

Robert Ludbrook on UNCROC

The United Nations Convention on the Rights of the Child was adopted by the United Nations General Assembly on 20th November 1989.

It's 20th birthday is being celebrated in New Zealand and around the world.

In New Zealand a 20th birthday is the time when a child legally becomes an adult – it is a rite of passage marking transition to adulthood. The Convention has had a significant impact on the lives of New Zealand children – it has led to a much broader acceptance that children have individual rights and responsibilities and has markedly increased opportunities for children to have a say and have their views heard and taken into account by parents, schools, policy makers and the courts.

The Convention had a long gestation before it was formally adopted by the General Assembly in 1989. A 20th birthday celebration is a time to look back as well as to look forward. A backward glance at the origins of the Convention and the how it came into being may help us to gain a better understanding of it.

EARLIER DECLARATIONS OF CHILDREN'S RIGHTS

League of Nations Declaration on the Rights of the Child 1924

The earliest move to establish an internationally accepted set of rights for children was made by the League of Nations in 1924 when it proclaimed the Geneva Declaration on the Rights of the Child. The Declaration was well ahead of its time and the concept of children having independent rights was seen as radical. It was quite brief but made the important point that children, because of their vulnerability, require special safeguards and protections.

Declaration of the Rights of the Child 1959

This Declaration proclaimed by the UN General Assembly in November 1959 might be described as a junior version of the Universal Declaration of Human Rights adopted by the newly formed United Nations in December 1948. Like the 1924 Declaration, it did not define "child" but it extended to all children without distinction or discrimination, the right to enjoy special protection, and opportunities and facilities for their development physically, mentally, spiritually and socially in a healthy and normal manner. It stated that, in all laws affecting children, the best interests of the child shall be the paramount consideration. The Declaration establishes ten principles which include:

- Children have a right to a name and nationality;
- The right to post-natal care, adequate nutrition, housing, recreation, medical services and social security;
- A handicapped child has a right to special treatment, education and care;
- Children need love and understanding and shall grow up in the care and responsibility of their parents and in an atmosphere of affection and moral and material security;

- Children of tender years shall not, save in exceptional circumstances, be separated from their mother. Society shall extend particular care to children without a family and those without adequate means of support;
- Children shall be entitled to free and compulsory education, at least in elementary stages and shall have the opportunity to develop their abilities. Their best interests shall be the guiding principle for their educators. They shall have full opportunities for play and recreation;
- Children shall in all circumstances be among the first to receive protection and relief and shall be protected against all forms of neglect, cruelty and exploitation. They shall not be engaged in employment before an appropriate minimum age and shall not engage in any occupation which would prejudice their health or education or interfere with their development;
- Children shall be protected from all forms of discrimination and shall be brought up in a spirit of understanding, tolerance, friendship, peace and universal brotherhood and in full consciousness that their energy and talents should be devoted to the service of their fellow men.

Plainly the 1959 Declaration contained building blocks that were used as a foundation for the 1989 Convention. The use of male language and its stereotyped views of male and female parenting roles jar today but the Declaration covers most of the ground later traversed in UNCROC. What is most noticeable to the modern eye is that the Declaration while using rights terminology is exclusively concerned with children's welfare and protection. There is no right for children to express their views or to have a say in decisions that affect them. Neither is there any right of free speech or freedom to receive information.

MOVING FROM A CHILD WELFARE FOCUS TO A CHILDREN'S RIGHTS FOCUS

The notion that children have rights and have a great deal to contribute to society if given the opportunity was being discussed and promoted by a few liberal thinkers in England and the United States. These include the American paediatrician B.I. Beverly (author of *In Defense of Children* (1941) where he argued that children should be encouraged to be self-reliant; the English educationist A. S Neill who in *Summerhill* (1962) wrote about his school where all important decisions were made by a democratic process in which the vote of students as young as seven years carried the same weight as that of the headmaster; and the US teacher John Holt (*Escape from Childhood* (1974) who wanted the right to vote to be given to all children regardless of age.

These views were treated with ridicule and scorn by most commentators at the time of publication.

International Year of the Child 1979

The United Nations designated 1979 as the International Year of the Child – a year in which special attention was to be given throughout the world to the needs of children and the rights conferred on them by the 1959 Declaration on the Rights of the Child.

In New Zealand a special Commission was set up to organise events round a series of themes highlighting different aspects of children's welfare and rights. The newly established Human Rights

Commission organised a conference *The Rights of the Child and the Law* held in Christchurch from 23rd to 25th November 1979.

There were more than 40 papers given by people of eminence in the legal, health and social welfare professions and by representatives of non-government organisations. Reading these presentations thirty years on one is surprised that there appears to have been no input at the conference from children themselves and that not one of the papers advocates that children should be given greater opportunities to express their views and have their views taken into account. Children's rights in 1979 were perceived and defined in welfare terms.

There was no movement pressing for the empowerment of children or their greater participation in decision-making whether at a personal or societal level. Children's rights talk at that time was focused on children as objects of concern rather than as individuals who had the capacity to make or influence decisions which affected them.

[Human Rights Commission Report into Residential Care 1978](#)

The passing of the Human Rights Act 1978 and the establishment of the Human Rights Commission in that year was a milestone in the recognition of human rights in this country. The first major investigation conducted by the Commission was into conditions of children in Auckland residential homes run by Department of Social Welfare. The report found that practices breached the human rights of residents in a number of respects and was probably in breach of NZ's obligations under the UN Covenant on Civil and Political Rights 1966 which had been ratified by NZ in 1978. That report had a huge impact on safeguards for children deprived of their liberty.

[New Zealand Committee for Children](#)

One of the topics discussed at the Rights of the Child and the Law conference was the need to secure a Voice for the Child – the most favoured suggestion being a Commission for Children. There was a wide divergence of views on the need for, and the role of, such a Commission. The focus of the discussions seemed to be which adult professionals would be best qualified to speak for children.

Despite the lack of consensus on these issues a Committee for Children was established the following year. It struggled on for several years and finally had its funding withdrawn and was disbanded in 1984. Rather than quietly slipping from sight the Committee used the remainder of its funds to place a half page advertisement in the NZ Listener pointing out three areas in which children were treated less favourably than adults; namely

- Children could be hit or smacked by their parents and carers without it being an assault;
- Children did not qualify for the minimum wage to which adults were entitled;
- Children could not vote or participate in public affairs.

New Zealand's first Commissioner for Children

The idea of a Commissioner for Children had been mooted by individuals and agencies for some time before the first Commissioner, Dr Ian Hassell, was appointed in 1988. While the Children and Young Persons Bill made no provision for the appointment of a Children's Commissioner energetic lobbying by a number of organisations resulted in the creation of a new office of Commissioner for Children. The statutory functions of the Children's Commissioner made no reference to children's rights.

THE DEVELOPMENT OF THE CONVENTION

The idea of a separate Convention on the Rights of the Child was first mooted by Polish delegates to the United Nations. Member countries of the United Nations were invited to appoint delegates to attend working sessions where the Convention would be discussed and articles drafted and voted on. The sessions were also attended by representatives of UN-affiliated organisations such as UNICEF, DCI, UNHCR, and WHO.

Three working sessions were held in Geneva over a period of ten years. The last session was in 1987. Staff of the Ministry of External Relations permanently stationed in Geneva represented this country at this and earlier sessions. A first draft had been prepared by United Nations staff drawing on the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as well as on the Declaration on the Rights of the Child and other UN instruments concerned with children such as the Standard Minimum Rules on the Administration of Juvenile Justice (Beijing Rules) 1985.

Delegates could propose amendments to the text and these were voted on. Where there were contentious articles these were referred to a smaller working group where an attempt was made to work out a compromise. There were many areas of contention but among articles which engendered great conflict were art 38 Children affected by armed conflict and Art 21 Adoption. Discussion became so heated at times that the Polish chairperson walked out on several occasions.

At the final working session in 1987 a final draft was decided on. There followed a process of editing and harmonising the wording of the draft with other UN instruments and completing translations into official UN languages. The Convention was adopted by the UN General Assembly on 20 November 1989 and came into force after it had been ratified by 20 countries.

Work done in advance of New Zealand's ratification of the Convention

New Zealand ratified the Convention in April 1993 more than three years after its adoption by the General Assembly.

In February 1990 the Ministry of Foreign Affairs and Trade (MERT) circulated a copy of the Convention to those government agencies that had the greatest involvement with children. It requested that they look at the provisions in the Convention relevant to their areas of responsibility and asked them to assess and report on whether any legislative changes would be necessary to

ensure consistency.

Most government agencies were slow to respond and those that did reply provided little information about the steps they had taken to assess whether the laws and policies for which they were responsible were consistent with the Convention. The Department of Social Welfare took three years to respond and then sent a ten line fax saying it saw no difficulties in ratification. Labour Department took 18 months to reply but sent a detailed response opposing ratification on the grounds that NZ's employment laws did not comply. Justice Department identified non-compliance in respect of adoption law and the mixing of adults and children in prisons. Human Rights Commission made a prompt response pointing to a number of areas of the law which were not consistent including corporal punishment in the home and schools, school expulsion procedures, lack of religious freedom of school students and young prisoners and the minimum age for joining the armed forces. Inexplicably, the Commissioner for Children was not asked to comment.

A careful scrutiny of the relevant legislation and departmental policies would have elicited hundreds of areas of non-compliance but MERT relied on information from the agencies that responded and, with honourable exceptions, the agencies treated the request with cavalier indifference. Of the areas of inconsistency identified only a small number were the subject of reservations.

The approach of MERT (and maintained by its successor the Ministry of Foreign Affairs and Trade) was that New Zealand should not ratify human rights Conventions unless NZ legislation was fully compliant at the time of ratification and that any areas of inconsistency should be made the subject of a reservation. This approach resulted from a misconception about the nature of such Conventions.

The obligation undertaken has been described as one of "progressive implementation". Article 4 requires ratifying countries to "undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the ...Convention." If New Zealand laws, policies and practices are fully compliant, ratification becomes an empty gesture. This misapprehension has led to the error that because NZ laws and policies were found prior to ratification to be fully consistent with the Convention no further action is required except in the areas covered by NZ's three reservations.

Because of this, no attempt has been made to review all laws, policies and administrative practices to identify areas of non-compliance or doubtful compliance despite recommendations from the Committee on the Rights of the Child that this be done.

The UN Committee in its two reports on NZ's progress has identified 45 areas of inconsistency and has made many recommendations for change, only a small proportion of which have been addressed. The government seems also to have embraced another fallacy that once a reservation has been entered it is under no obligation to make the changes necessary to withdraw it. More than sixteen years after ratification all three New Zealand reservations remain in place despite assurances to the UN Committee that they will be withdrawn.

Respect for the views of the child

The most significant feature of the Convention is the right conferred on children to express their views freely in all matter that affect them and for their views to be given due weight when decisions are made: art 12 .1. This right is reinforced by the entitlement of children to be heard in any judicial and administrative proceedings affecting them (art 12.2) and the right to freedom of expression and entitlement to receive information and ideas of all kinds (art 13.1). The child's right to be heard in judicial proceedings has been enshrined in the Children, Young Persons and Their Families Act 1989 and in the Care of Children Act 2004. The latter Act also requires parents and carers to include children in decision-making within the family.

The opportunities for children to participate in administrative and policy decisions have not kept pace and New Zealand children have little say in school governance and policies or in public and community affairs.

CONCLUSION

There is no doubt that the Convention has raised public awareness of the rights of children and has set benchmarks by which New Zealand's laws, policies and practices can be measured. It means that NZ's progress towards full compliance is monitored every three years by an international committee of experts. Much has been achieved in the 20 years since the Convention was adopted but much remains to be done before New Zealand fully meets the obligations undertaken on ratification. Next year government representatives will appear before the UN Committee at the consideration of NZ's combined 3rd and 4th reports and so its progress to full implementation will come under scrutiny.

Robert Ludbrook
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