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The Human Rights Law Resource Centre is a leading community legal centre.

The Centre promotes and protects human rights through policy analysis, advocacy, strategic litigation and capacity building at the national and international levels.

Through these activities, the Centre contributes to the alleviation of poverty and disadvantage and the promotion of freedom, dignity and equality.

The Centre is a registered charity. Donations are gratefully received and fully tax deductible.

NCYLC 2010 Children's Law Awards

To coincide with the 2010 Children's Law Awards and Youth Week 2010, this special edition of the Human Rights Law Resource Centre Bulletin will consider the human rights and legal issues affecting children and young people.

The 2010 Children's Law Awards recognise the achievements and commitment of those individuals and organisations who advance the legal rights and interests of children and young people across Australia. Organised by the National Children's Youth and Law Centre (NCYLC) and Mallesons Stephen Jaques, the Awards were presented by the Honourable Catherine Branson QC, President of the Australian Human Rights Commission, on 16 April 2010.

The Awards aim to encourage real and lasting change for children, and to ensure that children, one of the most vulnerable groups in our society, receive the best possible start to life. The Awards recognise that the tireless efforts of those who work to represent, advocate for, and raise awareness of children's legal rights are worthy of public praise and support.

By coinciding with the 2010 Children's Law Awards, this special edition of the Bulletin aims to serve as a further means of highlighting and raising awareness of the legal and human rights issues facing children. The articles in this Bulletin will consider a few current children's rights issues, including Australia's implementation of the UN Convention on the Rights of the Child, why Australia needs a National Children's Commissioner, the age of criminal responsibility and youth justice conferencing.



2010 CHILDREN'S LAW AWARDS

Promoting the Rights of Children and Young People

Winners of the 2010 Children's Law Awards

Congratulations to the winners of the 2010 Children's Law Awards.

The National Award for Outstanding Legal Representation of the Rights and Interests of Children & Young People

Winner: Robert Croser

Robert Croser has acted as a legal representative for children in the Adelaide Youth Court of since 1981. Over the last 10 years, the number of children found to be at risk of abuse or neglect, and the number of children under care and protection orders has continued to rise nationally. Rob has acted in the majority of applications made to the Youth Court under the Children's Protection Act.

Rob has demonstrated an extraordinary ability to develop rapport with and gain the trust of the children he represents. Many of these children come from socially disadvantaged backgrounds and many have been subjected to abuse and neglect. They are the most vulnerable members of our community. Rob goes beyond his brief to ensure that appropriate services, whether counselling, educational or other supports are put into place before agreeing to the application being finalised.

The judges were very impressed with Rob Croser's extraordinary commitment and accomplishments over 30 years. He has developed a strong rapport with, and earned the trust of, his clients – including children and young people from highly diverse and disadvantaged backgrounds. At the same time, he is regarded as a leading authority in this field by members of the judiciary, the public service and the Ministry.

The National Award for Outstanding Contribution to Advocacy in Policy or Law Reform to Advance the Legal Rights and Interests of Children & Young People

Winner: Youth Affairs Council of South Australia

The Youth Affairs Council of South Australia (YACSA) is a non-government body that has advocated for law and policy reform in the area of youth justice since its inception in the 1980s.

In 2009, YACSA campaigned for the State Government to reverse its decision not to replace the Magill Youth Training Centre (YTC) for remandees and detainees. The conditions at the Magill YTC for remandees and detainees had been described in *The Australian* as a "hellhole" and the UN Youth Ambassador, Chris Varney, described it as "a living children's rights abuse hell".

YACSA's public campaign exposed the conditions within Magill YTC and drew attention to broader issues of children's rights in relation to detention and rehabilitation. The campaign generated positive debate, included and empowered children, and was supported by a large number of organisations. In September 2009, the Government reversed its decision and announced it would proceed with a new facility, with the design to be based on explicit respect for children's rights.

The judges were very impressed by YACSA's development of innovative and effective strategies to win over community and political support in relation to the nature and conditions of juvenile detention (at Magill YTC), a notoriously challenging area of public policy. YACSA's campaign was persistent, but subtle and respectful, and was inclusive and empowering for children and young people.

The Media Award for Raising Awareness of Important Children's Legal Rights Issues

Winner: Louise Sutherland and the *BURN* project – A project of Legal Aid NSW in partnership with Community Prophets.

Louise Sutherland is a criminal legal practitioner at Legal Aid NSW. Louise took a lead role in the creation of the short film *BURN* and a related interactive website, a major Legal Aid campaign on youth crime prevention and education. Through her work as a criminal lawyer, Louise became aware that many children and young people misunderstood the criminal law and did not realise they could be held accountable for someone else's actions if they participate in a crime as a group.

Louise, with the support of Legal Aid NSW, working in partnership with Community Prophets, coordinated the making of the short film *BURN* and the interactive website. *BURN* has been shown in 300 workshops to schools, youth services and clients of the Department of Juvenile Justice and has informed 13,000 school students and young people.

The judges were very impressed the consultative and inclusive nature of this innovative and successful project, which centrally involved children and young people in its development. A central part of Legal Aid NSW's community legal education program, *BURN* has been shown to over one hundred schools and youth groups and informed over 13,000 students and young people.

National Finalists of the 2010 Children's Law Award

The National Award for Outstanding Legal Representation of the Rights and Interests of Children & Young People

Joe Harman

Joe Harman has over 25 years experience representing the rights of children. A significant part of Joe's practice involves representing children as an Independent Children's Lawyer, in both Family Court and State Care jurisdiction. Joe is on the Legal Aid Commission panel for children's representation. Legal Aid in Penrith says that Joe takes on the hard and really tough cases that others will not, and has helped to set a standard and contribute to a culture of legal aid in the area.

Joe has worked to improve the representation and handling of children's issues. He was integral in the Children's Case Program (CCP) pilot through the Parramatta Registry, and between 2003 and 2008 Joe participated on behalf of the Law Council in a national training program to educate lawyers in that scheme, presenting from an independent children's lawyer perspective.

Anna Radonic

Anna Radonic has been the principal solicitor at Youthlaw, Young People's Legal Rights Centre Inc Victoria since it was established in 2001. Anna has worked for over 25 years as a lawyer in the legal aid sector with a focus on the representation of children and young people. Prior to Youthlaw, she worked at the Youth Legal Service at Victoria Legal Aid and at the Victorian Aboriginal Legal Service, and as a locum at other inner-city community legal centres.

Anna represents vulnerable and disadvantaged children and young people in day to day matters and also conducts test case and strategic litigation. Anna has modelled service delivery and professionalism that is youth friendly, respectful, informative and responsive.

Clients love her down to earth, helpful manner even if it is to tell them to "get on that train and get to court". One of her clients stated, "Anna really helped me out, I felt she was on my side, she changed my life".

The National Award for Outstanding Contribution to Advocacy in Policy or Law Reform to advance the legal rights and interests of Children & Young People

Nicholas Tucker

Nicholas Tucker is the voluntary Chairperson of the Brisbane based Protect All Children Today (PACT) Board of Management. PACT co-ordinates a network of up to 70 trained volunteers across Queensland who provide support to children (and their families) who find themselves involved in Court proceedings (Magistrate and District Court).

As a direct result of a major research project undertaken by Nick in relation to children as witnesses following the introduction of the *Evidence (Protection of Children Amendment) Act 2003*, PACT now provides feedback on the issues that negatively and positively impact a child's ability to give evidence. This feedback is provided via the PACT volunteers and the PACT Board, to key stakeholders including the Department of Communities, Child Safety Services, the DPP, and the Chief Magistrate, Chief Judge and Associates. "Every single report from every volunteer is reviewed by the PACT Board".

The provision of PACT's evidence-based feedback has resulted in significant improvements for child witnesses, impacting on the District Judge Benchbook and best practice framework and the implementation of legislation. It has far reaching influence across a range of jurisdictions and has helped to reduce the anxiety and trauma experienced by child witnesses.

Katrina Wong

Katrina Wong is the convenor of the NSW Youth Justice Coalition and is the children's solicitor at Marrickville Legal Centre.

As convenor of the Youth Justice Coalition, Katrina facilitates advocacy and cross-sector dialogue among professionals and decision makers about issues relating to the rights of young people in NSW. She convened and co-organised the hugely successful *Rights Here, Rights Now* youth forum and collated the information to complete a submission to the National Human Rights Consultation.

Katrina was also instrumental in the pivotal *Bail Me Out* report, a report on the study of young people in detention conducted by the Youth Justice Coalition. This report, and Katrina's continued advocacy through media and other means, were driving factors behind the amendment to section 22A of the NSW *Bail Act* to increase access for young offenders applying for bail.

The Media Award for Raising Awareness of Important Children's Legal Rights Issues

The Eastern Community Legal Centre and their "Human Rights are Aussie Rules" program

The Eastern Community Legal Centre in Victoria teaches children about human rights through the principles of fair play and good sportsmanship. It presents complicated human rights principles in way that is easy for children to relate to, rather than as abstract ideas or technical legal jargon.

Recognising the need for community education, Eastern Community Legal Centre developed a forty-minute performance, *FRED's Fair Play*, focussing on the four FRED human rights principles (Freedom, Respect, Equality, and Dignity) outlined in the Victorian Charter of Human Rights and Responsibilities.

The play is accompanied by a one hour workshop and the popular Handball for Human Rights competition. It has been seen by thousands of students in schools, community festivals and sporting days across Victoria.

Please note that material in this Bulletin ("Material") is intended to contain matters which may be of interest. The Material is not, and is not intended to be, legal advice. The Material may be updated and amended from time to time. We endeavour to take care in compiling the Material; however the Material may not reflect the most recent developments. The Material represents the views and opinions of the individual authors and the Material does not represent the views of Mallesons Stephen Jaques or the views of the firm's clients.

Convention on the Rights of the Child: The State of Play in Australia

The *United Nations Convention on the Rights of the Child* (the "Convention") aims to impose obligations upon state parties for the protection and development of children by safeguarding their fundamental economic, social, cultural and political human rights. Australia signed the Convention on 22 August 1990 and ratified it on 17 December 1990. Since then, policy statements at the national level have indicated that children's rights are a priority. However, reports into the status of children and the law show that children's rights continue to be an area of concern across all Australian jurisdictions; state, federal and territory. There is a significant disparity between governments' public recognition of the importance of children's rights and action taken to protect these rights. This article argues that the failure to provide effective implementation of the Convention rights stems from the failure to comprehensively and effectively incorporate the Convention into domestic law. This article considers the extent to which the Convention is incorporated into Australian law and recommends the adoption of a coordinated national approach. It also highlights three key areas of concern for children's rights including youth justice, education and health.

Current Protections: Limitation of the State-Based Approach

One of the critical obligations under the Convention is that state parties must undertake all appropriate legislative and administrative measures for the domestic implementation of Convention rights.¹ Despite this, in Australia there is no national or uniform state codification of the Convention. As stated unanimously by the High Court in the case of *Minister for Immigration and Ethnic Affairs v Teoh*,² the

1 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1557 UNTS 3, art 4 (entered into force 2 September 1990).

2 (1995) 183 CLR 273.

rights conferred by the Convention are not enforceable against the Australian Government until they are codified into domestic law. As a result, the parliament, the executive government and the judiciary are not formally bound by rights conferred under the Convention in formulating and enforcing legislation or policy. The federal system of governance in Australia also means that rights protected at a state level, without uniformity, create inequality based on geography. This is a particular concern when a Convention right is breached.³

It can be argued that efforts have been made recently to introduce protections for children based on the Convention through the Victorian and the Australian Capital Territory (“ACT”) Human Rights Acts where children are afforded special protection on the basis of their vulnerabilities.⁴ In the ACT, for example, this extends to discrimination on the basis of:

race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth, disability or other status.⁵

Courts can hear cases of alleged violations or interference with these rights. Further, in these jurisdictions, all policy and decision making must be consistent with the rights protected under the Human Rights Acts, unless a report is tabled in parliament to justify otherwise. However significant concerns remain as to the efficacy of these court and legislative mechanisms to provide effective protection to children.⁶ Although Victoria and the ACT should be commended for incorporating these rights into their legislation, these Human Rights Acts fall short of a considered and comprehensive incorporation of the integrated principles contained in the Convention and fail to take advantage of the growing jurisprudence internationally on child rights that has built around the Convention. This legislation also creates further inequality as there are no comparable provisions in any other state or territory. Additionally, despite the recommendation for a national Human Rights Act in Australia following the National Human Rights Consultation in 2009, there is no indication that one will be enacted in the foreseeable future.

The only other example of a national and uniform introduction of a Convention principle is the application of the principle found in Article 3(1), which provides that in all actions concerning children, the best interests of the child must be a primary consideration. This consideration is paramount in determinations of parental care and responsibility for children under the Commonwealth *Family Law Act 1975* and for the care and protection of children in all states and territories.⁷ However, there are critiques of the implementation of the ‘best interests’ principle.⁸ Beyond the contentious issues of child protection and family law, other areas in which Australian protection of children’s rights is significantly out of step with the Convention include youth justice, education and health, in particular due to the disparity between those in remote and indigenous communities and their metropolitan and non-indigenous peers.

National Implementation

This article recommends a national implementation of the Convention, a position which is supported by the United Nations Committee on the Rights of the Child (the “Committee”). In 2005, the Committee

3 For example in Queensland, children aged 17 can be detained in adult prisons. Additionally, though there is some consistency among states and territories as to age of consent for sexual activity, the defence of similar age is only available in some states and territories.

4 *Human Rights Act 2004* (ACT) s 11; *Charter of Human Rights and Responsibilities Act 2006* (VIC) s 17.

5 *Human Rights Act 2004* (ACT) s 11.

6 See for example the concerns expressed in Youthlaw, *Submission to the Victorian Attorney General’s Independent review of the Equal Opportunity Act (1995) Victoria*, (2008). See also the assessment of the ACT Human Rights Act Research Project on the impact of the Human Rights Act 2004, <www.acthra.anu.edu.au/publications/index.html> at 23 March 2010.

7 *Children and Young People Act 2008* (ACT) s 8; *Children and Young People (Care and Protection) Act 1998* (NSW) s 9; *Children, Youth and Families Act 2005* (VIC) s 10; *Care and Protection of Children Act 2007* (NT) s 10; *Child Protection Act 1999* (QLD) s 5; *Children, Young Persons and their Families Act 1997* (Tas) s 8; *Children and Community Services Act 2004* (WA) s 7; and *Children’s Protection Act 1993* (SA) s 4.

8 See for example Patrick Parkinson and Judy Cashmore, *The Voice of a Child in Family Law Disputes* (2008); The Non-government Report on the Implementation of the United Nations Convention on the Rights of the Child in Australia May 2005, 11 - 12; Sally Hamilton and James McDougall “Children and the law - A lawyer’s role” (2010) 96 *Precedent* 13-18, Chief Justice Diana Bryant “Children both seen and heard” (2008) 92 *Reform* 21-24; and Harries et al, ‘Shifting the child protection juggernaut to earlier intervention’, (2009) 34(3) *Children Australia*, 5-8.

expressed concern over Australia's lack of a national approach to addressing the problems of inequality in education, youth homelessness, alternate care and juvenile justice for indigenous children.⁹ Just over four years after these comments were made the Council of Australian Governments ("COAG") adopted a national framework for protecting children, raising hopes of better coordination and collaboration between the Federal, state and territory governments in the area of child protection.¹⁰ The framework recognizes the need for a national approach to child protection and family support services. The challenge of achieving coordination between government and across portfolio areas is daunting, particularly without an explicit overarching commitment to a comprehensive policy framework such as that offered by the Convention. Despite the commitment and the encouraging reference to the Convention in the underlying principles of the Framework, no assurance has been made to the incorporation of the Convention rights in any measurable or accountable manner.

A functional partnership between the Federal and state governments on child protection will require effective research and analysis of underlying causes. This will touch many of the basic survival rights contained in the Convention (health, social security, family, appropriate care) and will impact on other development rights also addressed in the Convention (education, alternative care, periodic review, right to information and the right to be heard). The international child rights community is currently working on the development of international standards in the area of alternative care to build best practice across the world. However, Australia still lacks a practical framework for identifying and implementing best practice between states and territories in these areas.¹¹

Particular attention is required to provide for the effective participation of children and young people in decision making processes that affect them. This must be addressed in the political, legal and judicial systems to effectively implement the Convention in Australia.¹² Such a scheme must provide effective legal recourse for children whose rights are not adequately protected and build awareness of the need to ensure fundamental rights are considered at all levels of government in policy, legislation and decision making. As a result, Australia would be better placed to improve child protection schemes and address issues of youth justice, disparity in education and health care.

Youth Justice

Australia was a leader in international best practice for youth justice late last century, but now falls short of the required international standards in a number of key aspects, most notably the rates of detention of indigenous children and commitment to effective diversionary and rehabilitative practice.

Under the Convention, children are recognised as vulnerable members of society in need of special safeguards and care,¹³ a conclusion similarly reached by the *ACT Human Rights Act 2004*. The key Convention principles relating to juvenile justice are found in the paragraphs of Article 37:

- Article 37(a) which sets out human rights and principles for the treatment of detained children;
- Article 37(b) which provides that children are to be detained as a measure of last resort and for the shortest possible time; and
- Article 37(c) according to which detained children must be separated from adult offenders.

The first issue which must be addressed is that Australia has a reservation to Article 37(c) and it is current practice to detain children and adults without segregation. For example in Queensland, children aged 17 can be detained in adult prisons, rather than juvenile centres, and children aged 17 are able to be tried as adults. Reports indicate that these children, even those segregated from the main prison

9 Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Concluding Observations: Australia*, UN Doc CRC/C/15/Add.268 (20 October 2005).

10 Council of Australian Governments, *Protecting Children is Everyone's Business: Framework for Protecting Australia's Children 2009–2020* (April 2009), foreword.

11 Notwithstanding the important work of the National Child Protection Clearinghouse. See <<http://www.aifs.gov.au/nch/>> at 9 April 2010.

12 See McDougall et al *"Seen and Heard Revisited"* (2008).

13 See *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1557 UNTS 3, preamble (entered into force 2 September 1990).

community because of their age, are exposed to the traumatic effects of adult prisons with serious mental and psychological consequences for their long term development.¹⁴

The second issue, which has been commented on by the Committee,¹⁵ is that Western Australia has mandatory sentencing laws, which can apply to juveniles and are therefore in contravention of the 'last resort' principle in detaining children. This 'last resort' principle was also potentially breached by the 2007 amendment to section 22A of the *Bail Act 1978* (NSW) which restricted the number of bail applications an individual can make, with limited exceptions. Consequently, the number of juveniles on remand increased significantly. Additionally, the subsequent overcrowding of juveniles detention centres may also lead to the transfer of juveniles to adult detention centres.¹⁶

These examples make it clear that reform must be implemented at the national level.

Education

Education features extensively under the Convention: eight of the fifty-four articles refer to education as fundamental to the rights of the child. It is also an area in which disparity between Indigenous and non-Indigenous children was a major focus of the Committee.

The National Assessment Program for Literacy and Numeracy *National Summary Report: Achievement in Reading, Writing, Language Conventions and Numeracy 2009*¹⁷ illustrates the stark disparity in academic performance between Indigenous and non-Indigenous children. Generally, approximately thirty percent of Indigenous children fall below the national minimum average, whereas only approximately ten percent of non-Indigenous children fall below the same threshold. Further, research conducted by the Australian National University found that five-year-old Aboriginal children are only one year behind their non-Indigenous counterparts and that this gap doubles by the time the children are in late primary school and early secondary school.¹⁸ This indicates that access, quality and utilisation of education decreases as the affected children mature.

It was suggested by the *Non-Government Report on the Implementation of the United Nations Convention on the Rights of the Child in Australia (2005)* that a national strategy is required to address this disparity. The current work on the development of a National Curriculum¹⁹ represents an opportunity to commence the broader strategic task – if it allows for the need to recognise and address cultural, linguistic and social issues faced by children from Indigenous families and communities.

Health

A common thread between youth justice, education and health outcomes in Australia is the evident disadvantage between Indigenous and non-Indigenous children. The challenge is particularly evident in the Northern Territory.²⁰ In addition to the cultural and social issues, geography creates a natural barrier to equality when it comes to access to healthcare. One startling statistic which highlights the disparity is that the Indigenous infant mortality rate is nearly three times that of the general population.²¹ Indigenous health care issues, received attention in the second half of 2009 with the release of the Final Report by the National Health and Hospitals Reform Commission. The summary recommendations for Indigenous Health care highlight the importance of establishing a national authority to deliver culturally appropriate care. Other recommendations included increasing investment into training a specialised

14 Cathryn Moynihan, 'Justice For All... Unless You're a 17-year-old Queenslander' (2007) 61 *Head Note* 20.

15 Committee on the Rights of the Child, above n 6, 15 [74].

16 Katrina Wong et al. *Bail me Out: NS W Young People and Bail* (2010) Youth Justice Coalition.

17 Based on state and territory achievement score data. See <http://www.naplan.edu.au/verve/_resources/2009_NAPLAN_Summary_Report.pdf> at 23 March 2010.

18 Sarah Smiles "Age Increases education gap for Indigenous Children, *The Age* (Canberra), 1 April 2008.

19 The curriculum is being developed by the Australian Curriculum Assessment and Reporting Authority. see <<http://www.acara.edu.au/curriculum.html>> at 9 April 2010.

20 The population of the Northern Territory is 200 000 people, spread across an area well over one million square kilometres which contains about 100 different languages.

21 National Aboriginal Community Controlled Health Organisation, *What's Needed to Improve Child Health in the Aboriginal and Torres Strait Island Population* (2003), 6.

Indigenous health workforce. These steps still require an internationally recognised framework for measurement and evaluation to ensure that we fulfil our obligations under the Convention.

Conclusion

Without a coordinated national approach to the implementation of Convention rights, Australia will fall short of the expectations of the UN Committee. Consistent incorporation of Convention rights into Australian law and policy has the potential to enhance and promote the wellbeing of children, as well as improve outcomes for child protection, development and education. A national implementation would not only centralise resources and coordination but would ensure human rights are equally respected irrespective of state and territory borders. The implementation and enforcement of these rights on a national level could also provide greater transparency and accountability for the protection of fundamental children's rights.

Amelia Avery-Williams (Summer Clerk) and Alex Feldman (Solicitor), Mallesons Stephen Jaques

Why Australia needs a National Children's Commissioner

The United Nations Convention on the Rights of the Child ("the Convention") is the most widely accepted human rights treaty in history, ratified by 193 State Parties. However, Australia does not have a mechanism supported by the Federal Government for ensuring the protections it affords are translated into practical outcomes. Instead, responsibility for decision making in respect of children is often divided between and across governments. Significant gaps exist. The burden of oversight in addressing the gaps often falls to under-resourced community organisations and charities.

For many children in Australia, this situation may not result in any readily-identifiable disadvantage. However, for Indigenous children, those in out of home care, in contact with the youth justice system, recently arrived, the victims of sexual and physical abuse, involved in family breakdown and conflict, facing disadvantage in access to education, disability support and living in poverty, the need for sustained and effective monitoring and advocacy is very real.

There have been calls for the appointment of a National Children's Commissioner for over fifteen years. This article considers the importance and the possible role of a National Children's Commissioner.

Reasons why Australia needs a Child Commissioner

In ratifying the Convention, the Australian Government made a commitment to protect and promote children's rights in Australia. As demonstrated by numerous reports,²² there is more work to be done to ensure practical implementation of the Convention in Australia, particularly in areas concerning Indigenous children, child protection, youth justice and youth homelessness. As a nation, we are not fulfilling our responsibilities to these children. Reform in these areas must remain a priority.

Children and young people are in a vulnerable position when it comes to engaging in social and legal reform and often lack the skills, experience and political clout to independently address the issues identified above. They are not represented in the electoral process; they have not yet been able to form an effective lobbying force; they do not wield power or hold large resources; they are not consulted as key stakeholders in society. A National Children's Commissioner would be a small step to address this situation - to use position, knowledge and skills to engage in advocacy and to support measures that address these short-comings.

The Australian Human Rights Commission, State Children's Commissioners and the Commonwealth Ombudsman - Isn't This Enough?

Currently, children's commissioners/guardians exist in all states and territories in Australia. These Commissioners have made a positive start to advocate for the rights and interests of children and young

22 see Australian Law Reform Commission "*Seen and Heard Report*" (1997), McDougall et al "*Seen and Heard Revisited*" (2008), FAHCSIA's report "*The Road Home*" and Australia's *Combined Second and Third Reports under the Convention on the Rights of the Child* (2003).

people. However, state Commissioners have limited impact on federal policy and legislation. Federal issues such as immigration, social security and family law are some of the key issues for children, yet outside the mandate of the existing statutory state and territory positions. A National Commissioner would have a specific role in addressing national issues, with the opportunity to collaborate with state Commissioners to avoid duplication and maximise the impact of advocacy.

The Australian Human Rights Commission has never been provided with funding to meet its mandate to monitor the implementation of the Convention by the Federal Government. Notwithstanding this neglect, the Commission has undertaken powerful and influential research and advocacy on behalf of children, such as *Seen and Heard*, *Bringing Them Home* and *A Last Resort* the latter two considering the stolen generation and immigration.²³ However adult and child rights issues cannot always be addressed together. Some issues call for a dedicated child-specific approach (out of home care and child protection); others still require attention that recognises the particular vulnerabilities of children in a broader human rights context (consider the different principles applying to youth justice).

Current arrangements for the protection of children's rights through bodies such as the Australian Human Rights Commission also do not afford appropriate visibility and ongoing commitment to children and young people. As a separate body with a specific mandate to exclusively focus on children and young people, a National Children's Commissioner could provide national visibility to child rights and give children and young people a significant voice on national issues (cyber safety; young people's experience of violence and homelessness, obesity, to name a few recent examples).

The Commonwealth Ombudsman's complaints procedure has no specific entry or procedures established to effectively handle children's complaints. A National Children's Commissioner could implement a complaints procedure designed for children to use. This would both improve services relevant to children and encourage participation and recognition of the contribution of children and young people.

Global Progress to Protect Children's Rights

The case for a National Children's Commissioner is strengthened by the global movement to protect children's rights. National Children's Commissioners exist in many countries, including New Zealand (established 1989), England (established 2004), Wales (established 2001), Scotland (established 2004), Belgium (established 1998) and Northern Ireland (established 2003). In these countries, Commissioners have a mandate to safeguard and promote the *rights* and best interests of children and young people. Experiences from these countries highlight the need for formal and practical independence of the Commissioner including appropriate funding and reporting mechanisms.

Role of a National Children's Commissioner

To be effective, an Australian Commissioner for Children should be an independent statutory body with responsibility for a broad range of tasks and strong connections to community networks. The 2008 Bill suggests, for example:

- Monitoring and evaluating Australia's compliance with the Convention, in consultation with other organisations and in particular, preparing a report to the UN Committee on the Rights of the Child;
- Monitoring, reviewing and commenting on laws, policies, service standards and practices that affect young Australians;
- Conducting inquiries to assist in and drive law reform;
- Developing consultation mechanisms and encouraging youth participation; and
- Developing mechanisms to ensure best practice service standards for children's and youth programs, such as a National Code for the Protection of Children.

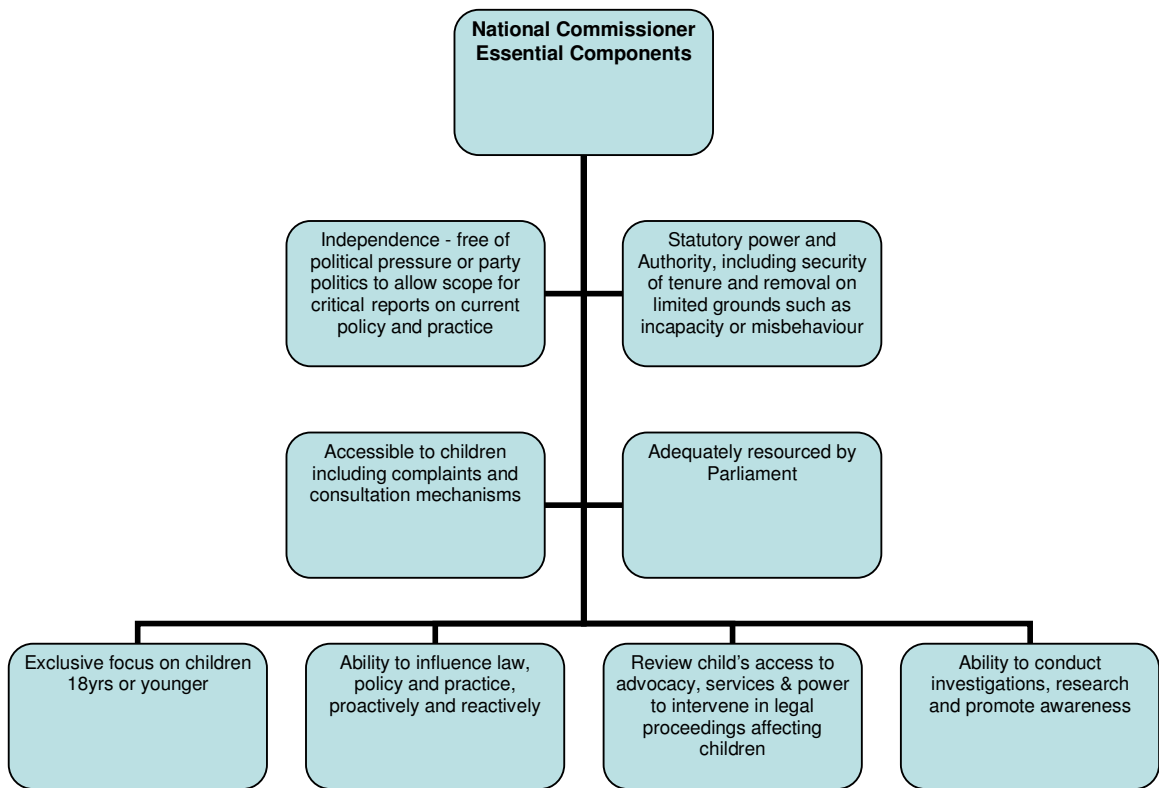
23 Australian Law Reform Commission "*Seen and Heard Report*" (1997), Australian Law Reform Commission "*Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*" April 1997; Australian Law Reform Commission "*A Last Resort? National Inquiry into children in immigration detention*" (2004).

Framework for the National Commissioner

Integral to its independence, a Commissioner must have the ability to determine its own priorities. Its functions could be supported by statutory powers including:

- initiating public inquiries;
- subpoena witnesses and documents;
- acting or identifying the need for a legal guardian for children such as unaccompanied child refugees;
- making reports and recommendations to Parliament on any issue relating to children and young people; and
- intervening in court proceedings involving rights of children and young people.

Structure of the Commissioner for Children:²⁴



Conclusion

This paper has briefly outlined the need for increased protection and advocacy for children and identified one practical step towards achieving this. An independent, properly resourced and authoritative National Children's Commissioner would be an invaluable resource, both for children and for the government in meeting its obligations under the Convention.

As a nation, we should be able to admit our mistakes and work to address the harm that is still caused to some of our most vulnerable. Now is the time to move forward.

Melissa Dejong (Solicitor and secondee to the National Children's and Youth Law Centre), Mallesons Stephen Jaques and Subhaga Amarasekara.

24 The essential components are sourced from Defence for Children International Australia, *Towards Taking Australia's Children and Young People Seriously: A Commissioner for Children and Young People*, 1998, <http://www.dci-au.org/html/aus_seriously.html> at 15 February 2010.

The Age of Criminal Responsibility

In November 2009, newspapers around Australia published outraged reports that Western Australian police had charged a twelve year old Aboriginal boy with receiving a stolen Freddo Frog. While the role of race in the story cannot be ignored, the resonance of the tale also lay in the youth of the offender and the childishness of the offence. As his lawyer said, "It's scandalous that a 12-year-old child should be subject to prosecution for a case of this type".²⁵ It is widely accepted in today's society that children who break the law *should* be treated differently than their adult counterparts. Yet under Australian law, children as young as ten can be held criminally responsible for their actions, despite international condemnation that this age is too low.

This paper examines the international position on the minimum age of responsibility, noting that Australia's position is now out of step with international best practice. It then considers how the youth justice system can address social fears that eliminating responsibility for children will produce an accountability vacuum, suggesting that an increase in the minimum age of responsibility is not incompatible with holding children accountable for their actions.

In Australia and internationally, child offenders are seen to have a special status stemming from their age and attendant assumed lack of maturity. Under Article 40(3)(a) of the *United Nations Convention on the Rights of the Child* (the "Convention"), governments are required to set a minimum age below which children cannot be held criminally responsible. This obligation applies to Australia, which became a party to the Convention on 17 December 1990. The Convention itself does not specify an appropriate minimum age, thus leaving individual states a degree of discretion to determine what age of responsibility to adopt. However, this discretion is not unlimited. Article 4 of the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (also known as "The Beijing Rules") requires that the minimum age "shall not be fixed at too low an age level" and shall be determined bearing in mind children's proven levels of "emotional, mental and intellectual maturity". This has been interpreted and applied differently across the international community, with the result that there is considerable difference in the minimum ages of criminal responsibility around the world.

In all Australian jurisdictions, the minimum age is now set at 10 years.²⁶ This is on par with England, Wales and Northern Ireland. However, this age is lower than many other countries. It is difficult to obtain comprehensive and up-to-date data on the age of criminal responsibility across the globe, but analysis of 2009 Concluding Observations of the United Nations Committee on the Rights of the Child ("Committee") shows that the minimum age ranges widely, from seven (Pakistan, Qatar) to fifteen (Philippines) and sixteen (Bolivia, Mozambique). In fact, as far back as 1997, the Committee stated in its Concluding Observations on Australia that the minimum age of ten years was too low and should be increased. This view was reiterated in a General Comment published by the Committee in 2007 where it was said that a minimum age of criminal responsibility below twelve years is not considered to be internationally acceptable. Given these criticisms and the international trend towards increasing the minimum age of criminal responsibility, the question must be asked whether Australia's minimum age should be increased.

Before discussing the arguments for and against raising the minimum age, an additional factor should be considered. Across Australia there is an extra layer of protection for young offenders known as the principle of *doli incapax*, which is a legal presumption that children aged between ten and fourteen are not capable of being found guilty of crimes. However, this presumption offers limited protection as it can be rebutted by the prosecution showing that the accused understood their act was 'seriously wrong' and not just naughty or mischievous. The effectiveness of this measure in protecting children has also been questioned by some commentators such as Dr. Ben Matthews, who notes that the presumption is often ignored or, when it is recognised, is easily rebutted.²⁷

25 Farah Farouque and Fran Rimrod, 'Boy, 12, to Fight Stolen Freddo Charges', *The Age* (Melbourne) 16 November 2009.

26 See for example s 38(1) Criminal Code Act (NT); s 344 *Children, Youth and Families Act 2005* (Vic); s 5 *Young Offenders Act 1993* (SA); and s 5 of the *Children (Criminal Proceedings) Act 1987* (NSW).

27 Ben Matthews, *Australian Laws Ascribing Criminal Responsibility to Children: The Implications of an Internal Critique, Post-modern Insights, and a Deconstructive Exploration* (PhD Thesis, Queensland, 2001).

Increasing Australia's Minimum Age

Generally, legislative and policy reform in this area has been directed towards increasing children's rights and moving away from the more punitive measures associated with the adult criminal justice system. In favour of this move, human rights groups have stressed such factors as the incongruence between the ages at which people are given the rights to vote, drink alcohol and drive motor vehicles, compared to the age at which criminal responsibility can be imposed on them.

However, there are dissenting voices, particularly from victims' rights groups, suggesting that a harsher approach should be adopted towards young offenders. High profile cases, such as the Bulger killing in England, at least superficially fuel arguments that children have the capacity to understand the wrongfulness of their actions despite their age. Added to this are suggestions that raising the minimum age of responsibility will make adult criminals more likely to engage children to do their 'dirty work' for them, given that the young person is beyond the reach of the law.

These concerns can be partly addressed when effective social welfare measures are in place that will provide for a child's serious behavioural issues to be addressed without resorting to adjudication of criminal responsibility. In popular parlance, raising the minimum age would not necessarily give a free pass to children to commit crime.

In England and Wales, for example, although children under ten cannot be charged with an offence, the crime is recorded by police and the child can be made the subject of a child safety order and placed under the supervision of social workers or a local multi-agency team.²⁸

In Brazil, where the minimum age is eighteen, a distinction is made between persons under twelve years (who are classified as children) and persons between twelve and eighteen (who are classified as adolescents).²⁹ Under the relevant legislation, if a child under twelve commits a crime they will be dealt with by a Custody Council which is non-judicial and aims to protect the child. But if an adolescent, between twelve and eighteen, commits a crime, a judge can impose a punishment ranging from admonition or repairing the damage caused through to probation and incarceration (in extreme cases).³⁰

These punishments are deemed to be 'socio-educational' measures aimed at socially reintegrating the adolescent and preventing them from committing future crimes. Already, similar measures are in place in Australian jurisdictions to deal with young offenders above the age of ten, with the focus on restorative justice rather than retribution and punitive sanctions.

Australia remains out-of-step with the UN Committee on the Rights of the Child's recommendations that Australia increase its minimum age for criminal responsibility.

There is no apparent government initiative to reconsider the age of criminal responsibility although there are often reviews of youth justice policy and strategies.³¹ This is partly due to the increasing focus on restorative justice and the need for more effective and consistent use of diversionary programs and strategies for dealing with crime and in light of the ongoing over-representation of young Indigenous offenders in correctional detention. How future reform in this area will balance the competing considerations is open to speculation.

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Youth Justice Conferencing: Achieving Restorative Justice?

An analysis of Australia and New Zealand

Traditionally, the two main schools of thought on youth justice have been the welfare model and the justice model. The welfare model focuses on offender rehabilitation, whereas the justice model

28 'Thousands of crimes by under-10s', *BBC News UK*, 2 September 2007 <http://news.bbc.co.uk/2/hi/uk_news/6974587.stm> at 9 February 2010.

29 *Statute of the Child and Adolescent 1990* (Brazil), art 2.

30 Sergio Shecaira, 'Brazil: Criminal Responsibility of Minors in National and International Legal Orders' (2004) 75(1-2) *International Review of Penal Law* 201.

31 For example in NSW, the Minister for Juvenile Justice has commissioned a strategic review of Juvenile Justice Policy and Practice, auditing the current juvenile justice police, practice and strategies in NSW. See generally, Department of Human Services NSW, *NSW Juvenile Justice Policy Review: Terms of Reference - Review of NSW Broader Strategic Juvenile Justice Policy in NSW* <http://svc233.wic007tv.server-web.com/strategic_review_terms_of_reference.htm> at 1 March 2010.

emphasises due process and accountability. Restorative justice is a more recent approach which can be seen as an attempt to reconcile these two approaches, through a focus on crime as harm done to individuals and communities, rather than to the State. As such, a key feature of restorative justice is the inclusion of the victim in the decision-making process. As it has been applied in the youth justice field, it involves the mediation of concerns between the victim, the offender and their respective families and communities to achieve reconciliation, restitution and rehabilitation.

The appropriate treatment of young offenders has been presented as a challenge to the traditional criminal justice system. As Andrew Becroft, Principal Youth Court Judge for New Zealand, stated in 2005 at the Commonwealth Law Conference in London:

Youth offenders are not “small adults” to whom a cut-down version of the adult Court may be applied, but are young people at varying states of emotional, intellectual and cognitive immaturity.³²

The most prominent example of these principles of restorative justice being applied in the youth justice system has been the introduction of youth justice conferencing as an alternative to a formal court sentencing process.

New Zealand

The practical use of restorative justice concepts has been firmly established through the introduction in *New Zealand of the Children, Young Persons and Their Families Act* (“CYPF Act”). The CYPF Act was considered a groundbreaking piece of legislation when it passed into law in 1989. It aimed to provide the means by which to prevent and address child and youth offending. The CYPF Act details principles specifically relevant to youth justice, including the principle that unless the public interest requires otherwise, criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter.³³ The Family Group Conference (“FGC”) is the practical application of restorative justice principles and is considered to be the cornerstone of the legislation.

FGC allows for a transfer of the State’s power to the family, victim and wider community, although this is subject to the Youth Court’s power to approve and monitor any decisions that are made. Approximately twenty four percent of young offenders in New Zealand are dealt with through this mechanism.³⁴ There are six situations under the CYPF Act where an FGC must be held and unless they are arrested, a young person must appear at an FGC before they are summoned to appear in the Youth Court.

The philosophy behind the FGC recognises that young people “may be immature, vulnerable and are still very much part of and influenced by their families”.³⁵ The process used varies depending on the young person and the specialist Youth Justice Coordinator facilitating the FGC. However the intended outcome remains the same: to produce a negotiated, community response to the offence. This is facilitated through the presence of the young person, his or her advocate, members of the family and whoever they invite, the victim (and often their representative), the police, the social worker and the Youth Justice Coordinator.

Australia

Each Australian state and territory has some form of youth conferencing scheme. Daly estimates that in recent years the annual number of young people undergoing conferencing is somewhere between 5300

32 Andrew Becroft, ‘Trial and Treatment of Youth Offenders: Human Rights at the Coalface of Youth Justice’ (Speech delivered at the Commonwealth Law Conference, London, September 2005) < <http://www2.justice.govt.nz/youth/publications/conference-london-sept-2005/london-conference-sept-2005.pdf> > at 1 March 2010.

33 s 208(a).

34 Andrew Becroft, ‘Community-Based Approaches to Youth Offending: A Recipe For Success’ (Speech delivered at the Conference on the Rehabilitation of Youth Offenders, Singapore, 21 - 22 November 2007) <http://www2.justice.govt.nz/youth/publications/speeches/Singapore%20_2_%20RecipeforSuccess%20Singapore%20CBAYO.pdf > at 2 March 2010.

35 Andrew Becroft, ‘How to Turn a Child Offender into an Adult Criminal - In 10 Easy Steps’ (Speech delivered at the Children and the Law International Conference, 7 September 2009) <<http://www2.justice.govt.nz/youth/publications/speeches/Tuscany-Paper-Becroft.pdf>> at 2 March 2010.

and 5800.³⁶ Although it varies slightly between each jurisdiction, the conferences primarily involve the young offender, his or her supporters, the victim, his or her supporters, a police officer and the conference convenor. It is expected that the conference be conducted in a compassionate and understanding environment as opposed to the adversarial nature of a court hearing. The final undertakings to be completed by the young offender are discussed and agreed to by the offender and the victim.

The initial approach adopted in Australia, referred to as the “Wagga Wagga model”, was a process organised and run by police. Report No. 84 by the Australian Law Reform Commission (“ALRC”) noted criticisms of the extent of police participation in the conferences. In some cases young people may be intimidated by the police presence. Another concern was that the young person may not be as open to the restorative process if they viewed the police authority warily. In these cases young people can be hostile and non co-operative. The ALRC discussed the desirability of conference administration by independent bodies such as a judicial officer, youth worker or community based lawyer. Additionally, the Report acknowledged the need to monitor the manner in which the conference is held to avoid oppressive or intimidating conduct.³⁷ The ALRC favoured the approach where conferences are organised by organisations separate from the police, such as government agencies responsible for youth justice.

In New South Wales (“NSW”), the Department of Juvenile Justice is responsible for the operation of youth justice conferences.³⁸ An additional incentive for diversion from the court process exists for summary offences that do not involve violence where NSW Police can give a young person a warning as an alternative to arrest. When a young person is arrested, the Police must consider whether they are eligible for a caution or a youth justice conference. However, for them to be ‘eligible’ to attend a conference they must admit the offence. In deciding whether a young person would be cautioned, referred to a youth conference or charged, a pre-determined set of criteria must be applied by the police. This includes the seriousness of the offence, whether violence was involved, harm caused to the victim and the individual’s previous history of offending and cautions or conferencing. One unique aspect of the NSW scheme is the identity of conference convenors. People who live and work in the local communities are contracted to organise and facilitate youth justice conferences. Recruitment, selection and training aims to work co-operatively with Indigenous community members and community people from non-English speaking backgrounds.

Achieving Objectives?

Conferencing as an approach to youth justice has many different objectives. In accordance with the philosophy of restorative justice, conferences are a means for a young offender to accept responsibility, to make amends with the victim and to avoid the stigma associated with criminal prosecution and to discourage reoffending. Several studies have been undertaken to determine whether these objectives are being achieved.

Rates of Recidivism

At this stage in Australia, there is no clear and consistent evidence that restorative justice diversion methods reduce the rate of recidivism generally. In Victoria, a study found no significant difference in reoffending.³⁹ However, in the Australian Capital Territory the first report on recidivism found that there was a thirty eight percent decrease in reoffending for young violent offenders, but very little difference for young property offenders.⁴⁰ This statistic is particularly significant given the relatively large numbers

36 Kathleen Daly, ‘Conferencing in Australia and New Zealand: Variations, Research Findings, and Prospects’ in Allison Morris and Gabrielle Maxwell (eds), *Restorative Justice for Juveniles* (2001).

37 Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) 18.54.

38 See Part 5 of the Young Offenders Act 1997 (NSW).

39 Mark Griffiths, ‘The Implementation of Group Conferencing in Juvenile Justice in Victoria’ (Paper presented at the Restoration for Victims of Crime Conference, Melbourne, September 1999)
<<http://www.aic.gov.au/events/aic%20upcoming%20events/1999/~media/conferences/rvc/griffith.ashx>> at 2 March 2010.

40 Lawrence Sherman, Heather Strong and Daniel Woods, *Recidivism patterns in the Canberra Reintegrative Shaming Experiment (RISE)* (2000) Centre for Restorative Justice.

of young offenders involved in the study and because each offence type was tested separately. In NSW, a Bureau of Crime Statistics and Research study found that there were reduced rates of recidivism in young people cautioned or after a youth justice conference.⁴¹ However, the study noted that the reoffending rates were higher than other studies in South Australia and Queensland for similar diversionary measures.

New Zealand research has shown that recidivism rates for young people are lowest when they are dealt with at the lowest possible level in the criminal justice system and when they receive less severe outcomes.⁴² It is better for the individual and the community that the Youth Court hand out a lower sentence, or for police to divert from more formal processes, than to send the young person to an FGC or for a harsher sentence to be imposed.

An alternative method for evaluating reoffending rates considered the nature of the conference itself and its effect on reoffending. A New Zealand study reported that conferences were more successful where a young offender had shown remorse, had not felt shamed, had participated in the conference and accepted its outcomes and where they had met with and apologised to the victim.⁴³ In light of this evidence, it would appear that the non-police conferences have greater capacity to achieve the objectives when facilitated professionally and there is meaningful engagement by the young person.

However without clear evidence of dramatically lower rates of reoffending, the conferences may be seen as furthering the broader objectives of the restorative justice movement, which fundamentally alter the roles played by police, the courts, the offender, family members of the offender and victims.⁴⁴

Widening Social Participation

Widening the social participation in youth justice can be seen as one of the broader objectives of restorative justice. Conferences offer victims an opportunity to address the harm they have suffered and possibly achieve restitution. In Queensland over ninety percent of both victims and parents indicated satisfaction with the conference.⁴⁵ In NSW, research shows that at least ninety-one percent believed that the conference was 'somewhat fair' or 'very fair' to the victim.⁴⁶ In WA the level of satisfaction is slightly lower at eighty-three percent.⁴⁷

In New Zealand, there is appears to be an inherent conflict between the suggestion that the victim is at the heart of this process and the CYPF Act, which primarily focuses offenders and their families. Interestingly, the NZ statistics show that on average only half of victims are satisfied with FGC outcomes, whereas over 80 percent of police, offenders and offenders' families are happy.⁴⁸

Another example of social participation seen in New Zealand is the increased empowerment of Māori. While the FGC does not incorporate an explicitly indigenous method of dispute resolution, one of the important elements of a Māori model of justice is an emphasis on consensus and involvement of the community. These ideas are compatible with the FGC model and can be seen to help achieve the objectives of restorative justice in New Zealand.

41 Sumitra Vignaendra and Jacqueline Fitzgerald, 'Reoffending among young people cautioned by police or who participated in a youth justice conference', 103 *Crime and Justice Bulletin*, NSW Bureau of Crime Statistics and Research, October 2006, 13.

42 Gabrielle Maxwell et al, *Achieving Effective Outcomes in Youth Justice: An Overview of Findings* (2004) New Zealand Ministry for Social Development.

43 Gabrielle Maxwell and Allison Morris, 'Family Group Conferences and Reoffending' in Allison Morris and Gabrielle Maxwell (eds), *Restorative Justice for Juveniles* (2001).

44 Kenneth Polk et al, *Early Intervention: Diversion and Youth Conferencing - A National Profile and Review of Current Approaches to Diverting Juveniles from the Criminal Justice System* (2003) Australian Government Attorney General's Department.

45 Hennessey Hayes, Tim Prenzler and Richard Wortley, *Making Amends: Final Evaluation of the Queensland Community Conferencing Pilot* (1998).

46 Lily Trimboli, *An Evaluation of the NSW Youth Justice Conferencing Scheme* (2000).

47 Rosemary Cant and Rick Downie, *Evaluation of the Young Offenders Act (1994) and the Juvenile Justice Teams* (1998) Social Systems and Evaluation (Perth).

48 Allison Morris and Gabrielle Maxwell, 'Restorative Justice in New Zealand: Family Group Conferences as a Case Study' (1998) 1(1) *Western Criminology Review* 1.

Response to Criticisms/Proposals

Youth justice conferences are still evolving in response to research and critical analysis. It would appear that progress has been made in improving the outcomes achieved by conferences, there is still work to be done in this area.

As previously mentioned, the ALRC's preference for the non-police model for youth conferencing has been adopted by some Australian States.⁴⁹ The ALRC also recommended the adoption of a set of national standards for Australia, which should include best practice guidelines for family group conferencing with a compliance monitoring system. Currently, though some ALRC recommendations have been adopted, there is still a lack of national consistency in this area.

It has also been shown from research studies undertaken in this area that the training of conference facilitators should take into account the different responses of both male and female offenders, offenders from different socio-economic levels, and the problems with a police-conducted model.

Preliminary research from New Zealand indicates that girls experience family group conferences in a different way to their male counterparts. For example, fifty-one percent of females, compared with seventy-five percent of males indicated they could understand how the victim felt.

However, females were less likely to feel that they had been treated fairly.⁵⁰ These findings indicate that a more nuanced approach to conferences is required and could be achieved by additional training for conference facilitators.

In New Zealand, there has also been criticism of the lack of proper assessments of the psychological, psychiatric, education and health factors that affect young offenders. The 2009 Health and Education Assessment Programme is an initiative that aims to address this criticism. It brings together several government departments who will provide recommendations to be considered at the FGC.⁵¹ An assessment considering health, disability and education factors is carried out on each young offender who is referred to their first FGC and is considered to be at high risk of reoffending. A written report containing recommendations arising from the assessments is then brought to the FGC for discussion. This approach further enables FGC decision-making to be tailored to address issues that are contributing to the offending and allows FGC outcomes to be further tailored to the needs of the individual offender.

Conclusion

The introduction of youth justice conferencing to Australia and New Zealand in the late 1980's and early 1990's has been a radical development. The use of restorative justice concepts through this mechanism increases the possibility that the causes of re-offending can be positively addressed and an outcome that is satisfying for all affected can be achieved.

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Turning 18 and Leaving Care

The Need for Transitional Support

Children leaving care are one of the most vulnerable groups in society. Not only are they required to make the transition to adulthood quicker and at a far younger age than the average Australian, but often they must do so released from a support system upon which they may have been reliant on for financial, emotional and developmental support for most of their life. By continuing to provide appropriate and targeted assistance at this point, the likelihood that care-leavers will continue to have to rely on other forms of social assistance in the long term can be reduced.⁵² This article will consider the state

49 Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997)18.54.

50 Gabrielle Maxwell et al, "Differences in how girls and boys respond to family group conferences: preliminary research results", (2001) 17 *Social Policy Journal of New Zealand*.

51 Ministry for Justice E-flash 9A, May 18 2009.

52 See, for example, the Hon James Wood AO QC, *Report of the Special Commission of Inquiry into Child Protection Services in NSW*, vol 3, pp 837-839.

legislative regimes⁵³ that regulate the transition of children leaving care and the adequacy of the plans provided for those children. Care leavers should be provided with a clear plan of transition, should be assisted in implementing this plan and be given access to the services necessary to help them build a successful and independent life.

The *CREATE Foundation 2009 Report Card* found that sixty-five percent of young people leaving care do not have transition plans developed for them.⁵⁴ The Report Card found that the regulations governing the transition to independence do not necessarily result in actions that assist care-leavers. The CREATE Foundation is a national not for profit organization that represents the voices of children and young people in out of home care.

When is a Plan Made and to what Extent?

Formulating a plan for a care-leaver's transition to independence is a vital preliminary step. In New South Wales ("NSW"), the agency supervising a care-leaver must prepare a plan, in consultation with that person, before they leave care.⁵⁵ Guidelines prepared under the *Children and Young Persons (Care and Protection) Act 1998* (NSW) in 2008 specify that planning should commence at least twelve months before leaving care. In contrast, many other states, such as Queensland and South Australia, specify that planning should normally begin at age fifteen. The NSW approach is effective if there is a pre-determined date for leaving care, but will disadvantage some care-leavers if they leave care unexpectedly.

The NSW Guidelines also specify that the plan should generally cover accommodation, employment and income support, access to education and training, knowledge and understanding of personal history, including cultural background, contact with family members and independent living skills, including financial management and health and lifestyle issues. Whilst these are important issues, it is crucial that every plan is tailored for each care-leaver to best meet their needs and that it specifies, as far as can be determined, the agencies and contacts that can provide the resources necessary for its implementation.

Studies have found that there is a lack of clarity regarding who should monitor the development and implementation of plans. It is important that specific case work positions are established to assume responsibility for overseeing these processes. While such positions have been created in some states, there needs to be more consistency across Australia.

The Duration and Effectiveness of After-Care Assistance

Once a plan has been created, the next issue is the extent of support and duration of after care assistance. In NSW, a care-leaver must be given appropriate assistance until they reach the age of twenty-five (or later in special circumstances).⁵⁶ This is similar to the Northern Territory, South Australia and Western Australia. However, other states provide a shorter duration, such as Victoria and Tasmania, which only extend support until the age of twenty-one.

For support to be effective and accessible, formal associations and partnerships between relevant government departments and agencies are important. For example, it would be logical to have connections between child protection and the disability services, health, housing, education and employment departments, just to name a few.

The *CREATE 2009 Report Card* found that most jurisdictions have established partnerships between child protection services and those responsible for disability services and housing. For example, in NSW, there is a formal agreement between the DOCS and NSW Housing which targets, amongst others, young people aged under twenty who are leaving or who have left care and have no family support. They conducted a shared access trial in Maitland to provide stable housing for those who were

53 The regime includes legislation and accompanying guidelines and manuals, which regulate the issue either specifically or through general statements.

54 Dr Joseph McDowall (2009). *CREATE Report Card 2009 - Transitioning from care: Tracking progress*. Sydney: CREATE Foundation.

55 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 166.

56 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 165.

assessed as needing additional support. Arrangements like these will make support much more accessible for care-leavers.

Monitoring

Whilst it is pleasing that all states and territories have regulation in these areas, to varying degrees, it is crucial that care-leavers actually receive the support and guidance that the regulations stipulate. Ensuring this support requires effective monitoring and accountability. For example, it is concerning that the *CREATE 2009 Report Card* found that only Western Australia was able to specify how many young people actually had a current plan – seventy-three percent of those transitioning in 2007-08.

Furthermore, current legislation in many states and territories does not require monitoring of the development of care-leavers. No monitoring is conducted as to whether care-leavers complete secondary school, find stable accommodation or find employment. Departments should be responsible for following up with care-leavers and gathering sufficient information on their progress towards independence. This helps not only to understand the care-leaver's particular requirements, but also to ensure they are safely transitioning to independence.

Conclusion

Although the purpose of leaving care is for care-leavers to become self-sustaining and independent, this does not happen immediately. By formulating an individualised plan, assisting in the performance of the plan until it is completed and sufficiently monitoring outcomes to ensure support is effective, this daunting and challenging time can be made much easier for care-leavers. Ongoing support for care-leavers will also benefit the nation as a whole. As *CREATE's 2008 Report Card* concluded "a relatively small investment now will save a huge social and economic cost in the future".⁵⁷

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Parens Patriae Jurisdiction

Parens Patriae and the Welfare Jurisdiction of the Family Court

Parens patriae was the term originally used to describe the ancient common law doctrine of the protection of infants and persons of unsound mind by the Crown. Its literal translation from the Latin is 'parent of the nation'. As a political development, its modern use in Australia and other common law jurisdictions can be traced to 16th Century England. It involved the Crown taking responsibility for those unable to care for themselves. This article will discuss the modern application of *parens patriae* particularly in cases involving medical treatment of children.

As a prerogative right of the Crown it was delegated to the Lord Chancellor who exercised the *parens patriae* jurisdiction in the Courts of the Chancery in England. Over time *parens patriae* came to be used almost exclusively for the protection of the property of minors, the minor being made a ward of the State while their matter was dealt with.

More recently, cases demonstrate that *parens patriae* is not merely limited to situations where a child has been made a ward of the State.⁵⁸ At common law, the jurisdiction is considered to be potentially broad.⁵⁹ The court can make orders "in all matters relating to the custody, guardianship and welfare of all infants".⁶⁰ In *Re Jules*, Justice Brereton described the court's jurisdiction of *parens patriae* as necessary to "safeguard and oversee the welfare of those who are unable to attend to their own welfare and, in particular, children".

57 Dr Joseph McDowall (2009) *CREATE Report Card 2009 - Transitioning from care: Tracking progress*. Sydney, CREATE Foundation, 77.

58 *Secretary, Department of Health and Community Services v JWB and SMB* (1992) FLC 92-293.

59 *Director-General, Department of Community Services; Re Jules*, [2008] NSWSC 1193, 7.

60 *G v P* [1977] VR 44, per Kaye J at 46.

The Welfare Jurisdiction of the Family Court

While the Supreme Courts of the States and Territories of Australia have inherited the *parens patriae* common law jurisdiction, the Family Court of Australia derives a similar power to make orders relating to the welfare of children from Part VII of the *Family Law Act 1975* (Cth) ("the Act"). The Act provides:

s67ZC(1) In addition to the jurisdiction that the Court has under this Part in relation to children, the Court also has jurisdiction to make orders relating to the welfare of children.

s67ZC(2) In deciding whether to make an order under subsection (1) in relation to a child, a court must regard the best interests of the child as the paramount consideration.

This power is often referred to as the 'welfare jurisdiction' and is accepted as a statutory equivalent to the *parens patriae* jurisdiction.⁶¹

Section 67ZC of the Act gives the Family Court wide and flexible powers to make orders relating to the welfare of children.

Primarily, the statutory jurisdiction relates to the exercise of "Parental Responsibility", which is defined as "all the duties, powers, responsibilities and authority which, by law, parents have in relation to children" in section 61B of the Act. This includes the responsibility of both day-to-day and long-term decisions.

In situations where those who have been entrusted with parental responsibility are not exercising it in the best interests of the child, the court can assume the role itself. It should be noted that the courts are generally reluctant to act as *parens patriae* unless absolutely necessary:

[...] judicial interference in the performance of an aspect of parental responsibility should occur only as a last resort or where the welfare of the child will clearly be advanced by the order being made.⁶²

The Scope of the Welfare Jurisdiction: Medical Treatment of Minors

More recently, cases involving the welfare jurisdiction have largely involved questions concerning the medical treatment of children. While the courts will generally attempt to give the parents and the child autonomy to make decisions,⁶³ there are some medical procedures which cannot be consented to by a parent exercising ordinary parental responsibility. This occurs in cases where there is no clear legal authority for either the parent or the child to consent to a particularly serious treatment. As such, the medical treatment may be an unlawful intervention or even an assault. These cases call for the approval from the court as *parens patriae*.

In *Secretary, Department of Health and Community Services v JWB and SMB*,⁶⁴ Marion was a fourteen year old girl suffering from mental retardation, severe deafness and epilepsy. Her parents applied to the Family Court for an order authorising the performance of a hysterectomy and an ovariectomy, or in the alternative, an order allowing them to consent to the procedures themselves. They claimed it was in the best interests of the child to perform the procedures so as to prevent pregnancy and menstruation.

The court looked at and endorsed in the finding in *Gillick v West Norfolk and Wisbech Area of Health Authority and Others*⁶⁵ that the power of a child's parents to make decisions for the child diminishes as the child gets older and develops the capacity, in intelligence and maturity, to make decisions for themselves: This is now often called in medico-legal circles being 'Gillick competent'. Although it was accepted that Marion would never be Gillick competent, the court held that parents can never consent to non-therapeutic, irreversible medical procedures such as non-therapeutic sterilisation. It then used its welfare jurisdiction to authorise the performance of the hysterectomy.

61 see Explanatory Memorandum, Family Law Reform Bill 1994, page 73, paragraph 319; *Director-General, Department of Community Services; Re Jules*, [2008] NSWSC 1193; *Secretary, Department of Health and Community Services v JWB and SMB* (1992) FLC 92-293; *Ray and Anor & Males and Ors* [2009] FamCA 219 at 79.

62 *W and G (No 2)* (2005) FLC 93 - 248 per Carmody J at 123.

63 *K v Minister for Youth and Community Services* at 326F.

64 (1992) FLC 92-293.

65 [1986] AC 112 at 186.

However the welfare jurisdiction has also been used to override the wishes of a *Gillick* competent child if the court feels that it is in the best interests of that child. This has been done in cases where a child has refused medical treatment. While the law is still uncertain in Australia, there have been a number of UK cases where the court has authorised treatment against the child's wishes.⁶⁶ This line of decisions has been controversial in child rights circles as it has been seen to undermine the development of the law (particularly since the landmark *Gillick* decision) in recognising that children are rights holders in the same way that adults are.

The limits of the Welfare Jurisdiction

While overriding the wishes of a *Gillick* competent child appears to indicate that there would be few restrictions on the exercise of *parens patriae* powers, the powers (at least as interpreted under the Family Law Act in Australia) are not broad enough to allow any order relating to the welfare of a child.⁶⁷

In particular, the welfare jurisdiction may not give the Family Court the power to make orders in relation to third parties (except where expressly provided for in the Act) or to override an order in relation to another statute where it would be in the best interests of the child to do so.

In *Minister for Immigration and Multicultural and Indigenous Affairs and B and Another*,⁶⁸ the High Court found that while the Family Court's welfare jurisdiction enables it to make orders that are binding on a parent, nothing in Part VII of the Act gives the court the power to make 'parenting' orders against the Commonwealth (the Department of Immigration, Multicultural and Indigenous Affairs) in relation to non citizen children held in immigration detention. It is worth considering whether implicit in this decision was an acknowledgment that since historically *parens patriae* is an inherent power of the Crown, the Crown is unable to bind itself.

In any event it seems clear that the *parens patriae* jurisdiction has provided (and will likely continue to provide) a valuable forum for exploring the rights of children and the responsibilities of those that are committed to their welfare.

Jaime Lee (Solicitor), Mallesons Stephen Jaques

Anti-Terrorism Legislation and our Children

Since 11 September 2001, Australia has adopted significant measures to strengthen national security. These include what is known as "anti-terrorism legislation". The reach and impact of many aspects of this legislation has set up considerable tension between effective law enforcement in the face of threats to national security and the protections offered by the criminal justice system for fundamental human rights. This article will examine the interaction of Australian anti-terror legislation with Australia's obligations under the *United Nations Convention on the Rights of the Child* ("the Convention"), and argue that the delicate balance between children's rights and national security is yet to be achieved.

The Australian Government began to enact a range of anti-terrorism laws in early 2002. These new laws sought to strengthen Australia's protection of government information, aviation, telecommunication interception and extend Australia's criminal laws to acts committed by Australians overseas. The Australian Government also introduced a range of new terrorism crimes and offences. In September 2005, a consensus on anti-terror laws was reached by the Council of Australian Governments ("COAG") that the State and Territory Governments would adopt mirror legislation to the Federal *Anti-Terrorism Bill 2005* (Act No 127, 2005) and *Anti-Terrorism Bill (No 2) 2005* (Act No 144, 2005).

⁶⁶ see *Re W (a minor) (medical treatment)* [1002] 4 All ER 627; *Re R* [1999] 4 All ER 177.

⁶⁷ *L v T* (1999) FLC 92-875.

⁶⁸ (2004) 219 CLR 365.

Preventative Detention and Control Orders

The *Anti-Terrorism Act (No 2) 2005* (Cth) (the “Act”) introduced a range of new measures for preventative detention and control.⁶⁹

The Act, which amended the *Criminal Code Act 1995* (Cth), permits control orders to be issued over terrorist suspects for up to twelve months. A control order is an order of the court that restricts the movement and actions of individuals, including where they can go and who they can talk to.⁷⁰ Additionally, preventative detention orders were introduced for persons suspected of engaging in or planning for an imminent terrorist attack, where there is insufficient evidence for charges to be laid. If an order is made, a suspect can be detained for up to forty-eight hours under Federal legislation and up to fourteen days in each state. The Constitutional validity of these orders was upheld by the High Court in *Thomas v Mowbray*.⁷¹

Under these laws, both preventative detention and control orders can be made for children aged sixteen to eighteen years but cannot be sought for children under sixteen years. A control order can last up to twelve months for an adult, but only three months for a child.⁷² However, there is no limitation on the issue of subsequent control orders, enabling the control to last, through the issuing of successive control orders, for an indefinite period.⁷³ In addition, under the *Australian Security Intelligence Organisation Act 1979* (Cth), a warrant can be issued for questioning and detention of children aged sixteen to eighteen in relation to a terrorism offence.⁷⁴

Impact on Children’s Rights

The ability to control and restrict the movement, actions and associations of a child has a clear potential to breach the right of the child to free association and peaceful assembly (Article 15 of the Convention) and the right of the child to freedom from unlawful or arbitrary interference with privacy, family, home or correspondence (Article 16 of the Convention).

The Convention does not contain a general derogation Article, unlike the *International Covenant on Civil and Political Rights* (“ICCPR”), which allows derogation from obligations in a time of state emergency, such as a terrorist attack. Certain Articles provide for limiting specific rights in accordance with the law and only if necessary for national security, public safety or public order. Generally, arguments for derogation of human rights under anti-terror laws, such as the right to liberty, have depended upon the general emergency derogation provision in the international covenants. However, this argument cannot apply to the rights of children under the Convention, unless the article specifically allows limiting rights in certain circumstances. The range of security measures implemented in legislation in Australia must therefore comply with our obligations under the Convention even though such measures were designed for use in emergency situations.

Rights to association and assembly contained in Article 15 of the Convention can be limited in circumstances which are necessary for the interests of national security, public safety or public order (Article 15(2) of the Convention). The terms of the Act permit a control order to be made if a senior Australian Federal Police (“AFP”) member considers that the order would substantially assist in preventing a terrorist attack or if the person subject to the order provided training to or received training from a terrorist organisation.⁷⁵ These circumstances in part encompass the national security or public safety exceptions in Article 15(2), although the terms of the Act are substantially wider than envisaged by the Article. Control orders may also be made to control or restrict a person from leaving Australia,

69 See generally Parliamentary Library Law Internet Resources of Terrorism Laws <<http://www.apf.gov.au/library/INTGUIDE/law/terrorism.htm>> at 26 March 2010 for a chronology of Australia’s Anti-Terrorism Laws.

70 Michael Walton “The Anti-Terrorism Bill (No 2) 2005: An Overview” in *Human Rights Defender*, Special Issue, The Anti-Terrorism Bill (No 2) 2005, November/December 2005, 4 <[http://www.ahrcentre.org/documents/Human_Rights_Defender_The_Anti-Terrorism_Bill_%20\(No2\)_2005.pdf](http://www.ahrcentre.org/documents/Human_Rights_Defender_The_Anti-Terrorism_Bill_%20(No2)_2005.pdf)> at 26 March 2010.

71 [2007] HCA 33.

72 *Criminal Code Act 1995* (Cth) 104.28.

73 *Criminal Code Act 1995* (Cth) 104.28.

74 Part III, Division 3, s 34ZE (4).

75 *Criminal Code Act 1995* (Cth) 104.2(2).

using certain telecommunications or technology, from carrying out certain activities or to order a person to wear a tracking device or remain at a specified place during certain times.⁷⁶ Such orders could clearly infringe the rights contained in Article 16. Although evidence of balancing the Convention rights and national security is visible in the Act, by the inclusion of special rules for young people under section 104.28 of the *Criminal Code Act 1995* (Cth), the ability to control or restrict a child to the degree the Act permits indicates that the Convention rights may not be afforded equality to security protections.

The ability to detain a child suspect without charge for up to 14 days under State legislation,⁷⁷ or 48 hours under Federal Legislation, by a preventative detention order would appear to violate Article 37 of the Convention. Article 37(b) provides that children must be detained only as a measure of last resort. Preventative detention enables children to be detained where no criminal culpability has been proven by a court. However, proponents of the legislation argue that as the circumstances demand the child be suspected of engaging in or planning for an imminent terrorist attack,⁷⁸ a preventative detention order would be made in accordance with last resort principles. Further, additional limited protections were included for children subject to a preventative detention order; including contact with a parent or guardian in which they are allowed to disclose that they are being held in preventative detention and a provision that they must be detained separately from adults. Despite these protections, these types of orders have been questioned for both motive and relevance. If an attack is imminent, the arrest powers of the police to charge for conspiracy or attempt would surely be sufficient for public protection.⁷⁹ Further, while these orders are in place, a detained person cannot be questioned by ASIO or the police, casting doubt on the purposes and intended use of these orders.⁸⁰ Again it would appear that in balancing of liberty and security, fundamental freedoms have not emerged victorious.

A Delicate Balance?

In adopting mirror legislation, the Australian Capital Territory (“ACT”) introduced several changes to comply with the *Human Rights Act 2004* (ACT). Under the ACT legislation, preventative detention orders cannot be made for persons under eighteen years of age. At the Federal level, proposed legislative reforms to national security legislation and a Discussion Paper were released by Attorney-General Robert McClelland in 2009. However, these make no reference to increasing the age at which preventative detention or control orders can be issued.

It is clear that parliament has taken human rights into account in adopting safeguards for children, in an attempt to balance liberty, security and the special protections required for children. However, the lack of a general emergency derogation provision in the Convention and the ability to detain children aged sixteen to eighteen under preventative detention and control orders indicates that the precarious balance of the Convention rights and protections has probably been subverted under current terrorism legislation. It is important to enhance the protection of the Convention rights under Australian anti-terrorism laws to promote the liberties that terrorism attacks. By ensuring Australia’s international obligations to human rights are balanced equally with police powers, Australia can not only provide safeguards against terrorism but can also provide safeguards for the rights of its own children.

Amelia Avery-Williams (Summer Clerk), Mallesons Stephen Jaques

Special Commission of Inquiry into Child Protection in New South Wales

In 2007, the New South Wales (“NSW”) Government requested that the Honourable James Wood AO QC conduct a Special Commission of Inquiry into Child Protection Services in NSW (“Special Commission”). This request was prompted by the death of two children, both of whom had a long

76 *Criminal Code Act 1995* (Cth) 104.5(3).

77 See, for example, section 26K(2) of the *Terrorism (Police Powers) Act 2002* NSW.

78 For example under section 105.4 of the *Criminal Code Act 1995* (Cth) and 26D of the *Terrorism (Police Powers) Act 2002* NSW.

79 Michael Walton “The Anti-Terrorism Bill (No 2) 2005: An Overview” in *Human Rights Defender*, Special Issue, The Anti-Terrorism Bill (No 2) 2005, November/December 2005 <[http://www.ahrcentre.org/documents/Human_Rights_Defender_The_Anti-Terrorism_Bill_%20\(No2\)_2005.pdf](http://www.ahrcentre.org/documents/Human_Rights_Defender_The_Anti-Terrorism_Bill_%20(No2)_2005.pdf)> at 26 March 2010.

80 *Criminal Code Act 1995* (Cth) 105.42.

history of involvement with the Department of Community Services (“the Department”). A two year old boy’s body was found stuffed in a suitcase in a western Sydney park and a seven year old girl was found in her Hawks Nest home, starved to death. The death of these children highlighted the ineffectiveness of the current system and the need for a new approach.

In 2002 the Department had overhauled the child protection system, implementing a reform program that had aimed to

- employ an additional 910 caseworkers and support staff;
- establish an early intervention service;
- expand and improve out of home care services;
- improve professional development opportunities for caseworkers and their managers; and
- improve systems including those for finance, human resources, recruitment and occupational health and safety.

This reform program attracted a funding boost, increasing the annual budget in 2007/2008 to more than \$1.2 billion.⁸¹

Although by 2008, many of the 2002 reforms were underway or implemented, the benefits of these reforms were not yet fully evident. Nevertheless, the Special Commission considered what changes within the child protection system were needed in order to cope with future levels of demand. Between 2002 and 2007, there had been a seventy-nine percent increase in child protection reports and a thirty-seven percent increase in the number of children in out of home care.⁸² The arrangements for early intervention, responding to child abuse and neglect, interagency cooperation, out of home care and the role of the courts and of the oversight agencies were also examined as part of this inquiry.

Commissioner Wood handed down the Special Commission of Inquiry Report into Child Protection Services in NSW in November 2008. The Inquiry had included a consultation generating over 600 submissions and twenty-four public forums held around the state of NSW. The report indicated that at a time when the level of reporting of child abuse and child neglect is increasing, the challenge facing governments is to develop a sufficiently resourced system which provides appropriate support, flexible prevention and early intervention programs.⁸³ The Report stressed that child protection is a collective responsibility for the whole of government and the broader community.⁸⁴

The inquiry found that the number of reports being made to the Department was increasing and therefore the Department was forced to close many cases due to insufficient funding. In its defence the Department maintained that a substantial volume of the reports did not require the use of the Department’s statutory powers. However this still added to the strain on the Department’s limited resources in circumstances where the cases would have been better dealt with by other organisations. The inquiry also found that there were insufficient prevention and early intervention services and that an increasing number of children and young people were requiring out of home care for longer periods of time.⁸⁵

The Report’s 111 recommendations were ranked in priority according to whether they should be implemented immediately, in the short term or in the long term. The most pressing recommendations (requiring “immediate” attention) included relocation of the majority of the Complaints Unit functions to the Helpline, the requirement that all Casework Managers possess a relevant tertiary qualification as well as experience in child protection work and the introduction of programs to ensure greater cooperation between agencies and the Children’s Court. It was also recommended that those making reports should be informed of the progress of their report. This was designed to avoid duplication of

81 *Executive Summary and Recommendations*, Report of the Special Commission of Inquiry into Child Protection Services in NSW, 2008, ii.

82 *Opening Address by Commissioner Wood*, Special Commission of Inquiry into Child Protection Services in NSW, 17 December 2007, 3.

83 *Opening Address by Commissioner Wood*, Special Commission of Inquiry into Child Protection Services in NSW, 17 December 2007, 3.

84 *Keep them Safe: A Shared Approach to Child Wellbeing*, March 2009, II.

85 *Executive Summary and Recommendations*, Report of the Special Commission of Inquiry into Child Protection Services in NSW, 2008, ii - iii.

reporting for the same incident and to encourage community members to become involved in addressing the problems identified. Further, increased funding was required so that alternative dispute resolution processes could be used in proceedings involving the care of children.

On 3 March 2009, the NSW Premier and the Minister for Community Services announced the Government's response to the Special Commission, accepting 106 out of 111 of the Report's recommendations in full or in principle. The Government's response (*Keep Them Safe: A Shared Approach to Child Wellbeing*) set out a five year action plan accompanied by a \$750 million investment, 40 percent of which is to be directed to activities of non-government organisations. This recognises the superior ability of many non-government organisations to provide specialised support in the area of child protection. It is anticipated that these non-government organisations will use the funding to provide more places for children in out of home care, to establish a network of referral services to provide links for children and families needing support and to fund assistance programs for Aboriginal families. It is also envisaged that the reforms will facilitate the exchange of information between non-government organisations in order to continue the improvement of child protection services.

The Government's response also included legislative reforms. Under the reforms, mandatory reporters will only need to report where children or young people are exposed to a "risk of *significant harm*". This is a higher threshold than the previous "risk of harm" test.⁸⁶ Child Wellbeing Units are to be established in the Government's major mandatory reporting agencies, including NSW Health and NSW Police. These Units will help mandatory reporters decide whether cases satisfy the new thresholds and if not, what alternative local responses and assistance can be given.

The Wood Inquiry only examined child protection services in NSW. However the challenges faced in NSW faces are not unique. Since the release of the report from the NSW inquiry, the Northern Territory announced in November 2009 that it would conduct another independent inquiry into child abuse less than three years after the previous report.⁸⁷ In the last decade every state and territory has conducted at least one significant review into its child protection services. South Australia and Queensland have conducted inquiries into children in state care and the abuse of children in foster care. The Gordon Inquiry conducted in Western Australia in 2002 examined the response of government agencies to complaints of family violence and child abuse.

A state by state approach falls short of the national reform that is required to ensure consistent and measurable improvements to child protection in Australia. We also note the current Australian Law Reform Commission's family violence inquiry with terms of reference that include the interaction between state and federal child protection laws. The Council of Australian Governments has also developed the National Framework for Protecting Australia's Children 2009-2020. This Framework was developed in recognition of the need for co-ordination between Australian government programs and policies and aims to deliver a more integrated response to the problem.⁸⁸ We look forward to reforms that ensure that children and young people grow up in environments free from harm.

Kirsten Lau (Summer Clerk), Elizabeth McGill (Solicitor) and Erin Piatek (Solicitor), Mallesons Stephen Jaques

Children in Armed Conflict

Prohibitions and Prosecutions in International Humanitarian Law

Human Rights Watch estimates that there are approximately 200,000 to 300,000 children currently involved in armed conflicts as soldiers for both rebel groups and government forces around the world. Many children are forcibly recruited, and even those who 'volunteer' often do not see viable alternatives. The cultural, political and social settings can present life as a soldier as an opportunity for recognition. Assimilation back into the community is also difficult. International law has recognised the problem and its prevalence with treaties restricting and prohibiting the recruitment and use of children in armed

⁸⁶ *Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009*, Schedule 1.

⁸⁷ *Little Children Are Sacred* (2007), Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, 2007.

⁸⁸ *Protecting Children is Everyone's Business - National Framework for Protecting Australia's Children 2009-2020*, Council of Australian Governments, 2009, 9.

conflict. This article will consider the prohibitions against the recruitment and use of child soldiers in war in international conventions. It will then consider the potential to prosecute violations as a war crime before the International Criminal Court (“ICC”).

The issue of child soldiers was first addressed internationally by the two *Protocols Additional to the 1949 Geneva Conventions* (1977), which dealt with the protection of victims of both international and non-international conflicts. These require ‘all feasible measures’ to be taken to prevent children under fifteen years from taking part in international hostilities and expressly prohibit the recruitment and participation of children under the age of fifteen in non-international conflict. These prohibitions were echoed by the *Convention on the Rights of the Child* (1989) (the “Convention”), which has been ratified by every member of the United Nations other than Somalia and the United States.

The *Optional Protocol to the Convention on the Rights of the Child* (2000) (the “Protocol”), which has to date been ratified by 126 countries, raises the prohibited age in non-State forces to eighteen, and requires States to take all feasible measures to prevent the recruitment and use of those under eighteen in such forces. The Protocol also requires that all feasible measures be taken to stop children under eighteen being directly involved in hostilities with State armed forces, sets eighteen as the minimum age for national conscription, and sets requirements for recruitment on a voluntary basis from age sixteen onwards. It is argued that the protocol does not go far enough, as ‘feasible measures’ may not prevent those under eighteen joining national armed forces and States need only avoid ‘direct’ participation from children to comply.

The most stringent regional prohibition on the recruitment and use of child soldiers is featured in the *African Charter on the Rights and Welfare of the Child* (1990), which came into effect in 1999. It requires all necessary measures to be taken to ensure that no person under 18 takes part in hostilities, with a particular emphasis on recruitment. Despite these measures, the use of child soldiers is common in signatory States such as the Democratic Republic of Congo, Uganda and Sierra Leone. Further steps have been taken to assist in dealing with this problem. In addition to prohibitions directed at the States, the recruitment and use of children in armed conflict have now been criminalised for individuals in many States (though State involvement in prosecution remains important).

The widespread acceptance of a prohibition on the recruitment and use of child soldiers demonstrated by the Convention led to its inclusion as a war crime in the *Rome Statute of the International Criminal Court* (1998) (“the Rome Statute”). The International Criminal Court can prosecute the conscription or enlistment of children under the age of fifteen years in armed conflicts as a war crime. The ICC can initiate a prosecution itself where state parties are unable or unwilling to prosecute the crime themselves. Whilst the Rome Statute has not been universally ratified (the United States is a notable absentee), even countries who are not parties to the Rome Statute can opt in to its jurisdiction on a case-by-case basis.

The Court’s jurisdiction is already having a visible impact, as demonstrated by the case of Thomas Lubanga Dyilo of the Democratic Republic of Congo (“DRC”).⁸⁹ Lubanga was the first man arrested and detained under the Rome Statute for enlisting child soldiers. Additionally, in the Special Court for Sierra Leone, four individuals have been convicted of the war crime of recruiting and using child soldiers and there are two other warlords from the DRC currently in ICC custody.

The Lubanga case resulted from an ICC investigation at the invitation of the Congolese authorities in March 2004. An arrest warrant was issued for Lubanga’s on 10 February 2006. The warrant alleges that as President of the Union of Congolese Patriots (“UPC”) and Commander-in-Chief of the Force Patriotiques pour la Liberation du Congo (“FPLC”), Lubanga managed and directed the enlistment and conscription of children under the age of fifteen into a military force and then used those children to execute combat operations. This conscription, enlistment and active participation in hostilities of children under fifteen constitutes a war crime under the Rome Statute and Lubanga faces the prospect of life imprisonment if convicted. He was arrested on 17 March 2006, but the trial did not commence until 26 January 2009. As at January 2010, the Prosecution has concluded its case and the Defence will soon begin to present its case.

89 *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06. Information on the current progress of this case and the trial hearing is available on the ICC website.

It is hoped that trials such as that of Lubanga will act as a deterrent to those recruiting and using children in armed conflict. This relies on news of the charges, prosecutions and punishments being properly communicated to the affected region. Human Rights Watch has indicated that militia leaders in the Congo are aware that the charges have been laid and have stopped openly admitting to the inclusion of children in their forces. However, this case also demonstrates the difficulties associated with such trials, as apparently many of Lubanga's followers have interpreted the delay caused by the stay of proceedings between 2006 and 2009 as an indication of his innocence. If proceedings in The Hague do result in a conviction, it will be a landmark result for the ICC. The next step will be to ensure that other perpetrators are made aware of their own vulnerability to prosecution.

Matt Gould (Summer Clerk), Mallesons Stephen Jaques

Adding Teeth to CROC

An Individual Complaints Process for the Convention on the Rights of the Child

The Convention on the Rights of the Child ("the Convention") is the most ratified human rights treaty in history. The two Optional Protocols – on children in armed conflict and on the sale of children, child prostitution and child pornography – have also attracted significant state support, with 131 and 135 ratifications respectively as at 14 February 2010.⁹⁰ Many hail this as a revolutionary step forward for human rights, and children's rights in particular.

This article examines the narrow but important question of whether the enforcement mechanisms in the Convention are adequate and whether a new individual complaints process is desirable. According to UNICEF, in the decade after the arrival of the Convention, more progress was made "in realizing and protecting children's rights ... than in any other comparable period in human history".⁹¹ Although there is much truth in this view, it is equally true that a large number of reservations have been made to the Convention and that millions of children around the globe are still denied their basic human rights. The enforcement mechanisms in the Convention are weak in comparison to other UN human rights conventions. This article acknowledges that there are drawbacks to an individual complaints process. However, these are outweighed by the additional enforcement and the awareness of violations of children's rights that an individual complaints process could bring.

Enforcement under the Convention

By ratifying the Convention, a state is bound under international law to "respect and ensure the rights set forth in the present Convention".⁹² Whether the Convention is then automatically incorporated into domestic law depends on whether the state is 'monist' or 'dualist'. For monist states, such as France, a ratified treaty immediately becomes part of domestic law and is fully enforceable in domestic courts. For dualist states, such as those belonging to the common law world, the Convention does not become law unless and until the legislature specifically enacts the provisions of the treaty. Enforcement issues are thus particularly significant in dualist states, such as Australia, that have not specifically enacted all of the provisions of the Convention.

There are five general enforcement mechanisms found in human rights treaties: education, fact-finding, conciliation, complaint procedures and coercion.⁹³ The Convention is only armed with weak versions of the first two mechanisms.

For example Article 45(b) contains an education provision under which the Committee on the Rights of the Child ("Committee") may transmit observations and suggestions upon a states request for technical advice or assistance to UNICEF and other organisations.

The Committee engages in fact finding through by states to submit reports every five years on the progress they have made on guaranteeing enjoyment of Convention rights.⁹⁴ The Committee then

90 OHCHR, <www2.ohchr.org> at 15 February 2010.

91 UNICEF, <http://www.unicef.org/crc/index_30223.html> at 15 February 2010.

92 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1557 UNTS 3, art 2(1) (entered into force 2 September 1990).

93 David Balton, (1990) 12 *HRQ* 120, 126.

makes 'concluding observations' on those reports.⁹⁵ This public reporting procedure is the main enforcement process under the Convention. Unlike other human rights conventions, the Convention on the Rights of the Child does not contain an individual petition process or a state-to-state complaints procedure.⁹⁶

The reporting system is only effective to the extent that it provides a basis for international and domestic criticism of governments, based on reported facts and the Committee's concluding observations. It seems that most states take their reporting requirements seriously, and the independent, eighteen-person Committee has rarely hesitated to criticise state failures.⁹⁷ However, the Committee cannot instigate inquiries into overly optimistic state reports. It may, however, request advice from non-governmental organisations such as UNICEF when seeking to corroborate state claims,⁹⁸ and it regularly holds 'days of discussion' and consults experts on general themes, such as children in armed conflict.

Hence, current enforcement powers under the Convention are weak, as they consist primarily of self-assessment by states, the very entities whose accountability is being monitored.

An Individual Complaints Process for the Convention?

Under the Optional Protocol to the International Covenant on Civil and Political Rights ("ICCPR"), individuals (otherwise referred to as 'authors') may issue a communication to the Human Rights Committee asking it to come to a non-binding view as to whether the individual's human rights under the ICCPR have been infringed. An example of such a communication was *A v Australia*,⁹⁹ where a Cambodian refugee claimed that his continuing four-year immigration detention amounted to arbitrary detention under Article 9(1) of the ICCPR, and that his right to judicial review was denied by a privative clause in the *Migration Act 1958* (Cth) contrary to Article 9(4) of the ICCPR. Although the Human Rights Committee found for the author, its view was not implemented by Australia.¹⁰⁰ On 29 August 2000, the Howard Government expressed its dissatisfaction with the UN system of individual communications.¹⁰¹ It also stated it would refuse any 'unwarranted requests' from the UN to delay deportation of asylum seekers, thereby effectively frustrating communications by asylum seekers who fear torture after deportation.¹⁰²

The above illustration indicates both the advantages and drawbacks of a human rights individual complaints processes. On the one hand, individuals can apply international pressure to a state to encourage it to comply with human rights standards where all domestic remedies have been exhausted or are ineffective. On the other hand, even those states with a relatively good human rights record like Australia may react unpredictably to this international pressure, which could have a destabilising effect on the international human rights system.

Some commentators argue that individual communications raise the problem of determining whether particular obligations in the Convention were to be immediately implemented or require progressive implementation.¹⁰³ This may be determined by whether an obligation is qualified by the availability of resources. However, it is submitted that this is an issue of interpretation and that individual communications would still increase the efficacy of the Convention.

94 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1557 UNTS 3, art 44 (entered into force 2 September 1990).

95 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1557 UNTS 3, art 45(d) (entered into force 2 September 1990).

96 The International Covenant on Civil and Political Rights, Convention on the Elimination of all Forms of Discrimination, Convention on the Elimination of all Forms of Racial Discrimination and the Convention Against Torture.

97 Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* 1999, p 719; Rita Shackel, [2003] *AILJ* 21, 46.

98 Article 45(a).

99 560/1993, April 1997.

100 in contrast to the previous communication in *Toonen v Australia* 488/1992, 4 April 1994.

101 Joanne Kinslor, (2002) 8(2) *AJHR* 79, 83.

102 Joanne Kinslor, (2002) 8(2) *AJHR* 79, 83.

103 Sharon Detrick above n 106.

Conclusion

Children are among the most vulnerable and dependent people in society. The Convention itself specifically recognises that there are already significant barriers to the effective enforcement of the human rights of children. An individual complaints process, while not a perfect solution, would be a step in the right direction towards bolstering international respect for children's rights.

Sylvester Urban (Summer Clerk), Mallesons Stephen Jaques

Case note: Australian Crime Commission

Australian Crime Commission v NTD8 [2009] FCAFC 86

In this case the full Federal Court on appeal held that the 'best interests of the child' is a relevant consideration when deciding whether it is reasonable to issue a notice for the production of a document or thing under s 29(1)(b) of the *Australian Crime Commission Act* (the "ACC Act"). However, the Court refused to find that best interest of the child must be the primary consideration. In the circumstances of the case, the Court found that the Australian Crime Commission Examiner ("Examiner") did consider the best interests of the child before issuing a notice to produce medical records of eight young Aboriginal females.

Facts

NTD8 is an Aboriginal community-controlled health services provider, primarily in the area of counselling and advice work in sexual and reproductive health for young women and girls. Importantly, they are the sole providers of these services in the region. The Examiner issued a Notice to NTD8 under s 29(1)(b) of the *ACC Act* for the production of personal and health records of eight Aboriginal females which were under sixteen years of age. Prior to issuing the Notice, the Examiner is required, under s 29(1A) of the *ACC Act*, to be satisfied that it was "reasonable in all the circumstances to do so". The purpose of producing the records was to assist the Australian Crime Commission in its investigation of Indigenous domestic violence and child abuse. These investigations were conducted in response to *the Intergovernmental Summit on Violence and Child Abuse in Indigenous Communities* and the *Little Children are Sacred Report*, commissioned by the Northern Territory government.

The Notice also contained a notation prohibiting the disclosure of information about the Notice or any other matters connected with it, except for the purpose of challenging its validity in Court. This meant that NTD8 could not explain to the relevant Aboriginal girls the reasons for the breach of confidentiality. It was feared that this breach of trust would discourage the girls and others from using NTD8's services. This is significant as NTD8 was the sole provider of such health services to a wide geographical region. The Examiner argued that the notation would in fact operate to protect the confidentiality of NTD8's clients.

There were two main issues on appeal. First, whether the best interests of the child is a relevant primary consideration when deciding whether to issue a Notice. If so, the second issue was whether in the circumstances of this case, the Examiner did consider the best interests of the child.

Decision

Having regard to the scope and purpose of the relevant provisions of the *ACC Act*, the Court found that the best interests of the child was a relevant consideration which the Examiner was obliged to consider before issuing a Notice under s 29 of *ACC Act*. It was held that the power conferred by s 29 is wide with few express constraints. Although s 29 did not impose any express obligations on the Examiner to consider the best interests of the child, this obligation may be implied through statutory construction.

However, the Court refused to find that the best interests of the child must be a primary consideration of the Examiner. It was held that to do so in the absence of express terms would stretch the boundaries of statutory interpretation. Therefore, it is the Examiner's responsibility to attribute appropriate weight to various and competing considerations.

The Court did not rely on the adoption of the Convention on the Rights of the Child (the “Convention”) to conclude that the best interests of the child is a relevant consideration, because the Convention does not form part of Australia’s domestic law.

The Court found that in the circumstances of this case, the Examiner did not fail to consider the best interests of the child.

The Court recognised that the Examiner faced two competing interests. From one perspective, it is in the children’s best interest that information is gathered for the prevention of domestic violence and child abuse. On the other hand, the process of doing so may discourage Aboriginal women from using NTD8’s services in the future. The Court relied on the fact that Legal Submissions prepared by an ACC officer made specific reference to NTD8’s concerns that disclosure may discourage the affected and other Aboriginal women from using their medical services. These Legal Submissions were then adopted by the Examiner in his reasons. Based on this the Court found that the Examiner did take into consideration the best interests of the child.

The decision is available at <http://www.austlii.edu.au/au/cases/cth/FCAFC/2009/86.html>.

Kirsten Lau (Summer Clerk) and Lisa Qin (Solicitor), Mallesons Stephen Jaques

Case note: Sadiqi

Statutory Guardianship of Children - Power without Litigable Responsibility? *Sadiqi v Commonwealth of Australia (No 2)* [2009] FCA 1117

This case followed the plaintiff’s successful review of his refugee status and the granting of a temporary protection visa. The Federal Court considered whether, as a consequence of his lengthy detention, the plaintiff could seek compensation from the Australian Government pursuant to s 6 of the *Immigration (Guardianship of Children) Act* 1946 (Cth). McKerracher J ultimately found that a breach of the statutory guardianship responsibilities by the Minister for Immigration and Citizenship (the “Minister”) does not give rise to an independent cause of action.

Facts

According to s 6 of the *Immigration Act*, the Minister is the legal guardian of every non-citizen person under the age of eighteen years that enters Australia. This guardianship is to the exclusion of the child’s natural parents and includes all the same powers and responsibilities as would be held by a natural guardian of the child.

In this case, the plaintiff was a citizen of Afghanistan. He was intercepted by Australian officers while travelling to Australia in October 2001 and was detained at Christmas Island. At the time of interception by Australian officers, the plaintiff was sixteen years old. He was subsequently transferred to Nauru in December 2001, where he was granted certain visas by Nauru while pursuing a claim for protection as a refugee. The plaintiff’s application to be recognised as a refugee was denied.

The plaintiff travelled to Perth in November 2002 in order to give evidence at a coronial inquiry and was held in immigration detention until February 2004. During this time, he sought review in the Refugee Review Tribunal under s 198C of the *Migration Act* 1958 (Cth). This section allows the review of the refugee status of an individual who has stayed in Australia for a continuous six month period.

The Tribunal found that he was a refugee and he was granted a temporary protection visa on 25 February 2004. Subsequently, the plaintiff brought proceedings in the Federal Court seeking various forms of relief, including compensation.

Decision

Although much of McKerracher J’s judgment was concerned with the precise definition of the Plaintiff’s status under the *Migration Act*, the Minister’s obligations as the Plaintiff’s statutory guardian were also considered. It was held by the Court that the power and responsibility vested in the Minister as guardian were analogous to those held by a natural parent.

Nevertheless, a breach of those responsibilities did not give rise to a freestanding cause of action. The Court referred to the recent decision of *Trevorrow v State of South Australia (No 5)*, where it was held by

Gray J that absent the creation of any private cause of action by the relevant statute, no freestanding cause of action could exist.¹⁰⁴ The same conclusion was reached by the Court in the current case. (It should be noted that *Trevorrow* is currently under appeal).

Despite this outcome, the statutory provisions designating the Minister as guardian remained relevant to any other causes of action the Plaintiff might have, particularly with respect to duty of care and statutory misfeasance. These causes of action were ultimately proven by *Trevorrow*. However, unlike in *Trevorrow*, these particular causes of action were not pursued by the Plaintiff in the present case and no damages were ultimately awarded. It is likely that the divergent approaches were a result of the unique facts of *Trevorrow*, in which public officials were found by the Court to have acted in a way that they knew to be illegal. No such situation was found or alleged in the current case.

The decision is available at <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2009/1117.html>.

Lloyd Tomlin (Summer Clerk), Mallesons Stephen Jaques

Case note: Quang

The Appointment of an Independent Children's Lawyer and the Requirement of 'Exceptional' Circumstances

State Central Authority v Quang [2009] FamCA 1038

*State Central Authority v Quang*¹⁰⁵ ("Quang") considers when exceptional circumstances exist so as to justify the appointment of an independent children's lawyer under s 68L(3) *Family Law Act 1975* (Cth) ("the Act"). In doing so, it also illustrates the manner in which the Convention on the Civil Aspects of International Child Abduction (entry into force 1 December 1983) ("the Convention") secures a parent's right of access to children living in other jurisdictions.

Background: Child Abduction Convention

Australia is a party to the Convention. The object of the Convention¹⁰⁶ is to provide a mechanism for State Authorities to bring proceedings in various Convention countries to secure the return of children wrongfully retained in another Convention country and to ensure that parental rights of access are respected. As outlined in articles 7 and 21, the achievement of these objects requires the co-operation of Convention countries to promote the peaceful enjoyment of access rights.

The Convention is given effect in Australia by the *Family Law (Child Abduction Convention) Regulations 1986* (Cth) ("the Regulations"). Rule 24 of the Regulations requires the Commonwealth Central Authority to take action to secure the rights of access to a child in Australia if requested by a State Central Authority. Rule 25 of the Regulations enables the Commonwealth Central Authority to apply to the court for orders to protect access rights.

Facts

In *Quang* the father of children, referred to as L and C, lived in Spain where he had been in a relationship with the children's mother before she returned to Australia. The parents had signed a regulatory agreement in Spain which gave the father the right to sixty consecutive days with the children in Spain each year. Spain is also a Convention country. The State Authority of Spain, on application by the father, requested the Commonwealth Central Authority under Rule 24 of the Regulations to seek orders pursuant to Rule 25 of the Regulations, compelling the mother to comply with the regulatory agreement.

At the interlocutory stage, Bennett J was asked to consider whether an independent children's lawyer was required to represent the interests of L and C at the hearing of the father's application to enforce the regulatory agreement. In so doing, Bennett J described the exceptional circumstances that must exist in

¹⁰⁴ (2007) 98 SASR 136; [2007] SASC 285 at [946].

¹⁰⁵ [2009] FamCA 1038.

¹⁰⁶ Article 1.

order for the court to appoint an independent children's lawyer in Convention proceedings under section 68L(3) of the Act.

Appointment of an Independent Children's Lawyer

Section 68L(3) of the Act enables the court to appoint an independent children's lawyer in proceedings under the Convention where there are exceptional circumstances. When appointed, the independent children's lawyer is not a legal representative of the children but rather,¹⁰⁷ is entrusted to act in what they believe to be the best interests of the child.

In *Quang*, Bennett J concluded that there were three exceptional circumstances so as to justify the appointment of an independent children's lawyer. Firstly, there were evidentiary issues arising from the fact that the Commonwealth Central Authority had to rely upon information from the Central Authority in Spain who was in turn receiving information from the father. Secondly, there was insufficient evidence to allow Bennett J to appropriately consider the time that L and C should spend with each of their parents given that the regulatory agreement between their parents had never been implemented. Thirdly, there were potential legal issues arising from the fact that the regulatory agreement conferred responsibilities and obligations on the parties in respect of an unborn child.

Rights of Child Convention

It appears that Bennett J's decision to appoint an independent children's lawyer was additionally influenced by Her Honour's view that the best interests of the child should be considered in proceedings under the Convention. Bennett J referred to Her Honour's earlier decision in *State Central Authority v Peddar*¹⁰⁸ where it was said that whilst the Convention provides the framework enabling State Central Authorities to initiate proceedings in other Convention Countries, it is the *United Nations Convention on the Rights of the Child* (which holds the best interests of the child as paramount) that must guide the resolution of the proceedings.

Conclusion

The decision of Bennett J in *Quang* provides guidance as to when an independent children's lawyer will be appointed in proceedings under the Convention by elaborating upon what may amount to 'exceptional' circumstances under the Act. In doing so Bennett J expressed the view, that the best interests of the child should be considered in Convention proceedings.

The decision is available at <http://www.austlii.edu.au/au/cases/cth/FamCA/2009/1038.html>.

Lucienne Maxwell (Summer clerk) and Simon Seguna (Solicitor), Mallesons Stephen Jaques

Case note: BVB v Victims of Crime Assistance Tribunal

***BVB v Victims of Crime Assistance Tribunal* [2010] VSC 57 (5 March 2010)**

This decision was an appeal from the Victorian Victims of Crime Assistance Tribunal concerning financial assistance for a victim of school bullying under the *Victims of Crime Assistance Act 1996* (Vic) (the "Act"). For the first time, the court recognised that bullying, even by someone under the age of criminal responsibility (ten years of age in Australia), could be considered a criminal act entitling the victim to financial assistance.

Facts

Section 1 of the Act states that a primary victim of a criminal act may have recourse to financial assistance where compensation cannot be obtained from the offender or from any other source.

In this case, the appellant, a young female, sought financial assistance for harm suffered as a result of bullying incidents at a public school. She had attended a Victorian primary school and at the age of eight was 'bullied' by other students for nearly five years. The long history of incidents involved students threatening to have her killed, menacing her with a broken bottle, physical assault and verbal abuse. Following an incident where the appellant, then in Year six, was pushed off the monkey bars and

¹⁰⁷ in accordance with *Family Law (Child Abduction Convention) Regulations 1986* (Cth) s 68LA(2).

¹⁰⁸ [2008] FamCA 519.

seriously injured her back, she was removed from the school and sent to a private school which caused substantial financial strain on her parents. The psychologist before the Victorian Victims of Crime Assistance Tribunal (“Tribunal”) gave evidence that the appellant, now fifteen, continues to suffer from a “generalised anxiety disorder”.

The appellant brought the claim before the Tribunal “on the *basis* of bullying but on the *grounds* of threats to kill and assault” (emphasis added). The majority of the incidents occurred when both the perpetrators and the appellant were under ten years of age and thus below the age of criminal responsibility.¹⁰⁹ The issue for the court was whether, despite the age threshold, the incidents could be considered as ‘criminal acts’.

Decision

Section 3(1)(a) of the Act defines a ‘criminal act’ as conduct that would constitute a relevant offence but for the offender being excused of criminal responsibility by reason of a legal incapacity or other legal protection.

At first instance, the Tribunal was unsatisfied that the bullying incidents amounted to actual criminal behaviour because they lacked the requisite ‘criminal intent’. The Tribunal drew a distinction between what it considered to be ‘rough and tumble’ in the school yard including ‘hollow’ threats to kill by ten year old children and ‘actual criminal acts’, as defined in s 3 of the Act.

However, in contrast to the Tribunal, Cavanough J of the Supreme Court of Victoria determined that, for the purposes of establishing whether the appellant was a victim of a criminal act, ‘legal principles and protections’ relating specifically to the age of the offender are not relevant. To that end, his honour determined that ‘basic’ or ‘general’ intent to commit a criminal act is sufficient. The evidence clearly indicated that there was hostility and an intent to harm the appellant. It was irrelevant whether the perpetrators had the means or intent to actually carry out the threats, given that they had undoubtedly put the appellant in fear of her life.

The court did not express a view as to whether accidental or involuntary conduct could also give rise to a claim for compensation under the Act. The matter was remitted to the Victims of Crime Assistance Tribunal to be reheard.

Implications

The decision has been heralded as a landmark ruling, recognising the seriousness of bullying as a crime deserving of compensation and has opened an avenue for relief for young victims of bullying. However, a prominent psychologist and founding member of the National Centre Against Bullying, Dr Michael Carr-Gregg has suggested that the decision may move the focus from ensuring that schools remain responsible for providing safe environments to sending a message that “if you can’t get justice at school...you can get external compensation”.¹¹⁰

The case also highlights the lack of effective response by schools and the Education Department to bullying, particularly by allowing such behaviour to continue over a long period of time. Only days after this decision was delivered, a teenage girl, who had been subjected to bullying for two years without any meaningful response from the school, received \$290,000 compensation from the Education Department of Victoria in an out-of-court settlement. While these cases may be indicative of a more lenient approach to bullying compensation, they also, more importantly, underscore the need for better frameworks in place to recognise and address bullying in schools instead of relying on compensation to solve the issue.

The decision is available at <http://www.austlii.edu.au/au/cases/vic/VSC/2010/57.html>.

Bella Khabbaz (Summer clerk), Malleons Stephen Jaques

¹⁰⁹ *Children, Youth and Families Act 2005* (Vic) s 344.

¹¹⁰ ABC Television, “Bullying ruling opens door for compo claims”, *Lateline*, 10 March 2010, <<http://www.abc.net.au/lateline/content/2010/s2842401.htm>> at 16 March 2010.

If I Were Attorney-General...

A Rights Mandate for Children and Young People

If I were Attorney-General I would recognize that the way in which we treat children and young people today will shape the Australia of the future. I would acknowledge that there is an undeniable link between fair recognition of a person's rights and their inclusion and participation in society. Far from recognizing and protecting their human rights, children and young people are over policed and under supported in the current Australian context.

Children and young people are overrepresented in homelessness figures and face a disproportionate level of unemployment and disadvantage. They are subject to heavy-handed laws; move-on notices and curfews when they try to use public spaces; punitive probation requirements when they try to get their drivers licenses; increasingly serious sanctions for not attending school, in some cases even withholding of benefits from their families. Each year governments across the country 'up the ante' in law and order campaigns that disproportionately affect young people, while children and young people have little or no way of influencing the political process.

If I were Attorney-General I would start from a rights-based framework, one that fully recognizes the human rights of children and young people. I would keep in mind that civil and political rights, such as freedom of association and assembly and the right to participation, are rights that children, as humans, hold. They also hold economic, social and cultural rights such as the right to adequate housing and an adequate standard of living. Children have some further rights that recognize their vulnerability, but these rights to protection augment rather than diminish their fundamental human rights.

Drawing on the recommendations that were made by the *Seen and Heard report*,¹¹¹ I would start by calling a National Summit on Children and Young People and from the summit I would convene an implementation taskforce. I would ensure that there was supported and effective participation of children and young people within the Summit. This would include a fully resourced preliminary consultation process which engaged children and young people of various ages and backgrounds and led into the development of the taskforce and its priorities. Attention would also be given to the taskforce's reporting and accountability to children and young people.

I would introduce a bill to lower the voting age, making it possible (though not compulsory) for young people to enroll to vote once they reach the age of fourteen years. I believe that this would produce a greater political awareness of the issues faced by young people across Australia and send a clear message that we are serious about listening to what children and young people have to say.

I would build on the commitment made by the Council of Australian Governments ("COAG") to a National Framework for Child Protection to create a National Framework on Youth Justice as part of my portfolio responsibilities. This would provide national leadership and move us away from 'tough on crime' stances that always translate as 'toughest on those that can't vote'.

I would place youth homelessness at the top of the agenda for COAG. The National Youth Commission found that youth homelessness has doubled in the last two decades.¹¹² As Attorney General I would make sure that the \$1 billion this report calls for to tackle the problem is made available and I would follow-up by making it an ongoing agenda item for COAG and a priority issue for the newly established taskforce.

I would also build on the work done in establishing the Australian Youth Forum, and ensure that it moves beyond the 'roundtables' model to be a truly participatory consultative body for children and young people. Exactly what it should look like would only become clear after a wide consultation of young people led by the taskforce. I would also appoint a National Children and Young Peoples Commissioner, independent of both the Government and the Australian Human Rights Commission and reporting directly to Parliament. The Commissioner would work closely with the taskforce to ensure that children's and young people's voices are heard by Government. The Commissioner's office would be overseen by a management committee of children and young people.

111 This report commissioned by the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission in 1997 is a comprehensive analysis of the legal system and the ways in which it serves (or fails to serve) children and young people.

112 National Youth Commission, *Australia's Homeless Youth: A report of the National Youth Commission Inquiry into Youth Homelessness*, Letter to the Australian Community p V, <<http://www.nyc.net.au/>> at 23 March 2010.

I would also call for a broad National Policy for Children that has the *Convention on the Rights of the Child* as its foundation.

Finally, I would provide funding for specialist children's lawyers based in the community sector. Currently in this sector there is one children's lawyer for, approximately, every one million young people under 25. Community lawyers can assist children and young people to navigate the system, thus reducing conflict, homelessness, incarceration and other consequences of legal problems. But more importantly, advocacy can assist young people in claiming and protecting their own human rights; a process which is undervalued and overdue in the Australian context.

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