

Conference Paper for the 2010 SNAICC National Conference – Session 11

[Purpose: to explain the child rights framework so it can be used in advocacy – to enable participants to draw attention to abuses they have experienced or witnessed, to identify good practice in respecting rights and to get involved in the child rights reporting processes]

WHAT ARE HUMAN RIGHTS? WHAT ABOUT CHILDREN’S RIGHTS? WHAT ABOUT INDIGENOUS RIGHTS?

Human rights are about recognising and respecting the inherent value and dignity of all human beings regardless of their nationality, race, place of residence, gender, colour, culture, religion, etc. Human rights are interrelated, interdependent and indivisible, and are now increasingly incorporated into a set of standards internationally agreed through treaties and declarations.

The development of these standards into an international human rights framework began with the United Nations Human Rights Declaration¹ in 1948. Subsequent covenants (International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights both in 1966) extended the framework. Another key part of the framework is the *Convention on the Elimination of all Forms of Racial Discrimination (CERD)*. Of particular significance to us in recognising the particular vulnerability of children and young people is the Convention on the Rights of the Child of 1989 (further explanations below).

Today this framework also recognises the special status of Indigenous peoples. Because everyone should live free from discrimination and have equal rights, the United Nations Declaration on the Rights of Indigenous Peoples was created in 2007 to “*maintain and strengthen their own institutions, cultures and traditions and to pursue their development in keeping with their own needs and aspirations*”². Australia has now adopted the UN Declaration³ and recognises the distinctive rights of the original people of Australia such as the right to distinct status and culture⁴, the right to self-determination⁵, the right to the lands⁶, and so forth.

The UN Declaration on the Rights of Indigenous People sets out 46 articles that aims at providing an international legal framework for Indigenous populations. It recognises “*in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child*”⁷. *Consistently with other instruments (including CERD and CROC)*, the Declaration prohibits discrimination against Indigenous peoples and promotes their participation in all matters that concern them.

World leaders and organisations have acknowledged the need to draw special attention to children’s rights including the right to indigenous cultural identity. Children’s rights must be part of an international human rights framework while still recognising their special needs and unique protection. The CROC was one of the first treaties to give guidance on the rights of Indigenous peoples and include specific references to Indigenous children in various provisions.⁸

¹ <http://www.un.org/en/documents/udhr/>

² [UN Declaration on the Rights of Indigenous Peoples, see at http://www.un.org/esa/socdev/unpfii/en/drip.html](http://www.un.org/esa/socdev/unpfii/en/drip.html)

³ <http://www.abc.net.au/news/stories/2009/04/03/2534210.htm>

⁴ [UN Declaration on the Rights of Indigenous Peoples, Article 8](#)

⁵ UN Declaration on the Rights of Indigenous Peoples, Article 3

⁶ UN Declaration on the Rights of Indigenous Peoples, Article 26

⁷ Preamble, United Nations Declaration on the Rights of Indigenous Peoples

⁸ Committee on the Rights of the Child, 50th Session, General Comment No. 11, Indigenous Children and their rights under the Convention, January 2009

THE CONVENTION ON THE RIGHTS OF THE CHILD

WHAT IS CROC?

The Convention on the Rights of the Child is a **unique international legal text** drawn up under the auspices of the **United Nations** that focuses on protecting the rights, interests and development of children and young people. The Convention applies to all children regardless of race, colour, religion, gender, age, etc, and the Convention's values are respected within the family, schools, communities, child care providers and all levels of administration.

In its first article, the Convention gives a **specific definition of the "child"** as a human being under 18 and also refers specifically to indigenous children. It also sets out **four core principles**:

1. Non-discrimination
2. Devotion to the best interests of the child
3. Rights to life, survival and development
4. Respect for the views and participation of the child

WHEN, WHY and WHO?

It was created in **1989** as **world leaders** recognised that children needed special care and protection. They also wanted to make sure that the world recognised **children's rights as human rights**. In this respect, each right spelled out in the Convention is inherent to the child's dignity, survival and development.

HOW DOES CROC WORK?

What makes CROC more relevant to children is that **by signing and ratifying CROC, the Australian Government made a commitment to ensuring that Australian legislation and policy is consistent with the rights set out in CROC**. The Australian Government is accountable to the international community, and specifically to the United Nations Committee on the Rights of the Child, for its compliance, including by meeting its reporting obligations to this Committee.

REPORTING PROCESS OF CROC

The ratification of the **UN Convention on the Rights of the Child in December 1990** signifies that the Government has to make sure that every child in Australia has every right set out in the Convention. The compliance with Australia's government actions are monitored by the **UN Committee on the Rights of the Child** based in Geneva, Switzerland.

Every 5 years, the Government is asked to **report on progress** that has been made in implementing the Convention and any reform that is underway, to a panel of experts who measure **Australia's performance in implementing the Convention and meeting children's rights**. This Government Report should indicate **any factors or difficulties which affect a country's law and policies** which explain any discrepancies with the principles of the Convention. Recommendations and concerns are expressed by the Committee at the end of the report review.

Although the Australian Government is bound by the Convention to meet certain obligations, the Committee encourages **NGOs to conduct independent research** and provide their own perspective on children's issues. After the last reporting cycle in 2005⁹ on the implementation of UN Convention, **Concluding Observations** were drawn up by the Committee which endorsed the non-government sector's major rights alerts and concerns.¹⁰

⁹ See at <http://www.youthlaw.asn.au/upload/australiashadowreport.pdf>

¹⁰ Concluding Observations, Committee on the Rights of the Child, Australia, 40th Session, Consideration of reports submitted by states parties under article 44 of the Convention, September 2005.

Main rights alerts were drawn up on: Non-discrimination and equality regarding the situation of Indigenous children in Australia, Indigenous children and young people's civil rights and freedoms, Basic health and welfare of Indigenous children, lack of government assistance to young people, Indigenous education and Refugee children.

RELEVANT PARTS OF CROC TO INDIGENOUS CHILDREN¹¹

Advocating Australia's children and young people's rights unquestionably includes Aboriginal and Torres Strait Islander children's rights. In 2008 the ABS figures set out that Aboriginal and Torres Strait Islander peoples represented 2.5% of the Australian population. The Indigenous population is relatively young and in 2008 it was estimated that 49% of the indigenous population was aged under 20 years.¹²

Although children and young people have special needs and require special protection, the issues affecting Indigenous youth call for even more attention in regard to the protection and preservation of their cultural identity. CROC specifically refers to the importance of safeguarding indigenous cultural background in article 30:

"In those States in which ethnic, religious, or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion or to use his or her own language".

Article 12 recognises the importance of establishing a dialogue through consultation between the governments and the communities concerned. This also means the integration of the **child's participation in the decision-making process**.

Articles 5, 9-11, 18, 19-21, 25, 27(4), 39 refer to **family environment and alternative care**. The provisions call for the protection of the integrity of indigenous families and communities, support and assistance in child-rearing responsibilities and require the collection of data on the family situation of indigenous children in a culturally sensitive way. The principle of the best interests of the child is the paramount consideration in any alternative care placement of indigenous children. Article 20 (3) stipulates the importance of the continuity in the child's upbringing to the child's ethnic, religious, cultural and linguistic background.

Articles 6, 18(3), 23, 24, 26, 27(1-3) refer to the right to **basic health and welfare** through the enjoyment of the "highest attainable standard of health" (article 24) and access to effective health services in remote areas. Disabled children should have access to special care, treatment and help to integrate them into society without enduring social disadvantage. Children have also the right to social security and the right to live in the most culturally-appropriate standard of living.

¹¹ Committee on the Rights of the Child, General Comment No.11 (2009), Indigenous children and their rights under the Convention

¹² The Australian Institute of Statistics (2008), 4714.0 – National Aboriginal and Torres Strait Islander peoples - Social Survey. Accessed on May 11th, 2010

EXAMPLES OF BREACHES OF INDIGENOUS CHILDREN'S RIGHTS

In this section, we consider how human rights are grounded in the day-to-day realities of life. Human rights call for all Australians to be free - and regardless of their origins – have choices about how they live and the means to make those choices. In particular we consider an understanding of rights that are relevant to indigenous children and young people so that they can survive, develop to their potential and enjoy their rewards of their culture.

Criminal Law and Juvenile Detention

To understand the over-representation of Indigenous young people in the Australian criminal justice system, in 2007-2008¹³ 40% of young Australians under a supervision order (requiring them to report to police) on an average day were indigenous. Furthermore, the rate was even higher (60 %) for those in detention awaiting sentencing. Sadly this experience is not unique to Australia. The This issue was given attention by an International Expert Group Meeting (IEGM) drawn from Indigenous Peoples.¹⁴ Part of their work focuses on exploring contemporary Indigenous issues and proposing an international human rights framework for Indigenous children and youth in custody. In March 2010, IEGM recommended the State parties to follow up on the General Comment No.11 (2009) and articles 37¹⁵ and 40¹⁶ of CROC to examine appropriate measures for dealing with young people interacting with State judicial systems. The IEGM called for support for Indigenous peoples to design and implement traditional restorative justice systems in accordance with the rights set out in the Convention.

Family Violence

The National Plan to Reduce Violence Against Women and Children (2009-2021) notes that family violence is often linked to socio-economic inequalities among males and females, geographical and social isolation and substance misuse. Violence against indigenous women also has terrible consequences on the wellbeing of children.. Family violence contributes to homelessness, insecurity, health problems and places greater stress on being able to provide adequate care for children. Greater support for community based solutions and early interventions are required.¹⁷

Child Protection

The National Framework for Protecting Australia's Children (May 2008) analyses the intergenerational effects of child abuse and neglect but fails to offer meaningful solutions for indigenous communities.

¹³ Australian Institute for Health and Welfare, Juvenile justice In Australia 2007--08, available at <http://www.aihw.gov.au/publications/index.cfm/title/10853> 2009, p. vii

¹⁴ International Expert Group Meeting (EGM) on Indigenous Children and Youth in Detention, Custody, Foster-Care and Adoption 4 -5 March, 2010, Tsleil Waututh Community Centre North Vancouver, British Columbia, Canada The Meeting was attended by Permanent Forum members, indigenous experts from the seven UNPFII socio-cultural regions, government officials and representatives from UN Agencies and Funds. Representatives of indigenous peoples' organizations were also welcome to attend.

¹⁵ Article 37 b on torture and deprivation of liberty, "No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time"

¹⁶ "States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

¹⁷ CROC Article 19, "1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement."

Native land titles and housing scheme

As mentioned in the Special Rapporteur's UN report¹⁸ on the situation of Indigenous peoples in Australia (March 2010), the Government resists providing for Indigenous ownership of homelands even though it would help to address socio-economic disadvantages. Indeed, according to article 27 of CROC parents share responsibility to provide adequate standard of living to the child. Recognition of land remains a significant barrier to the cultural development and wellbeing of Indigenous families and children.

Additionally, the long-term leasing scheme implemented by the Government also serves to limit indigenous control over traditional lands and resources which again obstructs economic development and self-determination. Housing is provided conditionally by and under the control of the Government, limiting job opportunities and development of know-how.

Health services for Indigenous peoples

Although the Council of Australian Governments is undertaking a wide range of measures to "close the gap" on social and economic disadvantages between indigenous and non-indigenous populations, concerns were expressed by the Special Rapporteur regarding the lack of culturally-appropriate health services for indigenous peoples. Indeed, there are still medical challenges that need to be overcome in order to halve the gap between non-indigenous and indigenous children. As stated in article 24 of CROC, "the child has a right to the **highest standard of health and medical care attainable**. States shall place special emphasis on the provision of primary and preventive health care, public health education and the reduction of infant mortality."

Education programmes

Education is the key to develop the child's personality, opinion and knowledge of his or her environment and that is the reason why education programmes must foster respect of the child's cultural identity, language and values. Article 29 (1.c) of CROC sets out the State ought to ensure "the development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own".

The benefits of education accrue over a lifetime and are determinant for health, wellbeing and access to economic resources. With a greater involvement of Indigenous parents in their children's education, schools can become the focal point for community and support a greater role for Indigenous parents in their and their children's education. Indigenous parents are more likely to send their offspring to what they consider as culturally inclusive curricula.¹⁹ The Northern Territory Emergency Response measures have shown inadequacy in providing educational opportunities that have resulted in Indigenous children's lower rates of school attendance and achievement. The Special Rapporteur emphasised respect of cultural diversity and the need for a better approach to address the challenges of bilingual education.²⁰ Importantly, flexible curricula and teaching all Australians Indigenous history and culture can lead to less marginalisation and reduce social and cultural costs for Indigenous Australians.²¹

¹⁸ United Nations, General Assembly, James Anaya, (2010) Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to development

¹⁹ Schwab, R.G. and Sutherland, D. 2003. 'Indigenous learning communities: A vehicle for community empowerment and capacity development', Learning Communities: International Journal of Learning in Social Contexts, 1 (1): 53–70.

²⁰ Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, March 2010

²¹ Biddle, N. Centre for Aboriginal Economic Policy Research, A Human Capital Approach to the Educational Marginalisation of Indigenous Australians, CAEPR Working No. 67/2010

Upholding Indigenous children's rights must occur both at a government and at a community level.

COMPLAINT AND ACCOUNTABILITY MECHANISMS FOR CHILDREN'S RIGHTS

Accountability mechanisms, including reporting obligations and the impact of an independent non-government report, are useful for raising awareness of the importance of compliance with human rights obligations. They increase dialogue, research and momentum for progress. For example, in 2006 the *UN Human Rights Council* put in place the *Universal Periodic Review* to review the human rights records of all UN members' states. This mechanism is based on interactive dialogue between the country concerned, other States, NGOs and national human rights institutions. Australia is scheduled to be reviewed in February 2011 and this will give opportunity to the non-government sector to increase human rights dialogue with the Government in order to improve protection and promotion of Human Rights.²²

However, reporting obligations are not sufficient to ensure government obligations to upholding children's rights are met. Although the international legal instruments set out obligations to State parties to comply with international standards, concerns are still expressed as to the ongoing violation of children's rights. Indeed, there is often no clear domestic sanction which could be imposed to safeguard the respect of children's and youth rights. Let us examine the existing complaint mechanisms to denounce rights violations.

What are the complaints mechanisms available in Australia?²³

National level

- **Australian Human Rights Commission** (complaints are often resolved through conciliation, outcomes can include an apology, compensation, changes to a policy or developing and promoting anti-discrimination policies)

State/Territory level

- **Anti-Discrimination Boards** (only deal with certain types of discrimination only)

In Australia, complaints mechanisms are rather weak as the boards or tribunals have limited powers. Often after conciliation, the matter must be referred to a court for final determination and enforcement.

HOW INDIVIDUALS CAN USE MECHANISMS OF THE UN TO SUBMIT COMPLAINTS?²⁴

- **Special Procedures** (intervening directly with Governments on specific allegations of violations of human rights that come within their mandates such as Working Groups, Special Rapporteur, Special Representative or Independent Expert)
- **UN Treaty bodies** (some Committees will receive complaints from individuals, groups or their representatives (including children) who claim that their rights have been violated by a State that is a party to a convention or covenant provided that the State has recognised the competence of the committee to receive such complaints)
- **Office of the High Commissioner for Human Rights (OHCHR)** (supports the work of the United Nations human rights mechanisms, such as the Human Rights Council and the Committee on the Rights of the Child but not the Committee on the Elimination of Discrimination Against Women).
- **UN Committee on the Rights of the Child** (cannot consider individual complaints under CRC)

²² Universal Periodic Review, Background Paper for Australian NGOs by Anna Cody, Louise Edwards and Ben Schokman

²³ Australian Human Rights Commission, see at <http://www.hreoc.gov.au/index.htm>

²⁴ Children Rights Information Network (CRIN), see at <http://www.crin.org/index.asp>

HOW TO REPORT TO THE UN COMMITTEE ON THE RIGHTS OF THE CHILD

As the next Child Rights Reporting process begins later this year, consider how you can contribute your stories and experience. This is a process for all Australians – and it is essential that the most vulnerable voices are included. These stories must be brought into the international human rights reporting process, to increase pressure and urgency on the government to improve its compliance and make lasting progress.

THE IMPORTANCE OF COMMUNITY BASED SOLUTIONS *Case Studies of Good Practice*

Youth Justice

In 2001, community members and Aboriginal elders initiated the *Kimberley Regional “At Risk” Indigenous Youth Diversion Program*²⁵ through the Yriman Project with the objective to divert young people away from criminal behaviours. This project focused on **“reconnecting” young people to their culture**, to community members, to develop self-identity, to discover an alternative lifestyle and a sense of belonging for a positive future.

Petrol Sniffing

Since entering into operation in 1994, the *Mount Theo Programme*²⁶ is a diversionary project that has demonstrated successful outcomes through its various branches to tackle “at risk” issues such as petrol-sniffing. This programme was initially **designed by tribal elders (Warlpiri community) and consists in young addicts living at the outstation for at least month as a rehabilitation cure**. The community elders assist young people in developing new skills and undertaking traditional and cultural activities to reconnect with their identity. This programme has been a success in terms of outcomes, prevention and has enabled the young Indigenous to be reinserted into society with a more positive vision of their future.

Family Violence

The Tangentyere Council²⁷ has implemented the *Safe Families programme* managed by **Indigenous staff members that work through consultation and workshops with local Indigenous leaders, community groups and service providers in Alice Springs**. This programme has three branches:

- *Family Support and Outreach* provides information to women and children that are identifies as being at risk and help to make them to stay as a family.
- *Children’s Safe House* consists in providing short-term accommodation to young people aged between 7 and 14 years who are escaping family violence.
- *Families safe House* that can cater for 6 families suffering from homelessness, as a consequence of family violence, and can therefore stay together in a safe environment.

Aboriginal and Torres Strait Islander Child Placement Principle

Each Australian state and territory has legislated for the **Aboriginal and Torres Strait Islander Child Placement Principle**, that is to say a preferred order of placement:

- 1/ Child’s extended family
- 2/ Child’s Indigenous community
- 3/ Other Indigenous community
- 4/ Non-Indigenous carers (if a culturally-appropriate placement cannot be found)

In 2007-08, **72%** of Aboriginal children were placed in accordance with the principle.²⁸

²⁵[http://www.parliament.wa.gov.au/Parliament/Commit.nsf/\(Evidence+Lookup+by+Com+ID\)/84767450D4893AA7C825760B0010758E/\\$file/Sub+11+KALACC+\(Attachment+1\).pdf](http://www.parliament.wa.gov.au/Parliament/Commit.nsf/(Evidence+Lookup+by+Com+ID)/84767450D4893AA7C825760B0010758E/$file/Sub+11+KALACC+(Attachment+1).pdf)

²⁶ http://www.mttheo.org/mttheo_story.htm

²⁷ http://www.tangentyere.org.au/services/family_youth/safe_families/

²⁸ Percentages from AIHW (2009, Table 4.9, p.65)

However in the following states and territory:

- **Queensland** 56% of Indigenous children were placed in accordance with the principle;
- **Northern Territory** where 48% of children were placed into Indigenous homes; .
- **Tasmania** where only 35.3% of Indigenous kids were placed into preferred placements and 64.7% into non-preferred placements.

The failure of placing Indigenous children into culturally-adequate families has been attributed to a shortage of Indigenous carers, problems in the process of recruitment and retention for carers, the trauma and the disadvantage associated with the Stolen Generations, the unwillingness of some Indigenous to be associated with the “welfare” system and the disproportionately high number of Aboriginal and Torres Strait Islander children compared to adults.²⁹

Aboriginal and Torres Strait Islander Health Equality

Although Australia has seen significant progress in public health, the benefits are not equally shared in the country as there is a blatant health gap between Indigenous and non-Indigenous Australians.

The *Close the Gap Campaign* calls for **Australian governments to adopt a partnership approach with Aboriginal Community Controlled Health Services for regional and community planning for health equality**. This campaign aims at providing a vast range of care for Indigenous people to address inequalities by 2030. It calls for Aboriginal and Torres Strait peoples and their representative bodies to be active participants with the Government in developing and implementing a national plan for Indigenous health. These services must be culturally appropriate and must be involved in health planning at all levels (national, state / territory, community).³⁰

The Aboriginal Community Visitor Program

Community Visitor Programs are appointed by the Commission for Children and Young People and Child Guardian but are independent of any government agency or community organisation. They aim at helping children and young people who are in situations of out-of-home care by regularly visiting them in care centres located in remote and regional Aboriginal and Torres Strait Islander communities. Their role is to make sure that the concerns, views and wishes of children and young people are heard and seriously taken into consideration.

The community visitor program has approximately identified one in three Aboriginal and Torres Strait Islander children and young people as a serious issue alert, requiring additional therapeutic care. Among these alerts, they notify issues in relation to an allegation of harm or neglect, to safety concerns during family contact, a lack of Child Safety Officer contact and a lack of engagement in cultural activities.³¹

Audience workshops:

Opinions/ recommendations for implementing CRC and child protection

Story telling: Tell us about your experience: In your opinion, what solution or measure already implemented has been successful?

²⁹ For more information see *Why is There a Shortage of Aboriginal and Torres Strait Islander Carers?* (Bromfield, Higgins, Higgins, & Richardson, 2007).

³⁰ http://www.hreoc.gov.au/social_justice/health/ctg_community.html#1

³¹ Child Guardian Reports: Child Protection System 2008-2009, Chapter 8, Special Needs of Aboriginal and Torres Strait Islander Children

The National Children's and Youth Law Centre ('NCYLC', 'the Centre') is a Community Legal Centre dedicated to addressing human rights issues for children and young people in Australia through legal change – the only community legal centre of its kind in Australia.

- Mission and Vision

NCYLC aims at raising awareness of children's rights through various means:

- providing advice and information to children and young people on legal rights and responsibilities through the Lawstuff website*
- promoting and encouraging the implementation of a child rights-based approach when dealing with legal matters and strongly supporting the **United Nations Convention on the Right of the Child***
- bringing about changes to policies and promoting opportunities for the participation of children and young people in decision making at all levels.*

NCYLC activities revolve around three main core areas:

- Advocacy*
- Education*
- Information*

The Centre supports the use of legal strategies to improve and protect the rights of children. It also identifies and removes barriers of access and disadvantage for children from all sectors of Australian society. And therefore, the Centre assists organisations and decision makers in having awareness of children's rights and being more responsive to the needs of children as active members of the society.

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