

CHAPTER 4

THE RIGHTS OF THE CHILD

Children and young people require stable accommodation and social and emotional support to grow and develop. Where families are unable to provide this primary and secondary support and nurture, or for some reason fail, it should be guaranteed by the State.'

INTRODUCTION

4.1 The Inquiry found that homelessness represents a personal tragedy for many thousands of Australia's children. It also represents a failure by governments to fulfill our international commitment to protect the rights of children. This commitment has been made at the international level in the Declaration of the Rights of the Child and other international instruments, and at the national level by means of the incorporation of these international agreements in Federal law.

MEANING AND CONTENT OF THE DECLARATION OF THE RIGHTS OF THE CHILD

4.2 The Declaration of the Rights of the Child was agreed to by a unanimous vote of the General Assembly of the United Nations on 20 November 1959. It establishes internationally agreed minimum standards for the protection of the rights of children. It has been endorsed by advanced industrial nations and by less developed nations and by nations of all political and religious traditions. As a relatively economically advanced society, and as a nation which prides itself on its human rights record and which takes an active part in promoting the international protection of human rights, Australia has a particular responsibility to meet these standards. Indeed, Australia has publicly committed itself to fulfilling the standards established by the Declaration.'

4.3 The rights recognised in the Declaration of the Rights of the Child are included in the body of rights which the Human Rights and Equal Opportunity Commission has been given the responsibility to promote and protect under Federal law.' As noted in Chapter 1, the Commission established the Inquiry because of its responsibility to protect the rights of children. Homeless children are among the most vulnerable to denial and breach of their rights, as this Report demonstrates. The Declaration of the Rights of the Child, and more particularly the Principles establishing children's rights to:

- grow up in the care and responsibility of their parents wherever possible;
- adequate housing;
- enjoy the benefits of social security;
- protection from all forms of neglect, cruelty and exploitation; and
- special protection,

formed the basis of the Inquiry. Our approach to our investigations was informed by these Principles, as are our recommendations. In this chapter we briefly describe the relevant Principles and their interaction.

ROLE OF THE FAMILY

4.4 Principle 6 of the Declaration of the Rights of the Child provides:

A child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and responsibility of his parents, and in any case, in an atmosphere of moral and material security.. Society shall have the duty to extend particular care to children without a family and to those without adequate means of support.

Responsibility for the care of children and the protection of their rights, then, rests primarily with the family. The Declaration recognises that it is in the interests of the child to grow up in the family environment wherever possible.

4.5 International law recognises that the family is the fundamental group unit of society and is entitled to protection and assistance from society and the State.' The State has a clear duty not to interfere arbitrarily with the right of individuals, both children and adults, to family life' and is obliged to provide necessary assistance to families to enable them to fulfill their responsibilities towards their children.

46 Where a child's rights are not adequately protected by the family, for whatever reason, governments also have a duty to assist and protect the child directly. ° That is to say, governments have accepted the ultimate responsibility to guarantee the child's rights should these rights not be accorded adequate protection by the family. Principle 6 of the Declaration emphasises that governments have a particular duty towards children without adequate means of support.'

47 The obligation to protect the family, the interest of children in growing up in a family if possible, and the right of individuals to family life, mean that governments are bound to assist and encourage children to remain in or return to the family, by all appropriate means. However, to withhold assistance where it is essential for children outside families, would be directly contrary to the obligation to provide special protection, as discussed below.'

RIGHT OF THE CHILD TO 'SPECIAL PROTECTION'

48 Principle 2 of the Declaration of the Rights of the Child provides:

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity.

Children are entitled to the same human rights as all other individuals.' In addition, however, it is recognised that children need special measures of protection and assistance.'° The interaction of the right to special protection with children's other rights has the following aspects:

- children may be given protection and guidance in the exercise of their rights until they develop the capacity to make their own decisions;
- special assistance may be needed to ensure that children effectively enjoy their rights;
- measures implemented to ensure the right to special protection must respect children's other rights.

49 Children, like adults, have rights to freedom from arbitrary interference with family life, freedom from arbitrary detention, privacy, liberty of the person, and freedom of choice of residence." Although the way in which these rights apply to the child and are exercisable depends on the child's age and the development of the child's capacity to make choices,² they dictate certain principles for the manner in which 'special protection' should be provided to children. These principles, developed in more detail throughout this Report, may be outlined as follows:

- protection and assistance should be provided in a manner which interferes with family life as little as possible, subject to the protection of the child from cruelty and abuse;
- protective measures should be implemented in ways which do not unnecessarily restrict the liberty of the child;
- children should have their views considered in determining measures to protect them, in accordance with their capacity to form and express their own views; and
- legal powers affecting children should be subject to checks against arbitrariness by regular processes of review and by provision of effective advocacy:³

RIGHT TO SOCIAL SECURITY

4.10 Principle 4 of the Declaration of the Rights of the Child provides in part:

The child shall enjoy the benefits of social security.¹⁴

This Principle does not require that social security payments should be made directly to the child. The right to 'benefit from' social security must be interpreted in the light of the right to 'special protection'. Further, Principle 4 of the Declaration groups the right to social security with other rights designed to protect a comprehensive right to an adequate standard of living.⁵ For younger children particularly, who are likely to lack experience in managing money, this may require that social security take forms other than direct payments to the child. This does not mean, however, that a lower standard of rights concerning social security is permitted for children (simply because of their status as children) than that afforded to adults.⁶ Rather than having any lesser entitlement, the rights of children to special protection and assistance mean that the social security system is required to give particular attention to their needs. Finally, it is not sufficient for the law to provide for entitlement to social security for children in theory, if they are denied their rights in practice, because of lack of information, advocacy, or other resources."

4.11 The right to benefit from social security applies, then, to all children who are in need of assistance — whatever the reason. The Declaration of the Rights of the Child imposes a duty on society and public authorities to extend particular care to children who are 'without adequate means of support.' There is no additional requirement that the child should be in need for a 'good' or 'genuine' reason, such as some fault on the part of parents. States are required to ensure this right to all children in need, without discrimination.⁹ Children who have been or are in danger of being neglected, abused or exploited have an additional right to protection and assistance^o — but the right to social security is not restricted to such children.

4.12 The primary obligation of parents to provide for their childree means that, where appropriate, governments may legitimately seek a contribution from parents towards the costs incurred by government in ensuring an adequate standard of living to their children. Again, however, the obligation of government towards the child exists whether or not such contributions from parents can be obtained.

RIGHT TO ADEQUATE HOUSING, MEDICAL SERVICES AND NUTRITION

4.13 Principle 4 of the Declaration of the Rights of the Child provides in part that:

The child shall have the right to adequate nutrition, housing, recreation and medical services.

The Declaration recognises that income support may not in itself be sufficient to guarantee effectively an adequate standard of living for children. It therefore provides more specifically for rights to an adequate standard of living.²² As already indicated, the State is obliged to guarantee the enjoyment of these rights,²³ either through assistance to families in need, or directly to children whose needs are not, for whatever reason, provided for by the family. The principles outlined above for the provision of special protection also apply to the manner in which the right to housing should be ensured. The principle that assistance must be provided in a manner which does not unnecessarily restrict liberty, requires that housing options be provided to take account of the varying needs of children." Where children are mature enough to make responsible choices and live independently, they have the right not to be excluded from housing by discriminatory laws or practices.

4.14 The Declaration of the Rights of the Child does not specify what is meant by 'adequate'." Rather than setting a fixed standard, the approach of international law is to relate the standards required to a country's resources, so that developed nations, such as Australia, have the highest level of obligation, and must meet a higher standard of 'adequacy' than bare subsistence.²⁶

4.15 In the Australian context, the Administrative Appeals Tribunal has given some indication of what should be regarded as an adequate standard of living:

There must be some standard against which a sufficient livelihood should be measured. A street dweller in Bombay is alive and manages to exist from day to day. ..Is this to be the standard of a sufficient livelihood in contemporary Australia? Clearly not. There must be a level between mere subsistence and hedonistic indulgence that should be regarded by the community as tolerable to the person concerned and acceptable to the community generally as existing in its midst. It must be a level of existence that would at least comply with our international obligations. It must be a level of existence of which we would not be ashamed, were it to be known throughout the world as being tolerated in this community. It must be a level consistent with our own conscience and standards that we would apply to ourselves. It must be a level of existence above mere animal survival, recognizing other factors that go to sustain life in our community."

4.16 By this standard, mere shelter is clearly not sufficient. Adequate housing requires the provision of secure accommodation reasonably appropriate to the needs of the child. **It** must be consistent with the other rights guaranteed by the Declaration of the Rights of the Child. For example, children are entitled to grow up 'in an atmosphere of affection and of moral and material security'," to 'grow and develop in health'," to be given opportunities and facilities to enable them to develop 'in a healthy and normal manner and in conditions of freedom and dignity'," and to be free from exploitation and abuse.' These requirements are not satisfied where children:

- lack secure, permanent accommodation;
- live in conditions detrimental to their health, or prejudicial to their development;
- live in an environment where they are exposed to abuse; and/or
- are exposed to exploitation, or are exploited in return for accommodation.

PROTECTION AGAINST NEGLECT, CRUELTY AND EXPLOITATION

4.17 Principle 9 of the Declaration of the Rights of the Child provides:

The child shall be protected against all forms of neglect, cruelty and exploitation.

The need for administrative measures, social policies and programs, as well as legislation, to ensure children's rights in practice is particularly clear in the context of the right to protection against neglect, cruelty and exploitation. This aspect of the right to special protection requires governments to take effective measures against neglect by adults responsible for children. It also imposes a more direct duty on governments themselves to ensure that children are not neglected, and are not exposed to abuse or exploitation in society generally. Governments are, for example, required to provide children with means of escaping from situations in which they are neglected or vulnerable to abuse and exploitation. Homelessness is all too clearly such a situation.' The right to protection against neglect or abuse means that governments have a particular obligation to ensure that children without a home because of neglect or abuse are not faced with a lack of adequate housing or a lack of effective and immediate access to social security, which could force them to remain in or return to that home, or expose them to being exploited in order to survive.

4.18 As discussed above, the right of the child to special protection must be ensured in a manner consistent with other human rights. The rights to liberty of the person, freedom from arbitrary detention, privacy and freedom from arbitrary interference with family life require that children should not have to face a greater degree of official intervention in their lives than is necessary in order to provide the protection which is their right. Children are entitled to have their needs met in the least restrictive manner. Institutionalisation should only be an option, if

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at all, where it is genuinely the only means of securing protection to the child. This should not result from an absence of other options. There must be available a range of assistance, services, and options for care and accommodation adequate to meet the needs of children in different situations: not simply because this is desirable in itself, but also so that courts and other responsible agencies are not faced with the alternative of violating children's rights to protection, or violating the civil rights which this nation has undertaken to accord them.

THE SIGNIFICANCE OF THE CONVENTION ON THE RIGHTS OF THE CHILD

4.19 On 9 December 1988, after 10 years' work, the international community completed the drafting of a Convention on the Rights of Children. Australia played an active role in these negotiations, the principal purpose of which was to entrench the protections and rights contained in the Declaration of the Rights of the Child in the more specific and more effective framework of a full International Treaty. Many of the provisions of the Draft Convention have particular relevance to the situation of Australia's homeless children:

- the right of children deprived of their family environment to special protection and assistance;"
- the obligation, to the maximum of each country's resources, to ensure the child's survival and development:"
- the right of families to receive appropriate measures of assistance if they are in need:³⁶
- the right of children to protection from neglect, abuse and exploitation, particularly sexual abuse and exploitation:"
- the right of children involved in the juvenile justice system to special consideration for and protection of their rights:"
- the right of children to the highest attainable standard of health:"
- the right of children to benefit from social security;" and
- the right of children to an adequate standard of living, specifically including adequate housing:"

4.20 The new Convention goes beyond the Declaration of the Rights of the Child in both the detail and nature of its provisions. The Convention, as a treaty, will also create binding international legal obligations for nations which ratify it."

4.21 This is not to say that the Commonwealth presently lacks power to act to protect children's rights. The rights recognised in the Declaration of the Rights of the Child, and to be guaranteed by the Convention on the Rights of the Child, are in many cases already the subject of legal obligations binding on Australia, under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

4.22 Many of these rights — such as the right to housing* and the right to benefit from social security" — apply to all individuals, not only to children. This does not mean, however, that the Federal Government has only two options with respect to their protection, namely, either to legislate to guarantee these rights to everyone or not to legislate at all. It is for the Parliament to judge what means are appropriate to fulfill treaty obligations:* The Federal Parliament may legislate to implement a treaty in part only, so long as this is consistent with the object and purpose of the treaty:* Although the human rights Covenants require rights to be protected without discrimination, it is also recognised that children require special protection." Special legislation and other measures to protect the rights of children, therefore, can already be regarded as within the power of the Federal Parliament.

4.23 Adoption by Australia of the Convention on the Rights of the Child would, however, put these powers and obligations concerning children beyond doubt. Early ratification of the Convention by the Federal Government would improve Australia's ability to set certain minimum standards for the protection of our children and, in particular, to ensure basic protections are accorded to homeless children.

Notes

1. O'Connor, *Most of us have got a lot to say and we know what we are talking about': Children's and Young People's Experiences of Homelessness* (1988) at 6.
2. This commitment has been expressed:
 - by voting in favour of the Declaration: G.A. Res. 1386(XIV) 14 LI/s/ GAOR Supp. (No.16) at 19, UN Doc. A/4354 (1959);
 - through support for the Universal Declaration of Human Rights, proclaimed by the United Nations 40 years ago, on which the Declaration of the Rights of the Child is based; by ratifying subsequent human rights treaties which reinforce provisions of the Declaration: the International Covenant on Economic, Social and Cultural Rights, ratified by Australia on 12 December 1975 and the International Covenant on Civil and Political Rights, ratified by Australia on 13 August 1980;
 - and by Federal legislation. Australia has also played an active role in seeking further protection for the rights set out in the Declaration by playing an important part in the negotiation of the new Convention on the Rights of the Child.
3. *Human Rights and Equal Opportunity Commission Act 1986* (Cwth), s.3(1). Pursuant to s.11(1)(k), the Commission has the responsibility of reporting to the Attorney-General on what action needs to be taken by Australia to comply with the provisions of the Declaration. This function includes recommending action to be taken or laws to be made by the Commonwealth, but also includes recommending action to be taken by State and Territory Governments and other responsible authorities.
4. Universal Declaration of Human Rights, Article 16(3); International Covenant on Economic, Social and Cultural Rights, Article 10(1); International Covenant on Civil and Political Rights, Article 23.
5. Universal Declaration of Human Rights, Article 12; International Covenant on Civil and Political Rights, Article 17.
6. The Declaration of the Rights of the Child is addressed to parents, non-government organisations, and governments: Preamble, cl 6. See also International Covenant on Civil and Political Rights, Article 24(1): every child without discrimination is to have 'the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State'.
7. It is governments, rather than individuals, who have directly binding legal obligations towards children under the International Covenant on Economic, Social and Cultural Rights, Article 2(2), and the International Covenant on Civil and Political Rights, Article 2(1).
8. International law does not permit the destruction of one right to be used as a means of protecting another: Universal Declaration of Human Rights, Article 30; International Covenant on Civil and Political Rights, Article 5(1).
9. The Declaration of the Rights of the Child recognises that 'everyone' is entitled to the rights recognised in the Universal Declaration of Human Rights: [Preamble, cl 2](#). The Universal Declaration states that 'everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind': Article 2. The International Covenant on Civil and Political Rights requires rights to be guaranteed to 'all individuals': Article 2(1). The preparatory documents of that Covenant confirm the view that the rights which it guarantees apply to children: see citations in W. Bennett, 'A Critique of the Emerging Convention of the Rights of the Child', (1987) 20 *Cornell International Law Journal* 1, at 28. This view was shared by the Australian representatives in the drafting of the Covenant on Civil and Political Rights: see UN Doc. E/CN.4/850/Add.12.
10. Declaration of the Rights of the Child, Preamble, cl 3 and 4, and Principle 2. The right of children to special protection and assistance is also confirmed in the Universal Declaration of Human Rights, Article 25(2); the International Covenant on Economic, Social and Cultural Rights, Article 10(3); and the International Covenant on Civil and Political Rights, Article 24.
11. Universal Declaration of Human Rights, Articles 3, 9, 12, 13; International Covenant on Civil and Political Rights, Articles 9, 17, 12.
12. Two important factors which, with Australia's support, are now incorporated in the Draft Convention on the Rights of the Child.
13. Principles for the protection of the rights of children in dealing with the criminal justice system are developed in more detail in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the 'Beijing Rules'), adopted by the General Assembly on 29 November 1985 ((IA. Res. 40/33). These principles are discussed further in Chapter 2, Government Responses to Youth Homelessness and Chapter 21, Legal Needs and Services.
14. The Universal Declaration of Human Rights, Article 22, and the International Covenant on Economic, Social and Cultural Rights, Article 9, recognise the right of 'everyone' to social security. The Declaration confirms that this right applies to children.
15. The Universal Declaration of Human Rights, Article 25(1), and the International Covenant on Economic, Social and Cultural Rights, Article 11, expressly provide for the right to an adequate standard of living.
16. The Universal Declaration of Human Rights prohibits discrimination concerning the rights recognised therein (Article 2), including the right to social security.
17. The Declaration of the Rights of the Child calls for 'legislation and other measures': Preamble, cl 6. The International Covenant on Economic, Social and Cultural Rights, Article 2(1), requires States to use 'all appropriate means, including particularly the adoption of legislative measures', in order to realise the rights which the Covenant recognises, including the

- right to social security. In the drafting of this Covenant it was observed with respect to this obligation that 'it would be deceiving the peoples of the world to let them think that a legal provision was all that was required ...': UN Doc. E/CN.4/SR.232 (1951). Parties to the Covenant have been advised that it is not sufficient simply to set out relevant legislative provisions in their reports to the United Nations on measures of implementation: UN Doc. A/40/600/Add.1 (1985).
18. Principle 6.
 19. Declaration of the Rights of the Child. Principle 1: Universal Declaration of Human Rights, Article 2; International Covenant on Economic, Social and Cultural Rights, Article 2(2).
 20. Declaration of the Rights of the Child, Principle 9.
 21. As recognised in the Declaration of the Rights of the Child, Principle 6.
 22. See also, Universal Declaration of Human Rights, Article 25: 'Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing, and medical care and necessary social services ...' and the similar provision in the International Covenant on Economic, Social and Cultural Rights, Article 11.
 23. See also, Article 11 of the International Covenant on Economic, Social and Cultural Rights, which expressly provides in this respect that 'The States Parties will take appropriate steps to ensure the realization of this right ...'.
 24. See Chapter 18, Accommodation Services.
 25. The Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights similarly refer to 'adequate' standards without defining them.
 26. The International Covenant on Economic, Social and Cultural Rights, Article 2(1), requires each State to take steps 'to the maximum of its available resources'. See P. Alston and G. Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 156, at 179-80, for confirmation of the view that this represents a heavier obligation for developed countries.
 27. *Re Ezekiel and the Director-General of Social Security*, (1984) 6 *Administrative Law Notes*, N235 (B.J. McMahon, Senior Member). The case concerned the meaning of the words 'sufficient livelihood' in the *Social Security Act 1947* (Cwth), s.124(1)(c).
 28. Principle 6.
 29. Principle 4.
 30. Principle 2.
 31. Principle 9.
 32. See also International Covenant on Economic, Social and Cultural Rights, Article 10(3).
 33. See Chapter 5, The Experience of Homelessness.
 34. Article 20.
 - 35, Article 6.
 36. Article 18.
 37. Article 19.
 38. Article 40.
 39. Article 24.
 40. Article 26.
 41. Article 27.
 42. It is now clear that the power of the Federal Parliament to legislate with respect to 'external affairs' allows the implementation of any genuine treaty obligation: *Commonwealth v Tasmania (Dams Case)* (1983) 158 *Commonwealth Law Reports* 1; *Richardson v Forestry Commission (Tasmanian Forests Case)* (1988) 164 *Commonwealth Law Reports* 261. The power remains subject to the express limitations contained in the Constitution-such as the guarantee of freedom of religion which applies to the Commonwealth under s.116 - and the implied limitations - notably that the Commonwealth may not interfere with the continued existence and functioning of the States. The power to legislate based on an international instrument which does not create binding legal obligations, such as the Declaration, is less certain. The question in such a case would be whether the Declaration would be regarded by the courts as evidence of sufficient international concern.
 43. International Covenant on Economic, Social and Cultural Rights, Article 11.
 44. International Covenant on Economic, Social and Cultural Rights, Article 9.
 45. *Richardson v Forestry Commission*, *op cit*.
 46. *Commonwealth v Tasmania*, *op cit*, at 234 per Brennan J.
 47. International Covenant on Economic, Social and Cultural Rights, Article 10(3); International Covenant on Civil and Political Rights, Article 24.