

Taking a 'rights-based' approach to matters involving children

Overview

NCYLC takes a child rights-based approach to its policy work. A child-rights-based approach identifies and evaluates children's needs by reference to their rights under international legal instruments including the UN Convention on the Rights of the Child ("CROC").



In an Australian context, this analysis is linked to an examination of the factors within Australian society – social, cultural, economic, political, legal, economic and personal – that support or undermine the realisation of these rights. This determines that a child-rights-based approach will often call for a response that is not simply legal or political. A comprehensive response will often be multi-sectoral and interdisciplinary and developed in a manner that builds community ownership and support.

What rights do children have in Australia?

Australia ratified CROC in 1990. From that time, as a matter of international law, every person under 18 in Australia became entitled to the rights set out in CROC. Australia has also accepted an obligation in good faith to take all appropriate measures to implement those rights within domestic law.¹ Practically speaking, Australia has failed to do so.²

Despite this failure, CROC is still relevant to Australian law in several ways. For example, it is widely accepted that Australia's international obligations can play a role in:

- i. statutory interpretation where there is an ambiguity,
- ii. the development of common law,

¹ Vienna Convention on the Law of Treaties 1969 art26: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'

² NCYLC and YouthLaw, *Preliminary Review of the Implementation Status of the Seen and Heard Report*, Discussion Paper 9, Nov 2007; Concluding Observations of the Committee of the Rights of the Child for Australia, CRC/C/15/Add79 (10 November 1997) and CRC/C/15/Add268 (20 October 2005).

- iii. the application of the principle of legitimate expectation, and
- iv. the exercise of judicial discretion.

Despite the above, CROC has admittedly limited legal force in Australia (until such time as it is fully implemented). However, it still provides a very powerful **ethical and political framework** which can be influential in government decision making and law making. Just because CROC doesn't have the force of law in Australia doesn't mean we should shy away from holding up the rights contained therein as very important, and as owed to every child in Australia.

More about CROC

CROC is an international convention setting out the civil, political, economic, social and cultural rights of children. Nations that ratify this international convention are bound to it by international law. Compliance is monitored by the United Nations Committee on the Rights of the Child which is composed of members from countries around the world.

Here are some of the major issues covered in CROC and the related Articles:

- Protection without **discrimination** (Article 2)
- All decisions made about children must be in their **best interest** (Article 3)
- Right to **life** (Article 6)
- Right not to be separated from **parents** (Article 9)
- Right to **express views** and have them heard (Article 12)
- Right to **freedom of expression** and information if it is within the legal boundaries (Article 13)
- Right to **thought, conscience and religion** (Article 14)
- Right to be **protected from neglect and abuse** (Article 19)
- Disabled children have the right to special care (Article 26)
- Right to **health services** and to have the highest attainable standard of health (Article 24)
- Right to benefit from **social security** (Article 26)
- Right to an adequate **standard of living** (Article 27)
- Right to have access to **education** (Article 28)
- Right to be **protected from illicit drugs** (Article 33)
- Right to be **protected from sexual exploitation and abuse** (Article 34)



What does it mean to adopt a 'rights-based' approach?

There are increasing calls for adopting a rights-based approach when analyzing matters which affect children. The phrase 'rights-based' approach can seem vague and confusing – what does it mean?

It isn't simple. A rights-based approach means analyzing the matter through the lens of a complex set of ideas and principles which are set out in international instruments, principally CROC.

Children have 'rights', not 'interests'

Believe it or not, in Australia the idea that children have 'rights' is quite contentious. Most politicians and judges prefer to speak about children's 'interests' instead, which are invariably decided by others (e.g. parents). Under CROC, children have rights which are inalienable, not interests.

Universally accepted standards provide the foundation of a rights-based approach

International human rights law provides the normative framework to guide the design, implementation and evaluation of policies and processes affecting children by identifying the entitlements to which all children are eligible by virtue of their status as human beings.³

CROC provides the core standards of a rights-based approach for children

Although children (by virtue of their status as human beings) are beneficiaries of rights under all the international human rights treaties (e.g. ICCPR, ICESCR and CRPD), CROC was designed specifically for children and has become the 'international standard against which to measure legislation and policies'⁴ in relation to matters which will affect children.

The rights contained in CROC can generally be arranged into three categories:

- i. Rights of general application which apply to all children such as the rights to life (art 6); name, nationality and identity (arts 7 and 8); education (arts 28 and 29); health (art 24); freedom of expression (art 13); and protection against torture (art 37).
- ii. Rights which apply to children in specific circumstances such as children subject to adoption (art 21); criminal justice proceedings (art 40); children seeking refugee status (art 22); armed conflict (art 38); exploitative child labour (art 32); and children deprived of their family environment (art 20).
- iii. Rights which apply to children with specific characteristics such as Indigenous children or children from minority groups (art 30) and children with disabilities (art 23).

³ G Monahan & L Young (eds), 'Children and the Law in Australia', p37

⁴ *M v State Centre for Child Law Case* CCT 53/06 (26 September 2007) at [16] per Sachs J

The three general principles of a rights-based approach

1) Interdependence and indivisibility

This means that the realization of a specific right cannot be divorced from the realization of the other rights to which children are entitled. E.g. in the context of juvenile justice, it's no good if a system complies with article 40 (with respect to children who are subject to criminal justice proceedings) if these children are denied the right to an effective education, appropriate health care and an adequate standard of living.

To say that rights are indivisible means that there is *no hierarchy of rights*. It thus affirms the equal status of *all* human rights and the need to adopt a holistic approach.

2) Accountability

Seeing as states voluntarily choose to ratify human rights treaties, the principle of accountability demands that states are obligated to respect, protect and fulfill the rights contained in those treaties. This may mean that states have *positive obligations* to ensure that those rights are not violated. This would require preventative measures to be taken (not only reactive measures after rights have been infringed upon).

3) Universality

It is generally recognized by commentators that all children are at all times endowed with the same rights that are universally applicable. This means that children are entitled to the same human rights as all other human beings, not as a means to an end, but as an end in themselves. For example, an approach whereby we invest in children (through education) because it is economically efficient to invest in the early years, does not respect the human rights of children. Rather, a rights-based approach would say that children have a *right* to education irrespective of any prospective economic benefits.

The four specific principles of a children's rights-based approach

In addition to the above, four specific principles have been identified by the Committee on the Rights of the Child as important to a child rights-based approach.

1) Non-discrimination

Article 2 of CROC requires that children's rights are not nullified or hindered by any distinction, exclusion, restriction or preference based on any ground. This may require a state to take affirmative action to ensure that certain groups of children (e.g. asylum seekers, Indigenous Australians) are not discriminated against on the basis of belonging to that group.

2) The best interests principle

Article 3(1) of CROC requires that the best interests of the child be a primary consideration in all actions concerning children. According to the Human Rights Committee, this obligation demands a child-impact assessment and evaluation with respect to all legislation and policy development.⁵ The 'bests interests' may seem like a subjective concept, but as a starting point it is informed and constrained by the rights and principles provided for under CROC.

3) Survival and development

The right to survival and development (article 6(1) of CROC) applies to *all* rights to which children are entitled. Again, the idea of 'development' is to be understood in the context of the other rights set out in CROC.

4) Participation

It is of utmost importance that children have a say in decisions that will affect them. Their say is not necessarily determinative, but due consideration will be given to the child's views in light of his or her age. This is reflected in article 12 of CROC.

Rights-based approach in action – our policy work

In terms of practical steps, the first stage of a human rights-based approach is to evaluate and identify the children's needs by reference to their rights. This will involve looking at various factors – social, cultural, economic, geographic, political, environmental and personal – that undermine the realization of those rights.

Here are some examples of the policy issues we have tackled in the past and how we have used a rights-based approach to evaluate them:

Issue	Summary of NCYLC's rights-based analysis
Youth homelessness (2009 submission)	<ul style="list-style-type: none"> • Universally accepted human rights standards (CROC) provide a clear normative framework to assess laws and policies with respect to children and young people. • A consideration of the issue of the homelessness of children and young people should include the identification and assessment of relevant rights, such as (from CROC): <ul style="list-style-type: none"> (i) the right to be protected from violence and abuse; (ii) the right to family and its nurturing and care (and the right to be provided with alternative care when a child has been temporarily or permanently deprived of an appropriate family environment); (iii) the right to benefit from social security; (iv) the right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development; (v) the right to information and education;

⁵ Concluding Observations of the Committee on the Rights of the Child for Australia, note 38 at [24]

	<ul style="list-style-type: none"> (vi) the right to be heard and to express views in decisions; (vii) the right to appropriate measures to promote physical and psychological recovery and social reintegration as a victim of neglect, abuse or cruel and degrading treatment; and (viii) the right not to be discriminated against. <ul style="list-style-type: none"> • Given that a child or young person is often likely to become homeless because of breakdown of family relationships and the experience of violence and abuse in the conventional family setting (as opposed to the direct result of financial distress, mental health issues or the failure of social networks), the government approach to youth homelessness should not place disproportionate emphasis on efforts to 'reunite' a child or young person with his or her family. It should, rather, focus on realising the immediate rights of children (under CROC). • In order to support the rights of children (to safety and protection from abuse, alternate care, accommodation, adequate standard of living, social security and education), current assistance and support available to homeless children should be reviewed and improved. Child protection systems to date have been unable to provide secure, stable accommodation, particularly for young people leaving home care and the juvenile justice system. • Many providers of accommodation for homeless people specifically exclude young people because they are deemed to be "problematic". This gap in service provision reinforces youth homelessness in crisis, short term, medium term and long term settings. The failure to adopt a rights-based approach means that solutions are shelved and those most at risk are abandoned.
NSW Juvenile Justice system (2009 submission)	<ul style="list-style-type: none"> • Consideration should be given to a much clearer incorporation and enunciation of the fundamental international principles of youth justice in both policy and legislation – including for example in the principles set out in section 6 of the <i>Children (Criminal Proceedings) Act 1987</i>. • The United Nations Committee on the Rights of the Child in October 2005, after considering Australia's 2nd and 3rd reports under the Convention, recommended that Australia bring its juvenile justice systems fully into line with the Convention. It urged Australia to "[i]mprove conditions of detention of children and bring them into line with international standards". • The New South Wales Government is failing to take adequate account of the needs of children in detention. This is a clear breach of international standards. • The requirement that children be separated from adults in all places of detention is a universally acknowledged basic human right. There is concern about the implementation of this right. • The general disadvantage of Australia's indigenous population has also been widely noted by various international bodies. This apparent discrimination is a breach of Australia's international obligations. • The right of children to express their views freely and to participate in decisions that affect them is a crucial aspect of effective implementation of the Convention. Not all NSW Children's Courts provide a "child-friendly environment" and "child-friendly information" as required by UNCROC. • Detention (including pre-trial detention) should be a last resort (under international guidelines). New South Wales has a high rate of incarceration of children compared with other States and Territories and other comparable countries. This suggests that there are not adequate

	alternatives to detention in NSW.
Youth Allowance – New Participation Requirement ('Activity Test') (2009 Position Paper).	<ul style="list-style-type: none"> • Article 26 of CROC stipulates that state parties are to recognise the right of every child to benefit from social security. State parties are also instructed to take necessary measures to achieve the full realisation of this right. Youth Allowance is a direct enforcement of such right • If a recipient does not meet the requirements of the Activity Test, their payments will be affected. The recipient will lose their payment for up to 8 weeks if they deliberately and persistently avoid their obligations. These changes in the YA scheme do not support the aspirations of Article 26 of the CROC. • CROC recognises social security as a fundamental human right. It should not be made subject to an Activity Test.
Magill Detention Centre (2009 letter to SA Premier urging closure)	<ul style="list-style-type: none"> • CROC is the touchstone that guides the NCYLC's work. Children and young people in Australia deserve to be treated fairly, with respect and in a just manner. • It is a fundamental principle of youth justice that the detention of children should only be a measure of last resort. When detention cannot be avoided, we must ensure that the care of those children detained is a paramount consideration. There is an increasingly strong case that the Magill Centre is a symbol of the failure to provide that care to an adequate standard. The response of the Australian public to the revelations as to the circumstances of the death of Mr Ward in Western Australia illustrates that the care of those in detention is an issue of concern to the Australian community. • There is growing evidence that the conditions at the Magill Centre are in breach of international standards for children in custody. • Article 27 (1) of the Convention establishes that every child has a right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. Young people detained at the Magill Centre suffer cramped and decrepit conditions that do not meet necessary standards for the detention and rehabilitation of young people in secure care. • Article 37(c) of the Convention establishes that every child deprived of liberty shall be treated with humanity, dignity and in a manner which takes into account the needs of persons of his or her age. The Magill Centre fails to meet the basic needs of, let alone take positive steps towards the rehabilitation of, detainees.
Same-sex adoption (2009 submission)	<ul style="list-style-type: none"> • Current adoption laws in NSW fall short of viewing the child's best interests as paramount, and fail to accord the basic social and legal rights enshrined in CROC, to children living in same sex families. • Article 7 of CROC states that a child has the right to know and be cared for by his or her parents as far as possible. The current NSW adoption laws do not allow children living in same sex families this right. A same sex partner of a legal parent has no legal parenting rights to that child. • The current NSW adoption laws also contravene Article 2 of CROC: a child's right not to be discriminated against, irrespective of the child's or his or her parent's or legal guardian's sex, social origin, or other status. As a result of the current adoption laws, "children raised in same sex families miss out on many legal certainties and rights that other children in NSW take for granted". For example, they have no right of succession or inheritance if their legal parent's partner dies, nor do they enjoy the legal recognition of both their parents.