

Children's rights in New Zealand law and society

G W Austin*

This article explores the various sources of children's rights in New Zealand law. These are found in legislation, common law and international documents. The results of a survey of schools and community agencies dealing with children are contained in the latter part of the article. Very little formal recognition of children's rights is found in school charters and mission statements. Children's rights and children's welfare are often equated. Funding for this project was provided by the New Zealand Law Foundation.

I INTRODUCTION

The significance of children's rights in New Zealand law and society is increasing. Given recent constitutional and political developments, this is no surprise. Across the New Zealand legal and social spectrum rights are becoming more important than they have been, at least in the recent past. The enactment of the New Zealand Bill of Rights Act 1990,¹ the rejuvenation of the Treaty of Waitangi as a source of rights,² and the greater cognisance now taken of international human rights norms in the legislative process³ and in judicial and administrative decision-making⁴ show that New Zealand law and society are becoming more rights focussed. Children's rights are illuminated, if not specifically, at least by some of the spill from the new light thrown onto these general sources of legal rights.

Today, children's rights have their own legal spotlight in the form of the United Nations Convention on the Rights of the Child⁵ which was ratified by the New Zealand government in 1993.⁶ In addition, some domestic legislation includes children's rights among the statutory objects or purposes. One of the statutory objects of the new Child Support Act 1991, for instance, is to "affirm the right of children to be maintained by

* Lecturer in Law, the University of Auckland.

1 See Part II.A.1, below.

2 See Part II.A.2, below.

3 See *Legislative Change: Guidelines on Process and Content - revised ed* Report 6 Legislation Advisory Committee, 1991 (p3) which outlines the requirements for the introduction of new legislation. Ministers intending to propose legislation must submit papers to the Cabinet Legislation Committee which is required, amongst other things, to "confirm that the Bill complies with the Treaty of Waitangi and the Bill of Rights Act 1990 and international legislation and standards".

4 See Part II.D, below.

5 The text of the United Nations Convention on the Rights of the Child ("the UN Convention") used for the purposes of this article is found at *Family Law Statutes*, (6ed, Butterworths, Wellington, 1994) 499-515.

6 The UN Convention was signed by New Zealand in 1989.

their parents". In litigation, statements of judicial policy often refer to children's rights. In access and custody decisions, children are said to have a right to contact with their parents.⁷ Increasingly, in family law statutes and case law, children's rights form an important part of the rhetoric justifying individual decisions and sweeping policy agenda.⁸

Yet for all this, there appears to be some ambivalence towards children's rights in the wider New Zealand community.⁹ While there are many positive moves towards recognition of the rights of children, there is, as yet, no fully developed children's rights consciousness. This is a significant gap. Children are differently placed from most adults in their ability to assert their rights for themselves. Thus the extent of children's rights protection will depend upon developments on a number of fronts. The law can only achieve so much. Legal developments need to be accompanied by ideological shifts in all sectors of society if the rights of New Zealand children are to be secured and protected. Some recognition of this is to be found in Article 42 of the UN Convention which imposes an obligation on States Parties to make the principles and provisions of the Convention "widely known".¹⁰ Indeed, changes in community consciousness may be more significant for many New Zealand children than those occurring within the legal system itself. Relatively few children may be affected by a Court of Appeal decision concerning the extent to which a Minister of the Crown may be required to take into account the UN Convention when exercising a statutory discretion.¹¹ The lives of many more may be changed significantly if schools and community groups bring children's rights concerns to the forefront of their thinking.

This article examines the legal context and parts of the social context of children's rights¹² protection in New Zealand. Part II presents an exposition of the different

7 For discussion, see J Caldwell "Disputes on Child Access: Judicial Disputes in New Zealand" (1990) 4 *Canta LR* 246; *Re K* [1991] 1 *FLR* 57; *Payne v Payne* (1994) 12 *FRNZ* 252. For critical appraisal of these developments, see P Tapp "Family Law" [1994] *NZ Recent LR* 140.

8 See Part II.D.2, below.

9 See Tapp, above n 7 on the relationship between the extent of governmental commitment to social welfare provision and children's rights protection.

10 The UN Convention, article 42 provides "States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike."

11 *Tavita v Minister of Immigration* [1994] 2 *NZLR* 257; see Part II.D.1, below.

12 The article does not explore the philosophical issues associated with children's rights on which there is an extensive literature. See: V Worsfold "A Philosophical Justification for Children's Rights" (1974) 44 *Harvard Educational R* 142; A Skolnick "The Limits of Childhood: Conceptions of Child Development and Social Context" (1975) 39 *L and Contemporary Problems* 38; F Schrag "Children in the Moral Order" (1977) 52 *Philosophy* 167; F Schoeman "Rights of children, Rights of Parents, and the Moral Basis of the Family" (1980-81) 91 *Ethics* 6; C Wellman "the Growth of Children's Rights" (1984) 70 *Archiv für Rechts und Social Philosophie* 441; M Minow "Beyond State Intervention in the Family: For Baby Jane Doe" (1985) 18 *J of*

sources of legal rights for New Zealand children. Legally, children's rights protection occurs in a range of different ways. Considered here are: the extent to which children benefit from the general New Zealand human rights law, specific common law protection of children's autonomy, international law and its effects on administrative and judicial discretions, and domestic legislation that makes specific reference to children's rights. Part III considers the place of children's rights in the wider New Zealand community. The data for Part III derive from a survey of New Zealand schools and community groups. The key purpose of the survey was to assess the influence children's rights on these institutions. Part IV concludes the article with some suggestions for future directions in thinking about children's rights in New Zealand law and society.

II THE LEGAL SIGNIFICANCE OF CHILDREN'S RIGHTS

A number of different legal sources currently touch on the rights of children. Whereas most recent attention has focussed on the United Nations Convention on the Rights of the Child, it represents only one part of the body of legal protections that may apply to children. Furthermore, as an international law instrument, the UN Convention does not bind domestic Courts.¹³ A point bearing emphasis in this context is that children may benefit, at least potentially, from rights that extend to *all* New Zealand citizens. Of the rights articulated in the New Zealand Bill of Rights Act 1990 for instance, only one - the right to vote - is limited by reference to age.¹⁴ On the face of the Bill, all others apply to the whole population. Children, in the same way as adults, may make legitimate claims to the right to be free from discrimination, arbitrary search and seizure, enforced medical treatment and all other rights contained in the Bill. The right to life, liberty, freedom of association and minimum standards of criminal justice may be just as relevant to children's lives as to adults'.

A *Human Rights are Children's Rights*

Human rights are children's rights. Children come within the general ambit of human rights protections.¹⁵ Children may benefit from domestic protection of human

L Reform 933; D Feldman "Rights Capacity and Social Responsibility" (1987) 16 Anglo-American LR 97.

13 See generally, GW Austin "The UN Convention on the Rights of the Child - and domestic law" (1994) 1 Butterworths Family Law Journal 63.

14 The New Zealand Bill of Rights Act 1990, s 12 provides: "Every New Zealand citizen who is over the age of 18 years - (a) Has the right to vote in genuine periodic elections of members of the House of Representatives, which elections shall be by equal suffrage and by secret ballot; and (b) Is qualified for membership of the House of Representatives".

15 Some commentators argue that the UN Convention provides children with *less* protection than other human rights law. See: RL Barsh "The Convention on the Rights of the Child: A Re-assessment of the final text" (1989) 7 J Hum Rights 142; C Maher "The Protection of Children in Armed Conflict" (1989) 9 BC Third World LJ 297; D Gomien "Whose Right (And Whose Duty) is it? An Analysis of the Substance

rights, such as those contained in the New Zealand Bill of Rights Act 1990, and from New Zealand's international obligations, such as those contained in the International Covenant on Civil and Political Rights. The latter is illustrated by the recent Court of Appeal decision on the importance of international human rights law in domestic courts, *Tavita v Minister of Immigration*.¹⁶ The Court held that certain international human rights treaties may fetter the exercise of a Ministerial discretion.¹⁷ Relying on the United Nations Convention on the Rights of the Child and the International Covenant on Civil and Political Rights,¹⁸ the Court of Appeal set aside a Ministerial decision to execute an deportation order on the basis that the Minister should have considered the rights associated with family privacy articulated in these documents.¹⁹ At the centre of the case was a child whose right to family privacy would have been significantly affected had her father been deported. Although both treaties were relied on by the Court, the International Covenant on Civil and Political Rights would have been a sufficient basis²⁰ for the holding. To the extent that the decision protected the child's rights, it may not have been necessary for the Court to rely on the specific rights for children articulated in the United Nations Convention on the Rights of the Child.²¹ The point is reinforced by reference to the precedents from the European Court of Human Rights cited by the Court of Appeal in support of its analysis.²² These cases centred on the right to family privacy in article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In the European cases, an approach broadly

and Implementation of the Convention on the Rights of the Child" (1989) 7 J Human Rights 161.

16 Above n 11.

17 The comparable Australian decision, *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353, went further. The High Court of Australia held that the ratification of international treaties (including the UN Convention) was a sufficient basis to raise a legitimate expectation that, subject to any contrary legislation, administrative decision-makers would act in conformity with the Convention and treat the best interests of the child as a primary consideration.

18 Taken together, the Court of Appeal considered that the UN Convention and certain articles of the International Covenant on Civil and Political Rights make up the internationally recognised "basic rights of the family and the child": [1994] 2 NZLR 257, 265. See also *Re the S Children (No 3)* (1994) 12 FRNZ 430.

19 In the light of the *Tavita* decision, the policy of the New Zealand Immigration Service is to consider the effect of the removal on New Zealand-based family members, taking into account the nature and strength of the relevant family ties. See *K v The Branch Manager of New Zealand Immigration Services* 11/4/1995 High Court, Hamilton Registry, M335/94, Hammond J.

20 In particular, see arts 23.1 and 24.1 of the International Covenant on Civil and Political Rights.

21 This point is reflected in the early history of the 1989 UN Convention on the Rights of the Child. At an early stage some nations considered that a separate convention for children was unnecessary as children were adequately protected by existing international human rights law. See C Cohen "Introductory Note" (1989) 28 ILM 1456.

22 *Berrehab v Netherlands* (1988) 11 EHRR 322; *Beldjoudi v France* (1992) 14 EHRR 801.

analogous to that in *Tavita* was taken by the European Court without reliance on the United Nations Convention on the Rights of the Child.

Tavita concerned the use of conventions in the exercise of statutory discretions. In addition, they may be looked to as an aid to the interpretation of ambiguous statutes.²³ International law may also be incorporated into domestic law by specific statutory provisions. An example is section 14(1)(e) of the Guardianship Amendment Act 1991, the Act which puts into effect the Hague Convention on the Civil Aspects of International Child Abduction. In addition to bringing the Hague Convention into New Zealand domestic law, the Act also has the potential to bring other international human rights law before the New Zealand Family Court. Section 14(1)(e) provides a substantive defence to an application for summary return of a child who has been abducted to New Zealand. The abducting parent is permitted to lead evidence that “the return of the child is not permitted by the fundamental principles of New Zealand law relating to the protection of human rights and fundamental freedoms”. While this defence is seldom relied upon in litigation, such authority that exists suggests that the courts will hear evidence of breaches of human rights law within the country to which the child would ordinarily be returned by the court. The meaning of “New Zealand law” is somewhat unclear. It would certainly include the New Zealand Bill of Rights Act 1990. It also includes international conventions to which New Zealand is a party, such as the International Covenant on Civil and Political Rights.²⁴

1 *The New Zealand Bill of Rights Act 1990*

As noted, the rights contained in the New Zealand Bill of Rights Act 1990 apply to children. While the precise scope of the effect of the New Zealand Bill of Rights Act 1990 is as yet unclear, there is little reason to suggest that rights protection given to the general New Zealand population are not to include children. These may include minimum standards of criminal justice, the requirement that other statutes be interpreted consistently with the New Zealand Bill of Rights Act 1990 wherever possible, the influence that the Bill is to have on common law developments,²⁵ damages awards for breach of specific rights,²⁶ and its use as a general guide to administrative decisions and institutional and community polices.

The significance for children of the New Zealand Bill of Rights Act 1990 was suggested very soon after its enactment by the official response to the “strip searching” incident at Hastings Boys High School.²⁷ In June 1991 18 boys were strip searched by

23 J Burrows *Statute Law in New Zealand* (Butterworths, Wellington, 1992) 238.

24 There must be reliable evidence of a breach of the human rights norms in the country to which summary return under the Guardianship Amendment Act 1991 is sought: *B v S* (1994) 12 FRNZ 473 where a party relied on the New Zealand Bill of Rights Act 1990, s 19 and the Human Rights Act, s 21 - prohibiting discrimination on the ground of ethnic origin; cf: *S v M* (1993) 10 FRNZ 277; [1993] NZFLR 584.

25 *R v H* [1994] 2 NZLR 143, 147.

26 *Simpson v Attorney-General* [1994] 3 NZLR 667.

27 *Re Strip Searching at Hastings Boys High School* (1990-92) 1 NZBORR 480.

teachers under the instruction of the school principal because of a concern that cannabis distribution networks may be operating at the school. The Commissioner for Children investigated the incident.²⁸ He relied on the principles of the New Zealand Bill of Rights Act 1990 in his scrutiny of the school's actions. The Commissioner's Report shows the potential of New Zealand Bill of Rights Act 1990 to influence the lives of children in significant ways. In his view, the search had been in breach of a number of rights.²⁹ The Report also suggests that application of principles such as *in loco parentis* which have justified unwarranted interference with children's rights in the past, need to be reconsidered in the light of modern conditions and legal frameworks.³⁰

The effects of the Bill of Rights on the lives of children will become clearer as the law develops. Particularly important for the lives of children is the extent to which rights from which they may benefit are to be subject to the "justified limits" clause in section 5 of the Bill. The question becomes: what "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" may be imposed on the rights articulated in the Bill of Rights solely because the person who is the subject of the rights is a child? As has been suggested elsewhere,³¹ the argument that children's rights may be so limited is a plausible one. For instance, although section 11 provides that "everyone" has the right to refuse to undergo any medical treatment, there is certainly scope to argue that some limit on the way that the right applies to children who refuse medical treatment against their parents' wishes would be justified within the terms of section 5 of the Bill.³² Similarly, limiting a child's right to freedom of expression provided for in section 14 of the Bill may be justifiable within the terms of section.³³

Rights articulated in the Bill of Rights Act do not apply in some watered down version to children. The starting point must be that children are as entitled to the benefits of rights contained in the Bill as adults - subject to unambiguous legislative provisions overriding them. While some limitations on the rights may be permitted under section 5, such limits must be lawful and demonstrably justified in New Zealand society. They may not be arbitrary or capricious. A limit may not be out of proportion with what may be achieved by it - in exactly the same way as limits on adults' rights must be proportionate to the desired end. In practical terms, this means that those who would treat children differently from adults must be able to point to

28 The Commissioner for Children is appointed under Part IX of the Children, Young Persons, and Their Families Act 1989 and is vested with statutory investigative powers under s 411(1)(e) to inquire generally into, and report on, "any matter, including any ...practice or procedure relating to the welfare of children and young persons".

29 The facts disclosed *inter alia* that the boys had been subjected to degrading treatment contrary to s 9 of the New Zealand Bill of Rights Act 1990.

30 *Re Strip Searching at Hastings Boys High School*, above n 27, 500.

31 GW Austin *Children: Stories the Law Tells* (Victoria University Press, Wellington, 1994) 146.

32 Cf: *Cairns v James* [1992] NZFLR 353.

33 See the Commissioner for Children's analysis in *Re Strip Searching at Hastings Boys High School*, above n 27.

some logical reason for doing so that must stand up to scrutiny under section 5 of the Bill of Rights. In the absence of any specific and unambiguous legal power to override a child's right, it is unlawful to behave otherwise.

2 *Te Tiriti o Waitangi/The Treaty of Waitangi*

A further legal source of rights for New Zealand children that stands in a special position is the Treaty of Waitangi.³⁴ Exactly how children's rights may be protected under the Treaty of Waitangi is an evolving question.³⁵ The guarantee of *te tino rangatiratanga* in article two of the Treaty in respect of *taonga* is considered by some to apply to children.³⁶ This is an aspect of tribal self-determination for it forms part of the claims by *iwi* to control their own people.³⁷ Given developments in thinking about the Treaty of Waitangi as a source of rights, it may be that specific rights for children must be viewed as an aspect of the right to *iwi* integrity, wellbeing and economic viability. Simply put, *iwi* self-determination may be a way of promoting children's rights.

The suggestion that the Treaty of Waitangi has potential to be a source of children's rights may seem an unorthodox idea. In part, this is because within western legal systems, rights are most often viewed as providing an individual with a direct relationship with the State which allows for alleged infringements of rights to be investigated and, if an unlawful infringement has occurred, rectified.³⁸ Legal principles deriving from the Treaty of Waitangi enlarge this perspective. At least part of the philosophy informing the Children, Young Persons, and Their Families Act 1989 is consistent with these ideas. Although it is difficult to discern a single set of coherent principles in the Children, Young Persons, and Their Families Act 1989,³⁹ it is

34 See P McHugh *The Maori Magna Carta* (Oxford University Press, Auckland, 1991) for an explanation of the legal standing of the Treaty of Waitangi in New Zealand law.

35 See generally J Metge and D Durie-Hall "Kua Tutu Te Puehu, Kia Mau: Maori Aspirations and Family Law" in WR Atkin and M Henaghan (eds) *Family Law Policy in New Zealand* (Oxford University Press, Auckland, 1992) 54; MH Durie "The Treaty of Waitangi - Perspectives on Social Policy" in IH Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 280; P Hopa "From the Flax Roots" in G Maxwell et al (ed) *Toward a Child and Family Policy for New Zealand* (The Office of the Commissioner for Children, 1990) 54.

36 Metge and Durie-Hall, above n35.

37 See J Williams "Not Ceded but Redistributed" in W Renwick (ed) *The Treaty of Waitangi in International Contexts* (1991, Victoria University Press, Wellington) 190.

38 For historical background to the liberal origins to this conception of human rights in the family law context, see M Minow "The Free Exercise of Families" [1994] U of Illinois LR 925; on processes for achieving universal consensus in respect of children's rights concerns, see Abdullahi An-Na'im "Cultural Transformation and Normative Consensus on the Best Interests of the Child" (1994) 8 Int'l J of L and the Family 62.

39 WR Atkin "The Courts and Child Protection - Aspects of the Children, Young Persons, and Their Families Act 1989" (1990) 20 VUWLR 319.

reasonably clear that children's *welfare* is considered by Parliament to be linked to the welfare of wider kin groups, including families, family groups, whanau, hapu and iwi. A less well developed, but certainly analogous, idea is that children's *rights* may likewise be.⁴⁰

Other perspectives on the Treaty of Waitangi as a source of children's rights may focus on matters of brute practicality. Like adult members of iwi, children have been victims of flagrant breaches of the guarantees contained in articles two and three of the Treaty of Waitangi. It would be absurd to suggest that dispossession of lands, forests, fisheries and other resources has not affected members of iwi who happen to be children. Maori children have been towards the bottom of most socio-economic heaps - according to standard indicators - for generations.⁴¹ Breach of the Treaty guarantees by successive governments is a major cause.⁴² So far as recognition of Treaty rights and Treaty settlements go some way to provide a basis for iwi economic viability, children's rights may be advanced. Restoring an assets base to an iwi so that it can afford to fund university scholarships for its young members, for example, is one very practical route towards securing their right to an education.⁴³

This brief survey suggests that when considering the range of means of protecting or furthering children's rights, analysis should not be limited to rights specifically directed at children. In the wake of the enthusiasm for specific sources of *children's* rights, the obvious point made in this Part - that children are people also and are also subjects of general rights protections under the law - may bear emphasis. How these sources of

40 It is important not to overgeneralise about the extent to which wider kin networks will be a source of children's rights protections. Children who need protection *from* their families may be placed in serious jeopardy if ideological positions as to the appropriate role for the State in child protection are allowed to cloud common sense. See *Review of the Children, Young Persons, and Their Families Act 1989* Report of the Ministerial Review Team to the Minister of Social Welfare (Wellington, 1992); Tapp, above n 7, 142-143; L Max *Children: Endangered Species?* (Penguin, Auckland, 1990) chapter 14. The point here is to draw attention to the developments in modern jurisprudence surrounding the Treaty of Waitangi which affect the legal notion of sovereignty in New Zealand. See P McHugh "Legal Reasoning and the Treaty of Waitangi: Orthodox and Radical Approaches" in Oddie and Perrett (eds) *Justice, Ethics and New Zealand Society* (Oxford University Press, Auckland, 1992) 109. As legal issues relating to rights protection are tied closely to issues of sovereignty - to the extent that rights claims involve some form of State intervention - the relevance of Treaty jurisprudence should be noted. This raises complex issues of constitutional theory which are beyond the scope of this article. See generally, J Kelsey *A Question of Honour? Labour and the Treaty 1984-1989* (1990, Allen & Unwin, Wellington) chapter 8 "The Role of Law".

41 Metge and Durie-Hall, above n 35.

42 See Metge and Durie-Hall, above n 35, for analysis linking successive governmental breaches of the Treaty of Waitangi to Maori family law and practice.

43 For instance, it is intended that part of the compensation to be paid in the Tainui-Waikato Ropatu claim will be used to establish trusts whose purposes will include supporting education for Tainui-Waikato people. See: Waikato-Tainui Deed of Settlement; Waikato-Tainui Raupatu Claims Settlement Bill 1995.

rights might apply will need to be worked out gradually as new cases arise. And there may be sources of children's rights in addition to those considered here. International conventions, the New Zealand Bill of Rights Act 1990 and the Treaty of Waitangi are merely the more obvious ones.

B Common Law and Equity

Specific common law protection of children's rights centre on the "mature minor principle".⁴⁴ This was articulated first in the now famous decision in *Gillick v West Norfolk AHA*.⁴⁵ The House of Lords held that children may consent to some types of medical treatment independently of their parents so long as they thoroughly understand the implications of their decisions.⁴⁶

The facts of *Gillick* centred the case on the relatively narrow issue of a child's ability to consent to contraceptive advice and treatment by a doctor. However, the broader significance of the decision was quickly recognised. In the first few years after it was decided, *Gillick* was considered to stand for the proposition that mature minors have the right to make many decisions for themselves. In part, this was due to the manner in which Mrs Gillick put her case. She argued that a government directive to doctors that they may provide contraceptive treatment and advice to children under the age of 16 years without the consent or knowledge of their parents unlawfully interfered with parental rights.⁴⁷ This required the Court to analyse the scope of parents' rights and their relationship with children's rights. The conclusion that, in some circumstances, provision of treatment or advice would not be unlawful required the Court to engage in deeper questioning of the legal significance of children's developmental capacity and how it relates to children's legal autonomy. *Gillick* held that parents' rights exist, but only so long as they are needed for children's care and protection. As children's capacity to understand fully the implications of their choices develops, the parental right to control or dictate those choices diminishes.⁴⁸ The High Court of Australia has perhaps

44 For critical appraisal, see K Federle "On the Road to Reconceiving Rights for Children: A Postfeminist Analysis of the Capacity Principle" (1993) 42 DePaul LR 983.

45 [1986] AC 112.

46 For commentary on the *Gillick* case, see: A Bainham "The Balance of Power in Family Decisions" [1986] CLJ 262; PN Parkinson "The Gillick case - just what has it decided?" [1986] Fam Law 11; J Devereux "The Capacity of a Child in Australia to Consent to Medical Treatment - Gillick revisited" (1991) 11 OJLS 283; WR Atkin "A Blow for the Rights of the Child: Mrs Gillick in the House of Lords" (1985) 1 Family Law Bulletin 35, reprinted as "Parents and Children: Mrs Gillick in the House of Lords" [1986] NZLJ 90.

47 This was one of a number of arguments presented in the case which ranged over tort, criminal law, and administrative law principles.

48 Ronald Dworkin's analysis of the right to do things of which other people do not approve is particularly relevant here. If we are to take rights seriously, we must acknowledge that sometimes people will do things others do not consider wise. See R Dworkin *Taking Rights Seriously* (Harvard University Press, Cambridge, 1977) Chapter 7.

given fullest expression to the implications of the *Gillick* decision. The High Court emphasised that “[e]ven an intellectually disabled child should not be assumed to lack the legal capacity to consent to her own medical treatment”.⁴⁹

Common law recognition of children’s rights centres on children’s right to make decisions. In other areas, the common law has less to say. As there is no common law obligation to support and nurture children, for instance,⁵⁰ it cannot be said that children have a common law right to support from their parents or from anyone else. Thus the focus of the common law is considerably narrower than other sources of children’s rights. The United Nations Convention on the Rights of the Child is an obvious comparison. Furthermore, common law recognition of children’s rights may take second place to other common law principles. Some six years following *Gillick*, the English Court of Appeal narrowed the scope of the decision by holding that it did not apply to a child’s decision to *refuse* medical treatment.⁵¹ Under English law, a doctor may treat a child against the child’s will if a parent consents to the treatment. Much of the Court of Appeal’s analysis in the case focussed on the law of torts and the question of when a doctor may treat a person without incurring civil liability. The Court’s answer was: whenever a person who gives consent is entitled to do so. Children’s autonomy rights were thus severely reduced because application of the *Gillick* principles to a situation where a child is refusing treatment would be inconsistent with established principles of the law of torts.

A further illustration is the limits of the equitable jurisdiction when determining the property interests of *de facto* spouses.⁵² Whilst significant developments have occurred in the willingness of courts to recognise that a *de facto* spouse’s contributions to the property of his or her partner should be recognised by way of a proprietary right or monetary award,⁵³ courts do not focus directly on the rights and interests of children who are members of the families concerned. As noted elsewhere,⁵⁴ this is in large part due to the limited focus of the equitable jurisdiction. Equity addresses rights of the spouses in relation to *property*. Broader issues - such as the rights of children to stability, shelter and psychological well-being - are not considered relevant. While some limited recognition may be given to the contributions of a spouse to the upbringing of children, the limits of the equitable jurisdiction means that the

49 M Rayner “Children’s voices, Adults’ choices: Children’s rights to legal representation” (1992) 33 Family Matters 4 - discussing *Secretary, Department of Health and Community Services v JMB and SMB* (1992) 15 Fam LR 392.

50 For general discussion of the obligations of parents see J Eekelaar “Parental Responsibility: State of Nature or Nature of the State?” [1991] J of Social Welfare and Family L 37; J Eekelaar “Are Parents Morally Obligated to Care for Their Children?” (1991) 11 OJLS 340.

51 *Re R* [1992] Fam 11; *Re W* [1992] 4 All ER 627.

52 In the New Zealand context, see WR Atkin *Living Together Without Marriage* (Butterworths, Wellington, 1991) chapters 5-8.

53 *Oliver v Bradley* [1987] 1 NZLR 586; *Wech v Linnell* (1993) 11 FRNZ 569; *Gillies v Keogh* [1989] 2 NZLR 327; *Lankow v Rose* [1995] 1 NZLR 277.

54 See G Austin *Children: Stories the Law Tells* (Victoria University Press, Wellington, 1994) chapter 8.

implications of any property division for children of the *de facto* marriage are not addressed. Even the issue of provision of a home for a child is avoided by the traditional limits on legal doctrine.

While the common law may be a significant source of children's rights protections in some context, it is limited by the contexts in which it applies. This is due, in large part, to the confines of traditional legal doctrine and policies. While children's advocates should be aware of the specific protections of children's rights to be found at common law, it must be acknowledged that the common law is not equipped to achieve broad-based protection of children's rights.

C *The United Nations Convention on the Rights of the Child*

The most comprehensive coverage of children's⁵⁵ rights is to be found in the United Nations Convention on the Rights of the Child. It is part of the modern trend in international human rights law to recognise and protect the rights of specific groups of people in specific ways. The 1979 Convention on the Elimination of All Forms of Discrimination Against Women is another example.⁵⁶ The appearance of the United Nations Convention on the Rights of the Child⁵⁷ in 1989 shows that children's rights

55 Under the UN Convention, art 1, a "child" means "every human being under the age of eighteen unless, under the law applicable to the child, majority is obtained earlier". Thus the Convention does not impose an international standard for when a child reaches majority. This is left to be determined under the domestic law. The Convention is unclear as to whether it applies before birth. The reference to "human being" in art 1 should be compared with the wording in the Preamble which incorporates the wording in the 1959 Declaration on the Rights of the Child: "Bearing in mind that, as indicated in the Declaration on the Rights of the Child, 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth'". For discussion, see D McGoldrick "The United Nations Convention on the Rights of the Child" (1991) 5 Int'l J of L and the Family 132, 133-134. In a recent New Zealand Family Court decision, a judge applied the protective measures of the Children, Young Persons, and Their Families Act 1989 to an unborn child: *In the matter of Baby P (an unborn child)* [1995] NZFLR 577, Judge Inglis QC. His Honour considered that as the 1989 Act enacted a radically new regime for the protection of children, cases which had held that a Court had no or limited jurisdiction in respect of an unborn child could be distinguished. See *In re F (in utero)* [1988] 2 WLR 1288; cf *R v Henderson* [1990] 3 NZLR 174.

56 See generally M Chen *Women and Discrimination: New Zealand and the UN Convention* (VUP/Institute of Policy Studies, Wellington, 1989).

57 Precursors to the UN Convention on the Rights of the Child were the 1924 Declaration of Geneva adopted by the League of Nations and the 1959 Declaration on the Rights of the Child. Neither document was binding at international law and both were of a more aspirational character than the UN Convention. The Declaration of Geneva was drafted by the Save the Children International Union, a non-government organisation established to respond to the needs of children after World War I. It did not mention children's rights. Its focus was more on the obligations of humankind to protect children and included such requirements as "The child that is hungry must be fed; the child that is sick must be helped; the child that is backward must be helped;

have finally achieved a status in international law equivalent to the rights protection accorded to other minorities.⁵⁸ These moves were part of the enlarging protection of human rights at international law reflected in such documents as the Universal Declaration of Human rights, the International Covenant on Economic, Social, and Cultural Rights and the International Covenant on Civil and Political Rights.⁵⁹ The UN Convention was adopted without vote, and with its signature in 1995 by the United States Ambassador to the United Nations, has almost universal accession.⁶⁰

The UN Convention ranges over many significant matters affecting children's lives. Perhaps its main purpose is to give children priority in a nation's allocation of resources and in its policy concerns. To achieve this end, the Convention requires:

- recognition that children have needs that are different from adults',
- an acknowledgment that children should, where possible, be part of a loving and caring family environment;
- state agencies and people who interact with children to respect and act in the best interests of children.⁶¹

The text of the UN Convention breaks down into six categories of rights:⁶²

1 Economic rights

Parties to the UN Convention recognise the right of every child to a standard of living that is adequate for the child's physical, mental, spiritual, moral and social development. While parents and people actually responsible for the child have the primary obligation, Parties are required to assist parents to secure children's economic

the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succoured". The 1959 Declaration did refer to children's rights, proclaiming children's entitlement to such things as healthy and secure development, education, and to be to be protected against all forms of neglect, cruelty and exploitation. See further P Alston "The Legal Framework of the Convention on the Rights of the Child" (1991-92) *Bulletin of Human Rights* (United Nations, Geneva).

58 C Corcos "The Child in International Law: A Pathfinder and Selected Bibliography" (1991) 23 *Case Western Reserve J of Int'l Law* 171, 173.

59 Together, these documents have become known as the "International Bill of Rights": see generally: L Chen "The United Nations Convention on the Rights of the Child: A Policy-Oriented Overview" (1989) 7 *J of Human Rights* 16; RJ Levesque "The Internationalization of Children's Human Rights: Too Radical for American Adolescents?" (1994) 9 *Connecticut J of Int'l Law* 237, 266.

60 See C Cohen and P Miljeteig-Olssen "Status Report: United Nations Convention on the Rights of the Child" (1991) 8 *NY L School Journal of Human Rights* 367 for background to the acceptance of the UN Convention in the international community. In the New Zealand context, see J Davidson "The United Nations Convention on the Rights of the Child" (1990) 2 *Butterworths Family Law Bulletin* 121.

61 See Levesque, above n 59, 269.

62 See McGoldrick above n 55.

rights.⁶³ Access to health care⁶⁴ and social security⁶⁵ are other aspects of a child's economic rights that are provided for in the Convention.

2 *Social and cultural rights*

Specific provision is made in the UN Convention to protect the rights of children who are members of ethnic, religious or linguistic minorities or who are members of indigenous peoples to enjoy their own cultures, profess and practise their own religion and to use their own languages.⁶⁶ This right is to be exercised "in community with other members of the child's group", suggesting that under the UN Convention, children do not have an *independent* right to choose a minority status other than that of their kin groups.⁶⁷ Other aspects of children's social and cultural rights include the right to education. Specific provision in the UN Convention is made regarding the availability of education,⁶⁸ and parts of its content.⁶⁹ Primary education is to be compulsory and available free to all.⁷⁰ Higher education is to be accessible to all on the basis of capacity. Parties to the UN Convention are required to take steps to encourage regular attendance at schools and the reduction in drop-out rates.⁷¹

3 *Political and civil rights*

Central to children's civil and political rights is the freedom of thought, conscience and religion.⁷² There is specific recognition of the role of parents in the exercise of this right. Parties to the Convention are required to "respect the rights and duties of the parents...to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child". The right is limited only by what is necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.⁷³

Other aspects of children's political and civil rights guaranteed by the UN Convention are the right to freedom of association and peaceful assembly⁷⁴ and the right to be free from discrimination of any kind.⁷⁵ The right to freedom of association and peaceful assembly is qualified in much the same way as the right to freedom of thought,

63 UN Convention, art 27.

64 UN Convention, art 24, 25.

65 UN Convention, art 26.

66 UN Convention, art 30.

67 Scope may exist under such other rights as the right to freedom of expression (art 13) and the right to freedom of thought, conscience and religion (art 14).

68 UN Convention, art 28.

69 UN Convention, art 29.

70 UN Convention, art 28.1(a).

71 UN Convention, art 28.1(e).

72 UN Convention, art 14.

73 UN Convention, art 14.3.

74 UN Convention, art 15.

75 UN Convention, art 2.

conscience and religion.⁷⁶ The right to be free from discrimination is of a more absolute character. Parties to the UN Convention are required to take all appropriate measures to ensure that children do not suffer discrimination because of the status, activities, expressed opinions and beliefs of the child's parents, legal guardians or family members.⁷⁷

4 *Legal process rights*

The UN Convention addresses children's rights in both civil and criminal proceedings. Children are given the right to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or appropriate body.⁷⁸ Children are guaranteed the right to be free from arbitrary or unlawful interference with their privacy, family, home or correspondence and are to be free from unlawful attacks on their honour and reputation. The UN Convention prohibits certain forms of punishment to be used against children and prohibits unlawful or arbitrary deprivation of liberty.⁷⁹ It requires Parties to the Convention to treat children who enter the criminal justice system in a way that is consistent with their sense of dignity and worth.⁸⁰ The UN Convention also specifies guarantees in respect of Parties' criminal justice systems - such as the prohibition on retrospective application of criminal laws,⁸¹ the presumption of innocence,⁸² and the right to assistance with the preparation and presentation of the child's defence.⁸³

5 *Humanitarian rights*

Parties to the UN Convention are required to respect rules of international humanitarian law in the context of armed conflict which are relevant to children. More specifically, Parties are required to take all feasible measures to ensure that children who under the age of 15 years do not take a direct part in hostilities. Parties may not recruit children under the age of 15 years into their armed forces. Where children are victims of any form of neglect, exploitation, abuse, torture or any other form of cruel, inhuman or degrading treatment or punishment Parties are required to take all appropriate measures to promote the children's physical and psychological recovery and social reintegration. This requirement may be of particular significance for children who are victims of armed

76 UN Convention, art 15.2.

77 UN Convention, art 2.2.

78 UN Convention, art 12.1.

79 UN Convention, art 37. This article prohibits the use of cruel, inhuman or degrading treatment or punishment. It prohibits the imposition of capital punishment or life imprisonment in respect of a person under the age of 18 years.

80 UN Convention, art 40.

81 UN Convention, art 40.2(a).

82 UN Convention, art 40.2(b)(i).

83 UN Convention, art 40.2(b)(ii).

conflict.⁸⁴ The right to a name and nationality are further instances of humanitarian concerns,⁸⁵ as are the specific rights in respect of children who are refugees.⁸⁶

6 *Family rights*

At a number of points in the UN Convention, specific mention is made of the role of parents in securing and protecting children's rights.⁸⁷ Recognition of the role of parents to guide children in religious and ethical dimensions of life is one example.⁸⁸ The UN Convention also makes more specific provision for the maintenance of family life - such as the right to know and be cared for by parents,⁸⁹ and the right to keep in contact with parents unless that is inconsistent with the best interests of the child concerned.⁹⁰ The child's right to family life is implicit in a number of articles of the UN Convention and in the Preamble.⁹¹

As this brief survey of its contents indicates, the UN Convention contains rights touching on a wide range of contexts. The precise role that the UN Convention is to play in New Zealand law remains unclear, however. In part, this is because of the role of international law in domestic courts. Because the Convention has not been directly incorporated into domestic law, no child and no person acting on behalf of a child may go to a New Zealand court and plead simply that she or he has suffered as a result of a breach of one of the rights contained within it. Moreover, rights contained in the Convention are not self-executing. To the extent that they are not already part of New Zealand's domestic law, they require legislation or policy development to be put into effect. Often this is expressed in the articles of the Convention. For instance, article 3.2 provides:

3.2 States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or

84 UN Convention, art 39.

85 UN Convention, art 7.1.

86 UN Convention, art 22.

87 See also art 23(1) of the International Convention on Civil and Political Rights which declares that "the family is the fundamental group unit of society and is entitled to protection by society and the state".

88 UN Convention, art 14.2.

89 UN Convention, art 7.1.

90 UN Convention, art 9.

91 UN Convention, art 20 - special treatment and care for children who have been separated from their families; art 22 - specific provisions in respect of reunification of refugee children with their families. The Preamble recites that the UN Convention recognises that "the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding" and that "the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community."

her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

The requirement that the Party "take all appropriate legislative and administrative measures" indicates that legislation is required to put the article into effect. Thus, it is not the UN Convention itself that enacts the right. Rather, the rights protection given by the Convention is through its requirement that domestic legislation and administrative practices be brought into line with the Convention, if necessary.⁹²

D Administrative and Judicial Discretions

Although the UN Convention is not directly applicable in New Zealand courts, it is making its presence felt in litigation involving children and families. As Cooke P has observed, "[t]he law as to the bearing on domestic law of international human rights and instruments declaring them is undergoing evolution".⁹³ In particular, there now exists scope for the UN Convention to influence the exercise of administrative decision-making and judicial discretions in family law cases.

1 Administrative decision-making

It has been suggested elsewhere⁹⁴ that *Tavita v Minister of Immigration*,⁹⁵ has given the UN Convention a significant boost⁹⁶ in New Zealand law. The case involved a New Zealand child whose father was an overstayer in New Zealand. A warrant for the father's deportation had been issued. If the father had been deported, the child and the father would have been separated. As one witness deposed, if the deportation warrant was to stay in force, the child and her father would become "a stranger to his daughter". The Court of Appeal required that the Minister of Immigration have regard to article 9 of the UN Convention on the Rights of the Child before he finally executed the deportation warrant. Article 9(1) provides:

9(1) States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial

92 Each Party must prepare a report to the UN Committee on the Rights of the Child on its record of compliance with the UN Convention within two years of its ratification and then every five years thereafter. The Ministry of Youth Affairs has been given the responsibility to comply with New Zealand's reporting obligations. On national and international compliance and criticisms of various Parties' records in respect of children's rights, see Youth Law Project (1994) 2 Youth Law Review 1-35.

93 *Tavita v Minister of Immigration* [1994] 2 NZLR 257, 266.

94 See Austin, above n 13, 65.

95 *Tavita v Minister of Immigration*, above n 93.

96 While the *Tavita* decision may have enhanced the legal standing of the UN Convention, its long term implications for children's rights remain unclear. A possible, and unfortunate, result of the decision may be to encourage the production of children in order to secure an advantage in the immigration process, leading to exploitation of children and young women who may be enticed into becoming pregnant.

review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

Tavita did not involve direct application of the Convention in the domestic courts. Rather, the Court required the Minister to have regard to Convention (and other international documents)⁹⁷ in exercising his discretion to execute the warrant. The issue raised in the case did, however, provide the Court of Appeal with the opportunity to emphasise that the adherence by New Zealand to international human rights documents, including the UN Convention, was not mere "window dressing." Administrative decision-makers who do not appropriately take into account New Zealand's obligations under the UN Convention may increasingly have their decisions questioned according to administrative law principles.

2 *Judicial discretions in family law contexts*

As is widely acknowledged, much of family law involves large elements of discretion.⁹⁸ At one extreme, there are decisions involving child placement under the Guardianship Act 1968. These cases allow judges a large measure of discretion. Courts are required to have regard to the welfare of the child as the first and paramount consideration.⁹⁹ The "welfare principle" is widely regarded as one of the most open-ended standards known to the law. Although the wishes of the child are to be taken into account, the court has a further discretion as to the weight to be given to them. At the other extreme are cases arising under the Matrimonial Property Act 1976. Although the 1976 Act vests the court with a number of discretionary powers, they have been largely confined by judicial precedents. In most cases arising under the Matrimonial Property Act 1976, courts will only depart from equal sharing of matrimonial assets in exceptional cases.¹⁰⁰

Between these two extremes are cases dealt with under more recently enacted statutes such as the Children, Young Persons, and Their Families Act 1989 and the Child Support Act 1991. Consistent with recent legislative drafting practice, these Acts include lengthy recitals of statutory principles. In theory, at least, these principles should be taken into account in the exercise of discretions vested in judges by these enactments.

The issue that has not been fully explored is the extent to which New Zealand courts, in exercising the various discretions that exist in domestic family law, should

97 See Part II.A.1, above.

98 See S Parker "Rights and Utility in Anglo-Australian Family Law" (1992) 55 MLR 311.

99 Guardianship Act 1968, s 23.

100 On the development of judicial discretions under the Matrimonial Property Act 1976, see C Bridge "Reallocation of Property After Marriage Breakdown: the Matrimonial Property Act 1976" in Atkin and Henaghan, above n 35, 231.

have regard to the UN Convention. A handful of cases suggest that court are prepared to hear argument on the subject.

A recent decision of the High Court in a child custody dispute, *H v F*,¹⁰¹ indicates how the UN Convention might be taken into account in a child custody dispute. The case involved three children aged 11, 10 and 9. They had spent their lives in an Exclusive Brethren community, first in the custody of their parents and then in the custody of their grandparents and an unmarried aunt. The children had been entrusted to the custody of their grandparents when the children's parents began experiencing marital difficulties. After reconciling, the parents sought return of their children, having decided that they would leave the Exclusive Brethren community. Maintaining that this would not be in the children's best interests, the grandparents refused to relinquish custody. The children, meanwhile, had expressed a desire to remain in the community.

Acknowledging that both the grandparents and the parents had compelling cases for custody, the Fraser J entrusted custody to the parents. His Honour considered that although article 14 of the UN Convention requires Parties to "respect the right of the child to freedom of thought, conscience and religion" it would have been inconsistent with other aspects of the Convention to have allowed the children to remain with the grandparents. His Honour observed:¹⁰²

It may also be noted that there are respects in which the views held by the exclusive Brethren fellowship are incompatible with principles formulated in the Convention, for example, freedom to seek and receive information and ideas of all kinds (art 13), freedom of association (art 15), the accessibility of higher education to all on the basis of capacity (art 28), and education being directed to the preparation of the child for responsible life in a free society in the spirit of...tolerance and friendship among all peoples and...religious groups (art 29).

Fraser J cited with approval an English Court of Appeal decision which held that "the impact of the tenets, doctrines and rules of a society upon a child's future welfare must be one of the relevant circumstances to be taken into account" in the exercise of a judge's discretion.¹⁰³ For Fraser J, the UN Convention on the Rights of the Child was a legitimate source from which to derive New Zealand society's tenets, doctrines and rules in the child custody context. In his Honour's view: "the terms of the United Nations Convention reflect the generally accepted standards of society in this country".¹⁰⁴

Over the years, judges have often expressed the view that their decisions should appropriately reflect society's expectations. Rough correspondence has existed between social expectations and the various rules that have fettered judicial discretions from time

101 *H v F* (1993) 10 FRNZ 486. Although this was a hearing *de novo* in the High Court, the Court had regard to the evidence that had been led in the Family Court, as is appropriate when determining an appeal from a specialist tribunal.

102 *H v F*, above n 101, 499.

103 *Re R (a minor)* unreported, 4 September 1992 CA per Purchas LJ.

104 *H v F*, above n 101, 499.

to time. The rule which endured until the 1970s that children of “tender years” should, all things being equal, be brought up by their mothers is an example.¹⁰⁵ Another is the rule that older children should be entrusted to parents of the same gender: boys to their father and girls to their mothers.¹⁰⁶ As New Zealand society has become more overtly pluralistic¹⁰⁷ it has become more difficult to reach such clear conclusions. Recourse to rules or established social standards in support of conclusions in child custody cases has become less easy, exposing child custody decision-making to the criticism that it amounts to no more than judicial “subjective ideology”.¹⁰⁸ As Fraser J’s decision in *H v F* perhaps indicates, the UN Convention on the Rights of the Child may now be taking on the role of symbolising New Zealand society’s expectations as they apply to children’s welfare. That is, the UN Convention may be beginning to symbolise relevant social expectations for a society where a general consensus may otherwise be impossible to discern.

Following *Tavita*, some statements in Family Court cases suggest that the UN Convention has taken on even greater significance than Fraser J’s analysis in *H v F* indicates.¹⁰⁹ The decision in *H v F* suggests no more than that it is permissible for judges to have regard to the UN Convention as a source for relevant social expectations. In the context of administrative discretions, *Tavita* went further and held that some decision-makers making some decisions may be *required* to take account of the policies underlying the UN Convention and other international human rights obligations in respect of children and families. Some Family Court judges have suggested that in exercising the various judicial discretions contained in family law legislation, judges may also be required to take the UN Convention into account. Judge Inglis QC suggested as much when in *In the Matter of the S Children* his Honour noted that “[i]n the exercise of its discretionary powers in matters covered by the Convention the Court may need to take account of the terms of the Convention”.¹¹⁰ In *Re the W Children*,¹¹¹ Judge von Dadelszen expressed similar views. In a case arising under Children, Young Persons, and Their Families Act 1989, his Honour relied on *Tavita* for the proposition that:¹¹²

it is plain from the approach of the Court of Appeal in that case that when the Family Court is required to exercise its discretion in cases such as the present it is legitimate, *even essential*, to fall back on [the UN] Convention when the Court is required to ensure that the fundamental rights of the child as proclaimed in its articles are recognised and protected (emphasis added).

105 Eg: *Palmer v Palmer* [1961] NZLR 129, 131.

106 Eg: *Morton v Morton* (1911) 31 NZLR 77; *Meurant v Meurant* [1922] NZLR 262.

107 See Tapp, above n 9. For discussion in the UK context, see A Bainham “Family Law in a Pluralistic Society” (1995) 22 J of L and Society 234.

108 J Eekelaar “Trust the Judges: how far should family law go?” (1984) 47 MLR 593, 597.

109 But cf: *K v The Branch Manager of New Zealand Immigration Services* 10 April 1995 High Court, Hamilton M335/94 per Hammond J

110 [1994] NZFLR 971, 977.

111 *Re the W Children* (1994) 12 FRNZ 548.

112 *Re the W Children*, above n 111, 558-559.

In this case Judge von Dadelszen relied on the UN Convention to resolve a perceived "tension" between key sections in the Children, Young Persons, and Their Families Act 1989 - between sections 4, 5 and 13 which emphasise the preservation and reconstitution of family relationships and section 6 which gives priority to the welfare of the child. In the light of the UN Convention his Honour considered it appropriate - "even essential" - to give greater weight to the welfare principle.

It is too soon to assess whether these cases represent a trend. Insufficient numbers of cases are reported to gain a reliable sense of the importance given to the UN Convention in Family Court cases involving children. Furthermore, the emphasis given to legal principles and doctrines varies between different registries and judges. Different approaches to the pressing, and often urgent, issues New Zealand Family Courts face on a daily basis are to be expected. Some judges may give considerable weight to the principles in the UN Convention. Others may reach equally supportable results without reference to it.¹¹³

The fairly general level of analysis of the UN Convention may be appropriate given the nature of most family law cases in New Zealand. In the main, New Zealand society has been spared the kind of corrosive, polarising litigation on the nature of children's rights that has become almost commonplace in other jurisdictions.¹¹⁴ The aim of the

113 To date, there has been little rigorous analysis in New Zealand family law cases of the substantive content of relevant articles of the Convention, the tensions between them, the various limitations that apply, and the complex relationship between the UN Convention and specific part of New Zealand's domestic family law. This observation is not meant as a criticism. In the majority of cases that come before the New Zealand Family Court involving children, it is at least questionable whether detailed legal argument on these issues is helpful or even appropriate. In the workaday world of the New Zealand Family Court, the opportunity costs should be considered before advocates are encouraged to provide the Court with detailed submissions on the UN Convention and other aspects of international law touching on the rights of children. Rather than using resources on the provision of detailed legal argument and analysis, it must be asked whether children's "rights" may be better protected through more practical means such as better resourced counselling facilities, more detailed analysis of the facts of their real lives and the causes of their families' problems, and so on. Effective child protection requires a significant commitment of financial resources at every level of state involvement. Delivery of welfare services becomes more difficult in times of fiscal austerity. A further difficulty may be the increasing demands on the New Zealand Family Court as its jurisdiction increases. See generally Harding "Financing the Family Court - Are there Storm Clouds Gathering" in *The Family Court Ten Years On* (New Zealand Law Society, Wellington, 1991) 203. The Child Support Act 1991 is a recent example of legislation which has increased demands on Family Court's time. Similar problems may arise with the enactment of the Domestic Violence Bill 1994 which is currently before the New Zealand Parliament.

114 See MA Glendon *Rights Talk: the Impoverishment of Political Discourse* (Free Press, New York, 1991); Developments in the Law "The Constitution and the Family" (1980) 93 Harvard LR 1156.

New Zealand judges who do refer to the UN Convention in the course of their reasoning seems more to remind everyone involved of the central place of the children who have become the subjects of the dispute. Rather than providing scope for elaborate and detailed legal argument, the UN Convention may be more appropriately used to signal the importance of the children's wellbeing and welfare and as a way of insisting that children do not become objects of adults' processes and agenda.

E Statutory Objects and Principles

The final source of children's rights within the New Zealand legal system is the specific mention that is made of them in statutory objects and principles. The Child Support Act 1991, which brought about a radical change to the law of financial provision for children, lists a number of statutory objects in section 4. The first object of the 1991 Act is stated to be:

4 Objects: The objects of this Act are -

(a) To affirm the right of children to be maintained by their parents:

As noted above, the Children, Young Persons, and Their Families Act 1989 contains a range of statutory objects and principles. Specific mention is made of children's rights in section 13 which establishes the principles to guide courts and persons exercising powers under the Act in relation to the care and protection of children. The first guiding principle in section 13(a) is that "children and young persons must be protected from harm, their rights upheld, and their welfare promoted".

Neither section 4(a) of the Child Support Act 1991 nor section 13(a) of the Children, Young Persons, and Their Families Act 1989 amount to unequivocal legislative protection of children's rights. These sections are confined either by other principles in the Acts or by their mechanistic provisions. The Children, Young Persons, and Their Families Act 1989 contains such a large and diverse range of legislative principles and objects that it is difficult to discern clearly Parliament's intentions on the topic of children's rights - or on any other aspect of the Act, for that matter.¹¹⁵ By itself, section 13(a) would not support an argument that decision-makers under the Children, Young Persons, and Their Families Act 1989 must give primacy to children's rights. The point is illustrated by *Re the W Children*,¹¹⁶ where Judge von Dadelszen needed to rely on the UN Convention to resolve the "tension" between the various emphases in the objects and principles of the 1989 Act.

Despite the reference to the right of children to be supported by their parents in section 4(a) of the Child Support Act 1991, a recent High Court decision suggests that the "right" is limited by the mechanistic provisions of the Act which establish the exact financial entitlements under the Act. In *Andrews v Andrews*,¹¹⁷ a mother brought a

115 Atkin, above n39.

116 *Re the W Children*, above n 111.

117 (1993) 11 FRNZ 250; [1994] NZFLR 39.

claim for a departure order in respect of a formula assessment under the 1991 Act. Under prior legislation, the mother was entitled to \$520 per month in maintenance payments. Under the 1991 Act her entitlement was reduced to \$43 per month. She argued that as this result was inconsistent with the objects of the 1991 Act, including section 4(a), a departure from the formula assessment should be granted. Rejecting this argument, Hammond J reasoned that though a formula assessment may in some cases reduce a parent's liability to support his or her children, this result should not be departed from on the basis that it appears to be inconsistent with the statutory objects. In his Honour's view, the right of children to be maintained by their parents¹¹⁸ is not an absolute right. Rather it "is a right to be maintained according to the various detailed provisions [of the Act]".¹¹⁹

Although the current fashion is to refer to children's rights in statutory objects and principles in relevant legislation,¹²⁰ this brief analysis of the Children, Young Persons, and Their Families Act 1989 and the Child Support Act 1991 indicates that the practical effect of such provisions may be fairly limited. Statutory expression of children's rights must be viewed in context. Competing legislative policies and detailed mechanistic provisions may be significant limitations on otherwise broad legislative statements on children's rights protection.

F Summary

Within the New Zealand legal system, children's rights are recognised in a range of different ways with varying degrees of legal force. Whereas the United Nations Convention on the Rights of the Child represents a significant international development, its ratification by New Zealand in 1993 did not radically alter either the legal status of New Zealand children or the extent to which their rights will be protected under New Zealand law. For those who would strive to protect and further the rights of New Zealand children, it is necessary to have a detailed understanding of all the ways that they are addressed in New Zealand law. As there is no one coherent source of children's rights law, consideration of a range of legal sources and materials is needed. This Part has surveyed some of the relevant legal sources that may be used to protect

118 The UN Convention, art 27.4, requires States Parties to "take all appropriate measure to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad".

119 The Court of Appeal refused leave to appeal from Hammond J's decision: *Andrews v Andrews* [1995] NZFLR 769. The Court held that an apparent inconsistency between a formula assessment and the objects of the 1991 Act did not raise an issue of law. It observed that if none of the statutory grounds for a departure order can be made out, "it must be recognised that the result conforms with the objects of the legislation". See also *Diamond v Cotogni* (1994) 12 FRNZ 276, 281. For critical analysis, see Tapp above n 9.

120 R Hammond "Embedding Policy Statements in Statutes: A Comparative Perspective on the Genesis of A New Public Law Jurisprudence" (1982) 5 *Hastings Int'l and Comparative LR* 323.

and further the rights of New Zealand children. With more creative advocacy and analysis it is likely that others will surface.

III CHILDREN'S RIGHTS IN THE NEW ZEALAND COMMUNITY

This Part considers attitudes towards children's rights in certain sectors of the New Zealand community. The theoretical basis for this part of the article has been outlined elsewhere.¹²¹ Briefly, the concern is that to concentrate only on *legal* protection of children's rights is to ignore other approaches to children's rights that may be more significant for individual New Zealand children. Relatively few children, for instance, are likely to be affected by a judicial decision such as *Tavita* - at least in the short term. The lives of many more New Zealand children are likely to be affected positively if schools and community groups bring children's rights to the forefront of their thinking and practices.¹²²

A *Child Welfare Community Groups*

A survey of child welfare community organisations was designed to generate information about the variety of ways that children's rights issues may be thought about by those working with children on a day to day basis. It was not intended to be a statistical survey. Rather, it was intended to be an impressionistic study of attitudes and conceptions of children's rights concerns outside of the formal legal system.¹²³ If a general trend is discernible, it is that by the time of the survey little evidence of a children's rights vocabulary is evident in the documentation provided by the groups. Moreover, the groups appear to be little influenced by *legal* developments in the area of children's rights. Few organisations went so far as to include in their statements of principles/kaupapa the "recogni[tion of] the rights of the child as stated in the UN Convention on the Rights of the Child and to ensure that all services respect these rights."¹²⁴ As the following analysis shows, however, this should not necessarily be taken as a criticism. Children's lives can be improved in a variety of ways. The survey

121 Austin, above n 54, chapter 9.

122 A further reason for examining responses to children's rights *outside* the legal system was to explore the possibility of discovering more creative thinking about issues associated with children's rights. Outside formal legal institutions, there exists the possibility that thinking about children's rights may be less confined by technical legal concerns such as justified limitations clauses and the like. As yet, however, children's rights are so little referred to in the mission statements/kaupapa of community organisations, that this aspect of the project could not be undertaken.

123 This part of the research was based on a postal questionnaire which was sent to approximately 60 New Zealand community organisations whose profiles suggested that their operations would affect the lives of children in significant respects. An initial mail-out solicited the willingness of the organisations to participate in the survey. Information was provided by approximately 40 organisations.

124 This was included in the statements of principles/kaupapa of a large national organisation which provides welfare, health and recreational services for children throughout New Zealand.

of community organisations concerned about the welfare of children is a useful reminder that the legal system does not necessarily have all the answers.

1 *Children's rights vocabulary*

Comments from officers of the community organisations responding to the survey suggest that children's rights and welfare are largely equated in their thinking. In answer to the question whether their statements of objectives make any reference to the rights of children one organisation replied "we think it does - please view and assess". In fact, the objectives of the group do not include reference to children's rights. The objectives comprise eight detailed principles relating to the "eradication of abuse and neglect of children". They also include a commitment to a multi-cultural perspective and to the "goals" of the Treaty of Waitangi. Another group replied affirmatively that its statement of objectives included reference to the rights of children, adding: "We are always concerned about the rights of children." This organisation provides "telephone and face to face counselling services" in a range of contexts including in the areas of child abuse and family break-down. Again, the organisation's mission statement included no reference to children's rights.

This pattern suggests that for some officers in community organisations, the phrase "children's rights" does not have a meaning that distinguishes it from more familiar concerns about the wellbeing of children. Where children's rights are specifically mentioned, the context appears to be somewhat generalised. For instance, in further documentation, the organisation concerned with prevention of child abuse and neglect mentioned above defines "child abuse" as: "any act by an individual, institution or society as a whole, that interferes with the well being of a child and deprives that child of his or her rights." The organisation does not specify which rights are meant. As the discussion in Part II of the UN Convention indicates, children's rights apply to a wide range of children's life activities. From the organisation's literature, it is unclear for instance, whether it goes so far as to consider interference with, say, a child's right to receive and impart information as "abuse". The use of the term "rights" here seems more designed to signal the group's dedication to the wellbeing of children - rather than being designed to address children's rights in a more specific way.

2 *Children's welfare as children's rights*

Lack of any mention of children's rights in a community welfare organisation's mission statement does not suggest that the organisation is not concerned with the rights of children. One officer of a group which focuses on provision of support for families in crisis said:

...children have the right to grow up knowing who they are, where their roots are, and that they are safe and are loved and that they belong. Ultimately my organisation has as its bottom line "the best interests of the child". This bottom line raises real issues as regards children's rights; who they live with; education; discipline; decision-making; safety and the like.

In addition to supporting families, the organisation works within the framework of the Children, Young Persons, and Their Families Act 1989 to provide homes for children who need them and support for their caregivers. While the organisation's literature does not tease out children's rights issues with the degree of particularity to be found in legal literature, in its focus and operations the organisation is dedicated to supporting families and children to forge better lives. The information provided by the organisation suggests that in its attempt to do so, the concept of children's *welfare* is more important to it than children's *rights* - or, at least, in the view of its officers, the two concepts are very closely linked.

The responses of many community organisations suggest that "welfare" is a more familiar and comfortable term than "rights". This is consistent with history. The "welfare of the child" has been familiar terminology in New Zealand law for decades.¹²⁵ In 1926 its *paramountcy* was enshrined in statute.¹²⁶ The "best interests of the child" is similarly familiar. Children's rights is a much more recent development.¹²⁷ It is likely that people within the community who are concerned with the wellbeing of children will continue to view their operations through the framework provided by welfare terminology. That there is considerable cross-over between children's rights and welfare ideas is reflected in article 3 of the UN Convention which requires that:

3. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

It is noteworthy that article 3 applies to both public and private social welfare institutions. Those community organisation which emphasise the "welfare" or "best interests" of children are - possibly without knowing it - acting consistently with one of the key articles in the UN Convention.

3 *Incidental protection of children's rights*

One group concerned with the prevention of family violence considered that protection of the rights of children "is more implied than specifically stated" in its objectives. This was an organisation that answered candidly that it had no information base that deals with the rights of children. However, an examination of the activities of this organisation suggests that it is actually dedicated to children's rights. It has campaigned for reform of the law permitting corporal punishment. It has also made extensive submissions to the Ministry of Youth Affairs about the relevance of the UN Convention on the Rights of the Child to family violence issues. Furthermore, in

125 See S Maidment *Child Custody and Divorce* (Croom Helm, London, 1984); I Pinchbeck and M Hewitt *Children in English Society* (Routledge and Kegan Paul, London, 1983); Austin, above n 54.

126 Guardianship of Infants Act 1926. For a brief discussion of the history of the UK equivalent, see B Hogget *Parents and Children* (Sweet and Maxwell, London, 1993) 6-9.

127 M Freeman *The Rights and Wrongs of Children* (Frances Printer, London, 1983).

working towards an end to family violence and in supporting its victims, the organisation is actively promoting children's rights. There can be few interferences with children's rights more gross than violence. Several of the rights included in the UN Convention are concerned with the prevention of violence against children.¹²⁸ In taking practical steps to eradicate it the organisation is giving practical expression to the policies and concerns of the UN Convention. Although the organisation does not mention children's in its objects or principles, the organisation is probably doing as much for the promotion of children's rights as any which does. As with many of the organisations in the survey, this organisation's activities show that specific mention of children's rights is not needed for active promotion and protection of children's rights to take occur.

4 Summary

Little express mention of "children's rights" appears in the organisations' literature relating to their objectives and principles. More common are familiar terms such as "welfare" and "best interests". In general terms, however, community action which focuses on protection of children's welfare is consistent with protection of children's rights - at least within the areas with which the community organisations are concerned.

As Part II of this article details, the significance of children's rights is growing on a number of fronts. Both internationally and nationally, the language of children's rights is becoming an important language for discussing crucial issues affecting children's lives. It is a language which is beginning to carry weight. "Rights" have the power to turn needs into entitlements.¹²⁹ Thus, community organisations concerned with the wellbeing of children may benefit from placing greater emphasis on children's rights. Being able to articulate concerns in the language of rights may enhance the profiles of many of these groups in that they will be able to discuss their activities, principles and objectives in ways that are becoming increasingly significant.

For instance, the main concern of one of the organisations surveyed is to support new mothers. The organisation did not mention children's rights specifically in any of its publicity literature, or in statements of principles or objects. However, in its support of new mothers, it is doing much to promote children's rights. Support of new mothers leads to safer, more healthy, more nurturing and caring environments for children. In its fund-raising activities and in other contexts in which the organisation needs to convince others of its importance, it may be advantageous to emphasise that in all that it does for new mothers, it is also promoting the rights of children. For, as the survey indicates, children's rights are addressed in a variety of ways through the activities of variously focussed community organisations. Within New Zealand communities, promotion and protection of children's rights depends to a significant degree on the activities of these groups as much as on anything that the law can

128 UN Convention, arts 3, 6, 24.2, 24.3, 37.

129 See M Minow *Making All the Difference* (Cornell University Press, Ithaca, 1991) 294.

achieve. Articulating their objectives and principles in terms of children's rights may serve to emphasise this fact.

One crucial area of children's rights where there seemed to be less commitment was the area of children's right to autonomy. No organisation surveyed clearly articulated a view that children have the right to make or participate in decisions affecting them.¹³⁰ A number of the activities of surveyed organisations affect the lives of older children who are perfectly able to express their own views. The lack of emphasis on decision-making autonomy may flow from the prevailing focus on children's "welfare" or "interests" rather than "rights" specifically. Focussing on welfare may lead to the perception that children, rather than being full *subjects* of legal rights, are merely *objects* of adults' concerns. Given that there is much common ground between rights and welfare, children's lives are significantly enhanced by community organisation's focus on children's welfare. However, a full commitment to children's rights should involve commitment to supporting children in their own decision-making and self-determination.¹³¹ In more general terms, recognising that children have rights contributes meaningfully to society's view of children's dignity and worth.¹³² This would be consistent with most community organisations' purposes and should be encouraged.

B *Children's Rights in Schools*

A similar survey was conducted of the significance of children's rights in the objectives and principles relied on in the operation of New Zealand schools.¹³³ The first point to note is the degree of defensiveness about the exercise exhibited by some schools. Replying to the question about whether the school charter included reference to children's rights, one principal¹³⁴ wrote: "A school is all about children. We don't need any more regulations". Mistrust of the law was evinced in another response:¹³⁵

130 See generally, M Henaghan "The 'Rights' of Children when decisions are made about and which affect the welfare and interests of children" in *The Family Court Ten Years On*, 48.

131 See generally, M Freeman "Whither Children: Protection, Participation, Autonomy?" [1995] Manitoba LJ 307. Cf: J Eekelaar "The Interests of the Child and the Child's Wishes: The Role of Dynamic Self Determinism" (1994) 8 Int'l J of L and the Family 42.

132 M Freeman "Taking Children's Rights More Seriously" (1992) 6 Int'l J of L and the Family 52.

133 This part of the research was based on postal questionnaires which were returned from approximately 70 New Zealand schools. The selection of schools was designed to generate a cross-section of the various types of schools currently operating in New Zealand. In the notes which follow, schools are identified by type: Level of School/whether State, Private or State: Integrated/whether co-educational or single sex (G=girls' school; B=boys' school; Co-ed: both boys and girls) and the current enrolment (to a rounded figure). In general terms: Contributing=ages 5-10; Int=ages 11-12; Fm3-7=ages 13-18; Fm1-7=ages 11-18.

134 Contributing/State/Co-ed/200+.

135 Fm3-7/State/Co-ed/1300+.

"Our ethos is guidance centred but we are not over pedantic in observing the letter of all legislation - as I am sure you will realise, the law is frequently an ass - with or without the 'r'". Another principal said:¹³⁶

What a sad day for our children if the adults who cared for them did so only because the law made them. It is not, unfortunately the school that the child needs protection from. What touching faith so many people have in the power of words and paper to make people behave well.

This was in response to a question about any reference that may have been made in the resolution of disputes to: the Office of the Commissioner of Children, the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993. In this school they had not.¹³⁷ The principal of a large urban secondary school¹³⁸ commented that there was "no need" to include rights in the school's charter. The school worked on the basis of "respect for (a) self; (b) others; (c) property". He added: "'Rights' invite arrogance and division and selfishness - we do not preach rights here; we talk privilege and responsibility."

In general terms, children's rights concepts were not prevalent in the literature provided by the schools surveyed.¹³⁹ They tended to be addressed indirectly rather than directly. Where children's rights were addressed specifically, the context suggested that the schools believed that children would have rights only when the students have demonstrated that they can fulfil certain responsibilities. That is, according to a number of the schools, "rights" are things that students must earn. They are not theirs *as of right*.

1 *Children's rights vocabulary*

As with the community organisations, some schools considered that they were addressing the rights of their students without actually referring expressly to children's

136 Fm3-7/State/G/600+. Another principal put the point in similar terms. When asked if the school had included references to the rights of children in any school policies, she responded: "No - actions speak louder than words". Fm3-7/State/Int/G/100+.

137 In a number of replies, rights seemed to be linked with bureaucracy and red tape. Since the recent New Zealand education reforms, much of the management of the schools has passed from the now defunct Department of Education to the schools themselves, greatly increasing the workloads for many senior school staff. Exasperation with the current demands of the New Zealand education sector may have prompted one respondent to the survey to write: "It was difficult and time-consuming to complete this. We expect some feedback as we are not here to provide information so someone can write an academic paper." On education reforms, see generally: the Education Act 1989; for a brief history of the New Zealand educational reforms, see: J Kelsey *Rolling Back the State: Privatisation of power in Aotearoa/New Zealand* (Bridget Williams Books, Wellington, 1993) 89-92.

138 Fm3-7/State/Co-ed/1800+.

139 In part this may be due to the fact that most school charters were drafted before the New Zealand government ratified the UN Convention.

rights in their charters or sets of guiding principles.¹⁴⁰ Typical was the comment from a small urban school¹⁴¹ that “rights have not been stated under the banner of the [UN Convention] but they are referred to in general terms”. This was followed by an extract from the school charter which did not mention children’s rights expressly:

X School aims to provide balanced programmes to cater to, and meet the needs of all its pupils. Emphasis is placed on the security and success of all pupils. The fostering of self-esteem and a sense of caring towards others is thought important, and children are encouraged to accept and understand responsibility.

The responses from this school reflect a belief that the school’s policies and approaches to learning already adequately address student rights, thereby obviating the need for specific reference to them. The response from a middle sized girls’ secondary school¹⁴² was similar: “in a sense all policies have to do with students’ rights to feel safe, to learn without disruption, to achieve, etc”. This school had a strong policies on equity, sexual harassment and on the Treaty of Waitangi. Literature provided by the school emphasised commitment to “respecting the dignity of the human person, compassion, [and] justice”. This was consistent with another response where a guidance counsellor considered that school¹⁴³ saw the “rights of the children as paramount” yet could point to no specific written school policy where student’s rights were mentioned. In a number of the school’s activities, however, children’s rights were addressed (albeit without specific reference to them), particularly in areas such as equal opportunities, child abuse and sexual harassment.

A small church school,¹⁴⁴ noting that the school’s charter does not make specific reference to children’s rights, referred to the mission statement which include the following aim: “The pursuit of excellence in a caring Christian family atmosphere so that each is well-educated, responsible, confident and capable of contributing to society”. The principal considered that this clause “impliedly” addressed children’s rights, stating her belief that “by implication children in a family have rights and responsibilities and the adults caring for them also have rights and responsibilities”. In the principal’s view, the school’s Christian ethic “means we respect all involved in the school”. In similar terms was the response from a large urban secondary school¹⁴⁵ which made no reference to children’s rights in its documentation but where the deputy principal insisted:

140 For the schools whose principles and guidelines did not address children’s rights specifically, an interesting issue that could not be explored in the context of the survey was whether it was the survey itself which prompted the school officers to portray the activities and policies they highlighted in terms of rights. That is, it is unclear whether the emphases in the survey caused the school officers responding to it to portray the policies, principles and objectives they highlighted in terms of children’s rights when that would otherwise not have been the case.

141 Contributing/State/Co-ed/-100+.

142 Fm3-7/State:Int/G/600+.

143 Fm1-7/State/Co-Ed/400+.

144 Fm3-7/State:Int/G/100+.

145 Fm3-7/State/Co-Ed/1200+.

It has not been an intention to prevent "rights of children" that has prevented such matters being included in the Charter. A general feeling would be that our school and its staff have an unwritten concern for the "rights of children" that is unquestionable and assumed.

Principals of a few larger schools considered that children's rights were addressed through participation of the students in decision-making processes. For instance, when asked about the school's view regarding the place of rights in the management of the school, the principal of one of New Zealand's larger urban schools responded:¹⁴⁶

X School has a long history of student involvement in the school's management expect[ially] through student representation on the Board of Governors (pre-1989) and subsequently [on] the Board of Trustees.

Student representation on Boards of Trustees was viewed by many schools in the survey as furthering children's rights. However, no further explanation was provided by any of the principals responding. The responses did not indicate, for instance, whether student representation furthered the rights of *all* students, or merely those students who attended School Trustee meetings. Moreover, there was no analysis of which of the rights of children student representation is designed to further.

2 *Rights and responsibilities*

Explicit statements of rights, such as the following (from the guidelines of rural primary school),¹⁴⁷ were rare:

People's Rights

People in the school have the right to : -

- 1 Respect and courtesy.
- 2 Enjoyment of the teaching/learning situation including success, recognition and fair treatment.
- 3 Express opinions.
- 4 To be listened to.
- 5 Make and admit a mistake.
- 6 Personal safety and respect of property.
- 7 Parental support.
- 8 Feel accepted and important.
- 9 A non-sexist and non-racist education."

More common were statements which linked children's rights specifically with their responsibilities within the school context.¹⁴⁸ The following table of rights and

¹⁴⁶ Fm3-7/State/co-Ed/1400+.

¹⁴⁷ Full Primary/State/Co-Ed/300+.

¹⁴⁸ Responding to the question "If the rights of children have not been included in the school's charter, please indicate why" one Principal responded: "Neither does the

responsibilities was included in a small rural primary school's¹⁴⁹ 1995 Parent Handbook:

Statement of Rights

If I have the right	then	I have the responsibility
1. to be listened to		to listen to others
2. to choose my own friends		to accept the choices of others
3. to have my say		to let others speak also
4. to use the facilities		to let others use them also
5. to have my turn		to let others have their turn
6. to be able to join in		to let others join in also
7. to be spoken to politely		to speak politely to others
8. to have my privacy		to let others have their privacy
9. to disagree		to accept others disagreeing
10. to be treated fairly		to treat others fairly also
11. to be accepted		to accept others also
12. to be able to work quietly		to allow others to work
13. to have my property respected		to respect others property also
14. to be encouraged		to encourage others
15. to success		to allow others their success

Having Rights Also Involves Having Responsibilities

This "statement of rights" makes it clear to parents that the rights of children that are specified in the list must be earned. They are not children's *as of right* but are linked to broader educational goals. Rights are used as a vehicle for learning about responsibilities to other people and the need to protect *their* rights.

It is inappropriate to question the educational aims of schools which adopt this strategy in respect of children's rights. To seek to teach children about responsibilities towards other people is sound educational policy. In emphasising responsibilities to this extent, however, rights may become unhelpfully characterised. A question raised by this list, and others like it, is whether rights should be portrayed as so easily lost. The list implies, for instance, that a child has the right to be heard *only* if he or she listens to others, suggesting that the school's own obligations to let the a child express herself or himself arises only if the child fulfils the child's end of the bargain. The list gives no indication that children may have rights other than those which the school's officers decide children may have - provided that the children behave in the way that the school decides is appropriate. That is, the list does not look beyond the specific school context to the social and legal frameworks which may further the rights of New Zealand citizens - including children. Nor does it suggest that there may be limits on the

charter detail children's responsibilities - you don't ask why". Fm3-7/State/Co-ed/1300+.

149 Full Primary/State/Co-Ed/90+

school's rights - or that the school has responsibilities.¹⁵⁰ The message is that one only has rights if one fulfils the expectations of those who have power over one's life. Children's rights are balanced against the school's administrative needs for certain types of accepted behaviour. By contrast, in the adult world, it is only in extreme situations that rights may be denied merely because of the way one behaves. The schools did not explain why the position should be different for children.

3 Summary

With the increasing focus on rights within the New Zealand legal system, it is inevitable that schools will find themselves under greater pressure to address children's rights in some detail in their policy formulation and day to day activities.¹⁵¹ The impression from the survey is that few schools have done this. It should be noted, however, that many of the child-centred policies already in place in New Zealand schools are consistent with the protections afforded by aspects of children's rights. As noted, a key focus of children's rights is protection of children's best interests and much of the information provided by the schools reflected a strong commitment to this. A stronger commitment to children's rights may help give greater focus to these policies in the future.

Schools are placed in a special position as regards the rights of children. In New Zealand, education is compulsory.¹⁵² The school system requires children to be in certain places for set periods of time and to perform mandatory tasks. If required of adults, these would be immediately recognised as gross invasions of rights. Of course, these are not necessarily invasions of the rights of children. Indeed, the UN Convention on the Rights of the Child requires States Parties to make primary education compulsory.¹⁵³ As Michael Freeman points out, a degree of liberal paternalism¹⁵⁴ is necessary in the area of children's rights. That is, the principle of compulsory education may be morally justified as something which will allow children to mature to independent adulthood.¹⁵⁵ It does not follow, however, that once inside the school gate children are hermetically sealed away from the world of rights.¹⁵⁶ This is not to

150 For instance, the list does not state whether the school has a responsibility to create an environment where children feel comfortable about expressing themselves on things that concern them. Of course, many schools do so - but it is illuminating that no school saw *its* responsibilities as necessary corollaries of children's rights. The conditions on children's rights were always fulfilment of the *child's* responsibilities.

151 Already this is occurring in Auckland, New Zealand's largest city. In cases involving suspensions or expulsions, children may be represented by specialist lawyers who are highly motivated child advocates: information provided by the Youth Law Project (Inc) at Auckland.

152 Education Act 1989, s 20 provides for compulsory enrolment at school between the ages of 6 and 16.

153 UN Convention, art 28.1(a). see Education Act 1989, s 3.

154 See generally M Freeman *The Rights and Wrongs of Children*, above n 127.

155 M Freeman "Whither Children: Protection, Participation, Autonomy?" [1995] Manitoba LJ 307.

156 See *Re Strip Searching at Hastings Boys High School* (1990-92) 1 NZBORR 480.

suggest that breaches of children's rights are occurring in New Zealand schools. However, while some of the schools in the survey have considered the rights of the children in their care in a detailed and conscientious way, others appear not to have grappled with the issues with much rigour. Some seemed hostile to the issue. With the rise in importance of children's rights in New Zealand law and policy, the latter position may be unsustainable. These developments suggest that increasingly attitudes and actions of all adults who wield power over children will be scrutinised under the spotlight of children's rights. Schools which fail to address children's rights in their policy formulation may merely be delaying the inevitable.¹⁵⁷

IV CONCLUSION

Children's rights enter into New Zealand law and society from a range of sources. They differ in their strength. They have different emphases. Some are enacted into domestic law. Others apply less directly. Children's rights also depend on the world views of those whose decisions affect children's lives. Commitment to children's rights requires understanding and commitment across many contexts.

Restrictions on children's rights may be necessary and justifiable in some, or even many, circumstances. Michael Freeman's argument for "liberal paternalism"¹⁵⁸ is a useful way of thinking through whether restrictions on a child's autonomy rights may be justified as restrictions which the child may come to appreciate. Restrictions may be tested by asking whether they are likely to allow the child to develop into a fully autonomous individual.¹⁵⁹ Individual cases will raise difficult problems and choices to be made in different factual and policy contexts.

The analysis above has assumed that children's rights are important and should be furthered and protected. For New Zealanders, ratification of the UN Convention on the Rights of the Child means that there is now little scope to doubt this assumption. For a real difference to be made to children's lives, however, more is needed than assumptions, or even august legal documents articulating the international community's commitment to the issue. Children's rights need to become part of moral and ideological frameworks which define the humanity of the human condition. To recognise that someone has rights is to acknowledge that person's humanity.¹⁶⁰ Unjustified restriction of others' rights chips away at - and sometimes downright denies - their personhood. For most

157 In *Re Strip Searching at Hastings Boys High School* above n 156, 503, the Commissioner for Children recommended that school Boards of Trustees, principals and other staff inform themselves of the provisions of the New Zealand Bill of Rights Act 1990. A similar recommendation might be made with reference to the UN Convention on the Rights of the Child.

158 Freeman, above n 155; *Re Strip Searching at Hastings Boys High School* above n 156.

159 Cf: M Minow, above n 129, chapter 9. Autonomous individuality should be recognised as including the ability to form relationships - to recognise and appreciate the connections between people. See also, Austin, above n 54, chapter 9.

160 Freeman, above n 155.

people it is obvious that children are people. That acknowledgment will only be partial, however, until it is also recognised that children have rights.