ARTICLES

Advancing Children's Rights and Interests : The Need for Better Inter-governmental Collaboration

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Are children's rights adequately protected by Australian law? The Federal Government claims that they are. But the Chief Justice of the Family Court of Australia, in an address delivered in Perth in November 1996, has argued to the contrary.

IT is my great honour to have been invited to give this prestigious address. The Sir Ronald Wilson Lecture honours one of Australia's leading human rights jurists and his seemingly inexhaustible commitment to promoting and enhancing the interests of individuals and groups facing discrimination and prejudice.

While Sir Ronald is by no means a stranger to the difficulties of such work, his current role in leading the 'Stolen Children Inquiry' must rate as one of the most delicate and emotionally charged responsibilities which one could face. Australia should count itself lucky that such an eminent legal figure is pursuing this essential building block in the imperative process of reconciliation.

My special vantage point in family law leaves me concerned that dissonant forces are operating with respect to children, a segment of the

† Chief Justice, Family Court of Australia. This paper is an edited version of the Sir Ronald Wilson Lecture 1996, delivered in Perth on 13 November 1996.

community who in the main have little political clout and rely on the moral integrity of adults for respect of their rights and protection of their interests. It is with such thoughts in mind that my address will consider ways to enhance children's rights and interests.

I propose to look at the issue from four perspectives, each of which presents challenges and opportunities for stronger collaborative approaches by governments and their institutions. First, I want to remind us of the responsibilities which arise from ratification of the United Nations Convention on the Rights of the Child and some of the implications for our federal political system, including the treaty-making process. Secondly, the paper turns to consider some of the pressing issues in how we meet the obligation to protect children adequately from abuse. The third topic for attention is the significance of adequate legal representation for children in the family law context. Finally, I would like to draw your attention to a recent High Court decision in the legal arena of international child abduction for what it says about hearing children's views where there is an application for them to be returned.

OUR RESPONSIBILITIES TO CHILDREN'S RIGHTS AND INTERESTS

The title of my address — 'Advancing Children's Rights and Interests: The Need for Better Inter-governmental Collaboration' — reflects what I see as one of the most pressing issues facing the community.

The past 10 years or so have seen much talk about children as holders of rights that should be observed and interests that adults have a responsibility to advance. At a Commonwealth level, the landmark investigations of the Human Rights and Equal Opportunity Commission ('HREOC') drew unprecedented attention, controversy and resources to the plight of homeless children[1] and the plight of mentally ill children and adults.[2] Now, in conjunction with the Australian Law Reform Commission, HREOC is pursuing a reference on the subject of Children and the Legal Process.[3] At the same time, the House of Representatives Standing Committee on Legal and Constitutional Affairs is looking at aspects of the provision of family services, a matter of significant importance to children.[4]

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1. National Inquiry into Homeless Children *Our Homeless Children* (Canberra: AGPS, 1989).
2. Human Rights and Equal Opportunity Commission *Report of the National Inquiry into the Human Rights of People with Mental Illness* (Canberra: AGPS, 1993).
3. ALRC *Speaking for Ourselves — Children and the Legal System* (Sydney, 1996).
4. *The Inquiry into Family Services* chaired by Mr Kevin Andrews MP. In February 1997, the Joint Standing Committee on Treaties resolved to inquire into various aspects of the UN Convention on the Rights of the Child.

Likewise, the 'Stolen Children Inquiry' and the work of outspoken Social Justice Commissioner Mick Dodson offer a critical chance for Australia to try to understand, and make what amends we can, for violating the fabric of Aboriginal family life.

Yet, running in tandem with these windows of opportunity, I see a disturbing tendency among governments to sheet home responsibility for the needs and deeds of children to the children themselves and their families, rather than to the social and economic forces which shape the stresses upon families. The singularly unfair habit of portraying single mothers as an irresponsible cause of delinquency is a characteristic example of this.

Families and their relationships can only do so much. They are just one but, of course, a significant part of the much larger infrastructure around children. Few families, even with the best will in the world can meet the otherwise overwhelming tide of the social and economic circumstances around them.

Their strengths are necessarily restricted in how they can tolerate poor housing conditions, deal with poverty, withstand unemployment and stem the increasing alienation of young people from shared community goals.

What concerns me particularly is that for some time now the language of family-focused policy talk has inadequately translated into actions. Support is not reaching where the needs are great, and for those whose social power is weak or limited the mechanisms for achieving the observance of rights are so frail or inaccessible as to be theoretical rather than real.

THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD[5]

If commonsense and social justice considerations alone do not make obvious the importance of government support for children's rights, then it must be remembered that a mandate also lies in Australia's international obligation to implement the United Nations Convention on the Rights of the Child in accordance with Article 4 of that instrument:

> States Parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation.

5. The Convention was ratified by the Commonwealth Executive on 17 December 1990 and entered into force for Australia on 16 January 1991. On 22 December 1992, the Attorney-General declared the Convention to be an instrument relating to human rights and freedoms made pursuant to s 47(1) of the Human Rights and Equal Opportunity Commission Act 1986 (Cth): *Cth Gazette* GN 1, 13 Jan 1993, 85.

Two particular features of this provision should be underlined. The first is that the qualification upon the implementation of measures to promote economic, social and cultural rights *to the maximum extent of available resources* must be appreciated in a global context.[6] The Convention on the Rights of the Child has been ratified by an enormous number of nation states across what is termed the first, second, and third worlds. It is simply untenable for Australia to claim that shortfalls in its implementation of children's rights can be justified on the grounds of resource scarcity.

Australia lacks an equitable distribution of resources not the resources themselves. It is one of the world's wealthy nations yet it is unprepared to support its children. According to an international study by the Bread for the World Organisation which was released last month, Australia has the second-worst level of child poverty in the industrialised world.[7] Aboriginal children endure greater levels of malnutrition and three times the national rate of mortality.

Even the most basic and general of Convention obligations have been poorly met by Australia. Relatively little has been done by governments to fulfil the Convention expectation in Article 42 that its contents will be made widely known and our first formal report to the United Nations was three years past its due date.[8] Moreover, the formal report is unwieldy and more descriptive than it is analytical or reflective about lack of compliance. This should not be surprising, I suppose, because as far as I am aware Australia's formal report was produced by government representatives alone, in isolation from the community and, most inappropriate of all, without any input from children and young people themselves.

I share the serious concerns which have been expressed in the excellent 'alternative' report which has been prepared by the Australian Section of Defence for Children International, following a consultation process with community organisations and young people's groups.

Their document[9] was launched in Sydney in November 1996 in conjunction with the Human Rights Council of Australia. That this alternative report will be considered by the UN expert monitoring committee is, in my view, very important. Unlike Australia's formal report, it details the many and varied areas where a claim of Australian compliance with the Convention seems hollow and lends further weight to the importance of developing a national agenda for children which ties governments to measurable and resourced implementation targets.

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6. It should also be noted that no qualification applies to civil and political rights.
7. 'Our Children are Second Poorest' *The Age* 17 Oct 1996, 1.
8. A-G Dept *Report under the Convention on the Rights of the Child* (Canberra, Dec 1995).
9. Defence for Children International (Australian Section) *Australia's Promises to Children — The Alternative Report* (Canberra, 20 Nov 1996).

At a recent UNICEF Conference on the implementation of the United Nations Convention on the Rights of the Child in May 1996,[10] criticisms were made by French speakers and echoed by myself of the tendency of some Western nations to pay lip service to the Convention and to treat it as having practical relevance only to under-developed countries.

An important basis for my criticisms was the former government's proposed legislation to nullify the effects of *Teoh's* case,[11] which, contrary to their claims, was not a radical extension of the law concerning the relevance of international treaties, but rather a straightforward application of well-established principles. The former government's Bill was an overreaction and completely at odds with the spirit and plain words of Article 4 of the Convention. The Bill lapsed when Parliament was prorogued prior to the recent federal election and I am pleased that the present Commonwealth government has not so far sought to revive that Bill or one with a similar purported effect. [12]

A further reason for my critical stance was the appalling and continuing record in Australia's treatment of our indigenous children, the lesson of which appears to be lost on the present government judging by its reaction to the issue of the 'Stolen Children Inquiry'. One could add to that the scandalous treatment of the children of illegal non-citizens in this country by successive Australian governments.[13]

The second point, and one which I would like to particularly stress, is that Australia's federal system of government provides no excuse for the Commonwealth government where lack of implementation or a violation of children and young people's rights is identified in the actions of State and Territory governments. In this regard, the following words by the late Justice Lionel Murphy in the *Koowarta* case are apposite:

> The Constitution envisages no division of external affairs power between the Parliament and the State Parliaments. The Parliament, in exercising the external affairs power (as well as its other powers), is entitled to make laws for the peace order and good government of the Commonwealth, that is, of the people as a whole, notwithstanding the opposition of any State Government or Parliament....

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10. M Verdugo & V Soler-Sala (eds) *Simposio Internacional Sobre La Convencion De Los Derechos Del Nino Hacia El Siglia XXI* (Spain: Salamanca UP, 1996).
11. (1995) 183 CLR 273. The Bill to reverse the effect of the High Court's decision was the Administrative Decisions (Effect of International Instruments Bill) 1995 (Cth).
12. See K Walker & P Mathew 'Case Note: *Minister for Immigration v Ah Hin Teoh*' (1995) 20 Melb Uni L Rev 236. On 25 February 1997, the Minister for Foreign Affairs and the Attorney-General issued a Joint Statement foreshadowing government legislation to counter the *Teoh* decision.
13. A Nicholson 'Children First! The State of Young Australians' (unpublished) cited in R Ludbrook 'Young Asylum Seekers — Haven or Hell?' in R White & C Guerra (eds) *Ethnic Minority Youth in Australia: Challenging the Myths* (Hobart: National Clearinghouse for Youth Studies, 1995).

> The people of the States are entitled as well as obliged to have the legislative and executive conduct of those affairs which are part of Australia's external affairs carried out by the Parliament and Executive Government of Australia.[14]

Although one would not know it from reading Australia's official report to the United Nations Committee on the Rights of the Child, the Commonwealth Parliament and Executive have been criticised for an appearance at least of complacency in the face of State legislation which is said to contravene obligations under the Convention.[15]

The Western Australian government's passage of the Crime (Serious and Repeat Offenders) Sentencing Act 1992 (WA) was, in my view, rightly condemned for its breach of numerous Convention articles such as the right of children to be heard in proceedings about their detention and the discrimination against young Aboriginal males which resulted from the criteria contained within the Act.[16]

Similarly, in Victoria, Convention obligations were flouted when in 1993 the State government legislated, contrary to expert advice from the Human Rights Commissioner and the International Commission of Jurists, to grant the police powers of criminal investigation which treat children over the age of 14 as adults.[17] The legislation denied them access to a court hearing in which they could challenge the basis of police intentions to fingerprint them, even in circumstances where 'reasonable force' would be used.[18]

These are but two examples directly concerning children where, in my view, the Commonwealth Parliament undoubtedly had the power, the moral authority and the international as well as domestic responsibility to legislate so as to create a Constitutional inconsistency that rendered the State laws invalid.[19]

The key reason for Commonwealth inaction would seem to have been

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14. *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, Murphy J 241.
15. Eg G Brewer & P Swain *Where Rights are Wronged — A Critique of Australia's Compliance with the UN Convention on the Rights of the Child* (Melbourne: National Children's Bureau, 1993); J Harvey, U Dolgopol & S Castell-McGregor *Implementing the UN Convention on the Rights of the Child in Australia* (Adelaide: SA Children's Interests Bureau, 1993); P Boss, S Edwards & S Pitman *Profile of Young Australians — Facts, Figures and Issues* (Melbourne: Churchill Livingston, 1995); K Funder (ed) *Citizen Child — Australian Law and Children's Rights* (Melbourne: Aust Inst of Family Studies, 1996); Defence for Children International (Australian Section) supra n 9.
16. Harvey et al ibid.
17. Crimes (Amendment) Act 1993 (Vic).
18. See D Sandor 'Kids, Cops, Lock-Ups and the Convention on the Rights of the Child' in Funder supra n 15.
19. Interesting issues as to inconsistency have recently arisen in respect of the reach of the paramountcy principle contained within the Family Law Act : see *Re Z* [1996] FLC ¶ 92-694. An application for special leave to appeal to the High Court has been made.

the perceived political consequences of 'interfering' in what are termed 'State rights', a concept which I think is misconceived. I reject the notion of 'State rights' in this area not only for the jurisprudential reasons given by the late Lionel Murphy but also because to invoke the language of rights for institutions and jurisdictions is to detract from the core concept of rights as an essential feature of *humanity*; it is people who are rights holders, not parliaments or executives.

To distort the language of rights in such a manner is to distract from engaging in the substantive issues for purely pragmatic reasons. The inescapable fact is that upon entering into treaty obligations, the Commonwealth Executive undertakes the responsibilities set out in Article 4.

A CHILDREN'S COMMISSIONER?[20]

To the extent that one might propose a hierarchy of obligations within Article 4, it seems to me that at a bare minimum, the maxim 'first do no harm' has some application to these matters and that two necessary duties follow: first, the Federal government is prohibited from seeking to legislate in contravention of the Convention, and secondly, it has an active responsibility to do all within its power to prevent and redress State and Territory as well as Commonwealth breaches, regardless of whether such violations are accidental or intentional.

It seems to me that a system needs to be established whereby the proposed legislation of Commonwealth, State and Territory governments is assessed for its conformity with the Convention on the Rights of the Child prior to Parliamentary debate. Within such a process, I think there may be a role to be played by a Children's Commissioner who is responsible to the Federal Parliament. The establishment of such an Office is a measure which I and many others believe is essential for concentrating Australia's efforts on compliance with the Convention. This option was pioneered in Norway and followed in Sweden and New Zealand with considerable success.[21]

Appropriate funding and independence would be necessary for this statutory position, which should be empowered to investigate breaches by State and Territory as well as Federal governments and their instrumentalities. It should also be charged with the responsibility of scrutinising legislation of all levels of government for their conformity with the Convention. These functions should be performed both in response to a specific reference and

20. 'The name and role of a Commissioner is preferred to that of Ombudsman as it incorporates complaints, investigation and resolution, as well as policy development and child advocacy thus making it both reactive and proactive': Harvey et al supra n 15, 7.

21. Harvey et al supra n 15.

at the Commissioner's own instigation. The external affairs power would provide the Constitutional underpinning for legislating to create such an Office, coupled with the United Nations Convention on the Rights of the Child.

While the cooperation of the States and Territories would be desirable, it would be by no means essential and if, after consultation, some States or Territories would not cooperate, then the Federal government could act on its own initiative.

In suggesting such a structure, I am of course mindful that criticisms of the Commonwealth government's inaction may not augur well for those, such as myself, who would like to see the central government take a stronger stance on conformity with the Convention. It does, however, seem to me that the special position of children in particular requires an approach which avoids relying upon redress through litigation and that if there is one matter where politicians should be able to span ideological divides it is the rights and interests of children.

It would be an absurdity if Australia's elected representatives were unable domestically to match the consensus which has been achieved by the bulk of the international community.

I accept that any method for ensuring our laws conform with the Convention is a harm-minimisation strategy rather than an affirmative one. However, I can see little chance of moving further towards meeting the many issue-specific targets which should be set within the Convention framework until there is a structural means to prevent legislative contraventions of the Convention and an independent system of investigation and audit.

THE TREATY MAKING PROCESS

Criticisms that have been advanced from time to time, and particularly in relation to the United Nations Convention on the Rights of the Child, have been that the process of ratification of treaties is one where the decision is taken by the Executive and not by the Parliament and that the Executive can by such a process effectively enhance the powers of the Federal Parliament at the expense of the States and Territories.

While that criticism might be thought to have some validity in relation to bilateral treaties, it should not be forgotten that the United Nations Convention on the Rights of the Child did receive Parliamentary scrutiny in the sense that it became a Declared Instrument under section 47(1) of the Human Rights and Equal Opportunity Act 1986 (Cth).[22] Secondly, its high

22. The Minister's declaration had effect on and from 13 January 1993. Unsuccessful attempts were subsequently made in each House of Parliament pursuant to s 47(3) of the Human

degree of international acceptance makes it almost unthinkable that Parliament would have refused to endorse it.

It may be that measures which seek to improve consensual inter-governmental processes in relation to treaties are desirable, but I would oppose any process which *required* the agreement of all State and Territory Parliaments before an international treaty was ratified. This would enable one jurisdiction to veto agreements for the entire nation.

On the other hand, there may well be substance in the proposition that ratification of treaties should require approval by the Federal Parliament.

I think that the federal role of the Senate provides an ample structural basis for the proper consideration of the impact of treaty ratification upon the States and Territories. Criticisms that this has not been manifest in practice point, I think, to more pervasive problems associated with the predominantly two-party political system within Australia and ideas concerning the role, identity, and function of State and Territory Senators in a Federal Parliament. 'The buck' must stop at some point and that point is, appropriately, the Federal Parliament.

What I have in mind is a mechanism akin to the Senate Standing Committee for the Scrutiny of Bills which would perform the dual function of assessing proposed treaties and supervising their recognition and implementation.

PROTECTION OF CHILDREN AND ADOLESCENTS FROM ABUSE

Of all the areas where children's rights are unnecessarily compromised, one of the most disturbing issues is the variance of legal frameworks and service standards in the protection of children and adolescents from abuse. Although Victoria has been somewhat in the eye of a media storm over its system failures recently, I would not think any jurisdiction is immune from criticism.

What I find most remarkable is that fundamental differences exist across the eight States and Territories 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. [23]

Rights and Equal Opportunity Commission Act 1986 (Cth) to disallow the Minister's declaration: *Hansard* (HR) 1 Sept 1993, 691-701; *Hansard* (Sen) 30 Sept 1993, 1473-1498, 1595-1598; *Hansard* (Sen) 5 Oct 1993, 1682-1685.

23. M Rayner *The Role of the Commonwealth in Preventing Child Abuse: A Report to the Minister for Family Services* (Melbourne: Aust Inst of Family Studies, 1994).

I am by no means the only person to have urged a national approach to the protection of children and young people from abuse, but the calls continue to fall on what seem to be deaf ears.

When I recently suggested that a nationwide Royal Commission was necessary to tackle the disparate current state of affairs, a spokeswoman for the Federal Minister for Family Services, Mrs Judi Moylan, was reported to have said some agreement had been reached with State and Territory governments to develop a national child and family framework which would set out objectives, performance indicators and priorities.[24]

While steps taken towards greater inter-governmental cooperation deserve support, the apparent parameters of the agreement would seem to still fall short of addressing the concerns I have mentioned.

One simple legal step would be to provide for such care and protection determinations to be dealt with by cross-vesting when they arise within proceedings under the Family Law Act 1975 (Cth). Unlike section 27(3) of the Family Court Act 1975 (WA) there is no equivalent provision according the Family Court of Australia the powers available to the relevant State Children's Court.

An example of where cross-vesting provisions have been usefully brought into play was *Re Karen and Rita,*[25] which I decided when sitting at first instance in Queensland. It, however, is the only State in which this could have been achieved.

That was a case which involved both custody and access issues (as they were then described) and a care and protection application in relation to the same children. The cross-vesting provisions enabled the transfer of the care and protection application to this Court by the Supreme Court of Queensland so that all the proceedings where decided as a single package.

In that case, departmental files of the relevant prescribed child welfare authorities in two States were tendered in evidence and indicated a long history of allegations of sexual abuse of the children against the mother and her relatives, together with other allegations of physical abuse made against foster parents.

It emerged during the course of evidence that the source of the allegations of sexual abuse against the mother and her relatives was the father, as were the allegations of physical abuse against the foster parents. The fact of this information being available, together with the opportunity to observe the father and mother in the witness box, enabled me to form a conclusion that the allegations were almost certainly false and malicious. I also concluded, with the aid of other evidence, not only that the children were then in need of care and protection, but also that when and if they

24. C Milburn 'Call for National Probe on Children' *The Age* 7 Nov 1996, 3.
25. [1995] FLC ¶ 92-632.

should cease to be in need of such care they should have no further contact with the father but should be placed in the custody of the mother.

HEARING CHILDREN'S VIEWS IN PROCEEDINGS

The representation of children in proceedings under the Family Law Act is one matter where there is a great deal of case law guidance but a seeming lack of political will to allocate adequate resources. In essence, a children's representative plays a role which is comparable to that of counsel assisting a Royal Commission.[26] The lawyer is not an advocate for the child's instructions, although any wishes must be put forward. Also, in many cases, children's representatives can play a critical role in brokering a settlement which is focused upon the future well-being of the child rather than the win/lose mentalities which litigants are prone to embrace.

I see the funding of children's representatives as being central to the welfare of children in this jurisdiction, as is the training of such advocates. To this latter end, the Court has recently participated, along with the Family Law Section of the Law Council of Australia and Legal Aid Commissions, in an extensive training program for children's representatives and this has already resulted in substantial gains in the quality of representation offered.

It is therefore a matter of great concern that some Legal Aid Commissions are now curtailing or limiting the provision of children's legal representatives. This is a particular problem in Victoria and Western Australia. As I understand the situation, for some time now here in Western Australia, legal aid for children's representatives is routinely provided for only two of the case types which were identified in the Full Court's guideline judgment of *Re K*:[27]

- cases involving allegations of child abuse, whether physical, sexual or psychological; and
- cases involving alleged anti-social conduct affecting the child.

Other important circumstances identified in *Re K* such as:

- where neither parent is represented;
- where it is proposed that siblings are separated; and
- applications for Court authorisation of special medical procedures such as sterilisation

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26. See *Bennett and Bennett* [1991] FLC ¶ 92-191. A report entitled *Representing the Child's Interests in the Family Court of Australia* was recently prepared for me by a Working Group chaired by Judicial Registrar Dianne Smith with representatives from Legal Aid organisations and the Court's Registrar and Counselling Sections. The report and its recommendations were formulated following the preparation of a widely circulated discussion paper and the receipt of submissions. Copies are available from Judicial Registrar D Smith, Family Court of Australia PO Box 9991, Brisbane 4001.

27. [1994] FLC ¶ 92- 461.

are subject to 'exceptional circumstances' applications for the exercise of discretion by the Director of Legal Aid.

As I understand it, the effect of the most recent developments in funding are yet to be decided by the Western Australian Commission but there may be a curtailment in the disbursements budget for experts' reports in children's matters. This is obviously a particular problem in cases where the parties' financial circumstances render them unable to contribute to the costs of a report and a step not to be taken lightly because such reports often assist in the early resolution of disputes.

Looking to Victoria, I am most concerned by restrictions which have been imposed by Legal Aid on the funding of children's representatives. The Commission refuses to fund a child's representative where the parents are not legally aided and will only pay half the cost of representation for the child when one parent is legally aided.

This is a classic example of treating children as chattels of their parents and the whole issue of their aid is made referable to the Commission's own administrative decision as to whether or not it will aid their parents. It has also set a retrospective cap on aid which has meant that a number of children who would have been aided are no longer assisted at the trial stage.

By comparison, the approach taken in New South Wales to the recent legal aid cuts will impact far more heavily on proceedings other than family law. Family law matters have not been quarantined, but in a much more responsible approach than that of Victoria Legal Aid, the caps which have been introduced do not apply to children's representatives. The new $15 000 ceiling for the funding of each proceeding applies only where *all* parties are legally aided and unlike the 'ambush' entailed in the Victorian approach, the New South Wales limits do not have retrospective effect. While I lament the New South Wales Commission's need to make significant reductions in other areas, I commend their approach to family law as a highly appropriate recognition of both the importance of children and of a 'level playing field' between adult parties in this jurisdiction.

To date, neither the Federal or State governments have done anything about the situation and this silence provides tacit encouragement for what appears to be a direct breach of this country's obligations under Article 12 of the Convention.

The Court considers that the representation of children at the present level is vital and that in the long run it is not only more likely to lead to the earlier resolution of disputes, but also to ensure that, as far as possible, outcomes will be in the child's best interests. It would be disastrous if children should have to compete with other litigants for legal aid funds and, to avert such a situation, I have been advocating the setting up of a separate fund for the purpose of their representation.

The Senate inquiry into legal aid will provide the opportunity for such

issues to be considered, but again it seems to me that children are at risk of bearing the brunt of inter-governmental quarrels over fiscal responsibility with no attention being paid to the damages incurred while these skirmishes are sorted out.

Legal representation is by no means the only way in which children's views are heard. Historically, the most common method has been through family reports wherein children are assessed by social science professionals. These are not conducted as a matter of course and many cases are resolved before such reports are obtained. Further, it cannot be said that children have traditionally been much involved in the conciliation and mediation processes which are part of the Court's case management system to encourage negotiated agreements rather than courtroom battles.

The Court's counselling service has certainly become more child focused in recent years but this does not mean an automatic inclusion of children into the process.[28] Rather, parents are seen first and the extent to which they are able to focus on their children's best interests is assessed. If they cannot do this but remain fixed on their inter-spousal dispute, counsellors will usually decide that involving the children would be counter-productive and possibly harmful.

I think it is fair to say that the traditional view has been a protective one, based on the assumption that parents will speak appropriately for their children or that a professional who has had no contact with them can step in and protect their interests. This should be challenged as a blanket philosophy while of course not placing children in the position where they are required to be seen to adopt a view or position.[29]

The Family Law Rules prevent children from being called as witnesses, or even filing an affidavit without prior leave of the Court.[30] The rationale here is said to be that they should be protected from cross-examination, possible parental manipulation and the harm to future family relationships which can result from their becoming involved in what remains essentially an adversarial system.

I think that there are grounds for concern that Australia is breaching the relevant articles of the United Nations Convention on the Rights of the Child by not providing an opportunity for children to be heard. In New Zealand, a child representative is appointed as a matter of course and there is much to be said for this approach. Also, there may be older children who hold strong views about their future and wish to be heard directly, just as there may be children who have pertinent information about themselves or

28. C Brown 'Involving Children in Decision Making Without Making them the Decision Makers' *Association of Family and Conciliation Courts NW Regional Conference* (Nov 1995).

29. See Family Law Act 1975 (Cth) s 68H.

30. Order 23 rule 5.

younger siblings which needs to be obtained directly in order to satisfy the necessary level of proof.

It must be remembered that children's evidence is relied upon in a range of sensitive proceedings in other jurisdictions, including care and protection applications in State and Territory courts. In my view the need for appropriate safeguards should not act as a complete barrier to considering how children and young people may participate in pre-trial or other proceedings to which they are not a party but where their best interests are the focus.

CHILD ABDUCTION

The question of children's views was recently the subject of High Court attention in the context of child abduction, one of the most heart-rending aspects of family law. It is particularly significant because it was the first time that the High Court granted special leave to appeal in a case involving the Australian regulations giving effect to the 1980 Hague Convention on the Civil Aspects of International Child Abduction

In the case known as *De L*,[31] the Australian born wife was married to an American citizen and residing in America with the benefit of a 'resident alien status' visa that entitled her to work there. After separation she removed her two daughters aged approximately 12 and 10 years of age to Australia. An application for the return of the children was dismissed by the trial judge. In doing so, her Honour placed weight on a report prepared at her request by the Court's counselling service. The report addressed the question of the wishes of the children as to which parent they preferred to live with. Both children, particularly the elder daughter, were seen to have attachments to the mother (and, in my view, to Australia where they have other family).

Although finding that the children had been wrongfully removed within the meaning of the Convention, her Honour found that the children 'objected' to being returned to the United States within the meaning of regulation 16(3)(c) of the Regulations. Having so found, her Honour purported to exercise her discretion to refuse to order the children's return. The Central Authority was successful in its appeal.

The Full Court considered that the counsellor's evidence of the children's wishes did not provide evidence that could satisfy a finding that the children 'objected' to being returned.

In considering the proper interpretation to be given to the term 'objection' a majority of the Full Court (Kay and Mushin JJ) adopted a

31. [1996] Fam LR 390.

narrow meaning of the word and explained such a stance with reference to the strict policy underlying the Convention.

Their Honours declined to follow the English Court of Appeal's construction in *S v S*,[32] where the Court of Appeal approved of President Sir Stephen Brown's approach in an earlier unreported case, where the President said the word should be understood literally. The Court of Appeal specifically rejected Bracewell J's view in *Re R* that '[t]he word "objects" imports a strength of feeling which goes beyond the usual ascertainment of the wishes of a child in a custody dispute'.[33]

Kay and Mushin JJ favoured Bracewell J's interpretation but I disagreed on this point, saying:[34]

> I think it is wrong for a number of reasons to adopt a strained construction of a perfectly simple concept of 'objection'. First, in my view, a Court should not expect children to necessarily express their views within adult formulations. While Courts may appreciate notions of forum, comity and jurisdiction, and that an objection to meet the terms of Regulation 16(3)(c) must as a matter of law be with respect to the place of habitual residence rather than the person with rights of custody, this is not the stuff of children's concepts and nor should it be expected that children will speak in such terms unless rehearsed.
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> Secondly, children who have sufficient maturity for account to be taken of their views may not necessarily express them with the strength of feeling suggested by the words of Bracewell J and I think it is inconsistent with a developmental understanding of children and an appreciation that interview situations can be intimidating, notwithstanding the best efforts of the interviewer.
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> Thirdly, the policy of the Hague Convention is not compromised by hearing what children have to say and taking a literal view of the term 'objection' because it remains for the Court to make the critical further assessments as to the child's age, maturity and whether in the circumstances of the case the discretion to refuse return should be exercised.
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> Relevantly to these matters, the former Chief Justice of the High Court, Sir Anthony Mason AC KBE delivered a speech to the Second National Conference of this Court in September 1995 titled 'International Law and its Relationship with Family Law' where he offered the following caution with respect to the Hague Convention: 'It is therefore important that courts do not disable themselves from doing justice by adopting too strict an approach to the application of the regulations and the Convention'.[35]
>
> Addressing Regulation 16(3)(c) in particular, he observed that: 'It is difficult for a judge to balance the attainment of the Convention's objects against the child's objection — it is a matter of comparing two considerations which do not readily lend themselves to comparison. And reg 16(3)(c) clearly contemplates that a court is entitled to refuse to return a child if it is satisfied of the matters set out in the sub-regulation. Ultimately, it must be for the court to determine the strength and

32. [1992] 2 FLR 492, 499.
33. [1992] 1 FLR 105, 107-108.
34. *De L* [1996] FLC ¶ 92-674, 83 016 - 83 017 (footnotes added).
35. A Mason *Enhancing Access to Justice: Family Court of Australia — Second National Conference* (Canberra: Fam Ct of Aust, 1996) 43.

> seriousness of the objection and the consequences that may follow, particularly for the child, if the objection is not heeded'.[36]

In the High Court,[37] six of the seven judges preferred the broad approach to the meaning of a child's 'objection' saying:

> There is no reason why [the regulation] should be construed by any strict or narrow reading of a phrase expressed in broad English terms.... No form of words has been employed which would supply, as a relevant criterion, the expression of a wish or preference or of vehement opposition. No 'additional gloss' is to be supplied.... Further, as was pointed out by Nicholson CJ in the present case, the policy of the Convention is not compromised by hearing what children have to say and by taking a literal view of the term 'objection'. That is because it remains for the Court to make the critical further assessments as to the child's age, maturity and whether in the circumstances of the case the discretion to refuse return should be exercised.[38]

While acknowledging the arguments accepted by his fellow High Court judges, Kirby J was not persuaded that the word 'objects' should be given a broad construction. Like Kay and Mushin JJ, His Honour appears to have approached the question of how to interpret the term with foremost concern for giving maximum effect to 'the language, objectives and history of the Convention'. From this standpoint, an interpretation which permits only the narrowest exceptions to the presumption of mandatory return is entwined with the deterrence of abductions. In his Honour's view, a child's preferences or wishes should not defeat:

> the high policy expressed in the Convention which the Contracting States have negotiated on a reciprocal basis. They have done so in the asserted belief that, in general, return will be in the best interests of children as a class.[39]

The outcome leaves it more open for a child's objection to be made out in Australian law than is the case in contracting states such as Switzerland, Israel and the United States which have adopted a strict reading of the meaning of the word. However, it should be remembered that the finding that a child objects only opens the door for a court to exercise the discretion to refuse to order the child's return; it does not lead to such a decision. It therefore remains to be seen whether *De L* actually results in Australian courts deciding to refuse to order the return of children at a more frequent rate than is the case in contrasting jurisdictions.

It is of interest that the majority judgment of the High Court adverted to the need for children to be represented in such cases. I regard this as an

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36. Ibid, 56-57.
37. *De L* supra n 31.
38. *De L* supra n 31, 399-400.
39. *De L* supra n 31, 424.

important recognition by the High Court of children's rights. While it may be thought by some to run counter to the policy of the Convention, I do not believe that it does so. It gives further validity to my criticisms of legal aid commissions and their attitude to the representation of children.

While the Hague Convention is an important illustration of international cooperation, its mechanisms are not without difficulties. A significant one is that it does not address the situation as to what happens to the children after their return. There is a presumption that upon return to the jurisdiction, a competent body will resolve the competing claims over the children. The position was explained by the Full Court in *Gsponer v Director General, Department of Community Services (Victoria)*:

> There is no reason why this Court should not assume that once the child is so returned, the courts in that country are not appropriately equipped to make suitable arrangements for the child's welfare.[40]

Even so, it is no offence to judicial comity to appreciate that contracting states may have systems which, in practice, differentially facilitate or impede access to such a competent body. In a dissenting Full Court judgment in the non-Convention case which came to be known as *ZP v PS*,[41] I said:

> There are some cases where the comparatively rigid application of the Convention results in custodial parents and children being returned to the original country in circumstances where, in the individual case, it may not be in the best interests of the particular child or children that this should occur.
>
> No doubt the framers of the Convention took the view that despite this, the interests of the great majority of children are best served by a comparatively rigid approach to the question of their return to a Convention country.
>
> I, nevertheless, consider that the failure to make provision for what should occur after children are returned to the country of habitual residence is a weakness of the Convention as it presently operates and one which should be remedied.

Central Authorities established under the Hague Convention have a vital administrative role to play in returning the children to their place of habitual residence, but the extent of their responsibilities upon achieving the return is limited. Article 7 would seem to envisage the responsibility of the Central Authority ending upon the safe return of the child to the jurisdiction. The Article does not envisage a role for the Central Authority, such as initiating proceedings, once the child has been returned.[42]

The role of the Central Authority therefore requires further enhancement and this entails examining, with the benefit of experience in the operation

40. [1989] FLC ¶ 92-001, 77 160.
41. [1994] FLC ¶ 92-480; see also *Cooper v Casey* [1995] FLC ¶ 92-575.
42. See *McOwen and McOwen* [1994] FLC ¶ 92-451, Kay J.

of the Hague Convention, the expectations which should be placed upon it for the welfare of the child.

A second important difficulty is that the Hague Convention is premised on the belief that, save for limited exceptions, the return of an abducted child is in his or her best interests. One cannot, however, be blind to the significance of a primary caretaker (usually mothers) for a child's welfare. It should not be forgotten that not all external abductions involve the heartless removal of children from their familiar environment. A number, particularly where women are the abductors, involve escape from family violence and religious persecution.

Article 7(h) of the Hague Convention imposes an *obligation* upon Central Authorities:

> To provide such administrative arrangements as may be necessary to secure the safe return of the child.

Given that the welfare of a child is inextricably bound up with the welfare of its primary caregiver, this obligation may require elaboration and recognition of this understanding.

In *Murray's* case,[43] where there were very serious allegations of violence, the administrative arm of the Family Court of Australia made additional cooperative arrangements with the New Zealand Family Court to minimise the risk of harm upon the return of the wife with the children and to facilitate her speedy access to the making of an application before the New Zealand courts. She was still, however, required to bring those proceedings herself, and although in her case it appears that she had the financial capacity to do so, many women would *not* have had that capacity and the children may have suffered accordingly. That is antithetical to the underlying motivations of the Hague Convention.

Whilst the Hague Convention has its sights properly set upon wrongfully removed or retained children, it would seem necessary for the mechanisms to provide for the safe passage home and subsequent protection of mothers who flee in such circumstances and the protection of children. It is surely a critical aspect to the prevention of a further abduction.

In at least one Australian case where an Australian mother abducted her children, she was ordered to and did return the children to their father in California. Now, however, she says she is quite unable to support herself in California or mount legal proceedings for custody there. No doubt there are other such cases.

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43. *Murray v Director of Family Services (ACT)* [1993] FLC ¶ 92-416.

CONCLUSIONS

There are many areas where the rights and interests of children are neglected, ignored or violated. The issue of children's rights is too important to be determined by budgetary decisions taken by bureaucrats and politicians more concerned with achieving international credit ratings than with people.

It is to be hoped that attention will begin to be paid to these matters before it is too late. The Convention on the Rights of the Child provides a real opportunity for the Federal government and those of the States and Territories to improve the present situation and make Australia a more child-centred society. On the other hand, it also provides a benchmark by which we can be judged by the rest of the world. If that judgment were to be made today, there are many areas in which we would be found wanting.

In another context, Graca Machel, the author of the United Nations Report on the Impact of Armed Conflict on Children said:

> This report is a call to action. It is unconscionable that we so clearly and consistently see children's rights attacked and that we fail to defend them. It is unforgiveable that children are assaulted, violated, murdered and yet our conscience is not revolted nor our sense of dignity challenged.[44]

Her call for the widespread dissemination and aggressive enforcement of the internationally agreed standards which protect children, such as the Convention on the Rights of the Child, are also relevant within Australia where, within our borders, there are too many children struggling to escape the domestic forces which give rise to the perils of which Ms Machel has written: assault, violation and murder.

Our children are our future. Surely it is more than time that our legislators and bureaucrats realised this and, to leave the final words to Ms Machel: 'Embraced a new morality that puts children where they belong — at the heart of all agendas'.[45]

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44. Press Release *Report Calls for Protection of Children from War* 11 Nov 1996 http://www.unicef.org/newsline/kidwar.htm.
45. *A Personal Note From Graca Machel* http://www.unicef.org/graca/graca.htm.