

**THE LAW SOCIETY OF  
THE AUSTRALIAN CAPITAL TERRITORY**

**SIR RICHARD BLACKBURN LECTURE**

**14 May 2002**

***CHILDREN AND YOUNG PEOPLE -  
THE LAW AND HUMAN RIGHTS***

**The Honourable Alastair Nicholson, AO RFD  
Chief Justice  
Family Court of Australia**

**The Jaeger Room  
Australian Academy of Sciences Shine Dome  
Canberra**

## INTRODUCTION

I am greatly honoured to have been invited to present this year's address commemorating the enormous and wide ranging contributions to Australian society made by The Honourable Sir Richard Blackburn OBE. I commend the Law Society of the Australian Capital Territory for having initiated this important annual event in 1986 and I feel privileged to follow in the footsteps of the eminent speakers who have given the Lecture since Sir Richard himself delivered the first one.

Sir Richard graduated with a Bachelor of Arts from the University of Adelaide and Oxford University and a Bachelor of Civil Law degree from Oxford University. He was a Rhodes Scholar for South Australia in 1940 and attended Eldon Law School in 1949.

Sir Richard served in the Australian Imperial Forces from 1940 to 1945 and rose to the rank of Captain. In 1949 he was called to the Bar at the Inner Temple in 1949 and he was admitted to practice as a solicitor in South Australia in 1951.

His Honour served as a Judge of the Supreme Court of the Northern Territory from 1966 to 1971 before his appointment as a Judge of the Supreme Court of the Australian Capital Territory. From 1971 to 1976, he was also Chairman of the Law Reform Commission of the Australian Capital Territory. He was appointed Chief Judge in 1977 and became the first Chief Justice of the Australian Capital Territory in 1982. He also served as a Justice of the Federal Court of Australia from 1977 to 1984.

His commitment to knowledge and scholarship was a vigorous one. He held the appointment of Bonython Professor of Law at the University of Adelaide between 1950 and 1957 and was associated with the Australian National University as Pro-Chancellor and Chancellor from 1976 until 1987. It is therefore most fitting that Lady Blackburn established the award of a medal in the University's Faculty of Law to honour Sir Richard's memory.

The medal, which symbolises Sir Richard's commitment to the highest standards of legal scholarship, is awarded to the student who has qualified for the award of the degree of Bachelor of Laws with Honours and who submits the best research paper in fulfilment of the requirements for the award of the honours degree.

In respect of Indigenous peoples, his Honour's Northern Territory decision in *Milirrpum v Nabalco Pty Ltd ("Gove Land Rights Case")*<sup>1</sup> is perhaps most readily recalled but I noted with interest the following fond recollections of Colin McDonald QC:

*"What was interesting about those days was that the Northern Territory Supreme Court was, in its own pioneering way, also experimenting with justice issues for Aboriginal people. The Court under the leadership of Sir Richard Blackburn and Sir William Forster, assisted by Justice Muirhead, Justice Toohey and Justice Gallop was very open to new and creative arguments in achieving practical justice for Aboriginal people and yet doing so in a way compatible with the Court's structures and the wider Australian legal framework."*<sup>2</sup>

## **THE PERSPECTIVE OF A JUDGE**

The title of my address "Children and Young People - The Law and Human Rights" builds on the helpful suggestion of the A.C.T. Law Society Executive. Adding the element of "human rights" to the title was creating a rod for my own back. The combination offers a potentially inexhaustible menu of specific topics. Each could be my single concern this evening and I would not be able to do any of them justice.

Were I to focus on a particular segment of our young, such as asylum seekers, Indigenous peoples, or those who have special disability needs, I would invariably end up spending much of my time speaking about or updating the deficits that were flagged by the comprehensive 1997 report of the Human Rights and Equal Opportunity and Australian Law Reform Commission, *Seen and Heard*.<sup>3</sup>

Regrettably, I doubt that I could fill the rest of my allotted time by telling you the good news of how governments have subsequently remedied the identified problems. In fact, five years have passed since the Report and the Commonwealth Government has not yet formally responded to it.

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<sup>1</sup> (1971) 17 FLR 141

<sup>2</sup> Colin McDonald *"The coming of the Boat People to Australia, Brickbats and the non material rewards of Pro Bono legal work"*, A paper delivered at the Commonwealth Attorney-General's "For the Public Good: The First National Pro Bono Law Conference, 5 August, 2000 National Convention Centre, Canberra

<sup>3</sup> Australian Law Reform Commission/Human Rights and Equal Opportunity Commission (1997) *Seen and Heard: priority for children in the legal process*, Report No 84, ALRC, Sydney.

This observation highlights a further problem attending the tyranny of choice within the title of tonight's address. The actions or inaction of governments, deeply and inevitably, affect the rights of children, both directly and indirectly, perhaps more so than other constituencies in our community. It is therefore hard to avoid levelling a degree of criticism against governments when speaking about children. For judges this gives rise to a particular risk; that such remarks are portrayed pejoratively as political.

The difficulties have been highlighted for me by my own experience in a number of instances that I need not discuss here.

However, it might be of interest in this regard to refer to the *Statement of Principles of the Independence of the Judiciary* adopted by Chief Justices of the Asia-Pacific region at Beijing in 1995. This Statement was signed by the then Chief Justice of the High Court of Australia, Sir Gerard Brennan.

It declared that the objectives and functions of the judiciary include the following:

- (a) to ensure that all persons are able to live securely under the Rule of Law; and
- (b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights; (My underlining)

The key words of limitation are “*within the proper limits of judicial function*”. While this is a limitation, and views will obviously differ as to the extent of this limitation, the provision must mean quite a lot more than judges saying nothing at all about human rights.

There are of course broad human rights topics about which judges might be said to have no greater expertise than anyone else. Nevertheless judges are also citizens and, I believe, have a democratic right and duty to address such subjects.

However, there are many other issues where judges do have a particular knowledge and insight that is not always available elsewhere. I have in mind practical matters such as legal aid, the availability of legal representation for children, the administration of justice, and legislative reform.

While it is true that the legal profession also have much to contribute to these sorts of issues, their comments are all too easy for politicians and others to dismiss as being motivated by self-interest. The only other group that can be expected to have such knowledge are public servants, and both

convention and the law effectively prevent them from saying anything contrary to government.

But practical matters are not the perimeter of what I am thinking of here. There is also the need for judges to contribute to community discussion of "big picture" impacts on the development of our domestic legal system.

The more fully we debate issues such as the incorporation of international human rights treaties and - a very topical subject here in the Territory I know, the question of a Bill of Rights - the better we shape the extent to which both today's and tomorrow's children are able to enjoy their human rights.

I realise that mine are views with which some of my colleagues and others may differ. A common argument levelled against judges for speaking out is that such public conduct affects their actual impartiality or the appearance of it, which is necessary for public confidence in their independence.<sup>4</sup> One hears the term "separation of powers" bandied about in the course of such

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<sup>4</sup> In this regard, I was pleased to read the remarks in the High Court's decision *Re Colina; Ex parte Torney* (1999) 166 ALR 545.

The case arose following contempt proceedings had been brought against a man for scandalising the Family Court by demonstrating outside the building in Melbourne, distributing written material to members of the public, and making abusive remarks about the Family Court and its members. His alleged conduct was described in the following way by:

*"Some of the comments attributed to Mr Torney were expressed in very strong terms, blaming the court and its judges for the deaths of people and for instances of child abuse, describing the judges as being "terrorised" by women's organizations, and claiming that "decisions are being made on a daily basis destroying the lives of innocent children". The literature said to have been handed out by [the alleged contemnor] complained of bias against men. It asserted that if people knew the nature of orders made by judges, the likely consequence would be violent action towards the judges. Judges were said to make decisions "based on their twisted morals" and are "protected by ... secrecy".<sup>4</sup>*

The alleged contemnor claimed that my public comments about unfounded attacks on the court by men's groups had, in some way, made it impossible for him to receive a fair trial on the contempt issue before another judge of the Family Court. In the High Court's judgment, Gleeson CJ and Gummow JJ, with whom McHugh and Hayne JJ agreed, said as follows:-

*"The speech made by Nicholson CJ, and his remarks in media interviews, conveyed an emphatic response to allegations that the Family Court manifests a systemic bias against men. It is not surprising that the Chief Justice saw it as his right, and his duty, to make such a response. In the course of his defence of the court, Nicholson CJ addressed the merits of the allegations made against the court, and answered such allegations with detailed argument. In doing so, it is contended, he expressed opinions on matters that may well arise for decision by Burton J. Furthermore, it is argued, he made it clear that he regarded attacks on the court of the kind he addressed as very serious, and as having the potential to undermine the integrity and authority of the court".*

With respect, their Honours captured with precision, the motivation for my comments – defence of the Court.

criticisms although I am yet to see a persuasive analysis of why this doctrine is said to be infringed.

In the 21<sup>st</sup> Century, let us abandon the myth that judges are blank slates without a history of views, opinions and involvements. It is the very nature of legal training that lawyers should develop an inquiring mind and, in my view, most desirable that their minds are applied to matters of human rights and that they develop both intellectual and moral pursuits.

Appointment to the judiciary does not and should not erase a person's history of thought or sever his or her commitment to a view of a just society. Likewise, the process of judging is an educative privilege as much as it is a high responsibility and those experiences can and do bring about changes in opinions and even the change from being seen as what is termed a "conservative" to "expansionist" or "radical" jurist.

In my view, our community understands these realities not the least because judges, courts and the processes of justice are more under scrutiny at this point in history than ever before. The idea of judges as opinion-free mere legal technologists brings to mind a comment made some nine years ago by the then Chief Justice of Australia, Sir Anthony Mason, in respect of the declaratory theory of law:

*“It is scarcely to be credited that anyone with any understanding of the judicial process now believes the fairy tale that judges ‘discover’ the law and then declare it, without actually making it, as though the judges resembled the Delphic oracle in revealing the intention of the pagan gods.”<sup>5</sup>*

Save for the convention that the members of judiciary resign party-political membership and refrain from engaging in partisan politics, the law and human rights of children and young people is better served by and expects an active, socially participating and visible judiciary than one which is mysterious, remote and silent.

I can well understand that these words are not very palatable to some politicians and to the media. In the case of those politicians, they have an unfortunate tendency to treat the judiciary as part of the Public Service. They are also very conscious that criticism from the judiciary may be better informed than that which emanates from the public generally, particularly in relation to legal topics.

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<sup>5</sup> A. Mason "The Role of the Courts at the Turn of the Century", the Fifth Annual Oration in Judicial Administration, Melbourne, 3 November 1993 at 21-22.

In the case of the media, certain commentators consider that they are the sole source from which public criticism should emanate. When one looks at those who control Australia's media, other than the ABC, this provides very little protection to the public. We have already seen the efforts that have been made to prevent the ABC from publicising matters inconvenient to governments of both political persuasions

I turn from those introductory remarks to engage more directly with the subject matter of this address.

## **THE SCOPE OF THIS ADDRESS**

Much could be said about the content of laws which advance or cut across children and young people's human rights. However, problems arising from the federal nature of our polity must not go ignored as they too have an undesirable impact. To this end, I have some suggestions that would go some way to dealing with our constitutional limitations.

An ambivalent attitude to human rights treaties such as the United Nations Convention on the Rights of the Child ("UNCROC") is, in my view, another obstacle to better respecting our young. In this regard, I have some suggestions about how the current approaches of courts could better give effect to the right guaranteed by Article 12 of UNCROC – the right of children and young people to be heard and to have their views taken into account in decision that affect them.

I think it fair to say that however well-intentioned we may be, our legal system in Australia does not protect the rights of children adequately. We can also say that not much effort has been made to address this problem. Defects operate in the system at a number of levels. One of the most serious defects relates to structure. The protection of children and young people from violation and maltreatment - a subject of intense community concern - is a salient illustration I will now turn to.

## **CHILD PROTECTION**

We have no less than eight sets of child protection laws with fundamental differences in such critical matters as:

- how abuse or maltreatment is defined,
- the systems through which abuse notifications are investigated,
- the level and availability of primary, secondary and tertiary services, and

- the relative emphasis placed on forensic investigation as contrasted with measures of service and assistance to children, young people and their families.<sup>6</sup>

They are administered by different agencies and adjudicated by different courts. All of this occurs against a background of an increasingly mobile community.

At the same time we have the Family Court and now the Federal Magistrates Service, operating in the area of private law, that is, dealing with disputes between individuals (usually parents) about children. However, the federal courts have no power to make protective orders other than in the context of and as between the parties before them. Yet research has highlighted that dealing with child abuse allegations is part of the core business of the Family Court and the Federal Magistrates Service.<sup>7</sup> On occasions we have the spectacle of both federal and State courts dealing with the same people and the same issues.

The federal courts may be, and often are, faced with a situation where genuine child protection issues emerge, such as the realisation that the children are likely to be at risk from both parents. Yet these courts have no means or jurisdiction to protect the child, save for requesting the relevant child welfare authority to investigate and intervene. There is no power to compel the authority to be joined as a party.

For a while the cross vesting scheme offered some possibility of correcting this situation but the High Court's decision in *Wakim's* case put an end to that.<sup>8</sup>

The case of *Re Karen and Rita*,<sup>9</sup> decided when that scheme was in force, provided a classic example both of the sort of dilemma that I am describing and a solution that the cross vesting scheme offered. There, I was not confined to the jurisdiction conferred by the *Family Law Act* and I was able to make orders in favour of the Child Protection Authority under the Queensland child protection legislation. This happened because the Supreme Court of Queensland made an order under cross vesting legislation transferring the child protection matter to the Family Court in

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<sup>6</sup> M. Rayner, (1994) *The Commonwealth's Role in Preventing Child Abuse : A Report to the Minister for Family Services*, Australian Institute of Family Studies, Melbourne.

<sup>7</sup> See T. Brown with R. Sheehan, M. Frederico and L. Hewitt (2002) *Resolving family violence to children*, the evaluation of Project Magellan, a pilot project for managing Family Court residence and contact disputes when allegations of child abuse have been made, and the references therein, available at <http://www.familycourt.gov.au/papers/html/magellan.html>

<sup>8</sup> (1999) 198 CLR 511.

<sup>9</sup> (1995) 19 Fam LR 528.

circumstances where the latter was already dealing with a dispute between the children's parents.

It is disturbing that following *Re Wakim*, there was quick legislative action to ensure that commerce was not particularly inconvenienced by that decision, but no action was taken in the area of children's law. This is despite the fact that the Family Law Council had already urged that advantage should be taken of the cross vesting scheme to address the issue to which I have adverted.

The Australian attitude to these issues is to be contrasted with that in the United States, where there has been active interest for some years in the context of what is there described as a "Unified Family Court".<sup>10</sup> The concept is that one Court will deal with all of the problems of families and children and young people, which are so often interlocked. These will include traditional family law disputes, domestic violence, child protection and juvenile crime.<sup>11</sup> Some more radical suggestions involve such Courts dealing with criminal offences against children.

In jurisdictions such as the UK and New Zealand, which do not experience the same constitutional difficulties as are present in Australia, the move is in the same direction.

In Australia we find a deafening silence or denial that there is a problem. However, I can assure you that experienced professionals in the field are quick to say that there is a very real one.

My colleague Justice Linda Dessau had this to say:

*"Having sat in the Children's Court, Magistrates' Court, Coroner's Court and for the past four years in the Family Court of Australia (the FCA), I have contemplated how children fare across the spectrum of court experiences. My assimilated view leads me to the*

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<sup>10</sup> See A. Nicholson "Future directions in family law", A paper presented to Family Law : Processes, practices and pressures, International Society of Family Law, 10<sup>th</sup> World Conference, 10 July 2000, Brisbane, Australia available at <http://www.familycourt.gov.au/papers/html/nicholson10.html>

<sup>11</sup> As to the inclusion of jurisdiction concerning young offenders, The Honourable Justice Linda Dessau has noted:

*"... a unified family court must also include juvenile crime. Otherwise, those children charged with offences would be dealt with as the junior part of an adult criminal justice system. To follow that course would be to marginalise those children, who in reality are mostly indistinguishable from the children who are in need of care and protection or suffering family breakdown, family violence or other family problems."* 'Children and Family Violence Laws in Australia' Paper presented to the conference In the Mainstream: Contemporary Perspectives on Family Violence, September 1999, Belfast.

*view that until Australia has one Unified Family Court, children and families will irreparably suffer from disjointed and/or overlapping court services.*"<sup>12</sup>

The question is what can be done about it, given the limitation prescribed by the Constitution? I do not, in the course of an address such as this, pretend that I have instant answers to the problem. I do propose to suggest a number of ways that might be explored to do so.

The most obvious would be for the States and Territories to refer the power to make child protection laws to the Commonwealth. This would enable a uniform child protection law to be passed, applicable to the whole country. Such an approach would complement the current community concerns about the need for an effective national approach to protect children from abuse and violence.

This need not and arguably should not, mean that the Commonwealth should take over the enforcement of that law, which could continue to be the province of State and Territory Child Welfare Departments and State Children's Courts. As a Commonwealth law, protection orders made by those Courts would have the benefit of automatic national application.

A less satisfactory method would be for the States and Territories to agree upon uniform legislation, with an extra-territorial effect to Court orders.

This still leaves the problem of the two federal courts, exercising jurisdiction only in private law. The decision in *Re Wakim* prevents the States from conferring child protection jurisdiction on them. However, if power was referred to the Commonwealth as I have suggested, then the Commonwealth could confer this jurisdiction on them in the same way as it has done in the case of children of unmarried parents.

I should stress that I do not see the Family Court and the Federal Magistrates Service as necessarily exercising primary jurisdiction in the child protection area. What I would see happening is that they would do so in appropriate cases. In others they could no doubt transfer matters to the Children's Courts. Similarly the latter could, in circumstances such as those in *Re Karen and Rita*, transfer those matters to the federal courts.

In the absence of a reference of powers, there is still a minimalist suggestion that might have some appeal.

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<sup>12</sup> "Children and the Court System", A paper delivered to The Australian Institute of Criminology conference, Brisbane, 17 June 1999, available at <http://www.familycourt.gov.au/papers/html/dessau.html>

The *Family Law Act* has always envisaged the possibility of setting up State Family Courts. Only Western Australia took up this offer. Judges of the Family Court of Western Australia hold dual commissions both as judges of that Court and of the Family Court of Australia. The Commonwealth remains responsible for the funding of the Western Australian Court.

If the other States and Territories were to enact similar legislation and confer State and Territory Commissions upon those federal Judges normally residing in the relevant State and Territory and confer State or Territory child protection jurisdiction on those Courts, the problem would be largely solved. Similarly the appointment of Federal Magistrates as State Magistrates could also be made and care jurisdiction conferred upon them.

Drawbacks to this solution might arise from federal judges and magistrates sitting outside the States and Territories where they hold State Commissions. However there are solutions to this. It is already proposed that judges of the Family Court of Australia receive temporary State commissions to enable them to sit at first instance in Western Australia. This solution could be extended.

Another problem might relate to appeals. In Western Australia, appeals from the Family Court, if it is exercising State jurisdiction, go to the Full Court of the Supreme Court of Western Australia. If it is exercising federal jurisdiction they go to the Full Court of the Family Court of Australia.

Again, this is not an insuperable barrier. The situation could simply be left as it is. Alternatively, it may be that some limited reference of power could be made from the States to the Commonwealth to enable the Appeal Division of the Family Court of Australia to act as an intermediate Court of Appeal. This could involve the conferring of federal commissions on some of the State and Territory Children's Court Judges and their assignment to enable them to sit on the Appeal Division of the Family Court of Australia.

Even under what I have described as a minimalist approach there would be a significant benefit for the development of the law concerning the protection of children and young people. One of the visionary features of Australia's private family law system is that we have a specialist intermediate appellate division that enables consistency across Australia.<sup>13</sup> This advantage does not extend to public child protection law as appeals fall within the general appellate structure of each State or Territory. As a

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<sup>13</sup> As noted previously, the bifurcated appeal structure in Western Australia is an exception.

result, Australia lacks a cohesive body of appellate guidance save for the rare occasion when matters arising under child protection law are considered by the High Court.

There are no doubt other matters that would need attention, but I do not believe any of them to be insuperable. One would be the different evidentiary regime that operates in Children's Courts than in the federal courts. The admission of hearsay evidence is much more liberal in protection matters before the Children's Courts. I think that there are strong grounds for the adoption of similar evidentiary provisions in the federal courts, particularly in children's matters. If this were to be done, this problem would disappear.

In summary there is much that could be done, if only we in Australia had the will to address these issues. I hope that these remarks may help to reignite debate over these issues.

I conclude on this point by quoting from a 1998 article by my colleague Justice John Faulks:

*"In summary, my prediction for the future of the different courts' involvement in the care and protection of children is one of enthusiasm and hope. My hope stems from the extraordinary dedication and commitment I have experienced among judicial officers from whatever court they may have come about the need to look after our future the children of Australia. Perhaps we can do more than all the king's horses and all the king's men. Maybe we can put Humpty Dumpty back together again."*<sup>14</sup>

I admire his Honour's enthusiasm. I also agree with his remarks about the judicial officers working in this field. I am not sure that I share his hope. I think that legislative rather than judicial action is needed to overcome these problems.

## **IMPLEMENTING HUMAN RIGHTS TREATIES AT HOME**

Apart from these serious structural difficulties there are very ambivalent Australian attitudes towards treating children as people. If evidence is needed, it is only necessary to consider the debate about the ratification of

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<sup>14</sup> The care and protection of children : the interaction of the Magistrates and Family Courts : More than all the King's Horses and all the King's Men A paper delivered at the 11th Annual AIJA Magistrates Course, Monday 23 November, 1998 available at <http://www.familycourt.gov.au/papers/html/faulks2.html>

the UN Convention on the Rights of the Child ("UNCROC") and the extreme conservative attitudes expressed by many of its opponents.

That Convention prescribes a most useful benchmark for setting minimal standards for the treatment of children. It has been ratified by every country except the USA and Somalia. President Clinton signed it, but it can only be ratified by Congress. It has not been ratified, for something of the same reasons that have attracted criticism in Australia. Basically, the conservative right appears to assume that it is "anti-family" and in some way derogates from the "rights" of parents. Like all international instruments, its language is such as to lend itself to such strained interpretations. If it is read without such preconceived notions however, its meaning is plain and non-threatening.

I agree with the standpoint of Australian academics Melinda Jones and Lee Ann Bassar Marks who argue that UNCROC, while not forming a part of Australian law, nevertheless provides a blueprint for the rights of the child.<sup>15</sup> They continue:

*"The Convention recognises that children are rights bearers, and as human beings are entitled to be treated with dignity, and with equal concern and respect without discrimination. It recognises the fundamental role of the family unit and is concerned to support the family, such that the family can support children, so that children can fully assume responsibility in the community. Children are recognised as vulnerable and in need of special safeguards".*

It has often surprised me how nervous Australians across the political spectrum now are compared to their predecessors about treaties of this kind. UNCROC is the successor of the 1924 Declaration of Geneva and the 1959 UN Declaration on the Rights of the Child. Australia supported both and played an active part in the drafting of UNCROC.

Citizens of Europe do not appear to suffer from the same reservations about human rights treaties. Even the conservative legal system of the UK now embraces the fact that its laws must comply with European recognised human rights norms such as the European Convention on Human Rights. Given modern European history that is a marked advance. To date there is no evidence of a loss of sovereignty in that country, or the imposition of a monstrous regime from elsewhere.

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<sup>15</sup> "United Nations convention on the Rights of the Child: a blueprint for Australia's children" in M. Jones and L.A.B Marks (Eds) *Children on the Agenda, the rights of Australia's children*, Prospect Media, Sydney, 2001, p.1

On the contrary, it has been a positive force for the people with Government institutions called upon to examine their policies and practices in order promote compliance. I have also been struck when talking to young UK lawyers, how much wider their horizons are than their counterparts in this country. Many have spent a year in a European University and have command of at least one other European language. They are also much more aware of human rights law.

Judges similarly, are much more conscious of the need for laws to comply with human rights norms and citizens have more chance of challenging unjust treatment by the Executive or the legislature.

Much the same can be said of Canada, albeit for different reasons. This is because of the Charter of Fundamental Rights and Freedoms, which has been of enormous direct and indirect benefit. I was interested to read an article in The Australian some weeks ago that was highly critical of the Canadian Charter. On the same day I tuned in to a judicial chat group, of which I am a member. A Canadian judge quoted recent Canadian surveys that found that the Charter had the support of more than 75% of Canadians. This support was also reflected in Quebec. One might well ask—What are we frightened of?

I have a theory that one of the things that we are frightened of is the possible destruction of our federal system. The decision of the High Court in *The Commonwealth v Tasmania (The Tasmanian Dams Case)*,<sup>16</sup> opened a yawning chasm for those who would support States' rights.

It is now quite clear that as a result of ratifying UNCROC, the Commonwealth has the power, for instance, to legislate to correct the structural anomalies in children's law such as those to which I have referred. Looking more broadly, it could clearly pass a Charter like Canada, or a Bill Of Rights and do so regardless of the attitude of the States.

It is not the law that stands in the way of such initiatives. The prime obstacle seems to me to be a reluctance by the Commonwealth to give domestic effect to human rights treaties that we have voluntarily ratified and in the case of UNCROC, vigorously advocated in the international community. In this regard, Australian National University Professor Hilary Charlesworth has observed that there is a failure to appreciate that domestic implementation is the *raison d'être* for such instruments:

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<sup>16</sup> (1983) 158 CLR 1.

*"The very point of international human rights treaties is to protect human rights within the borders of a state. They set out standards with which domestic laws and practices must conform. Australia thus seems to be Janus-faced with respect to human rights treaties. The internationally-oriented face enjoys the international status it receives from being a party to the treaties; while the nationally-turned face refuses to acknowledge the domestic implications of its international obligations."*<sup>17</sup>

This approach is not confined to Governments of a particular persuasion. The previous ALP Commonwealth Government indicated that it proposed to legislate to nullify the decision of the High Court in *Teoh* that gave limited domestic application to UNCROC in administrative decision-making.<sup>18</sup> The present Government has indicated a similar willingness to do so but has not yet produced legislation to this effect.

Australia has not escaped significant international criticism in relation to UNCROC by the UN Committee on the Rights of the Child. As the due date draws near for lodgement of our second report on compliance, it is perhaps timely to recall what was said of our first account submitted in December 1995. In its 1997 Concluding Observations, the Committee noted within what it termed "principal subjects of concern", the effect of Ministerial Statements aimed at countering the *Teoh* decision and the lack of domestic force to UNCROC.<sup>19</sup> It went on to say:

*"The Committee is also concerned that there is no right of citizens to launch complaints in the local courts on the basis of the Convention on the Rights of the Child."*

As noted by the Full Court of the Family Court in *B and B: Family Law Reform Act 1995*,<sup>20</sup> Australia's First Report informed the Committee that:

*"Australia does not propose to implement the Convention on the Rights of the Child by enacting the Convention as domestic law. The general approach taken in Australia to human rights and other conventions is to ensure that domestic legislation, policies and practice comply with the Convention prior to ratification."*

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<sup>17</sup> Professor Hilary Charlesworth (2000) "The UN and Mandatory Sentencing", *Australian Children's Rights News* (No. 25), Defence for Children International - Australia.

<sup>18</sup> (1995) 183 CLR 273.

<sup>19</sup> CRC/C/15/Add.79, 10 October 1997, at par 7, available at:

<http://www.unhcr.ch/tbs/doc.nsf/MasterFrameView/3d744477ea59fdaf8025653200508bb8?Op=endocument>

<sup>20</sup> (1997) FLC ¶92-755 at par 10.12

Local audits and the UNCROC Committee's Concluding Observations run counter to the suggestion that compliance was achieved prior to or even subsequent to ratification of UNCROC.<sup>21</sup> Leaving aside concerns about particular segments of children in Australia, some of the Committee's other principal concerns included:

- the absence of a comprehensive policy for children at the federal level;
- the disparities between the different States' legislation and practices, including budgetary allocations;
- the lack of public knowledge of UNCROC (a view later echoed by the Parliamentary Joint Select Committee on Treaties);<sup>22</sup> and
- *"that the general principles of the Convention, in particular those related to non-discrimination (art. 2) and the respect for the views of the child (art. 12) are not being fully applied"*;

Again, confining myself to the most overarching recommendations of the Committee, it urged:

- awareness raising campaigns on UNCROC, particularly *"the right of the child to participate and express his/her views, in line with article 12 of the Convention"*; and
- *"that there be a federal body responsible for drawing up programmes and policies for the implementation of the Convention on the Rights of the Child, and monitoring their implementation."*

The advent of a Federal Minister for Children and Youth Affairs in the present Executive structure may presage some activity on these recommendations and I note with interest that the Minister led the Australian delegation to the United Nations Special Session on Children held last week.

Notwithstanding this development, I maintain my longstanding view that as well as a Minister responsible for children, Australia needs a truly

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<sup>21</sup> See for example: Australian Law Reform Commission/Human Rights and Equal Opportunity Commission (1997) *Seen and Heard : priority for children in the legal process*, Report No 84, ALRC, Sydney. The Australian Section of Defence for Children International (1996) *Australia's Promises to Children - The Alternative Report*; G. Brewer and P. Swain (1993) *Where Rights are Wronged - A Critique of Australia's Compliance with the United Nations Convention on the Rights of the Child*, National Children's Bureau of Australia, Melbourne; J. Harvey, U. Dolgopol and S. Castell-McGregor (Eds) (1993) *Implementing the U.N. Convention on the Rights of the Child*, Children's Interests Bureau, Adelaide.

<sup>22</sup> Joint Standing Committee on Treaties *United Nations Convention on the Rights of the Child - 17<sup>th</sup> Report*, tabled 28 August 1998 available at <http://www.aph.gov.au/house/committee/jsct/REPORTS/Report17/Rept17Contents.htm>. See Executive Summary under the heading "Publicising the Convention". It appears there has been no Government response to the Joint Standing Committee' Report.

independent statutory body that is charged with the responsibility to monitor and promote domestic compliance and implementation of UNCROC, and is properly resourced to do so. Such a body should report directly to Parliament and should have the tasks such as scrutinising every piece of legislation that might have implications for children.

The person with ultimate responsibility for the body should have the same independence of the Executive as does a member of the judiciary. I consider that this independence is necessary because it does not always suit government policy to be child focused. With the best will in the world, the responsible Minister may not be in a position to direct public attention to a particular problem because of the principle of cabinet solidarity. Similar considerations apply in respect of a Children's Commissioner who holds a Public Service type appointment.

Such officials have functioned effectively in Scandinavian countries for many years. Unfortunately, when attempts have been made in this direction in Australian States, these Offices have been the subject of criticism for a lack of independence in the sense that I have described.<sup>23</sup>

## **REPRESENTATION OF CHILDREN IN LEGAL PROCEEDINGS**

Representation is the norm in criminal proceedings against children. In proceedings involving their welfare and best interests, it is much more patchy.

In the Family Court and the Federal Magistrates Service, the principles set out by the Full Court in *Re K* are applied.<sup>24</sup> These set out a list of criteria that will be regarded as indicia of the need for a child or children to be represented. It is of interest to note that in that case the Full Court pointed out that the failure to provide representation for **all** children affected by family law proceedings may be a breach of Australia's international obligations.

It is also of interest to note that in New Zealand all such children are in fact represented.

It is of course one thing to provide representation and another to provide effective representation. At present a Committee consisting of

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<sup>23</sup> See Defence For Children International (Australia) (1998) *Taking Children Seriously: A Commission for Children and Young People*. The concrete proposal arising from the analysis is available at <http://www.dci-au.org/html/section6.html>.

<sup>24</sup> (1994) FLC ¶92-461.

representatives of the two courts, Government and the legal profession is preparing guidelines for child representatives and I expect to be in a position to release draft guidelines for comment in the next few weeks. These guidelines will lay down minimum standards for the conduct of child representatives that I intend to issue as a Practice Direction after appropriate consultation.

This initiative arises from a concern that I have had for some time that the fact of representation does not always mean that the child's wishes are necessarily heard or, more importantly taken into account in the decision making process.

Section 68F(2)(a) of the *Family Law Act* requires that a Court must consider the wishes of a child and give them such weight as the age and maturity of the child require.<sup>25</sup> Providing an appropriate mechanism for the obtaining of such wishes is not always easy. Similarly, issues as to what weight should be given to children's views at particular ages present difficulties.

There are grounds for thinking that courts have placed too little weight on the views of young children. The Children's Issues Centre at the University of Otago, New Zealand, wrote of their researches:

*“One of the most important conclusions to be drawn from our study is that children do have views about their lives after parental separation and that they are highly capable of expressing their views. Even children as young as five years’ of age can talk about their feelings and what situations mean to them despite the complexity of the experiences . . . the view that children’s capacities to understand and participate have been underestimated (Mayall, 1994; Simpson, 1989) is reinforced for us by this study.”*<sup>26</sup> (footnotes omitted)

At the same time care must be taken to ensure that the views of particular children have not been “bought” by a parent, or that the children are not reacting to the fact that the parent with whom they reside has the particular responsibility for matters such as their discipline.

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<sup>25</sup> See *H v W* (1995) FLC ¶92-598 which was further considered in *R and R: Children's Wishes* (2000) FLC ¶93-001.

<sup>26</sup> *Access and Other Post-Separation Issues – a Qualitative Study Research Report* Children's Issues Centre, University of Otago, July 1997. See also S. Wyver (2000) "Young children's participation in decision-making" *Australian Children's Rights News* (No. 27), Defence for Children International - Australia, p.6.

I have little doubt that many children and particularly older children feel disempowered by proceedings in the Courts. Solutions are not easy.

Sometimes a judicial officer can see the children during the course of the hearing. There are cases where this is appropriate but there are grounds for caution and it should not be done in every case.<sup>27</sup>

While there is a need for caution, there are also children who indicate that they would like to express their views directly to the judge.<sup>28</sup> I think that judges should consider doing this more often, especially in cases involving older children

Apart from this course, the alternatives seem to be that the children should give evidence themselves or should be heard as the result of a counselling interview conducted by an experienced person.

The concept of children giving direct evidence has not been favoured and indeed the *Family Law Rules* provide that a child cannot give evidence without the leave of the Court.<sup>29</sup> Such leave is rarely granted. While I think that it is doubtful whether a child should ever be a compellable witness in family law proceedings, I wonder if it is not time to re-think the approach of never calling children as witnesses. Children do give evidence in other courts. Methods have been developed to protect them, including the opportunity to give evidence by video link from a location other than the court room. There may be children who wish to give evidence and if they do, it is difficult to see the rationale for preventing them doing so. To refuse them this right may well be a breach of their entitlements under UNCROC and may effectively prevent the Court ascertaining their wishes.

Nevertheless, the process usually employed of the child being interviewed by an experienced counsellor would seem to be the solution in most cases. However where wishes are in issue, care must be taken to ensure that the wishes that have been expressed are still current.

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<sup>27</sup> See generally: J. Cashmore "Children's Participation in Family Law Matters" in C Hallett and A Prout *Hearing the voices of children: Social Policy for a New Century*, Falmer Press, forthcoming; J. Doogue and S. Blackwell "How do we best serve children in proceedings in the Family Court?" Volume 3 Part 8 *Butterworths Family Law Journal* (New Zealand), December 2000; *B v B (Minors) (Interviews and Listing Arrangements)* (1994) 2 FLR 489 per Nourse LJ and Wall J.

<sup>28</sup> See J. Cashmore "Children's participation in family law matters", paper presented at the 2001 World Congress on Family Law and the Rights of Children and Youth, Bath England, September 2001.

<sup>29</sup> See Order 23.

Further, it is extremely important that such counsellors be properly trained and in particular be trained in the techniques of interviewing children. Although Courts are not bound to accept their recommendations, it must be realised that they carry considerable weight. Very often, the decision whether or not to extend legal aid in a particular case is dependent upon the contents of the counsellor's report. Many cases are settled out of court as a result of these recommendations. The future of the children in question may thus be determined by what appears in the report. The responsibility of the counsellor is thus a heavy one.

The carrying out of this task becomes even more difficult in relation to children coming from a different cultural and ethnic background. Legitimate concerns have been expressed that some of our counsellors preparing reports have too limited an understanding of these ethnic or cultural factors. These concerns must be and are being addressed.

The Family Court is currently engaged in a major re-think of how best to take proper account of culture in its approaches. We commenced with what I believe to have been pioneering work with Indigenous communities, which included the employment of Indigenous family consultants.

In relation to ethnic issues, we have had an independent audit by specialist consultants which is now the subject of a major consultation with culturally diverse communities.<sup>30</sup> The consultants have made far-reaching recommendations that are now being implemented. These include measures such as judicial and staff education as to different cultures and an employment policy that sees that more of our staff, including counsellors come from diverse ethnic backgrounds. We are also reviewing our publications and data collection in order to better understand and serve these groups. I believe we are the first court to conduct such an exercise on this scale.

## **CHILDREN, VIOLENCE AND LITIGATION MODELS**

A major problem affecting the rights of children is the extent of family violence and abuse to which they are exposed in our community.

It may be directed against them, or it may take the form of violence and abuse directed against others. All too often, it is the principal care-giver of children who is the target and for children, this needs to be understood as

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<sup>30</sup> J. Cossar and M. Dimopolous *Diversity Audit Report and Recommendation for the Family Court of Australia National Cultural Diversity Committee*, 2002.

capable of being more traumatic than threats directed against the children themselves.<sup>31</sup>

All of our courts struggle to deal with this problem and any associated professional can tell chilling stories as to what they have observed. In its extreme form it extends to the murder of partners and children, but there are many gradations below that.

One aspect that has troubled me for many years has been the increasing reluctance of governments to spend monies on legal aid. This strikes directly at the people and in particular, the children who are most vulnerable. What is not realised is that many of the people coming to family and children's courts are inarticulate, come from different cultural backgrounds and may well be in fear of their former partner. Some may be under a psychological disability. Such people may be incapable of conveying the extent of the violence to which they or their children have been subjected. They may convey it in such a way that their evidence is not accepted. An interesting example of this latter problem was discussed by the Full Court in *T and S*.<sup>32</sup>

If such people do not have access to competent legal representation, the chances of the Court getting it wrong increase dramatically. Worse still, there are no doubt, many cases where the court never gets a chance to adjudicate. This is because the parent concerned gives up out of fear or in despair at their inability to cope with the legal system. This may have extremely serious consequences for the children.

It is only a partial answer to provide representation for the children. It is important that this be done, but the child representative cannot substitute for a legal representative of the parties. Indeed their impartial position prevents them from doing so.

The end result of all this is that our children suffer to a greater or lesser extent.

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<sup>31</sup> Powerpoint presentation on Attachment and Development by Dr. Sarah Mares to the Judicial Development Program, Family Court of Australia, Queenscliff, Victoria, May 2002.

<sup>32</sup> (2001) FLC ¶93-086. An application for leave to appeal to the High Court of Australia was refused with costs on 19 March 2002. The case is discussed in A. Nicholson "Australian Judicial Approaches to International Human Rights Conventions and 'Family Law', A Paper presented to the Miller Du Toit and University of Western Cape Family Law Conference, 26 March 2002, Cape Town, South Africa, available at [www.familycourt.gov.au/papers/html/capetown.html](http://www.familycourt.gov.au/papers/html/capetown.html).

What then are the answers to this problem? In one sense there are no answers. There are however better means that we can adopt than those that we are currently adopting.

One obvious course of action is to provide more legal aid and better and more available interpreter services in all courts. Another is to provide more extensive community education as to the problems created by family violence and the creation of a zero tolerance culture in relation to it.

I have already drawn attention to the need for a better-structured court system. Perhaps however, we should also be examining our long held faith in the adversary system in relation to family litigation.

In an interesting article that was previously presented to the 1999 Australasian Conference of Family Court Judges held in Auckland, Judge Jan Doogue and Ms Suzanne Blackwell had this to say:

*"The following comment from Finlay [in 1983] is as apposite in New Zealand today as it is in Australia:*

*Thus it can be seen that the [legislation] contains the tentative beginnings of a non-adversary system, but the courage has so far been lacking to carry them through to their logical conclusion.*

*We suggest Judges should take a more dominant part in the proceedings earlier and give greater direction as they deem necessary in order to achieve the primary objective as earlier stated. There should be no impediment to the Court deciding what witnesses should be called, and whether certain matters should be excluded as not likely to serve the primary objective. As Finlay has said:*

*While the convinced common lawyer would probably say that the discovery of the truth is the inevitable result of the adversary process of law, this is an unproven assumption, based in the folklore of the common law, so that this particular argument ought perhaps to be put into suspended animation until we have proof one way or the other.*

*For reasons expressed earlier in this paper, decisions as to who ought to be in control of the proceedings should be made by the Court at the outset.*

*Courts have allowed parties to bring too adversarial an approach to these cases and as a result pre-trial phases have often been too extensive and too protracted. We discern that it has been a matter of comfort for many of those concerned (including Judges) to allow pre-trial phases to be extended and evidence to be admitted way beyond what may have been mandated by the facts of any case because of a failure to be courageous or through lack of time in the initial phases to honestly analyse whether the issues in fact require such work to be done. As a result there has been a commensurate lengthening of hearing time, an increase in costs, and extended periods of delay and conflict, not only for the parties but, probably even more detrimentally, for the child or children."* <sup>33</sup>(footnotes omitted)

In Australia, the Australian Law Reform Commission in its report on civil justice, avoided an examination of the adversary system despite the fact that it was within its terms of reference.<sup>34</sup> In the case of family and children's law, I regard this as most unfortunate.

I think that this is a subject that bears much more careful examination. The evidence suggests that where Courts adopt a more active and inquisitorial approach in these areas, more satisfactory results are achieved. In addition, as pointed out by Justice Geoffrey Davies of the Court of Appeal, Queensland, our procedural system is shifting inexorably in an inquisitorial direction:

*"The adversarial model was premised on the assumption that civil litigation was essentially a private matter. The parties were left to conduct proceedings as they saw fit and according to their own timetable. The judge assumed a passive role, intervening like an umpire only if a non-delinquent party sought the imposition of sanctions. The responsibility was upon the parties alone to identify the issues in dispute, and it was for the party making an assertion to prove it, without assistance from his or her opponent. The judge, being the impartial arbiter, was left with the job of determining the contest according to what was presented to her or him. The judge could not transgress beyond the issues and evidence presented by the*

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<sup>33</sup> J. Doogue and S. Blackwell "How do we best serve children in proceedings in the Family Court?" Volume 3 Part 8 *Butterworths Family Law Journal* (New Zealand), December 2000 citing H. Finlay (1983) "Towards Non-Adversary Proceedings in Family Law" (1983) 10 *Sydney Law Review* 61.

<sup>34</sup> (1999) *Managing Justice: a Review of the Federal Civil Justice System*, Report No. 89, ALRC, Sydney.

*parties. All steps in the action were intended to lead up to a climactic trial.*

*To state the elements of the adversarial model in that way shows immediately how far we have already departed from it. Case management systems, in various forms, and a greater assumption by judges of responsibility for the speed at which and the form in which disputes are conducted, and even for the issues upon which they will be conducted, have changed much of that. With some limited exceptions, of which the Family Court is one, however, there is still a tendency on the part of many litigating lawyers and judges to look towards an ultimate single trial as the main event.*<sup>35</sup>(footnote omitted)

Although it is established in law that proceedings concerning children under the *Family Law Act* are not strictly adversarial, the Court's Magellan pilot in relation to the handling of cases involving child sexual abuse enhances the inquisitorial emphasis.<sup>36</sup> That project involves a much more active role for the court in the obtaining of evidence and the control of the timing of events in such cases. It also involved much more active cooperation between child protection authorities, court counsellors and child representatives than is normally the case. It has recently been the subject of a successful evaluation.<sup>37</sup>

In other areas the court is moving in the same direction. The Future Directions Committee, supported by the ALRC, recommended a more active case management process in relation to all family law cases and a new case management system of that type is now being introduced throughout Australia.<sup>38</sup>

I think that this area needs to receive much greater attention than has previously been the case. It is true that a move in the direction of an inquisitorial system will probably require greater judicial resources but I suggest that money so spent may well be saved through minimising the time and expense of litigation within the present, more adversarial, system.

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<sup>35</sup> "Justice in the 21<sup>st</sup> Century", A paper delivered at the Family Court of Australia Judges' Annual Conference "Challenges for the 21st Century", Sydney, 7 July 2000.

<sup>36</sup> See *M v M* (1988) 166 CLR 69 and the discussion in *In re P (a child); Separate Representative* (1993) FLC ¶92-376.

<sup>37</sup> See T. Brown with R. Sheehan, M. Frederico and L. Hewitt (2002) *Resolving family violence to children*, the evaluation of Project Magellan available at <http://www.familycourt.gov.au/papers/html/magellan.html>

<sup>38</sup> The Report of the Future Directions Committee is available at <http://www.familycourt.gov.au/court/html/future.html>.

Based on the success of the Magellan pilot, the Court is giving priority to extending the model to other locations in Australia. We are also aiming to give streamlined and dedicated attention to two further categories of cases.

First, a project we have called "Mercury" aims to deal with the large number of interim applications that come before the Court particularly during what is often the heated period following separation when children are vulnerable to losing important relationships in the wake of adult bitterness. Using case conferences techniques, the intent is to resolve or at least narrow the issues between the parties as promptly as possible.

The second, and at this stage less developed initiative, aims to apply the lessons learnt from the Magellan Project to cases where partner abuse and other forms of family violence are significant issues. As you would appreciate, such allegations are common and the Court needs to find a way to partial out which require a different form of management without detracting from, or being seen to dilute, our long-standing commitment to putting the safety of vulnerable adults and children at the forefront.

## CONCLUSION

You will recall that my introductory comments mentioned Colin McDonald's tribute to Sir Richard. He rightly praised Sir Richard's commitment to achieving *"practical justice ... in a way compatible with the Court's structures and the wider Australian legal framework"*.

I would be proud to be remembered in the same way and hope that my address tonight might spur further thinking about how all of us with a responsibility to children and young people can constructively forge better legal systems and structures for their enjoyment of human rights.

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