'An Overview of Elder Abuse and Neglect in Australia'. 20 *Journal of Elder Abuse & Neglect* 108 and James, M. (1994) 'Abuse and Neglect of Older People'. 37 *Family Matters* 94.

[146] Australian Institute of Family Studies, 'Families in Australia 2011: Sticking Together in Good and Tough Times', *Report of National Families Week* 2011, available at http://www.aifs.gov.au/institute/pubs/factssheets/2011/fw2011/fw2011d.html.

Currently there is no specific legal obligation owed by a child towards his/her parents under any Australian law at either a national or state level. A child however must interact with his/her parents in a way consistent with the laws of Australia and in accordance with basic human rights.

15 Summary

Since ratification of the UNCRC, Australia has made steady progress in implementation of many of its provisions against international efforts and standards. However, as outlined in this report, there are several areas in Australia's implementation of the Convention that need to be further strengthened. Australia is one of the most developed countries in the world, and its implementation of the UNCRC should reflect this status and its economic well-being, which arguably currently is not consistently the case on its current record of achievement towards implementation of the Convention and in recognition of the child's bundle of rights.[147] This report has focused specifically on provisions in the Convention that relate to family law and family relations, and in this domain it is clear that Australia needs to examine how its implementation of the UNCRC can be harmonised to a greater extent across different jurisdictions and domains of children's lives to ensure equal and consistent protection of the rights of all Australian children irrespective of place of domicile, origin of birth, family situation or ethnic or racial background.

Australia's combined fifth and sixth periodic reports are due to be submitted to the CRC by 15 January 2018. It is hoped that some of the weaknesses in Australia's implementation of the Convention highlighted in this report and in the concluding observations of the CRC in response to Australia's fourth periodic report[148] might be addressed by the Australian Government, at least in part prior to its next report being due or at the very least identification of the core areas that require more attention with a plan of action put forward for addressing these areas in the future, in its report to the CRC.

[147] Australian Research Alliance for Children and Youth, Report Card: The Wellbeing of Young Australians (2013) available at: http://www.aracy.org.au/documents/item/126.

[148] CRC/C/AUS/C0/4.

http://www.springer.com/978-3-319-23188-4

The Rights of the Child in a Changing World
25 Years after The UN Convention on the Rights of the Child
Cvejic Jancic, O. (Ed.)
2016, XVIII, 410 p., Hardcover
ISBN: 978-3-319-23188-4