LawAsia: "Children and the Law: Issues in the Asia Pacific Region"
Carlton Crest Hotel, Brisbane
Friday 20 June 2003, 9.00am

Opening Address: "Children's Rights and Court Responses"

Chief Justice Paul de Jersey AC[*]

Introduction

It is my great pleasure to deliver this opening address, and I at once congratulate LawAsia on its initiative as convenor. Fifty, or perhaps even twenty years ago, a conference like this, focused on the manner in which the law accommodates children, would doubtless have attracted little interest. It is a measure of the extent to which the recognition of children within the legal system has progressed that this conference is supported by delegates in such numbers and such high-profile speakers.

I particularly welcome visitors to Queensland, and our "institutional" visitor LawAsia itself. We hope LawAsia's presence in Queensland may become more enduring! Now 37 years old, our host association has an enviable record of wonderfully effective work in fostering professional relationships and understanding in the region, and in promoting the rule of law in diverse environments. We warmly welcome LawAsia to Brisbane. I also wish to thank the Queensland Law Society and the Law Council of Australia, as co-hosts of the conference.

The range of pressing issues concerning children within the contemporary legal system is indeed varied. I note with interest many of the specific topics to be discussed over the next three days, including the place of children within

---

[*] I am indebted to my associate, Mr Chris Peters, for his assistance in the preparation of this address.

the existing strictures of refugee law and criminal law, and the effect of war on children's legal rights. These are topics most worthy of consideration, and I have no doubt the speakers to follow me will shed much light on the relevant issues.

In opening the conference, and with due deference to other speakers, I will comment briefly on two topics of particular interest: first, the development of children's rights over the past century, and second, the court system's ability to accommodate the needs of children. The latter has considerable practical import for judges on a daily basis, and the former provides a useful overview of the interaction of the law with children.

The Development of Children's Rights

Until recently, recognition of children's legal rights was scant. Jeremy Bentham described in plain language the prevailing attitude in 1840:

> "The feebleness of infancy demands a continual protection. Everything must be done for an imperfect being, which as yet does nothing for itself. The complete development of its physical power takes many years; that of its intellectual faculties is still slower. At a certain age, it has strengths and passions, without experience enough to regulate them. Too sensitive to present impulses, too negligent of the future, such a being must be kept under an authority more immediate than that of the laws …"[1]

Bentham's words evidence a perception of children as objects necessitating protection, rather than individuals capable of making reasoned decisions and meeting responsibilities. There is no doubt children need special protection,

and the criminal law recognizes this in providing for certain offences. Since 1840, the attention given the position of children has intensified.

Children's Rights in an International Context

In an international context, perhaps the first substantive step was taken in 1924, when the League of Nations adopted Eglantyne Jebb's Declaration of the Rights of the Child in Geneva.[2] The Declaration contained five aspirational principles designed to encourage the personal development of every child.

Further progress was made in 1959, when the General Assembly of the United Nations adopted its Declaration on the Rights of the Child.[3] That Declaration, separate and distinct from the 1924 Declaration though similarly titled, supplemented the Universal Declaration on Human Rights issued by the United Nations in 1948[4] by recognising that children have specific and particular rights, not necessarily equivalent to those of adults.[5]

Despite these two important instruments, the recognition of children's rights remained limited until very recently. Even in 1972, notwithstanding the progress forged by the adoption of the two children's rights declarations, Professors Henry Foster and Doris Freed were introducing their thought-provoking article "A Bill of Rights for Children"[6] with the view that "Children are

[1] Cited in M Ward, "Children's Rights: A Framework for Analysis" (1979) 12 *University of California Davis Law Review* 255 at 256.
[2] September 26, 1924.
[3] GA Res 1386 (XIV) 14 UN GAOR Supp (No 16) at 19, UN Doc A/4354 (1959).
[4] GA Res 217A (III), UN Doc A/810 at 71 (1948).
[5] M Jones and L Marks, "United Nations Convention on the Rights of the Child: A Blueprint for Australia's Children" in M Jones and L Marks (eds), *Children on the Agenda: The Rights of Australia's Children*, Prospect, Sydney, 2001 at 3.
[6] H Foster and D Freed, "A Bill of Rights for Children" (1972) 6 *Family Law Quarterly* 343.

persons and the law should recognise that fact, although it will take some doing."[7]

Probably the most crucial step in the movement for the recognition of children's legal rights was the adoption of the Convention on the Rights of the Child by the United Nations General Assembly on 20 November 1989.[8] The Convention has now been ratified by 191 states,[9] making it "the most widely and rapidly ratified human rights treaty in history."[10] The Convention was ratified in this country on 17 December 1990,[11] and its content was reinforced by the Declaration on the Survival, Protection and Development of Children at the World Summit for Children in 1990.[12] The Convention provides a comprehensive framework within which countries agree to support the legal rights of children, although there remain concerns about the practical implementation of the Convention in many states.

Children's Rights in a Domestic Context

Progress made on an international stage over the past century has been reinforced by an apparently inexorable trend towards the recognition of children's rights in national laws. In the United States, perhaps the most well-known example of this was the 1967 Supreme Court decision in *In re Gault*[13]. The case concerned a 15 year old boy, Gerald Gault, who made a number of lewd telephone calls to a neighbour. He was arrested by police and brought to

---

[7] *idem* at 343.
[8] GA Res 44/25, annex, 44 UN GAOR Supp (No 49) at 167, UN Doc A/44/49 (1989), entered into force Sept 2 1990.
[9] UNICEF, "The Convention on the Rights of the Child," available at http://www.unicef.org/crc/convention.htm.
[10] *ibid*.
[11] H Finlay, R Bailey-Harris and M Otlowski, *Family Law in Australia*, 5th ed, Butterworths, Sydney, 1997 at 366.
[12] Available at http://www.unicef.org/wsc/declare.htm.
[13] 387 US 1 (1967).

trial in a juvenile proceeding, where several vital procedural safeguards were disregarded, including the requirements that witnesses be sworn in and that the trial be recorded. The judge committed Gault to the local industrial school for six years, a decision against which he appealed.

The Supreme Court held that due process clause of the United States Constitution had been violated, finding "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[14] That sentiment has been reinforced in the United States many times. For example, in *Tinker v Des Moines School District*[15], the Court responded to discipline meted out to 13, 15 and 16 year old students for wearing black armbands to school by holding that:

> "Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State."[16]

The recognition of children as distinct legal persons entitled to specific human rights in the United States is echoed in other domestic legal systems. In the United Kingdom, the most prominent example of this recognition is the well-known decision of the House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority*[17]. The case related to a memorandum issued by a governmental authority advising young people on contraception and offering clinics should difficulties with contraception arise. The authority refused to guarantee that parental consent would be pursued in all clinic cases. A mother of five girls under 16 objected to what she characterised as an undermining of parental rights. The court disagreed. According to Lord Scarman:

[14] *idem* at 13.
[15] 393 US 503 (1969).
[16] *idem* at 511.
[17] [1986] AC 112.

> "Parental rights … do not wholly disappear until the age of majority … But the common law has never treated such rights as sovereign or beyond review and control. Nor has our law ever treated the child as other than a person with capacities and rights recognized by law … Parental right yields to the child's right to make his own decision when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision."[18]

That decision provides clear support for the attainment of legal rights by children as soon as they become reasonably capable of exercising them in a considered manner. The principle espoused in *Gillick* has been endorsed in this country in *Secretary, Department of Health and Community Services v J W B & S M B* (*Marion's case*)[19].

As other speakers will doubtless point out, the trend towards the recognition of children's rights, both domestically and internationally, is far from spent. One need be only vaguely conscious of world affairs to be aware that in many countries, children's very lives, let alone their livelihoods, are at risk through a lack of legal protection. That is regrettably true as much in our own region as any other part of the world. Nonetheless, the trend demonstrated by the various international instruments and domestic cases is a positive one, and there should be a sense of optimism about the progress that has been made, and the progress that will continue to be made.

[18] *idem* at 183-184, 186.
[19] (1992) 175 CLR 218.

Children in the Courts

I turn then from the relatively general issue of children's rights to the specific question of the capacity of courts to accommodate children.

I regret to have to record the substantial number of alleged victims of sexual assault cases determined in the District Court of Queensland who are children. In the period of 12 months ending 31 May 2003, the District Court in this State disposed of 999 criminal matters. Of those, 190 were child sex cases which is almost 20%. The total of 999 included 289 sex based cases. Accordingly, of all alleged sex crime dealt with over that period, almost two-thirds of the cases concerned child victims. In contemporary Queensland, the courts are, therefore, particularly challenged in this area.

Traditionally, courts have demonstrated considerable scepticism about the receipt of evidence from children. In a 1997 review of children's evidence, the Australian Law Reform Commission concluded that:

> "… the structures, procedures and attitudes to child witnesses within all these legal processes frequently discount, inhibit and silence children as witnesses. In cases where the child is very young or has or had a close relationship with one of the parties or where the subject of the evidence is particularly sensitive, children often become so intimidated or distressed by the process that they are unable to give evidence satisfactorily or at all."[20]

[20] Australian Law Reform Commission, *Seen and heard: priority for children in the legal process*, Australian Government Publishing Service, Canberra, 1997 at para 14.2.

It is beyond reasonable argument that some children are acutely and particularly susceptible to some of those weaknesses; such is the nature of human development. Increasingly, however, there is recognition within the court system that all children are different, and that whereas one child of a particular age may be incapable of providing reliable evidence on a matter, another of that same age may be perfectly reliable, lucid and clear in his or her explanation. There is every reason for the court to approach the evidence of every child without preconception.

Such an open-minded attitude is reflected in practice in the criminal courts' developing ability to accommodate optimally the evidence of children. Let me summarise the position which has obtained in Queensland since 1977. A child of any age is competent to give evidence provided he or she understands the nature of the oath, and even if the child does not understand the nature of the oath, he or she may give unsworn evidence.[21] Additionally, in relation to children under 12 years or other persons who by virtue of their age would be disadvantaged as a witness, the court may make a variety of orders to assist, including the following:

- to obscure the person charged, or exclude the person charged from the courtroom;[22]
- to exclude all persons other than those specified by the court from the courtroom;[23]
- to permit the witness to give evidence in a separate room;[24]
- to permit a specified person to be present while the witness gives evidence to provide emotional support;[25]
- to permit the witness to give videotaped evidence;[26] or

[21] s 9 *Evidence Act* 1977 (Qld).
[22] s 21A(2)(a) *Evidence Act* 1977 (Qld).
[23] s 21A(2)(b) *Evidence Act* 1977 (Qld).
[24] s 21A(2)(c) *Evidence Act* 1977 (Qld).

- some other order that the court considers appropriate.[27]

Alternatively, where a witness under 12 made a statement shortly after the relevant events, that statement may be admissible itself as evidence.[28] However, the criminal court has an overriding power to exclude such evidence if it considers that to do so would be in the interests of justice.[29]

A landmark report of the Queensland Law Reform Commission in 2000[30] preceded the introduction into Parliament of the *Evidence (Protection of Children) Amendment Bill* 2003 (Qld) on 13 May. That bill, if enacted, will streamline the position yet further. Most significantly, the bill introduces a new Division 4A in the *Evidence Act* 1977 (Qld), which makes special provision for the evidence of "affected child witnesses". Under the proposed new law, any child under 16 who is a witness in certain specified criminal proceedings, such as proceedings relating to sexual offences, will be entitled to special consideration when giving evidence, including a presumption in favour of pre-recording evidence and mandatory use of closed circuit television facilities, where available.[31] Moreover, the bill proposes to extend and improve the existing arrangements for children's evidence, reflecting an ongoing awareness on the part of the legislature of the needs of children in the courts.

In Queensland, the courts, like the legislature, are conscious of maintaining the comfort of children giving evidence to the greatest extent possible. Only last month, this attitude was manifested in the launch of a "Chill Zone" in the

[25] s 21A(2)(d) *Evidence Act* 1977 (Qld).
[26] s 21A(2)(e) *Evidence Act* 1977 (Qld).
[27] s 21A(2)(f) *Evidence Act* 1977 (Qld).
[28] s 93A *Evidence Act* 1977 (Qld).
[29] s 98 *Evidence Act* 1977 (Qld).
[30] Queensland Law Reform Commission, "The Receipt of Evidence by Queensland Courts: The Evidence of Children," Report No 55, June 2000.
[31] Proposed s 21AB(a) *Evidence Act* 1977 (Qld) (contained in s 63 *Evidence (Protection of Children) Amendment Bill* 2003 (Qld)).

higher courts, a room in which children can prepare for a court appearance in less daunting surroundings than the general court complex. While this sort of initiative hardly revolutionises the capacity of children to give evidence, it is another step in accepting children as intelligent, capable individuals under the law.

Ultimately, all such measures are directed at ensuring the achievement of just and fair outcomes at trial. In dealing with children, the court must strike a balance between receiving reliable evidence and refusing to accept unreliable evidence. The approach prevailing in Queensland is designed to achieve that balance, thereby aiding the pursuit of justice.

Conclusion

I conclude on a cautionary note, by referring to Professor Michael Freeman, from University College London. He writes:

> "As we enter a new millennium it is worth reflecting on the one we have left. Throughout most of it children were not educated; throughout all of it they were abused. Until almost its very end children were at best objects of concern, at worst objects of property. The rights movement, whatever its deficiencies, has had a civilising effect, and by the end of the millennium we were coming to see children as persons, as social participants … But, as far as children and their rights are concerned, neither the end nor even the beginning of the end is in sight. We must beware false dawns."[32]

[32] M Freeman, "Recognising a Child's Humanity" in M Jones and L Marks (eds), *Children on the Agenda: the Rights of Australia's Children*, Prospect, Sydney, 2001 at i.

Professor Freeman's words are an eloquent reminder that for all the past progress in furthering the position of children in the eyes of the law, there remains much to be done. Beyond the topics I have touched on this morning, this conference will turn to consider the impact on children of current events playing out not only in far-off countries, but also within our own region. I commend such sessions to you. And, more generally, I commend you on your continued interest in this area. It is a field vastly deserving of the attention you will bestow upon it.