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Children's Rights in NSW

by

Lenny Roth

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ISSN 1325-5142

ISBN 0 7313 1781 5

June 2005

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Lenny Roth

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EXECUTIVE SUMMARY

Legal restrictions on children

There are a number of legal restrictions on children. Many of these restrictions apply to all persons under the age of 18 but some only apply to younger children (eg to persons under the age of 16). Some of the restrictions are absolute while others are relaxed if parental consent and/or court approval is given. The restrictions relate to recreational activities (eg drinking alcohol and gambling), civic participation (eg voting and serving as a juror), and to a range of other important matters such as making a will, taking legal action, consenting to medical treatment, having sex, getting married, changing one's name, obtaining a passport and being eligible for a driver's licence. The restrictions are justified on various grounds, including that children are not competent to do certain things; and that their vulnerability and immaturity means that they need to be protected from activities that may cause them physical, psychological or economic harm.

Discrimination against children

As well as being confronted with legal restrictions, children have faced restrictions or have been treated less favourably than adults in many areas of their lives as a result of policies and practices based on assumptions about them. State laws (since 1993) and federal laws (since 2004) make it unlawful to discriminate against a person on the grounds of age in areas such as employment and the provision of goods and services. However there are a number of exceptions to these laws. Some exceptions have been criticised such as the broad exception for compliance with other laws, and the exception for youth wages. The issue of youth wages is controversial and has been the subject of recent inquiries at the federal level. The argument against youth wages is that they breach the principle of equal pay for equal work and that they can be substituted with competency-based wages. The reason given for maintaining youth wages is that they are necessary to protect young people's position in the labour market.

School student's rights

Students with disabilities: State and federal laws prohibit educational authorities from discriminating against students with disabilities (the state laws only apply to public educational authorities). However, it is not unlawful to discriminate if the student with a disability requires services or facilities which would impose an 'unjustifiable hardship' on the educational authority. Some recent cases have upheld the rights of students with disabilities but in one case the High Court held that the school had not discriminated against a student with an intellectual disability who had been excluded from school because of violent behaviour associated with that disability. According to Dr Ian Dempsey, while the laws have increased awareness about disability, the spirit of the laws continue to be resisted at all levels. This may improve after the Federal *Disability Standards for Education* come into effect in August 2005. The Standards clarify the obligations of public and private education authorities and schools.

School bullying: The incidence and impact of school bullying, including 'e-bullying', has been recognised as a major problem in NSW in recent years. Recent state and

national initiatives have sought to address this problem. In January 2005, the NSW Department of Education published a new policy that requires every government school to develop and implement an Anti-Bullying Plan. In addition, on 30 March 2005, *Speak Up Day* was launched in which schools provided opportunities for bullied students to tell their stories in a safe and supportive environment and hosted a range of other activities to address bullying. At the national level, the *Bullying. No Way!* website was launched in 2002, and the *National Safe Schools Framework* was produced in 2003, along with federal funding to help schools implement best practice programs.

Suspensions and expulsions: The NSW Department of Education's policy, which only applies to government schools, sets out the grounds for suspending and expelling a student, including grounds for which suspension is mandatory. It also outlines the procedures for notifying and resolving suspensions. It requires schools to comply with the principles of procedural fairness and it contains a right of appeal. The policy has been criticised on various grounds including the zero tolerance approach to some types of misbehaviour, the length of suspensions and the absence of an independent appeal panel. Under new laws enacted in 2004, private schools are required to have suspension and expulsion policies that are based on principles of procedural fairness. It has been recognised that suspensions and expulsions can have a negative impact on students and their life opportunities. One recent Government strategy to address this is the creation of suspension centres to help students return to school after a long suspension.

Student's privacy: The NSW Department of Education is required to comply with state privacy laws, which regulate the collection, storage, access, accuracy, use and disclosure of personal information. However, as permitted by the Act, the Department of Education has made a *Privacy Code of Practice* that modifies the operation of the Act. The Code was made on the basis of the view that "in some circumstances, the privacy rights of students must necessarily be a secondary consideration to the relationship between schools, parents, guardians and caregivers". Most private schools are required to comply with federal privacy laws. This paper also outlines student's rights in relation to bag and locker searches and discusses the use of drug testing.

Consenting to medical treatment

The common law position is that a child can consent to medical treatment when he or she has sufficient understanding and intelligence to enable him or her to understand fully what is proposed. The child's consent will be valid notwithstanding parental opposition but a court can override the child's consent. If a child is not competent to consent, his or her parents can generally give consent. However, there are certain medical procedures for which parents cannot give consent and which require court authorisation. Courts can override a child's refusal to have medical treatment but it is unclear in Australia whether parents can do so. In the United Kingdom, the courts have held that parents can override a child's refusal. Various statutory provisions in NSW complicate the law on children's capacity to consent to, and refuse, medical treatment. The NSW Law Reform Commission is currently considering codifying or amending this area of the law. The Commission released an Issues Paper in June 2004.

Parent's powers

The *Family Law Act 1975* provides that each parents of a child who is not 18 has parental responsibility for the child. With parental responsibility comes the power to make decisions relating both to the long-term and day-to-day care, welfare and development of the child. Parents have the power to determine matters such as the child's name, their education, their religion, where they are to live and the discipline they receive. However, the 1986 *Gillick* decision, which was approved by the Australian High Court in *Marion's case* in 1992, has been seen as a watershed case in establishing children's right to make their own decisions as they mature. More recent decisions in the UK have retreated from that decision and the law in Australia is not clear on what decisions children can make as they mature, other than decisions relating to medical treatment. Provisions were inserted into NSW care and protection laws in 1998 to deal with serious conflicts between parents and children. They provide for conciliation but also allow the Children's Court to make orders re-allocating parental responsibility. Some of these orders have been described as a child-parent "divorce".

Exclusion of children from shopping centres

Children view shopping centres as attractive places to frequent. They can socialise and express themselves away from the direct control of parents. Shopping centres also offer children entertainment and access to important services. However, children's use of shopping centres has been seen as problematic for other users and for the owners and managers. Conflict has arisen between children and security guards who are employed to police the centres. Many children have been issued with banning notices and, in some cases, failure to comply with such notices has led to trespass charges. Exclusion from a centre can have significant consequences for children, particularly in terms of accessing essential services. Initiatives have been developed to address this problem including the development of shopping centre protocols in some areas. In 2003, the NSW Shopping Centre Protocol Project produced a guide on how to develop a local protocol.

Children's right to be heard

Article 12 of the UN Convention on the Rights of the Child recognises children's right to be heard in all matters affecting them, including in government and legal processes. To some extent this right has been recognised in NSW.

Government processes: Involving young people in the decisions and processes that impact on their lives is a key part of the NSW Government's youth policy. The NSW Youth Advisory Council also gives young people aged 12-24 a means to participate in the development of government policies and programs. In addition, since 1998, the NSW Commission for Children and Young People has been promoting children's participation in various ways. In recent years, in Australia and the UK there have been calls for a lowering of the voting age from the age of 18 to, for example, the age of 16. The arguments for and against such a proposal are outlined.

Legal processes: The formal legal processes that most directly involve children are the care and protection, family law, adoption and juvenile justice systems. The lack of participation by children in legal processes was highlighted by a national inquiry's 1997

report. Since then the NSW Law Society has published *Representation Principles for Children's Lawyers* and there have been some notable developments in relation to children's participation in care and protection and family law proceedings. Child representatives in care and protection proceedings are now required to act on the instructions of the child unless he or she is incapable of giving instructions. In family law proceedings, the best interests model of representation continues to operate but guidelines have clarified the child representative's role and the Family Court is currently examining different ways of involving children directly in proceedings. With regards to civil proceedings, the position remains that children cannot bring legal actions in their own right and name. Instead they must act through an adult representative.

The human rights of children in NSW

The UN Convention on the Rights of the Child sets out children's human rights. This includes children's civil and political rights as well as their economic, social and cultural rights. The Convention is not part of the law in Australia but complaints can be made to the Human Rights and Equal Opportunities Commission about breaches of the Convention by the Federal Government. The Federal Government has a duty under international law to implement the Convention and to ensure that the States and Territories also implement it. The UN Committee on the Rights of the Child monitors Australia's compliance with the Convention.

The UN Committee and non-government organisations have expressed a number of concerns about Australia's compliance with the Convention. This paper focuses on issues relevant to NSW. Concerns have been expressed about child employment laws, laws that do not prohibit all forms of physical punishment and laws restricting children's freedom of assembly. Criticisms have also been made regarding the ongoing poor outcomes for indigenous children, in relation to health and education and also in relation to their overrepresentation in the juvenile justice and care and protection systems. Other concerns about the juvenile justice system include the increasing imposition of fines on children and the recent involvement of the Department of Corrective Services in the management of juvenile offenders. Youth suicide and children's access to mental health services are two other areas of concern.

1. INTRODUCTION

Overview

This paper builds on the Research Service's 1996 Briefing Paper, *Children's Rights*.¹ The first section presents a summary of the legal restrictions on children. Sections that follow examine children's legal rights in a number of areas outside the four major areas of juvenile justice, care and protection, adoption and divorce law.² The topics covered are: (1) discrimination against children; (2) school student's rights; (3) children's right to consent to, and refuse, medical treatment; (4) parent's powers; and (5) the exclusion of children from shopping centres. In relation to each area, this paper summarises the law, notes recent developments and identifies issues. This paper then considers children's right to be heard in all matters affecting them, including in government and legal processes, as recognised in the UN Convention on the Rights of the Child. The last section looks at children's human rights as set out in the Convention, and it refers to concerns that have been raised about the implementation of these rights in NSW.

The information presented in this paper reflects the law as at 31 May 2005.

Definition of children

Franklin writes that, "societies tend to divide their members' life cycle into the two broad age states of childhood and adulthood. The transition between them is typically associated with the acquisition of distinctive rights, privileges and obligations."³ In NSW, 18 is the age at which a person acquires many important legal rights, privileges and obligations.⁴ It is also the age at which parental responsibility legally ceases.⁵ In addition, 18 is the age adopted by the Convention on the Rights of the Child. For these reasons, this paper defines children as persons under the age of 18.⁶

¹ Manning F, *Children's Rights*, NSW Parliamentary Library Research Service, Briefing Paper No 17/96.

² The NSW Parliamentary Research Service has published a number of specific papers on juvenile justice, care protection and adoption. Divorce law is a federal matter and, on that basis, is not covered here. Note, however, that children's participation in care and protection proceedings and family law proceedings is discussed in Section 8 of this paper.

³ Franklin B, *The New Handbook of Children's Rights: Comparative policy and practice*, Routledge, London and New York, 2002, p 16-17

⁴ See Section 2 of this paper.

⁵ See Section 6 of this paper.

⁶ It is noted that it may be more appropriate to distinguish older children from young children by referring to the former as "young people" or "young persons". This distinction is made, for example, in NSW care and protection laws, which refer to a person aged 16 or over as a "young person"; and which contain some different provisions in respect of young persons. For ease of reference, only the term "children" is used in this paper.

The debate about children's rights

This paper does not discuss the theoretical debate about “children's rights”, which was briefly outlined in the 1996 Briefing Paper.⁷ Fortin states:

...the notion that children enjoy rights is not a new one – rather, it has been the topic of speculation and comment for over 30 years. Certain themes constantly recur. Indeed, although writers have often approached this field of thought from a variety of viewpoints, they have all identified common areas of concern, principally surrounding how to identify children's rights, how to balance one set of rights against another in the event of conflict between them, and how to mediate between children's rights and those of adults.⁸

NSW Commission for Children and Young People

One very significant development for children's rights in NSW since the 1996 Briefing Paper was the establishment, in 1998, of the NSW Commission for Children and Young People. The Commission's main functions include:

- Promoting the participation of children and young people in the making of decisions that affect their lives;
- Promoting and monitoring their safety, welfare and well-being;
- Making recommendations on legislation, policies and services affecting them;
- Promoting awareness and understanding of issues affecting them;
- Conducting special inquiries, at the Minister's direction, into issues affecting them.⁹

The legislation establishing the Commission has recently been subject to a five-year review. The review was completed at the end of 2004. The government is considering the report's recommendations. The report has not yet been tabled in Parliament.¹⁰

⁷ See 1996 Briefing Paper, note 1, at pp 3-7, 12-16. See also Fortin J, *Children's Rights and the Developing Law*, Lexis-Nexis UK, 2003, Ch 1; Franklin B, note 3, Ch 1; Freeman M, *Children's Rights*, Ashgate Dartmouth, 2004 (two volume collection of essays); and Guggenheim M, *What's Wrong with Children's Rights*, Harvard University Press, 2005.

⁸ Fortin J, note 7, at p 3.

⁹ See section 11, *NSW Commission for Children and Young People Act 1998*. For a discussion of the establishment of the Commission, see Griffith G, *Child Protection in NSW: A review and oversight of supervisory agencies*, Briefing Paper No 16/2001.

¹⁰ The information in this paragraph was sourced from the website of the NSW Commission for Children and Young People www.kids.nsw.gov.au

2. LEGAL RESTRICTIONS ON CHILDREN

Overview

There are a number of legal restrictions on children in NSW. Many of these restrictions apply to persons under the age of 18 but some only apply to younger children (e.g to persons under the age of 16). Some of the restrictions are absolute while others are relaxed if parental consent and/or court approval is given.

Many, if not all, of the legal restrictions that currently apply to persons under the age of 18 previously applied to persons under the age of 21. This changed progressively after NSW lowered the “age of majority” from 21 to 18 in 1970.¹¹ The reduction in the age of majority followed a recommendation by the NSW Law Reform Commission in its 1969 *Report on Infancy in Relation to Contracts and Property*.

The legal restrictions on children are justified on various grounds including that children do not have sufficient competence to do certain things or occupy certain positions (eg drive a car, vote, be a director, be a juror); and that their vulnerability and immaturity means that they need to be protected from activities that may cause them physical, psychological or economic harm (eg employment, consumption of alcohol, viewing of sexually explicit material, entering into contracts). Note that Section 3 of this paper looks at the extent to which age-based restrictions are justifiable.

Summary of legal restrictions

Table 2.1 summarises various legal restrictions on children in NSW. The restrictions are summarised in three categories: (1) general; (2) civic participation; and (3) recreation. The restrictions are contained in both state and federal laws. Unless otherwise stated, references to “children” are references to persons under the age of 18.

¹¹ *Minors (Property and Contracts) Act 1970 (NSW)*, ss 8, 9. The “age of majority” was developed by the common law centuries ago and refers “to the point at which a child attains legal adulthood, it marks the passage from the dependent legal status of minority of infancy to the full legal status of majority or adulthood”: Harland D, *The Law of Minors in Relation to Contracts and Property*, Butterworths, Sydney, 1974, at p 1. For example a minor who had not reached the age of majority was not generally bound by contracts. The “age of majority” has less relevance today because most of the legal restrictions are now contained in legislation.

TABLE 2.1

Activity	Restriction
General	
School	Children between the ages of 6 and 14 (inclusive) must attend school. ¹²
Employment	There is no general minimum age of employment. However, note that children under 15 must go to school (see above). In addition, there is a prohibition on employing children below the age of 15 in employment that puts their well-being at risk; and approval from the Minister is required to employ a child under 15 in certain types of employment (eg entertainment, door-to-door sales). ¹³ There are also restrictions on children below certain ages being employed in some types of dangerous employment (eg using explosive power tools). The law is discussed in more detail in Section 9 of this paper.
Director of company	Children cannot be appointed as directors of a company. ¹⁴ Note also that children cannot hold any office in a co-operative. ¹⁵
Contracts and property	Children are not bound by contracts or property transactions unless it is for their benefit and they are mature enough to know what they are entering into. ¹⁶ A child who has entered into a contract that is not binding may repudiate the contract at any time prior to his or her 19 th birthday. ¹⁷ The Supreme Court can grant a child capacity to enter into contracts and property transactions. ¹⁸ People doing business with children often require a parent to guarantee that the child will fulfil their part of the bargain. However, it is against the law for a landlord to require a guarantor in a residential tenancy agreement. ¹⁹
Wills	Children who are not married, or contemplating marriage, cannot make a valid will unless they obtain court approval. ²⁰

¹² *Education Act 1990 (NSW)*, s 22.

¹³ *Children and Young Persons Care and Protection Act 1998 (NSW)*, ss 222, 223.

¹⁴ *Corporations Act 2001 (CTH)*, s 201B(1).

¹⁵ *Cooperatives Act 1992 (NSW)*, s 65.

¹⁶ See *Minors (Property and Contracts) Act 1970 (NSW)*. This summary is adapted from *The Law Handbook*, Redfern Legal Centre Publishing, 9th edition, 2004, at p 199.

¹⁷ *Minors (Property and Contracts) Act 1970 (NSW)*, s 31.

¹⁸ *Minors (Property and Contracts) Act 1970 (NSW)*, s 26.

¹⁹ *Landlord and Tenant (Rental Bonds) Act 1977 (NSW)*, s 9.

²⁰ *Wills, Probate and Administration Act 1898 (NSW)*, ss 6, 6A, 6B.

Activity	Restriction
Decisions about how and where to live	Parents have responsibility and powers in relation to their children until they reach the age of 18. This includes the power to make decisions concerning the day-to-day and long-term welfare of their child. However, it has been recognised that parents' powers diminish as their child matures. This area of the law is discussed in Section 6 of this paper.
Medical treatment	At common law, a child is capable of consenting to medical treatment if he or she has sufficient understanding and intelligence to understand fully what is proposed. If a child is incapable of consent, parents can generally consent on their child's behalf. Various statutory provisions in NSW affect this common law position. The law is discussed in Section 5 of this paper.
Legal actions	Civil court rules of procedure do not allow children to bring or defend legal proceedings in their own name. Instead, children must act through an adult representative (usually a parent), who is known as a guardian ad litem or next friend. The law is discussed in Section 8 of this paper.
Limitation periods for legal actions	Limitation periods (ie time limits) for commencing some types of court actions do not begin to run until a child turns 18. ²¹ However, due to reforms in 2002, the limitation period for <i>personal injury</i> actions will not be postponed unless the child's parents irrationally fail to bring a claim on the child's behalf. ²²
Evidence in court	A child may give evidence on oath if he or she can understand the nature and consequences of the oath. ²³ Under sections 12 and 13 of the <i>Evidence Act</i> , a person (including a child) is presumed to be competent to give evidence unless the court decides that they are incapable of understanding that they are under an obligation to tell the truth. Someone who is not competent to give evidence on oath may give unsworn evidence if certain conditions are satisfied.
Sexual intercourse	It is an offence for a person to have sex with a child who is under 16. ²⁴
Marriage	Children under the age of 16 cannot get married. ²⁵ Children between the ages of 16 and 18 can marry an adult with court approval. The court may approve if the circumstances are so exceptional as to justify it. Parental consent is also generally required for such a marriage but the court can dispense with this.
Name change	Children who are not married cannot register a change of their name without parental consent, except in limited circumstances. ²⁶

²¹ See *Limitations Act 1969 (NSW)*, s 52(1) and s 11(3).

²² See *Limitations Act 1969 (NSW)*, s 50F and s 62D. See also s 50E.

²³ Law Handbook, note 16, at p 200. The following summary is also sourced from p 200.

²⁴ *Crimes Act 1900 (NSW)*, s 66C. Note that in 2003 the age of consent for sexual intercourse between males was lowered from 18 to 16: *Crimes Amendment (Sexual Offences) Act 2003 (NSW)*.

²⁵ See *Marriage Act 1961 (CTH)*, Part II.

²⁶ *Births, Deaths and Marriages Registration Act 1995 (CTH)*, ss 28, 29.

Activity	Restriction
Passport	Children who are not married cannot obtain a passport without parental consent, except in limited circumstances. ²⁷
Driving	Children cannot obtain a learner's licence until age of 16 (for motorcycles, 16 and 9 months). Provisional licences cannot be obtained until the age of 17. ²⁸
Social security	Youth allowance is the main social security benefit for young people. The minimum age to qualify for Youth Allowance is 16. However, 15 year olds who are "independent" are also eligible. Children who have not completed their school education will generally not be eligible unless they are undertaking full-time study or they have entered into an Activity Agreement and have taken reasonable steps to comply with it. ²⁹
Civic participation	
Voting	Children cannot vote in federal or state elections. ³⁰
Member of Parliament	Children cannot stand as a candidate in federal or state elections. ³¹
Jury duty	Children are not qualified to serve as jurors. ³²
Armed forces	The minimum age for voluntary enlistment is: 16 years for the navy and 17 years for the army and the air force. ³³

²⁷ *Passports Act 1938 (CTH)*, s 7A.

²⁸ NSW RTA website: www.rta.nsw.gov.au.

²⁹ Centrelink website:
http://www.centrelink.gov.au/internet/internet.nsf/payments/youth_allow.htm

³⁰ *Commonwealth Electoral Act 1918 (CTH)*, s 93; *Parliamentary Electorates and Elections Act 1912 (NSW)*, s 20. As to whether the voting age should be lowered, see Section 8 of this paper.

³¹ *Commonwealth Electoral Act 1918 (CTH)*, s 163; *Parliamentary Electorates and Elections Act 1912 (NSW)*, ss 20, 79, 81B.

³² *Jury Act 1977 (NSW)*, s 5.

³³ Australian Government, *Australia's First Report under the Convention on the Rights of the Child*, December 1995, at para 1382.

Activity	Restriction
Recreation	
Alcohol	It is generally an offence to supply alcohol to a child. ³⁴ It is generally also an offence for a child to obtain or drink alcohol on licensed premises or in registered clubs ³⁵ ; to possess or drink alcohol in a public place without parental supervision ³⁶ ; and to take delivery of alcohol obtained by remote sale. ³⁷
Cigarettes	It is an offence to supply cigarettes to a child. Note also that police can seize cigarettes from a child in a public place. ³⁸
Gambling	Children are prohibited from various forms of gambling, eg from entering a public lottery and from betting on a totalizator ³⁹ . Children are also prohibited from entering a casino. ⁴⁰
Licensed premises, registered clubs	There are restrictions on children entering and being in certain parts of licensed premises and registered clubs. ⁴¹
Sex clubs	Children are prohibited from entering declared sex clubs. ⁴²
Movies, magazines, video games.	There are censorship restrictions on children of certain ages viewing certain films, playing certain video games, and purchasing certain magazines. ⁴³
Tattoos and piercing	It is an offence to tattoo a child without written parental consent. ⁴⁴ There are no laws specifically restricting ear or body piercing of children but note that without a valid consent this will constitute an assault.

³⁴ *Liquor Act 1982 (NSW)*, s 114.

³⁵ *Liquor Act 1982 (NSW)*, s 115; *Registered Clubs Act 1976*, s 51.

³⁶ *Summary Offences Act 1988 (NSW)*, s 11.

³⁷ *Liquor Act 1982*, s 128 (introduced in 2002). Note that only some of the alcohol offences are referred to in this summary. See generally Department of Gaming and Racing, *Young People and the NSW Liquor Laws*, Information Sheet, April 2003.

³⁸ *Public Health Act 1991 (NSW)* ss 58, 59.

³⁹ *Public Lotteries Act 1996 (NSW)*, Part 6 Division 2; *Totalizator Act 1997 (NSW)*, ss 82-84.

⁴⁰ *Casino Control Act 1992 (NSW)*, Part 6.

⁴¹ See *Liquor Act 1982 (NSW)*, Part 7A; *Registered Clubs Act 1976 (NSW)*, Part 6.

⁴² *Summary Offences Act 1988 (NSW)*, Part 3A.

⁴³ *Classification (Publications, Films and Computer Games) Enforcement Act 1995 (NSW)*.

⁴⁴ *Children and Young Persons (Care and Protection) Act 1998 (NSW)*, s 230.

Legal responsibilities

Consistent with there being legal restrictions on children, which take account of children's immaturity, there are also some limitations on the legal responsibilities that are imposed on children. One is that a child under the age of 10 years cannot be held responsible for committing a criminal offence.⁴⁵ There is also a presumption that a child below the age of 14 is incapable of knowing that their criminal conduct is wrong.⁴⁶ In addition, the juvenile justice system treats juvenile offenders differently to the way that the criminal justice system treats adult offenders. On the other hand, it should be noted that children have some of the same legal responsibilities that are imposed on adults. For example, Ludbrook notes that children are "required to pay taxes, they can be bankrupted for non-payment of enforceable debts and they can be sued in negligence or other torts if they are found to be able to distinguish right from wrong."⁴⁷

⁴⁵ *Children (Criminal Proceedings) Act 1987*, s 5.

⁴⁶ This is discussed in Section 9 of this paper.

⁴⁷ Ludbrook R, 'Children and the Political Process', in Jones M and Marks L, *Children on the Agenda: the rights of Australian children*, Prospect Media, 2001, at p 75.

3. DISCRIMINATION AGAINST CHILDREN

Overview

This section is concerned with discrimination against children on the grounds of their age. As well as being confronted with age-based legal restrictions, children have faced restrictions in many areas of life as a result of discriminatory policies and practices adopted by individuals and organisations. In 1994, the *Anti-Discrimination Act 1977 (NSW)* was amended to make some forms of age-discrimination unlawful. In June 2004 federal age-discrimination laws were enacted, which contain similar provisions.⁴⁸ While the pressure for enacting age-discrimination laws may have come from older people, and groups representing their interests, the state and federal laws also protect children from discrimination based on their age. This section summarises the laws and identifies some criticisms made of them. It then examines two important issues: (1) the use of age-based distinctions in laws and policies; and (2) youth wages.

NSW Anti-Discrimination Act 1977

Introduction of laws

The Coalition Government in NSW introduced the *Anti-Discrimination (Age Discrimination) Amendment Bill* in November 1993. The Minister for Community Services, Hon James Longley MP, commented on discrimination of young people:

...young people often suffer from stereotypical assumptions based on age and can suffer discrimination in relation to access to credit and accommodation as a result. In addition, age-based criteria are regularly applied in the field of unemployment to the detriment of young people. The national inquiry of the Human Rights and Equal Opportunity Commission into homeless children found that young people often experience discrimination in the provision of rental accommodation. Landlords and real estate agents often view them as financial risks owing to perceptions that they have relatively low income and insecure employment opportunities.

...in the field of employment, young people may face unfair discrimination where age is used as a proxy for competency and skills in the setting of junior wages. The younger employee may also be disadvantaged by certain business practices, such as the redundancy policy of last on first off. Young persons also face difficulty in obtaining credit and access to loans.⁴⁹

Summary of provisions

Age discrimination is unlawful in certain areas of public life

As summarised in Table 3.1 below, subject to a number of exceptions, it is unlawful to discriminate on the ground of age in relation to certain areas of public life.⁵⁰

⁴⁸ The *Age Discrimination Act 2004 (Cth)* commenced on 23 June 2004.

⁴⁹ Hon James Longley MP, *NSWPD*, LA, 18/11/93.

⁵⁰ The Table is a summary only and covers the main provisions relevant to children.

Area	Exceptions
Employment	<p>In relation to offering employment to persons under the age of 21 or the terms of employment offered to such persons.</p> <p>If being a particular age is a genuine occupational qualification for a job that relates to dramatic performances, other entertainment, or the provision of educational and welfare services.</p>
Conferring qualifications for an occupation	May impose a reasonable minimum age under which an authorisation or qualification will not be conferred.
Provision of public education	May refuse admission if the level of education sought is provided only for students above a particular age.
Provision of goods/services	<p>Holiday tours can be offered to specific age groups.</p> <p>Sporting activities can be aimed at specific age groups.</p> <p>Insurance, superannuation and credit providers can discriminate on basis of age if there is good actuarial or statistical evidence to support their policy.</p>
Provision of accommodation	Shared accommodation for less than six people.

NOTES TO TABLE:

1. *Age of person's relative:* It is also unlawful to discriminate against a person on the ground of the age of the person's relative or associate (eg to refuse a person a lease on the ground that they have young children who will be living there).
2. *Positive discrimination:* There are exceptions relating to positive discrimination. For example, section 49ZYR provides that the age-discrimination provisions do not apply to "or in respect of anything done to afford persons who are of a particular age or age group access to facilities, services or opportunities to meet their special needs or to promote equal or improved access for them to facilities, services and opportunities."
3. *Statutory and common law restrictions on children not affected:* The provisions do not affect the operation of a law that relates to the legal capacity or the legal entitlements, obligations or disqualifications of persons who are under 18 years of age.⁵¹ In his second reading speech, the Minister commented as follows:

...the [legislation] provides a specific exception to ensure that legal age requirements and protections, such as legal concepts of the age of majority are not affected by the legislation... [V]arious laws...exist in New South Wales which are designed to protect specific age groups or to set competency standards, for example, driver's licence requirements, voting age, drinking or smoking age, educational requirements concerning age, provisions for separate treatment of young people in the criminal justice and corrections systems, and the age of sexual consent. The Government has no intention that such requirements should be affected by the [legislation].⁵²

⁵¹ Section 49ZYQ(a). See also section 54.

⁵² Hon James Longley MP, *NSWPD*, 18/11/93.

What is discrimination?

Both direct and indirect discrimination are unlawful.

Direct discrimination exists if, on the ground of age, the perpetrator treats a person less favourably than in the same or similar circumstances the perpetrator treats or would treat a person who is not of that age or age group.⁵³ This includes treating a person less favourably on the ground of a characteristic that appertains generally to, or is generally imputed to, persons who are of that age or age group.⁵⁴ An example of direct discrimination would be a landlord refusing rental accommodation to a 16-year old on the ground that young people of that age are unreliable tenants.

Indirect discrimination means requiring a person to comply with a requirement or condition with which a substantially higher proportion of persons who are not of that age or age group are able to comply, being a requirement which is not reasonable.⁵⁵ An example in relation to children would be a video store policy requiring applicants for membership to show a driver's licence for identification purposes. Such a policy would exclude many children from being able to obtain a membership.

Complaints and remedies

A person (including a child) may lodge a written complaint to the NSW Anti-Discrimination Board in respect of a breach of the Act.⁵⁶ Complaints may also be made *on behalf of* a child if the child and his/her parents consent.⁵⁷ If the complaint appears to be covered by the Act, the Board will investigate the complaint and will attempt to resolve the matter through conciliation.⁵⁸ Conciliation involves helping the parties to reach a private settlement that they both agree on.

If conciliation is not successful, the Board may refer the matter to the Administrative Decisions Tribunal for a hearing. The Tribunal determines whether discrimination has occurred and makes a binding decision. If the complaint is made out, the Tribunal can award damages (up to \$40,000), and can make other orders such as preventing the perpetrator from continuing or repeating the discriminatory conduct.⁵⁹

In 2003/04, four complaints of discrimination against children (including of a relative of

⁵³ Section 49ZYA(1)(a).

⁵⁴ Section 49ZYA(2).

⁵⁵ Section 49ZY(1)(b).

⁵⁶ Section 88(1).

⁵⁷ Section 88(2).

⁵⁸ Sections 89, 92.

⁵⁹ Section 113.

a child) were lodged with the NSW Anti-Discrimination Board.⁶⁰ These included:

- A complaint about a child not being allowed in a restaurant (the ADB held that the complaint was lacking in substance).
- A complaint about the refusal to rent a property to an adult because they had a child (this complaint was withdrawn⁶¹).
- A complaint about a child not being allowed to go to a concert with their mother (this complaint was withdrawn).
- A complaint by a mother who was not allowed to drop her child off right outside the school gates (this complaint was still open).

NSW Law Reform Commission's recommendations for reform

In the 1990s, the NSW Law Reform Commission conducted a comprehensive review of the *Anti-Discrimination Act 1977*. The Commission published its final report in November 1999.⁶² The report contained 161 recommendations. These were incorporated into a draft *Anti-Discrimination Bill* that would replace the current provisions.

In relation to the operation of the Act generally, the Commission recommended changing the way in which discrimination is defined and it made a number of recommendations in relation to the complaints process, tribunal proceedings and the available remedies. The Commission also recommended that the scope of the Act be expanded so that it also applies to the employment of volunteers and trainees,⁶³ private educational authorities⁶⁴, the exercise of functions and powers by local government and the administration of State and local government laws and programs.⁶⁵

Due to a number of considerations, the Commission gave “serious attention to the desirability of recommending repeal of the [age discrimination provisions] or to a restriction of [those provisions] to the areas of the greatest legitimate concern.”⁶⁶ But

⁶⁰ Information obtained via private telephone communication with officer of NSW Anti-Discrimination Board (ADB) on 6 April 2004. Note that the NSW ADB annual reports show the total number of age discrimination complaints but do not show the number of age discrimination complaints relating to children.

⁶¹ Note that the fact that a complaint was withdrawn does not necessarily mean that the complainant did not get redress for his or her grievance. The complaint may have been withdrawn after the parties reached a settlement.

⁶² NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92, November 1999.

⁶³ *Ibid*, recommendation No.9 on p 128.

⁶⁴ *Ibid*, recommendation No. 20 on p 182.

⁶⁵ *Ibid*, recommendation No. 29 on p 227

⁶⁶ *Ibid* at p 272. The Commission referred to the possibility of limiting the provisions to the area of employment and to people over the age of 40.

the Commission decided against this because “to remove or limit the scope of the current regime would tend to undermine the legitimate effect of the current provisions in concentrating attention on the inappropriateness of stereotyped assumptions about people on the basis of age, where individual decision making is required.”⁶⁷

The Commission made several recommendations concerning the exceptions to the age-discrimination provisions. These included (1) there should be an exception in relation to the provision of education up to and including secondary schooling;⁶⁸ (2) the exception relating to junior employees should be re-considered by a specified target date;⁶⁹ and (3) the exception for sport should apply only in relation to competitive sporting activities, where the strength, stamina or physique of the competitors is relevant.⁷⁰

The recommended reforms have not been implemented at the time of writing except for reforms enacted in 2004 relating to the processing of complaints.⁷¹

Federal Age Discrimination Act 2004

Introduction of the Act

The *Age Discrimination Act 2004* commenced operation on 23 June 2004. In introducing the bill into parliament in June 2003, the then Federal Attorney-General, Hon Daryl Williams MP, stated (in part):

Despite existing state and territory laws, age discrimination is an increasingly significant problem for our society.

The Nelson Report *Age counts* found that age discrimination against older workers is prevalent and is caused by negative stereotyping of older workers.

The Human Rights and Equal Opportunity Commission's 2000 report *Age Matters* also identified many areas in which age discrimination occurs.

These reports – and many others – highlight the negative consequences of age discrimination both on the economy and on the health, financial and psychological well-being of individuals.

The bill is consistent with the international commitment to eliminate age discrimination...

...

This bill will send a powerful national message about the importance of eliminating unfair age discrimination.⁷²

⁶⁷ Ibid at p 273.

⁶⁸ Ibid, recommendation No. 74 on p 449)

⁶⁹ Ibid, recommendation No. 72 on p 440.

⁷⁰ Ibid, recommendation No. 79 on p 469.

⁷¹ See *Anti-Discrimination (Miscellaneous Provisions) Act 2004* (commenced 2 May 2005).

⁷² The Hon Daryl Williams MP, *CPD (HR)*, 26/6/03.

Summary of provisions

Areas covered

The Act applies to the same areas as the NSW laws. In addition, the Act applies to the administration of Commonwealth laws and programs.⁷³ In relation to employment, the Act also extends to Commonwealth employees; and in relation to education, the Act also applies to *private* educational authorities.

Exceptions

The Act contains similar exceptions to the NSW laws. There is an exception for positive discrimination⁷⁴ and an exception in relation to federal migration legislation, social security legislation and taxation legislation, certain other federal legislation, state legislation, court orders, Awards and federal industrial agreements.⁷⁵

The Act has an additional exception in relation to health.⁷⁶ In particular, there is an exception for certain federal health programs, for individual decisions relating to medical services that are reasonably based on evidence and professional knowledge, and in relation to the administration of certain health legislation.

Complaints and remedies

Persons (including children) may make a complaint about a breach of the Act to the Human Rights and Equal Opportunity Commission (HREOC).⁷⁷ If the complaint appears to fall within the scope of the Act, HREOC will inquire into and attempt to conciliate the complaint. If conciliation is not successful, the complainant can commence proceedings in the Federal Court or the Federal Magistrates Court. The remedies available to the Court are similar to those open to the NSW Anti-Discrimination Board for state matters.⁷⁸

Operation alongside state legislation

The Act is intended to operate alongside state age-discrimination legislation. Thus, section 12 provides, “this Act is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Act.” That section also provides that if a person lodges a complaint under state age-discrimination

⁷³ Section 31.

⁷⁴ See section 33.

⁷⁵ See sections 39, 40, 41, 43.

⁷⁶ See section 42.

⁷⁷ See section 53.

⁷⁸ See *Human Rights and Equal Opportunities Commission Act 1986 (CTH)*, s 46PO(4).

laws, they cannot lodge the same complaint with HREOC.

Criticisms of federal laws

Outlined below are some criticisms of the federal laws relevant to children. These criticisms were referred to in the Senate Committee's report on the bill⁷⁹ (particularly in the dissenting reports by Labor and the Democrats) and in submissions made by the NSW Commission for Children and Young People⁸⁰ and the Youth Affairs Council of Victoria⁸¹. Some of these criticisms are also applicable to the NSW laws.

- *Specialist Commissioner*: There should be a specialist Age Discrimination Commissioner in HREOC.⁸²
- *Discrimination at work*: (1) The Act should apply in relation to unpaid work.⁸³ (2) The Act should not have an exemption for youth wages.⁸⁴ (3) The Act should prohibit age-based harassment in the workplace in the same way that sexual harassment in the workplace has been prohibited.⁸⁵
- *Exemptions*: The general exemptions in the Act are too broad.⁸⁶ In particular, the exemption for direct compliance with another law, the exemption for charities and religious bodies, and the exemption in relation to health, insurance, credit, and social security legislation. It has been submitted that rather than containing broad exemptions, discrimination should only be exempt where it can be established that the discrimination is for the benefit of a certain group.⁸⁷

⁷⁹ The Senate Legal and Constitutional Legislation Committee, *Provisions of the Age Discrimination Bill 2003*, September 2003.

⁸⁰ NSW Commission for Children and Young People, *Information Paper: Proposals for Commonwealth Age Discrimination Legislation – Comments*, undated.

⁸¹ Youth Affairs Council of Victoria, *Proposal for Age Discrimination Legislation: YACVic's response to the Information paper*, February 2003.

⁸² Senate Committee report, note 79, p 19ff and p 44ff.

⁸³ See Senate Committee report, note 79, at p 9 and NSW Commission for Children and Young People Submission at p 2.

⁸⁴ Senate Committee report, note 79, at p 10ff and at p 42.

⁸⁵ See Senate Committee report, note 79, at p 35ff (Labor) and p 46 (Democrats). Issue (2) is discussed below. As to issue (3) see *Age Matters* report, note 96, at p 65-66. For a recent case of child-harassment at work, see 'Teen wins sex case damages', SMH, 4/5/05.

⁸⁶ See Senate Committee report, note 79, at p 22ff, p 38 (Labor) and p 45 (Democrats).

⁸⁷ NSW Commission for Children and Young People Submission, note 80 at p 2ff; and Youth Affairs Council of Victoria Submission, note 81, at p 2ff.

Age-based distinctions in laws and policies

Introduction

It can be seen that both state and federal age-discrimination laws contain exceptions for age-based distinctions in other laws (eg laws such as those set out in Table 2.1 above).⁸⁸ The age-discrimination laws also contain exceptions for age-based distinctions in policies in certain sectors, such as credit and insurance. Note also that policies in other sectors that have age-based distinctions may fall outside the areas covered by the age-discrimination laws. Thus, the age-discrimination laws allow for many laws and policies in NSW to contain age-based distinctions. It is relevant to consider whether this approach is justifiable.⁸⁹ Outlined below are some comments on this issue by the NSW Law Reform Commission and the Law Commission of Canada.⁹⁰

NSW Law Reform Commission

In its 1999 report on the review of the *Anti-Discrimination Act 1977 (NSW)*, the NSW Law Reform Commission said:

...the concept of age is not an entirely irrelevant consideration in many areas of public activity. The difficulty is to identify those areas where it is entirely irrelevant and to distinguish them from those areas where it is not. For example, taking the important area of employment, we treat it as a matter of pride that we protect our children from the labour force and require them to have educational opportunities. Similarly in other areas, there are laws relating to the legal capacity and welfare of people under 18 years which provide legitimate protection to children.⁹¹

The Commission said that it was appropriate for age-discrimination laws to have a general exception for compliance with other laws. It explained:

Whilst age can be an arbitrary measure, in many areas it is largely accurate and provides a practical approach to what otherwise might require a mass of individual assessments. Pragmatic judgments based on a criterion such as age, as to abilities and weaknesses are not necessarily correct in relation to each individual, but individual assessment is not immune from arbitrary variation. Questions of degree are involved.⁹²

The Commission discussed this exception further and concluded that legislation

⁸⁸ *Anti-Discrimination Act 1977 (NSW)*, s 49ZYQ(a) and s 54; and *Age Discrimination Act 2004*, s 39, 40, 41 and 43.

⁸⁹ Note that the issue being considered here is whether aged based distinctions are justifiable. If they are, another question arises, namely, whether the particular age selected is the most appropriate.

⁹⁰ See also the discussion in Herring J, 'Children's Rights for Grown-ups', in Fredman S and Spencer S, *Age as an Equality Issue: Legal and Policy Perspectives*, Hart Publishing UK, 2003, at p 159-161.

⁹¹ NSWLRC report, note 62, at p 432.

⁹² *Ibid* at p 433.

containing age-based distinctions should be subject to review:

Generally, the statutory provisions...reflect a policy decision that age is an appropriate basis for regulating particular kinds of conduct. Without having undertaken a comprehensive review of the provisions, it appears that generally that approach is legitimate in the areas where it has been adopted – nevertheless the Commission recommends that a review be undertaken of such legislation and that any future legislation which may introduce age-based criteria, should be the subject of scrutiny by a Parliamentary Committee. The purpose of such scrutiny should be to ensure that age is not being used as a short-cut to an appropriate consideration of individuals on their merits. Such an approach is readily justifiable where individual assessment would involve a largely impressionistic or subjective decision made in a vast number of cases, where the intrusion on individual rights is not likely to be disproportionate to the benefits sought to be achieved by the form of regulation imposed, and where the link with age is reasonably clear.⁹³

Law Commission of Canada

In February 2004, the Law Commission of Canada published a discussion paper entitled *Does Age Matter? Law and Relationships Between Generations*. The discussion paper raises and discusses the following general questions:

Is it appropriate to use age in our legislation, public policies and programs? Are age-based distinctions in Canadian law just? Are there situations in which such distinctions result in injustice? What are the advantages and disadvantages of using age as a criterion? Are current age categorizations appropriate? Are they outdated? Could other concepts better reflect the diversity of life choices among Canadians? What about the relationships between generations? Are they rooted in fairness and understanding between generations, or disengagement and distrust? What is the role of law in supporting relationships across generations?⁹⁴

The Law Commission summarises its discussion paper as follows (in part):

We...noted that law often is based on outdated assumptions and is often unresponsive to changing patterns of our society. The use of age as a marker in our laws must be questioned. Age is often presented as an effective substitute for other statutory objectives: protecting persons from exploitation, ensuring that people have the ability or maturity to act, or redistributing resources. In this Discussion Paper, we ask whether these objectives are legitimate and whether other concepts could be better deployed. We ask whether we can continue to use age as a marker in a context of changing relationships between generations.

Our thinking about age and its legal consequences must be done in the context of the dynamic relationships between generations, and the importance of ensuring a just and equal society. The Discussion Paper specifically questions whether our current age distinctions are based on stereotypes about young and old, and whether our current age distinctions are outdated or inefficient. It also explores possible alternatives to concepts of age and generations.⁹⁵

⁹³ Ibid at p 434.

⁹⁴ Law Commission of Canada, *Does Age Matter? Law and Relationships Between Generations*, Discussion Paper, February 2004, p 3.

⁹⁵ Ibid at p 41. The public consultation process was to be complete at the end of April 2005.

Youth Wages

Introduction

A report in 2000 by the Human Rights and Equal Opportunity Commission states:

Many industrial awards and agreements in Australia provide for junior rates of pay for younger workers. Sometimes these scales provide for full rates at 18 but in other areas even young adults, those between 18 and 21, can receive lower pay. Junior rates are determined solely on the basis of age and exclude the consideration of individual competency and responsibility levels that determine rates of pay for non-junior employees. Junior rates clearly constitute different treatment based on age. Junior rates are, however, currently exempt from federal, State and Territory anti-discrimination legislation.⁹⁶

In 1999, the Hon Peter Reith MP, said, “junior wages have been a feature of the wages system in Australia since early this century. Over 400,000 young people under 21 are paid junior wages – this represents over half of all employed young people.”⁹⁷

Consideration of the issue in NSW

The Coalition Government’s 1993 statement on enacting the age discrimination laws

In the second reading speech on the *Anti-Discrimination (Age Discrimination) Amendment Bill 1993*, the Minister for Community Services said:

The introduction of competency-based training wages for young people to replace the present age-based systems involving junior wage rates were discussed at length in the white paper. Significant concerns have been expressed by employer groups that the removal of age-based wage systems in the wholesale-retail sector at this time could have a significant impact on teenage employment.

The wholesale-retail sector accounts for 51.4 per cent of youth employment. This sector relies heavily on the use of junior rates of pay as a way of remunerating young people for their skills and there is very little development of competency standards in the industry at this stage. Employers also expressed concerns that the switch to training wages would involve considerable time and expense in the restructure of wage rates. Given the circumstances of the wholesale-retail sector, the Government considers that it would not be appropriate to immediately make systems involving junior wages unlawful under age discrimination legislation.⁹⁸

The age-discrimination laws that were enacted contained a temporary exemption for youth wages, which would cease to operate on a day appointed by proclamation.⁹⁹ To date, no such proclamation has been made.

⁹⁶ Human Rights and Equal Opportunities Commission, *Age Matters: A report on age discrimination*, May 2000, at p 113.

⁹⁷ Hon Peter Reith MP, *CPD (HR)*, 24/6/99, p 7490.

⁹⁸ Hon James Longley MP, *NSWPD*, 18/11/93.

⁹⁹ *Anti-Discrimination Act 1977 (NSW)*, s 49ZI(3).

Consideration by NSW Law Reform Commission in 1999

The NSW Law Reform Commission discussed this issue in its 1999 report of review on the NSW *Anti-Discrimination Act*. The Commission said:

The issue of whether employers should be able to pay a lower wage to workers under 21 years is a contentious one. On the one hand, there is concern that the abolition of youth wages would lead to an increase in youth unemployment and reduce the opportunities for young workers to gain experience. On the other hand, it has been suggested that workers should be paid according to merit and productivity and that a "training wage" would be a more appropriate option for an inexperienced worker. Wage discrimination against young people is considered by some to be just as offensive as against women or Aboriginal people. Many of the justifications used to deny women equal pay have been used to deny fair treatment in the workplace to juniors: they are not good workers, they need more training, they do not need the money, they have no dependents to support etc. Although none of these arguments is convincing, attempts to change the practice have been unsuccessful due to fears of significant economic ramifications. Reviews of age discrimination in the ACT, Western Australia, South Australia and Victoria have recommended that, in the absence of conclusive evidence of the effects of youth wages on youth employment, it is inappropriate to prohibit youth wages. It has also been argued that the system of youth wages should not be altered by anti-discrimination law, but rather in the industrial arena in line with the policy of equal pay for work of equal value.¹⁰⁰

The Commission then referred to the option of implementing "competency-based training wages to replace age-based wages".¹⁰¹ It also noted that "all existing age-discrimination legislation in Australia, except the Northern Territory, makes some provision for youth wages."¹⁰² The Commission concluded:

Although the current exception is difficult to justify in terms of justice or equity, the Commission is reluctant to recommend repealing the exception while the matter is being considered in the industrial arena and federally. However, given that the exception is now operating beyond the target date, the Commission recommends that a further target date be set to ensure that alternatives are considered and change is not permanently resisted.¹⁰³

Consideration of the issue at the federal level

The Workplace Relations Act 1996

In 1996, the Coalition Government wanted to create a permanent exemption for youth wages from the anti-discrimination provisions in industrial laws. Those provisions had been put in place by the Keating government in 1993.¹⁰⁴ However, after discussions with the Democrats when the bill was before the Senate, the Coalition agreed to extend

¹⁰⁰ NSWLRC report, note 62, p 437-38.

¹⁰¹ Ibid at p 439.

¹⁰² Ibid p 439-440.

¹⁰³ Ibid at p 440. No new target date has been set.

¹⁰⁴ CPD (Sen), 30/8/99, p 7947.

the existing temporary exemption, due to expire on 22 June 1997, for three years.¹⁰⁵ The government also put in place a mechanism for the Australian Industrial Relations Commission to review the feasibility of abolishing junior rates of pay.¹⁰⁶

Australian Industrial Relations Commission Inquiry in 1999

The AIRC conducted a comprehensive inquiry into youth wages and its report was tabled in parliament on 24 June 1999.¹⁰⁷ The report examined the history and operation of junior rates, whether non-discriminatory alternatives to junior rates existed, and the desirability of replacing junior rates with non-discriminatory alternatives. The AIRC concluded that, “none of the identified non-discriminatory alternatives most closely examined by us were feasible.”¹⁰⁸ However the AIRC went on to say:

We do not close off the possibility that there are feasible alternatives. We explored the possibility of developing our own proposal but did not persevere. We were already persuaded that in the design of replacement junior rate classifications no one size fits all. The fit of an alternative is a matter of attention to detail and the merits in the particular circumstances. The industrial parties and other interested parties would need to be involved, and that procedure fell outside the statutory limits of our Inquiry.¹⁰⁹

Change to youth wages exemption in 1999

Relying on the AIRC’s report, the Federal Government introduced the *Workplace Relations Legislation Amendment (Youth Employment) Bill 1999* on the same day that the report was tabled. The bill was introduced in anticipation of the expiry of the temporary exemption on 22 June 2000. After that date there would have been a rebuttable presumption that junior rates were discriminatory and ought not be approved or ought to be removed as part of the award review process.¹¹⁰

The bill proposed to create a permanent exemption for junior wages in existing Awards. It also proposed to require the AIRC to include junior wages in Awards that did not then contain them. The Labor Party initially opposed the bill. It argued that the government’s plan to indefinitely keep junior rates was contradictory to the approach taken by the AIRC in its report and that the government’s “plan to go beyond that and actually force the [AIRC] to apply junior rates of pay into areas that do not currently have junior rates of pay is clearly in breach of the approach adopted by the [AIRC] in

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Australian Industrial Relations Commission, *Junior Rates Inquiry: Report of the Full Bench inquiring under s 120B Workplace Relations Act 1996*, 4 June 1999.

¹⁰⁸ Ibid at p ix.

¹⁰⁹ Ibid at p ix.

¹¹⁰ Ibid at p 89, para 3.14.

its report.”¹¹¹ Labor argued that there should be a case-by-case analysis of junior wages in Awards.¹¹²

Facing opposition to the bill from the Democrats and the Labor Party, to enable the bill to pass the Senate (with Labor support), it was amended to make it clear that the AIRC would proceed on a case-by-case basis when considering junior wages. The onus would be on the applicant to demonstrate that an Award should be varied to include, remove or vary junior wages.¹¹³ The bill was passed in September 1999. Note that trade unions had wanted the legislation to limit the upper age limit for youth wages to people under the age of 18 but the legislation did not set an upper limit.¹¹⁴

HREOC Report on Age Discrimination in 2000

In its 2000 report *Age Matters: A Report on Age Discrimination*, the Human Rights and Equal Opportunity Commission (HREOC) said:

The Commission appreciates that the federal government's support for junior rates is founded on concern that their removal could have a detrimental impact on the youth labour market... The Commission notes, however, the unanimous view of youth organisations and young people in submissions to this inquiry that junior rates are exploitative, not protective, and should be repealed.

Determining the acceptability or otherwise of junior pay rates has been difficult because of the lack of unequivocal evidence as to the effect their abolition would have on the youth labour market overall. If there is no significant detrimental effect, the differences cannot be justified. The evidence, however, is inconclusive.¹¹⁵

After discussing the AIRC inquiry and the federal government's subsequent legislation, HREOC concluded that it “does not consider that the maintenance of a permanent exemption for junior rates can be justified. Special measures of protection and assistance must be temporary and periodically reviewed.”¹¹⁶ The Commission recommended that the federal government should:

- (a) Encourage and work with industrial parties to develop and trial a full range of employment, training and wage options for young people;
- (b) Amend the Workplace Relations Act to require the Australian Industrial Relations Commission to undertake a further review of junior rates and feasible non-discriminatory

¹¹¹ Hon Arch Bevis MP, *CPD (HR)*, 24/6/99 at p 7381.

¹¹² *Ibid* at p 7380-82

¹¹³ See Second Reading Speech, *CPD (Sen)*, 30/8/99. Note that in 2000, Labor and the Democrats blocked a proposed regulation that would have permanently exempted junior wages in *certified agreements* from the operation of anti-discrimination laws.

¹¹⁴ 'Reith backs down on youth wages', *The Australian*, 25/8/99.

¹¹⁵ *Age Matters* report, note 96, at p 114.

¹¹⁶ *Ibid* at p 115.

alternatives within a reasonable period;

- (c) Require the Australian Industrial Relations Commission in its considerations of junior rates on a case by case basis to consult widely with young people and their representative organisations; and base its assessment on whether junior rates are proportional to the objective of increasing young people's access to full-time employment and are the most effective and least discriminatory means to this end.¹¹⁷

Age Discrimination Act 2004

In the Explanatory Memorandum to the *Age Discrimination Bill 2003*, the government states that it “considers that youth wages are necessary to protect young people’s competitive position in the labour market. Employers are also strongly supportive of youth wages.” The Senate Committee Report on the bill refers to submissions from various interest groups supporting and opposing the youth wages exemption.¹¹⁸ The Senate Committee did not express a final view on the youth wages exemption. Senator Brian Greig on behalf of the Australian Democrats expressed a dissenting view in opposition to the youth wages exemption.¹¹⁹ He stated (in part):

As we have previously argued, young people are required to pay the same amount for food, rent and clothing as other Australians and only full-time students have access to public transport and other concessions.

...

Youth wages convey the implicit message that work undertaken by young people is less valuable than work undertaken by older people. They suggest that worth of a worker is to be determined according to age, rather than skills, training or experience. They represent a fundamental contravention of the principle of equal pay for equal work, which is enshrined in international human rights conventions to which Australia is a signatory...

Youth wages are inherently discriminatory and the policy justifications advanced in their favour are unconvincing. The Democrats do not believe that reducing the pay of young Australians is the way to create job opportunities for them.¹²⁰

The NSW Commission for Children and Young People also argued against a general exemption for youth wages. It said that youth wages should instead be covered by the general “positive discrimination” exception. Under this exception, it is not unlawful to discriminate on the basis of age if the act is intended to reduce a disadvantage experienced by people of particular age.¹²¹ The Commission states:

That is, it is unclear why exempting all wages earned by young people in Australia from charges of discrimination is necessary.

¹¹⁷ *Age Matters*, p 115-16. See submissions from p 58-63 and discussion from 113-15.

¹¹⁸ Senate Committee report, note 79, at p 10-11.

¹¹⁹ *Ibid* at p 42.

¹²⁰ *Ibid*.

¹²¹ *Age Discrimination Act 2004*, s 33(c). See also subs 33(a) and (b).

Allowing positive discrimination provisions to determine situations when a lower youth wage is appropriate for a particular job helps young people (individually and as a group) as well as employers benefit from lower youth wages. It will also be consistent with Australia's commitment to [the Convention on the Rights of the Child].¹²²

The 2005 *Non-government Report on the Implementation of the United Nations Convention on the Rights of the Child in Australia* recommends that "all Australian Governments in addressing discrimination on the basis of age commit to replacing age-based rates of pay with competency-based rates of pay."¹²³

¹²² NSW Commission for Children and Young People Submission, note 80, p 2-3.

¹²³ National Children's and Youth Law Centre and Defence for Children International (Australia), *The Non-government Report on the Implementation of the United Nations Convention on the Rights of the Child in Australia*, May 2005, at p 64-65 (Recommendation 102).

4. SCHOOL STUDENT'S RIGHTS

Overview

As Jeffs states, “no institution impinges upon the daily lives of the overwhelming majority of children more than school.”¹²⁴ There are a multitude of children’s rights issues that arise in relation to school. The issues covered in this section include discrimination, bullying, suspensions and expulsions, wearing of school uniform and student’s privacy. Student’s right to participate in school-decision making is discussed in Section 8 of this paper. Other student’s rights issues not covered in this paper include compulsory attendance, choice of school, school fees, student discipline, and student’s right to have a safe learning environment that is free from violence and avoidable accidents. Over the last decade, there has been an increase in awareness of student’s rights due to litigation, media coverage, and with publications such as *Know Your Rights at School*, produced by the National Children’s and Youth Law Centre.

Discrimination by schools

Overview of anti-discrimination laws

State and federal laws prohibit discrimination on several grounds by educational authorities. Federal laws make it unlawful for both public and private educational authorities to discriminate on the grounds of race, sex, pregnancy, marital status, disability and age.¹²⁵ The NSW *Anti-Discrimination Act 1977* makes it unlawful for private and public education authorities to discriminate on the grounds of race and for public education authorities to discriminate on the other grounds referred to above as well as on the grounds of homosexuality and transsexuality.¹²⁶ The NSW Law Reform Commission has recommended that the Act be amended so that private education authorities also cannot discriminate on all relevant grounds.¹²⁷

Discrimination is unlawful in relation to refusal of admission, conditions of admission, denying or limiting access to a benefit, expulsion, or subjecting the student to any other detriment. Both direct and indirect discrimination are unlawful.¹²⁸ The laws contain some exceptions. For example, there are exceptions for same sex schools, and for

¹²⁴ Jeffs T, ‘Schooling, education and children’s rights’, in Franklin B, *The New Handbook of Children’s Rights: Comparative policy and practice*, Routledge, London & New York, 2002, p 57.

¹²⁵ *Racial Discrimination Act 1975*; *Sex Discrimination Act 1984 (CTH)*, s 21; *Disability Discrimination Act 1992 (CTH)* s 22.

¹²⁶ *Anti Discrimination Act 1977 (NSW)*, s 17 (race), s 31A (sex and pregnancy), s 38K (transgender), s 46A (marital status), s 49L (disability), s 49ZYL (age).

¹²⁷ NSWLRC Report, note 62, recommendation No. 20 on p 82.

¹²⁸ See below under “disability discrimination” for definitions of discrimination as well as direct and indirect discrimination.

‘unjustifiable hardship’ in the case of students with disabilities (see below). Also, while federal laws apply to private schools, religious schools can discriminate on the ground of marital status or pregnancy if the school “discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of [its] religion or creed.”¹²⁹

Students and their parents can lodge complaints with the NSW Anti-Discrimination Board (for breaches of NSW law) or with the Human Rights and Equal Opportunities Commission (for breaches of federal law).¹³⁰ As state and federal laws overlap, students and parents will generally have the option of complaining to either body

Main types of discrimination

According to the authors of *Discrimination Law and Practice*, the elimination of discrimination across the education system has been directed mainly at the disadvantage faced by three groups: (1) Students with a disability; (2) Aboriginal students; (3) Female students.¹³¹ This paper focuses on discrimination against students with a disability. This issue arises, for example, when a student with a disability is denied admission to a mainstream school on the basis that the school cannot accommodate the student.

Discrimination against students with disabilities

Anti-discrimination laws

As outlined above, both state and federal laws make it unlawful for educational authorities to discriminate against a person on the ground of disability. However, state laws only apply to public educational authorities.

Both state and federal laws define “disability” broadly. The NSW definition is:

- (a) total or partial loss of a person’s bodily or mental functions or of a part of a person’s body, or
- (b) the presence in a person’s body of organisms causing or capable of causing disease or illness, or
- (c) the malfunction, malformation or disfigurement of a part of a person’s body, or
- (d) a disorder or malfunction that results in a person learning differently from a person without the disorder or malfunction, or
- (e) a disorder, illness or disease that affects a person’s thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour.¹³²

Both direct and indirect discrimination are unlawful. An educational authority discriminates *directly* if, on the grounds of disability, it “treats [a] person less favourably than in the same circumstances, or in circumstances which are not materially

¹²⁹ *Sex discrimination Act 1984 (CTH)*, s 38(3).

¹³⁰ For further discussion of complaints and remedies see Section 3 of this paper.

¹³¹ Ronalds C and Pepper R, *Discrimination Law and Practice*, The Federation Press, Sydney, 2nd edition, 2004, at p 77.

¹³² *Anti-Discrimination Act 1977 (NSW)*, s 4.

different, it treats or would treat a person who does not have that disability.”¹³³ Circumstances are not materially different simply because a school would need to take special measures to accommodate a student with a disability.¹³⁴ In other words, direct discrimination may exist where an educational authority refuses to make adjustments to buildings, facilities, or to provide special services required by a disabled student.

However, it is *not* unlawful to discriminate with respect to refusal of admission or expulsion if the student with a disability requires services or facilities which would impose an ‘unjustifiable hardship’ on the educational authority; and it is *not* unlawful to discriminate with respect to denial of a benefit if the student with a disability requires the benefit to be provided in a special manner and it cannot without ‘unjustifiable hardship’ be so provided.¹³⁵ In determining whether there is ‘unjustifiable hardship’, all relevant circumstances of the particular case are to be taken into account including:

- (a) the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned, and
- (b) the effect of the disability of a person concerned, and
- (c) the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship.¹³⁶

An educational authority discriminates *indirectly* against a student with a disability if it:

...requires the [student] to comply with a requirement or condition with which a substantially higher proportion of persons who do not have that disability...comply or are able to comply, being a requirement which is not reasonable having regard to the circumstances of the case and with which the [student] does not or is not able to comply.¹³⁷

In other words, indirect discrimination arises where a general policy or practice impacts disproportionately on a student with a disability; and where that policy or practice is unreasonable in all the circumstances (see the case of *Clarke* below).

Some recent disability discrimination cases

Cases of disability discrimination by educational authorities generally involve situations in which a child with a disability has been:

- denied enrolment to a mainstream school; or
- excluded from a mainstream school due to behavioural problems related to

¹³³ *Anti Discrimination Act 1977*, s 49B.

¹³⁴ NSW Anti-Discrimination Board website, ‘What are my disability discrimination rights to state education’, <http://www.lawlink.nsw.gov.au/adb.nsf/pages/disabilityeduc>. See the express provision to this effect in s 5(2), *Disability Discrimination Act (Cth)*.

¹³⁵ *Anti Discrimination Act 1977*, s 49L(4), (5).

¹³⁶ *Anti Discrimination Act 1977*, s 49C.

¹³⁷ *Anti Discrimination Act 1977*, s 49B(1)(b).

- his/her disability; or
- denied particular support services at the school; or
- excluded from participating in regular school activities.

Some recent disability discrimination cases are outlined below.

*Hills Grammar v HR&EOC (2000)*¹³⁸

A child who had spina bifida sought admission to a private school kindergarten. The school rejected her application for admission on the ground that accommodating her needs would result in unjustifiable hardship. The Commission rejected this defence and held that the school had unlawfully discriminated against the child. This decision was reached despite the additional costs that the school would incur, including staffing costs and costs related to access modifications. The Commission held that the detriment to the school would be far outweighed by the benefits to the student, the school and the community itself. The Federal Court upheld this decision.

*I v O'Rourke and Corinda State High School (2001)*¹³⁹

A high school refused to allow a student with disabilities to attend an excursion to an island to study tourism because she was in a wheelchair and the school considered that her safety would have been at risk in travelling to the island. The school offered the student an alternative excursion to a local shopping centre. The student's parents complained that the school had directly discriminated against their daughter. The Commission upheld this complaint, noting that the school had not sought expert advice and had not involved the student's parents in the decision concerning alternative travel to the island. The student's other complaints about indirect discrimination at the school formal and at a graduation dinner, where she had access difficulties, were not upheld.

*Purvis v New South Wales Department of Education and Training (2003)*¹⁴⁰

A 12-year old child had exhibited violent behaviour at school as a result of a condition attributable to brain damage suffered in infancy. The school Principal and Department of Education determined that the student should be excluded from school and should be enrolled in a special school. The child's foster parents challenged this determination on the basis that it amounted to direct discrimination. The High Court, by majority, held that the proper comparison was between the child in this case and a hypothetical child without the disability who exhibited the same violent behaviour. The Court therefore held that there was no discrimination because the school would have treated a student without the disability who exhibited the same violent behaviour in the same way.

¹³⁸ (2000) FCR 306. This summary is based on Ronalds and Pepper, note 131, at p 87.

¹³⁹ (2001) EOC 93-132. This summary is based on Stewart D, 'Inclusion: How Far Does A School Have to Go? Ensuring Best Practice: The Case of "I"', 2003 8(1) *Australia & New Zealand Journal of Law and Education* 77.

¹⁴⁰ (2003) 202 ALR 133.

Catholic Education Office v Clarke (2004)¹⁴¹

A deaf 12-year-old child sought enrolment at a high school. The school insisted on the child accepting a 'model of learning support' that would include note-taking assistance in the classroom but would not include the provision of Australian Sign Language interpreting services. A complaint of indirect discrimination was lodged on the child's behalf and was upheld by the Full Federal Court. The Court held that the school had required the child to comply with a condition, namely to receive classroom instruction without the aid of an interpreter; that a substantially higher proportion of students without the disability was able to meet this requirement; that the child could not comply with this requirement; and that the requirement was not reasonable in the circumstances.

New federal disability standards for education

On 17 March 2005, the *Disability Standards for Education 2005*, which have been developed pursuant to s 31 of the *Disability Discrimination Act 1992 (CTH)*, were tabled in the federal Parliament.¹⁴² They are expected to come into effect in August 2005.¹⁴³ The primary purpose of the Standards "is to clarify, and make more explicit, the obligations of education and training service providers under the [Act] and the rights of people with disabilities in relation to education and training."¹⁴⁴ The Standards will apply to public and private education authorities and schools.¹⁴⁵ It will be unlawful to contravene a Standard. On the other hand, compliance with a Standard will be a defence to a discrimination complaint. The Standards have been in development since 1995 and there has been extensive consultation with stakeholders and the states and territories. NSW and several other states did not support the introduction of the Standards in their current form due to concerns about compliance costs.¹⁴⁶

The impact of the disability discrimination laws

Dr Ian Dempsey, of the Centre for Special Education and Disability Studies at the University of Newcastle, commented in 2003 on the impact of the federal *Disability Discrimination Act 1992* (the "DDA"). He states:

It would be naive to think that the DDA has eliminated much of the discrimination that school students with a disability experienced a decade ago. Like all pieces of legislation, the DDA is relatively open texture and is open to interpretation. And like all pieces of legislation, the spirit of

¹⁴¹ [2004] FCAFC 197 (6 August 2004).

¹⁴² Commonwealth Department of Education, Science and Training website: <http://www.dest.gov.au> (accessed 16 May 2005).

¹⁴³ Ibid.

¹⁴⁴ *Disability Standards for Education 2005 Guidance Notes*, p 1.

¹⁴⁵ Standards, clause 1.5.

¹⁴⁶ See Hon Dr Brendan Nelson MP, 'Most State and Territory Education Ministers Vote Against Disability Standards', *Media Release*, 11/7/03.

the DDA continues to be resisted at a variety of levels.¹⁴⁷

According to Dempsey, “the legislation has had a significant impact in the level of awareness about disability.” This is shown in “major increases in the identification of disability in schools...the widespread use of Action Plans, and the development of some excellent professional development resources.” However, Dempsey says that this increased awareness “has not necessarily resulted in an increase in inclusive practices in schools.” He states, “there is no reliable evidence of a significant movement of students with disabilities from segregated to inclusive settings.” Dempsey concludes (in part):

The DDA continues to provide much promise about what may be achieved for school students with a disability. In particular, the realisation of Education Standards appear to be tantalisingly close...and their ratification should do much to clarify the level of responsibility schools have in provision of support to these students...¹⁴⁸

While noting that that most Australian children with disabilities who are enrolled in school attend mainstream schools (86.3%), the 2005 *Non-government report to the United Nations on the Implementation of the United Nations Convention on the Rights of the Child in Australia* states that, “peak bodies of people with disabilities, and advocacy and support organisations of families and carers, have voiced concerns about the accessibility of educational institutions, the curricula and the levels of support and resources available to students.”¹⁴⁹ The report also states that there are “an exceptionally large number of claims lodged about discrimination in education under the *Disability Discrimination Act 1992*.” While noting that the adoption of disability standards has the potential to ensure the rights of children with disabilities, the report refers to significant concerns about aspects of the draft standards.

Recent inquiries that have examined the inclusion of children with disabilities

The extent to which children with disabilities are unable to fully access and participate in mainstream schools, with appropriate levels of support, has been the subject of a number of recent inquiries in NSW and other Australian jurisdictions. These include the NSW Teachers' Federation *Vinson Inquiry into the Provision of Public Education in New South Wales* (2002)¹⁵⁰; Western Australia's 2004 *Review of Educational Services for Students with Disabilities in Government Schools*¹⁵¹; and an inquiry in 2002 by the Commonwealth Senate Employment, Workplace Relations, and Education References

¹⁴⁷ Dempsey I, 'The Impact of the Disability Discrimination Act on School Students with a Disability in Australia', (2003) 8(1) *Australia & New Zealand Journal of Law and Education* 35 at p 42.

¹⁴⁸ Ibid.

¹⁴⁹ *Non-Government Report on the Implementation of the United Nations Convention on the Rights of the Child in Australia* (2005), note 123, at p 53ff.

¹⁵⁰ See Chapter 9 of the Vinson report.

¹⁵¹ See Western Australian Department of Education, *Pathways to the Future: A Report of the Review of Educational Services for Students with Disabilities in Government Schools*, 2004.

Committee, which considered “the effectiveness of Commonwealth programs targeted at students with disabilities and whether the needs of such students were being met.”¹⁵²

Recent NSW Government initiatives

On 22 March 2005, the new Minister for Education, Hon Carmel Tebbutt MLC, informed the Parliament on action being taken by the NSW Government to assist students with special needs. Hon Carmel Tebbutt MLC said that “over \$33 million” had recently been provided in funding for students with special needs in government schools. These funds had been provided for two programs, the learning assistance program and the funding support program. These programs were explained as follows:

... The learning assistance program was introduced in 2003 to support students experiencing difficulties in learning, including students with mild intellectual disabilities and language disorders enrolled in regular classes.

...The learning assistance program funding provides crucial support to teachers working with students with special education needs in regular classes. Through the program schools will receive both funding and specialist support teachers. Using statewide assessments to allocate funding means that funding and specialist support are available to students when and where they need it.

...the funding support program, is a \$29 million program to support over 10,000 students with disabilities who have moderate and high support needs and are enrolled in regular classes. These students have severe intellectual disabilities, physical disabilities, mental health disorders, autism, hearing and vision impairments, and are enrolled in regular classes. In 2004 over 10,000 students were supported through this program. In 2005 over 10,400 students will be supported through the program....Funding can be used for additional teacher time, training and development, additional teacher's aide support or time for teachers to co-ordinate student learning programs.

However, most schools utilise the funding for additional teacher aide special support. As well as the learning assistance program and the funding support program, in 2004 the Government allocated an additional \$15.6 million over the 2005-07 period so that each special education class will have a teacher and a teacher's aide, special, by 2007. Through this strategy, in 2005 each class for students with emotional disturbance, behaviour disorder or autism has been provided with a full-time teacher's aide, special. In excess of 300 teacher's aides, special, have been employed through this initiative...¹⁵³

¹⁵² Commonwealth Senate Employment, Workplace Relations, and Education References Committee, *Education of students with disabilities*, December 2002, p 1.

¹⁵³ Hon Carmel Tebbutt MLC, *NSWPD*, 22/3/05.

School bullying

The nature, extent and effects of bullying

Bullying has been defined by the NSW Department of Education as:

...intentional, repeated behaviour by an individual or group of individuals that causes distress, hurt or undue pressure.

Bullying involves the abuse of power in relationships. Bullying can involve all forms of harassment (including sex, race, disability, homosexuality or transgender), humiliation, domination and intimidation of others.

Bullying behaviour can be:

- **Verbal** eg name calling, teasing, abuse, putdowns, sarcasm, insults, threats
- **Physical** eg hitting, punching, kicking, scratching, tripping, spitting
- **Social** eg ignoring, excluding, ostracising, alienating, making inappropriate gestures
- **Psychological** eg spreading rumours, dirty looks, hiding or damaging possessions, malicious SMS and email messages, inappropriate use of camera phones¹⁵⁴

A 1994 report by a House of Representatives Standing Committee on violence in schools identified bullying as a major problem.¹⁵⁵ The NSW Legislative Council Standing Committee's 1995 *Report into Youth Violence in New South Wales* heard evidence suggesting that approximately 15 percent of children, or one in seven, reported being bullied at least once a week.¹⁵⁶ Research published by Rigby in 1997 found that in a survey of more than 38,000 students between the ages of seven and 17 years, about one child in six was bullied each week in Australian schools.¹⁵⁷

An article in the *Sydney Morning Herald* in November 2004 stated that research published by Rigby in 2003 found "that across 40 government and non-government schools surveyed, about half of all children had been bullied, although most of it was categorised as low level."¹⁵⁸ Another article in the *Daily Telegraph* in March 2004 reported on a subsequent study by Rigby, which found that "more than 120,000 children in NSW do not feel safe at school because of bullying."¹⁵⁹

¹⁵⁴ NSW Department of Education and Training, *Anti-Bullying Plan for Schools*, December 2004, at clause 5.1.

¹⁵⁵ House of Representatives Standing Committee on Employment, Education and Training, *Sticks and Stones: Report on violence in Australian Schools*, Canberra, 1994.

¹⁵⁶ According to Legislative Council Standing Committee on Social Issues, *Inquiry into Children's Advocacy*, September 1996 at p 138.

¹⁵⁷ Rigby K, *What Children tell us about bullying in schools*, Children Australia, 1997 referred to in Commonwealth Department of Education, Science and Training, *National Safe Schools Framework: Key Information From the Literature About Bullying*, undated, p 5: accessed on DEST website: www.dest.gov.au (16 May 2005).

¹⁵⁸ 'Beating the bullies', *Sydney Morning Herald*, 27/11/04.

¹⁵⁹ 'What 120,000 children fear', *Daily Telegraph*, 18/3/04. See also 'Is your child safe at school:

Research has found that bullying “is a physically harmful, psychologically damaging and socially isolating aspect of [a] large number of Australian children’s school experience.”¹⁶⁰ Bullying can lead to: (1) low levels of mental health including damaged self esteem, increased anxiety, deepened depression, and increased likelihood of suicidal thinking; (2) induced social maladjustment including fear of other children and absenteeism from school; (3) physical un-wellness.¹⁶¹ In extreme cases, victims may resort to violent retaliation.¹⁶² There is also evidence to suggest that bullies experience adverse outcomes. They are “more likely to drop out of school, use drugs and alcohol, as well as engage in subsequent delinquent and criminal behaviour.”¹⁶³

Recent media and literature

In recent years, the media has frequently reported on the issue of school bullying. An article in November 2003 reported that, “bullying is a silent epidemic. In schools it has increasingly been acknowledged as an insidious and damaging problem...”¹⁶⁴. A number of articles have commented on the rising incidence of bullying via SMS text message and the Internet, called ‘e-bullying’ or ‘cyber-bullying’.¹⁶⁵

In November 2004, the issue of school bullying re-surfaced in the media with suggestions that a stabbing at a Sydney private school had been provoked by bullying, and that the school had a widespread bullying problem.¹⁶⁶ The principal denied these claims. In December 2004, it was reported that a NSW Department of Education review had identified a bullying problem at a boarding school in NSW.¹⁶⁷

Cruelty epidemic makes life a misery’, *Daily Telegraph*, 15/4/04; and ‘Bullying at school worst in world’, *Sydney Morning Herald* 15/12/04. For statistics on bullying in other countries see Hay-Mackenzie F, ‘Tackling the Bullies: In the Classroom and the Staffroom’, (2004) 7(2) *Australia & New Zealand Journal of Law and Education* 87.

¹⁶⁰ *Key Information from the Literature about Bullying*, note 167, p 6.

¹⁶¹ Kennedy G, Regional Director, Student Welfare NSW Department of Education and Training, *Building Positive Relationships, The key to student wellbeing at school*, paper delivered at seminar organised by Commission for Children and Young People on 16 March 2004. See also American Medical Association Council on Scientific Affairs, *Bullying Behaviours among Children and Adolescents*, 2002: published on the AMA’s website at: <http://www.ama-assn.org/ama/pub/category/14312.html#consequences> (accessed 16 May 2005).

¹⁶² *Key Information from the Literature about Bullying*, note 167, p 7.

¹⁶³ *Ibid.*

¹⁶⁴ ‘Let’s harass bullying out of existence’, *Sydney Morning Herald*, 4/11/03.

¹⁶⁵ See for example, ‘School bullies armed with new technology’, *Illawarra Mercury*, 4/12/04, ‘Cyber bullying leaves its scars’, *The Australian*, 19/10/04; ‘Pupils bullied in cyberspace’, *The Daily Telegraph*, 20/8/04; ‘School bullies use SMS to tease victims’, *Sydney Morning Herald*, 15/8/03, ‘Playground bullies go hi-tech’, *The Daily Telegraph*, 31/3/03; ‘Text message bullies prey on children’, *The Sunday Telegraph*, 3/11/02.

¹⁶⁶ See ‘School knifing lifts the lid on bully culture’, *Sydney Morning Herald*, 20/11/04.

¹⁶⁷ See ‘Scathing report on school of excellence’, *Sydney Morning Herald*, 21/12/04.

In the academic literature, an article in the 2004 *Australian and New Zealand Journal of Law and Education* discusses the problem of homophobic bullying in schools.¹⁶⁸ It refers to recent cases, discusses the long-term impact on victims, and highlights the need for schools to develop strategies to combat homophobia.

Student's rights in relation to bullying

Criminal law

Bullies who physically assault, or threaten to assault, other students, could, depending on the seriousness of the incident, be charged with a criminal offence. Note, however, that the minimum age for criminal responsibility in NSW is 10 years and that there is a presumption that children aged between 10 and 14 are incapable of committing a criminal act. A victim of such bullying could also apply to the court for an Apprehended Personal Violence Order (APVO) against the bully.¹⁶⁹ Children under the age of 16 cannot apply for an APVO but the police can apply on their behalf.¹⁷⁰ In 2001, the President of the Victorian Children's Court referred to the increasing use of intervention orders (similar to APVOs) by school students in Victoria.¹⁷¹

School's duty of care towards students

Under the law of negligence, school authorities have a duty to take reasonable care for the safety of students. Teachers also have such a duty and school authorities can be held vicariously liable for a teacher's breach of duty. Failure to take action to prevent bullying may amount to a breach of duty, particularly if a teacher or the school failed to respond adequately to a student's complaints about bullying. If such a breach of duty has caused the student harm, the student could sue for damages.¹⁷²

School authorities have been held liable in a number of cases where a known bully has assaulted a student resulting in physical injury.¹⁷³ There have been few cases where

¹⁶⁸ Kendall C and Sidebotham N, 'Homophobic Bullying in Schools: Is there a duty of care?', (2004) 9(1) *Australia and New Zealand Journal of Law and Education* 71. See also 'Coming out getting easier for gay teenagers', *Sydney Morning Herald*, 25/5/05.

¹⁶⁹ See Part 15A *Crimes Act 1900 (NSW)*. This is discussed in Ford D, 'The law: a help or hindrance for the bullied student', at p 9 in *School Law 2001 National Conference Papers*, LAAMS, Sydney, 2001.

¹⁷⁰ See *Crimes Act 1900 (NSW)*, s 562C(2)(a).

¹⁷¹ Radio National, 'Classrooms and Courtrooms', *The Law Report*, 20/11/01, which noted that in the past 12 months the Court had dealt with about 300 applications for intervention orders by children against other children.

¹⁷² See Ford (2001), note 169, at p 12ff. See also Kendall C and Sidebotham N, 'Homophobic Bullying in Schools: Is there a Duty of Care?', 9(1) *Australia and New Zealand Journal of Law and Education* 71 at p 78ff.

¹⁷³ See Maher A, 'Bullying in Schools', at p 6ff in *School Law 2001 National Conference Papers*, LAAMS, Sydney, 2001.

compensation has been sought for physical and psychological harm allegedly caused by bullying over an extended period of time. However, the Victorian County Court upheld two such claims in 2001 and 2003.¹⁷⁴ Also, in August 2002, it was reported that a person who was bullied at school was suing the NSW Department of Education for up to \$750,000 damages, claiming that years of physical and verbal abuse at school had caused him physical and psychological injuries and had affected his career.¹⁷⁵

Note also that schools have a duty under occupational health and safety law to ensure that students are not exposed to risks to their health or safety.¹⁷⁶

Anti-discrimination laws

Students who have been bullied on grounds such as sex, homosexuality, race, or disability may be able to take action against an educational authority under state or federal anti-discrimination laws.¹⁷⁷ Those laws do not expressly require schools to take action to prevent bullying on those grounds (except for bullying that amounts to sexual harassment), but failure to do so could amount to a breach of those laws.¹⁷⁸

In 2003, the Administrative Decisions Tribunal held that the NSW Department of Education had indirectly discriminated against a student in circumstances where a school had failed to prevent race-based bullying of the student.¹⁷⁹ The basis for this decision was that the school's wide-ranging response to bullying did not address race as a possible basis for bullying. The school had therefore limited the student's access to a benefit available to other students. The student was awarded \$10,000 in damages.¹⁸⁰ This decision was overturned on appeal.¹⁸¹ The Appeal Panel held that "if the benefit actually provided is a program of anti-bullying measures, then it could not be said that [the student's] access to that benefit is limited... because the benefit is not as effective to her as it is in relation to her as it is in relation to other students... It is not unlawful to

¹⁷⁴ See Kendall and Sidebotham, note 172, at p 83. See also at p 71-72 discussing a student's action in 1997 against his school and the NSW Department of Education alleging breach of their duty of care in respect of homophobic bullying. According to the article, the claim was settled. The Department agreed to allow the student to return to school and to train staff and students about the harms of homophobia.

¹⁷⁵ 'Ex-student sues over bullying', *Sydney Morning Herald*, 7/8/02.

¹⁷⁶ See *Occupational Health and Safety Act 2000* (NSW), s 8(2).

¹⁷⁷ See Ford, note 169, at p 21.

¹⁷⁸ *Ibid.*

¹⁷⁹ *FP and FQ on behalf of FR v Department of Education and Training; FP v Department of Education and Training* [2003] NSW ADT 68

¹⁸⁰ 'Racist bullying under scrutiny after girl wins \$10,000 damages', *Sydney Morning Herald*, 14/5/03.

¹⁸¹ *Director General, Department of Education and Training v FP and FQ on behalf of FR* [2003] NSWADTAP 51.

provide a benefit that is less effective in relation to some students than others.”¹⁸²

Having overturned the Tribunal's finding that there was indirect discrimination, the Appeal Panel then considered whether the Tribunal was correct to reject the complaint of *direct* discrimination on the grounds of race. The Appeal Panel held that the Tribunal was correct on that point, and explained the law as follows:

...racial harassment of a student by fellow students at a school, which the teachers knew about or ought to have known about and took inadequate steps to eradicate, may constitute unlawful discrimination on the ground of race...Being in a school environment poisoned by racial harassment may constitute a “detriment”...It may also constitute denial or limitation of a “benefit”...if the benefit is cast as being the opportunity to enjoy the educational and social functions of a school free from harassment...It is necessary to establish, however, that the detriment, or the denial or limitation of the benefit, occurred because of discrimination on the ground of the person's race. In other words, the race of the victim must be a factor which influenced the inadequate response on the part of the school authorities...¹⁸³

Recent NSW government action to address bullying

In January 2005, the Department of Education published a policy for dealing with bullying behaviour in NSW government schools. The policy, entitled, *Anti-Bullying Plan For Schools*, requires every school to develop and implement an Anti-Bullying Plan that is consistent with the policy and which:

- includes a policy statement that is consistent with the School Discipline Code and articulates clearly that bullying is not acceptable
- includes a definition that captures all forms of bullying, including verbal, physical, social and psychological
- includes a statement of purpose that outlines individual and shared responsibilities of students, parents, caregivers and teachers when dealing with bullying behaviour
- provides information for students, parents, caregivers and teachers to identify bullying behaviours
- includes strategies that will be utilised by the school to effectively deal with bullying behaviour
- provides students, parents, caregivers and teachers with clear procedures to report bullying
- includes strategies for monitoring and evaluating the effectiveness of the Plan.¹⁸⁴

¹⁸² Ibid at para 39.

¹⁸³ Ibid at para 50.

¹⁸⁴ NSW Department of Education and Training, *Anti-Bullying Plan for Schools*, 2005, cl. 5.05.

The policy then elaborates on each of these points. In relation to “strategies...to effectively deal with bullying behaviours”, the policy states that:

- 6.2.1 Schools must deal with bullying quickly and effectively
- ...
- 6.2.3 Strategies for dealing with bullying must be linked to the School Discipline Policy and encompass the range of options available to deal with unacceptable behaviours, including suspension and expulsion.
- 6.2.4 In dealing with bullying behaviour schools need to recognise the repeated and recurring nature of bullying and have mechanisms in place to identify patterns of repeated offending.
- 6.2.5 Students, their parents and caregivers must be encouraged to be proactive in dealing with bullying, so that appropriate support can be provided to students involved in any incident.
- 6.2.6 The Anti-Bullying Plan must include specific strategies for:
 - Reporting...
 - Intervening...
 - Accessing help and support...;
 - Communicating Department appeal procedures...
 - Professional learning...

The policy also lists a number of resources to support the Anti-Bullying Plan such as *Anti-Bullying: Best Practice in Schools* (NSW Department of Education, 1999) which outlines programs in primary and secondary schools that have been effective in addressing and reducing bullying behaviour.¹⁸⁵ Note also that the Department has put in place a number of measures specifically to combat racism in schools.¹⁸⁶

The Department’s *Procedures for Suspension and Expulsion* have also been revised such that a student may be suspended for engaging in “aggressive behaviour, which includes hostile behaviour directed towards students...including verbal abuse and abuse transmitted electronically such as by email or SMS text messages.”¹⁸⁷

On 7 March 2005 it was reported that the NSW government was planning to introduce new measures under which students would need written permission from parents or carers to carry a mobile phone at school.¹⁸⁸ Public schools would also be instructed to maintain a mobile phone register. Premier Carr said, in relation to this proposal, that he

¹⁸⁵ Ibid at p 7. As to best practice for dealing with bullying see also Rigby K, ‘Addressing Bullying in Schools: Theory and Practice’, Australian Institute of Criminology, *Trends and Issues in Crime and Criminal Justice*, June 2003, No 259. In this article Dr Rigby examines five explanations for why bullying occurs in schools and looks at the implications of these explanations for policies and practices in schools (both what schools are doing and what they should be doing).

¹⁸⁶ These are listed on the *Racism. No Way!* website:
http://www.racismnoway.com.au/together/programs_and_strategies/nsw/

¹⁸⁷ NSW Department of Education and Training, *Suspension and Expulsion of School Students – Procedures*, 2005, cl 6.2.1.

¹⁸⁸ ‘Schools tighten mobile phone rules’, *ABC Online*, 7/3/05.

was concerned about a rising trend of bullying through phone text messages.¹⁸⁹

Non-government schools are not bound to follow the Department's *Anti-Bullying* policy. However, according to a spokesperson for the former Education Minister, Hon Andrew Refshauge MP, under laws passed in 2004, non-government schools are required to report on anti-bullying programs they have in place.¹⁹⁰ The new laws do not specifically refer to anti-bullying policies but they require non-government schools to provide a safe and supportive environment for students by means that include school policies and procedures providing for the welfare of students.¹⁹¹

In 2005, the *Daily Telegraph* launched *Speak Up Day*, which had the government's support and took place on Wednesday, 30 March 2005.¹⁹² The new Education Minister, Hon Carmel Tebbutt MLC, commented on this initiative as follows (in part):

Speak Up Day was successfully conducted across New South Wales. Both government and non-government schools participated in a range of activities that reflects the excellent work of school communities in taking a stance against bullying. It also recognises and highlights bullying as an issue for all members of the community. School communities have helped to break the power of the secrecy of bullying by providing further opportunities for those who are bullied and bystanders to tell their stories in a safe and supportive environment. Schools have also hosted a range of activities that best reflect the needs of their school communities. For example, Strathfield South High School celebrated the opening of its peer mediation room... The school has also released an anti-bullying policy that has been written by students.¹⁹³

Recent national action to address bullying

In June 2002, the website, *Bullying. No Way!* was launched.¹⁹⁴ The website was created by Australia's educational communities, including state, territory and Commonwealth government education departments. The website aims:

- To provide a nationwide resource of State and Territory approaches to minimising bullying, harassment and violence in schools.
- To develop a framework for sharing Australian school community solutions that work.
- To use technology and networks to make this information as accessible as possible to school communities.
- To make sure that all students can learn in a safe and supportive school environment.

The *Racism. No Way!* website has also been established, which is designed to help

¹⁸⁹ Ibid.

¹⁹⁰ 'Head says bullying reports are nonsense', *Sun Herald*, 21/11/04.

¹⁹¹ See *Education Act 1990 (NSW)*, s 47(g) inserted by *Education Amendment (Registration of Non-Government Schools) Act 2004*.

¹⁹² 'Speak Up on Bullies', *Daily Telegraph*, 28/2/05.

¹⁹³ Hon Carmel Tebutt MP, *NSWPD*, 6/4/05. See also *NSWPD*, 2/3/05 at p 14393.

¹⁹⁴ The website is located at <http://www.bullyingnoway.com.au>

school communities develop an understanding of racism and provide practical information and strategies to help address racism in schools.¹⁹⁵

The *National Safe Schools Framework* was produced in 2003 as a result of a collaborative effort between the Commonwealth, and State and Territory, government, non-government school authorities and other key stakeholders.¹⁹⁶ The main aim of the Framework is to assist all school communities in building safe and supportive school environments where bullying, harassment, and violence are minimised. The Framework contains a set of guiding principles as well as suggested approaches that are designed to support schools in achieving the aim of the Framework, and to “assist them to reflect on their existing practices and plan for improvement.”¹⁹⁷

In November 2003, the federal Minister for Education, Training and Science, the Hon Dr Brendan Nelson MP, announced “a \$4.5 million funding package” to complement the Framework:

- \$3million for teacher professional learning for teachers and principals;
- \$1million grants programme to help schools select and implement effective evidence-based, best practice programmes to address bullying, violence and abuse;
- \$300,000 for materials and other support to guide schools in the implementation; and
- \$200,000 to support the *Bullying. No Way!* website.¹⁹⁸

In July 2004, the Minister announced that, as the first stage of the grants project, 104 schools across Australia would receive grants of up to \$5,000 to develop, pilot and/or evaluate strategies addressing bullying, violence and abuse.¹⁹⁹ In December 2004, the Federal Parliament passed legislation that requires state educational authorities to commit to a series of conditions in order to receive federal funding.²⁰⁰ One of those conditions is implementation of the *National Safe Schools Framework*.

¹⁹⁵ The website is located at <http://www.racismnoway.com.au>

¹⁹⁶ See Ministerial Council on Education, Employment, Training and Youth Affairs, *National Safe Schools Framework*, 2003, p4. This can be accessed at: <http://www.mceetya.edu.au> (accessed 16 May 2005). See also Commonwealth Department of Education, Training and Science (DEST), *Implementation Manual for National Safe Schools Framework*, 2003; and DEST, *National Safe Schools Framework: Resource Pack*, 2003.

¹⁹⁷ *National Safe Schools Framework*, *ibid*, at p 6.

¹⁹⁸ Hon Dr Brendan Nelson MP, ‘\$4.5 billion to keep bullying out of schools’, *Media Release*, 2/11/03.

¹⁹⁹ Hon Dr Brendan Nelson MP, ‘Grants to help keep bullying out of schools’, *Media Release*, 13/7/04

²⁰⁰ Hon Dr Brendan Nelson MP, ‘Howard Government Delivers \$33 billion National Standards, Values and Consistency for Australian Schools’, *Media Release*, 8/12/04.

Recommendations in non-government 2005 report

The 2005 *Non-government Report on the Implementation of the United Nations Convention on the Rights of the Child in Australia* makes the following recommendations with respect to school bullying:

- That all Schools of Education in universities include pre-service training for teachers, directed specifically at bullying and related conflict resolution.
- That schools are required by the Department of Education to carry out periodic surveys among students, staff and parents to discover more about the sorts of peer relations being fostered by the school. These surveys – in accordance with Article 17 – would allow students the opportunity to express their views and describe their experiences.
- That research is funded to explore the nature of peer relations among children and young people in order to assist children and young people in the development of skills in dealing with bullying and harassment and in peer support mechanisms.²⁰¹

Suspensions and Expulsions

Introduction

Suspension and expulsion are the most serious forms of discipline available to schools in NSW. This paper does not discuss school discipline generally but notes that:

Discipline within schools is a contentious issue impinging on the rights and needs of the child... Balancing the rights of teachers and all students to a safe and productive teaching and learning environment with the rights of individual students who may be disruptive or require special attention poses particular difficulties.²⁰²

Powers of suspension and expulsion

Government schools

Under the *Education Act 1990*, the Director-General of School Education may suspend any child from a government school; and the Minister may, on the recommendation of the Director-General, expel a child of any age from a government school.²⁰³ These powers of suspension and expulsion have been delegated to school principals.²⁰⁴ The NSW Department of Education and Training has a detailed policy on suspension and expulsion of students from government schools (outlined below).

²⁰¹ *Non-Government Report on the Implementation of the United Nations Convention on the Rights of the Child in Australia* (2005), note 123, at p 23 (Recommendations 32-34).

²⁰² NSW Parliament, Legislative Council, Standing Committee on Social Issues, *Inquiry into Children's Advocacy*, Report No. 10, September 1996, at p 140.

²⁰³ Section 35(3).

²⁰⁴ Pursuant to *Education Act 1990* (NSW), s 119.

Non-government schools

Private schooling is based on a contract between the school and the parents, which may indicate the circumstances in which a student can be suspended or expelled.²⁰⁵ If there is no express provision in the contract, there is an implied term that a student will not be suspended or expelled unreasonably.²⁰⁶ There has been doubt as to whether the law requires private schools to afford students procedural fairness in relation to suspensions and expulsions - as is the case for public schools.²⁰⁷ However, in 2004 new laws were passed in NSW that contain additional requirements for registration of non-government schools. One of those requirements is that they have “school policies relating to discipline” that “are based on principles of procedural fairness.”²⁰⁸

Recent changes to suspensions and expulsions policy

In 2004, the NSW Department of Education revised its policy on suspensions and expulsions following consultation with interest groups. The new policy came into effect on 28 January 2005. The Premier, Hon Bob Carr MP, said, “the new rules would give principals more authority to take swift and decisive action against severely disruptive students”; and that they “will also cut back on appeals.”²⁰⁹ The main changes are:

- Suspensions can now be imposed for more types of disruptive behaviour, including abusive e-mails and text messages;
- The types of misconduct for which a school *must* suspend a student have been expanded, eg to include supply of a prescription drug. The revised policy also states that such suspensions are to be long suspensions (ie 5-20 school days), subject to consideration of a number of factors.
- The revised policy also explains the role of an ‘observer’ at disciplinary interviews and the role of a ‘support person’ at resolution meetings.

²⁰⁵ The Law Handbook, note 16, at p 193.

²⁰⁶ Ibid. Note, according to Knott, if there is no express provision in the contract, it is unlikely that the private school has the power to impose a suspension. See Knott A, ‘Suspension and Expulsion in School’ in Edwards J, Knott A and Riley D, *Australian Schools and the Law*, LBC Information Services, 1997, at p 211.

²⁰⁷ See Knott A, *ibid*, at p 216-217. See also Chisolm R, *Teachers Schools and the Law in New South Wales*, New South Wales University Press, 1987 at p 46-47.

²⁰⁸ *Education Act 1990* (NSW), ss 47(g)(i), 47(h) inserted by *Education Amendment (Registration of Non-Government Schools) Act 2004*.

²⁰⁹ NSW Department of Education and Training, ‘Government issues tough new guidelines on suspension and expulsion’, *Media Release*, 3/8/04, p 1.

*The suspensions and expulsions policy in summary*²¹⁰

The nature and purpose of suspensions

The policy defines suspension as the “removal of a student from a school for a period of time determined by the principal. Suspensions are imposed in cases of unacceptable behaviour in the interest of the student and/or the school community...” Students may receive a short suspension (of up to four school days) or a long suspension (between five and twenty school days). The purpose of a suspension is stated as follows:

Suspension is only one strategy within a school's student welfare and discipline policies. It is most effective when it highlights the parent(s) and carer(s) responsibility for taking an active role, in partnership with the school, to modify inappropriate behaviour of their child. The school and the government school system will work with parent(s) or carer(s) with a view to assisting a suspended student to rejoin the school community as quickly as possible.

Suspension allows students time to reflect on their behaviour, to acknowledge and accept responsibility for the behaviours which led to the suspension and to accept responsibility for changing their behaviour to meet the school's expectations in the future. It also allows time for school personnel to plan appropriate support for the student to assist with successful re-entry. This may include access to appropriate support staff such as an Aboriginal community liaison officer (ACLO) and support teacher behaviour (STB).²¹¹

Suspensions must be imposed for certain types of misbehaviour

Principals *must* suspend any student:

- who is physically violent, resulting in pain or injury, or who seriously interferes with the safety and well-being of other students, staff, or others; or
- who uses or possesses a prohibited weapon, firearm or a knife without reasonable cause; or
- who uses, or possesses, a suspected illegal substance (not including alcohol or tobacco) or who supplies a restricted substance (eg prescription drugs).²¹²

Principals are to impose a *long* suspension for these types of misconduct, subject to consideration of a number of factors (these are outlined below).

Suspension for other types of misbehaviour – general principles

There are other grounds upon which a principal *may* suspend a student (these are

²¹⁰ NSW Department of Education and Training, *Suspension and Expulsion of School Students-Procedures*, 2004. The following summary refers to clauses in this revised policy.

²¹¹ Clauses 5.01, 5.02.

²¹² Clause 6.1.5.

outlined below under the headings “grounds for short suspension” and “grounds for long suspension”). There are some general principles that principals must take into account in determining whether to impose a suspension on these other grounds.

First, a principal should not generally suspend a student unless the principal has implemented a range of student welfare and discipline strategies to deal with the problem behaviour, and has provided the student with a formal written caution.²¹³ Second, in determining whether a student should be suspended, the principal must consider the safety, care and welfare of the student, staff and other students in the class.²¹⁴ The principal must also take into account factors such as the age, individual needs, any disability and the developmental level of the student.²¹⁵

Grounds for short suspension

Short suspensions may be imposed on students for:

- *Continued disobedience*: including breaches of the school discipline code such as refusal to obey staff instructions, defiance, disrupting other students, minor school-related criminal behaviour, use of alcohol or persistent use of tobacco; or
- *Aggressive behaviour*: which includes hostile behaviour directed towards students, members of staff or other persons, including verbal abuse and abuse transmitted electronically such as by email or SMS text messages.²¹⁶

If the principal decides to impose more than two short suspensions on a student in any twelve-month period, the School Education Director must be advised.²¹⁷

Grounds for long suspension

The principal may impose a long suspension if:

- Short suspensions have not resolved the issue or inappropriate behaviour; or
- The misbehaviour is so serious as to warrant a long suspension.²¹⁸

²¹³ See clauses 6.1.2 and 6.1.3. Note that clause 6.1.4 states, “in some circumstances the principal may determine that a student should be suspended immediately. This will usually be due, but not limited to, reasons such as the safety of students or staff.”

²¹⁴ Clause 6.1.1.

²¹⁵ Clause 4.0.5.

²¹⁶ Clause 6.2.1.

²¹⁷ Clause 6.2.7.

²¹⁸ Clause 6.3.1.

In determining whether a student's behaviour is serious enough to warrant a long suspension the principal must consider the safety of students and staff, the merit and circumstances of the particular case, and factors such as the age, individual needs, any disability and the developmental level of the student.²¹⁹

Subject to consideration of these factors, (a) principals *are to* impose a long suspension for the types of misconduct in respect of which suspensions must be imposed; and (b) principals *may* impose a long suspension for the following types of misconduct:

- *Use of an implement as a weapon* in a way which seriously interferes with the safety and well-being of another person;
- *Serious criminal behaviour related to the school*: including malicious damage to property (school or community), or against the property of a fellow student or staff member on, or outside of, the school premises;
- *Persistent misbehaviour*: including repeated refusal to follow the school discipline code; making serious threats against students or staff; and behaviour that deliberately and persistently interferes with the rights of other students to learn or teachers to teach.²²⁰

The principal must not impose any more than two long suspensions on a student in any 12-month period without the approval of the School Education Director.²²¹ If after two long suspensions, the matter has not been resolved, other strategies must be considered including alternative educational placements or expulsion from the school.²²²

Notifying and resolving suspensions

The policy also outlines steps that should be taken by principals with respect to notifying parents or carers and resolving suspensions. One of the matters that should be included in the notice to parents is "the clear expectation that the student will continue with studies while suspended and, in the case of a long suspension, that a study program will be provided."²²³ This statement is not complemented by a specific obligation in the policy for schools to provide suspended students with a study program.

Resolving suspensions requires convening a resolution meeting of personnel involved in the welfare and guidance of the student, including parents or carers, to discuss the basis

²¹⁹ Clause 6.3.1.

²²⁰ Clause 6.3.2.

²²¹ Clause 6.3.8.

²²² Clause 6.3.9.

²²³ Clause 7.2.3.

for resolving the suspension.²²⁴ In the case of a long suspension, a resolution meeting must be convened at the earliest opportunity and the aim is to minimise the number of days of suspension.²²⁵ For long suspensions, the school counsellor must be informed and prepare a report for the principal.²²⁶ If a student has been suspended for an incident that involved violence or weapons, the principal must undertake a risk assessment if he or she believes that the student's return will pose a risk.²²⁷ The student should not be re-admitted until the issues in the assessment have been addressed.²²⁸

Grounds for expulsion

Expulsion is defined as “permanent removal of a student from a school.” There are two grounds for expulsion (1) Serious misbehaviour; and (2) Unsatisfactory participation in learning by a student of post compulsory school age.

Serious misbehaviour: The principal may expel a student of any age from the school in serious circumstances of misbehaviour. Except in the case of a most serious incident, before expelling a student on this ground, the principal must have implemented all other appropriate student welfare and discipline strategies.²²⁹

Unsatisfactory participation in learning: The principal may expel a student of post-compulsory school age (ie 15 or over) for unsatisfactory participation in learning.²³⁰ This will generally be for a documented pattern of non-satisfactory completion, non-serious attempts to meet course objectives, or non-compliance with Board of Studies requirements for the award of a School Certificate or Higher School Certificate.²³¹ Before a principal considers expulsion on these grounds, the student must receive at least one formal written warning that such action is being contemplated. A program of improvement should be developed in conjunction with the student to assist him or her to meet outstanding requirements. The student must also be provided with a reasonable period in which to improve his or her participation.²³²

²²⁴ Clause 7.3.1.

²²⁵ Clause 7.3.6.

²²⁶ Clause 6.3.6.

²²⁷ Clause 7.3.10

²²⁸ Clause 7.3.11

²²⁹ Clause 8.2.1.

²³⁰ Clause 8.1.1

²³¹ Clause 8.4.2

²³² Clause 8.4.2.

Arrangements for student following expulsion

If a student is expelled for serious misbehaviour, the principal must arrange within ten school days an alternative educational placement appropriate to the needs of the student.²³³ If a suitable alternative cannot be arranged, the principal must refer the issue to the School Education Director for resolution.²³⁴ If a student is expelled for unsatisfactory participation in learning, the arrangement of an alternative placement is the responsibility of the student and the student's parents or carers.²³⁵

Refusal to re-admit a student to all or any government schools

If a student has been expelled from any government school, the Minister may, on a recommendation by the principal or school education director, refuse to admit the student to all or any other government schools. The student may not then re-enrol in a government school without the approval of the Minister.²³⁶ The principal may make such a recommendation in extreme circumstances of misbehaviour. A School Education Director may make such a recommendation where the expulsion of a student for misbehaviour has been referred to him or her for resolution and the behaviour of the student is so extreme that it is not possible to find a suitable placement.²³⁷

Procedural fairness prior to suspending and expelling

The policy states that the "principles of procedural fairness are fundamental to the implementation of these procedures."²³⁸ Procedural fairness is to be given particular emphasis when consideration is being given to a long suspension or expulsion.²³⁹ Procedural fairness is generally recognised as having two essential elements (1) the right to be heard; and (2) the right to an impartial decision. The right to be heard includes knowing the allegations and other information that will be taken into account, being able to respond to the allegations, and having that response considered.

The policy specifically requires that a formal disciplinary interview be held with the student prior to making the decision to suspend or expel.²⁴⁰ Principals must ensure that the student is given explicit information about the nature of the allegations and is given the opportunity to consider and respond to the allegations.

²³³ Clause 8.2.3.

²³⁴ Clause 8.2.4

²³⁵ Clause 8.4.6.

²³⁶ See Section 34(4), clause 8.3 and Appendix 1.

²³⁷ Clause 8.3.1.

²³⁸ Clause 5.0.4.

²³⁹ Clause 6.3.4 and clause 8.1.3.

²⁴⁰ Clauses 6.2.2, 6.3.5, 8.2.1.

The policy states that, for very young children, it may be advisable to have a parent or carer present at the meeting.²⁴¹ Where consideration is being given to a long suspension or expulsion, the student *must* be able to have an appropriate observer of their choosing present at the interview.²⁴² This could be a teacher, year advisor, another student or parent(s) or carer(s). An observer does not take part in the meeting but is there to watch and to ensure that the student can fully participate in the meeting.²⁴³

Where a principal is considering expulsion, he or she must ensure that: the student is notified in writing of the reasons for the possible expulsion; the parent(s) or carer(s) is given a copy of all relevant documents; the student and parent(s) or carer(s) are given seven days to respond; and their response is considered before proceeding. The student is to be placed on a long suspension pending the principal's decision.²⁴⁴

Appeals against suspensions and expulsions

The policy states that although the right to appeal is not necessarily an essential element of procedural fairness, it is considered appropriate to incorporate such rights in respect of suspensions and expulsions from government schools.²⁴⁵ The policy therefore provides that students and parent(s) or carer(s) may appeal if they consider that correct procedures have not been followed or that an unfair decision has been reached.²⁴⁶ An appeal is to be made to the School Education Director and if the Director declines an appeal, a subsequent appeal can be made to the Regional Director.²⁴⁷ Appeals are to be dealt with within 20 school days of their lodgement.²⁴⁸ An appeal does not put on hold the principal's decision to suspend or expel a student.²⁴⁹ Where an appeal is upheld, the person determining the appeal will decide what action is to be taken.²⁵⁰

Outside of the appeal mechanisms outlined in the policy document, it is possible for a student or parent to challenge a suspension or expulsion in the Supreme Court on the basis of a denial of procedural fairness. For example, in 2003, year 10 students from McLean High School, who had been suspended for allegedly smoking cannabis on

²⁴¹ Clause 6.2.2 and 6.3.5.

²⁴² Clause 6.3.5.

²⁴³ Appendix 3.

²⁴⁴ Clause 8.2.1.

²⁴⁵ Appendix 2.

²⁴⁶ Clause 10.0.1.

²⁴⁷ 10.0.4.

²⁴⁸ Clause 10.0.5

²⁴⁹ Clause 10.0.7

²⁵⁰ Clause 10.0.6.

school grounds, sought an injunction from the Supreme Court on the basis that they had been denied procedural fairness and that they would suffer undue hardship if the suspensions stood (eg not being able to sit for trial School Certificate Exams and not being able to do work experience).²⁵¹ The interlocutory injunction was not granted. Note also that a complaint can be made to the NSW Ombudsman.

Criticisms of suspensions and expulsions policy

The National Children's and Youth Law Centre has made several criticisms of the Department's policy on suspensions and expulsions including:²⁵²

- The Department's zero-tolerance policy (ie mandatory suspensions for certain types of misconduct) is unfair and should be discontinued. School principals should have discretion as to whether or not to suspend a student depending on the seriousness of the incident and other matters. For example, minor "physical violence" may not warrant a suspension.
- The policy should expressly permit and encourage schools to use restorative practices, such as conferencing, as an alternative to suspending or expelling a student, following a serious incident. Pilot conferencing programs in Queensland and Victorian schools have had positive outcomes.²⁵³
- The maximum length of long suspensions (20 school days) should be reduced to 10 school days. This would minimise the disruption to the student's education. Other states, including South Australia, Victoria and Tasmania, do not allow suspensions to last beyond 10 school days.
- Appeals against suspensions and expulsions should be made to an independent appeal panel. The UK has recently introduced an independent appeal panel for appeals against permanent exclusions and a proposal has been introduced in New Zealand.

The 2005 *Non-government Report on the Implementation of the United Nations Convention on the Rights of the Child in Australia* states that suspension and expulsion policies in government schools in Australia are deficient and inconsistent in a number of areas relating to: (a) a student's right to representation; (b) arrangements for the continuing education of expelled students; and (c) impartiality in review processes and

²⁵¹ *CF v State of New South Wales* (2003) 58 NSWLRC 135.

²⁵² National Children's and Youth Law Centre, *Submission to NSW Department of Education on Procedures for Suspension and Expulsion*, February 2004. The author of this Background Paper was formerly employed by the Centre and was involved in preparing its submission.

²⁵³ Note that conferencing was trialled in some NSW government schools in 1997 to deal with bullying and other conflicts. See Strang H, 'Restorative programs in the school setting', in *Restorative Justice Programs in Australia: A Report to the Criminology Research Council*, Australian Institute of Criminology, March 2001.

proper documentation and records management.²⁵⁴ The report also suggests that states and territories have overlooked the impact of broad suspension grounds.

Compliance with the policy

The National Children's and Youth Law Centre referred, in its submission, to a number of cases in which principals or deputy-principals have not followed the policy.²⁵⁵ The NSW Commission for Children and Young People also stated in 2002 that:

The most identifiable problem is the inconsistent application of [the policy]...[T]he procedures do not appear to be strictly followed in all instances. Not all students are set a study program for the period of their absence (short or long) or receive adequate support to re-enter the school community following suspension. Nor, it seems, are all young people expelled from school found an alternative education placement as the procedures stipulate. The Commission suggests that the Department should audit schools to check on their compliance with procedures.²⁵⁶

Note that the press release for the revised 2005 policy states, "the Department's Safety and Security Directorate will provide face-to-face training and support to school principals on student discipline, suspension and expulsion."²⁵⁷

Numbers of suspensions and expulsions from government schools²⁵⁸

Table 4.1 below shows the number of suspensions and expulsions from government schools in NSW for the years 1999 to 2001.²⁵⁹

	1999	2000	2001
Short suspensions	31, 527	35,503	40,819
Long suspensions	4,733	5,765	6,761
Total suspensions	36, 260	41, 268	47,580
Expulsions	355	332	403

²⁵⁴ *Non-Government Report on the Implementation of the United Nations Convention on the Rights of the Child in Australia* (2005), note 123, at p 54.

²⁵⁵ NCYLC Submission, note 252, p 41ff.

²⁵⁶ NSW Commission for Children and Young People, *A Report of an Inquiry into the best means of assisting children and young people with no-one to turn to*, 2002, at p 88.

²⁵⁷ NSW Department of Education and Training, 'Government issues tough new guidelines on suspension and expulsion', *Media Release*, 3/8/04, p 1.

²⁵⁸ Data on suspensions and expulsions from non-government schools is not published.

²⁵⁹ These figures were taken from Gonczi Prof A, *Measuring and Reporting on Discipline and Student Suspensions in NSW Government schools*, 2002.²⁵⁹

Note that 2001 is the last year when data on suspensions was reported. The manner in which suspensions data is reported is being changed, as recommended in Professor Gonczi's 2002 report, *Measuring and Reporting on Discipline and Student Suspensions in NSW Government schools*.²⁶⁰ Reporting of data will recommence in 2005.²⁶¹

The Gonczi report outlined some further statistics on suspensions and expulsions based on an analysis of data for the 2001 year:

- Students in years 7-10 made up 70% of suspensions (76% of long suspensions). Primary school children years 3-6 made up around 20% of suspensions.
- Acts of violence represented around 45% of all suspensions; persistent disobedience was the ground for a further 45% of suspensions; and weapons and illegal drugs resulted in less than 10% of suspensions.
- A disproportionate number of students who were given long suspensions were of Aboriginal and Torres Strait Islander background.²⁶²
- Close to 75% of students were being suspended for the first time.²⁶³

The Gonczi report states that, "the rise in the total number of suspensions in recent years is not indicative of declining educational standards or of schools being less safe than they were prior to the introduction of the new suspensions policy in 1999."²⁶⁴ The report states that the increase in suspensions over the past few years "suggests an increased level of concern among teachers and principals about various aspects of student behaviour."²⁶⁵ The report also concluded that, "overall, serious violence in NSW schools is rare."²⁶⁶ Children's rights advocates have suggested that if this is so, and if suspensions are to be used as a measure of last resort, the number of students who are suspended from schools in NSW cannot be justified.²⁶⁷

²⁶⁰ See NSW Department of Education and Training, *2003 Annual Report*, at p 84.

²⁶¹ Private telephone communication with officer of NSW Department of Education and Training.

²⁶² As to exclusions of indigenous students, see also *Non-Government Report on the Implementation of the United Nations Convention on the Rights of the Child in Australia* (2005), note 123, at p 52.

²⁶³ Gonczi report, note 259, at p 4-5.

²⁶⁴ *Ibid* at p 15.

²⁶⁵ *Ibid* at p 5.

²⁶⁶ *Ibid* at p 5.

²⁶⁷ *Non-Government Report on the Implementation of the United Nations Convention on the Rights of the Child in Australia* (2005), note 123, at p 55.

Consequences for suspended and expelled students

Suspensions and expulsions are justified as disciplinary strategies that are used by schools in the best interests of the student and/or of the school community. The school community includes other students and teachers, who have a right to an environment that is both safe and conducive to learning. Exclusions are also supported on the basis that they are either a measure of last resort, when other disciplinary strategies have failed, or that they are an appropriate response to a serious incident.

However, it is also important to recognise that suspensions and expulsions can have a negative impact on students and their life opportunities. In its *2002 Report on the best means of assisting children and young people with no-one to turn to*, the NSW Commission for Children and Young People stated:

The Inquiry identified suspension and expulsion from school as a very significant step towards a young person's having no-one to turn to.

Suspension or expulsion effectively cuts a troubled child off from important relationships, disrupts or puts a stop to their education, reduces academic performance and fosters low self-esteem and resentment of authority.²⁶⁸

The Commission's report then refers to the Department of Education's policy on suspension and expulsion and it notes, "suspensions are seen to operate as a kind of behavioural circuit-breaker." The Commission states, "for the 75% of suspended students in public schools [in NSW] who do not 're-offend'...suspension would appear to have this effect". However, the Commission then states:

For the 25% [of public school students in NSW] who are repeatedly suspended, or are expelled, the decision to cut them off has profoundly negative consequences. It deprives them of the opportunity to continue learning and to benefit, perhaps, from supportive relationships with peers and adults. Young people who don't finish school face more limited employment opportunities and are more likely to be unemployed.²⁶⁹

A joint report in 1997 by the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission found that "there is strong anecdotal evidence to suggest that a substantial proportion of youth offending starts with exclusion from school".²⁷⁰ That report also cited the Commonwealth Parliamentary Committee's *Report of the Inquiry into Truancy and Exclusion of Children and Young People from School* which, in reference to exclusion and early school leaving, stated, "there is little doubt that there is a strong correlation between early [school] leaving and criminal activity, poverty, unemployment and homelessness."²⁷¹

²⁶⁸ NSW Commission for Children and Young People report, note 256, at p 86.

²⁶⁹ *Ibid* at p 87-88.

²⁷⁰ Australian Law Reform Commission and Human Rights and Equal Opportunities Commission, *Seen and Heard: Priority for children in the legal process*, 1997, at p 209.

²⁷¹ Quoted in *Seen and Heard* report, *ibid*, at p 210. See also Fortin, note 7, at p 177-79. Fortin also refers (at p 174) to a UK Audit Commission report in 1996, which found that 42% of young offenders of school age sentenced in the juvenile courts had been excluded from school. See also Skiba et al, 'Consistent Removal: Contributions of School Discipline to the School Prison

The NSW Commission for Children and Young People's report discusses young people's perspective on being suspended and expelled:

Young people, whether suspended or not, do not necessarily share [the Department's] view about the effectiveness of suspension as a disciplinary tool. They point out that for those who do not enjoy or do not want to be at school, suspension can be an 'official holiday' and does not provide [an] incentive for students to change their behaviour. Further, because suspended young people are often left at home alone by their parents, lack of supervision can lead them into further trouble...

Among young people who have been suspended, the feeling of being unfairly treated in comparison with other students is strong. They experience feelings of rejection, shame and humiliation – often shared by other members of the family. Many also resent the fact that suspension only leads to them getting further behind with their education. We spoke with young people who had been suspended on several occasions, all of whom had multiple difficulties in their lives. On the one hand, suspension from school tended to compound their problems by worsening their attitude to school, further loosening their connections to it and sometimes inducing their parents to remove them from their school permanently without an alternative arrangement being found. On the other hand, young people who were linked with high support (but frequently short-term) alternative education programs found themselves in an environment which was better able to meet their learning and personal needs.²⁷²

The Commission stated that, "the challenge for schools is to ensure that suspended students do not lose their connections to the educational and protective social environment that a school provides."²⁷³ One recent government strategy that seems to be directed towards meeting this challenge has been the creation of suspension centres (discussed below). Another challenge is for the government and schools to implement pro-active strategies to promote good discipline and to provide appropriate assistance to disruptive students at an early stage so that exclusions are minimised.²⁷⁴

Suspension centres

In March 2003, the government announced that by 2007 twenty suspension centres would be "established across the State to implement new behaviour modification plans for students returning to school after long suspension. The 2003/2004 State Budget provided new funding of \$8 million over four years to support this initiative."²⁷⁵ This initiative had been discussed in the 2002 Gonczi Report.²⁷⁶

Pipeline', paper delivered at *School to Prison Pipeline Conference: Harvard Civil Rights Project*, May 16-17, 2003.

²⁷² NSW Commission for Children and Young People, note 256, at p 87-88

²⁷³ Ibid at p 88.

²⁷⁴ See NSW Teacher's Federation *Vinson Inquiry into the Provision of Public Education in NSW*, Pluto Press, 2002, Chapter 5. For a list of some of the Department's strategies in this regard, see NSW Department of Education and Training, *2003 Annual Report*, at p 85.

²⁷⁵ NSW Department of Education and Training, *2003 Annual Report*, p 84.

²⁷⁶ Gonczi report, note 259, at p 7.

The government has recently committed to building additional suspension centres as part of its \$70 million strategy to maintain and re-enforce discipline in schools. On 14 September 2004, Hon Dr Andrew Refshauge MP, then Minister for Education and Training, announced that:

As part of the \$70 million school behaviour and discipline plan, \$12 million will be spent over the next three years to build seven new behaviour schools, bringing to 35 the total number of behaviour schools; to set up seven new tutorial centres linked to existing high schools, bringing to a total of 40 the number of tutorial centres; and 20 new suspension centres will also be established to help students return to school after a long suspension. A total of \$58 million will be spent over the next four years to run these schools and centres.²⁷⁷

School uniforms

Ludbrook states:

School uniforms and dress codes are a common source of friction in schools throughout Australia. In a society which places great emphasis on appearance, fashion and style, and where there are strong advertising and peer pressures for young people to be part of the current youth culture, it is not surprising that some students claim the right to express their own personal preferences in their dress and appearance.²⁷⁸

He summarises the main arguments concerning school uniforms as follows:

...there are arguments in support of school uniforms: that they are cheaper; they avoid competitiveness or embarrassment for students who cannot afford fashion gear; they encourage orderliness and discipline; and they give students a greater sense of pride and loyalty towards the school. But, from a children's rights viewpoint, compulsory uniforms represent a restriction of their freedom of expression and discourage individual choice.²⁷⁹

As foreshadowed in Labor's 2003 election campaign, in August 2004, the NSW Department of Education published a new *School Uniform Policy*, replacing the 1989 policy.²⁸⁰ The new policy, which applies to public schools only, states that the government "supports the wearing of school uniforms...and the upholding of high standards of dress..." but does not require schools to have a uniform.²⁸¹

With respect to schools that want to have a uniform, the new policy states, "each school's uniform policy must be the result of formal consultation with students, teachers and parents or carers, including the Parents and Citizens' Association, local Aboriginal

²⁷⁷ Hon Dr Andrew Refshauge, *NSWPD*, 14/9/04.

²⁷⁸ Ludbrook R, 'Children's Rights in School Education', in Funder K, *Citizen Child: Australian Law and Children's Rights*, Australian Institute of Family Studies, 1996, at p 100.

²⁷⁹ *Ibid* at p 101.

²⁸⁰ See 'Uniforms without the uniformity', *Sydney Morning Herald*, 13/8/04.

²⁸¹ *School Uniform Policy*, cl. 4.

Educational Consultative Group and School Council, where relevant.”²⁸²

The new policy also states that decisions about uniforms “should be consistent with occupational health and safety, anti-discrimination and equal opportunity legislation.”²⁸³ In relation to anti-discrimination laws, the guidelines state, “flexibility must be used where implementation of the school uniform affects some students unequally”. The policy refers in particular to students with a particular ethno-religious belief, students with a disability and students who are pregnant.

With respect to enforcement of a school uniform policy, the policy states:

6.1.1 Positive reinforcement and encouraging responsible behaviour are the preferred approaches to ensuring students wear the school uniform.

...

6.1.3 Suspension or expulsion solely for non-compliance with uniform requirements is not to occur. Student enrolment cannot be contingent upon adherence to school uniform policy.

6.1.4 Students should not be disadvantaged where required uniform items are not available because of circumstances beyond their control.

6.1.5 Conscientious objections by parents to the wearing of school uniform should be respected.

6.1.6 Responses to students who do not wear uniform must be appropriate. They should be clarified, agreed upon by the school community and documented. Responses must be fair and consistent. They must not prevent students from continued participation in essential curriculum activities except where exclusion is necessary for reasons of safety. In this situation, alternative educational activities must be provided.

On 14 May 2005, the *Sydney Morning Herald* reported that a female student in year 11 at Auburn Girls High School was disciplined for disobeying the principal's orders to stop wearing a religious garment in school.²⁸⁴ She had been wearing a Mantoo²⁸⁵ to school for the last two years in accordance with her Shiite Muslim faith. She claimed that she was given a detention and that she had been threatened with suspension for breaching the school's uniform code. According to the article, a spokesman for the Department of Education said that the school had asked the student for a note from her parents allowing her to wear the Mantoo, which she did not provide. The Department's spokesperson also said that the principal did not threaten the student with suspension but said that she would ‘invoke the school's disciplinary code’. The student said that she had not been asked for a note and that she should not need one. An article on 16 May reported that the school principal acknowledged the student's parents' support for her dress and would grant her an exemption from the school's uniform code.²⁸⁶

²⁸² Ibid, cl. 5.3.2.

²⁸³ Ibid, cl. 5.3.1.

²⁸⁴ ‘Schoolgirl punished for Muslim dress’, *Sydney Morning Herald*, 14/5/05.

²⁸⁵ Described in the article as a body-length tunic.

²⁸⁶ ‘School backs down over student's dress’, *Sydney Morning Herald*, 16/5/05. See also ‘Peers set to follow Yasamin's dress example’, *Sydney Morning Herald*, 18/5/05.

Student's privacy

Protection of personal information under privacy laws

Personal information held by schools

Schools collect and hold a considerable amount of personal information about students and their families.²⁸⁷ This includes information about their identity and address, religion and ethnic background, academic performance, disciplinary matters and health.²⁸⁸ Students may also reveal sensitive information about themselves to school counsellors or teachers, for example the student may disclose drug use or pregnancy.

Government schools and state privacy legislation

General: The NSW Department of Education is required to comply with the *Privacy and Personal Information Protection Act 1998* (NSW).²⁸⁹ The Act “is based on the clear principle that individuals, including children and young people, have rights relating to their personal information.”²⁹⁰ Under the Act, the Department (and all public schools) must comply with the 12 Information Protection Principles (IPPs) relating to the collection, storage, access, accuracy, use and disclosure of personal information.

Information Protection Principles: Two of the IPPs are summarised below:

- *Collection:* Pursuant to IPP No. 2, in collecting personal information about a student, the Department must collect the information directly from the student unless (a) in the case of a student who is under the age of 16, the information has been provided by a parent or guardian, or (b) the student has authorised the collection of information from someone else.
- *Disclosure:* Pursuant to IPP No. 11, the Department must not disclose personal information about a student to another person in except in certain circumstances, for example: (a) if the student consents (b) if disclosure is directly related to the purpose for which the information was collected, and the Department has no reason to believe that the student would object, or (c) the Department believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of the student or another

²⁸⁷ Seemann J, ‘Privacy under the *Commonwealth Privacy Act 1988 – The Obligations of Schools to Students, Parents and Employees and Others*, paper delivered at University of New South Wales Continuing Legal Conference, *School Law Alert*, 29 July 2004.

²⁸⁸ Ibid.

²⁸⁹ Note that the NSW Attorney General is currently undertaking a five-year review of the Act. Note also that the Department may also need to comply with the *Health Records and Information Privacy Act 2002* (NSW).

²⁹⁰ NSW Department of Education and Training, *Privacy Code of Practice*, December 2000, cl. 3.2.

person.²⁹¹

Exemptions: The Act contains some general exemptions including an exemption in relation to law enforcement and an exemption for compliance with another Act or law.

Department of Education's Privacy Code of Practice: As permitted by the Act, the Department has produced a Privacy Code of Practice that modifies the IPPs.²⁹² The Code was developed as a response to the view that "in some circumstances, the privacy rights of students must necessarily be a secondary consideration to the relationship between schools and parents, guardians and caregivers."²⁹³ It also allows for the fact that younger children may not have sufficient capacity to give consent, for example, to disclosure of their personal information. In this regard, the Code states:

The extent to which the personal information rights of individual students are modified will...depend on the age, maturity and capacity for independent action of the students involved. Any limitation on the information rights of students will need to be justified in terms of [these] considerations.²⁹⁴

Some modifications that the Code makes on the above grounds include: allowing schools to collect information from parents about students who are 16 or older; allowing parents of a student to provide consent to the use of information for a purpose other than that for which it was collected; and allowing schools to disclose information about a student to parents when the school believes this is in the student's best interests. The Code also modifies the IPPs to enable the Department to provide a safe and disciplined learning environment. The Code provides that, for this purpose, it may be necessary to collect, use and disclose information provided by staff and students without the consent of the student to whom the information relates.

Remedies for breach of privacy rights: A student who feels that their privacy rights under the Act have been breached is entitled to an internal review of the relevant conduct by the Department of Education.²⁹⁵ The NSW Privacy Commissioner monitors internal reviews.²⁹⁶ If the review finds that there has been a breach, the Department may apologise, pay compensation, provide an undertaking and/or take measures to ensure the conduct does not occur again. If the student is not satisfied with the findings of the review he or she may appeal to the Administrative Decisions Tribunal.²⁹⁷

²⁹¹ There are additional restrictions on the disclosure of 'sensitive information'.

²⁹² NSW Department of Education and Training, *Privacy Code of Practice*, December 2000.

²⁹³ *Ibid* at cl. 3.2

²⁹⁴ *Ibid* at cl. 3.2

²⁹⁵ *Privacy and Personal Information Protection Act 1998* (NSW), s 53.

²⁹⁶ *Ibid*, s 54.

²⁹⁷ *Ibid*, s 55. For an example of a case determined by the Administrative Decisions Tribunal, see *MT v Director-General, NSW Department of Education and Training* [2004] ADT 194.

Department of Education has sought advice from Privacy Commissioner

The NSW Department of Education has previously sought and obtained advice from the NSW Privacy Commissioner on proposals including: (1) a proposal for details of all school students to be provided to the Department of Transport, to monitor users of bus and train passes under the School Student Transport Scheme; and (2) the development of a protocol between the Department and NSW Police for sharing information about students as a means of reducing or minimising crime risks in schools.²⁹⁸

Non-government schools and federal privacy legislation

Most private schools are now required to comply with the federal *Privacy Act 1988*, due to amendments relating to the private sector made in 2001.²⁹⁹ It contains similar privacy principles, known as the *National Privacy Principles*, which regulate the collection, storage, access, use and disclosure of personal information.³⁰⁰

Searches of students and their bags and lockers³⁰¹

A teacher has no right to search a student or their bag unless (a) the student agrees to be searched, or (b) there is a serious threat to the safety of other students. While a student is not obliged by law to submit to a search, the school's discipline code may impose on students a duty to agree to reasonable requests by teachers, so that refusal to comply could result in disciplinary action against the student.

Desks and lockers are school property and can therefore generally be searched without a student's consent. However, if a student has paid money to use a locker which is non-refundable then the school has no right to search it unless the student has signed an agreement giving teachers the right to open and search the locker.

Schools may contact the police if a student is suspected of having a prohibited weapon or drugs, and the police may be entitled to search the student. In 1998, the police were given new powers to search a student at school, and his or her bag and locker, if they have reasonable grounds for suspecting that the student has a dangerous implement.³⁰²

²⁹⁸ Privacy NSW website <http://www.privacy.nsw.gov.au>

²⁹⁹ The Federal Privacy Commissioner's website states, "If a private school...has an annual turnover of more than \$3 million, then it will be covered by the new private sector provisions from 21 December 2001. Most smaller private schools are also likely to be covered by the Act for various reasons, for example, because they are related to a larger organisation or because they provide a health service and hold health information": see <http://www.privacy.gov.au/>

³⁰⁰ See Seemann, note 287.

³⁰¹ This summary is adapted from the National Children's and Youth Law Centre, *Know Your Rights at School Kit*, 2nd edition, 1998.

³⁰² See *Crimes Legislation Amendment (Police and Public Safety) Act 1988*.

Drug testing of students

On 13 February 2005, the *Sunday Telegraph* reported that, "Sydney's most exclusive private schools are among those conducting random drug tests on students in an effort to crack down on substance abuse."³⁰³ According to the article, one private school conducted random urine tests four times per year and if a student tested positive they would undergo counselling until the problem was rectified. At another school, if drugs were detected through random testing, the student would lose their place at the school.

Geoff Munro, of the Australian Drug Foundation's Centre for Youth Drug Studies, has summarised some of the arguments associated with drug testing in schools:

The advocates of drug testing school students hope that it will provide proof of drug use where use is suspected, deter students from using drugs, assist former users to remain drug free, and reassure parents that the school is doing everything it can to prevent drug use. They regard subsequent monitoring by random testing as one way of enabling schools to retain an 'offender' at school, giving the student a 'second chance'...

...

However, drug testing is a controversial matter because it is intrusive, [it] infringes on the individual's right to privacy, and raises a host of legal, technical and ethical matters that are not resolved. It may be discriminatory, inasmuch as it places an obligation on young people that does not apply to adults. It has been criticised because it assumes a lack of trust between school staff and students, and it may reinforce a sense of suspicion and mistrust. As urine analysis is the preferred method of testing, and the collection of samples must be closely monitored, the process may cause the subject severe shame and embarrassment.³⁰⁴

Munro also notes that tests may detect drug use that occurred outside of school and that was unrelated to the student's attendance or performance at school. In addition, testing may result in disciplinary action for a student who is overcoming a drug dependency, which can take a considerable time. Other potential issues are that tests may not be reliable and that students may use chemicals to try to mask detection.³⁰⁵

On 14 February 2005, Jesuit Social Services published a report on how Catholic secondary schools deal with illicit drug use. The report, *Keeping them Connected*, found that "a zero tolerance approach to incidents of illicit drug use is not effective, in that it makes the school a 'no-go zone' for students seeking help or guidance in this area."³⁰⁶ The report made a number of recommendations that will be presented to Catholic school authorities and principals around Australia.³⁰⁷

³⁰³ 'Random tests keep our schools drug free', *Sunday Telegraph*, 13/2/05.

³⁰⁴ Munro G, *Drug Testing in Schools*, Centre for Youth Drug Studies, Australian Drug Foundation, undated, at p 2.

³⁰⁵ Ibid.

³⁰⁶ Jesuit Social Services, 'New report on Catholic schools and illicit drug use', *Media Release*, 14/02/05.

³⁰⁷ Ibid.

The Federal Minister for Education, Hon Dr Brendan Nelson MP, said recently that random drug testing in schools could have some benefits but should only be used if students, teachers and parents agreed on the policy.³⁰⁸ The NSW Premier, Hon Bob Carr MP, has rejected the policy of drug testing in schools, maintaining that it is not the education system's responsibility and that drug education is more important.³⁰⁹

³⁰⁸ 'Nelson applauds drug testing in schools', *Sydney Morning Herald*, 13/2/05.

³⁰⁹ 'Schools should teach, not test for drugs', *Sydney Morning Herald*, 14/2/05; and 'Premier dismisses drug testing as a waste of time', *Sydney Morning Herald*, 15/2/05.

5. CONSENTING TO MEDICAL TREATMENT

Overview

This section outlines children's right to consent to, and to refuse, medical treatment. It presents a summary of the current legal position and then discusses the NSW Law Reform Commission's 2004 Issues Paper, *Minors' Consent to Medical Treatment*. The Issues Paper considers the adequacy of the current laws and invites submissions from the public on possible reforms. When the Issues Paper was released, the Commissioner of the NSW Law Reform Commission, Professor Michael Tilbury, stated that this issue was controversial, as highlighted by two recent cases in Australia and the UK.³¹⁰

In the recent Australian case, the Family Court was asked to authorise the administration of certain hormonal treatments to a 13 year-old girl diagnosed as having gender identity dysphoria. The girl wanted to have the treatment and her guardian consented but the parties accepted that Court authorisation was required because the girl was not competent to give a valid consent.³¹¹ The case in the UK concerned a pregnant 14-year old, who decided to have an abortion after talking to a school counsellor. She went to hospital and took the first two pills that were part of a chemical abortion. After returning home, she discussed the matter with her mother. She then changed her mind and did not continue with the treatment. However, was too late to stop the abortion. She was upset and her mother complained that her rights as a parent were violated.

Another controversial case arose in NSW in May 2005. The Supreme Court of NSW overruled the refusal by a 16-year old cancer patient to have a life-saving blood transfusion.³¹² The teenager and his parents were Jehovah's Witnesses and they opposed the transfusion because it violated their religious beliefs. In authorising the hospital to proceed with the transfusion, Justice Gzell said:

I have no doubt...that it is in [his] best interests that he have the blood transfusion. He will die otherwise. His life ought to be spared. Notwithstanding that he is over 16 years old and his wishes must be given serious consideration, he is still a child.³¹³

Two weeks later, the Children's hospital made a subsequent application to the Supreme Court for approval to administer a further transfusion.³¹⁴ Justice Einstein approved the hospital's application and ordered that a legal tutor be appointed to represent the teenager. His father had told the court that his son "fully understands the position he's

³¹⁰ Tilbury M, 'A difficult legal question', paper delivered at conference on 'Consent to Medical Treatment' at NSW Parliament House, Sydney, 17 May 2004.

³¹¹ This case is discussed in more detail below.

³¹² See 'Against his will, the transfusion that saved a boy', *Sydney Morning Herald*, 4/5/05. See also 'Finding a place for religious dissenters', *Sydney Morning Herald*, 5/5/05.

³¹³ Quoted in 'Against his will, the transfusion that saved a boy', *Sydney Morning Herald*, 4/5/05.

³¹⁴ 'Court orders further transfusion against boy's wishes', *Sydney Morning Herald*, 12/5/05.

in and feels that having blood given to him against his wishes is a violation of his conscience. He believes that what his happening is not just a medical matter, he is being stripped of his right to be obedient and faithful to his God.”³¹⁵

Children’s health concerns³¹⁶

Adolescents: Adolescents have particular health concerns relevant to the physical, mental and emotional developments of puberty. These concerns include: heightened pre-occupation with body image and the physical changes to their bodies; increased awareness of sexuality (they may seek medical advice and treatment for contraception, sexually transmitted diseases, or pregnancy); experimentation with drugs and alcohol, and the onset of mental illness such as depression. Adolescents may be reluctant to share their health concerns with their parents. Adolescence is generally characterised by a desire for privacy, greater independence from parents, and a degree of conflict with parents and other authority figures. At the same time, parents will usually be anxious to retain some control and influence over their child’s well-being.

Younger children: Younger children are likely to require medical treatment, from time to time, for a wide range of childhood injuries and illnesses. They may require regular management of chronic health problems and as they develop they may require treatment for learning or behavioural problems. There are other health concerns that are more serious and may require decisions about life-saving treatment or invasive and irreversible treatment. Young children may also be found to be medically suited to blood or tissue donation to benefit another family member. Young children are usually voiceless in the way their health concerns are addressed. This vulnerability makes it important to ensure their welfare is protected and their best interests promoted.

Can a child consent to medical treatment?

Consent to medical treatment

As a general rule, a medical practitioner cannot lawfully treat a patient without a valid consent. Breach of this rule may result in civil liability (under the tort of trespass to the person) and/or criminal liability (in particular, the offence of assault). Treating a patient without consent could also result in disciplinary action.³¹⁷ There are some exceptions to the rule, for example in emergencies. The legal requirement of consent is “based on the principles of self-determination or autonomy, that is, the notion that individuals...have the right to choose how they live and what should be done with their own bodies.”³¹⁸

³¹⁵ Ibid.

³¹⁶ The following is a summary of New South Wales Law Reform Commission, *Minors’ Consent to Medical Treatment*, Issues Paper No. 24, June 2004 at p 5-7.

³¹⁷ As to civil and criminal liability and disciplinary action, see NSWLRC Issues Paper, *ibid*, at Chapter 8.

³¹⁸ NSWLRC Issues paper, *ibid*, at p 10.

The law generally considers adults to be competent to give a valid consent to medical treatment, unless it can be shown that a particular adult's capacity to understand is affected in some way, for example, due to an intellectual disability. The law as to children's capacity to consent to medical treatment is different, as outlined below. The NSW Law Reform Commission has commented that the law relating to young people's capacity to consent "is obscure, complicated and piecemeal. The current law results from several, disparate initiatives and the separate progression of the common law."³¹⁹

The common law

Summary of principles

The position at common law is that a minor (ie, a person under the age of 18) 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 UK House of Lords enunciated this principle in 1986 in *Gillick v West Norfolk and Wisbech Area Health Authority*³²⁰ and the High Court of Australia approved that decision in 1992 in *Marion's case*³²¹. The minor's consent will be valid notwithstanding parental opposition. Note, however, that a court exercising its welfare jurisdiction can override the minor's consent.³²² If a minor is *not* legally competent to consent to medical treatment, his or her parents can generally give a valid consent on his or her behalf.³²³ However, there are certain medical procedures for which parents cannot give a valid consent that require court authorisation.³²⁴

The *Gillick* decision

In this case, a mother of five young girls had argued that it was unlawful for the local health authority to advise doctors that they could give contraceptive advice and treatment to girls under the age of 16 without parental knowledge and consent. The grounds for this argument were: (1) that a girl below the age of 16 could not give a valid consent to medical treatment;³²⁵ and (2) that a doctor who acted on the advice would be unlawfully interfering with parental rights. The House of Lords, by majority, rejected both of these grounds and held that the advice given by the authority was lawful.

In rejecting the parental rights argument, the majority held that parental rights diminish

³¹⁹ Ibid at p 27.

³²⁰ *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 at 162.

³²¹ (1992) 175 CLR 218

³²² See NSWLRC Issues Paper, note 316, at p 37, para 2.34.

³²³ Ibid at p 78.

³²⁴ This is discussed in more detail below.

³²⁵ Legislation specifically provided that girls above age of 16 could give a valid consent.

as the child matures. Lord Scarman stated:

Parental rights clearly do exist, and they do not wholly disappear until the age of majority...But ...parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child.³²⁶

Lord Scarman rejected the idea of imposing a fixed age limit on parental rights in relation to consent to medical treatment:

The law relating to parent and child is concerned with the problems of growth and maturity of human personality. If the law should impose upon the process of “growing up” fixed limits where nature knows only a continuous process, the price would be artificiality and a lack of realism in an area where the law must be sensitive to human development and social change. If certainty be thought desirable, it is better that the rigid demarcations necessary to achieve it should be laid down by legislation after a full consideration of the all the factors...³²⁷

Lord Scarman then stated the following general principle:

The underlying principle of the law...is that parental right yields to the child’s right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision.³²⁸

Lord Scarman then applied the legal principle to the issue in the case:

When applying these conclusions to contraceptive advice and treatment it has to be borne in mind that there is much that has to be understood by a girl under the age of 16 if she is to have legal capacity to consent to such treatment. It is not enough that she should understand the nature of the advice which is being given: she must also have a sufficient maturity to understand what is involved. There are moral and family questions, especially her relationship with her parents; long-term problems associated with the emotional impact of pregnancy and its termination; and there are the risks to health of sexual intercourse at her age, risks which contraception may diminish but cannot eliminate. It follows that a doctor will have to satisfy himself that he or she is able to appraise these factors before he can safely proceed upon the basis that she has at law capacity to consent...And it further follows that ordinarily the proper course will be for him, as the guidance lays down, first to seek to persuade the girl to bring her parents into consultation, and if she refuses, not to prescribe contraceptive treatment unless he is satisfied that her circumstances are such that he ought to proceed without parental knowledge and consent.³²⁹

³²⁶ [1986] AC 112 at 184.

³²⁷ *Ibid* at 186.

³²⁸ *Ibid* at 186.

³²⁹ *Ibid* at 189. See also judgment of Lord Fraser at 170-74.

Marion's case

In *Marion's case*, the majority of the High Court of Australia approved of the *Gillick* decision that a minor is “capable of giving informed consent when he or she ‘achieves a sufficient understanding and intelligence to understand fully what is proposed’.”³³⁰ The majority of the Court said that, “this approach, though lacking the certainty of a fixed age rule, accords with experience and with psychology. It should be followed in this country as part of the common law.”³³¹

Legislation in NSWMinors (Property and Contracts) Act 1970

Section 49 of the *Minors (Property and Contracts) Act 1970* (NSW) gives medical practitioners immunity from a civil claim for assault or battery where:

- (1) Medical treatment...of a minor aged less than sixteen years is carried out with the prior consent of a parent or guardian...;
- (2) Medical treatment...of a minor aged fourteen or upwards is carried out with the prior consent of the minor.

The NSW Law Reform Commission notes that, “section 49 does not, in terms, confer a general capacity on young people to consent to medical treatment. Nor does it offer medical practitioners protection from criminal liability or from civil actions other than battery or assault (for example, false imprisonment).”³³² The Commission also points out that that this legislation was enacted many years before the *Gillick* decision and that there is some uncertainty about the way in which it interacts with the common law.³³³ For example, one issue that arises is whether a medical practitioner would have immunity under s 49(2) if he or she had obtained the prior consent of a minor who was over the age of 14 but who was not competent according to the *Gillick* test.

Other relevant legislation

Section 174 of *Children and Young Persons (Care and Protection Act) 1998* (NSW) allows medical practitioners to treat children and young people without their consent when it is an urgent matter to save the child or young person's life; or to prevent serious damage to the child's or young person's health.

Section 175 of that Act prohibits a medical practitioner from carrying out “special medical treatment” on a child under the age of 16 without first obtaining approval from

³³⁰ (1992) 175 CLR 218 at 237.

³³¹ *Ibid* at p 237-38.

³³² *Ibid* at p 31, para 2.17.

³³³ *Ibid* at p 32ff.

the Guardianship Tribunal.³³⁴ This applies irrespective of whether or not the child would otherwise be legally competent to consent.

Part 5 of the *Guardianship Act 1987* (NSW) provides a legislative framework for consent to medical treatment of patients *aged 16 or over* who are not capable of understanding the general nature and effect of proposed treatment.³³⁵ Part 5 provides that the person responsible for the patient can consent to “minor” and “major” medical treatment but that the approval of the Guardianship Tribunal is needed in cases of “special medical treatment.”³³⁶

The *Human Tissue Act 1983* (NSW) allows parents to consent to the donation from their child’s body of specified regenerative tissue, such as bone marrow, for the purpose of its transplantation to the body of a parent, brother or sister. The child must understand the nature and effect of the procedure and must agree with the proposed removal.

Can a child refuse medical treatment?

The common law³³⁷

Competent adults can refuse medical treatment for any reason, even if their refusal could result in death. This right is premised on the right of each individual to autonomy and personal integrity. As outlined below, different rules apply to minors.

First, the approach that has been taken in a number of cases in the UK is that parental consent can override a minor’s refusal of medical treatment, even when the minor is competent to give consent according to the *Gillick* test. Australian courts have not yet determined whether this approach applies in Australia.

Secondly, a court may override a minor’s refusal of medical treatment in exercising its welfare jurisdiction. The court’s discretion to override a young person’s refusal of treatment can be exercised if the refusal is contrary to the young person’s best interests. Courts often use this discretion in circumstances where a refusal of treatment would in all probability lead to the death of the child or to severe or permanent injury. That was the case in the Supreme Court decision referred to in the introduction to this section.

³³⁴ This is discussed in more detail below.

³³⁵ For a discussion of Part 5, see NSWLRC Issues Paper, note 316, at p 39.

³³⁶ *Ibid.*

³³⁷ Based on NSWLRC Issues Paper, note 316, at p 43-47.

Legislation

Section 49(1) of the *Minors (Property and Contracts) Act 1970* (NSW), referred to above, appears to take the same approach as the UK cases in relation to minors under the age of 16. While section 49 does not expressly refer to the refusal of medical treatment, it states that a parent's consent to the treatment of a young person under the age of 16 provides a defence to a civil action in battery or assault.

As noted above, Part 5 of the *Guardianship Act 1987* (NSW) allows persons responsible for patients who are over the age of 16 and who are incapable of consenting to medical treatment, to consent on their behalf. Note that Part 5 provides that such a consent to medical treatment has no effect if the person carrying out or supervising the treatment is aware, or ought to be aware, that the patient objects to the treatment.³³⁸ Note as well, however, that the Guardianship Tribunal can override this objection.³³⁹

What is the position if a child cannot consent to medical treatment?

Parental consent on behalf of child

As noted above, if a minor is not competent to consent to medical treatment, the minor's parents can generally give a valid consent on the minor's behalf, except in relation to certain medical procedures that require court authorisation.³⁴⁰ A court can override consent given by a parent on behalf of a child, if the court considers that the treatment would not be in the best interests of the child.³⁴¹

Court authorisation required for certain medical procedures

Common law

In *Marion's case*, the High Court of Australia held, by majority, that there are certain medical procedures to which a parent cannot consent on a minor's behalf because, given their nature, they require a court to decide whether or not they are in the best interests of the child.³⁴² In that case the High Court was concerned with the sterilisation of a young woman with an intellectual disability.

The Court decided that sterilisation was a special case requiring court authorisation. This was because (1) the sterilisation procedure involved invasive, irreversible and major surgery; (2) there was a significant risk of making the wrong decision about

³³⁸ *Guardianship Act 1987* (NSW), s 46(2).

³³⁹ *Guardianship Act 1987* (NSW), s 46A.

³⁴⁰ See NSWLRC Issues Paper, note 316, at p 78. This is discussed further below.

³⁴¹ *Ibid* at p 37, 76.

³⁴² *Ibid* at p 78-79. The following is based on these pages in the report.

whether it was in the young person's best interests; and (3) the consequences of such a wrong decision were particularly grave. The Court distinguished between sterilisation that was an end in itself and sterilisation that was an incidental result of surgery intended to cure a malfunction or disease.

In the recent case of *Re Alex*³⁴³, the Family Court of Australia was asked to authorise the administration of certain hormonal treatments to a 13-year-old girl diagnosed as having gender identity dysphoria. This condition resulted in a profound and longstanding wish to undergo a transition to become a male. The girl wanted the treatment and her legal guardian consented to it. However, it was accepted that that court authorisation was required because the girl was not competent to give a valid consent and because the treatment was invasive, permanent and irreversible, and not for the immediate purpose of curing a malfunction or disease.

Chief Justice Nicholson decided to authorise the administration of hormonal therapies that were the first stage of sex-change procedures but were not irreversible. The Chief Justice also authorised the administration of testosterone when Alex reached about 16 years of age. This would have certain irreversible effects (such as a deepening of Alex's voice), although those effects would not be fatal to any subsequent decision of Alex to be a woman. Once Alex turned 18, she could consent to undergo a full sex-change operation if that was then her desire.

Legislation

The *Children and Young Persons (Care and Protection) Act 1998* (NSW) requires approval to be obtained from the Guardianship Tribunal for any "special medical treatment" which is proposed in relation to a child *under 16* (whether or not the child is legally competent).³⁴⁴ Special medical treatment includes, for example, treatment that is likely to render the young person permanently infertile and treatment involving the administration of an addictive drug. The Guardianship Tribunal may only consent to the treatment if it is satisfied that the treatment is necessary to save the child's life or to prevent serious damage to the child's psychological or physical health.³⁴⁵

Under the *Guardianship Act 1987 (NSW)* approval is also required from the Guardianship Tribunal for "special medical treatment" in the case of a minor *over 16 who is incapable of giving consent* (ie who is incapable of understanding the general nature and effect of the proposed treatment or incapable of indicating whether or not he or she consents to it).³⁴⁶ For treatment likely to render person permanently infertile, the Tribunal must only give consent if satisfied that it is necessary to save the patient's life

³⁴³ [2004] Fam CA 297. The summary of this case is taken from Tilbury M, note 310.

³⁴⁴ Section 175 and *Children and Young Persons (Care and Protection) Regulation 2000*, cl 15.

³⁴⁵ NSWLRC Issues Paper, note 316, at p 82.

³⁴⁶ Sections 36(1)(b), 33.

or to prevent serious damage to the patient's health.³⁴⁷ For other types of special treatment the Tribunal may give its consent if it is satisfied that (1) the treatment is the only or most appropriate way of treating the patient; (2) the treatment is manifestly in the best interests of the patient and (3) if relevant guidelines have been followed.³⁴⁸

NSW Law Reform Commission's review

Terms of reference

In August 2002, the NSW Attorney-General asked the Commission to:

...inquire into and report on the laws relating to the consent of minors in New South Wales to medical treatment, with particular reference to:

- (a) whether the rights and interests of minors and of parents and guardians are appropriately recognised;
- (b) whether medical practitioners are adequately protected;
- (c) whether codification and/or amendment of the law is necessary; and
- (d) any related issues.³⁴⁹

Outline of Issues Paper

In June 2004, the NSW Law Reform Commission published a 195-page Issues Paper titled *Minors' Consent to Medical Treatment*. Submissions from the public were invited by 30 November 2004 but this date has been extended. The Commission's final report is not due until the end of 2005. The Commission's Issues Paper covers four broad areas:

- the legal competence of young people to consent to, and refuse, medical treatment;
- the legal framework governing consent to, and refusal of, medical treatment of young people in situations where [they] are not legally competent to make that decision themselves;
- the situations in which a medical practitioner can legally treat a young person without consent;
- implications for maintaining patient confidentiality when treating a patient under 18.³⁵⁰

A brief summary of the Commission's discussion of these areas is presented below. However it is first relevant to refer to an extract from the Commission's report about the rights and interests at stake in regulating consent to medical treatment.

³⁴⁷ Section 45(2).

³⁴⁸ Section 45(3).

³⁴⁹ NSWLRC Issues Paper, note 316, at p vii. The following footnote references are to pages in this Issues Paper unless otherwise indicated.

³⁵⁰ At p 2, para 1.3.

The rights and interests at stake

The Commission states:

In the broadest sense, the State has an interest in ensuring that the medical treatment of young people promotes their best interests. More particularly, it could be argued that the law should aim to achieve, at the least, the following:

- It should ensure that young people have ready access to appropriate medical care;
- It should recognise and protect young people's rights to participate in decisions affecting them and to exercise some control over their own health care relative to their level of maturity;
- It should protect young people from detrimental decisions that may harm them;
- It should recognise the role of parents and the State in participating in decisions affecting their child's welfare and in determining what is in his or her best interests, and promote the community's interest in encouraging parents to take responsibility for their child's well-being;
- It should provide the medical profession with a workable, clear and consistent framework for treating young people in order to provide them with the best possible care.³⁵¹

The Commission then refers to the UN Convention on the Rights of the Child and to legislative developments concerning children, and concludes:

...there has been increasing recognition in recent years, both internationally and domestically, of children and young people as people with rights, while at the same time a continuing emphasis on the role, responsibilities and interests of parents and families in caring and making decisions about their children's welfare. A legal framework devised to regulate the area of young people's consent to medical treatment must find a way to recognise and balance these rights and interests.³⁵²

The legal competence of young people to consent to and refuse medical treatment

The Commission states:

The current law is, arguably, unclear and uncertain in a number of respects, lacking a considered and coherent policy direction. Rather than providing a general framework by which to determine young people's competence, the current law has much more specific aims and scope.³⁵³

The Commission asks whether a person below the age of 18 should be able to consent to, or refuse, his or her own medical treatment? The Commission then notes three grounds on which it is argued that young people should, in some situations at least, be considered legally competent to consent to and refuse medical treatment:

- Some young people may be capable of maturing and developing to a degree that they can, and should, be considered to have the capacity of adults to understand and make decisions for their

³⁵¹ At p 11

³⁵² At p 13-14

³⁵³ At p 50.

own health care;

- The law in this area should be in line with the modern view of children as young people with rights, including a right to their own bodily integrity and a right to control, or at least to participate in, decisions affecting their bodies. The perception of children as chattels of their parents... over whom parents may exercise complete control, is outmoded and inappropriate;
- It is in young people's best interests to allow them ready access to health care and treatment when needed. In some instances, particularly for matters relevant to adolescent health, young people may not seek medical assistance if they have to involve their parents in the process.³⁵⁴

Possible models for reform

The Commission puts forward five possible models for deciding when a young person should be considered legally competent to consent to, or refuse, a particular type of medical treatment. The models are outlined in the Table below.³⁵⁵

	Basic model	Possible additional criteria/exceptions
1	Young person understands the nature and possible consequences of the treatment.	<ul style="list-style-type: none"> • Treatment is in young person's best interests; • Presumption of competence for young person above certain age (eg 14); • Written support for treating doctor's opinion from a second doctor.
2	Young person is above a certain age (eg 14)	General rule could be subject to exceptions for certain types of treatment to which a person of any age could consent.
3	Young person is above a certain age (eg 14) and understands the nature and possible consequences of the treatment.	
4	Young person of any age can consent to specified types of treatment (eg contraception).	
5	Young persons who fall into certain categories are automatically considered competent, eg young people who are homeless.	Treating doctor considers that treatment is in young person's best interests.

The Commission outlines the advantages and disadvantages of each model.³⁵⁶ The Commission also notes that "it may be that no single model of the five set out above is considered suitable as the sole means of deciding a young person's legal competence to consent. Instead, each model may contain features that are considered useful as

³⁵⁴ At p 51.

³⁵⁵ Based on Appendix A.

³⁵⁶ See Appendix A for summary of advantages and disadvantages.

indicators by which to assess competence.”³⁵⁷

Should different rules apply to refusal of medical treatment?

The Commission also notes that it may be ultimately considered appropriate for different rules to apply to determining if and when a young person can give a valid *refusal* for medical treatment.³⁵⁸ The Commission poses the question: should a minor have a right to refuse medical treatment and if so when should he or she be able to do so? The Commission lists a number of situations in which this question may arise such as where a young person with anorexia refuses treatment for the disease; where a young person with a mental illness refuses treatment, in particular, taking prescribed medication; or where a young person refuses a particular treatment that is preferred by the medical practitioner and/or parents and chooses a different treatment option.³⁵⁹

The Commission discusses the arguments for and against recognising a right of minors to refuse medical treatment.³⁶⁰ In support of such a right, it is argued that if young people are judged to be sufficiently mature, they should be able to refuse medical treatment in the same way that a mature young person can consent to treatment and in the same way that an adult has a right to refuse treatment. It is discriminatory and unjustifiably paternalistic to deny this right to young people.

Against such a right, it is argued that medical treatment is aimed at benefiting a young person and the refusal of such treatment would generally be considered to be to the young person’s detriment. It is also said that if the primary motivation in recognising young people’s right to consent is to allow them better access to health care, that same concern does not apply to allow them to refuse treatment and is in fact contrary to it. It could also be argued that the level of maturity that is needed to appreciate what is involved in refusing medical treatment is higher than the level of maturity required to consent to treatment. The Commission notes that instead of rejecting altogether a young person’s right to refuse, a different, or a more stringent test, could apply to deciding a young person’s capacity to refuse treatment.

The role of parents

The Commission states that consideration needs to be given to the role that parents should play within any proposed model for reform. It notes that the current law in NSW is unclear on the interaction between parents’ and young people’s rights to consent and how to resolve possible conflicts between a parent and a child.³⁶¹

³⁵⁷ At p 63.

³⁵⁸ At p 52.

³⁵⁹ At p 64.

³⁶⁰ The following is a summary of p 65-66.

³⁶¹ See p 63-64.

Making decisions where young person not competent

The Commission considers the situation where young people are not legally competent to consent to, or refuse, medical treatment themselves. The Commission notes that in such cases, it is generally the young person's parents who consent or refuse treatment, on the young person's behalf, and medical practitioners generally seek the parents' consent, or refusal, before making a decision about treatment. The Commission identifies three main questions about the role of parents in making medical decisions for young people who are not legally competent to make those decisions for themselves:

- What should happen when parents disagree about whether to consent to or refuse medical treatment for their child?
- Should family members other than parents be legally entitled to participate in the decision-making process regarding the child's medical treatment?
- Should there be limits on the parents' ability (or that of any other family member, or the legally competent young person) to consent to or refuse medical treatment for their child, and if so, where should those limits lie? That is, are there some medical decisions that should not be able to be made solely by the parents (or a competent young person) but that should require some authorisation from an external body, such as from a court?³⁶²

In relation to the third question, the Commission states:

There is a great deal of uncertainty surrounding this area of the law governing consent to medical treatment of young people. There is also the suggestion that the law as it stands is failing in its aim to provide adequate safeguards to protect children's right to bodily integrity and ensure that serious medical procedures are only authorised if they are in the child's best interests. The implementation of a coherent framework, following a consistent policy approach, may provide greater protection of young people's rights, as well as give both parents and medical practitioners greater certainty as to their roles and responsibilities. Any attempt to formulate such a framework must consider the following uncertainties and questions of policy arising from the law as it currently operates:

- The uncertainty of the common law principles requiring court authorisation for certain medical decisions;
- Possible gaps and inconsistencies in the legislative provisions relating to court or tribunal authorisation;
- Questions and uncertainties surrounding which external body does and should have power to decide applications for authorisation, and the criteria that should be applied in reaching such a decision;
- At the most fundamental level, whether it is preferable to place the power and responsibility of making certain, very important decisions about a young person's medical care with an independent third party rather than with the young person's parents.³⁶³

At this point, it is relevant to note that in August 2003, the Standing Committee of Attorneys-General (SCAG) agreed to develop a nationally consistent approach to

³⁶² At p 72.

³⁶³ At p 76-77.

authorisation procedures required for the lawful sterilisation of minors with a decision-making disability. An Issues Paper was released for public consultation in 2004.³⁶⁴

Treating young people without consent

The Commission notes that in NSW there are certain situations in which a medical practitioner can legally treat a minor without his or her consent or without the consent of his or her parents. These situations fall into the following categories:

- Emergency treatment
- Special medical treatment (emergencies or institutional consent)
- Suspected child abuse
- Public health measures (for infectious diseases)
- Minor treatment.³⁶⁵

The Commission looks at the adequacy of the law in relation to each of these areas.³⁶⁶

Treating young people with special needs

The Commission gives specific consideration to a number of groups of young people with special needs. These groups include young people:

- With a mental illness or intellectual disability;
- Who are in out-of-home care;
- Who are from a non-English speaking background;
- Who are Aboriginal or Torres Strait Islander;
- Who are homeless;
- Who are in juvenile detention centres;
- Whose parents are not competent to make medical decisions.³⁶⁷

Disclosure of and access to young people's health information

The Commission considers the ways in which law currently manages this issue and highlights areas that may require clarification or change. One of the issues considered in this section is young people's right to have medical information kept confidential from their parents.³⁶⁸ The Commission states that "the prevailing view in the literature is that a young person who has sufficient understanding and intelligence to consent to a particular medical treatment should have the right of confidentiality with respect to that

³⁶⁴ *Non Therapeutic Sterilisation of Minors with a Decision Making Disability*, 2004.

³⁶⁵ At p 100.

³⁶⁶ See Chapter 5.

³⁶⁷ See Chapters 6 and 7.

³⁶⁸ See p 174.

treatment.”³⁶⁹ Thus, if a doctor judges a young person to be competent to consent to receive advice on contraception, the doctor is obliged not only to give such advice but also to keep the consultation confidential from the young person's parents.

The Commission notes that there are two competing views regarding the position of young people who are *not* legally competent to consent to medical treatment. One view is that the medical practitioner may disclose the young person's medical information to his or her parents. First, because the obligation of confidence is based on a person's autonomy and if a young person is not competent to consent, he or she is not capable of exercising autonomy as regards the treatment he or she wanted; and secondly, because parents have a right to know information necessary to carry out effectively their parental duties of care.

The alternative view is that even where a young person is found to lack the capacity to consent, the fact that he or she consulted the medical practitioner, and what the medical practitioner has learned in assessing the young person's competence, must be kept confidential if the young person objects to the disclosure or gave the information with an expectation that it would not be disclosed. In support of this view, it is argued that confidentiality is not based solely on autonomy. It is also based on young people's right to and need for privacy, which should not be less than those of adults. There is also a public interest argument that without the guarantee of confidentiality, many young people will not seek medical advice.

General comments on the possible need for reform

The Commission states generally in relation to law reform:

The law governing the consent of young people to medical treatment is a complex combination of legislation and common law...[T]his current legal framework lacks both clarity and consistency, with definitions of core concepts varying, or in some instances, lacking. In addition to definitional problems, the framework is piecemeal in nature and lacks a coherent policy direction. These problems are largely attributable to the limited scope of statutory regulation and the separate development of the common law.

The absence of a clear legal framework may leave medical practitioners unable to provide medical treatment with the relative certainty of the law. Similarly, young people and their parents may encounter difficulties when medical treatment is sought. In recognition of these concerns, the terms of reference direct the Commission to consider whether the laws should be codified or whether amendment is appropriate.

Codification would entail replacing all existing statute and common law with a statute, or group of statutes, that dealt with young people's consent to medical treatment in a comprehensive and self-contained manner. The self-contained nature of codified legislation means that recourse to other sources of law, including the common law, would be excluded. This would provide easier access to and greater clarity of the law. In addition, principles and guidelines could be included in the codified legislation to enhance its value as a practical tool for individuals on both sides of the doctor-patient relationship. However, while codification offers significant advantages, it is not without disadvantages. One of the most compelling objections to codification is that a statutory code is less able to evolve with society than the common law.

³⁶⁹ At p 174. The following is based on p 174-175.

If it is determined that the law should not be codified, an option would be to consolidate the law. Consolidation would involve bringing together all relevant statutory provisions in one statute or in a group of statutes. Significantly, the common law principles would continue to apply in conjunction with consolidated legislation. While this would create a potential lack of clarity, retention of the common law would enable development of the law without the need for statutory amendment.³⁷⁰

³⁷⁰ At p 195. See also the Commission's discussion (at p 14-15) of the need to consider whether changes need to be made to the Medicare system to allow young people to make greater use of the bulk-billing system independently of their parents. The Commission notes that any changes to Medicare can only be made at the federal level.

6. PARENT'S POWERS

Overview

This section outlines parent's responsibilities and powers and considers the wider implications of the *Gillick* decision that parent's powers diminish as their child matures. It then refers to laws enacted to with serious conflicts between children and parents.

Parent's responsibility and powers³⁷¹

The *Family Law Act 1975* provides that "each parent of a child who is not 18 has parental responsibility for the child."³⁷² Parental responsibility is defined to mean "all the duties, powers, responsibilities and authority which, by law, parents have in relation to children."³⁷³ The Act does not set out a list of parental powers, duties, responsibilities and authority. However, it is clear from provisions in the Act that the main *duty* of a parent is to maintain their child, which includes providing food, shelter and clothing for the child; and that parental responsibility includes *the power* to make decisions relating to both the long-term and day-to-day care, welfare and development of the child.

Dickey explains that from the powers formerly possessed by a child's guardian and custodian at common law and from modern cases, it is clear that parental responsibility in relation to a child involves the power to determine:

- The form of education that the child is to receive;
- The religion, if any, that the child is to be brought up in;
- The medical treatment that the child is to receive³⁷⁴;
- The name by which the child is to be known;
- The place where the child is to reside;
- The diet that the child is to receive;
- The persons with whom the child may associate; and
- The discipline that the child is to receive³⁷⁵.

As well as the power to:

- Administer the child's property; and
- Make representations on behalf of the child.

³⁷¹ This section is based on Dickey A, *Family Law*, Lawbook Co, 4th edition, 2002, p 331-332.

³⁷² *Family Law Act 1975*, s 61C

³⁷³ *Ibid*, s 61B.

³⁷⁴ This is discussed in detail in Section 5 of this paper.

³⁷⁵ The use of physical punishment is discussed in more detail in Section 9 of this paper.

In *Marion's case*³⁷⁶, Justice Brennan summarised the extent of parental powers:

The responsibilities and powers of parents extend to the physical, mental, moral, educational and general welfare of the child. They extend to every aspect of the child's life. Limits on parental authority are imposed by the operation of the general law, by statutory limitations, or by the independence which children are entitled to assert, without extra-familial pressure, as they mature. Without these limits, the parents' responsibilities and powers may be exercised for what they see as the welfare of their children.³⁷⁷

Parent's powers diminish as their child matures

While the 1986 decision of the House of Lords in the *Gillick case* was concerned with children's capacity to consent to medical treatment the decision dealt more generally with the concept of parental rights. This can be seen from the extracts of Lord Scarman's judgment outlined in Section 5 of this paper. In addition, Lord Scarman referred with approval to the following statement from an earlier case:

...The common law can, and should keep pace with the times. It should declare...that the legal right of a parent to the custody of a child ends at the 18th birthday; and even up till then, it is a dwindling right which the courts will hesitate to enforce against the wishes of the child, and the more so the older he is. It starts with a right of control and ends with little more than advice.³⁷⁸

The *Gillick* decision has been seen as a watershed case in establishing children's right to make their own decisions as they mature.³⁷⁹ Michael Freeman comments:

Some wanted to read *Gillick* narrowly, as being about medical treatment or even only contraception. But John Eeckelaar predicted that its effect was to overturn all parental rights once an adolescent had acquired *Gillick* competence. Even the right to decide where the child should live. In his view, children now had 'that most dangerous but most precious of rights: the right to make their own mistakes'. And the right to do what others think is wrong, Ronald Dworkin has famously reminded us, is at the root of 'taking rights seriously'.³⁸⁰

Jane Fortin states that, "the *Gillick* decision sent a strong message to parents that their own rights of decision-making were constrained and that they had a duty to allow their adolescents to make a gradual transition to adulthood."³⁸¹ However, Fortin notes that there is no clear guidance as to the point at which adolescents reach a stage of maturity when they can reach a decision for themselves.³⁸² Fortin also expresses concern that

³⁷⁶ (1992) 175 CLR 218.

³⁷⁷ *Ibid* at p 278.

³⁷⁸ Lord Denning in *Hewer v Bryant* [1970] 1 QB 357 at 369 quoted by Lord Scarman in *Gillick*, note , at p 186.

³⁷⁹ See Freeman M, 'The End of the Century of the Child?', (2000) 53 *Current Legal Problems* 505 at 518. Accessed at: <http://www.oup.co.uk/pdf/0-19-829940-0.pdf>

³⁸⁰ *Ibid* at p 519-520.

³⁸¹ Fortin J, note 7, at p 81.

³⁸² *Ibid* at p 83.

courts are inclined “to conclude that the adolescent’s capacity for decision-making should be judged by the outcome of the decision.”³⁸³

Subsequent decisions of the UK Court of Appeal have retreated from the *Gillick* decision. The Court has held parents can override their child’s refusal of medical treatment even if their child is *Gillick*-competent. In other words, while parents cannot override a *Gillick*-competent child’s consent to medical treatment, parents can override a *Gillick*-competent child’s refusal of treatment. Fortin states, “it is remarkable...that such a short time was to elapse between the *Gillick* decision and the case law involving the Court of Appeal comprehensively undermining that decision’s attempt to ensure that parents respected their growing adolescent’s capacity for autonomy.”³⁸⁴

While the judiciary has retreated from the *Gillick* decision, Freeman points out that the UK legislature “grappled with some of the implications of *Gillick* in formulating the most child-centred legislation of the century, the Children Act of 1989.”³⁸⁵

While the High Court of Australia approved the *Gillick* decision in *Marion’s case*, and it cited the statement that “parental rights...exist only so long as they are needed for the protection of the person and property of the child”, the position in Australia as to the right of *Gillick*-competent children to make their own decisions (even against parental opposition) is not entirely clear. The High Court did not discuss the application of the *Gillick* principle to other decisions concerning children’s lives.

In a recent case involving a challenge to the immigration detention of non-citizen children, the High Court dealt with an argument that the children’s detention was punitive because they lacked the capacity to bring about an end to their detention by requesting removal from Australia.³⁸⁶ Three members of the Court referred to *Marion’s case* and stated, or indicated, that a child could make a valid request for removal on his or her own behalf if he or she had sufficient understanding and intelligence to make a decision on that matter.³⁸⁷ Note however that this case did not involve a dispute between a child and his or her parents.

³⁸³ *Ibid* at p 83.

³⁸⁴ *Ibid* at p 84.

³⁸⁵ Freeman, note 320, at p 519.

³⁸⁶ *Re Woolley; Ex parte Applicants M276/2003 by their next friend GS* [2004] HCA 49.

³⁸⁷ See Gleeson CJ at para 30, McHugh J at para 102, Gummow J at para 154. Note that other members of the Court answered the argument by stating that if the child could not make a valid request for removal, the child’s parent or guardian could do so on the child’s behalf.

Laws dealing with serious conflicts between children and parents

The new laws enacted in 1998

As part of the changes to child protection laws in 1998, new provisions were inserted to deal with situations of serious or persistent conflict between a child or young person and his or her parents. The objects of Part 1 of Chapter 7 of the *Children and Young Persons (Care and Protection) Act 1998* are:

- (a) to ensure, so far as possible, that conflicts between children or young persons and their parents are resolved without recourse to legal proceedings;
- (b) to enable proper access to services where breakdowns in relationships occur between children or young persons and their parents; and
- (c) to enable the Children's Court to make appropriate orders in circumstances where the differences between a child or young person and his or her parents are so serious that it is no longer possible for the child or young person to continue living with his or her parents.³⁸⁸

Requests for assistance to deal with serious conflicts: A parent, child, young person or any other person may ask the Director-General of Community Services for assistance if "there is a serious and persistent conflict between the parents and the child or young person of such a nature that the safety, welfare or well-being of the child or young person is in jeopardy."³⁸⁹ On receiving a request for assistance, the Director-General may provide or arrange for the provision of such advice as is necessary to help the parents and child or young person to resolve the conflict and to enable the child or young person and his or her parents to have access to appropriate services.³⁹⁰

Requests for assistance where conflict so serious that child cannot live at home: If the differences between a child or young person and his or her parents are so serious that it is no longer possible for the child or young person to continue living with his or her parents, the child, young person, or a parent may request the Director-General to attempt to resolve those differences.³⁹¹ On receiving a request, the Director-General must seek to resolve the differences by any form of dispute resolution that he or she considers appropriate, prior to making an application to the Children's Court for orders.³⁹²

Alternative parenting plans: Conciliation may result in the parents and child or young person agreeing to an alternative parenting plan. This is a plan that sets out the way in which the needs of the child or young person are proposed to be met having regard to

³⁸⁸ Section 110.

³⁸⁹ Section 113(1)(a). See also subsection (b).

³⁹⁰ Section 113(2).

³⁹¹ Section 114(1). See also general provision for requesting assistance: s 21.

³⁹² Section 114(2).

the breakdown in the relationship.³⁹³ It may include proposals concerning the re-allocation of parental responsibility or specific aspects of it, residential arrangements, supervision, contact, education, medical care and the provision of services.³⁹⁴ An application can be made to the Children's Court for registration of the plan.³⁹⁵

Court orders: If the parties are unable to reach agreement, the child or young person, parents, or the Director-General may apply to the Children's Court for an order approving an alternative parenting plan.³⁹⁶ The Court may make such orders as it considers appropriate to give effect to a proposed alternative parenting plan or specified parts of it.³⁹⁷ In considering whether to make an order, the Court must have regard to the view of the child or young person, their age and maturity, their capacity for independent living, and the practical and emotional supports available to them.³⁹⁸

In the Second Reading Speech to the *Children and Young Persons (Care and Protection) Bill*, Hon Faye Lo Po MP stated that alternative parenting plans:

...may not work in all situations, for adolescence is a difficult time for many young people and their families. However, we will now have a system to assist in resolving issues in an orderly, cooperative and supportive approach which will allow for the practical things to be done if the child or young person is insistent that they are not going to live at home.³⁹⁹

Cases in which orders have been made reallocating parental responsibility

An article in the *Sydney Morning Herald* on 19 November 2004 reported on a successful application by a 17-year-old girl for an alternative parenting plan order:

A 17-year-old Hunter Valley girl has divorced herself from her mother, stripping her of her parental role in the eyes of the law. This is the first child in NSW to divorce her mother.⁴⁰⁰

According to the article, the magistrate said that the girl's mother "had forfeited her right to be legally considered a parent in the eyes of the of the law when she effectively 'abandoned' her daughter." There was evidence before the court that the girl's mother had prostituted her daughter when she was between the age of 10 and 12. An adult friend of the girl agreed to continue caring for her until she turned 18.

³⁹³ Section 115(1)(a).

³⁹⁴ Section 115(1)(b)

³⁹⁵ Section 119.

³⁹⁶ Section 116.

³⁹⁷ Section 118(1).

³⁹⁸ Section 118(2). For a commentary on UK provisions see Fortin, note 7, at p 109-113.

³⁹⁹ Hon Faye Lo Po MP, *NSWPD*, 11/11/98.

⁴⁰⁰ 'Teenager divorces her mother', *Sydney Morning Herald*,, 19/11/04.

There are similar provisions in Victoria, which allow the Court to make “irreconcilable difference” orders. An article in the *Herald Sun* on 30 November 2004 reported that:

Up to 13 Victorian children and their parents or guardians have sought to “divorce” each other with irreconcilable difference orders since 2000.

The children, aged 17 and younger, and their parents or carers have asked the Children’s Court to legally separate them on the basis their relationship is no longer able to work.⁴⁰¹

The article notes that of the thirteen applications, including four in 2003/04, four children were placed into the care of the state. Three applications were struck out. A Children’s Court solicitor said that cases “could include parental pressures against a gay child or demands to conform to religious attire or education.” On 21 June 2004, it was reported that a 14-year-old Victorian boy had become the youngest Australian to “divorce” his parents and had been placed in the care of the state.⁴⁰²

⁴⁰¹ ‘Child, parent divorce rises’, *Herald Sun*, 30/11/04.

⁴⁰² ‘The World Today -14 year old Victorian boy divorces his parents’, *ABC Online*, 21/6/04.

7. EXCLUSION OF CHILDREN FROM SHOPPING CENTRES

Children's use of shopping centres

In a 2002 report, the Youth Action Policy Association (YAPA) commented as follows:

Over the last 25 years many regions across Australia have seen an increase in urbanisation and population growth and a decrease in unregulated public space. This has been accompanied by a growth in privately-owned public space. The modern shopping complex has replaced the town centre and main street strip shopping...At the same time there has been a decline in local services and facilities, and affordable, accessible public recreational space is limited.

Young people view shopping centres as desirable and legitimate places to congregate. They tend to use these spaces for more than shopping. 'Hanging out' with friends – socialising – is a popular activity for most young people, which is an important part of growing up.

...

Shopping centres have been successful at marketing themselves to the public in general. Young people are no exception and many view shopping centres as attractive places to be, for a variety of reasons. Firstly young people are able to be with friends and to express themselves away from the direct control of parents. Shopping centres also offer young people entertainment opportunities and access to important services. Young people see them as relatively safe and at the same time as being places where things happen.

It has been well documented that young people's use of shopping centres has been seen as problematic for other users and for the owners and managers of these spaces. Shoppers report being intimidated, retailers raise concerns about losing business, the media reports negative incidents involving young people and owners and managers are left with a decision about how to respond.

The types of responses have varied and sometimes a combination of responses employed, however responses can be typified as those which:

- Discourage young people from using the space;
- Actively move unwanted people on;
- Increase surveillance;
- Design environments so as to enhance safety and lawful behaviour;
- Acknowledge young people as legitimate users of the space.⁴⁰³

Conflict between security officers and children

Shopping centres contract security personnel to monitor the centre. A report published in December 2003 by a team from the University of Western Sydney explains that conflict has developed between young people and security personnel because of their competing perceptions about how shopping centres should be used:

Young people believe they have a right to access shopping centres, to meet friends and to utilise the facilities available, often without understanding that shopping centres are private or semi-private property. Security personnel often perceive young people as potential threats to retail trade and to the general order of the centre, often without acknowledging that centres deliberately seek to attract young people as consumers. The resulting clash can and does result in negative

⁴⁰³ Turner S, *Shopping for a Solution: An Evaluation of Western Sydney Shopping Centre Youth Projects: Report*, Youth Action Policy Association NSW, 2002, at p 13.

outcomes for both young people and security personnel. For young people, these conflicting perspectives can and have resulted in increased surveillance, significant contact with security personnel, admonishment, exclusion or banning and even criminal charges for trespassing (where bans are not abided by). For security personnel, conflict with young people can result in ongoing tension, physical confrontation and allegations of illegal use of force.⁴⁰⁴

Young people have complained about security personnel harassing them or treating them unfairly. Young people have said that security guards have told them to move on without giving them a reason; that security guards have intentionally intimidated them; and that guards have targeted them because of who they associate with or because of their race or cultural background.⁴⁰⁵ A 2002 report by YAPA stated that the interactions between youth and security guards had been identified as a major concern.⁴⁰⁶

Exclusion of children from centres

Issuing of banning notices

In an article published in 2000, a Legal Aid solicitor, Chris Grant, referred to “an ever increasing practice” of shopping centres in NSW excluding young people by issuing them with a “banning notice”.⁴⁰⁷ There is no data on the number of banning notices issued to children in NSW but data from one large shopping centre showed that in the 2001, 189 children had been banned and in 2002, 125 children had been banned.⁴⁰⁸ The notices are usually issued by security guards and they advise that the young person is prohibited from entering the centre (or a part of the centre) for a specified period. According to Grant, six months to two years is the length of time usually specified but there have been longer bans imposed, including lifetime bans.

Banning notices are usually issued when centre rules are broken. For example, where there has been shoplifting, vandalism, offensive conduct and use of offensive language.⁴⁰⁹ However, Grant refers to evidence that “security guards [also] frequently hand out banning notices to young people for the most frivolous of reasons, such as

⁴⁰⁴ Clancey G, Doran S, Robertson D, *NSW Shopping Centre Protocol – Creating the Space for Dialogue: The Report*, December 2003, at p 4.

⁴⁰⁵ Youth Action and Policy Association NSW, *Shopping Centre Security Guards and Young People: Resource Manual and Self-Paced Learning Package*, 2004, at p 74

⁴⁰⁶ Turner S, *Shopping for a Solution: An evaluation of Western Sydney Shopping Centre Youth Projects: Summary Report*, NSW Youth Action Policy Association, 2002, at p 2.

⁴⁰⁷ Grant C, ‘Banning the Banning Notice’, (2000) 25(1) *Alternative Law Journal* 32.

⁴⁰⁸ Clancey et al, note 404, at p 6-7.

⁴⁰⁹ Youth Action and Policy Association NSW, *You’re Banned! Shopping Centres, Banning Notices and Young People*, Factsheet. Accessed on YAPA website at: <http://www.yapa.org.au/youth/publicspace/banned.htm>

association with 'adversely known peers' or simply questioning the guards."⁴¹⁰ He also notes that some banning notices have not adequately stated the reason for the ban.⁴¹¹

The issuing of banning notices has been criticised on the ground that shopping centre management and security personnel have complete discretion as to what conduct justifies a ban and as to the length of the ban. Grant points out that "there are no regulations, guidelines, procedures or other methods of accountability governing the issuing of banning notices."⁴¹² Another criticism of bans is that they "are often imposed...without any due process or natural justice to the young person".⁴¹³

The bans have also been criticised on the ground that they can have significant consequences for young persons, particularly those who live in rural areas. A ban may result in "restricted access to essential services, a lack of an opportunity to socialise and little access to entertainment options."⁴¹⁴ If a young person has a job in the shopping centre, a ban can have a disproportionate impact.⁴¹⁵ In a recent Children's Court decision of *Police v SS* (2000), Magistrate Gilmour said:

...the issues raised in this case cause concern in relation to the rights of individuals to access essential services...when they are housed in structures such as the shopping centre...[T]he way in which these shopping centre bans are placed on young people and the length of the bans border on the harsh and unconscionable given that these shopping centres are placed in areas that service large residential suburbs and often they are the only places available to young people to shop, meet, be entertained and carry out everyday business.⁴¹⁶

Trespass charges for breaching banning notices

Young persons who have failed to comply with a banning notice have, in some cases, been charged by the police with trespass.⁴¹⁷ There is no data available on the number of children who have been charged with this offence. However, the number of incidents of criminal trespass recorded by NSW police as occurring on a shopping centre where at least one of the "persons of interest" was aged under 18 is shown in Table 7.1 below:⁴¹⁸

⁴¹⁰ Grant C, note 407, at p 33.

⁴¹¹ Ibid at p 33.

⁴¹² Grant C, 'Trespass on Shopping Centres', paper presented at *Children's Legal Service: Juvenile Justice Conference*, 5 May 2001, at p 2.

⁴¹³ Ibid at p 2.

⁴¹⁴ Youth Action and Policy Association NSW, Factsheet, note 409.

⁴¹⁵ Ibid.

⁴¹⁶ Quoted in Grant C, note 412, at p 8.

⁴¹⁷ Ibid.

⁴¹⁸ This data was obtained from the NSW Bureau of Criminal Statistics and Research. Note that "persons of interest" are alleged offenders or persons who the police suspect have been involved in a criminal incident. Some persons of interest are formally proceeded against by the

TABLE 7.1

1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
30	65	104	162	221	194	198	220	191	208

The offence of trespass on a shopping centre is more precisely an offence under section 4 of the *Inclosed Lands Protection Act 1901*(NSW) which provides as follows:

4 Unlawful entry on inclosed lands

- (1) Any person who, without lawful excuse (proof of which lies on the person), enters into inclosed lands without the consent of the owner, occupier or person apparently in charge of those lands, or who remains on those lands after being requested by the owner, occupier or person apparently in charge of those lands to leave those lands, is liable to a penalty not exceeding [5 penalty units].

Note also that section 6 authorises the owner or occupier of the inclosed lands to apprehend a person who is found committing an offence against the Act and to take them to the custody of the nearest police officer.⁴¹⁹

It appears to be arguable as to whether a particular shopping centre, or a relevant part of the centre, comes within the Act's definition of "inclosed lands".⁴²⁰ Note, however, that in a decision of the Bidura Children's Court, the Macquarie Shopping Centre was held to be an inclosed land for the purposes of the Act.⁴²¹

The prosecution generally relies on the banning notice as evidence that the young person entered the inclosed lands without the consent of the owner.⁴²² Unless the young person can challenge the notice⁴²³ or provide a lawful excuse, he or she will be guilty of an offence. Grant suggests that a young person may have a lawful excuse if, for example, he or she was entering the centre to attend a doctor's appointment.⁴²⁴

police and some are not. Criminal incidents involving multiple offenders can have more than one associated person of interest. Correspondingly, no person of interest information will be recorded for criminal incidents in which there is no known suspect. This is very common among incidents of property crime which have a low clear up rate.

⁴¹⁹ As to this happening in practice, see Grant C, note 407, at p 33.

⁴²⁰ See Grant C, note 412, at p 1.

⁴²¹ Ibid at p 4.

⁴²² Grant C, note 407, at p 33.

⁴²³ See Grant C, note 412, at p 4-6.

⁴²⁴ Ibid at p 7-8.

Initiatives to improve relations between centres and youth

Range of inclusive initiatives

A number of inclusive initiatives have been developed by shopping centres to improve their relationship with young people. The initiatives have included employing youth workers to operate from the centres, collaborating with local youth workers, establishing specific areas for young people to congregate without disturbing other users of the centre, involving young people in aspects of centre management decisions, using mediation to resolve conflicts, and fostering activities such as art displays that showcase the positive contribution young people can make to a community.⁴²⁵ Some shopping centres also worked with stakeholders to establish a shopping centre protocol.⁴²⁶

NSW Shopping Centre Protocol Project

The NSW Shopping Centre Protocol Project was initiated in 2002 due to “the increasing number of young people banned and subsequently charged with trespass on shopping centres in NSW in recent years. Growing evidence suggested that alternative methods could be successfully adopted in working with young people.”⁴²⁷ While local protocols and projects had been established in many areas of NSW, concern remained that “there was an absence of a systemic or macro response and that changes in workers [after a protocol had been developed] adversely affected local arrangements.”⁴²⁸ YAPA and the Youth Justice Coalition, with support from the Shopping Council of Australia, sought funding from the NSW Attorney-General’s Department to develop a state-wide guide to developing local protocols.⁴²⁹ In July 2002, the NSW Government announced it would allocate funding for that project. Hon Carmel Tebbutt MLC said:

The development of the protocol will bring together all key stakeholders to develop a model protocol that aims to improve relationships between young people and shopping centre users. The protocol may include information about clear rules within centres, effective ways of communicating to young people about centre rules, guidelines for responding to specific incidents, approaches to security, clear and consistent banning procedures, and processes for young people to make a complaint.⁴³⁰

In October 2003, the NSW Shopping Centre Protocol Project published *Creating the Space for Dialogue: A Guide to Developing a Local Youth Shopping Centre Protocol*

⁴²⁵ Clancey et al, note 404, at p 8-12.

⁴²⁶ Ibid at p 11.

⁴²⁷ NSW Shopping Centre Protocol Project, *Creating the Space for Dialogue: A guide to developing a local youth shopping centre protocol*, October 2003, p i.

⁴²⁸ Clancey et al, note 404, at p 38.

⁴²⁹ Ibid at p 38.

⁴³⁰ Hon Carmel Tebbutt MLC, *NSWPD*, 7/5/02.

along with a complementary report. A project team from the University of Western Sydney developed the Guide with the assistance of a Steering Committee made up of representatives from various stakeholders. The Guide “establishes principles and steps for developing a local protocol, recognising the different needs and characteristics of communities and shopping centres across NSW.”⁴³¹ According to the Guide:

A protocol...is an agreement between key people involved in managing, maintaining security, accessing or using a shopping centre. This agreement should publicly identify agreed behavioural standards and responses to unacceptable behaviour, how problems can be resolved and ways that people can work together to make a shopping centre safe and accessible. It should promote trust and transparency and imply a willingness to listen to the views of all parties. It is not legally binding, but is developed in a spirit of cooperation and goodwill.⁴³²

The Guide refers to key people who should be invited to participate in the development of the Protocol, including shopping centre management, security, young people, youth workers, police, local council, retailers and schools.⁴³³ The Guide outlines a number of principles which underpin the development of a Protocol. These include, for example, that “young people have the right to access shopping centres and to enjoy the use of these spaces free of harassment and discrimination; and that shopping centre managers, security personnel, retailers and shoppers have the right to expect that all users of shopping centres will behave appropriately while utilising these facilities/spaces.”⁴³⁴ The Guide goes on to outline suggested procedures for developing a local protocol. The Guide emphasises that the involvement of young people is critical.⁴³⁵

A Sample Protocol is included as an appendix to the Guide. The Sample Protocol refers to a hierarchy of consequences for unacceptable behaviour including warnings, cautions, and for more serious misbehaviour, interviewing the young person in the presence of a parent or guardian, where the young person is invited to show cause why they should not be excluded from using the centre for a specified period. They will be informed that any future inappropriate behaviour will result in banning. The Sample Protocol states that referral to a support agency/service might be appropriate at this stage. In relation to bans from the shopping centre, the Sample Protocol states (in part):

Exclusion from the use of the centre is the last resort and should only be used when the safety of patrons and staff are jeopardised by the behaviour of the young person or where serious criminal offences have taken place...

Banning should be used sparingly (if at all) and consideration must be given to arrangements to enable the young person to access employment or services and utilities within the centre and transport. Short term banning periods can be effective and more likely to be complied with than extended periods. For example, banning a young person for the remainder of the day or for the

⁴³¹ The Guide, note 427, at p i.

⁴³² *Ibid* at p 3.

⁴³³ *Ibid* at p 5.

⁴³⁴ *Ibid* at p 6.

⁴³⁵ *Ibid* at p 9.

remainder of the week will often be effective as banning them for extended periods. Bans should also be reviewed and reduced if it is later discovered that a ban should not have been issued or because of compliance with the notice for an extended period or because circumstances of the individual have changed necessitating their access to the centre.⁴³⁶

The Sample Protocol also refers to the need for complaint procedures that are clearly defined and transparent.⁴³⁷ For example, if a young person has a grievance with a security officer, the procedure might be to inform the centre manager of the complaint, and to complete a standard complaint form. Separate meetings might then be held with the young person (and support person) and the security officer to determine the nature and validity of the complaint. A meeting of the security officer and young person (and support person) might then be conducted to resolve the issue.

There is no data available on the number of shopping centres that have implemented a protocol since the Guide was published. However, Garner Clancey, one of the authors of the Guide is aware of shopping centre protocols that have been developed and finalised in Penrith and Macarthur Square, protocols that are close to being finalised in Bondi Junction and Hurstville, a protocol being drafted in relation to Parramatta Westfield.⁴³⁸ Centre management initiated the Macarthur Square protocol whereas the protocols in the other four areas were Council driven.

Training for security guards on dealing with young people

In March 2004, YAPA published the *Shopping Centre Security Guards and Young People: Resource Manual and Self-Paced Learning Package*. YAPA states that the package was developed having regard to “the need to enhance the training available to shopping centre security guards, to help them better understand and to respond to young people. The lack of training for security guards in part contributes to some of the tensions between young people and security guards attached to shopping centres.”⁴³⁹ YAPA has since conducted face-to-face training of security guards in NSW.⁴⁴⁰

⁴³⁶ Ibid at p 22.

⁴³⁷ Ibid at p 23.

⁴³⁸ Private communication with Garner Clancey, one of the authors of the Guide, on 3 May 2005.

⁴³⁹ See YAPA website: <http://www.yapa.org.au/youth/security/securityresource.htm>

⁴⁴⁰ Private communication with Garner Clancey on 3 May 2005.

8. CHILDREN'S RIGHT TO BE HEARD

Overview

This section looks at children's right to be heard in all matters affecting them, as stated in Article 12 of the UN Convention on the Rights of the Child. In particular it looks at recognition of this right in NSW. It refers to what the NSW government's *Youth Policy* says about young people's participation in government processes and in their communities. It then looks at two statutory bodies that have been established in NSW to promote youth participation: the Youth Advisory Council and the Commission for Children and Young People. It then discusses whether the voting age should be lowered. Next, it examines children's participation in NSW in two key areas: (1) in school decision-making and (2) in legal processes, particularly in court proceedings.

Article 12 and the right to be heard

Article 12

Article 12 of the UN Convention on the Rights of the Child states:

1. 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.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The meaning of Article 12

As Gerison Lansdown states, article 12 introduces "a radical and profound challenge to traditional attitudes, which assume that children should be seen and not heard."⁴⁴¹

Lansdown interprets the various elements of article 12 as follows:

All children are capable of expressing a view

There is no lower age limit imposed on the exercise of the right to participate. It extends therefore to any child who has a view on a matter of concern. Very small children and some children with disabilities may experience difficulties in articulating their views through speech but can be encouraged to do so through art, poetry, play writing, computers or singing.

The right to express their views freely

If children are to be able to express their views, it is necessary for adults to create the opportunities for children to do so. In other words, Article 12 imposes an obligation on adults in their capacity as parents, professionals and politicians to ensure that children are enabled and encouraged to contribute their views on all relevant matters. This does not, of course, imply that children should be required to give their views if they are not willing or interested in doing so.

⁴⁴¹ Lansdown G, *Promoting Children's Participation in Democratic Decision-Making*, UNICEF and United Nations Children's Fund, Italy, February 2001, at p 2.

The right to be heard in all matters affecting them

Children's right to be heard extends to all actions and decisions that affect children's lives – in the family, in school, in local communities, at national political level. It applies both to issues that affect individual children, such as decisions about where they live following their parents divorce, and to children as a constituency, such as legislation determining the minimum age for full time work. It is important to recognise that many areas of public policy and legislation impact on children's lives – issues relating to transport, housing, macro-economics, environment, as well as education, childcare and public health all have implications for children.

The right to have their views taken seriously

It is not sufficient to give children the right to be listened to. It is also important to take what they have to say seriously. Article 12 insists that children's views are given weight, and should inform decisions made about them. This does not mean that whatever children say must be complied with – simply that their views receive proper consideration.

In accordance with their age and maturity

The weight that must be given to children's views needs to reflect their level of understanding of the issues involved. This does not mean that young children's views will automatically be given less weight. There are many issues that very small children are capable of understanding and to which they can contribute thoughtful opinions. Competence does not develop uniformly according to rigid developmental stages. The social context, the nature of the decision, the particular life experience of the child and the level of adult support will affect the capacity of a child to understand the issues affecting them.⁴⁴²

The case for listening to children

Lansdown identifies four important reasons for listening to children: (1) It is a fundamental human right; (2) It strengthens a commitment to, and understanding of, democracy; (3) It leads to better decisions; and (4) It protects children better.⁴⁴³

(1) It is a fundamental human right: All people have a right to express their views when decisions are being made that directly affect their lives – and children are people too. Whether it is an individual decision about where a child will live following her parents' divorce, or broader issues such as the rules imposed at school, or representation of children in the media, children have a right to articulate their concerns, participate in the development of policy and be taken seriously.

(2) It strengthens a commitment to and understanding of democracy: Children need opportunities to participate in democratic decision-making processes within school and within local communities. Only by experiencing respect for their own views and discovering the importance of respect for the views of others, will they acquire the capacity and willingness to listen to others and so begin to understand the processes and value of democracy. It is through learning to question, to express views, and having their opinions taken seriously that children will acquire the skills and competence to develop their thinking and to exercise judgment in the myriad of issues that will confront them as they approach adulthood.

⁴⁴² Ibid at p 2-3. See also The Foundation for Young Australians, *Sharing a New Story: Young People in Decision-Making*, June 2003, at p 21-22.

⁴⁴³ Ibid at p 4-7. The following is a summary of these pages.

(3) *It leads to better decisions:* Children have a body of experience and knowledge that is unique to their situation. They have views and ideas as a result of that experience. Much of government policy impacts directly on children yet it is developed largely in ignorance of how it will affect the day-to-day lives of children and their present and future well-being. For example, most countries are concerned to improve educational opportunities and standards for children. Yet few take any measures to find out from children themselves what teaching methods work, whether the curriculum is relevant, and how to promote effective discipline. If we want to make the best decisions, we need the best information available. Consulting children and drawing on their knowledge and ideas is essential to the development of effective public policy.

(4) *It protects children better:* Having a voice about one's rights is essential to their fulfilment. Where it is recognised that children are entitled to challenge their situation and given the mechanisms to do so, abuse and violation of rights are far more easily exposed. Children who are encouraged to talk are empowered to challenge abuses of their rights and are not simply reliant on adults to protect them. Furthermore, adults can only act to protect children if they know what is happening to them. Violence against children in prisons, abuse in foster homes, and racism in schools can only be tackled effectively if they can tell their stories to those who can take appropriate action.⁴⁴⁴

UN Committee's general comment on Article 12

The UN Committee on the Rights of the Child has made the following general comment concerning State Parties' implementation of article 12:

Opening government decision-making processes to children is a positive challenge which the Committee finds States are increasingly responding to. Given that few States as yet have reduced the voting age below 18, there is all the more reason to ensure respect for the views of unenfranchised children in Government and parliament. If consultation is to be meaningful, documents as well as processes need to be made accessible. But appearing to "listen" to children is relatively unchallenging; giving due weight to their views requires real change. Listening to children should not be seen as an end in itself, but rather as a means by which States make their interactions with children and their actions on behalf of children ever more sensitive to the implementation of children's rights.

One-off or regular events like Children's Parliaments can be stimulating and raise general awareness. But article 12 requires consistent and ongoing arrangements. Involvement of and consultation with children must also avoid being tokenistic and aim to ascertain representative views. The emphasis on "matters affecting them" in article 12(1) implies the ascertainment of the views of particular groups of children on particular issues – for example children who have experience of the juvenile justice system on proposals for law reform in that area, or adopted children and children in adoptive families on adoption law and policy. It is important that Governments develop a direct relationship with children, not simply one mediated through non-governmental organizations (NGOs) or human rights institutions.⁴⁴⁵

⁴⁴⁴ See also *ibid* at p 8 as to rebuttal of arguments used to challenge participation by children.

⁴⁴⁵ UN Committee on the Rights of the Child, *General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child (arts 4, 42 and 44, para. 6)*, 27 November 2003, at p 5.

The Committee's comments on Australia's implementation of article 12

In 1997, the UN Committee on the Rights of the Child made the following observation concerning Australia's implementation of Article 12:

The Committee is concerned that the general principles of the Convention, in particular those related to...the respect for the views of the child (art.12) are not being fully applied.

...

The Committee believes that there is a need for an awareness-raising campaign on the right of the child to participate and express his/her views, in line with article 12 of the Convention. The Committee suggests that special efforts be made to educate parents about the importance of children's participation, and of dialogue between parents and children. The Committee also recommends that training be carried out to enhance the ability of specialists, especially care givers and those involved in the juvenile justice system, to solicit the views of the child, and help the child express these views.⁴⁴⁶

The federal government's response to the Committee's concerns in its 2003 report to the Committee⁴⁴⁷ refers to the establishment of a National Youth Roundtable to create direct dialogue with young Australians. It also reports that state governments have established a range of mechanisms to enable children to participate in the development of policies, programs and services affecting them, such as Youth Advisory Councils in NSW. The report then refers to the establishment of Children's Commissions.

The report also refers to the government's commitment to providing child inclusive practice in the provision of government funded services for families, particularly in relation to parental conflict or separation. Additionally, it refers to changes to care and protection and juvenile justice laws in NSW, which promote child participation.

Note that the 2005 *Non-government Report on the Implementation of the United Nations Convention on the Rights of the Child in Australia* criticises the National Youth Roundtables. It maintains that the former national peak youth group, the Australian Youth Policy and Advocacy Coalition, was a more effective system.⁴⁴⁸

⁴⁴⁶ UN Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Australia*, 10 October 1997, at paras 12, 28.

⁴⁴⁷ See Australian Government, *Australia's Combined Second and Third Reports under the Convention on the Rights of the Child*, March 2003, at p 22-27.

⁴⁴⁸ *Non-Government Report on the Implementation of the United Nations Convention on the Rights of the Child in Australia* (2005), note 123, at p 9.

The NSW government's policy on youth participation

Being Seen, Heard and Valued is one of the six key strategies in the NSW government's *Youth Policy 2002-2006*. The strategy involves "Increasing participation of young people in our community and involving them in the decisions and processes that impact on their lives."⁴⁴⁹ The policy refers to what the NSW Government was doing in 2002 to listen to young people and promote their participation:

Hearing from young people

We hear from young people in a number of different ways:

- The NSW Youth Advisory Council, a statutory body comprised of twelve young people, advise the Premier on matters of concern to young people and NSW Government policies concerning young people.
- The Children and Young Person's Reference Group advises the NSW Commission for Children and Young People on its efforts to promote the safety, well-being and rights of children and young people.
- The NSW Student Representative Council provides a voice for secondary students in government schools.
- Young people are members of the Juvenile Crime Prevention Advisory Council, which guides the design and funding of initiatives to reduce the involvement of young people in crime.
- The Youth Action Policy Association and the Youth Accommodation Association, which receive NSW Government funding advance the interests of young people.

Encouraging young people's participation

We encourage young people's participation by, for instance...

- Providing practical advice to organisations and youth services about how to involve children and young people in decision-making, using the *Taking Participation Seriously* toolkit.
- Maintaining a register of young people who are interested in sitting on NSW Government boards and committees.
- Requiring youth participation in the planning and management of youth drug services funded by the NSW Government.
- Funding peer mentoring and leadership programs for young people, including those specifically targeting young women and indigenous students.
- Supporting positive representations of young people in the media.

The policy also refers to a number of initiatives to be implemented in 2002 and 2003 to improve young people's participation. The NSW Government's 2003 implementation report in relation to the NSW Youth Policy outlines a number of achievements with respect to the strategy, *Being Seen, Heard and Valued*.⁴⁵⁰ These include:

- *Government services*: young people have been engaged in the development of regional youth plans through the *Better Futures Regional Strategy*.

⁴⁴⁹ NSW Government, *NSW Youth Policy 2002-2006, Working Together for Young People*, p 6.

⁴⁵⁰ Office of Children and Young People, *NSW Youth Policy 2002-2006, Working Together, Working For Young People: Implementation Report*, 2003, at p 1-2.

- *Government programs:* NSW Health has involved young people in the development of a range of health policies, such as the identification of best practice for youth health service delivery.
- *Schools:* Student Representative Councils are a key mechanism for student participation. The Department of Education is seeking to extend student leadership programs in government schools.
- *Community:* The Youth Week events that took place in 2003 are an example of the way the Government supports local councils to fund activities that are planned and managed by young people.
- *Out-of-home care:* The Department of Community Services has established a joint pilot project with the Office of the Children's Guardian to develop best practice guidelines and tools to increase the participation of vulnerable young people in their out-of-home care case planning.
- *Youth website:* The Government's Youth Website has been redeveloped to operate a portal that links young people to key information and enhances their ability to provide feedback to government.
- *Youth forums:* The Government would be organising a program of one-day youth forums to provide young people's input into public policy development. The first forum would take place in Youth Week 2004.
- *Aboriginal Youth Leadership Project:* This project aims to foster leadership and participation by young indigenous people.
- *Multicultural NSW:* Appointing two youth commissioners to the Community Relations Commission for a Multicultural NSW to represent young people from culturally diverse communities.

Statutory bodies in NSW that promote youth participation

NSW Youth Advisory Council

The New South Wales Youth Advisory Council was established under the *Youth Advisory Council Act 1989* to ensure that young people participate in the development of Government policies and programs that concern them. The Act defines young people as people aged between 12 and 24. The Council has the following functions:

- (a) to advise the Minister on the planning, development, integration and implementation of Government policies and programs concerning young persons,
- (b) to consult with young persons, community groups and Government authorities on issues and policies concerning young persons,
- (c) to monitor and evaluate legislation and Government policies and programs concerning young persons and to recommend changes if required,
- (d) to conduct forums, approved by the Minister, on issues of interest to young persons,

- (e) to collect, analyse and provide the Minister with information on issues and policies concerning young persons.⁴⁵¹

The Council consists of 12 part-time members appointed by the Premier. At least half of those members must be under the age of 25. The Council receives ex-officio support from the Office of Children and Young People, The Cabinet Office.

In 2002, the Council's activities included consulting with young people in relation to the development of the government's *NSW Youth Policy 2002-06*, meeting with a range of Government Ministers to promote the concept of youth participation; assisting in organising the Government's forum, *So you want to be in politics?*, held during National Youth Week; representing the views of young people on a number of committees; and participating in a number of conferences, seminars and forums.⁴⁵²

A review of the *Youth Advisory Council Act 1989* was conducted in 2003. The report of the review did not recommend changes to the Act but made recommendations concerning the operation of the Council.⁴⁵³

NSW Commission for Children and Young People

The NSW Commission for Children and Young People was established in 1998. One of the Commission's primary functions is "to promote the participation of children in the making of decisions that affect their lives and to encourage government and non-government agencies to seek the participation of children appropriate to their age and maturity."⁴⁵⁴ The Commission has undertaken several initiatives including:⁴⁵⁵

- Publishing a practical resource kit to help organisations involve children and young people in decision-making. The kit, *Taking PARTicipation Seriously*, has several modules focusing on different aspects of participation, including participation in conferences, and on boards and committees. There is also a module to help organisations get feedback from children and young people about how well they are being involved in the organisation.
- Publishing the *Ask the Children* series, which helps make children's views on different topics available to the public and to decision-makers. The topics have included issues that are important to children and young people, alcohol-related

⁴⁵¹ *Youth Advisory Council Act 1989*, s 11(1).

⁴⁵² See Youth Advisory Council NSW, *Annual report 2002*.

⁴⁵³ See NSW Government's youth website: <http://www.youth.nsw.gov.au/yac>

⁴⁵⁴ *Commission for Children and Young People Act 1998 (NSW)*, s 11(a).

⁴⁵⁵ This information is based on the Commission's Annual Reports for 2002/03 and 2003/04 as well as on information on the Commission's website: <http://www.kids.nsw.gov.au>

harm, children's experience in immigration detention centres, prescription medication and the ways that children seek help.

- Establishing a *Participation Advisory Service* that provides advice, support and resources to schools and government agencies to promote opportunities for children and young people to participate in decisions about their lives.
- Facilitating young people's involvement in conferences such as the 2002 NSW Childhood Obesity Summit, the 2003 Australasian Conference on Child Abuse and Neglect and the 2003 NSW Summit on Alcohol Abuse. Prior to the Alcohol Summit, the Commission consulted with more than 200 young people and organised a Young People and Alcohol Forum. The Forum brought together 59 young people from around NSW to discuss alcohol-related harm and how it could be reduced. The Forum developed 67 resolutions that were then taken forward to the Summit by 16 young people who participated throughout the Summit.
- Helping young people have their voices heard in the media by liaising with media about relevant issues and supporting young people to conduct interviews.
- The *Speak Up, Speak Out* program, which gives young people the opportunity to develop and practice advocacy skills.

Note also that the Commission's enabling legislation states that, in carrying out its *other functions*, the Commission is required to take the views of children into account and give them serious consideration.⁴⁵⁶ The Commission is required to consult with children, as set out in section 13 of the Act:

- (1) The Commission is to develop means of consulting with children that are appropriate to their age and maturity.
- (2) The Commission is to use those means of consultation in exercising its functions and, in particular, before making any significant recommendations.

One of the ways that the Commission involves young people in its work is through a Young People's Reference Group, which advises the Commissioner about issues that are important to children and young people and asks young people for their opinions about the work of the Commission and how to improve it. The Reference Group is made up of 12 young people, aged between 12 and 18, who are from the city, regional and rural areas in NSW. In 2003/04 the Group provided advice on 30 Commission projects, policies and new legislation proposed by the government.

⁴⁵⁶ *Commission for Children and Young People Act 1998 (NSW)*, 10(b).

Should the voting age be lowered?

Calls to lower the voting age

The voting age for both federal and state elections is 18 years of age.⁴⁵⁷ In recent years, some youth advocacy groups, politicians and commentators, both in Australia and in the UK have argued for a lowering of the voting age.⁴⁵⁸ Sixteen is the age that has most commonly been put forward. One suggestion has been that voting could be optional for children between the ages of 16 and 18. The issue was raised in the NSW Parliament in 1997 when a private members bill was introduced to lower the voting age from 18 to 16.⁴⁵⁹ There have been subsequent notices of motion to introduce similar bills.⁴⁶⁰

The *Non-government Report on the Implementation of the United Nations Convention on the Rights of the Child in Australia* states that:

The proposal has been made by young people from time to time that the voting age be lowered, but it has never been given serious consideration despite cogent evidence that children in their early to mid teenage years have the capacity to make independent political judgments on matters of public interest and on matters of particular interest to children as a class.⁴⁶¹

The 2005 non-government report recommends “that a multi-party committee, with significant representation of children from a variety of age and cultural groups, be established to consider the ramifications of lowering the voting age and suggesting an appropriate age at which children should be able to vote.”⁴⁶²

⁴⁵⁷ *Commonwealth Electoral Act 1918 (CTH)*, s 93; *Parliamentary Electorates and Elections Act 1912 (NSW)*, s 20.

⁴⁵⁸ See Ludbrook, ‘Children and the political process’, in Jones M and Marks L, *Children on the Agenda: the rights of Australia’s children*, Prospect Media, 2001, at p 65 and see also p 82. See also Simpson B, ‘Democracy: give children the vote’ (1993) 18 *Alternative Law Journal* at p 190-91; and Bessant J (1996) The silent consensus – Linking Citizenship and young people, *Children Australia*, 21, 45. See also the Youth Affairs Council of South Australia, ‘New Council, New Directions – Where do young people fit?’, *Media Release*, 21 May 2003. As to calls for lowering the voting age in the UK, see UK Electoral Commission’s review (below) and see also website of ‘Votes at Sixteen Campaign’: <http://www.votesat16.org.uk/>

⁴⁵⁹ *Parliamentary Electorates and Elections (Voting Age) Amendment Bill 1997*, introduced by Hon R.S.L Jones MLC (second reading: 19/6/97).

⁴⁶⁰ In 1999 and 2002, Hon R.S.L Jones MLC put forward motions to introduce bills with the same title; and in 2003, Hon I Cohen MLC put forward a notice of motion to introduce such a bill.

⁴⁶¹ *Non-government Report on the Implementation of the United Nations Convention on the Rights of the Child in Australia* (2005), note 123, at p 12.

⁴⁶² *Ibid* at p 12 (Recommendation 14).

Arguments for lowering voting age

The main arguments for lowering the voting age are as follows:

- The right to vote is one of the most important of all rights. It is the means by which people can exercise some influence over the nature and quality of the society in which they live and over laws and policies that will affect them in their daily lives. It is at the very heart of democracy.⁴⁶³
- Many laws and policies impact on children and they should have the same opportunities as adults to criticise or support such laws and policies through the political process.⁴⁶⁴ They should also be able to use the political process to influence the society they would experience as adults.⁴⁶⁵
- At least by the age of 16, young people have sufficient maturity and decision-making capacity to vote. This is supported by some research studies.⁴⁶⁶
- Lowering the voting age would be consistent with the age at which other significant rights and responsibilities arise. For example, at the age of 15 one can leave school, work full-time, and pay taxes; and at the age of 16, one can enter into sexual relations, be a parent, get married (with court approval), join most political parties and learn to drive.⁴⁶⁷
- Young people of today are better informed about politics. This is due to the introduction of citizenship education in schools and the greater extent to which children can access information through the Internet.
- Adults often do not cast their vote after a balanced consideration of all available information about the candidates and party policies. For many adults, voting is an expression of family or personal loyalties or ideologies or impressions formed by media coverage of the election.⁴⁶⁸
- Children are more likely to behave as responsible citizens if they are given a stake in society and an opportunity to influence its policies.⁴⁶⁹

⁴⁶³ Ludbrook, note 458, at p 67.

⁴⁶⁴ Ibid at p 71, 73.

⁴⁶⁵ Report of Yvote/Ynot project cited in The Electoral Commission (UK), *How Old is Old Enough: The Minimum Age of Voting and Candidacy in UK Elections*, July 2003, at p 32.

⁴⁶⁶ See Ludbrook, note 458, at p 75, 83-84.

⁴⁶⁷ See Hon Richard Jones MLC, *NSWPD*, 19/6/97 (second reading speech).

⁴⁶⁸ Ludbrook, *supra*, at p 76.

⁴⁶⁹ Ibid at p 72-73.

- The arguments used for denying children voting rights are the same as were used for denying voting rights to women and indigenous people.⁴⁷⁰

Arguments for maintaining current voting age

The main argument for maintaining the current voting age is that:

...18 is the age by which most people have reached a sufficient level of emotional and intellectual development to exercise the most important responsibility of electing political decision makers.

The maturity argument has at least three aspects:

- Younger people are more susceptible to being influenced by others in how to vote. This covers the situation where a young person might vote the way of his or her older friends or relatives do, whether through a lack of knowledge or strength of feeling on the part of the young person, or, potentially, because of intimidation;
- Younger people might be more likely to vote for parties with superficially attractive policies, without realising the wider consequences;
- Younger people do not have sufficient intellectual development or experience of life outside school to appreciate the wider ramifications of the vote they are casting.⁴⁷¹

UK Electoral Commission's recent review

The UK Electoral Commission recently conducted a review of the *Age of Electoral Majority*. The review arose in response to “growing calls to reduce the minimum voting and/or candidacy age as a way of encouraging participation in representative democracy by young people” and in response to a recommendation for such a review by the government’s Children and Young People’s Unit in a report in 2002.⁴⁷²

The Electoral Commission published its report in April 2004.⁴⁷³ The report looked at the voting age in other countries and the minimum ages for other social and civic activities in the UK, and it discussed the maturity of under-18s, the recent introduction of citizenship education in schools, and public opinion on the appropriate voting age. In conclusion, the Commission stated that it had “looked for clear evidence on which to base any change in the current voting age, and to date has found insufficient justification for such change.”⁴⁷⁴ It therefore recommended that the voting age should remain at 18 years for the time being.⁴⁷⁵ However, the Commission stated that:

⁴⁷⁰ Ibid at p 67 and see also The Electoral Commission (UK), note 465, at p 29.

⁴⁷¹ The Electoral Commission (UK), note 465, at p 30. See also Cowley P and Denver D, ‘Votes at 16? The Case Against’ (2004) 41(1) *Representation* 57.

⁴⁷² The Electoral Commission (UK), *Age of Electoral Majority: Report and Recommendations*, April 2004, at p 3.

⁴⁷³ Ibid.

⁴⁷⁴ Ibid at p 61.

⁴⁷⁵ Ibid at p 5

...circumstances may change the context significantly over the next few years. In particular, citizenship teaching may improve the social awareness and responsibility of young people. There may also (perhaps partly in response to this) be a wider debate about the general age of majority that can better inform consideration of individual age-based rights. We propose further research on the social and political awareness of those around age 18 with a view to undertaking a further review of the minimum age for electoral participation in the future.

The Electoral Commission would therefore expect to undertake a further formal review of the minimum voting age within five to seven years of this report. We would encourage the Government to consider in the meantime initiating a wider review of the age of majority, given the length of time that has passed since the last one.⁴⁷⁶

Children's participation in school decision-making

Introduction

The Department of Education's *Student Welfare policy* (1996) refers to student participation in the section entitled *Positive climate and good discipline*. Specifically, it refers to "maximising student participation in decision making", and "providing resources and opportunities for students to gain leadership experience using a range of mechanisms, including student representative councils or school parliaments."⁴⁷⁷ This section presents a brief overview of student representative councils and refers to some comments on the state of student participation in schools.

Student Representative Councils

Student Representative Councils in schools

Student Representative Councils (SRCs) are:

[A] group of students in a school elected by fellow students. They represent students in the school and organise ways for them to participate in school life.

SRCs facilitate leadership and decision-making by all students in a school. They are an important way for schools to provide meaningful leadership opportunities for students and to promote a voice for students in school decision-making.⁴⁷⁸

SRC's have a responsibility to liaise with a number of groups within the school community including students, the school principal, staff and committees, the school council and P&C, the local community and District SRC. According to the Department of Education, most high schools and some primary schools have SRCs. For secondary schools, there are school, district and state level SRC groups (see below).

⁴⁷⁶ Ibid at p 5. See also p 59ff.

⁴⁷⁷ Ibid at p 6. See also p 7.

⁴⁷⁸ NSW Department of Education and Training website: <http://www.det.nsw.edu.au>

In 1998, the Department of Education issued *Student Representative Councils: A practical guide for student leaders and teachers*. The guide is intended to “support schools and student leaders in establishing an effective and successful SRC by providing policy and operational information. Practical strategies and best practice examples are also included.”⁴⁷⁹ The introduction to the Guide states (in part):

Students are happier and participate in their education more effectively when adults listen to their ideas and value their opinions. Schools also benefit when students are actively involved in the life of the school. A Student Representative Council (SRC) is one structure which can assist students and schools in achieving this ideal.⁴⁸⁰

The second section of the Guide states (in part):

Whilst raising funds for the improvement of facilities or donation to charity is a worthwhile endeavour, a school’s SRC should focus on the development of leadership skills and the meaningful involvement of students in school decision making. This guide provides examples of how this level of involvement can be achieved.⁴⁸¹

Some examples of good practice listed in the guide include involving the SRC in:

- Committee decisions in all areas of school organisation;
- Workshops on a variety of topics and themes of concern to students including drug education, sexual harassment and other discrimination issues;
- Assisting schools to implement departmental policies, eg *Good Discipline and Effective Learning*;
- Making decisions about school organisation including subject choices, canteen organisation, community involvement, school management committee;
- Identifying problems which teachers may not be aware of eg...bullying in particular playground areas;
- Seeking assistance in developing negotiation and problem solving skills to solve real issues in their school.⁴⁸²

District and State Student Representative Councils⁴⁸³

District SRCs consist of representatives from 8-15 secondary school SRCs. District SRCs help to improve school SRCs within the district, to improve communication between school SRCs, and to deal with issues that affect the district.

The NSW Student Representative Council (NSWSRC) is the peak student leadership forum supported by the Department of Education. It consists of twenty elected

⁴⁷⁹ NSW Department of Education and Training, *Student Representative Councils: A practical guide for student leaders and teachers*, 1998.

⁴⁸⁰ Ibid at p 2.

⁴⁸¹ Ibid at p 9.

⁴⁸² Ibid at p 11-12.

⁴⁸³ This information was sourced from the NSW Department of Education’s website.

representatives from paired districts across NSW⁴⁸⁴ and two Aboriginal representatives elected through a state-wide expression of interest. It meets five times a year and works on resolutions passed by the student forum at the previous year's NSW State SRC Conference. The NSW SRC is consulted on student issues by senior Department officers, other government organisations, business and community groups.

The NSW State SRC conference, held annually, is organised and conducted by a working party of twenty students elected from paired districts. One hundred and thirty conference participants from all forty districts attend the conference. Each of the forty districts elects three students to attend and ten Aboriginal student leaders from across the state are nominated to participate by districts. The student forum debates and votes on recommendations passed on from district SRCs. Approved recommendations become resolutions for the NSW SRC to accomplish. The conference participants conduct follow up activities and/or conferences at district SRC forums. These district activities also flow on to school-based SRC activity.

Comments on the state of student participation in schools

In its 1996 report on *Children's Advocacy*, the NSW Legislative Council Standing Committee stated:

The Committee heard from a number of witnesses that the greatest challenge in improving advocacy within the education system is to ensure that children have a voice on issues that concern them. In speaking to students from schools in both urban and rural New South Wales, the Committee found this to be the single issue of greatest concern.

...

The Committee appreciates that the right of children to be heard in decisions affecting them has begun to be recognised through mechanisms such as student representative councils. The Committee was informed that these groups are increasingly becoming part of the decision-making process in the school, and they advocate on behalf of other students on issues arising in the school.

...

The Committee heard students are also becoming increasingly involved as part of school councils which have a significant role to play in identifying educational needs and priorities and in decisions regarding school finances...

The Committee welcomes and approves these initiatives. However, the Committee recognises that consultation can take a number of forms and may not be regarded as bona fide by those consulted...

For students to have a more meaningful voice, the Committee believes further cultural change is required in the education system...⁴⁸⁵

⁴⁸⁴ These consist of two geographically adjoining districts (so that from 40 districts there are 20 paired districts). One district elects a NSW SRC representative and the other elects a State SRC Conference Working Party representative.

⁴⁸⁵ NSW Parliament, Legislative Council Standing Committee on Social Issues, *Inquiry into Children's Advocacy*, Report No. 10, September 1996, at p 131-32.

In 2003, Robert Ludbrook commented critically about the state of student participation in schools in Australia:

Australia's education system is, generally speaking, a system imposed by adults on children. The subjects taught, curriculum content and teaching methods are all decided upon with little or no input from the students. Most schools also impose rules about school uniforms...and out of school activities. Rarely do students have any real influence over the formulation and implementation of these rules.

While there has been a movement to promote greater participation of students in school decision-making, few States and Territories make it a statutory requirement that children be represented on school decision-making bodies such as School Councils. If they are represented one student is commonly expected to represent a range of disparate interests within the school. Student Representative Councils are rarely provided with discretionary funding and their role and effectiveness is dependent on the support of the principal and teaching staff. Too often their main function is to organise school socials or to raise funds for the school.

Unless students can see that their ideas and recommendations are resulting in some visible changes they will soon lose interest. While a great deal has been written about participation processes and student capacity-building there is very little evidence of changes that have resulted from the time spent by students in developing ideas and putting forward recommendations...⁴⁸⁶

Children's participation in legal processes

Introduction

While all children are involved in some legal processes through their participation at school, in employment and consumer transactions, the formal legal processes that most directly involve children are the care and protection, family law, adoption and criminal law systems.⁴⁸⁷ Sometimes children's involvement in these legal processes will be in court proceedings but in many cases it will not. This paper focuses on children's participation in court proceedings. With respect to children's participation in legal processes generally, this paper refers to some general comments made in the 1997 report of the federal inquiry into children and legal processes; and then discusses changes to care and protection laws in NSW to promote children's participation.

⁴⁸⁶ Ludbrook R, 'Children's voices: empowerment or tokenism' (2003) 12(3) *Human Rights Defender* 2 at p 3-4. See also *Non-Government Report on the Implementation of the United Nations Convention on the Rights of the Child in Australia* (2005), note 123, at p 10-11. See also Fortin, note 7, at p 184-186 for a comment on student participation in schools in the UK.

⁴⁸⁷ See Australian Law Reform Commission and The Human Rights and Equal Opportunities Commission, *Seen and Heard: Priority for Children in the legal process*, Commonwealth of Australia, 1997, at p 91, 95.

Federal inquiry into children and the legal process (1997)

In the 1990s the Australian Law Reform Commission and the Human Rights and Equal Opportunities Commission carried out “the most comprehensive examination of children and the legal system ever undertaken in Australia.”⁴⁸⁸ This culminated in a 630-page report in 1997 entitled *Seen and heard: priority for children in the legal process*.⁴⁸⁹ The former Australian Human Rights Commissioner, Chris Sidoti comments:

Lack of participation by children in legal processes was one of the strongest messages to emerge from the inquiry. There is a consistent failure by institutions in the legal process consult with and listen to children in matters affecting them. Young people across Australia told the inquiry their views were basically ignored by adult participants in the legal processes.⁴⁹⁰

It is relevant to refer to some general comments made in the report, starting with a reference in the report to changing views about children and legal process:

Within the legal system the traditional view has been that children are objects of concern to the legal system, the subjects of the law and of the legal process but not participants in the legal process. Early international declarations regarding children's ‘rights’ were concerned principally with children's economic, social and psychological needs. This reflected the assumption that children could and should rely on the exclusive protection and participation of adults in the legal process to ensure the exercise of their rights. This view was premised on the assumption that children do not and should not have the capacity themselves to participate in legal processes to enforce their rights.

This assumption about children's rights and their participation in the legal process is changing and it is in the context of this change that this Report is written. Changes in substantive and procedural law reflect a growing appreciation that children's abilities and capacities to make decisions develop as they mature, and that children should be afforded a progressive right to participate in legal processes that affect them.⁴⁹¹

The report notes that the Inquiry received “extensive evidence of the problems and failures of legal processes for children.”⁴⁹² Of particular concern was evidence of:

- Discrimination against children...
- Failures, to some degree by each of the institutions of the legal process, to accommodate the changing notions of children's evolving maturity, responsibilities and abilities, and in particular a failure to consult with and listen to children in matters that affect them;
- The marginalisation of children involved in the legal process, whether by teachers, social workers, lawyers or judges, when decisions that are of significant concern to children are being made;

⁴⁸⁸ Sidoti C, ‘Noble rhetoric or concrete action? Children, legal processes and human rights’, (1998) Issue 72 *Reform* 48.

⁴⁸⁹ *Seen and Heard* report, note 487.

⁴⁹⁰ Sidoti C, *supra*, at p 51

⁴⁹¹ *Seen and Heard* report, note 487, at p 14.

⁴⁹² *Ibid* at p 15.

- A lack of coordination in the delivery of, and serious deficiencies in much needed services to children, particularly those who are already vulnerable;
- The systems of abuse of children involved in legal processes, particularly the appalling state of care and protection systems throughout Australia and the manner in which child witnesses are treated;
- The increasingly punitive approach to children in a number of juvenile justice systems;
- The discriminatory impact of certain legal processes resulting in the over-representation of some groups, particularly indigenous children, in the juvenile justice and care and protection systems;
- The concentration of specialist services and programs in metropolitan areas, disadvantaging rural and remote children in their access to services, the legal process and advocacy;
- Inconsistencies in legislation dealing with legal capacities and liabilities of children.⁴⁹³

The report refers to the barriers confronting children as follows:

Although children are involved with the state's legal processes, they are not always able to participate in them. Some children are too young to participate formally, and others, although old enough to understand and take part in the process, may not want to participate. Other children may be unaware of legal services and processes or may not have the skills and confidence necessary to fill out forms, seek information, give evidence and otherwise participate in legal processes. The legal process itself may discourage or inhibit participation by children.⁴⁹⁴

The Inquiry adopted the following approach in making its recommendations:

...the Inquiry has had regard to the barriers that an adult legal system presents for children. Our emphasis is on appropriate and effective participation for children. The Inquiry does not advocate wholesale involvement of children in all legal matters or processes. However, where children are mature enough and willing to participate in the legal process, that participation should be on the basis that children are the beneficiaries of all of the law's protections.⁴⁹⁵

It is beyond the scope of this paper to outline the report's recommendations concerning legal processes generally. Some of the report's recommendations concerning children's participation in court proceedings are discussed later in this section.

Changes to care & protection laws to promote participation

As a result of changes to care and protection laws in NSW in 1998, such laws now expressly recognise children's right to participate in decisions that affect them. Section 9 of the *Children and Young Persons (Care and Protection) Act 1998* sets out principles that are to be applied in the administration of the Act. Subsection 9(b) states:

Wherever a child or young person is able to form his or her own views on a matter concerning his or her safety, welfare and well-being, he or she must be given an opportunity to express those views freely and those views are to be given due weight in accordance with the developmental capacity of the child or young person and the circumstances.

⁴⁹³ Ibid at p 15.

⁴⁹⁴ Ibid at p 91.

⁴⁹⁵ Ibid at p15-16.

Section 10 also places an obligation on the Director-General of Community Services to ensure that children and young persons can participate in decisions under the Act that have a significant impact on their lives. Section 10 states:

10 The principle of participation

- (1) To ensure that a child or young person is able to participate in decisions made under or pursuant to this Act that have a significant impact on his or her life, the Director-General is responsible for providing the child or young person with the following:
 - (a) adequate information, in a manner and language that he or she can understand, concerning the decisions to be made, the reasons for the Department's intervention, the ways in which the child or young person can participate in decision-making and any relevant complaint mechanisms,
 - (b) the opportunity to express his or her views freely, according to his or her abilities,
 - (c) any assistance that is necessary for the child or young person to express those views,
 - (d) information as to how his or her views will be recorded and taken into account,
 - (e) information about the outcome of any decision concerning the child or young person and a full explanation of the reasons for the decision,
 - (f) an opportunity to respond to a decision made under this Act concerning the child or young person.
- (2) In the application of this principle, due regard must be had to the age and developmental capacity of the child or young person.

Other changes to promote children's participation in care and protection proceedings in the Children's Court are discussed in the next section.

Children's participation in court proceedings

Introduction

Children may be involved in various types of court proceedings including civil, criminal, family law, care and protection and adoption proceedings. Children may be involved in these proceedings in various capacities: they might be the claimant or defendant in civil proceedings, the person charged with an offence in criminal proceedings, and they are generally the subject of proceedings in the care and protection, family law and adoption jurisdictions. Children may also be witnesses in any of these proceedings. This paper does not discuss children as witnesses but focuses on children's participation as parties to, or the subjects of, proceedings.⁴⁹⁶

⁴⁹⁶ For discussion of children as witnesses, see *Seen and Heard* report, note 487, Ch 14.

Models for children's participation in court proceedings

Three basic models have developed for children's participation in judicial proceedings:

- (1) *Guardian ad litem or next friend*: An adult person, known as a guardian ad litem or next friend, is appointed to act on behalf of a child in the proceedings. The guardian ad litem instructs the legal representative on how to conduct the proceedings. The guardian ad litem must act in the best interests of the child.
- (2) *Best interests representation*: A legal representative is appointed for a child, who must act impartially and make submissions to the court to further the best interests of the child. The child's wishes should be presented to the court but the legal representative does not act on the child's instructions and may present a conclusion to the court inconsistent with the child's wishes.
- (3) *Direct representation*: This is the model that generally applies to adults. The legal representative acts on instructions from the child, irrespective of what the representative considers to be in the best interests of the child.

The Table below shows what model operates in the various types of proceedings.

Proceedings	Model	Further information
Criminal	Direct	Children who are charged with an offence are represented on the basis of direct representation. But note that many children, particularly young children, may have difficulty providing satisfactory instructions to their lawyers. ⁴⁹⁷
Civil	Guardian ad litem	Civil court rules of procedure do not allow children to bring or defend proceedings in their own right. Children must act through an adult guardian ad litem or next friend. This adult will be responsible for the conduct of the proceedings and will be liable for the litigation costs. If the guardian ad litem wants to settle the proceedings, court approval must be obtained. ⁴⁹⁸
Care and protection	Direct and best interests	Previously, children were represented via the best interests model. However, since 1998 the laws have provided for direct representation where a child is capable of giving instructions, and for best interests representation otherwise (see below).
Family law	Best interests	New guidelines make it clear that the best interests model operates but that children should be allowed to participate. The Family Law Council recently reviewed this and did not recommend major changes but made recommendations to clarify and strengthen the role of the child representative (see below).

⁴⁹⁷ See *Seen and Heard* report, note 487, at p 244.

⁴⁹⁸ See *Damages (Infants and Persons of Unsound Mind) Act 1929 (NSW)*.

Federal inquiry's recommendations

With respect to civil proceedings, the *Seen and Heard* report recommended that:

- *Role of guardian ad litem:* All court rules should require the guardian ad litem or next friend of a child to regard the best interests of the child as the paramount consideration in conducting proceedings on behalf of the child. The rules should stipulate that failure to consider the child's best interests constitutes a ground for removal of the next friend or guardian ad litem by the court.⁴⁹⁹
- *Mature minors:* Legislation should be introduced to create a rebuttable presumption that a child over the age of 16 years living independently is competent to initiate or defend litigation.⁵⁰⁰ If the child has initiated proceedings directly but the court is satisfied that the child does not understand the nature and possible consequences of the proceedings or is not capable of conducting the proceedings directly, the court may require the appointment of a next friend.⁵⁰¹

The report also made a number of recommendations regarding children's participation in care and protection and family law proceedings. This paper focuses on the report's recommendations concerning the *representation* of children in care and protection and family law proceedings.⁵⁰² The report also made other recommendations as to children's *participation* in family law proceedings.⁵⁰³ The report states generally that, "quality representation of children is of crucial importance for effective decision making concerning children and for assuring children a say in decisions that affect them."⁵⁰⁴

Best interests vs direct representation: The report evaluated the merits and weaknesses of the 'direct representation' and 'best interests' representation models in the context of family law and care and protection proceedings. The report's discussion has been summarised as follows in a recent report on family law proceedings:

4.13 The *Seen and Heard* report noted that the best interests model was well regarded by many of the submissions to the Inquiry. A major advantage noted was the protection afforded by the model for children involved in family law litigation. The major criticism noted in the report was the denial of the right by competent children to instruct their own advocates.

...

4.14 The report noted that many children feel marginalised as a result of a best interest representation.

⁴⁹⁹ *Seen and Heard* report, note 487, recommendation 67 on p 248.

⁵⁰⁰ *Ibid*, recommendation 68 on p 250.

⁵⁰¹ *Ibid*, recommendation 69. These recommendations have not been implemented in NSW.

⁵⁰² *Ibid*, Ch 13.

⁵⁰³ *Ibid*, Ch 16.

⁵⁰⁴ *Ibid* at p 243.

4.15 Another significant criticism noted in the report was the issue of role confusion, not only for the children, but also for the solicitors acting as the advocates. Part of the role confusion comes from the fact that the lawyer has no instructions and is not bound by the wishes or directions of the child.

4.16 The Seen and Heard report discussed the direct representation model as an alternative to best interest representation. The report noted that the strength of the direct representation model lay in the fact that the voice of the child in such a model is more direct and the model avoids role confusion.

4.17 Proponents of this model argue that this model alone enables the legitimate wishes and expectations of children to be fulfilled...

4.18 The drawback with the direct representation model is that it presumes that children will give instructions that are capable of being put into effect. This is not always the case. For example, a child may prefer to live with a parent who is unwilling or unable to have him or her. For the child whose instructions are 'I do not want to choose' or 'I will tell you, but I do not want you to tell anyone else' or just 'I don't know', the model presents great difficulties. It does not accommodate these children's desires to participate in the proceedings on their own terms.

4.19 The ALRC and HREOC concluded that no one model is appropriate to all circumstances.

Ultimately the needs of children differ to such an extent that there can be no single model appropriate for all children. Children vary greatly in their capacities, maturity and desire for involvement in litigation concerning themselves and their families. A form of representation suitable for an articulate child of fourteen may not be appropriate for a younger or pre-verbal child.⁵⁰⁵

Standards for representation of children: The report then recommended that, "clear standards for the representation of children in all family law and care and protection proceedings should be developed."⁵⁰⁶ The report discussed the content of such standards. For example, with respect to the nature of representation, the report stated:

In all cases where a representative is appointed and the child is able and willing to express views or provide instructions, the representative should allow the child to direct the litigation as an adult client would. In determining the basis of representation, the child's willingness to participate and ability to communicate should guide the representative rather than any assessment of the 'good judgment' or level of maturity of the child.⁵⁰⁷

The report also said that where the child is unable or unwilling to set the goals of the litigation, the standards should require the representative to ensure that the court is aware of the fact and understands that the representation is to be on the basis of the best interests of the child. The standards should specify the functions of a representative acting in the best interests of the child. Other matters to be addressed in the standards included communication between the representative and the child, confidentiality, and the basis for termination of the child representative's appointment.⁵⁰⁸

⁵⁰⁵ Ibid, p 32-33.

⁵⁰⁶ Ibid, recommendation 70 on p 274.

⁵⁰⁷ Ibid.

⁵⁰⁸ Ibid, recommendations 70, 74 and 76.

The NSW Law Society acted on this recommendation, publishing *Representation Principles for Children's Lawyers*.⁵⁰⁹ Furthermore, in recent years legislative guidelines have been introduced on child representation in care and protection proceedings and the Family Court has published guidelines for family law proceedings (see below).

Training, funding etc: The report made recommendations concerning the training and funding of legal representatives.⁵¹⁰ For example, it recommended that the practice of children's law in the Family Court and in State courts should be developed as an area of specialisation.⁵¹¹ In that regard, note that the Law Society of NSW has established a specialist accreditation process for lawyers representing children but this is voluntary and there is no accompanying designated training.⁵¹²

Recent developments in relation to care and protection proceedings

Under changes introduced in 1998, provisions were included in care and protection laws to promote children's right to participate in care and protection proceedings in the Children's Court.⁵¹³ The new provisions place an obligation on the Children's Court to ensure that children can understand and participate in proceedings, and they outline the role of a child's legal representative in such proceedings.

Children's Court to ensure children can understand and participate in proceedings:
Section 95 of the Act states:

- (1) The Children's Court must take such measures as are reasonably practicable taking into account the age and developmental capacity of the child or young person to ensure that the child or young person in proceedings before it understands the proceedings, and in particular, that the child or young person understands
 - (a) the nature of any assertions made in the proceedings; and
 - (b) the legal implications of any such assertion.
- (2) Without limiting the generality of subsection (1), the Children's Court must, if requested by the child or young person or by some other person on behalf of the child or young person, explain to the child or young person:
 - (a) any aspect of the Children's Court procedure; and
 - (b) any decision or ruling made by the Children's Court...

⁵⁰⁹ The Law Society of NSW, *Representation Principles for Children's Lawyers*, 2nd ed, 2002.

⁵¹⁰ Seen and Heard report, *supra*, p 287-296.

⁵¹¹ *Ibid*, recommendation 85 on p 290.

⁵¹² *Non-Government Report on the Implementation of the United Nations Convention on the Rights of the Child in Australia* (2005), note 123, at p 10 (footnote 23).

⁵¹³ *Children and Young Persons (Care and Protection) Act 1998* (NSW). Compare with *Children (Care and Protection) Act 1987* (NSW), ss 65-66.

- (3) Without limiting the generality of subsection (1), the Children's Court must ensure that the child or young person has the fullest opportunity practicable to be heard, and to participate, in the proceedings.

Children's right to appear: In any proceedings with respect to a child or young person, the child or young person may appear in person or be legally represented or, by leave of the Court, be represented by an agent, and may examine and cross-examine witnesses.⁵¹⁴

Legal representation: If it appears to the Children's Court that the child or young person needs to be represented in any proceedings before it, the Children's Court may appoint a legal representative for the child or young person.⁵¹⁵ The role of the legal representative of a child or young person in proceedings before the Children's Court includes:

- (a) ensuring that the views of the child or young person are placed before the Children's Court, and
- (b) ensuring that all relevant evidence is adduced and, where necessary, tested, and
- (c) acting on the instructions of the child or young person or, if the child or young person is incapable of giving instructions:
 - (i) acting as a separate representative for the child or young person, or
 - (ii) acting on the instructions of the guardian ad litem.⁵¹⁶

In relation to (c), the Act states that there is a rebuttable presumption that a child who is 10 years or older (and a young person) is capable of giving proper instructions to his or her legal representative.⁵¹⁷ The Children's Court can declare that a child who is 10 years or older (or a young person) is not capable of giving instructions; or that a child who is less than 10 years of age is capable of giving instructions.⁵¹⁸ If a child is incapable of giving instructions, the legal representative is to act as a separate representative. The role of the separate representative includes:

- (a) to interview the child or young person after becoming the separate representative,
- (b) to explain to the child or young person the role of a separate representative,
- (c) to present direct evidence to the Children's Court about the child or young person and matters relevant to his or her safety, welfare and well-being,
- (d) to present evidence of the child's or young person's wishes (and in doing so the separate representative is not bound by the child's or young person's instructions),
- (e) to cross-examine the parties and their witnesses,
- (f) to make applications and submissions to the Children's Court for orders (whether final or interim) considered appropriate in the interests of the child or young person,
- (g) to lodge an appeal against an order of the Children's Court if considered appropriate.

⁵¹⁴ *Children and Young Persons (Care and Protection) Act 1998 (NSW)*, s 98.

⁵¹⁵ *Ibid*, s 99

⁵¹⁶ *Ibid*, s 99.

⁵¹⁷ *Ibid*, s 99(3).

⁵¹⁸ *Ibid*, s 99(4).

Guardians ad litem: The Children's Court may appoint a guardian *ad litem* for a child or young person if it is of the opinion that (a) there are special circumstances that warrant the appointment (eg special needs because of age, disability or illness); and (b) the child or young person will benefit from the appointment.⁵¹⁹ The functions of a guardian ad litem of a child or young person are to safeguard and represent the interests of the child or young person, and to instruct their legal representative.⁵²⁰

Recent developments in relation to family law proceedings

The current position

The current position under the *Family Law Act 1975* as to children's participation in family law proceedings is summarised very briefly here in order for the reader to understand the recent developments.

Best interests of child the paramount consideration: The Family Court may resolve disputes about parental responsibility (eg who the child is to live with, what contact the child is to have with a non-resident parent) by making a parenting order. The Act provides that "in deciding whether to make a...parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration."⁵²¹

Court to take child's views into account: In determining what is in the child's best interests, the Family Court must consider a number of matters including "any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes."⁵²² The Court may inform itself of the wishes expressed by a child by having regard to a report given to the court by a family or child counsellor or welfare officer; and/or by such other means as the court thinks appropriate.⁵²³ Children's views are generally conveyed to the court through expert witnesses, court counsellors' reports and through a child's separate representative.⁵²⁴ The *Family Court Rules* allow for a judge to interview a child but this power is rarely used.⁵²⁵ Note that the Act does not permit the court or any person to require the child to express his or her wishes.⁵²⁶

⁵¹⁹ *Ibid*, s 100(1), (2).

⁵²⁰ *Ibid*, s 100(3).

⁵²¹ *Family Law Act 1975*, s 65E

⁵²² *Ibid*, s 68F(2)(a).

⁵²³ *Ibid*, s 68G

⁵²⁴ *Seen and Heard* report, note 487, at p 399.

⁵²⁵ See *Family Law Rules 2004*, r 15.02; and see 'Family Court to consult children', *The Australian*, 12/2/05.

⁵²⁶ *Family Law Act 1975*, s 68H.

Separate representation: Under the Act, if the court thinks it appropriate, the court may order that a child be separately represented.⁵²⁷ The court may make an order for separate representation on its own initiative or on the application of the child, an organisation concerned with the welfare of children or any other person.⁵²⁸ The legislation does not outline the role of a separate representative. The role has evolved in practice and in accordance with judicial decision. The Family Law Council states:

The model that has developed for the representation of children... is that of best interests representation. While a part of the role of the child representative is to ensure the wishes of the child are presented to the court, the child representative must ultimately make submissions to assist the court to make a decision based on what is in the best interests of the child, rather than upon the instructions of the child, or in accordance with the wishes of the child.⁵²⁹

Children as parties: Note that children also may be heard in family law proceedings by instituting proceedings on their own behalf. The Act provides that a child may institute proceedings for a parenting order⁵³⁰ and that a child may institute any other type of proceeding unless a contrary intention appears in the Act.⁵³¹ In practice, children rarely bring proceedings on their own behalf.⁵³²

Family Court guidelines for child representatives (2003)

Given the previous lack of clear guidance as to the content of the role, in 2003 the Family Court of Australia issued *Guidelines for child representatives: Practice directions and guidelines*. The guidelines “deal with the role and conduct of the child representative, as well as highlighting issues that have been the subject of confusion or disparate practice in the past, such as the relationship with the child.” They make it clear that the best interest model is the basis upon which the child’s representative must act.⁵³³ However, they also recognise the child’s right to participate by providing that:

- The representative must meet the child unless there are exceptional circumstances or significant practical limitations;
- The child’s best interests will ordinarily be served by the representative enabling

⁵²⁷ Ibid, s 68L(2). Guidelines on when a child representative should be appointed are outlined in the decision of the Full Court of the Family Court in *Re K* (1994) FLC 92-461.

⁵²⁸ Ibid, s 68L(3).

⁵²⁹ Family Law Council, *Pathways for Children: A review of children’s representation in family law*, August 2004, at p 32.

⁵³⁰ Section 65C

⁵³¹ Section 69C; and see *Seen and Heard* report, note 487, at p 410-11.

⁵³² *Non-Government Report on the Implementation of the United Nations Convention on the Rights of the Child in Australia* (2005), note 123, at p 11.

⁵³³ Family Law Council, note 529, at p 40.

the child to be involved in the decision-making about the proceedings (but this does not mean that the child is the decision-maker). The representative should have regard to (a) the extent that the child wishes to be involved and (b) the extent that it is appropriate for the child to be involved having regard to the child's age, developmental level etc;

- The representative is to explain to the child his/her role, the court process, the other agencies that may be involved and the reason for their involvement;
- The representative is to seek to provide the child with the opportunity to express his or her wishes, free from the influence of others. A child who is unwilling to express a wish must not be pressured to do so. The representative must take into account that the weight to be given to the child's wishes will depend on a number of factors.

The Guidelines require representatives to take particular care in matters involving cross-cultural and religious issues and to consider specific issues that arise in relation to indigenous children and children who have a disability.

Family Law Council's recent review of child representation (2004)

Pursuant to a reference by the Commonwealth Attorney-General, the Family Law Council recently conducted a review of children's representation in family law proceedings. The Council's report in August 2004 "considered a range of matters relating to child representatives and concluded that while some reforms should be made, particularly in relation to the support provided to child representatives, there is no need for radical reform in this area."⁵³⁴ More specifically, the report states:

Council particularly considered two major issues...The first is whether or not child representatives should act as independent advocates for the best interests of the child or act on the instructions of the child in direct representation mode. The second is whether child representatives should only be appointed from the legal profession.

In both cases Council concluded that there were sound reasons, supported by experience, why there should be no major change to the current system. It should be emphasised that the Committee that undertook this work consisted of both lawyers and social scientists and that it was unanimous in its recommendations.

Council was strongly of the view, however, that the role of the child representative can best be carried out by a lawyer with the assistance of a child and family counsellor with both professionals acting as a team.

Council also believes that initiatives like the release in 2003 of the *Guidelines for child representatives: Practice directions and guidelines* by the Family Court of Australia will assist in overcoming at least some of the confusion about the role of the child representative that has been apparent in the past.

⁵³⁴ Ibid at p 5.

Council believes that more can be done to clarify the role. As a result, Council makes a range of recommendations designed to clarify and strengthen the role of the child representative.⁵³⁵

On 18 November 2004, the Commonwealth Attorney General issued a press release stating that the government was considering the report's recommendations.⁵³⁶

Recent proposals as to children's participation in family proceedings

In September 2004, the new Chief Justice of the Family Court of Australia said:

For many years the view has been taken that generally it is not in the best interests of children to be directly involved in the court process with their wishes usually obtained through Family Reports and/or a Child Representative.

This is not a universally held view however. There are many countries, particularly European countries, where the children have much more direct involvement, and it seems to be very much in their interest to do so...

The question of how children should best be involved in proceedings needs I think to be reappraised in Australia and we should genuinely be open to the possibility that we need to significantly change the way in which we now include children.⁵³⁷

Chief Justice Bryant said that the new 'Children's Cases Program' would enable the Court to trial ways of involving children. This pilot program is a new way of handling trials of cases involving disputes about children.⁵³⁸ It is "intended to reduce the adversarial nature of proceedings and treat disputes about children in a more child focused way..."⁵³⁹ Chief Justice Bryant said that a Steering Committee was examining different ways of involving children in this process including direct participation.⁵⁴⁰

On 12 February 2005, the *Australian* reported that, "children caught in the tug of war as marriages break down may be routinely interviewed by judges in revolutionary changes being considered to reform Australia's adversarial family court system."⁵⁴¹ The article states, "Judge Linda Descau of the Family Court told a conference yesterday that a steering committee was wrestling with new protocols to provide greater opportunity for

⁵³⁵ Ibid at p 5.

⁵³⁶ 'Reform puts focus on children's representation in family law matters', *Media Release*, 18/11/04.

⁵³⁷ The Honourable Diana Bryant, Opening address at Law Council of Australia, 11th National Family Law Conference, *Beyond the Horizon, State of Family Law and the Family Court of Australia 2004*, 27 September 2004, Gold Coast; at p 18.

⁵³⁸ Family Court of Australia, *The Children's Cases Program: A new way of working with parents and others in children's cases*, Factsheet, available on website: <http://www.familycourt.gov.au/>

⁵³⁹ Ibid.

⁵⁴⁰ The Honourable Diana Bryant, note 537, at p 28.

⁵⁴¹ 'Family Court to Consult Children', *The Australian*, 12/2/05

judges to involve children in the decision that would determine their future.”⁵⁴² Justice Descau referred to the fact that judges rarely interviewed children in Australia whereas in other countries interviewing children was common. Justice Descau said, “this is something we must address further in Australia.”⁵⁴³

Recommendations in 2005 non-government report

The *Non-government Report on the Implementation of the United Nations Convention on the Rights of the Child in Australia* recommended that the government implement the major recommendations of the 1997 federal inquiry’s report in relation to children’s representation in family law proceedings; and that there should be a rebuttable presumption in favour of the appointment of a child’s representative in all cases where parents are engaged in disputes about contact and residency.⁵⁴⁴

⁵⁴² Ibid.

⁵⁴³ Ibid.

⁵⁴⁴ *Non-government Report on the Implementation of the United Nations Convention on the Rights of the Child in Australia* (2005), note 123, at p 12 (Recommendations 11-13).

9. THE HUMAN RIGHTS OF CHILDREN IN NSW

Overview

This section begins with a brief summary of the UN Convention on the Rights of the Child, which outlines children's human rights. It then considers the legal effect of the Convention in Australia and discusses the obligation of the federal and state governments to implement the Convention. It then outlines the role of the UN Committee on the Rights of the Child in monitoring compliance. Next, this section refers to criticisms concerning Australia's implementation of the Convention. It focuses on criticisms of laws in NSW but also identifies policy issues relevant to NSW. The criticisms are contained in the UN Committee's 1997 Concluding Observations and in the 2005 national non-government report to the UN Committee.

The UN Convention on the Rights of the Child

The UN Convention on the Rights of the Child is the most widely ratified human rights treaty with all countries having ratified it except for the United States and Somalia. Australia ratified the Convention in December 1990.

Forty articles in the Convention cover children's civil and political rights as well as their economic, social and cultural rights. Four of the Convention rights are recognised as being general principles. They are:

- (1) States shall ensure the rights in the Convention to each child without discrimination of any kind.⁵⁴⁵
- (2) The best interests of the child shall be a primary consideration (by courts, legislators, administrative authorities) in all actions concerning children.⁵⁴⁶
- (3) Every child has the inherent right to life and State Parties must ensure to the maximum extent possible the survival and development of the child⁵⁴⁷
- (4) Children who are capable of forming their own views have the right to express those views freely in all matters affecting them, their views being given due weight in accordance with their age and maturity.⁵⁴⁸

⁵⁴⁵ Article 2.

⁵⁴⁶ Article 3.

⁵⁴⁷ Article 6.

⁵⁴⁸ Article 12 (discussed in the previous section of this paper).

The other Convention rights are briefly summarised in Table 9.1 below.⁵⁴⁹

TABLE 9.1

Civil rights & freedoms	<p>Freedom of expression.</p> <p>Freedom of conscience, thought and religion.</p> <p>Freedom of association and peaceful assembly.</p> <p>Right to privacy.</p> <p>Right not to be subjected to torture or other cruel punishment.</p>
Family environment & alternative care	<p>Right not to be separated from parents except if necessary for best interests.</p> <p>Right to care if deprived of family environment.</p> <p>Right to protection from abuse and neglect.</p> <p>Best interests of child to be paramount in relation to adoption.</p> <p>State to assist parents in child rearing and to develop services for care of children.</p> <p>State to take measures to secure child support.</p>
Basic health & welfare	<p>Right to enjoyment of highest attainable standard of health.</p> <p>Right to standard of living adequate for physical, mental and moral development.</p> <p>Rights of children with disabilities.</p> <p>Right to benefit from social security.</p>
Education, leisure & cultural activities	<p>Right to education.</p> <p>Education to be directed to development of child's personality, talents and mental and physical abilities to their fullest potential...</p> <p>School discipline to be administered in a manner consistent with human dignity and in conformity with the Convention.</p> <p>Right to rest and leisure, and recreational activities appropriate to age.</p>
Special protection measures	<p>Rights of children who come into conflict with the law.</p> <p>Right to be protected from economic exploitation and from drug use, sexual exploitation, abduction and trafficking.</p> <p>Rights of children in minority groups to enjoy own culture and use own language</p> <p>Rights of child refugees.</p>

⁵⁴⁹ The full text of the Convention can be accessed from the Department of Foreign Affairs website at: <http://www.austlii.edu.au/au/other/dfat/treaties/1991/4.html>

The legal effect of the Convention in Australia

General

While Australia has an obligation under international law to implement the Convention, for example by ensuring that its laws comply with the Convention (as discussed below), the Convention itself has not become part of Australian law. This is because no federal or state legislation has been enacted to incorporate the Convention into domestic law. Thus, breaches of the Convention cannot be directly pursued in Australian courts. The Commonwealth Government has stated that:

Australia does not propose to implement the Convention...by enacting the Convention as domestic law. The general approach taken in Australia to human rights and other conventions is to ensure that domestic legislation, policies and practice comply with the convention prior to ratification. In the case of the Convention on the Rights of the Child a complaints mechanism also exists pursuant to the Human Rights and Equal Opportunity Commission Act 1986.⁵⁵⁰

Under the *Human Rights and Equal Opportunity Commission Act*, complaints can be made to the Commission about acts or practices of the Commonwealth that are in breach of the Convention. The Commission cannot make any enforceable orders. Its powers are limited to inquiring into a complaint, attempting conciliation and, if appropriate, making recommendations.⁵⁵¹ The Commission may report the results of an inquiry to the Minister⁵⁵², and the Minister must table the report in Parliament.⁵⁵³

Current proposals to have a Bill of Rights

It is relevant to note here that the Australian Capital Territory adopted a legislative Bill of Rights in 2004⁵⁵⁴ and there is a possibility that this will lead to similar developments elsewhere in Australia. If a Bill of Rights is eventually enacted in NSW or at the federal level, it may recognise the rights in the Convention (or at least its civil and political rights such as the rights to freedom of expression and privacy).

In April 2005, the Victorian Attorney-General raised the possibility of Victoria following the ACT and has set up a committee “to consult with the community and report on how human rights and responsibilities could best be protected and promoted in Victoria.”⁵⁵⁵ The Committee will report on its findings in November 2005. In NSW,

⁵⁵⁰ Australian Government, *Australia’s First Report under the Convention on the Rights of the Child*, Commonwealth of Australia, 1995, para 6.

⁵⁵¹ See *Human Rights and Equal Opportunity Commission Act*, s 29(2)(b), (c).

⁵⁵² *Ibid*, s 11(1)(f)(ii), s 29(2)(d).

⁵⁵³ *Ibid*, s 46. Note also that under s 11(1)(k), HREOC can, on its own initiative, report to the Minister as to any action that needs to be taken by Australia in order to comply with the provisions of the Convention.

⁵⁵⁴ *Human Rights Act 2004 (ACT)*.

⁵⁵⁵ See Office of the Attorney-General (Victoria), ‘Hulls appoints panel to lead discussion on

an earlier proposal to establish a Bill of Rights was rejected by the Legislative Council's Law and Justice Committee in October 2001.⁵⁵⁶ However, in January 2005, the NSW Law Society published a discussion paper entitled *A Bill of Rights for New South Wales and Australia*, which again presents the case for a Bill of Rights.

Bills of Rights can take various forms. The *Human Rights Act 2004* in the ACT sets out a number of civil and political rights. These rights are not part of the law in the ACT. However, the Act provides that, "in working out the meaning of a territory law, an interpretation that is consistent with [these] human rights is as far as possible to be preferred".⁵⁵⁷ This rule applies to all public officials, including the judiciary, statutory office-holders and administrative decision-makers. In addition, the legislation provides that the Supreme Court can make a declaration of incompatibility if, in proceedings before it, it finds that a territory law is inconsistent with the rights recognised in the Act.⁵⁵⁸ This declaration does not affect the validity of the law but the Attorney-General must table the declaration in Parliament and table a response within six months.⁵⁵⁹

Influence on common law and use to resolve ambiguity in legislation

Aside from the adoption of a Bill of Rights, the courts have recognised that international treaties to which Australia is a party (such as the Convention on the Rights of the Child) can provide a legitimate influence on the development of the common law and can be used to resolve an ambiguity that arises in the meaning of domestic legislation.⁵⁶⁰ Note that a number of judicial decisions in Australia have cited the Convention.⁵⁶¹

human rights', *Media Release*, 17/4/05. See also 'Move on Human Rights Act for State', *The Age*, 18/4/05.

⁵⁵⁶ NSW Parliament, Legislative Council, Standing Committee on Law and Justice, *A NSW Bill of Rights*, October 2001.

⁵⁵⁷ *Human Rights Act 2004 (ACT)*, s 30.

⁵⁵⁸ *Ibid*, s 32.

⁵⁵⁹ *Ibid*, s 33.

⁵⁶⁰ See Groves M, "International Law and Australian Prisoners", (2001) 24(1) *University of New South Wales Law Journal* 17 at 50. For a more recent statement on the influence of international instruments on the common law and statutory interpretation See *Re Kavanagh's Application* [2003] HCA 76 at [11]-[13], [23] per Kirby J. See also *Coleman v Power* [2004] HCA 39. Note that Gleeson CJ doubted whether international instruments can be used in the interpretation of domestic legislation that was enacted *before* Australia ratified the relevant instrument.

⁵⁶¹ As at 1998, almost 100 decisions in Australia cited the Convention, which was the highest number out of all countries: see Todres J, 'Emerging Limitations on the Rights of the Child and its Early Case Law', (1998) 30 *Columbia Human Rights Law Review* 159 at p 193, footnote 48.

Do public servants have to take the Convention into account when making decisions?

In 1995, a majority of the High Court held, in *Minister of State for Immigration and Ethnic Affairs v Teoh*⁵⁶², that ratification of the Convention gave rise to a legitimate expectation that administrative decision makers would act in accordance with it— unless there were statutory or executive indications to the contrary. In that case, the Minister’s delegate rejected an application for a permanent entry permit without treating the best interests of the applicants’ children as a primary consideration, contrary to the general principle in Article 3 of the Convention. The High Court held that while the delegate was not required to comply with Article 3 (since it was not part of domestic law), if the delegate proposed to act inconsistently with Article 3, procedural fairness required him to give the applicant notice and an opportunity of presenting a case against taking that course. It is not clear whether this principle applies to state public servants.⁵⁶³

On 10 May 1995 the Minister for Foreign Affairs and the Commonwealth Attorney-General issued a Joint Statement for the purpose of making an “executive indication to the contrary”; i.e that the ratification of a treaty by Australia does not create any legitimate expectations as to the conduct of the government and its bureaucracy.⁵⁶⁴ On 25 February 1997, another joint statement was issued to similar effect, which replaced the 1995 statement.⁵⁶⁵ This joint statement was expressed so as to apply to federal and state administrative decisions. The federal government has also introduced legislation on three occasions to negate the *Teoh* decision but these Bills were not passed.⁵⁶⁶ The UN Committee has expressed concern about the overriding of the *Teoh* decision.⁵⁶⁷

Note that in the recent case of *Re Minister for Immigration and Multicultural Affairs: Ex parte Lam*⁵⁶⁸, four members of the High Court questioned the validity of the *Teoh* decision.⁵⁶⁹ In its 2003 report to the UN Committee on the Rights of the Child, the Australian Government states that four members of the High Court indicated their “dissatisfaction” with the *Teoh* decision and that the Court would be likely to overturn

⁵⁶² (1995) 183 CLR 273

⁵⁶³ See for example, Parliament of Victoria, Federal-State Relations Committee, *Report on International Treaty Making and the Role of States*, 14 October 1997.

⁵⁶⁴ *Ibid.*

⁵⁶⁵ *Ibid.*

⁵⁶⁶ See *Administrative Decisions (Effect of International Instruments) Bill 1995*; *Administrative Decisions (Effect of International Instruments) Bill 1997*; *Administrative Decisions (Effect of International Instruments) Bill 1999*.

⁵⁶⁷ UN Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Australia*, 10 October 1997, at para 7.

⁵⁶⁸ (2003) 195 ALR 502

⁵⁶⁹ See McHugh and Gummow JJ at p 526-27; Hayne J at 531, and Callinan J at p 538-39.

the *Teoh* decision if it was relied on in a future case.⁵⁷⁰

Australia's obligation to implement the Convention

Australia's ratification of the Convention means that it has an obligation under international law to implement the Convention. This includes a duty to ensure that the States and Territories also implement the Convention.⁵⁷¹ Article 4 of the Convention requires Australia to "undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the...Convention." With respect to the economic, social and cultural rights in the Convention, Art 4 requires Australia to "undertake such measures to the maximum extent of [its] available resources and, where needed, within the framework of international co-operation."

In 2003, the UN Committee issued a general comment on *General Measures of Implementation of the Convention on the Rights of the Child*.⁵⁷² In relation to legislative measures to implement the Convention, the Committee said:

The Committee believes a comprehensive review of all domestic legislation and related administrative guidance to ensure full compliance with the Convention is an obligation. Its experience in examining not only initial but now second and third periodic reports under the Convention suggests that the review process at the national level has, in most cases, been started, but needs to be more rigorous...The review needs to be continuous rather than one-off, reviewing proposed as well as existing legislation. And while it is important that this review process should be built into the machinery of all relevant government departments, it is also advantageous to have independent review by, for example, parliamentary committees and hearings, national human rights institutions, NGOs, academics, affected children and young people and others.⁵⁷³

The Committee also refers to:

...the importance of ensuring that domestic law reflects the identified *general principles* in the Convention (arts 2, 3, 6 and 12). The Committee welcomes the development of consolidated children's rights statutes, which can highlight and emphasize the Convention's principles. But the Committee emphasizes that it is crucial in addition that all relevant "sectoral" laws (on education, health, justice and so on) reflect consistently the principles and standards of the Convention.⁵⁷⁴

⁵⁷⁰ Australian Government, *Australia's Combined Second and Third Report under the Convention on the Rights of the Child*, March 2003, at p 9, para 40.

⁵⁷¹ UN Committee on the Rights of the Child, *General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child (arts 4, 42 and 44, para. 6)*, 27 November 2003, at p 10, paras 40-41.

⁵⁷² *Ibid.*

⁵⁷³ *Ibid* at p 6, para 18.

⁵⁷⁴ *Ibid* at p 7, para 22. (emphasis added).

The UN Committee on the Rights of the Child

The Committee's role

The UN Committee on the Rights of the Child is responsible for monitoring compliance with the Convention.⁵⁷⁵ The Convention does not allow for inter-State or individual complaints to be made to the Committee about breaches of Convention rights.⁵⁷⁶ However, countries that are parties to the Convention are required to submit periodic reports to the Committee “on the measures they have adopted which give effect to the rights recognized...and on the progress made on the enjoyment of those rights.”⁵⁷⁷ Parties were required to submit a report within two years of ratification and are required to submit a report every five years thereafter.⁵⁷⁸ The Committee may request additional information from the countries.⁵⁷⁹ Non-government organisations may also make a report to the Committee.⁵⁸⁰ Having considered a country's report, the Committee may make non-binding “suggestions and general recommendations”⁵⁸¹, which are transmitted to the State Party and to the UN General Assembly.⁵⁸²

Reports to the Committee on Australia's compliance

Australia submitted its first report to the Committee in 1995. The report was given preliminary consideration at the Committee's Pre-Sessional Working Group meeting in January 1997. The Committee as a whole formally considered the report on 24-25 September 1997. The Committee adopted its Concluding Observations on Australia's first report on 10 October 1997. Australia has submitted to the Committee its combined second and third report, dated March 2003.⁵⁸³ The Committee is scheduled to consider that report during the 40th session in September 2005. A national non-government organisation report will be presented to the Committee in June 2005.

⁵⁷⁵ The Committee is composed of 10 experts with recognised competence in the field of children's welfare and development. The Committee meets three times a year in Geneva.

⁵⁷⁶ There is a complaints mechanism for the International Covenant of Civil and Political Rights but not for the International Covenant on Economic, Social and Cultural Rights.

⁵⁷⁷ *UN Convention on the Rights of the Child*, Article 44(1).

⁵⁷⁸ *Ibid*, Article 44(1).

⁵⁷⁹ *Ibid*, Article 44(4).

⁵⁸⁰ See Article 45.

⁵⁸¹ Article 45(d).

⁵⁸² Article 45(d).

⁵⁸³ Australia's second report was due in January 1998. However the Committee agreed that Australia should submit a combined second and third report at the time when the third report fell due. This was having regard to the fact that the Committee had considered Australia's first report (1995) along with updated information in September 1997.

UN Committee's criticisms in relation to Australia's first report

Overview

Outlined below are the Committee's concerns in relation to the following legislative issues arising out of Australia's first report to the Committee:

- Minimum age of criminal responsibility;
- Minimum age of employment and maximum working hours;
- Physical punishment of children;
- Laws that impact on freedom of assembly.

To enable a proper understanding of these concerns, a summary is presented below of the relevant laws in NSW in relation to each issue. The Federal Government's responses in its second report to the Committee in March 2003 are also extracted. Various other concerns of the Committee are listed following the discussion of the above issues.

Minimum age of criminal responsibility

The law in NSW

In NSW the statutory minimum age of criminal responsibility is 10 years, meaning that no child under that age can be guilty of an offence.⁵⁸⁴ There is also a rebuttable presumption at common law (known as *doli incapax*) that children below the age of 14 years are incapable of knowing that their criminal act was wrong.⁵⁸⁵ To rebut this presumption, the prosecution must prove that the child knew the criminal act was seriously wrong, as distinct from an act of mere naughtiness or mischief.⁵⁸⁶

Committee's concerns and Federal Government's response

The Committee stated that it was "deeply concerned that the minimum age of criminal responsibility is generally set at the very low level of 7-10 years, depending upon the state."⁵⁸⁷ The Committee acknowledged "the fact that the federal government [was] planning to harmonize the age of criminal liability and raise it in all the states to 10

⁵⁸⁴ *Children (Criminal Proceedings) Act 1987 (NSW)*, s 5. Note that the age of criminal responsibility under the common law was 7 years old. In NSW, the age of criminal responsibility was raised to 8 years old in the 1930s and then to 10 years old in the mid 1970s. This historical information was taken from Cunneen C and White R, *Juvenile Justice: Youth and Crime in Australia*, Oxford University Press, 2002, at p 267.

⁵⁸⁵ Urbas G, *The Age of Criminal Responsibility*, Australian Institute of Criminology, *Trends and Issues in Criminal Justice*, No 181, November 2000, p 1.

⁵⁸⁶ *R v CRH*, 18 December 1996, NSWCCA; cited in NSW Attorney General's Department, *A Review of the Law on the Age of Criminal Responsibility of Children*, 2000.

⁵⁸⁷ UN Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Australia*, 10 October 1997, at para 11.

years.”⁵⁸⁸ However, the Committee believed that this age was still too low.”⁵⁸⁹ Note that the Committee has also criticised other jurisdictions in which the minimum age for criminal responsibility is 12 years or less.⁵⁹⁰ The Federal Government’s response in March 2003 states that, “recent changes to State, Territory and federal laws have resulted in the age of criminal responsibility to 10 years of age in all jurisdictions.”⁵⁹¹ The response also refers to the common law presumption of *doli incapax*.

Subsequent developments in NSW

In 2000, the NSW Attorney General’s Department conducted a review of the law on the criminal responsibility of children. It released a Discussion Paper in January 2000.⁵⁹² In the introduction to that paper, the Attorney General’s Department noted that the *doli incapax* presumption had “been controversial in recent years both in Australia and the United Kingdom”.⁵⁹³ The paper referred in particular to a case in NSW in 1999 in which a Supreme Court jury acquitted a 10 year-old boy of manslaughter. The boy had thrown a younger boy into a river and the younger boy had drowned.

Issues raised in the Discussion Paper included whether the *doli incapax* principle should be retained or modified. Modification could include lowering the age or restricting the offences to which it applies, shifting the burden of proof to the accused, or lowering the standard of proof for rebutting the presumption to the balance of probabilities. The NSW Attorney-General’s Department completed the review in February 2001 but the report was not released to the public. According to an article in the *Sydney Morning Herald* on 12 February 2001, the report of review recommended maintaining the current presumption of *doli incapax* for children under the age of 14.⁵⁹⁴ The NSW Government has not made any changes to the law in this area since the review.

On 31 January 2005, the *Sydney Morning Herald* reported a case of a nine-year old boy being released without charge after being arrested during an operation targeting car theft in Sydney’s West.⁵⁹⁵ Premier Carr was asked whether the laws would be changed to allow children under the age of 10 to be charged with offences. Premier Carr said that

⁵⁸⁸ Ibid at para 29.

⁵⁸⁹ Ibid, para 29.

⁵⁹⁰ See Urbas, note 585, at p 2

⁵⁹¹ *Australia’s Combined Second and Third Report*, note 570, at p 16.

⁵⁹² NSW Attorney-General’s Department, note 586.

⁵⁹³ Ibid.

⁵⁹⁴ ‘Children still presumed to be innocent – at least until age 14’, *Sydney Morning Herald*, 12/2/01, extracted in Healey J, *Young Offenders*, The Spinney Press, 2003, at p 8. See also the two articles in that publication on p 6-8.

⁵⁹⁵ ‘Locking up 9-year-old thief no answer: Carr’, *Sydney Morning Herald*, 31/1/05.

lowering the minimum age of responsibility was not the answer.⁵⁹⁶

Minimum age of employment and maximum working hours

The law in NSW

(1) General

There is no minimum age for employment of children in NSW. However, school attendance is compulsory for all children of or above the age of 6 and below the age of 15.⁵⁹⁷ In addition, the *Children and Young Persons (Care and Protection) Act 1998* prohibits the employment of a child under the age of 15 years in any employment in the course of which the child's physical or emotional well-being is put at risk.⁵⁹⁸ Various other legislative provisions regulate child employment, as outlined below.

(2) Employment of under 15s in entertainment, door-to-door sales etc

The Act mentioned above also prohibits the employment of children under the age of 15 years in certain types of employment unless the employer has obtained an authority from the Minister. The relevant types of employment are:

- Taking part in an entertainment or exhibition;
- Taking part in a performance which is recorded for use in a subsequent entertainment or exhibition;
- Offering anything for sale from door-to-door;
- Participation in still photographic sessions.⁵⁹⁹

Exceptions: There are some exceptions.⁶⁰⁰ For example, an employer is not required to hold an authority to employ a child over the age of 10 if the employment is outside school hours and for no more than 10 hours per week; and if the employer complies with the Code of Practice (see below).⁶⁰¹ Additionally, an employer is not required to hold an authority to employ a child in relation to a fundraising appeal.

Applications: An authority may only be granted if the Minister is satisfied that the applicant has the capacity to comply, and will comply, with the laws and conditions on

⁵⁹⁶ Ibid and see also 'Carr against law change', *Sydney Morning Herald*, 1/2/05.

⁵⁹⁷ *Education Act 1990 (NSW)*, s 23.

⁵⁹⁸ *Children and Young Persons Care and Protection Act 1998 (NSW)*, s 222.

⁵⁹⁹ Ibid, s 223.

⁶⁰⁰ Ibid, s 224.

⁶⁰¹ *Children and Young Persons (Care and Protection-Child Employment) Regulations 2005 (NSW)*, cl. 7

which the authority is granted.⁶⁰² The Children's Guardian is responsible for inquiring into applications for authorities and reporting to the Minister.⁶⁰³

Conditions: Authorities granted by the Minister are subject to a number of conditions, including that the employer will comply with the Code of Practice.⁶⁰⁴ The Code regulates conditions and hours of employment. An amended Code of Practice came into effect on 1 April 2005.⁶⁰⁵ Clause 4 of the amended Code provides that an employer must not employ a child for more than 4 hours on any day on which the child is required to attend school; that an employer must not employ a child for more than one shift on any one day; and that an employer must ensure that each child is given a 10 minute rest break every hour and a 1 hour rest break every 4 hours.

(3) Employment in certain types of dangerous work: OH&S laws

The *Occupational Health & Safety Regulations 2000* limits the employment of children in certain types of dangerous work. A person cannot engage or be employed in certain types of work without holding a Certificate of Competency issued by WorkCover.

One category of work under the regulations is formwork and the use of explosive power tools.⁶⁰⁶ Persons under the age of 18 years are not eligible to apply for a certificate of competency to do work in this category.⁶⁰⁷ A second category of work includes scaffolding, dogging, rigging, operation and use of cranes, operation and use of boilers, application of pesticides etc.⁶⁰⁸ WorkCover *may* refuse to issue to a certificate of competency to do such work to persons under 18 years.⁶⁰⁹ Supervised trainees do not require a competency certificate for either category of work.⁶¹⁰

Note that the *Occupational Health & Safety Act 2000* repealed provisions in the former *Factories, Shops and Industries Act 1962* which prohibited the employment of children under the age of 14 years in a factory; and which also provided that children aged between 14 and 16 years could only be employed in a factory if the Minister granted special permission and the occupier of the factory had a doctor's certificate confirming

⁶⁰² *Children and Young Persons Care and Protection Act 1998 (NSW)*, sch 2, cl. 2.

⁶⁰³ *Ibid*, schedule 2, clause 3.

⁶⁰⁴ *Children and Young Persons (Care and Protection-Child Employment) Regulations 2005*

⁶⁰⁵ *Ibid*.

⁶⁰⁶ *Occupational Health and Safety Regulations 2000*, cl. 301,299.

⁶⁰⁷ *Ibid*, cl. 308(1).

⁶⁰⁸ *Ibid*, cl. 266.

⁶⁰⁹ *Ibid*, cl 290(2).

⁶¹⁰ *Ibid*, cl. 271, 302.

that the child was fit for the work.⁶¹¹ The repealed Act also contained provisions concerning young people working with dangerous machinery.

(3) Other laws

Other laws regulate child employment. One example is the *Dangerous Goods Regulations 1999*, pursuant to which children under the age of 16 cannot be employed in a licensed depot that holds dangerous goods⁶¹²; and children under the age of 18 cannot be employed as a supervisor in a self-service petrol station.⁶¹³ Another example is the *Coal Mines (Underground Regulation) 1999*, which provides that a person under 16 cannot be employed underground in a coal mine.⁶¹⁴

Committee's concerns and the Federal Government's response

The Committee recommended that, "specific minimum age(s) be set for employment of children at all levels of government."⁶¹⁵ The Committee also suggested there was a need for clear and consistent regulations in all the states on the maximum allowed work hours for working children who are above the minimum employment age.⁶¹⁶ In addition, the Committee encouraged Australia "to consider ratifying ILO Convention No. 138 concerning minimum age for employment."⁶¹⁷

The Federal Government's response to the Committee in March 2003 states (in part):

Australian governments have not found it necessary to legislate for a general minimum age for employment...As current law and practice is sufficient to protect children from harmful or exploitative forms of child labour, there is no perceived need for additional legislation.

...Most Australian children who work do so at weekends and during school holidays in order to supplement allowances from parents, or to help pay their education expenses. Such activity might also be reasonably expected to help them acquire important life skills. Furthermore, Australian children benefit from a highly developed education system, and a sophisticated system of

⁶¹¹ *Factories, Shops and Industries Act 1962 (NSW) (repealed)*, s 49.

⁶¹² *Dangerous Goods Regulations 1999*, cl 90.

⁶¹³ *Ibid.*, cl. 138(5)(a).

⁶¹⁴ *Coal Mines (Underground Regulation) 1999*, cl. 7A

⁶¹⁵ Concluding Observations, note 587, para 29.

⁶¹⁶ *Ibid.*

⁶¹⁷ *Ibid.*, para 29. See also para 11. ILO Convention No.138 requires State parties to specify a minimum age of employment not less than the age of completion of compulsory schooling and in any case not less than 15 years (Art 2). It also provides that the "minimum age for admission to any type of employment or work which by its nature or the circumstances in which it is carried out is likely to jeopardise the health, safety or morals of young persons shall not be less than 18 years" (Art 3). State parties may permit the employment or work of persons 13 to 15 years of age on light work which is not likely to be harmful to their health or development and not such as to prejudice their attendance at school (Art 7).

industrial regulation which provides a safety net of minimum employment conditions, including health and safety standards that are more than adequate.

While Australia has not ratified ILO Convention No 138, Australia has ratified a number of related ILO minimum age Conventions...

Furthermore, Australia's legislation providing for compulsory education, minimum ages for employment in selected occupations, child welfare and occupational health and safety demonstrates Australia's support for the principles of ILO Convention 138. These legislative provisions are supported by an Australian culture characterised by protective attitudes towards children, and news and media which are strongly predisposed to reporting instances of exploitation of children. This combination of laws and cultural factors prevents the admission of children to harmful employment...⁶¹⁸

The 2005 *Non-government Report on the Implementation of the United Nations Convention on the Rights of the Child in Australia* expresses concern about the absence in some States of laws providing for a general minimum age for admission to employment and laws which regulate the hours and conditions of employment for children.⁶¹⁹ The report also refers to other child-employment issues and recommends that "a specialised body responsible for the specific issue of children and young people at work (either nationally or in each State and Territory) be established."⁶²⁰

Recent law reforms in Victoria and Queensland⁶²¹

Victoria: Following a review of child employment in Victoria, new laws were enacted, which came into effect in June 2004. The *Child Employment Act 2003* provides:⁶²²

- *Minimum age:* The minimum age of employment of a child permitted by the Act is generally 13 years. This does not apply to employment in a family business or in the entertainment industry. Note also that a minimum age of 11 years applies to delivering newspapers and certain other deliveries.
- *Permit system:* Children under the age of 15 years are required to have a permit issued by the Child Employment Officer in order to work. This requirement has existed since 1970. Children employed in family

⁶¹⁸ *Australia's Combined Second and Third Report*, note 570, at p 95.

⁶¹⁹ *Non-government Report on the Implementation of the United Nations Convention on the Rights of the Child in Australia* (2005), note 123, at p 64.

⁶²⁰ *Ibid* at p 64.

⁶²¹ As to laws in other states see Queensland Commission for Children and Young People, *Queensland Review of Child Labour, Summary Findings*, April 2005, at p 31.

⁶²² This summary is based on information on the website of Industrial Relations Victoria: see <http://www.ir.vic.gov.au> (section entitled "employing children").

businesses are exempt. Parents are responsible for applying for a permit but the employer must also sign the application. The school principal must also sign if the work is to be performed during the school term. A permit cannot be issued without a satisfactory criminal record check being carried out in relation to a person who is to employ and/or supervise the child. Permits will be subject to conditions. A permit is issued for up to 12 months.

- *Prohibited work:* Children under the age of 15 years are prohibited from certain types of work including door-to-door selling; employment on a fishing boat other than in inland waters, employment on a building site at any time before the buildings on the site are at lock-up stage; and any other type of employment prohibited by the Governor in Council.
- *Light work only:* Children under the age of 15 years may only be employed to perform light work. Light work is defined as work that is not likely to be harmful to a child's health or safety, moral or material welfare or development; and is not such as to prejudice the child's attendance at school or his/her capacity to benefit from instruction.
- *General conditions:* A child must not be employed during school hours on a school day unless an exemption from school has been granted. The maximum number of hours a child can work – except in family businesses - are (a) during school term: a maximum of 3 hours per day and 12 hours per week; (b) outside school term: a maximum of 6 hours per day and 30 hours per week. Children can only be employed between 6am and 9pm.
- *Entertainment industry:* A mandatory code of practice for the employment of children in the entertainment industry, which will set down regulations specific to that industry, will be developed within 12 months.
- *Child Employment Officers:* The Act provides for the appointment of Child Employment Officers whose role is to provide information about the Act to employers, children, parents, schools etc and to investigate applications for permits and ensure compliance with the Act and permit conditions.

Queensland: Following a review of child labour by the Queensland Commission for Children and Young People, on 2 May 2005 the Queensland Government announced that it would introduce that state's first laws to specifically protect children from workplace exploitation.⁶²³ Features of the legislation (some of which reflect the recently introduced provisions in Victoria) will include:

- Broad safeguards for children in both paid and unpaid work;
- A general minimum working age of 13, reduced to 11 for some forms of supervised employment such as deliveries and charitable collections;

⁶²³ Premier Beattie, 'New laws will give child workers greater protection', *Media Release*, 2/5/05.

- The minimum age will not apply to work in a family business or in entertainment other than adult entertainment, but a code of practice will be developed to cover these areas;
- A list of prohibited forms of employment for children under the age of 18. Examples will include topless waitressing, topless modelling and other forms of adult entertainment;
- A new offence for employing a child under the age of 18 in work which is likely to harm the child's health, safety or wellbeing. Details will be finalised during drafting
- "Light work" provisions to limit children's hours of work during school terms so that their education does not suffer as a result of part-time employment. Details will be finalised during drafting;
- Clarification of employers' obligations to child employees. This will include requirements: to keep detailed records of child employees available for inspection; to provide induction packages and age appropriate training including workplace health and safety training; and to make all reasonable endeavours to ensure a parent or responsible adult is kept informed if a child is injured or becomes ill at work; and
- Stronger protection to enable people aged under 18 years who do not have easy access to a parent or guardian to autonomously enforce their industrial rights. This will be important for teenagers who live independently of their parents.⁶²⁴

Physical punishment of children

Committee's concerns and Federal Government's response

The Committee expressed its concern "about the lack of prohibition in local legislation of the use of corporal punishment, however light, in schools, at home and in institutions; in the view of the Committee this contravenes the principles and provisions of the Convention, in particular articles 3, 5, 6, 19, 28(2), 37(a), and 39."⁶²⁵ The Committee suggested that Australia "take all appropriate measures, including of a legislative nature, to prohibit corporal punishment in private schools and at home"; and that "awareness-raising campaigns be conducted to ensure that alternative forms of discipline are administered...in conformity with the Convention."⁶²⁶

In its March 2003 response, the Federal Government states that the issue of physical punishment in the home was considered by the Model Code Officers Committee, which reported in September 1998. The Government states:

The Committee considered Articles 19(1), 28(2) and 37 of the Convention. The Committee was of the opinion that "at the present, it goes too far to criminalise a corrective smacking by a parent or guardian, so long as the force used is reasonable." The Committee did recommend that a legislative standard of reasonableness be established and that the use of objects in such a way as to cause or risk causing injury be prohibited.

⁶²⁴ Ibid

⁶²⁵ Concluding Observations, note 587, at para 15.

⁶²⁶ Ibid at para 26.

The model provisions developed by the Committee have been included in legislation enacted in NSW...

Corporal punishment in Australian government schools and some non-government schools has been prohibited in the Australian Capital Territory, New South Wales, South Australia, Tasmania, Victoria and Western Australia.

This goes some way to addressing the concern of the Committee...

The law in NSW

At school: Corporal punishment is no longer permitted in any NSW school. The *Education Act* was amended in 1995 to ban corporal punishment in state schools and provide for it to be phased out of private schools by the end of 1996.⁶²⁷

At home: In 2001, NSW passed laws to clarify and limit the defence of "lawful correction".⁶²⁸ The new laws, which came into effect in December 2002, provide that physical punishment of a child by a parent or carer is only lawful if the application of physical force is reasonable having regard to the age, health, and maturity of the child, and the nature of the alleged misbehaviour. Physical force is not reasonable if applied to any part of the child's head or neck; or to any other part of the child's body in such a way as to be likely to cause harm that lasts for more than a short period.⁶²⁹ In September 2003, the first prosecution under these new laws was reported.⁶³⁰ The parent was "sentenced to a 12 months good behaviour bond for hitting his child with a belt that sustained bruising on the child's thigh and buttocks."⁶³¹

Do these changes bring NSW into compliance with the Convention?

The new laws in NSW on physical punishment of children in the home are unlikely to satisfy the UN Committee. In its October 2002 Concluding Observations on the United Kingdom's compliance with the Convention, the Committee stated:

...the Committee deeply regrets that the State party persists in retaining the defence of "reasonable chastisement" and has taken no significant action towards prohibiting all corporal punishment of children in the family.

The Committee is of the opinion that the Government's proposals to limit rather than to remove

⁶²⁷ Law Handbook, note 16, at p 193; and see *Education Reform Amendment (School Discipline) Act 1995*.

⁶²⁸ *Crimes Amendment (Child Protection – Physical Mistreatment) Act 2001*

⁶²⁹ Note that the *Crimes Amendment (Child Protection- Excessive Punishment) Bill 2000* would have also prohibited the application of force by the use of a stick, belt or other object (other than the open hand or other than in a manner that could reasonably be considered trivial or negligible in all the circumstances).

⁶³⁰ 'Corporal Punishment update in NSW', (2003) 35 *Australian Children's Rights News*, p 10.

⁶³¹ *Ibid*

the “reasonable chastisement” defence do not comply with the principles and provisions of the Convention...particularly since they constitute a serious violation of the dignity of the child...Moreover they suggest that some forms of corporal punishment are acceptable, thereby undermining educational measures to promote positive and non-violent discipline.⁶³²

Countries where corporal punishment has been banned

Legislation banning physical punishment by parents is in force in a number of countries including Austria, Croatia, Denmark, Germany, Latvia, Norway and Sweden.⁶³³ Also note that in 1996, Italy’s Supreme Court declared all physical punishment to be unlawful and in 2000, Israel’s Supreme Court did the same.⁶³⁴

Laws that impact on freedom of assembly

Committee’s concerns and the Federal Government’s response

The Committee stated that it was “concerned by local legislation that allows the local police to remove children and young people congregating, which is an infringement on children’s civil rights, including the right to assembly.”⁶³⁵

In its second report to the UN Committee in 2003, the Federal Government noted that Article 15(2) of the Convention permits restrictions on the right of peaceful assembly for certain purposes. It then stated that, “restrictions placed on children’s right to associate freely and peacefully assemble are designed to ensure public safety and order, including the safety of children as well as to prevent children from committing crimes and thereby becoming involved in the criminal justice system.”⁶³⁶

Laws in NSW

(1) Laws allowing police to remove children from public places in some regions

The *Children (Parental Responsibility) Act 1994* (superseded by 1997 laws) allowed police to remove a young person under the age of 16 years from a public place if they:

- (a) Reasonably believed that the young person was not supervised by a responsible adult; and
- (b) They considered that to take that action would reduce the likelihood of a

⁶³² UN Committee on the Rights of the Child, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, 9 October 2002, p 9, paras 36-37. See also *Concluding Observations: Canada*, 27 October 2003, p 7, para 32.

⁶³³ Fortin J, note 7, p 284, footnote 74.

⁶³⁴ Ibid.

⁶³⁵ Concluding Observations, note 587, at para 16.

⁶³⁶ *Australia’s Combined Second and Third Report*, note 570, at p 30, para 155.

crime being committed or of the young person being exposed to some risk.

The Fahey Government introduced these provisions as a strategy to address juvenile crime. The Government determined that these powers would only be made available in two areas, the Gosford and Orange police districts. The Act provided for a review to be undertaken after one year of operation. In 1995, the Government established an interdepartmental committee to evaluate the Act. In February 1997, the Committee delivered a critical evaluation of the legislation and recommended that the Act be repealed. Despite this recommendation, in 1997 an amended version of this legislation was passed, which came into force in December 1997.

The main amendments to these provisions under the 1997 Act were (1) that the police powers to remove children would only apply in 'declared operational areas'; (2) that children could be taken to a number of preferred places if their parents could not be located or if they could not safely be left at home (this was limited to one particular place under the 1994 Act); and (3) that the circumstances in which children could be removed were clarified.⁶³⁷ On introducing the 1997 laws, the Minister for Police, Hon Paul Whelan MP made the following comment about the third change:

The general wording of the power contained in the 1994 Act has been strongly criticised. The Government is concerned that powers provided by the Act are not applied so as to unfairly discriminate against young people, and the scope of the police powers under the bill has been clarified so as to provide proper guidance to police in the exercise of their powers and to ensure the child welfare objectives of the part are realised.⁶³⁸

The *Children (Protection and Parental Responsibility) Act 1997* allows police in 'declared operational areas' to remove young persons under the age of 16 years from a public place if they reasonably believe that he or she is:

- (a) Not supervised by a responsible adult; and is
- (b) In danger of being physically harmed; or is being exposed or is likely to be exposed to behaviour that could harm the young person physically or psychologically; or is about to commit an offence.⁶³⁹

Declared operational areas: The power to remove children from public places only applies in relation to declared operational areas. Councils can apply to the Attorney-General to have an area declared as an operational area.⁶⁴⁰ There a number of matters that the Attorney-General must take into account, including whether the council has adequately consulted with the local community, the extent and nature of crime in the area, whether the council has taken steps to include young people's needs in local

⁶³⁷ Interdepartmental Coordination and Evaluation Committee, *Review of the Children (Protection and Parental Responsibility) Act 1997: Final Report*, July 2001, para 2.2.2.

⁶³⁸ Hon Paul Whelan MP, *NSWPD*, 21/5/97, p 8975.

⁶³⁹ *Children (Protection and Parental Responsibility) 1997*, s 19.

⁶⁴⁰ *Ibid*, s 14.

planning processes, and whether appropriate arrangements have been made to cater for the needs of young people who are removed from public places, including culturally appropriate arrangements for Aboriginal children.⁶⁴¹

Four regions have been declared operational areas since the Act commenced. They are Orange (since 1997), Ballina and Moree (since December 1998) and Coonamble (since March 1999).⁶⁴² The declarations in respect of those areas have expired and only Moree and Orange are currently seeking a new declaration.⁶⁴³ In the period to 2001, the following numbers of children had been removed from a public place: 302 children in Moree, 114 in Coonamble, 43 in Orange and 7 in Ballina.⁶⁴⁴

Escorting a young person who has been removed: The police must escort the young person to the residence of the young person's parents or carer.⁶⁴⁵ The officer can only leave the young person there if a parent, carer, or other responsible person is present and is able and willing to care for the young person; or if the officer believes that the young person will be safe in the absence of a responsible adult.⁶⁴⁶ Otherwise, the officer can escort the young person to the residence of a close relative chosen by the young person.⁶⁴⁷ Failing these options, the police officer must place the young person, for a period not exceeding 24 hours, in the care of an approved person who is able and willing to care for the child or in the care of the Department of Community Services.⁶⁴⁸

Officer to consider young person's views: Before escorting a young person, the police officer must take into account the young person's wishes and feelings, considered in light of the young person's apparent age and understanding.⁶⁴⁹

Police powers in relation to removal and escort: To enable police to remove a young person, the officer can request a young person's name and age and their parent's address.⁶⁵⁰ The officer can also use reasonable force when removing a young person

⁶⁴¹ Ibid, s 14.

⁶⁴² Evaluation Committee Report, note 637, at para 4.3.1.

⁶⁴³ Private telephone communication with officer at Crime Prevention Division, NSW Attorney General's Department on 5 April 2005.

⁶⁴⁴ Evaluation Committee Report, supra, at para 4.3.1.

⁶⁴⁵ *Children (Protection and Parental Responsibility) 1997*, s 22.

⁶⁴⁶ Ibid, s 22(2).

⁶⁴⁷ Ibid, s 22(3).

⁶⁴⁸ Ibid, s 22(5).

⁶⁴⁹ Ibid, s 23(3).

⁶⁵⁰ Ibid, s 27.

from a public place and in escorting the young person.⁶⁵¹ An officer who believes that a person may be carrying a concealed weapon can search the person and take possession of any weapon they consider may put people in danger.⁶⁵²

Review of Act: A review of the 1997 Act in 2001 by an interdepartmental Co-ordination and Evaluation Committee recommended that the powers to remove children from public places be retained.⁶⁵³ The Committee's report noted that, "most stakeholders in the operational areas, including in the Aboriginal community in all but one of the operational areas, expressed considerable support for this Part of the Act. On the other hand, this Part of the Act was strongly criticised by stakeholders at the state level."⁶⁵⁴

(2) Laws giving police 'move on' powers

Since July 1998 (after the UN Committee published its concluding observations), police in NSW have had powers under the *Summary Offences Act 1988* to give reasonable directions to people in public places if the police have reasonable grounds to believe that the person's behaviour or presence in the place:

- Is obstructing another person or traffic;
- Constitutes harassment or intimidation of another person;
- Is causing or likely to cause fear to another person;
- Is there for the purpose of unlawfully supplying or obtaining a prohibited drug.⁶⁵⁵

When issuing a direction, the police must warn the person that failure to comply with the direction may be an offence.⁶⁵⁶ If the person fails to comply with the first direction, the police may issue a second direction, and in that case, issue a second warning that failure to comply may be an offence.⁶⁵⁷ If the person fails to comply with the second direction the person will commit an offence unless (a) the person has a reasonable excuse; or (b) the person did not persist, after the direction was issued, to engage in the relevant conduct.⁶⁵⁸ Note that the police may issue a direction to a group.⁶⁵⁹

⁶⁵¹ Ibid, s 28.

⁶⁵² Ibid, s 29.

⁶⁵³ Evaluation Committee Report, note 637, at paras 4.1 and 4.3.2.

⁶⁵⁴ Ibid at para 4.3.2.

⁶⁵⁵ Section 28F(1) inserted by *Crimes Amendment (Police and Public Safety Act) 1998*.

⁶⁵⁶ Section 28F(4).

⁶⁵⁷ Section 28F(5).

⁶⁵⁸ Section 28F(6), (7). The maximum fine is a penalty of \$220.

⁶⁵⁹ Section 28F(7A)

According to Anderson *et al*, this new legislation “had its roots in the ‘anti-gang’ policy developed by the Labor Party in the lead up to the 1995 state election. This policy was aimed at groups of young people in public places, who were said to be a threat to public safety.”⁶⁶⁰ According to the NSW Ombudsman’s 1999 report on the operation of the legislation in the first 12 months, 48 percent of persons ‘moved on’ were aged 17 or younger⁶⁶¹; 22 percent of all persons ‘moved on’ were indigenous and 51 percent of those indigenous persons were aged 17 years or younger.⁶⁶²

The Ombudsman’s report identified issues associated with the use by police of the ‘move on’ powers and made some recommendations, including that the powers “be governed by a code of practice (made pursuant to a Regulation) which clearly articulates the rights of citizens as well as the powers of police.”⁶⁶³

Criticism of these laws in the non-government organisation 2005 report

The 2005 *Non-government Report on the Implementation of the United Nations Convention on the Rights of the Child in Australia* criticises both of the NSW laws outlined above, as well as the new anti-terrorism laws.⁶⁶⁴ With respect to the ‘move on powers’, the report refers in particular to police targeting of young migrant and refugee people who gather in large groups in public spaces.⁶⁶⁵

Other concerns expressed by the Committee

Some other concerns expressed by the Committee in its concluding observations on Australia’s first report included:

- *Policy for children and monitoring:* The Committee expressed its concern about “the absence of a comprehensive policy for children at the federal level. It is also concerned about the lack of monitoring mechanisms at federal and local levels. Such mechanisms are of essential importance for the evaluation and promotion of the development of policies and programmes for the benefit of children.”⁶⁶⁶

⁶⁶⁰ Anderson T, Campbell S and Turner S, *Youth Street Rights: A policy and legislation review*, University of Technology’s Sydney Community Law and Legal Research Centre and Youth Justice Coalition, March 1999, at p 72.

⁶⁶¹ NSW Ombudsman, *Policing Public Safety*, November 1999, at p 37 at para 1.144.

⁶⁶² *Ibid* at p 230.

⁶⁶³ *Ibid*, recommendation No. 27 on p 279.

⁶⁶⁴ *Non-government Report on the Implementation of the United Nations Convention on the Rights of the Child in Australia* (2005), note 123, at p 15-19.

⁶⁶⁵ *Ibid* at p 16.

⁶⁶⁶ Concluding Observations, note 587, at para 9.

- *Aboriginals and disadvantaged groups- standard of living:* The Committee expressed its concern about the special problems still faced by Aboriginals and Torres Strait Islanders, as well as by children of non-English speaking backgrounds, with regard to their enjoyment of the same standards of living and levels of services, particularly in education and health.⁶⁶⁷
- *Aboriginals and juvenile justice:* The Committee also expressed its concern about the unjustified, disproportionately high percentage of Aboriginal children in the juvenile justice system, and that there is a tendency normally to refuse applications for bail of them. The Committee said that there was a need for measures to address the causes of the high rate of incarceration of Aboriginals. It suggested that research be carried out, including investigation into the possibility that the attitude of police officers towards these children may be contributing factors to the high rate of incarceration.⁶⁶⁸
- *Homelessness and suicide:* The Committee expressed its concern at the spread of homelessness amongst young people, which puts children at risk of involvement in prostitution, drug abuse, pornography, other forms of delinquency and economic exploitation. The Committee recommended that further research be carried out to identify the causes of the spread of homelessness. The Committee also encouraged Australia to adopt further policies of poverty alleviation, and to strengthen support services that it provides to homeless children. The Committee also expressed concern about the incidence of youth suicide.⁶⁶⁹
- *Child abuse:* The Committee believed that cases of abuse and ill-treatment of children, including sexual abuse within the family, should be properly investigated, sanctions applied to perpetrators and publicity given to decisions taken. The Committee also said that further measures should be taken with a view to ensuring the physical and psychological recovery and social integration of the victims in accordance with article 39 of the Convention.⁶⁷⁰
- *Female genital mutilation:* The Committee recommended that specific laws be enacted to prohibit female genital mutilation and that awareness-raising campaigns be conducted to sensitise communities about the dangers and harm

⁶⁶⁷ Concluding Observations, note 587, paras 13 and 32. See federal government's response in *Australia's Combined Second and Third Report*, note 570, at p 56-58, paras 285-295.

⁶⁶⁸ Concluding Observations, note *ibid*, at paras 22 and 32. See federal government's response in *Australia's Combined Second and Third Report*, *ibid*, at p 88-91, paras 451-464.

⁶⁶⁹ Concluding Observations, *ibid*, at paras 18 and 33. See federal government's response on youth suicide in *Australia's Combined Second and Third Report*, *ibid*, at p 58-59, paras 296-303. See federal government's response on youth homelessness in *Australia's Combined Second and Third Report*, *ibid*, at p 64-65, paras 334-340.

⁶⁷⁰ Concluding Observations, *ibid*, at para 26. See federal government's response in *Australia's Combined Second and Third Report*, *ibid*, at p 50-52, paras 254-263.

that result from this practice.⁶⁷¹

- *Maternity leave:* The Committee encouraged Australia to review its legislation to make paid maternity leave mandatory for all employees in both the private and public sectors, in light of the principle of the best interests of the child and Articles 18(3) and 24(2) of the Convention.⁶⁷²

Criticisms in the non-government 2005 report⁶⁷³

Introduction

The *Non-government Report on the Implementation of the United Nations Convention on the Rights of the Child in Australia* will be presented to the UN Committee in June 2005.⁶⁷⁴ The report was produced by the National Children's and Youth Law Centre and Defence for Children International (Australia) "following consultations with a wide range of people working with children and young people in Australia across many sectors as well as some participation and input from children and young people themselves."⁶⁷⁵ The report covers a wide range of issues across a number of sectors and it makes over 100 recommendations to the federal and state governments. A very brief summary of the issues discussed in the report is presented below.⁶⁷⁶ Note that the report has also been referred to in other sections of this paper.

General comments

The Summary in the report states (in part):

Australia has made some advances, and there are numerous examples of governments and communities developing programs and projects that provide support for children and their families. But the lack of an effective national commitment to the Convention, a national Commissioner for Children, and a national plan of action for children inhibits the development of a national collaboration process to evaluate, share information, learn lessons and promote best practice.

⁶⁷¹ Concluding Observations, *ibid*, paras 19, 34. See federal government's response in *Australia's Combined Second and Third Report*, *ibid*, p 34-35, paras 177-183. See also Hon Sandra Nori MP, *NSWPD*, 12 /11/03.

⁶⁷² Concluding Observations, *ibid*, at paras 17, 31. See federal government's response in *Australia's Combined Second and Third Report*, *ibid*, at p 40-41, paras 208-210.

⁶⁷³ See also the 1996 NGO report: Defence for Children International, *Australia's promises to the children – the alternative report*, November 1996.

⁶⁷⁴ *Non-government Report on the Implementation of the United Nations Convention on the Rights of the Child in Australia* (2005), note 123. See also 'Australia's shame: report to UN raises plight of children', *Sydney Morning Herald*, 6/6/05.

⁶⁷⁵ *Ibid* at p xii.

⁶⁷⁶ See also 'Australia's shame: report to UN raises plight of children', *Sydney Morning Herald*, 6/6/05.

.....

While the Australian Government's report outlines numerous examples of policy initiatives and programs, it falls well short in providing substantial evidence of accountability or review and evaluation. The gaps and priorities for action are clear – the substandard living conditions of indigenous children...remains Australia's greatest shame...[I]ndigenous children are not receiving effective health care or education, and they are many times over-represented in the child protection, out-of-home care and juvenile justice systems...

The Federal Government has failed to explain why it persists in a policy of arbitrary immigration detention of children in adult prisons for long periods of time in clearly damaging circumstances...

A consistent theme in the submissions to, and from the consultations for this report, was a very great concern about the ad hoc service delivery for children and their communities, and a failure to achieve systemic change and greater equity and equality of opportunity. Increasing numbers of children are identified as abused or neglected, or homeless, but for many, being identified in this way does not solve their problems or meet their needs. There is a shortfall in the delivery of services for the most vulnerable children...Many children with a disability, mental health problems or subjected to violence or experiencing homelessness are not getting the help they need to ensure a healthy development.

While there have been a number of developments in relation to Australia's participation, there are significant restrictions and tokenistic or manipulative processes in some important areas of children's and young people's involvement in society. Some Australian children and young people are still subject to discrimination and are not yet treated with respect by the education, health care, justice and social security systems.⁶⁷⁷

Civil rights and freedoms

The report discusses concerns about the lack of freedom of expression afforded to school students and infringements on children's right to privacy in schools, institutions and juvenile detention centres.⁶⁷⁸ It also refers to laws that have been enacted in recent years that give police greater powers in relation to children, including anti-terrorism laws and laws that impact on children being able to assemble in public places.⁶⁷⁹ The report also outlines concerns regarding female genital mutilation, corporal punishment, school bullying and concerns about the sterilisation of children with a disability.⁶⁸⁰

Family environment and alternative care

The report states that the main concerns about children in care are:

- The lack of stability and security in their placements;
- The lack of options in placing children;
- The difficulties in maintaining appropriate contact with their families;

⁶⁷⁷ *Non-government Report on the Implementation of the United Nations Convention on the Rights of the Child in Australia* (2005), note 123, at p xii-xiii.

⁶⁷⁸ *Ibid* at p 15, 19.

⁶⁷⁹ *Ibid* at p 15-19.

⁶⁸⁰ *Ibid* at p 20-24.

- Their poor educational performance; and
- The inadequate physical, dental and mental health service provision...⁶⁸¹

The report also expresses concern about the overrepresentation of indigenous children in care and recommends that the Government “prioritise working with...Indigenous community leaders, agencies and communities to establish a range of best practice solutions for Indigenous children and young people.”⁶⁸² In addition, the report refers to concerns about the lack of periodic reviews of children placed in care.⁶⁸³ In relation to domestic violence and child abuse, the report refers to four main areas of concern:

- The lack of follow-up notifications of children at risk of harm as a result of exposure to domestic violence;
- Problems in dealing with domestic violence and child abuse allegations in family law proceedings;
- Concerns for children on contact visits;
- The lack of services for children under 12.⁶⁸⁴

Other issues discussed in this section are: paid maternity leave, difficulties in accessing quality child-care, lack of coherence in delivery of family support services, insufficient support for children whose parents are in prison and laws that do not permit children born through assisted reproduction to access relevant information before the age of 18.

Basic health and welfare

The report notes that “obesity is a growing public health problem for Australian children” and it recommends that there be significant investment in school and day-care nutritional education and physical activity; and that legislation be implemented to limit advertising and marketing of junk foodstuffs to children.⁶⁸⁵

The report states that the “ongoing inequities in health status and services of indigenous children everywhere and all children particularly in rural and remote Australia, is one of the greatest health and social problems facing the country.”⁶⁸⁶ The report refers in particular to the high rates of indigenous infant mortality.

The report also comments that, “the right of young people to access health care and treatment in confidence, without parental consent or intervention, is inadequately understood and still contested. It is recommended that the legal capacity to consent to

⁶⁸¹ Ibid at p 26.

⁶⁸² Ibid at p 30.

⁶⁸³ Ibid at p 33-34.

⁶⁸⁴ Ibid at p 31.

⁶⁸⁵ Ibid at p 38.

⁶⁸⁶ Ibid at p 68.

medical treatment be clarified and clearly outlined...⁶⁸⁷

In addition, the report states that, "there are still marked inadequacies in terms of access to mental health services for children and young people, particularly those in rural and remote areas."⁶⁸⁸ It also criticises the scarcity of mental health services afforded to school students.⁶⁸⁹ The report suggests that this is a factor contributing to the high levels of suspension and expulsion from school.⁶⁹⁰ The report also states that there are "major concerns about the increasing prescription of anti-depressant medication, stimulant medication (for the treatment of...ADHD) and other psychotropic medication."⁶⁹¹ The report also notes with concern the high rates of youth suicide.⁶⁹²

With respect to children with disabilities, the report states, "academics, researchers and disability advocacy organisations in Australia continue to identify grave difficulties facing children with disabilities, their families and carers who need support, services, aids, equipment and technical assistance."⁶⁹³ It also notes that children with disabilities continue to suffer discrimination in education, training and employment.⁶⁹⁴

The report also addresses the issue of youth homelessness.⁶⁹⁵ It makes a number of recommendations including that "a nationally coordinated approach be developed to address the needs of homeless children under 16."⁶⁹⁶ In relation to social security, the report refers to the "significant and growing gap between Youth Allowance and other social security payments..."⁶⁹⁷ The report also refers to hardships that result from penalties imposed on young people who breach social security requirements.⁶⁹⁸

⁶⁸⁷ Ibid at p 42. See Section 5 of this paper as to the NSW Law Reform Commission's current inquiry into minors' consent to medical treatment

⁶⁸⁸ Ibid at p 42.

⁶⁸⁹ Ibid at p 43-44.

⁶⁹⁰ Ibid at p 43.

⁶⁹¹ Ibid at p 43.

⁶⁹² Ibid at p 39.

⁶⁹³ Ibid at p 41.

⁶⁹⁴ Ibid at p 41.

⁶⁹⁵ Ibid at p 47-50

⁶⁹⁶ Ibid at p 48.

⁶⁹⁷ Ibid at p 45.

⁶⁹⁸ Ibid at p 46.

Education

The report states that the “education of indigenous children is at a critical point in Australia.”⁶⁹⁹ It notes that, “despite the many initiatives introduced by state and territory governments over the preceding 20 years, the difficulties that have beset the education of Indigenous children and young people continue.”⁷⁰⁰ The report notes the high rates of non-attendance by indigenous children, the low retention rates of indigenous children and the high rate of suspensions and expulsions of indigenous children.⁷⁰¹ The report also discusses the extent to which students with disabilities can access and participate in mainstream education and it points out some deficiencies in relation to government procedures for suspension and expulsion of students.⁷⁰²

Children in conflict with the law

The report expresses concerns about the overrepresentation of indigenous children and children with a disability in the juvenile justice system.⁷⁰³ The report discusses the use of diversion schemes and recommends that funding be given to Indigenous Community Justice models in rural and remote communities.⁷⁰⁴ The report also expresses concern about the high number of young offenders being held on remand.⁷⁰⁵

The report criticises legislation enacted in NSW in 2004 that resulted in the transfer of responsibility for the Kariong Juvenile Justice Centre from the Department of Juvenile Justice to the Department of Corrective Services; and which permits the transfer of juvenile offenders throughout the correctional system.⁷⁰⁶

Additionally, the report expresses concerns about the increasing imposition of fines on young people for transport-related offences, public order offences and other summary offences.⁷⁰⁷ The report states that, “the heavy use of infringement notices undermines

⁶⁹⁹ Ibid at p 51.

⁷⁰⁰ Ibid at p 51.

⁷⁰¹ Ibid at p 51-52. Note that following a recent review of Aboriginal education in NSW, the NSW Government has announced plans for reform: see Hon Dr Andrew Refshauge MP, ‘Plan to education results for Aboriginal students’, *Media Release*, 1/12/04. See also Hon Carmel Tebbutt MLC, Minister for Education and Training, *NSWPD*, 4/5/05.

⁷⁰² Extracts from the report on these two issues are outlined in Section 4 of this paper.

⁷⁰³ Supra at p 60, 62.

⁷⁰⁴ Ibid at p 60-61.

⁷⁰⁵ Ibid at p 60-61.

⁷⁰⁶ Ibid at p 62. Note that a NSW Parliament Legislative Council Select Committee on Juvenile Offenders is currently inquiring into this legislation.

⁷⁰⁷ Ibid at p 62-63.

the diversionary philosophy of the *Young Offenders Act* and the rehabilitative focus of the juvenile justice system in general.”⁷⁰⁸ It recommends that governments “cease using...financial penalties to prosecute children for offences.”⁷⁰⁹

Special protection measures

This paper has already referred to concerns in the report about child employment laws.⁷¹⁰ In addition, the report notes that while children receive the protection of occupational health and safety laws, “there is evidence that child workers do not always receive work safety training, are injured and killed at work at a higher rate than adults, and are less likely to access their rights in relation to workers compensation.”⁷¹¹ The report also expresses concern that children and young people in Australia commonly experience bullying at work.⁷¹² The report makes a number of recommendations in this section including that a national inquiry into child labour be conducted and that a specialised body for children and young people at work be established.⁷¹³

⁷⁰⁸ Ibid at p 63.

⁷⁰⁹ Ibid at p 63.

⁷¹⁰ See above at p 128 of this paper.

⁷¹¹ Supra at p 64.

⁷¹² Ibid at p 64.

⁷¹³ Ibid at p 65.

10. CONCLUSION

This paper has outlined children's legal rights in a number of areas. It has also identified a number of concerns in relation to these areas and discussed recent developments that have taken place to address such concerns.

Several issues were identified in relation to school students. These include the extent to which students with disabilities are able to access mainstream schools with appropriate levels of support (which may be enhanced by the *Disability Standards for Education*); the incidence of school bullying (which recent measures such as the *Anti-Bullying Plan* policy and *National Safe Schools Framework* have sought to address); aspects of the Department of Education's policy on suspensions and expulsions and negative outcomes for excluded students (which may be improved by new suspension centres); and drug testing in private schools. In relation to other areas, the issues include the limited scope of the age-discrimination laws, including the exception for youth wages, the state of the current law on children's consent to medical treatment (which the NSW Law Reform Commission is inquiring into); and children's exclusion from shopping centres (which may improve with the development of Shopping Centre Protocols).

This paper also discussed children's right to be heard in all matters affecting them, including in government and legal processes. This right is recognised by the Convention on the Rights of the Child and it is increasingly being seen as a legitimate right of children in NSW. While children of all ages are precluded from voting at elections, their right to be heard is a key part of the NSW Government's most recent youth policy and the NSW Commission for Children and Young People has been promoting children's participation in various ways. The lack of participation by children in legal processes was highlighted in the 1997 report of a national inquiry. Since then there have been some notable developments (and possible future developments) for children's participation in care and protection and family law proceedings.

This paper also considered the extent to which children's human rights have been implemented in NSW. It referred to criticisms of child employment laws, laws that do not prohibit all forms of physical punishment, and laws restricting children's freedom of assembly. It also referred to ongoing concerns about the poor outcomes for indigenous children, including in relation to health and education and also with respect to their overrepresentation in the juvenile justice and care and protection systems. Other concerns included the involvement of the Department of Corrective Services in the management of some juvenile offenders, the imposition of fines on children, children's access to mental health services, and youth homelessness. The report cards suggest that much needs to be done to fully safeguard children's human rights in NSW.

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