

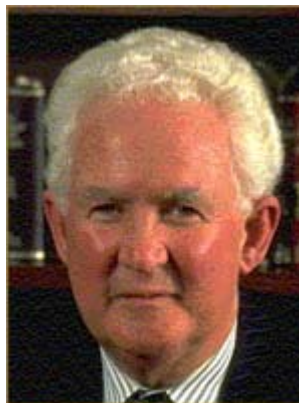


# Australian Children's Rights News

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## Strength in Unity – 21<sup>st</sup> Century Court Reform for Children

The Chief Justice of the Family Court of Australia, The Honourable Alastair Nicholson, argues for a unified model to deal with legal family matters including juvenile justice in a holistic way. This speech was delivered as the 2003 John Barry Memorial Lecture to commemorate the life of one of Australia's outstanding jurists.<sup>1</sup>



### INTRODUCTION

*"It makes little sense to deal with fragmented families in a legal system that is similarly fragmented."*<sup>2</sup>

Whatever else may be meritorious about the Australian Constitution, it tends to fragment the law relating to children and young persons; in particular between the Federal Government in relation to issues arising out of marriage, divorce and the custody of children and the State governments in relation to the areas of care and protection and juvenile crime. Depending on the nature of the matter, the same child can be the subject of proceedings in many courts at the same time.

Yet the problems that arise in families are typically interlocked. The young offender of today was often yesterday's victim of family breakdown, intra-familial abuse and multiple other problems,<sup>3</sup> and frequently, but of course not necessarily, then becomes tomorrow's adult criminal offender.

The purpose of this article is to outline a more holistic approach to the law relating to Australian families and children and particularly young people alleged or found to have broken the criminal law. Underlying this theme is my view that our courts and our law have become far too compartmentalised and could better serve the aim of doing justice.

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# President's comments:

**At the end of 2003, we face a number of challenges in relation to children's rights in Australia and the articles in this issue focus on several of these. They include the right for children to be treated fairly in various circumstances – as witnesses testifying in court, as people seeking asylum, as people conceived as a result of assisted reproductive techniques, as the “users” of services that are too often fragmented and uncoordinated, and as the recipients of a societal structure and environment bequeathed to them by their parents and older generations.**

In a speech delivered as the 2003 John Barry Memorial Lecture, The Chief Justice of the Family Court of Australia, The Honourable Alastair Nicholson, argues for a unified and less adversarial model more like the US family courts to deal with legal family matters including juvenile justice. In the full speech, Justice Nicholson said:

“Under our system as it operates at present, the same child can be the subject of proceedings in up to at least three different courts. He/she may be the subject of Family Court and child protection proceedings during which the child will be subjected to repeated interviews by different experts while at the same time, required to be a witness as the victim in criminal proceedings against the alleged perpetrator. Similarly, it is not uncommon for parents to be engaged in simultaneous proceedings in the Family Court in relation to child and property proceedings at the same time as they are engaged in protection proceedings in the Children's Court, domestic violence proceedings in a Magistrates' Court and also perhaps in the midst of associated criminal proceedings. The child may himself/herself become a juvenile offender. This fragmentation leads to considerable delay, is expensive and places intolerable pressures upon the people involved. It is anything but child-focussed.”

In her article on the *Management of Child Witnesses – Practical Solutions for Judges*, Moira Rayner also argues for a child-focussed approach which takes into account children's experiences and understanding when they are testifying in adult-oriented court proceedings.

“Children ‘giving evidence’ are just vulnerable inexperienced people with a voice of their own taking a part in formal proceedings that will result in a decision that has considerable legal consequences for somebody else who traditionally is the legal system's primary concern. ...By the time a child gets into a courtroom (even via CCTV) they have already been asked a lot of questions and have had a raft of experiences that influence how they behave in response to this situation.”

Professor Terry Carney's warning, cited by Justice Nicholson, is also timely in relation to the limitations of a rights framework being less useful in “mobilising resources” than “protecting individuals from denial of entitlements”.<sup>1</sup>

■ Harold Mitchell's Andrew Olle Media Lecture in October (reported by Alan Ramsey in the *Sydney Morning Herald* 22-23 November 2003) outlined the “five heavy burdens” the baby-boomer generation is bequeathing to those coming after them in terms of the cost of health services and education (especially tertiary education), difficulties with employment, housing and land crises, and environmental legacies.

■ Ann Harding, Director of the National Centre for Social and Economic Modelling, Chris Richardson of Access Economics, and the Governor of the Reserve Bank, Ian Macfarlane have all warned of increasing inequalities by age with younger generations facing higher costs and debts for education, and finding it difficult, if not impossible, to buy a house in cities like Sydney and Melbourne.

These are issues that should concern us all because of the ramifications for the future wellbeing of children and young people. As DCI's patron Philip Adams reminds us in his piece, *Ignorance is no defence*, reprinted with his kind permission from *The Australian*, we all have a responsibility to respond and demand from our elected leaders more equitable policies and longer term thinking. Instead of squandering the "bounty" from the \$7 billion excess as thinly spread tax cuts that will make little or no difference to most people, this excess could be used to boost badly flagging public services especially in health and education which have suffered under the Howard "user pays mentality". In fact that and a more inclusive approach to the disadvantaged in our society and a willingness to say 'sorry' might also yield dividends in terms of social capital. Judging by the letters to the editor in the major newspapers, increasing numbers of people are demanding just that and are keen to forgo minimally useful tax cuts (which would barely buy a milk-shake and sandwich" according to Federal Government Minister Amanda Vanstone) for the wider benefit of healthier public services and improved community spirit. As Justice Nicholson said: "I think that it behoves all of us to insist to the community that there are other and better ways of achieving a more just society than those we are currently adopting."

And this applies also to Australia's treatment of children seeking asylum either as unaccompanied minors or with their families. The Human Rights and Equal Opportunity Commission's report on its

national inquiry into children living in immigration detention is still to come. So also is the High Court's judgment ruling on the government's appeal against the Family Court's ruling that it that it could order the release of children in detention on welfare grounds, saying that its responsibility for their well-being overrides immigration law.

Also coming is the consultation paper that has been prepared by the National Children's and Youth Law Centre, DCI and Community Legal Centre volunteers in relation to the NGO alternative report to the UN Committee on Australia's performance on children's rights.

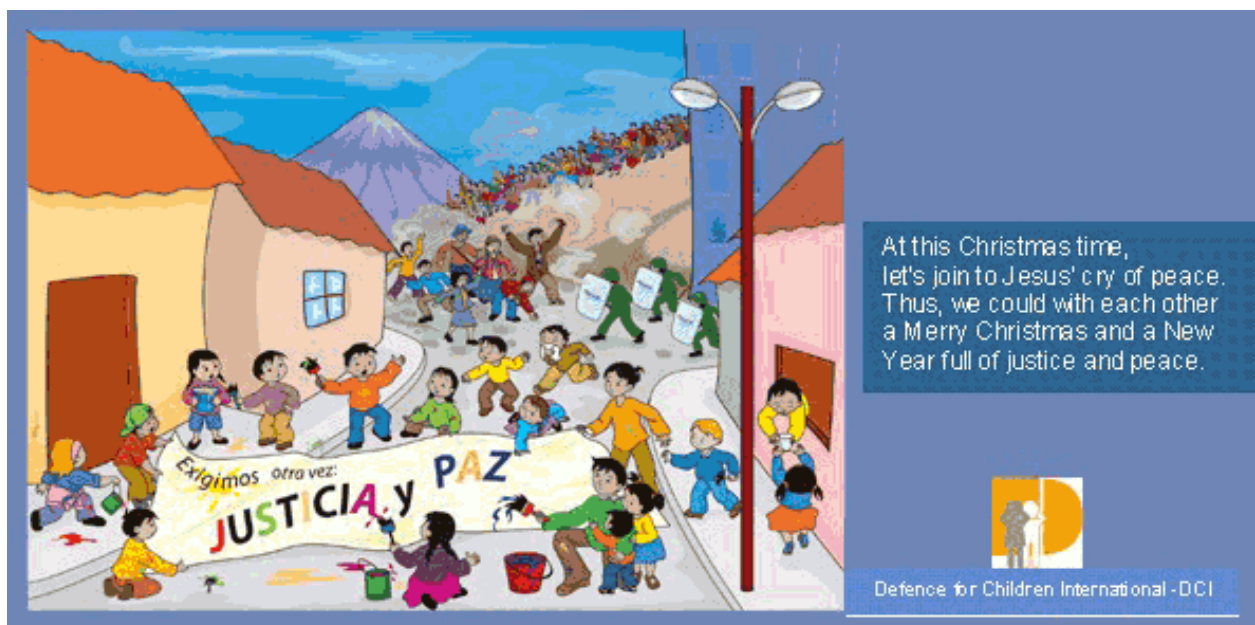
On behalf of DCI Australia, I would also like to wish everyone involved with DCI and other child advocacy organizations all the best for the New Year and for the continuing work in 2004.

### Best wishes

**Judy Cashmore, President, DCI Australia**

### Footnotes

1. "On the one hand, it [a rights framework] offers the uplifting hope of aspiring standards but, on the other, it also may serve as a distraction from the main debate about political values and resourcing. 'Rights talk ... is more effective in protecting individuals from denial of entitlements (such as presumptions of innocence or access to legal advice) than in mobilizing resources by groups (such as adequate housing). Civil rights are a political (structural) issue, not merely a precept to be legislated into existence." (p. 465-466) Carney, T. (1997). "Children's Rights and Juvenile Justice: An Agenda" in Borowski, A. and O'Connor, I. (Eds) Juvenile Crime, Justice and Corrections, Longman, Australia.



## A UNIFIED COURT

The concept that I espouse is what the Americans call a “Unified Family Court”. In Australia we are not used to the concept that family courts might exercise criminal jurisdiction. That is because we have ascribed a too limited role to what a family court is or should be.<sup>4</sup> However in my view it is less important what the court is called than what it does:

“Defined most simply, a family court is a single forum with which to adjudicate the full range of family law issues, based on the notion that court effectiveness and efficiency increase when the court resolves a family’s legal problems in as few appearances as possible.”<sup>5</sup>

So far as the types of cases is concerned, the American Bar Association has long endorsed jurisdiction for unified family courts on matters such as:<sup>6</sup>

- Juvenile law violations;
- Cases of abuse and neglect;
- Cases involving the need for emergency medical treatment;
- Voluntary and involuntary termination of parental rights proceedings;
- Appointment of legal guardians for juveniles;
- Intra-family criminal offences [including all forms of domestic violence];
- Proceedings in regard to divorce, separation, annulment, alimony, custody and support of juveniles; and
- Proceedings to enforce paternity and to enforce child support.

Under the unified court model all of these proceedings would be dealt with in one court and preferably by one judge. In “Family Justice: Specialized Procedures Trends in 2002: Family-Friendly Courts”, Carol Flango of the U.S. National Center for State Courts comments:<sup>7</sup>

“A single judicial officer can become familiar with the details of each family’s crisis and better address the family’s needs and foresee difficulties. Families might more readily obey court orders if they know they would have to appear before the same judicial officer.

On the other hand, concern has arisen that a judicial officer’s familiarity with a family and its issues will lead to prejudgment and that one judicial officer may not have the expertise to deal with all the issues. In Ben, Oregon the general jurisdiction circuit court judges carry a general caseload but are also responsible for coordinating a limited number of family law cases. One judicial officer is assigned to a family and hears all matters, civil and criminal, and children’s welfare. Because of their general experience, these judges have proved able to handle the diverse caseload. Motions to recuse judges based on over-familiarity and possible prejudice have been rare.”

Such a court would be equipped with professional staff such as mediators, social workers and psychologists, and have or have ready access to a range of medical, psychiatric and other expert resources. It would thus have some of the features of the Family Court of Australia and some State Children’s Courts but rationalised under one roof. Judge Michael Town, who has served as Presiding Judge of the family court in Honolulu, one of the oldest unified family courts in the U.S. has aptly observed:<sup>8</sup>

“The very existence of a unified court will encourage such services, as families with very similar problems and needs will appear on the different calendars being heard by the judges. The very same services are often needed regardless of the kind of case before the court. For example a divorcing family in serious distress with acting out children may require the same services as one with a child who commits a serious offense.”

In this vein, my colleague Justice Linda Dessau has expressed the following view with which I agree:

“... 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.”<sup>9</sup>

Research reported in 1992 by the U.S. National Center

for State Courts has shown that at least 64% of abuse and neglect cases, 48% of delinquency cases and 16% of divorcing families who had children previously went to court for another family related matter during the prior 5 years.<sup>10</sup>

In a just-published study by Gloria H. Danziger, a senior fellow of the Center for Families, Children and the Courts at the University of Baltimore, the author analysed six operating United States' unified family courts in Maryland, Hawaii, Rhode Island, New Jersey and Indiana. A major theme of her findings was the need for such courts to have jurisdiction in relation to juvenile crime, which the Unified Family Court in Maryland does not have.<sup>11</sup> Importantly, her study also makes the very clear point that in those States where unified family courts exercise the young offender jurisdiction, the juvenile arrest rate for violent crime and drug abuse is almost half of those States where there is no such unified approach. Similarly she found that in most States there is also a lowering of the arrest rate for property crimes.<sup>12</sup>

## A DIFFERENT ROLE

A key feature of unified courts is that they take a less adversarial approach to the problems raised. As contrasted with an inquisitorial approach, an adversarial system theoretically has core traditional features such as the following:

- The disputed issues and the proceedings concerning them are principally controlled by the parties;
- Facts are found through the testing of evidence in open court governed by the parties' strategies and the conventional rules of evidence with no independent evidence gathering by the court itself;
- There is a reliance upon legal representation and oral evidence;
- There is a strong adherence to rules of evidence and procedure governing pre-trial and trial process; and
- The judge/judicial officer is a passive disinterested and unbiased umpire regulating the parties' compliance with procedural and evidentiary rules.

Danziger describes the advantages of a break with tradition and a change in role, saying:<sup>13</sup>

“In order to resolve family problems in a comprehensive and coordinated way, the

unified family court considers all of the parties related to the family's legal proceedings, as well as all the agencies, institutions, or organisations that need to be consulted or brought into the case. In addition, the unified family court reviews the delivery of social services to ensure that agreements between families and agencies are implemented; if they are not, the court has the authority to enforce such agreements, monitor them for compliance, and/or order agencies to deliver services. This is a radical departure from the traditional responsibilities of the court: instead of simply adjudicating legal disputes, the court must now oversee services, assessments, evaluations, counselling, outreach, probation, diversion, attention and community services. This is not the *modus operandi* of a neutral and independent forum. It is a way of conducting business that renders the court inextricably linked to agencies – and the day to day actions of those agencies. The court is responsible for ensuring that services are appropriate and productive. While the court is independent of the agencies, it acts in concert with them.” (my emphasis)

This construction of the role and responsibilities of a court and its judges/judicial officers carries risks such as the actual or perceived loss of judicial independence. In addition, skills, resources and knowledge that are not conventionally expected of them become critical. Challenges of this kind arose with the establishment of the Family Court of Australia and, in my view can be managed.<sup>14</sup>

I would hasten, however, to make two matters clear.

First, my concern to see a unified system is not a bid for the Family Court of Australia to be the court venue. My concern is to see a careful examination of the feasibility of a unified model in an Australian setting with our particular constitutional context, and one that is informed by the strengths and also the drawbacks that have been found through evaluation of the various attempts that have been made elsewhere.<sup>15</sup>

I would also add that my support for blending criminal justice and civil matters in a single court does not mean I am advocating any retraction of the rights of a young person to due process, procedural justice, satisfaction of the standard of proof, or dispositional outcomes which are proportionate to the offence. Safeguards such as these are required by international

standards such as Articles 37 and 40 of the Convention on the Rights of the Child [‘CROC’], and the Rules and Guidelines that have been developed to facilitate domestic implementation and practice.<sup>16</sup> In my view, adherence to these instruments and evaluation of the extent to which the rights therein are actually realised must be incorporated into the design of unified courts as with any juvenile justice initiative.<sup>17</sup> In doing so, it must be remembered that the implementation of CROC:<sup>18</sup>

“... should be grounded in a welfare approach, its three core principles having significant implications for youth justice. First, children’s status requires discrete recognition and different responses from adult status, while taking account of individual experiences and capacities. Second, children’s welfare should be prioritized. This implies treatment support and guidance based on individual needs rather than punishment retribution and deterrence. Third, children should participate fully in decisions affecting their lives, having had opportunities to gain confidence, explore issues of importance to them, learn the skills required to actively participate, and take action on their own behalf.”

Professor Terry Carney’s warning about the limitations of a rights framework needs also to be heeded:<sup>19</sup>

“On the one hand it offers the uplifting hope of aspiring standards but, on the other, it also may serve as a distraction from the main debate about political values and resourcing. ‘Rights talk ... is more effective in protecting individuals from denial of entitlements (such as presumptions of innocence or access to legal advice) than in mobilising resources by groups (such as adequate housing). Civil rights are a political (structural) issue, not merely a precept to be legislated into existence.”

A legal shift began in juvenile justice in the mid-1970s from a welfare model to a rights-oriented justice model. Among the rationales for this was a desire to clearly distinguish between state intervention based on the needs versus deeds of young people brought before the court and, in a related vein, to tailor distinct forms of orders which, in the criminal justice domain, were in better conformity with the principle of proportionality.<sup>20</sup>

While the disentanglement of needs and deeds based state intervention may have been an appropriate response to the intrusive legacies of the welfare model, particularly for young women,<sup>21</sup> it is time to consider how a unified forum can retain the best of criminal justice rights protections within a more holistic court context. We have not even begun to move in the U.S. direction in this country however there is at least sign of limited promise. The Standing Committee of Attorneys-General has recently agreed to establish a working group to look at better ways to co-ordinate the Commonwealth family law system with the child protection systems of the States and Territories.<sup>22</sup> Unfortunately, it does not seem that consideration is being given to including juvenile justice issues.

The rethinking that I suggest should be informed by matters such as: the relatively low age of criminal responsibility within Australian jurisdictions; the infrequency with which alleged young offenders contest the charges laid against them; our knowledge of the prevalence of abuse and neglect histories; and the ever-present risk of net-widening. Non-traditional justice system initiatives such as “group-conferencing” – a label which subsumes a variety of structures and aims<sup>23</sup> – drug courts, and unified courts models must be subjected to rigorous, credible and independent evaluations that have a keen eye not just to outcomes but also the protection of young people’s rights during the process.<sup>24</sup> Interventions have to be demonstrably effective not only attractive in theory. They must certainly not be counterproductive, no matter how well-intended they are portrayed to be – and I am thinking here, for example, of the so-called “scared straight” programs<sup>25</sup> and the imposition of curfews on young people.<sup>26</sup>

## CONCLUSION

This article has advanced a radical and what some would no doubt describe as a pie in the sky proposal in relation to the improvement of the delivery of court services to families in Australia. I have done so advisedly. I do not think much attention has been paid to reform in recent years in this area. It is obvious that the United States has adopted what might be described as a vibrant response to fragmentation from which we can learn. The Australian approach on the other hand appears to be somnolent and disinterested.

In a speech delivered last year in Sydney, the Lord Chief Justice of England and Wales, Lord Woolf of Barnes quoted the person he described as the father of criminology, Sir Leon Radzinovicz. Sir Leon said:

“No meaningful advance in penal matters can be achieved in contemporary democratic society so long as it remains a topic of political controversy instead of a matter of national concern.”<sup>27</sup>

I strongly endorse Lord Woolf’s approach. Over the last 15 years in Australia we have seen a steady erosion of principles in relation to the sentencing of both adult and juvenile offenders that has done much to undo many of the advances of the past. We now have more and more people in jail sentenced to increasingly longer terms of imprisonment for reasons that have nothing to do with a scientific approach to the question of criminal punishment. We have had aberrations such as mandatory sentencing laws in relation to juveniles in the Northern Territory and in Western Australia.<sup>28</sup>

Politicians on all sides seem to see votes in appearing to be harsher and harsher upon all forms of criminal offenders regardless of whether there is any evidentiary basis supporting the taking of such action. We see wholesale amendments of legislation to increase penalties without any substance to them beyond popular clamour eagerly led on by radio shock jocks and irresponsible media coverage.

In propounding these severe penalties for criminal behaviour we appear to have learned nothing from history. In a sense the crippling penalties that we now impose for criminal offences will I believe eventually become to be seen as cruel and barbarous as the tortures that our forbears inflicted upon persons as part of the criminal law process.

Instead of following enlightened and sensible initiatives from the United States such as those to which I have referred tonight, we seem hell bent upon imitating the worst excesses of the American criminal justice system. We spend huge amounts of what are supposed to be limited public funds on building more and more prisons and setting up more and more law enforcement agencies while at the same time we starve our universities and research centres of funds, apparently uncaring that it is from these organisations that real advances can be expected.

I think that it behoves all of us to insist to the community that there are other and better ways of achieving a more just society than those we are currently adopting. To my mind, an important element of such a way forward is the unified court approach coupled with the safeguarding of human rights protections.

## Endnotes

1. This is an edited text of the of the 2003 John Barry Memorial Lecture delivered on 14 October 2003 at The University of Melbourne Department of Criminology to commemorate the life of one of Australia’s outstanding jurists.
2. Shepherd, R.E. (2000) “The Juvenile Court in the 21st Century” 12 CYC- ONLINE available at <http://www.cyc-net.org/cyc-online/cyc01-0100-juvenile.html>.
3. New South Wales Community Services Commission (1996) *The Drift of Children in Care into the Juvenile Justice System: Turning Victims into Criminals*, Sydney, Australia; Fogarty, J. (1999) Foreword in Cook, S. & Hancock, L (Eds.) *Privatising Youth Detention*, Centre for Public Policy, University of Melbourne; Elstein, S. G. (1999) “Understanding the Relationship Between Maltreatment and Delinquency” 18(9) *Child Law Practice* 136 reviews empirical findings on the link and identifies the limitations of such research. Keogh, T. (2002) “Juvenile Recidivism: New and surprising possibilities for mental health promotion and prevention” in Rowling, L. et al (Eds) *Mental Health Promotion: Concepts and Practice – Young People*, McGraw-Hill, Roseville, Australia.
4. Nicholson, A. and Harrison, M. “Specialist But Not Unified: The Family Court of Australia” *Family Law Quarterly*, forthcoming.
5. Babb, B. (1998) “Where we stand: An Analysis of America’s Family Law Adjudicatory Systems and the mandate to establish unified Family Courts” 32 *Family Law Quarterly* 31 at 35.
6. Institute of Judicial Administration/American Bar Association (1980) *Juvenile Justice Standards relating to Court Organization*, Standard 1.1 part 1, 5. See also (1998) “American Bar Association Policy on Unified Family Courts Adopted August 1994” 32 *Family Law Quarterly* 1.
7. Available at [http://www.ncsconline.org/WC/Publications/KIS\\_FamJus\\_Trends02\\_FamFriendPub.pdf](http://www.ncsconline.org/WC/Publications/KIS_FamJus_Trends02_FamFriendPub.pdf). Other research published by the Center found that 14 of 27 family courts without criminal jurisdiction (n=27) and 10 of 19 family courts with criminal jurisdiction (n=19) adopted a “One Judge/One Family Assignment”: Uekert, B. with Keith A. and Rubin, T (2002) *Integrating Criminal and Civil Matters in Family Courts : Performance Areas and Recommendations*, National Center for State Courts at 51 available at [http://www.ncsconline.org/WC/Publications/Res\\_SctFam\\_FamCtFamVioFinalReportPub.pdf](http://www.ncsconline.org/WC/Publications/Res_SctFam_FamCtFamVioFinalReportPub.pdf)
8. “The Unified Family Court: Preventative, Therapeutic and Restorative Justice for America’s Families”, essay for the National Centre for Preventive Law, California Western School of Law (Spring 2001) available at <http://www.preventivelawyer.org/main/default.asp?pid=essays/town.htm>.
9. “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>
10. Rubin, H. T. and Flango, V. E (1992) *Court Co-Ordination of Family Cases* National Center for State Courts, Williamsburg Virginia at 5.
11. (2003) *A Strong Presence in the Life of a Child: A Report on Unified Family Courts and Juvenile Delinquency Matters*, Center for Families, Children and Courts, University of Baltimore School of Law, 1420 North Charles Street, Baltimore, Maryland 21201.
12. Ibid 15 – 19. In “The Unified Family Court: Preventative, Therapeutic and Restorative Justice for America’s Families”, essay for the National Centre for Preventive Law, California Western School of Law (Spring

2001) available at <http://www.preventivelawyer.org/main/default.asp?pid=essays/town.htm> Judge Michael Town, who has served as Presiding Judge of the family court in Honolulu, one of the oldest unified family courts in the U.S. suggests:

“Such a court must promote and model fairness and effectiveness together with an ethic of care and a restoration of relationships where possible. As a result, future legal and social problems are more likely to be prevented. Public trust and confidence in the judiciary will grow, as will economic and political support.”

13. At 4-5.

14. The advantage of judicial involvement in the coordination of services has been graphically demonstrated in the Family Court’s Magellan project relating to the management of cases involving serious allegations of child sexual abuse or physical abuse: see Brown, T. with Sheehan, R., Frederico, M. and Hewitt, L. (2002) *Resolving Family Violence to Children*, the evaluation of Project Magellan, a pilot program for managing Family Court residence and contact disputes when allegations of child abuse have been made available at <http://www.familycourt.gov.au/papers/html/magellan.html>. The Family Court of Australia is also aiming to experiment with a less adversarial approach generally to cases involving children.

15. For a wide-ranging assessment of the potential drawbacks of a unified court in the U.S. context with particular reference to juvenile justice issues see Geraghty, A and Mlyniec, W. (2002) “Unified Family Courts: Tempering Enthusiasm with Caution” 40(4) *Family Court Review*, 435. In respect of domestic violence matters see Dunford- Jackson, B. L., Frederick, L., Hunt, B. and Hoffard, M. (1998) “Unified Family Courts: How Will They Serve Victims of Domestic Violence?” 32(1) *Family Law Quarterly*, 131.

16. The obligations in CROC are elaborated upon by several United Nations rules and guidelines, namely:

- UN Standard Minimum Rules for the Administration of Juvenile Justice 1985 (Beijing Rules) available on-line at [http://www.unhcr.ch/html/menu3/b/h\\_comp48.htm](http://www.unhcr.ch/html/menu3/b/h_comp48.htm);
- UN Standard Minimum Rules for Non-Custodial Measures 1990 (Tokyo Rules) – available on-line at [http://www.unhcr.ch/html/menu3/b/h\\_comp46.htm](http://www.unhcr.ch/html/menu3/b/h_comp46.htm);
- UN Guidelines for the Prevention of Juvenile Delinquency 1990 (Riyadh Guidelines) – available on-line at [http://www.unhcr.ch/html/menu3/b/h\\_comp47.htm](http://www.unhcr.ch/html/menu3/b/h_comp47.htm); and
- UN Rules for the Protection of Juveniles Deprived of Their Liberty 1990 – available on-line at <http://www1.umn.edu/humanrts/instr/j1unrjdl.htm>

17. See Nicholson, A. and Sandor, D. (2003) “Trying to Better See Both Sides of the Coin”, A paper presented at the Children Law UK Conference on Welfare and Justice, London, 23 May 2003, available at <http://www.familycourt.gov.au/papers/html/london.html>; Naffine, N. (1992) “Children in the Children’s Court: Can there be rights without a Remedy?” in Alston P. et al (Eds) *Children, Rights and the Law*, Oxford University Press. Carney, T. (1997) “Children’s Rights and Juvenile Justice: An Agenda” in Borowski, A. and O’Connor, I. (Eds) *Juvenile Crime, Justice and Corrections*, Longman, Australia.

18. Scraton, P and Haydon, D, (2002) “Challenging the criminalization of children and young people: Securing a rights-based agenda” in Muncie, J. et al (Eds) *Youth Justice – Critical Readings*, Sage, London at 323.

19. Carney, T. (1997) “Children’s Rights and Juvenile Justice: An Agenda” in Borowski, A. and O’Connor, I. (Eds) *Juvenile Crime, Justice and Corrections*, Longman, Australia at 465-466.

20. See further Naffine, N. (1992) “Children in the Children’s Court: Can

there be rights without a Remedy?” in Alston P. et al (Eds) *Children, Rights and the Law*, Oxford University Press. Carney, T. (1997) “Children’s Rights and Juvenile Justice: An Agenda” in Borowski, A. and O’Connor, I. (Eds) *Juvenile Crime, Justice and Corrections*, Longman, Australia; An international perspective is provided by Gatti, U. (1998) “Types of Judicial Response to Juvenile Delinquency” in *Deutsche Vereinigung für Jugendgerichte und Jugendgerichtshilfen e. V. and The International Association of Juvenile and Family Court Magistrates (Eds) Young Offenders and their Families – The Human Rights Issue: Proceedings of the 14th International Congress in Bremen Germany from August 28 to September 2 1994*, Monchengladbach : Forum-Verl, Godenberg Germany.

21. See for example Alder, C. and Baines, M. (Eds) (1996) *...and when she was bad? Working with young women in juvenile justice & related areas*, National Clearinghouse for Youth Studies, Hobart, Australia. The problem was not confined to Australia: Hudson, A. ““Troublesome girls’: towards alternative definitions and policies” in Cain, M. (Ed.) *Growing Up Good*, Sage, London, 197.

22. Attorney-General of the Commonwealth of Australia, News Release, 8 August 2003. See also, Family Law Council (2002) *Family Law and Child Protection Final Report*, AGPS, Canberra.

23. Alder, C. and Wundersitz, J. (Eds) (1994) *Family Conferencing and Juvenile Justice : The Way “Forward or Misplaced Optimism*, Australian Institute of Criminology, Canberra; Carney, T. (1997) “Children’s Rights and Juvenile Justice: An Agenda” in Borowski, A. and O’Connor, I. (Eds) *Juvenile Crime, Justice and Corrections*, Longman, Australia at 476-477.

24. (1995) “Conferences: set up to fail?” 3(4) *rights now! newsletter of the children’s and youth law centre*, 1; McMahon, R. (March 2002) “The NSW Youth Drug Court First Implementation Review” *rights now! newsletter of the children’s and youth law centre*, 9.

25. McCord, J. (2002) “Counterproductive Juvenile Justice” 35(2) *Australian and New Zealand Journal of Criminology* 238.

26. Deslandes, A. (March 2002) “Time Will Tell” *rights now! newsletter of the children’s and youth law centre*, 7.

27. (2003) “A new approach to sentencing” 15(3) *Judicial Officers Bulletin* 1 at 1.

28. See for example The National Children’s and Youth Law Centre and The Australian Section – Defence for Children International (2000) *Submission to the Human Rights Committee Concerning Australia’s Third and Fourth Periodic Reports under the International Covenant on Civil and Political Rights* available at <http://www.dci-au.org/html/iccpr.html>.

**Chief Justice Nicholson** retires from office in mid-2004 after more than 22 years as a Judge. DCI - Australia takes this opportunity to thank him for his championing of children’s rights through his judgments, his leadership of the Court, and by the public positions he has taken.

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## Children in Detention in UK

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### Threat to take children of failed asylum seekers into care

It appears that the UK is also taking a strong line against asylum seekers, threatening to take their children into care if they fail in their bid for asylum and refuse to leave Britain.

Home Office ministers said that they had to tackle the “perverse incentives” which stop people returning home voluntarily, because officials would not meet their target for removing failed asylum seekers if they relied on compulsory expulsion alone. Families that refuse a paid flight home and government help with resettlement currently receive benefits worth £16,000 a year.

In opposition to this policy, the cross-party committee says today that the policy could drive some families underground and provide others with an incentive to “go illegal” while abandoning their children in local authority care at public expense.

Instead of trying to step up the number of voluntary departures, it says, ministers should concentrate on “a vigorous government policy of swift compulsory removals”. The current rate of about 1,500 a month is “unacceptably low”.

She said the number of children taken into care would be kept as low as possible. “We will achieve this by ensuring that families who are refusing to cooperate with voluntary departure processes will be targeted for compulsory removal, so that we can ensure that all their members leave the country together.” The committee report is published today in advance of tomorrow’s Commons second reading of Mr Blunkett’s asylum and immigration bill.

The MPs support the government’s plan to restrict the appeal rights of rejected asylum seekers, but say that it should not be implemented until improvements have been made in the initial

decision-making process. The policy could lead to a crop of new legal challenges, the committee said. The concerns were that driving failed asylum seekers underground might make it harder to remove them. According to The Greater London authority up to 200 asylum seekers a week in London were being denied benefits because they had failed to claim refugee status as soon as they arrived in the UK.

Source: **The Guardian December 16, 2003**

### Call for Articles

Australian Children’s Rights News depends on the input of members affiliates and subscribers to keep providing you with a wide-ranging and informative update on children’s

rights issues. Others with a viewpoint on children and young people’s rights are also invited to submit.

We are now seeking articles to be considered for the first edition of 2004. Contributions of between 700 and 1500 words are preferred and should be e-mailed with full author details to [judycash@nsw.bigpond.net.au](mailto:judycash@nsw.bigpond.net.au)

Suggested graphics or photos to accompany the article are most welcome. The closing date for receipt of material is 23 February 2004 but please advise the editors as soon as possible if you are planning to submit.

**If you have an idea which you would like to discuss, please phone Judy Cashmore 02 9880 2286**

Articles published in Australian Children’s Rights News may also be placed on the DCI-Australia Website: [www.dci-au.org/](http://www.dci-au.org/)



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# Management of Child Witnesses - Practical Solutions for Judges

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**Moira Rayner**

This is an edited version of the paper Moira presented to the NSW Local Courts Annual Conference on 4 July 2003 at Brighton-Le-Sands.

Moira is a member of DCI-Australia's Advisory panel and has been a strong and passionate advocate for children and young people and human rights for many years. She was the founding Director of the Office of Children's Rights Commissioner for London. She was previously Commissioner/Chairman of the Western Australian Law Reform Commission and the Commissioner for Equal Opportunity in Victoria. She is currently Anti Corruption Commissioner (Western Australia) and Visiting Senior Fellow, Law Schools of Melbourne University and University of Western Australia.

In this article, Moira argues for and outlines what it means to provide for real participation for children in the legal system and particularly child witnesses.

'Children are not the people of tomorrow, but people today. They are entitled to be taken seriously. They have a right to be treated by adults with courtesy and respect, as equals.'<sup>1</sup>

## 1. Victims or citizens

In the last few weeks I've read four publications on children with growing unease.<sup>2</sup> They all make suggestions for legal and procedural reforms that are supposed to improve the quality of children's evidence in criminal prosecutions. Though they deal with the child's capacity to recall critical events, to understand concepts such as time and sequences of events or use the language used by professionals involved in investigations, and common obstacles, and delivery of evidence in a courtroom, nearly all focus on the adult's and the system's needs. In the quest for improving the quality of material on which



a forensic decision may be based by investigating and prosecuting authorities, courts and judicial officers, there is little emphasis on the fact that most children giving evidence have an entirely different perspective.

The proposals to facilitate giving evidence tend to focus on technological remedies which have not developed far at all from the so-called Pigott recommendations and early implementation pilots that I reviewed in the UK in 1987. These were the subject of recommendations of the last discussion paper for which I was responsible as Chairman of the WA Law Reform Commission, *Children and Other Vulnerable Witnesses* in 1990.

They mostly focus on the child as forensic object, but the strongest image is that of a piece of flotsam drawn along the flow of a formal, 'procedurally fair' decision-making process that was not designed with their participation in mind.

The process of a criminal trial draws from an important tradition that considers justice from the point of view of the accused: that recognises the importance of the presumption of innocence and imposes that most powerful standard of proof 'beyond reasonable doubt' before a responsible person, usually an adult, may be convicted.

This is not the world of most children. A child's recollection and recounting of the events that they are expected to talk about depends on their age and

stage of development, whether age-appropriate or not; what happened to them or what they saw or did and whether it was a standard part of their lives; how long ago it happened and how often they have talked about it since and with whom. Often the child inhabits a world with a simpler view of what justice is. They may believe that most adults tell the truth and that lawyers who ask them questions and seem to be their friends, are. They may, if victims of crime expect to tell their story and then **believe** the person who hurt or frightened them will be punished. Or they may be frightened – believing that threats may be realised, that they will not be believed or that they will be punished because they have themselves done something terrible or wrong.

The criminal investigation and hearing process is not designed to take these matters properly into account. Nor is the training that lawyers get and the way that judges are used to running their courts and intervening in what lawyers do in courts.

## 2. Some basic ideas

My paper is ordered around some basic ideas.

- Children ‘giving evidence’ are just vulnerable inexperienced people with a voice of their own taking a part in formal proceedings that will result in a decision that has considerable legal consequences for somebody else who traditionally is the legal system’s primary concern.
- The UN Convention on the Rights of the Child requires our governments to ensure that in all questions affecting a child, his or her interests shall be our paramount consideration. Article 12 of the Convention also requires our governments to ensure that a child participates in decisions that affect them.
- By the time a child gets into a courtroom (even via CCTV) they have already been asked a lot of questions and have had a raft of experiences that influence how they behave in response to this situation.
- Children’s memories and answers to

questions are important not only to criminal investigations of sexual offences against them but in care and protection, family law and civil proceedings, and when they are supposed to have committed offences themselves, when they are no less vulnerable or children than victims are. They are all entitled to special protection and to be treated with at least as much respect as adults.

- The aims of a justice system are not realised when a child victim or other witness or perpetrator cannot add their voice and their perceptions to the pot of facts and inferences from which a formal decision has to be divined by a court.

- Judges and magistrates work daily in a system that has only recently sought to adapt its end-of-the-line procedures to improve the quality of children’s evidence, to achieve that system’s objectives, not what the child expects. A paradigm shift is necessary to make changes that are effective. To make a child’s evidence useful judicial decision-makers must become informed and comfortable about children’s involvement in legal proceedings. Children should not seem to be ‘special’ witnesses any more than any other witness deprived of the confidence to speak. A child witness is now what the judges and lawyers focusing upon him once were. We have all had the experience. The way technology is used, questions are framed and answers understood depend on an understanding of the child’s perspective. It is not reasonable to expect a child to turn their world view into something we recognise. We need to walk around in their skin, and understand theirs.

- Anyone involved in an investigation in our justice system should do so from a values basis: that the child is entitled to be treated with respect for what she or he is now, not what he or she will become, as a participant in a process that started long before the child got near a court.

### 3. Why children's participation is important

Seeing children as participants in adult conversations is necessary to avoid making tragic mistakes. In the Australian film, *Careful He Might Hear You*, an intelligent, able and compassionate judge makes a tragic mistake in a child custody decision because he does not know how to question a child burdened with adult secrets, nor how to hear what the child really says.

In 1968 Mary Bell who was then 11 years old was convicted of killing two little boys and sentenced to detention for life. Gitta Sereny spent two years researching her story.<sup>3</sup> I commend it to you. That child was thought to be so 'evil' that it was more than 28 years later that it became apparent that she not only had not understood the nature and consequences of her acts but that she had been repeatedly sexually abused by her own mother, a prostitute with a thriving S&M practice – and who only as an adult and a loving person herself came to understand the moral enormity of her crimes. Nobody could hear her cries. Decisions were taken on the basis of her acts.

I have made plenty of these mistakes myself. One of my first briefs required an appearance in a Children's Court. I was instructed to prevent an order for care and protection being made with respect to a teenager whose response to her family breakdown had been to attempt suicide. Nobody represented her. She wasn't even in the court, though she was 15 years old. The Departmental social worker advised the court it was in the child's best interests. The magistrate said that an order would be in the child's best interests. I acted for her mother who said it wasn't. The order was made and the child placed in an institution from which she then ran away repeatedly for which she was repeatedly punished.

It was not until her case was well over that the fact and extent of my mother's condonation, connivance and collusion of her husband, the father's sexual exploitation of all of their six children became known. Neither the magistrate nor the social workers nor the lawyers for the respective parents, all advocating the 'best interests' of the suicidal girl, actually spoke

to her. I found out the truth out while preparing her mother's divorce petition (fault-based, in those days) and had to speak to the other children to establish the evidence (adultery). My client, the mother, expressed astonishment. The children insisted, 'We told you!' She honestly believed they never had. It was a lesson, that parents have various and fluctuating capacities to protect their children's rights and sometimes-conflicting interests interfere with the children's. My client wanted to keep her marriage and so did not 'hear' her children's voices at all. Common sense assumptions about children and their 'natural' guardians is not enough protection for children's rights.

I was a slow learner. When I represented children directly in various courts I assumed that I was an expert in assessing the 'best interests' of my clients, because I was so familiar with the courts that I could predict what judges would probably do. After more catastrophic child abuse cases I realized I was no expert on what is good for another person. I resolved to work out a policy approach to the role of lawyers who represent and advise children. It came down to learning to work with children on terms of mutual respect for the rights of the other. Unless children are accepted as clients in the full sense in their relationships with their legal advocates, and as full participants in a communication process in courts and tribunals and in the processes that lead them into those forums, serious mistakes are very likely to be made.

I would sum up my underlying principles for children's participation in these terms:

A child's belief that they can influence their own circumstances has been shown to be a key resilience factor, enabling them to survive horrific experiences, including neglect, violence and prolonged trauma.<sup>4</sup>

Increasingly, the law acknowledges that children do have 'rights' and are not passive participants in society. This acknowledgement includes human rights treaty obligations such as the UN Convention on the Rights of the Child and the International Covenant on Civil and Political Rights. Both guarantee participation as a keystone to rights protection. Children also have civil, criminal and administrative rights, including 'due process' – the right to be heard and, according to the House of Lords, the developing

rights that come with age and experience: the case of *Gillick v West Norfolk and Wisbech Area Health Authority*<sup>5</sup> recognised an older child's developing 'right' to make decisions about their own medical treatment.

## What 'participation' means

Acknowledging that children have the right to make real decisions about how they participate in a judicial process will seem strange at first, because in a sense it means conceding authority. It will seem inefficient and time-consuming. It is necessary and it works.

Children have limited capacity to make decisions about their own lives.<sup>6</sup> Yet as Janusz Korczak showed, children can do it effectively, if adults allow it. Korczak is not well known in Australia, though his heroic death, because he refused to leave the children in his Warsaw orphanage and went with them to Treblinka, captured the cinematic imagination.<sup>7</sup> The UN established the International Year of the Child and began drafting the UN Convention on the Rights of the Child in Korczak's honour. Janusz Korczak established and ran the first democratic orphanages, in which adults and children were subject to the same rules and to the judgements of 'courts' administered by children. They worked.

Hart's 'ladder of participation'<sup>8</sup> is a useful way of clearing up the fuzzy thinking around children's participation in legal decisions. I've modified it to try and make some sense out of our failed efforts over nearly 20 years to get better evidence out of children.

I believe they are ineffectual because we have not taken the step Korczak's words suggest. Children are assumed, by and large, to be forensic problems. Adults have choices about whether to participate and how, if at all, in an investigation. Children don't.

An adult may, until subpoenaed, decline to answer questions put to them by police or other government authorities and may decide where they will be questioned, what answers to give, whether to have advice before they answer questions, to have an independent witness there to protect their interests. An adult may decide not to participate. An adult may decide not to agree to a particular record of interview

– i.e. by signing a statement. An adult may decide not to allow their evidence to be documented for the other side to pull apart.

The only reasons to distinguish between the autonomy of adults and children are the duty to protect vulnerable witnesses and the difficulties of ordering the evidence to make it useful for probative purposes. There is no logical reason for distinguishing between the vulnerabilities of 'deserving' witness and any other witness whose evidence is pertinent to a decision to be made in a judicial process, affecting rights and interests. Our special rules for child witnesses should logically apply to children accused of offending as well.

Once in the courtroom any witness is subject to judicial discretion: how to allow evidence to be presented, and how to manage the witness's testimony, and the testing of that testimony. However it is in the area of discretion that most of the problems seem to arise.

## Rayner/Hart's ladder of participation in judicial proceedings

**Level 8.** The child decides that he or she wishes to be involved in the whole process that may lead to judicial decision-making. S/he sets the parameters of involvement – i.e. whether to talk to the police/child protection worker/investigator at all knowing that it might lead to giving formal testimony, whether as a victim, observer, or supposed participant in the criminal or wrongful acts of another person, including a parent or family member. The child has the real option of deciding not to be involved at all, and having decided to do so then determines how, and to whom, and how often, they tell their story, how it is recorded, who has access to that record, whether or not they personally give evidence, and whether or not this is in a courtroom itself – with or without formality, a support person, aides such as screens, or on CCTV either in the presence of an accused – or from a separate location. The child frames his or her whole involvement and comes to adults for advice, discussion and support. The adults do not direct but offer their expertise for the child to consider.

**Level 7** Much as in Level 8 above, but though the child makes the initial decision to be involved and decides how the involvement is to be framed and implemented, there is more adult involvement at every stage – i.e. informed, competent and expert adults are more prominently available and make suggestions without being approached by the child. The adults clearly have a supportive/expert role, but they do not take over.

**Level 6** Adults decide that the child must be involved in the investigation, but the child is involved in every step of its planning and implementation, from interviews to documentation, deciding whether and how to give oral evidence. Not only is the child fully aware of what is proposed and the possible implications of each choice but his/her views are always sought and considered, they are also involved at every point in taking the decisions – i.e. how many interviews, by whom, how it is recorded, who will be there, how they are to be involved in the court hearing – and though their views are influential they do not determine the matter. Where a decision is taken that the child did not support, the reason for that decision is explained to the child before it is implemented.

**Level 5** The testamentary task is defined, designed and run by adults, but the child is consulted. S/he has a full understanding of the process – this may be with the help of a witness support service, tours of the court, a support person at interviews etc. There is less detailed consultation, but it is ongoing. The adults take his or her opinions seriously, and the child is kept informed about the progress of the investigation. The child knows their views are taken seriously, and is advised promptly of any developments.

**Level 4** Adults decide on the testamentary task as in Level 5, but the child understands what is involved and how it will probably develop, and also knows who decided why they should be involved and why. Adults respect their views, if expressed. After the trial is over the child is advised what that decision was by an important third party such as the prosecutor or the judge

**Level 3** The child is asked to say what he or she thinks about the forthcoming interviews and court

processes but has little or no choice about the way he or she expresses those views or the scope of the ideas they can express or how they are used. The child is informed of the decisions that the adults have made about how the evidence is to be presented in court. After the decision has been taken, is advised what that decision was by their carer or a family member.

**Level 2** The child takes part in an investigation by e.g. being called out from class or play to talk to an investigator, and attends a court hearing arranged with as much care as possible by the adults but without a support person or other aides such as screens, CCTV: the judge exercises his or her discretion about how the child's evidence should be managed. The child knows that something important involving themselves is happening and can identify the people they already know, but the child does not really understand the issues or the nature of the proceedings or what will happen during the trial or afterwards.

**Level 1** The child does or says what adults suggest they do, but has no real understanding of the issues. Alternatively the child is asked what he or she thinks about various aspects of the process and adults use some of their ideas and act on some or even most of their expressed concerns but do not tell them what influence they have had on the final decision or indeed (worst case) forget or decide not to tell the child what the final decision was.

## **Key principles for children's participation in legal decision-making**

- 1. If young people are to participate, it should be easy from the beginning to get and feel involved, and stay involved.**

This cannot be done by a chat. This requires an ongoing relationship with the persons supporting the child. Many criminal trials take no less to get to court. If children are to participate meaningfully as witnesses a long-term commitment must be made to keep their memories alive and usable

## **2. Every process must be child-friendly**

Every process does not just mean the bits that are easy. It means more than using technology such as CCTV and video-taped interviews but includes the timing and the nature of the personal interactions, and asking questions that make sense to children.

## **3. Successfully involving children means that they should not be asked to “fit in” to structures that are already in place.**

This is crucial in litigation. In the Office of Children’s Rights Commissioner for London (OCRCL) the Advisory Board was set up before the staff were appointed meant that the children and young people who were to be involved in the project did not have to be bound by structures that were already created and we did not have to “fit in” with something that might not have been appropriate.

## **4. First impressions count**

If you keep a child waiting they will assume that they are not important, become bored and alienated. If they are to come to a courtroom it may be necessary to introduce the idea of its purpose and function through games and activities to get to know what their role is and how the court works.

## **5. Let the child set some of their own ground rules for participating: they must feel some sense of control.**

Children need to have some idea about what their involvement in the process means and need to know that if they wish to withdraw at any stage, then this is OK. Appointments to see lawyers, counsellors and others should suit children’s requirements, not be dictated to by adult convenience.

## **6. Preparation is essential**

There is now a lot of evidence that children who are effectively prepared to give evidence can find it an empowering, not a traumatic, experience. But there is a fine line between involving children, and accepting their experience as real and essential, and giving

them our own adult and ‘knowledgeable’ agenda. In the same way children can be ‘coached’ to give someone else’s story. If children are to be effectively involved, adults should not take away their voice and impose their own. However, children had to get the skills to make them effective, and to build their confidence up.

## **7. Keeping children involved takes planning and forethought**

Our experience at the OCRCL was that information and documents for children can be produced so that they are easy to understand, with lots of pictures, diagrams and clear explanations. We found, for example, that it was perfectly possible to translate large formal policy documents, such as the Greater London Authority’s 250 page draft transport strategy and economic development strategy, into a simple 8-page consultation document, which had the space for comment on the key questions or issues. It should be just as easy to explain court processes and familiarise children with the processes ahead – including cross examination.

## **8. Common problems in practice and how to deal with them**

I do not propose to recite what others such as Judy Cashmore and Rachel Manley have written about better and whose works can be read elsewhere. In fact I don’t want to say a lot about this at all. I would rather let Korczak speak for himself. We have to remember that in a legal process the child is a stranger in a strange land and with every reason to be afraid. We must give them a guide. We must not allow children to be bullied.

### **8.1 Lack of Preparation**

A judge can insist that any child witness be properly prepared to give evidence and to be advised exactly what that preparation was.

A judge should have informed herself of the developmental and memory issues relevant to the particular age and vulnerability of the child before a hearing.

Before a child is questioned a judge should lay out the ground rules for counsel including how long questioning will be permitted without a break, a request that counsel respect the immaturity of the witness and put questions in an appropriate way relative to the child's competence and that shouting or raising voices will not be permitted and that the judge will decide what time of day a child will be questioned, and when breaks are necessary

## 8.2 Failure to control courtroom conduct

A judge can and must prevent delays once a child has been set up to give evidence in the precincts of the court or in a remote CCTV location.

In ascertaining a child's capacity to give evidence the old standard of 'belief in God' is no longer sufficient or appropriate. A child needs only to be clear that she or he understands how important it is to tell the truth. Judges need to know how to talk to and listen to children of any age for this purpose.

It is not inappropriate for a judge to remind the child about the importance of telling the truth before questioning starts, including expressly permitting a child to say 'I don't know', and very important to tell the child how long it will go on for and what to expect.

A judge is entitled to require appropriate questioning from counsel including a clear warning about the vulnerability and lack of development and experience of the witness and that certain things will not be tolerated such as raising a voice, confusing or making a child feel inappropriately 'guilty'. Also:

- use appropriate language based on the child's point of view – i.e. what did the child experience?
- should not use legal terms
- should be one question at a time – e.g. 'were you in Smith Street?' Not 'were you in Smith Street or was your Mummy home?' which will get the answer it deserves
- should be simple

- should use the child's words
- must not be linked or multi-layered
- must not interrupt a child's answer
- must be in the active voice
- should not include negatives.

A judge should note signs that a child is getting confused (looks, silence, 'I forget' or 'I don't remember') and should not allow it to go on too long – about 20 minutes is enough. If a child says 'I don't know' more than a couple of times, break.

## 8.3 After the trial

It is an important part of a judge's duty to ensure that a child witness is informed by an appropriate person – if necessary, the Judge her/himself - of the outcome of the hearing and how their evidence influenced the decision, especially if it is not what the child wanted or expected.

## Footnotes

1. Korczak quotes from Joseph, S. (Ed.) *A Voice for the Child: the inspirational words of Janusz Korczak*. Thorsons (Harper Collins) London. 1999
2. Interim Report on Sexual Offences put out by the Victorian Law Reform Commission; *Our Best Interests – a State Plan to protect and advance the interests of children*, produced for the South Australian government by Robyn Layton QC; the NSW Legislative Council's Standing Committee report on *Child Sexual Assault Prosecutions*, and the *Materials Relating to Child Sexual Assault* produced by the NSW Judicial Commission as part of a pilot project.
3. Sereny, Gitta. *Cries Unheard – the story of Mary Bell*. MacMillan London 1998.
4. For a summary of that evidence see Rayner M and Montague, *Resilient Children and Young People – a review of the international literature*. Deakin University 1998/CWAV 2001.
5. *Gillick v Wisbech Area Health Authority* [1986] AC 112
6. Rayner, M. *Taking Seriously the Child's Right to be Heard*, in Alston P. and Brennan G (ed.s) *The UN Children's Convention and Australia*. Human Rights and Equal Opportunity Commission, Sydney, 1991.
7. Lifton BJ. *The King of Children. The Life and Death of Janusz Korczak*. St. Martin's Griffin, New York. 1988
8. Hart R.A. (1992) *Children's Participation: From Tokenism to Citizenship*, Innocenti Essays No.4 Florence. UNICEF

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# Ignorance is no defence

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**Philip Adams**  
**Patron of DCI**  
**Australia**  
*The Australian*  
**18 October 2003**



**Instead of another attack on the pricks in public life – and on recalcitrant colleagues in the media – today I propose to attack the public. Not just for the sake of argument, but because the public has a case to answer.**

I've been belting out columns for *The Australian* for decades. Given my ideological proclivities, my tenure may seem mysterious. I put it down to pity at the loftiest heights of News Limited. Yet there was a time when Rupert Murdoch – he himself – personally sacked me. This led to me spending a few years at *The Age*, then known by its conservative critics as “the Spencer Street Soviet”. The managing director was the young Randal McDonald, with Graham Perkin his legendary editor. Under their protection, Ben Hills ran the Insight investigative team, and managed to reveal all sorts of mendacity in Melbourne, both mercantile and municipal. Publishing this stuff was seen as subversive by the powerbrokers who dwelt in Toorak and dined at the Melbourne Club. McDonald, inspired by the example of Katharine Graham at *The Washington Post*, was despised as a class traitor.

One Insight investigation revealed that a highly significant Melburnian, a knight of the realm, had done some trading that was more down-under than insider. It involved the proposed underground railway and the buying up of real estate that, eerily, coincided with the undisclosed locations for the subway stations. As you can imagine, the profits were enormous. And what happened when *The Age* broke the story? Next to nothing. There was much

tut-tutting and tsk-tsking, but no-one went to jail. When similar stories by the team failed to dislodge other prominent miscreants, I realised that it was the public's fault. The media had done its job, and they weren't doing theirs.

Melbourne regarded itself as morally and culturally superior to sinful, sensual Sydney – the city seen as the standard-bearer in all forms of criminality, from bent cops to corporate crooks. Why, then, did so many of Melbourne's better known citizens survive scandals – even get away with murder?

There was even a case involving a well-known public figure whose wife died in mysterious circumstances closely resembling homicide. Though he had both motive and opportunity, the case, despite broad hinting in the media, was never investigated.

These days, of course, people are inured to political outrages. They expect them, take them for granted, even enjoy them. The public will get its knickers in a twist over a silly matter such as Peter Reith's mobile phone, while ignoring his involvement in having troops secretly trained in Dubai to be strike-breakers – something that could have, should have, brought the government down. When the same gentleman played a leading role in the “children overboard” con, once again we allowed him to get away with it. And only grumbled mildly when he was rewarded with an important overseas posting.

Recently, Helen Trinca wrote a forensic account of the waterside wars, focusing on the Dubai story and the government's denials of involvement. Once again, the revelations were of an order that would have toppled any respectable government, if that's not an oxymoron. Yet her book failed to raise an eyebrow. Nor did *Dark Victory*, written by David Marr and Marian Wilkinson. It turned the searchlight and the blowtorch on the behaviour of our leaders during and after Tampa, but provoked neither public nor fellow journalists into appropriate apoplexy.

The recent controversies swirling around the ex-minister for immigration, involving international criminality, generous donations to party slush funds and the provision of visas failed to dislodge Philip Ruddock. Indeed, the PM gave the minister an astonishing promotion. A bloke whose compliance with the law may at some stage be questioned has been appointed Attorney General! To run the laws of the land! And the public cops it.

As recently as the Hawke years, ministerial heads rolled on a fairly regular basis. But, despite Howard's promise to enforce ministerial rectitude, naughty ministers are defended. The worst a Wilson Tuckey need fear is a reshuffle. When the PM takes us to war via a series of shonky manoeuvres and misrepresentations, you'd expect community outrage. Blair is copping it in Britain and Bush in the US. But here? The Australian public doesn't seem to give a stuff. Newspoll announces that 71 per cent of the public feel they've been misled, but the PM's popularity rises. Just like John Laws' and Alan Jones' ratings rose after a reluctant Australian Broadcasting Authority was forced to investigate the "cash for comment" affair.

The media might not cover itself in glory on a raft of issues, but the public is complicit in letting the system down. You don't need to watch *The X-Files* to know the truth is out there. It's freely available to anyone who cares to read widely, either by selective scrutiny of the mainstream media or via the Web. We're dealing with a public that doesn't want to know. A public that chooses to ignore the truth about Tampa, the refugees, SIEV-X, the detention centres, the war in Iraq.

A public that proffers the blind eye and deaf ear, preferring to live in the amoral world of blissful, wilful ignorance. Instead of being enraged by the lies of our leaders and the gutlessness of the Opposition, we excuse our failure as citizens by saying, "We're not to blame; they've made us cynical." Sorry, that's not good enough.

The public has to lift its game.

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## **It's time - release all children and families from immigration detention**

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**The Human Rights Commissioner Dr Sev Ozdowski welcomed the government's decision to release Iranian asylum seeker Ibrahim Sammaki from immigration detention and grant him permanent residency in Australia.**

Dr Ozdowski has called for a similar compassionate response to be shown by releasing all children and their families in detention into the Australian community.

"The government's decision to permit Sammaki to bring his two Indonesian children (Sarah, aged 4 and Safdar aged 8) to Australia demonstrates that compassion is an indispensable component when dealing with migration and refugee issues," said Dr Ozdowski.

"It is clear it is time for the government to extend this compassion to the remaining 96 children in Australian immigration detention (excluding Nauru) by releasing them and their families into the community."

The Commissioner said that many Australians including himself believes such a step would:

1. be beneficial to the children and their families
2. allow the rehabilitation process to begin sooner rather than later, as ultimately more than 90 per cent are found to be refugees and are released into the community (Iranian children - 97 per cent and Afghan children 95 per cent )
3. enable this decision to be made without contradicting Australia's border protection policies and principles of sovereignty.

"The UN Convention on the Rights of the

Child states that detention should be a measure of last resort and for the shortest appropriate period of time, but how can this be the case when 50 children have been in Australian immigration detention for more than two years,' the Commissioner said.

The Human Rights and Equal Opportunity Commission is in the final stages of completing a report on its National Inquiry into Children in Immigration Detention which conducted interviews with 112 children and their families in detention and 27 focus groups with children, parents and ex-detainees on temporary protection visas.

It is anticipated the final report will be finalised and transmitted to the Attorney-General early next year and once it is tabled in Parliament, the report will be made public.

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## Child neglect and abuse database

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**Following the inquiry into the death of Victoria Climbié, the UK government has proposed setting up databases on every child in England to help prevent neglect and abuse. The British Medical Association has warned that sharing information in this way would be in breach on the Data Protection Act.**

**Source: The Guardian Wednesday October 29, 2003, David Batty**

The government's plan to keep a file on every child in England, so that those at risk of abuse, neglect or deprivation can be helped before they reach crisis point, has swiftly become mired in legal confusion and technical difficulties.

In a bid to avoid the appalling communication failures that contributed to the murder of Victoria Climbié, ministers plan to establish a sophisticated tracking system to keep tabs on the country's 11 million children.

The children's green paper, *Every Child Matters*, published last month, proposes creating an "information hub" in 150 local authorities to record details of all the children in the area. Each child will have an electronic

file - including their name, address, date of birth, school and GP - that states whether they are known to social services, education welfare, police, or youth offending teams.

But a survey of 80 councils earlier this month found that 85% lack a computer database capable of monitoring children's contact with welfare and law enforcement agencies. The report, *Electronic Safety Nets: Technology Systems to Safeguard Children*, by electronic data provider Headstart, warns that many local authorities are unlikely to meet the two-year deadline issued by the Climbié inquiry in January to set up such an IT system. Nearly 8% of those surveyed admitted the task will take more than five years. Resistance by the NHS to handing over data because this could breach patient confidentiality was identified as the main reason for the delay.

And a £10m pilot scheme intended to improve information sharing has failed to allay fears. The information, referral and tracking (IRT) project, set up by the government's Children and Young People's Unit, has been restricted by a QC's advice that it could be illegal for the NHS to pass on details about children to other agencies.

As a result of this warning, given to Bolton primary care trust in August, the local metropolitan borough council is unable to build a database on the 60-70,000 children in the area. Some of the other nine IRT pilots have also decided to suspend this work.

Andrew Dearden, chairman of the British Medical Association's community care committee, says: "Having a shared children's database involves taking information given to the NHS for one purpose and passing it to another agency to use for another, which is in breach of the Data Protection Act."

Ministers want the new electronic files to note "warning signs" within the family, such as imprisonment, domestic violence, or mental health problems, giving staff a full picture of a child's needs. Under the current Children Act, a parent's right to confidentiality can be overridden only if risk of harm to a child is "significant". The government proposes to change this and override the parents' right when there are simply "concerns" about a child, so action can be taken much earlier. It believes this will allow staff to prevent a wide range of problems, such as poor school performance, not just abuse and neglect.

Lawyers warn, however, that this amounts to a gross invasion of privacy. Solicitor Stephen Grosz, of Bindman & Partners, says the government must specify what it means by "concerns" if the scheme is to comply with article 8 of the Human Rights Act - the right to respect for private

and family life. He says: "Something as vague as concern might be tittle-tattle or trivial. That's textured language and open to abuse."

Eileen Munro, reader in social policy at the London School of Economics, agrees the plan is "bedevilled by a lack of clarity". She says: "If everyone working with children records the slightest worry, because they're afraid of getting into trouble if anything happens to the child, then files will quickly get clogged up with minor concerns that, on investigation, are discounted."

Sadiq Khan, of Christian Khan solicitors, calls for proper safeguards about who can access the data, how long it can be stored and how its accuracy can be challenged. He says: "There must be a watchdog to monitor children's records. The police national computer should only be accessed when officers have good reason, but some have been disciplined for selling the information to newspapers." Andrew Christie, director of the Hammersmith and Fulham children's trust in west London, plays down these fears. The creation of children's trusts, which amalgamate social services, education and healthcare, should resolve data protection problems about the transfer of information between different agencies, he claims. "Responsibility for child health - and children's medical records - will be formally delegated to the trust."

His trust, however, does not intend to set up a database as comprehensive as those proposed by ministers. "The government might want to keep a track on every child but that's not our priority," he says. "We're setting up a website that will store basic biographical details on children we know to be at risk of social exclusion. It won't exchange confidential data."

Christie accepts it will be challenging to verify the accuracy of the information stored. Last year, Hammersmith and Fulham council found that 48% of its social services files, covering 55,000 people, did not match up with local NHS records. Nearly 1,450 records disagreed on whether a person was alive or dead.

The disparity arose from flaws in the NHS patient tracing service, which only matched records by surname. In response, the council set up a computer system that checked the full name, age and address of patients at one GP surgery, which achieved a 100% match with social services files in a month. But Christie admits a complete match of all local records will take far longer.

The education secretary, Charles Clarke, is fighting for a bill in the Queen's speech next month that will address the legal and technical problems hindering information sharing. Phil Cain, co-author of the safety nets report, warns that if the legislation fails to remove these barriers IRT will prove a "white elephant". He says: "IRT is the last roll of the dice. It may be a pilot scheme but the government has no alternative plan. So we're stuffed if it doesn't work."

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## Woomera

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**Max Liddell**  
**Monash University**

**Many of us, as we grew up, read Alice's *Adventures in Wonderland and Through the Looking Glass*. We probably regarded Alice's story as a 'fairy story' and did not see any other implications. Alice's adventures were further sanitised and minimised by the Walt Disney film version of them. Yet Lewis Carroll's recorded treatment of Alice, viewed through a different lens, can be seen as a manual on the brainwashing and emotional abuse of children.**

One wonders whether John Howard has instructed Federal Ministers to read Alice's adventures, just as Ministers in the Victorian Government were instructed to read the '*Yes, Minister*' scripts some two decades ago. Federal Ministers have subjected children and families in immigration detention, child protection workers, state governments and external critics to the same kind of paradoxical communication and entrapment that Lewis Carroll's characters practiced on poor Alice.

'Double-bind theory' helps explain the impact of such communication. In brief, this theory suggests that, in a relationship that has survival value for the weak, the strong will issue orders or make statements which they require to be obeyed or agreed with. In practice it is impossible for the weaker party to do this. Children repeatedly subjected to such communication frequently develop schizophrenia.

Americans Paul Watzlavick, Janet Beavin and Don Jackson, in their book '*Pragmatics of Human Communication*', provide a simple example of the double-bind by drawing attention to a sign placed on a bridge which spanned an American freeway. The sign said 'Ignore This Sign'. In order to obey,

you must first notice the sign. But noticing the sign violates the instruction to ignore it. You are trapped; no matter what you do you will be wrong.

Lewis Carroll was the master of this kind of communication. Remember his dialogue between Alice and the Red and White Queens? Alice is asked how to make bread. She replies that you get some flour, and is asked where you pick the flour? When she replies that you don't pick it because it's ground, she is asked how many acres of ground she means, and told to stop leaving so many things out. On it goes; no matter what Alice says, she is wrong. Humpty Dumpty in his famous 'when I use a word it means what I say it means' speech spelled out the purpose. It was not about the meaning of words, but about who was in control.

The Federal Government's communication over children in detention mirrors such exercises in control and entrapment. Everyone else has been blamed. The child protection workers who investigated abuse of children at Woomera and seem to have substantiated the existence of abuse (admittedly such words were not used publicly) were wrong, as was the South Australian Government. The trap is sprung tight by the existence of a Memorandum of Understanding which in essence retained the responsibility for protecting children in detention in Woomera (and subsequently in Baxter) in the hands of the Federal Government. Confidentiality provisions prevent the South Australian Government from commenting without Federal permission. So the Federal Government can safely criticise everyone, knowing that the evidence of what abuses have been officially substantiated can never see the light of day.

The Federal Government's paradoxical communication has also been aimed at children and their parents. Fifteen-year-old Alamdar Bakhtiari was interviewed by a Melbourne *Age* reporter Russell Skelton earlier this year<sup>1</sup>. Skelton described him as showing all the signs of institutionalisation (having been in detention for nearly three years). Alamdar said he hated Australia, hated Baxter, but was afraid to leave; fearing the outside world more than his detention. In a curious twist, one of the factors holding up the Bakhtiari family's return to Pakistan (Mr. Bakhtiari had had his claim to be Afghan rejected) was that it was too dangerous for officials

to travel to Pakistan to get travel documents.

An Iraqi family who had been in detention for four years was deported. They were given a one-month tourist visa for Vietnam, and open tickets to fly from there to Syria and Iran, though they had no visas for those countries. They hoped to obtain these in Vietnam. However Australian authorities faxed authorities in Vietnam before the family arrived, warning that they were deportees and to use caution in dealing with them. Not surprisingly they were forced to return to Perth, and detention, after only two days. One of the children was said to have early psychosis. A spokesman for the Minister blamed the family for contacting the media, saying they had been repeatedly cautioned that a high profile would not help them. So we forced them to leave, made this impossible, then blamed them. The trap *par excellence*.

Earlier the link was drawn between such communication patterns and schizophrenia. One would never suggest that the government intends this with regard to children in detention, but it is reasonable to say that they have taken mind games far beyond what is moral or defensible. The distress and damage caused to children and families in detention show this clearly.

In some respects Alice was lucky; she woke up, and her nightmares faded. For children in detention, the nightmares continue, both in the abuses inherent in detention itself and in the double-bind in which the Federal Government has trapped them.

This is a short version of the paper presented by Max Liddell at the 9<sup>th</sup> Australasian Conference on Child Abuse and Neglect in Sydney in November 2003.

## Footnotes

1. Skelton, R. (2003) 'I hate Australia. I am not a criminal, I have done nothing wrong', *The Age*, 28 July: 1.

Editorial Note: Some features of the protocol are reproduced in the Full Court of the Family Court's Judgment in B (Infants) and B (Intervener) and the Minister for Immigration & Multicultural & Indigenous Affairs (2003) FLC 93-141 available at [www.familycourt.gov.au](http://www.familycourt.gov.au). Findings as to harm are found in the subsequent decision of B and B) and the Minister for Immigration & Multicultural & Indigenous Affairs [2003] FamCA 62, not yet reported, at the same site.

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# Possibly dying to seek asylum in Australia, the Land of the 'fair go'

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By Scott Phillips

Posted Friday, November 21, 2003

**It is with great sadness that I read in the press the informed legal view of none less than this country's Solicitor General that the Australian Government effectively has the power to keep asylum seekers in administrative detention until they (the asylum seekers, not the government) die. The Solicitor General was speaking during a hearing before the High Court of the cases put by asylum seekers to have their detention ruled invalid.**

As a citizen of this country who deeply values its traditions of political liberty, I am utterly dismayed to learn that our governmental structures are now so configured that a category of persons can be denied their liberty indefinitely, to the point that they might die in what amounts to political detention.

I could picture a dictatorial government taking such a position, and if I lived in such a country I imagine I would resist and protest against such a manifestly undemocratic and anti-humanitarian regime. In doing so, I would make a stand based on principle – namely, my commitment to ideals such as those enshrined in the institutions of “the rule of law” and, within that, *habeas corpus* (the idea that I cannot be detained unless a judge or court has made a determination of the legality of such detention). Of course, by engaging in any form of resistance and opposition in a context of rule by dictatorship I would most likely put myself at risk of being persecuted or otherwise harassed by the state authorities. Were this to eventuate and I held fears for my safety, and that of my relatives, I would

probably seek asylum in some other country, preferably a democratic country where people's political and civil freedoms were upheld and the rule of law applied.

Such a country would, in people's imaginations, be one like Australia. This is a country which, after all, has projected the image of the society of “a fair go for all”. The “fair go” idea is part of our common parlance as well as our industrial and historical folklore. People (including politicians) have been happy to run with the idea of “a fair go” as something that is central to our policies of social welfare and multiculturalism. And it was also appropriated in earlier iterations of this country's immigration program (for instance, the “Good Neighbour” scheme, whereby Australian citizens welcomed newly arrived migrants and helped them settle into their new lives in a new land). The “fair go” ideal also underscored our Humanitarian Refugee Assistance program.

But if the folklore of this country is built on the rhetoric of “a fair go”, it is important to remember that the reality has often been very different. There has been a much less generous, overtly (and covertly) racist and xenophobic dimension to the story of Australia – for too long and too often brushed under the carpet. But the history of Australia's settlement and the associated mistreatment of the Indigenous peoples is part of the unfinished business of Reconciliation with which we still wrestle to this day. And if I hear another commentator or politician – the good Prime Minister included – write off this concern as “the black armband view of history” I think I will surely weep.

Indigenous Australians' very real and tragic experiences of injustice, institutional racism, marginalisation from employment, housing, and other structures of opportunity are palpable for anyone who has traveled into the urban and regional

communities where our Indigenous brothers and sisters live. There is little of the “fair go” in Namatjira Lane on the fringes of Dareton or on Palm Island or in Logan or in Redfern. What you find in those parts of Australia are conditions which could hardly be described as fair.

The same must be said for our history of immigration policy. This country’s “White Australia” policy is part of a history of xenophobia – and it was a fear not just of foreigners, but of non-White foreigners, anyone who (to use the terms of earlier times) was not “fair skinned”. This was the meaning of “fair” that was inscribed into the song “Advance Australia Fair” and not the sense of “fair” as in socially just and equal treatment. So, the history of our national anthem is one where we have adopted a song which was written originally as an anthem to a country built on the ideal of racial purity rather than one founded on principles of social and political equality.

But the story is not all bad by any stretch of the imagination. As we know, many of the everyday people who have helped to shape this country have done so by seeking to put into place policies, laws and institutions that promote and protect political freedoms and social equality. We should never forget this: that is why we study our history – not only to learn about those areas where our values and actions were found wanting but also to see the ways in which we sought to create, as Eva Cox would have it, a truly civil society.

It is in this context – of our modern commitment to principles of fair treatment of everybody, and our support for universal human rights – that we should be deeply alarmed by the current government’s continuing “hard line” position on the treatment of asylum seekers. To effectively lock people up and throw away the key, when their only “crime” is to have sought our help in the face of political oppression, is the most enormous contradiction imaginable for a country allegedly committed to “a fair go for all”.

We must, as the citizenry, demand that our government desist at once from its policy of mandatory detention of asylum seekers. If we are to be true to our community standards, it is time for the community to show leadership to the government, so that it is finally brought kicking and screaming

along with the community. A good government is one that shows moral leadership to its community of electors, and can bring the community along with principles of justice and fairness. At present we seem not to have such a government.

So the community must exercise this moral leadership. We must do so by means that are wholly reasonable and peaceful. But we must speak out more definitely and decisively in support of a fair go for people – especially those who are seeking safe haven from political imprisonment and injustice. To simply throw them into jail here (or to tow them back out to sea and cast them adrift to the winds of fortune) is morally unacceptable. We should at the very least bring such asylum seekers ashore, feed them and shelter them while we make a determination on their claims to be legitimate refugees. Anything less surely must fall below our community standards of “a fair go”.

It is time for the community to make a stand. Otherwise these people – men, women and children – who are dying to seek asylum may end up dying in detention in the land of the fair go. Could there ever be a greater or crueler irony? Before you attempt to answer this question, I would encourage you to see the newly-released film *In This World* which depicts all too graphically the trauma which asylum seekers experience in their quest for a better life. If we are a humanitarian nation (as our new Immigration Minister would have it) then the community needs to show the government what we mean by that. As Mahatma Ghandi once said, we must “be the change we wish to see in the world”. If we value freedom and justice, we must campaign – reasonably, peaceably and determinedly – to enable asylum seekers to exercise their human rights. We must let these people be free while we see how, as a national community, we might help them. We must never surrender in advocating the justice of that moral position. Letting asylum seekers die in indefinite detention should not be part of the story of Australia.

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# Legal Cracks in the Immigration Barbwire?

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**The plight of detained asylum seeker children in Australia has been under the legal spotlight recently in the Commonwealth courts. Danny Sandor, a former President of DCI-Australia, summarises recent developments.**

## Introduction

The facts speak for themselves on the importance of the subject.

Departmental data as at the end of October identified that there were 96 children in immigration detention (excluding Nauru). April data from the same source had found 50 children to have been detained for over two years. Departmental statistics again show that 90 per cent of children are found to be refugees and are released into the community.<sup>1</sup>

On 10 December 2003, the then President of the Law Institute of Victoria estimated that 100 children were in detention centres in mainland Australia and a further 83 were detained in Nauru.<sup>2</sup> Mr. Howard Glenn, a spokesman for the advocacy group “A Just Australia” has a consistent view. He is more recently reported to have said that “most people did not know who was still being held but knew there were about 200 children left, including more than 90 exposed to the trauma of a hunger strike on Nauru.”<sup>3</sup> So what do we know?

We know that putting children in these cages is morally wrong. We know that it is the rule of Commonwealth Government policy. And we know that what the Commonwealth Government does is a purported reflection of our will as an Australian community. That’s the so-called “Australian way” they are claiming to preserve through the rule of automatic incarceration.

It’s the rule of the majority though. After all, in a

splendid display of exercising our human rights in a democracy, we – and I use the term loosely – elected the Government.

Is locking up kids and damaging them deeply the rule of law?<sup>4</sup> Fingers crossed, maybe not. It’s now up to our High Court to decide two different angles to the question.

## The Family Court’s Welfare Jurisdiction over Children

The welfare jurisdiction is ancient in its origins and wide in its ambit. Traditionally known by its latin label of *parens patriae* it derives from the responsibility of the English Sovereign for subjects who required protection, such as children and the poor. It is not limited to “citizens” and became vested in Australian courts by various historical developments. For the Family Court of Australia, the protection was emphatically expressed by the Commonwealth Parliament through the enactment of section 67zc of the *Family Law Reform Act 1995 (Cth)* (“the *Reform Act*”) which amended the *Family Law Act 1975 (Cth)* (“the *FLA*”).

Around the time of the *Reform Act*, a speech by Chief Justice Alastair Nicholson characterised the immigration detention of children as “antithetical to the welfare of a child” and he queried whether the welfare jurisdiction of the Court may have some application in respect of such children.<sup>5</sup> That question was squarely raised and answered by the Full Court of the Family Court in the 2003 case of *B and B*<sup>6</sup> in which it was central to the children’s arguments that detention was causing significant harm to their welfare.

The jurisdiction was invoked for two alternative purposes. The children asked the Court to order their release from detention or, if that was not found

to be legally possible, they asked for orders against the Minister for Immigration & Multicultural & Indigenous Affairs concerning their welfare and protection while detained.

All three Judges of the Full Court decided that the welfare jurisdiction enables orders directed to the Minister to protect the children from prospective as well as present harm and to safeguard their welfare. The Court was divided on the question of release. The Chief Justice and Justice Stephen O’Ryan found the *Migration Act* 1958 (Cth) did not operate to oust the Court’s welfare jurisdiction and that a court would have power under that jurisdiction to make orders releasing the children from detention if, on the found facts, detention was harming their welfare and, within the reasoning of recent Federal Court of Australia decisions, if such detention could be characterised as “indefinite”. The third member of the Full Court, Justice John Ellis considered that constitutional limitations would not permit such an order

The Full Court remitted the case for trial so that the facts could be ascertained and then the law as decided then applied to the case.<sup>7</sup> In the end result, and after a further appeal to a differently constituted Full Court,<sup>8</sup> the release of the children was ordered on an interim basis and they are now living outside of the detention centre environment.

The Minister successfully sought to have the decision taken to the High Court which has heard argument and reserved its decision until it has also considered the Minister’s appeals against the Federal Court decisions on which the Family Court relied.

Even if the Full Court’s reasoning is upheld by the High Court, and even if it is found that the immigration detention of children by Executive or Parliamentary Act is unconstitutional, it should not be expected that the High Court’s deliberations will alter the position of detained adults with children so far as release is concerned. A case known as *KN v SD and Secretary, Department of Immigration & Indigenous & Multicultural Affairs*<sup>9</sup> decided by the same Full Court as *B and B* highlights the distinction.

## The Detained Parent

KN is a citizen of the Russian Federation who arrived in Australia using a false passport. She stated that she had fled Vladivostok, fearing for her life and described events that the trial Judge said were “frightening and terrible”. These included her witnessing a murder in a nightclub and enduring rape on a number of occasions by casino security guards and local police. After giving birth to a son, she was placed in immigration detention as an unlawful non-citizen and the child lived in the community with his father. Pursuant to section 198(6) of the *Migration Act* 1958 (Cth), she was liable to be removed from Australia “as soon as reasonably practicable”, broadly speaking, when her review and appeal rights under the scheme of that act are exhausted.

One of the principal arguments rejected at trial and renewed on appeal, was that the meaning of “reasonably practicable” is to be construed with regard to the objects provision of Part VII of the *FLA* such that it creates an ambiguity that enables a Court to find that the statutory duty to remove a parent from Australia pursuant to the *Migration Act* does not apply.

Section 60B of the *FLA* speaks of the “right” of the child to know, have contact and be cared for by both of his or her parents. The essence of the mother’s argument was that her removal is not “reasonably practicable” if it interferes with the child’s section 60B rights and his best interests, which she contended it would.

All three members of the Full Court found it necessary to consider whether that section confers upon children a fundamental right, freedom or immunity which may only be overridden by express and unambiguous legislative provisions to the contrary. No other exception to the mandatory language of section 198(6) was submitted to apply.

A majority of the Court<sup>10</sup> proceeded on the basis that *B and B* had decided that the United Nations Convention on the Rights of the Child (“UNCROC”) had been incorporated into domestic law by provisions such as section 60B of the *FLA* which was introduced by the *Reform Act*, and that

the Convention provides a source of constitutional power to make orders in the welfare jurisdiction conferred by section 67zc *FLA*. The majority held, however, that the rights set out in section 60B are subject to the best interests test and thus not absolute rights even though they may be characterised as fundamental rights.<sup>11</sup> It was further explained:

“73. The rights contained in s.60B concern those of the children, not parents. We therefore see difficulty in a parent seeking to rely upon them in proceedings relating to themselves and not the child. ...

75. The reality is that the Migration Act operates in such a way as to negate fundamental rights conferred by Acts such as the Family Law Act and international instruments such as UNCROC. However, it is the role of the Parliament and not the Courts to determine these issues in circumstances where the intention of Parliament is clear, as we think that it is in this case.

76. We think it clear that this part of the Migration Act is expressed in terms that override Australia’s international obligations (UNCROC) as incorporated in Australian municipal law and also the Act. If this is so then it is apparent that the effect is to override the rights of an Australian child to know and have contact with one of his parents who entered Australia on a false passport.

....

77. ... in our view, rights conferred by s.60B and UNCROC cannot be interpreted as interfering with the reasonable practicability of removing the mother pursuant to s.198(6) of the Migration Act.

...

79. Of course, in some cases, there may be real impediments to the removal of the person concerned as considered by the Federal Court in *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri* (2003) 197 ALR 241 and by this Court in *B and B and Minister for Immigration & Multicultural & Indigenous Affairs* (supra).”

The majority concluded their reasoning saying:

“80. ... this case falls into a different category to

*B and B and Minister for Immigration & Multicultural & Indigenous Affairs* (supra). That case involved an application under s.67ZC of the Act seeking that the Court exercise its welfare jurisdiction. No such application was made here. Secondly, that was a case involving the detention of child asylum seekers which clearly distinguishes it from the instant case.”

## A Direct High Court Challenge

In the course of the High Court hearing argument concerning the Minister’s appeal against *B and B*, Justice Michael McHugh questioned the constitutionality of the laws empowering the immigration detention of children. Following that lead, on 31 October 2003, in a case distinct from family law, an application was made for writs of Habeas Corpus and Prohibition concerning four Afghan children who had been detained for 33 months, most recently at the Baxter detention centre.<sup>12</sup>

The essence of those writs is a claim that the children are unlawfully detained and have a right to be released. This claim is different to the proceedings in the Family Court where the children were claiming it is not in their best interests to be detained and the court should make a discretionary decision to release them.

Justice Kenneth Hayne of the High Court agreed that the application should be heard by the Full Bench of the High Court and this is due to take place in February 2004. Former Solicitor-General for the Commonwealth, Dr Gavan Griffith QC representing the children, told Justice Hayne that it will be argued that:

“... the power to make laws authorising immigration detention extends only so far as is reasonably capable of being seen as necessary for immigration purposes, that is, to admit or exclude aliens. Secondly, laws authorising administrative detention which exceed those limits are inconsistent with the separation of judicial power derived from Chapter III of the Constitution, and are constitutionally invalid. Thirdly, children have a special status and vulnerability, as long recognised at common law, and are owed

special duties of protection by the Crown. Fourthly, section 196 authorises prolonged and indefinite detention until removal, deportation or grant of a visa. Fifthly, the prolonged detention of children, insofar as it is purportedly authorised by section 196, is not reasonably capable of being seen as necessary for immigration purposes and exceeds the limits laid down in [the case of *Lim*]. Lastly, section 196 by way of conclusion is invalid in its application to children, and must be read down so as not to apply to children ... [see] section 15A of the *Acts Interpretation Act* and section 3A of the *Migration Act*.”

## Conclusion

If the High Court were to accept Dr Griffith’s argument and also the reasoning of *B and B*, it would represent radical developments for the human rights of detained children. The release of their parent(s) would still, however, remain reliant on the discretion of the Minister. But *B and B* has much more far-reaching potential. It is the first case to decide that UNCROC has been incorporated into domestic law, in that case by the *Reform Act*’s amendment of the *FLA*. Should the High Court agree, this would represent a quantum leap in the law for the rights of children in Australia – and not only those behind the barbwire.

Hand-wringing and doom-saying might go on in Canberra or in State and Territory parliaments over such a finding. But expect a yawn from the many more countries in which ratifying a convention like UNCROC automatically gives it local effect, unlike Australia where it doesn’t. In the past, Australia’s dismissive stance in respect to compliance with UNCROC and other human rights treaties has been illegitimately justified by the Commonwealth Government in the name of “sovereignty”.<sup>13</sup>

It would be a nice turn up if the ancient responsibilities of the Sovereign to children now vested in our courts perforated that smug excuse. A most traditional paternalistic answer to a present and dire human rights disgrace. It almost sounds like a Howard Government solution to a “social issue”.

## Footnotes

1. “It’s time – release all children and their families from immigration detention”, Press Release, Human Rights and Equal Opportunity Commission, 7 November 2003.
2. B. O’Shea “Why Australia needs a bill of human rights” *The Age Newspaper*, 10 December 2003.
3. P. Debelle “Hints of Free Thinking” *The Age Newspaper*, 21 December 2003, available at <http://www.theage.com.au/articles/2003/12/20/1071868697291.html>.
4. M. Liddell and C. Goddard “The Nightmares of Detention” *The Age Newspaper* 8 December 2003 available at <http://www.theage.com.au/articles/2003/12/07/1070732069774.html>
5. It may be that one avenue is the Family Law Act and the Court’s wide inherent jurisdiction to protect children. To my knowledge, a case concerning the children of asylum seekers or children who are themselves asylum seekers has not yet been brought. It would of course depend upon the particular facts, but such a case would raise interesting questions.”: 19 July 1995, “Children First! The State of Young Australians” cited by R. Ludbrook, R. (1995) “Young Asylum Seekers - Haven or Hell?” in White, R. and Guerra, R. (Eds) *Ethnic Minority Youth in Australia : Challenging the Myths*, National Clearinghouse for Youth Studies, Hobart at 103
6. *B (Infants) and B (Intervener) and the Minister for Immigration & Multicultural & Indigenous Affairs* (2003) FLC 93-141.
7. The Full Court rejected an application by the Minister that remittal be stayed pending the determination of the appeal to the High Court: see *Minister for Immigration & Multicultural & Indigenous Affairs and B and B* (2003) FLC 92-142.
8. *B and B and the Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FamCA 62, not yet reported, (per Kay, Coleman and Collier JJ) available at <http://www.familycourt.gov.au/judge/2003/pdf/bb3.pdf>
9. (2003) 30 FamLR 394.
10. Nicholson CJ and O’Ryan J; Ellis J agreeing in the result for differing reasons.
11. The majority’s approach in this regard rejected the proposition that fundamental rights and freedoms can only be conferred by the common law; see par 69.
12. Applicants M276/2003, Ex parte - Re Woolley & Anor [2003] HCATrans 445 (31 October 2003) transcript available at <http://www.austlii.edu.au/au/other/HCATrans/2003/445.html>.
13. D. Sandor (2000) “The Sorry and Shameful Saga of Mandatory Detention Laws in Australia” Vol. 13 No. 3 *International Children’s Rights Monitor*, pp. 16-23; H. Charlesworth (2000) “The UN and Mandatory Sentencing” *Australian Children’s Rights News* (No. 25), Defence for Children International – Australia

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# Inquiry into “joint custody” report released : what does it mean for children?

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**The House of Representatives Family and Community Affairs Committee into child custody arrangements has released its report “Every picture tells a story” after a hectic 6-month inquiry that received more than 1700 submissions.**

## **The 50:50 proposition**

The Committee supported the value of “shared responsibility” in decisions about their children’s schooling, religion, health and place of residence but did not recommend a starting-point presumption that children should spend equal time with both parents, as flagged by the Prime Minister, John Howard before the inquiry began. Although 50:50 shared residence for children in separated families was supported by some groups, and especially the father’s support groups, the Committee accepted the dangers of “a one-size-fits-all” legal approach to families and recognized that practical problems including distance, second families, and the lack of family-friendly workplaces.

The Chief Justice of the Family Court, Alastair Nicholson welcomed many of the recommendations and said in an opinion piece in *The Australian* on 30 December 2003 that:

“A presumption in favour of shared parental responsibility - not equal time - as the first tier in post separation decision-making is a sensible one. It is one that has always been encouraged by the court in those instances in which the child’s best interests would benefit from it. An appropriate public education project as suggested by the committee would be helpful in this regard. ... It is equally as important, as the committee has recognised, that such responsibility not be shared in cases where there is an entrenched conflict, family violence, substance abuse and serious child abuse, including sexual abuse. It is impossible for parents to share responsibility in these circumstances and the committee’s recommendation is a welcome recognition of this fact.

I have some concerns that the committee has underestimated the number of these cases and how and by whom they might be identified. It is not always easy to do this in the early stages of a family dispute and such cases form the bulk of

children’s matters heard in the court and will continue to do so under the committee’s proposals.”

The positive aspect of the discussion generated by the inquiry is the potential to increase awareness of the importance of children being able to maintain real relationships with both their parents and parents being able to continue to be involved in their children’s lives in a meaningful way, not just as regular or not-so-regular visitors.

The inquiry recommendation is also an acknowledgement that there are real concerns for the safety of children in some families. As Chief Justice Nicholson has said:

“The committee has pointed out, there are too many cases where the gap between the family law and child protection systems leads to children falling through the cracks. Significant expansion of the contact orders program and the children’s contact services are also highly desirable. Some great work has been done in both areas but their utility has been very much restricted by a shortage of funds.”

The recommendation for an “investigative arm” of the tribunal picks up on the Family Law Council recommendations which have not as yet been addressed or even responded to by the government. “Significantly reducing” the role of the courts, and limiting it to cases involving entrenched conflict, family violence, substance abuse and child abuse, including sexual abuse” might sound useful but how is this determined in advance in a given case? By the claim of one party? Streaming cases on this basis has the potential for enabling one party to divert the proceedings from the proposed tribunal to a court.

## **Tribunal recommendation**

The report has received less support from a number of quarters in relation to the recommendation to “establish a national, statute based, Families Tribunal with power to decide disputes about shared parenting responsibility with respect to future parenting arrangements that are in the best interests of the child/ren, and property matters by agreement of the parents.” The positive aspect is the proposal that the Families Tribunal should be “child inclusive, non adversarial, with simple procedures that respect the rules of natural justice”. But what this means

in practice has not been spelled out. Certainly increasing evidence shows that children feel that they often have no say in the decisions that are made about them and the inquiry has acknowledged the value of children's voices being heard in these processes. While children generally do not want to make the decision, they do want their views to be heard and especially in relation to maintaining easy access and contact with both parents.

The concern about the Tribunal proposal is that it will add another layer to the process and become "just one more place you have to go while reaching the same result" It also underlines how the Federal Magistrates Court has not served the main aim of its establishment - dealing with the "simpler" cases in a "simpler" way. Chief Justice Nicholson's opinion piece said any additional resources would be better directed to enhancing the current system than into new tribunals of dubious legal validity.

"... I am not sure that it would achieve what it seeks to do. Its effect would be to create a first tier decision-maker before there is access to the Courts with no legal representation or even a right to an interpreter. ...

The suggested structure is that of legal chair and professional members drawn from mediation and child psychological sources. Experience does not suggest that such a structure is any more efficient than a Court and it may well be less efficient."

The absence of a right to interpreters at tribunal hearings would be completely at odds with the purported claim that the tribunal would be "child-centred" and "respect the rules of natural justice" when many parents do not have the facility to use English in such a forum. It is difficult to see how it can adhere to "natural justice" in such circumstances.

## Research recommendation

Another positive aspect of the report is the recommendation that "a longitudinal research project on the long term outcomes of family law judicial decisions should be undertaken and incorporated into judicial education programs". For too long, important decisions about children's lives in family law and in child welfare have been made in the absence of real information about the long-term outcomes. This is a suggestion that would be welcomed by DCI-Australia.

When asked by the Committee in the course of its hearing 'Is there any process that exists within the court system where a judge can learn from their determinations in order to try and make better determinations in the future?' one of DCI-Australia's Advisory Committee members, Justice Richard Chisholm, responded:

It would be wonderful ... to be able to have access to information about the consequences of our

decisions. It might be painful in some cases to look at them, but as an educational thing ... it would be very good. (para 4.29)

As Justice Chisholm pointed out, however, there are privacy issues to be considered especially in the light of the changes to the Commonwealth Privacy Act which inhibit critical research in sensitive areas like this. They risk making some research impossibly difficult and/or expensive to the detriment of children. The Government response to the Committee's recommendations must not duck this core obstacle if it is serious about evidence based research – and the same is true for the opposition parties.

## Conclusion

So where to from here? The Committee's recommendations are only that -recommendations. And they will require both legislation and funding. Even though the Committee of backbenchers was bipartisan and its recommendations were unanimous, this is no assurance that a bill giving effect to its proposals will be adopted as the policy of any of the parties or that the necessary funding is provided. And the devil is always in the detail of not just the legislation but of course the price tag associated with implementation.

Before anyone gets too excited – for or against the Committee's proposals – let's wait to see the formal Government response. It may never happen as in the case of the still awaited Government response to the 1997 *Seen and Heard : Priority for Children in the Legal Process* report by the Human Rights and Equal Opportunity Commission and the Australian Law Reform Commission. A good deal of that report was devoted to children in the family law system. If the Commonwealth Government remains unable or unwilling to respond to the whole of the *Seen and Heard* report, the least it can do is make sure that its announced stance concerning the recent House of Representatives Family and Community Affairs Committee comprehensively encompasses the directions suggested by both Commonwealth auspiced inquiries in the private family law area.

Our current Prime Minister didn't ask for the *Seen and Heard* report or its recommendations. It was commissioned under the previous Keating Government. But just like children caught up in family law disputes, you don't always get what you want. Nor can or should Mr Howard think he can shirk responsibility and get away with it. *Seen and Heard* is not and must not be treated as the ugly step-child. Children and their rights do not vacate their vulnerable positions following elections.

**For copies of the report contact the Committee Secretariat on (02) 6277 4566 or visit the inquiry website at [www.aph.gov.au/house/committee/fca](http://www.aph.gov.au/house/committee/fca) We welcome your response to the report: please email your views to me at [info@dcj-au.org](mailto:info@dcj-au.org) for inclusion as "opinion pieces" in the next edition of ACRN.**

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## Updates on the rights of 'donor children' to know their parents in NSW

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Under draft legislation tabled in the NSW Parliament, a sperm donor register will be established in NSW and children conceived via sperm donor programs will have the right to find out the identity of their parents.

The bill will mark an end to the anonymity previously associated with sperm donations.

“Once they become adults, people conceived through assisted reproductive techniques (ART) will have the right to access identifying information about their genetic heritage held on the register,” said the NSW Health Minister Mr Iemma.

Some people are disappointed, however, that the legislation is not retrospective and will not help children conceived in this way in the past.

This position was justified by Mr Iemma on the grounds that “people in the past have donated on the understanding that their identity would be kept confidential and we will not betray that trust.”

Twenty-five years on from the birth of the world's first test-tube baby in 1978, around two in every 100 pregnancies in Australia are now a result of in-vitro fertilisation (IVF).

Other key proposals in the legislation to be debated next year include:

- o Limiting the number of children who can be conceived from one donor.
- o Setting time limits for the storage and use of sperm and eggs.
- o Banning American-style commercial surrogacy.

*Source: The Sun-Herald December 7, 2003*

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## Where are children's rights in holiday deals for sperm donors??

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A further news report indicates that the ethical issues associated with assisted reproductive techniques are alive and perhaps not so well. According to a recent report on News.com.au (*Sperm exchanged for holidays*), an Australian fertility clinic has been inundated with inquiries from “half the world” after advertising in Canada for sperm donors. The Reproductive Medicine Centre in Albury, in desperate need of donors, has offered free holidays to Calgary men willing to donate sperm.

The clinic advertised in the sports section of Alberta's Calgary University student newspaper offering sperm donors a \$7000 package which includes a free return trip, accommodation for a fortnight and a daily spending allowance. The clinic said that it only advertised in Calgary because one of its gynaecologists has contacts there who can help screen potential donors.

But responses have come from across the world as far away as the Ukraine and Russia.

The clinic claimed that it is preparing to meet legislative change by the NSW Government to allow children conceived by such means to learn who their biological parents were. Although the law is not yet in place, the clinic says it needs to prepare itself by collecting sperm from identifiable donors. Donors must also be willing to be identified in confidential records, although they would have no legal responsibilities for any children.

The clinic's approach is highly problematic because it is illegal in Australia to pay sperm donors. It is also illegal to import frozen sperm. There is a limit here of 10 families who can use sperm from one donor.

Leonie Hewitt from the Donor Conception Support Group (DCSG) is very critical of the Albury clinic's approach and says that Australia is sadly lagging behind the world as far as legislation is concerned

and with these sorts of attitudes. The DCSG has already had a number of emails from Canadian men wanting to take up the offer from this clinic although it has had no involvement in this international drive for donors.

“ It is quite unacceptable to recruit Canadian men and bring them over to Australia and pay their air fares, accommodation and a daily allowance. It is also illegal.” Said Leonie Hewitt.

Most importantly it flies in the face of the spirit of the legislation which aims to allow children to know who their biological parents are and does not comply with the SW Human Tissue Act and the guidelines of the National Health and Medical Research Council and Reproductive Technology Accreditation Committee.

*Source: The Sun-Herald December 7, 2003*

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**home page:**

**<http://www.dci-au.org>**

**email: [info@dci-au.org](mailto:info@dci-au.org)**

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## Battle of the exes

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**The battle for residence and contact between parents after separation and divorce is of course not unique to Australia. UK fathers who have to fight for every moment with their own children in the aftermath of break-ups claim that family law is becoming even harsher on men, write Anushka Asthana and Jamie Doward**

Sunday October 26, 2003  
The Observer

Shortly before he was arrested by a group of apologetic-looking policemen, Batman made a speech. ‘I can see my four children. But I did this for all the others that are going through the hell I suffered. If your house is on fire and all you need is a fire engine, the family court system would come and pour napalm over it.’ For Batman, aka Edward Gorecki, spending three days on the roof of the Royal Courts of Justice last week dressed in the garb of Gotham City’s most famous resident - and armed only with a plastic sheet for protection from the elements - was an act of desperation.

Along with his Robin - accomplice Jolly Stanesby - Gorecki donned a skin-tight outfit and climbed to the courts’ roof to unfurl a huge banner that read: ‘Caped Crusaders for Justice, Stop family law injustice today’. When they finally climbed down to cries of ‘We love you, Batman’ from their supporters below, the pair’s faces were tinged red, they were shivering and coughing uncontrollably, but neither of them could wipe the smiles off their faces. They believed that they had alerted the world to something they claim has long been overlooked: when it comes to equality, men are getting a raw deal.

One of the group of fathers outside the courts offered himself as an example. He has a young daughter. When she was two years old her mother stopped all contact between them, he claims, with no explanation. He took the issue to court and, after a six-month wait, was told that he could spend two hours once a fortnight, plus every other weekend, with his daughter.

He was forbidden contact with his daughter on any other day, despite living only three miles away from her mother who, he says, works part-time and receives benefits to help with child minding. He asked if he could look after his daughter instead of paying for a minder, but this was refused. Thinking it would help, he trained and became a registered child minder. He is now qualified to look after other people's children, but he is still allowed to see his own daughter only at designated times.

Welcome to the new sex war, a murky, Balkanised conflict fought on many fronts. Because of its deeply divisive nature, for every statistic suggesting that men are hard done by, there is another that will confirm the opposite, making attempts at any form of consensus almost impossible.

The argument splits into two separate, but related, strands - the financial and the legal. The latter centres around fathers who are incensed about what they see as the law's long-standing failure to recognise their rights to see their children.

The former, however, has emerged as an issue only recently as the courts, some now argue, have started to split divorced couples' assets on much more favourable terms to women than they did five years ago.

'In the last two to three years the case law has changed quite dramatically to give women a much bigger share of the combined wealth in the marriage,' said Toni Pincott of accountants Grant Thornton, which today publishes research showing that, in the majority of the

UK's 160,000 divorces each year, women receive 60 per cent of the assets, with men taking the remainder.

In 6 per cent of divorces, the accountancy firm found that women end up with 70 per cent of the assets. Only in 14 per cent of divorces are the assets split equally. In the vast majority of cases women get the house, its contents and the family pet. Men get the car and any investments.

Legal experts say it is simply a question of the UK playing catch-up. 'By and large we're moving towards equality and it's been pretty dramatic over the last two to three years. English courts are now the most generous to women in Europe - certainly at the upper end,' said James Ferguson, Head of Family Law at Taylor Wessing.

Some things, though, don't change. A straying partner is still the main cause of a divorce with 30 per cent of marriages ending due to affairs. In such cases the gender split was almost equal, with 45 per cent of women committing adultery, compared with 55 per cent of men.

But the legal and financial strands make for a curious tension. On the one hand, men increasingly feel they are taking a battering in the divorce courts. And certainly anecdotal evidence provides them with some ammunition. Pincott is a forensic accountant, someone whose job it is to uncover hidden assets. She says demand for her services has rocketed as more and more women seek bigger divorce settlements and hire experts to rake over every aspect of their husband's finances.

But on the other, while men are paying out more in the divorce courts, campaigners argue they are getting little in return when it comes to justice in the family law courts.

'Custody rulings appear to be based on the "sugar and spice and all things nice" school of biological determination rather than on

anything more significant. If a woman mothers a child, a warm universe of nurturing is conjured. If a man fathers a child, it simply implies nothing more than the swift biological function involved in the procreative act,' Bob Geldof writes in his new book, *Children and their Families*.

Geldof concludes the entire system needs an overhaul:

'When it comes to access to children, divorced men haven't a chance. Family law as it currently stands does not work. It is rarely of benefit to the child and promotes injustice, conflict and unhappiness.'

Last week similar sentiments transformed themselves into people-power when hundreds descended on Parliament to highlight the current system's inadequacies. One of the campaigners' chief concerns is that those mothers (and in more than 90 per cent of cases it is mothers who end up with the children) who deny fathers access are unlikely to be punished in the courts.

Judges take the view that prison sentences or fines are unlikely to help the children and as such access rights are routinely flouted. Government statistics show that every year the family courts make more than 50,000 enforcement orders but around half are ignored.

The campaign group Fathers 4 Justice, which mounted the Batman and Robin protest, says that as a result 100 men are losing touch with their children every day.

The group has a thick file of case studies to back up its claims. In the most extreme example, it cites the case of Mark Harris, who has had 133 orders broken by his ex-wife. Another man was sentenced to 84 days in prison for sending his son a text message on his fifteenth birthday - it was outside the times he was allowed to make contact.

It is the number of men telling stories of hardships that Fathers 4 Justice says leads it to take direct action about the cause.

But there is another aspect to this, showing the difficulties that women go through after divorce and highlighting of the methods used by 'militant' dads to make their point.

The domestic violence campaign group, Women's Aid, cites one case where a woman was allegedly surrounded by a group of men from Fathers 4 Justice who peered over her shoulder. They also point to the number of women who get dragged through court time and time again when they have good reason to reduce contact.

The Children and Family Court Advisory and Support Service (CAFCASS) refuses to hold talks with Fathers 4 Justice after its supporters painted the service's office doors purple and upset staff. 'I have no sympathy for them,' says Jonathan Tross, the chief executive of CAFCASS. 'I understand people who feel grief at the loss of their children, but they are going about it wrong.'

The group itself denies ever using intimidating techniques and instead says that its protests are fun that will get it noticed. Fearful of the financial and legal implications that divorce now entails, men's rights groups say that marriage is increasingly treated with hostility.

'I would avoid marriage if at all possible. I put all my property on the line and I don't see any advantages. It takes two to get married, but only one to get divorced. Why risk it? Cohabit instead,' said Jim Parton, of Families Need Fathers.

Male View magazine claims: 'Men who do get married are increasingly hesitant about having children, with the result that our population is now declining.' It is a startling claim, but emblematic of the way a significant, not to mention sizeable element, of the population now feels.

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# Protecting and Advancing the Interests of Children - Child Protection in South Australia (the Layton Report)

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**The Review of Child Protection in South Australia was one of the first initiatives of the current South Australian Government. In March 2002, Ms Robyn Layton QC was appointed as the independent Chair of the review process. The inquiry received over 200 written submissions and undertook more than 80 consultations with experts in Australia and overseas, community organisations, parent and youth consumer groups, advisory committees and government agencies and services within South Australia.**

The Terms of Reference were:

- (a) To deliver a plan to the Minister of Social Justice that provides effective strategies to improve the provision of child protection services in this State and ensure better outcomes for children, young people and their families.
- (b) Examine the adequacy of the SA criminal law and police procedures in dealing with child abuse.
- (c) Provide advice to government on the strategies and systems required to achieve a whole of government coordinated and integrated response to the protection of children.
- (d) Provide advice to government and consider legislation to ensure organisations protect children from sexual and physical violence whilst in their care. Particular attention will be given to screening mechanisms for checking suitability of employees/volunteers, policies, procedures and training.

The 206 Recommendations are far reaching and

encompass statutory protection for child and youth interests; early intervention and prevention; interagency collaboration; Family and Youth Services; mandatory reporting; alternative care; children and the courts; child death and serious injury review; education and training.

The Review developed an overall State Plan for Child Protection which incorporates structural and systemic changes focusing upon improving outcomes for children, young people and their families and sustaining a skilled work force.

## Major structural reforms

Five major structural reforms are recommended:

- A Child Protection Board with functions embodied in legislation and reporting to the Premier. Membership of the Board would comprise:
  - an independent Chair,
  - Chief Executives of all Departments, the Crown,
  - the Commissioner for Children and Young Persons, and
- Local Government, non-Government and academic representation.
- Regional Child Protection Committees to focus on inter-agency collaboration and provide a link between the Child Protection Board and inter agency case management committees at the local level;
- A Commissioner for Children and Young Persons established under specific legislation. The Commissioner's role would be underpinned and guided by the Convention on the Rights of Child and its

functions would include promoting the voice and participation of children and young people throughout all areas of government, non-government and the community generally, scrutiny of government policy and legislation; and research. In recognition of the urgent and specific issues facing many Indigenous children and young people it is proposed that there be an Indigenous Deputy Commissioner;

- A Guardian for Children and Young Persons' located within the Office of the Commissioner for Children and Young Persons. The statutory position would provide a means for ensuring that the statutory duties of the Minister in relation to children under Guardianship, and all children in out of home care, residential care and secure care are appropriately fulfilled;
- Appointment of a Child Death and Serious Injury Review Panel to provide a multi-agency and multi-disciplinary focus on child death reports and identify preventative and early identification processes which could improve the health and well being of children at risk.

## Early Intervention and Prevention Framework and Services

While the Review notes that there is some debate about what early intervention and prevention means, it is clear that the research shows that there are better outcomes if support and services focus on the environment of the child in the developmental stages from 0 to 3 years.

The Review recommends that the early intervention and prevention service framework include:

- Universal home visiting commencing in the antenatal period and following through after the birth of the child;
- Extending and improving the respite and emergency care services;

- Expansion of counselling and therapeutic services for children and young people;
- Increasing the range, nature and availability of parenting skills programs;
- Establishment of therapeutic and treatment services for parents and caregivers who abuse children and young people emotionally;
- Provision of sex offender treatment programs in prison and in the community.

[The government embraced the recommendation for a universal home visiting service which will include referral to support services if needed, and the \$16m program, *Every Chance for Every Child*, was announced in the May Budget.]

## Family and Youth Services

Strong evidence was put before the Review concerning many families missing out on services partly because of the screening process for child protection notifications.

The Review recommends a shift in practice for FAYS towards assessment of needs rather than focusing upon investigating incidents.

Recommended changes include:

- Co-operative interagency case management at a local level;
- Provision of specific services to meet the needs of adolescents at risk;
- Improved recognition of the skill and expertise required for front-line FAYS workers through reclassification of positions or increased promotional opportunities;
- Establishment of a complaints mechanism which includes an independent decision-making body;

- Improved training and development and an appropriate workload management system.

## Reform of the Justice System

Proposals for reform of the justice system encompass the criminal justice system, the Family Court and the Youth Court and include:

- Allowing different forms of evidence of children to be admitted other than by direct appearance of a child in Court, including pre-taped video evidence (the 'Pigott' system);
- An improved Children's Witness Service to support children who give evidence through a video recording or direct video through to the Court;
- Diversionary processes for child sexual offenders, including the option of instituting 'civil proceedings' against offenders who do not admit their guilt;
- Family and Youth Services involvement in cases notified to the Family Court;
- Extension of the Magellan program specialised intervention system;
- Enabling the Youth Court to make orders that parents undergo assessment in order to assist the court with decision-making.

## Education and Children's Services in Child Protection Reform

The Review identified a need to improve recognition and support for the role of schools and children's services in community education and development, as well as their service role in supporting children and young people and their families. Proposed initiatives include:

- Improved school based counsellor/social work support;

- Development of collaborative education and community based initiatives;
- Improved focus on child protection linked to child education outcomes and retention rates.

## Screening and Monitoring of Persons Working with Children

A statutory scheme is recommended for screening and monitoring of persons who are working with children, whether as volunteers or employees in education institutions, sports or recreation bodies or religious organisations.

## Training and Education

Recommendations concerning training and education focus upon multi-disciplinary and inter-agency training; community education; review of programs involving the higher education sector and judicial training.

## Children in Detention

The Review took the position that children in detention are at serious risk of abuse and recommended the State Government urge the Federal Government to release the children and their families into the community on a cost sharing basis.

## Legislative reform

Implementation of the recommendations of the Review will require significant legislative change across several Acts, in particular in the area of child related employment for screening and monitoring purposes and for the establishment of the Commissioner for Children and Young Persons and the Child Protection Board.

### ACTION SINCE RELEASE OF THE REVIEW REPORT

The Review report, *Our Best Investment – A State Plan to Protect and Advance the Interests of Children*, was released in March 2003. A whole

of Government response to the Review is currently being developed and this process has involved:

- An **Inter-government Committee** comprising Chief Executives from the Department of Justice, Human Services, Education and Children's Services and Aboriginal Affairs and Reconciliation;
- A **Senior Officers Group** (led by the Department of Justice) that is responsible for coordinating the preparation of the draft response;
- **Eighteen Task Groups** with membership from Government departments and service providers whose role included:
  - o Assessing the merits of the recommendations and advising the Government on their position in regard to the recommendations;
  - o Outlining the implications of the recommended position in relation to estimated budgets and urgency for implementation.

On 14 October 2003 a detailed response and presentation was provided to the **Inter-Ministerial Committee of Cabinet** established to oversee the development of the Government response.

The Minister for Social Justice also called for community feedback on the Review report in July 2003 and a variety of agencies from a broad range of government, non-government, peak/advisory/interests bodies, industrial/professional organisations and interested individuals responded. These comments have also been presented to the Minister for her consideration.

Interest in the outcomes of the Review remains high in South Australia. This is in no small measure due to the tireless efforts of Robyn Layton and her Review team both during the review process and since. Specific consultations with key agencies were undertaken following release of the report, and Robyn Layton has continued to conduct consultations with interested community sector

organisations. The Review has received widespread Australian coverage and has already been cited in a variety of government reports nationally. It is envisaged that a public statement on the government's position in relation to the Review recommendations will be forthcoming shortly. Advocates for children and young people in South Australia are vigilantly awaiting the government's response.

**Jen Harvey, with acknowledgment to the Child Protection Review Implementation Unit within the Department of Human Services.**

Copies of are *Our Best Investment – A State Plan to Protect and Advance the Interests of Children* available from:

The Department of Human Services,  
11 Hindmarsh Square Adelaide SA 5000.  
Telephone: 08 8226 6109

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## WA Child Deaths

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**In 2002, following the State Coroner's Report into the death of a 15-year-old Aboriginal girl, the State Government established a formal inquiry into the response of government agencies to complaints of family violence and child abuse in Aboriginal Communities. The Inquiry was known as the Gordon Inquiry. The report of the Inquiry – *Putting the picture together* - was released in July 2002 "But what has been done?"**

The report highlighted deficiencies in investigation of complaints and the sharing of information between agencies. At the time of the fifteen year old girl's death, 11 agencies, both government and non-government, were involved in the provision of support or services to the girl's family, yet no one agency, took a lead agency role in the coordination of these services.

The lack of coordination and the failure to share relevant information were identified by the Inquiry as

a flaw within the current system of Child Protection. Subsequently, the State Government has acted by establishing two committees to address child death:

One to be independently chaired, and comprised of a range of members drawn from government and non government agencies is to report on trends and systemic issues that may contribute to child death.

The second committee – the Child Death Review Committee- is to investigate all deaths of children known to the State Department of Community Development. The findings of this committee are reported to the Minister for Children and the Director-General of the Department of Community Development.

Furthermore, the Inquiry recommended that the State Government establish a Children’s Commissioner. This recommendation was rejected in November 2002 on the basis that existing structures and legislative provisions and proposed changes to the Child Welfare Act would provide adequate accountability. It is now December 2003, and as yet the proposed changes to the Child Welfare Act have not come to fruition.

**Cheryl Cassidy-Vernon**  
Manager, Youth Legal Service, Perth

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## **The Tasmanian Ombudsman’s Review of Claims of Abuse from Adults in State Care as Children**

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**In July 2003 the Tasmanian Ombudsman and the Department of Health and Human Services entered into an agreement to conduct a review of claims from adults who had been allegedly abused as children in State care.**

### **How did the Review come about?**

In July this year the media reported allegations of serious sexual abuse from a former State ward who had been in foster care. The Government responded by calling on adults who had suffered any form of abuse in State care to come forward with their claims.

The Government’s intent was to offer some form of redress and support to assist victims of past abuse.

The Ombudsman, who is independent of the Government and the bureaucracy, agreed to receive and assess the claims. A special Hotline was established to enable people to lodge their claims with the Ombudsman’s Office. The Hotline was officially discontinued in mid August but the Ombudsman’s Office has continued to accept claims.

In August 2003 the Premier announced the appointment of an Independent Assessor who will assess all claims and decide whether ex gratia payments should be paid to claimants. The Assessor has been given the power to determine payments up to a maximum of \$60,000 per person, or more in special circumstances.

### **What is the scope of the Review?**

The scope of the Review is set out in a Protocol Agreement between the Ombudsman and the Department. Adults over 18 who claim to have been abused as children in State care are invited to contact the Ombudsman’s Office. The Memorandum sets no time limits on when the abuse occurred and the concept of child abuse is not specifically defined. By definition, State care encompasses the full range of placements for children, including foster homes and Government and non-Government institutions run mainly by Church organizations.

The Ombudsman has two tasks. The first is to independently assess the strength of individual claims and to make recommendations to the Department as to what further action is required. Once all claims have been assessed, the Ombudsman will prepare a formal investigation report under section 23 of the *Ombudsman Act 1978* for the Minister for Health and Human Services and for tabling in Parliament. The report will identify any systemic issues which have emerged from the Review of past abuse. Recommendations will be made in respect of any changes to current practice, policy and procedures seen as necessary to prevent future abuse of children in State care.

### **What is the Ombudsman’s Review process?**

The Ombudsman has established a special team of six people to carry out the Review. All members of the team are experienced professionals who are sensitive to the needs of people who have been victims of abuse. The review process is as follows:

➤ Preliminary details of claims are recorded when the initial telephone contact with the Ombudsman Office is made.

➤ Persons who meet the Review criteria are interviewed by two investigators and a written summary of the interview is prepared. Interviews are being conducted in all parts of the State. Arrangements are being made to interview inter-state residents.

➤ A detailed analysis of departmental file information is undertaken to verify that the person was in State care and to record any reported incidents of abuse. The file analysis is frequently a complex process which may involve researching archival material and examining several files for the one person. The task is complicated by the fact that the Department responsible for the welfare of children in State care has undergone many changes in the past forty years and the relevant legislation has similarly undergone significant change.

➤ The Ombudsman forwards to the Department a dossier for each claimant which provides:

- details of the person's history while in State care
- a summary of their interview
- the Ombudsman's overall assessment of the strength of their claim
- recommendations to the Department for further action.

➤ All claimants are advised as soon as they contact the Ombudsman's Office that they may seek counseling through the Department. They are also advised when their dossier is to be sent to the Department and what the Ombudsman's recommendations are.

### **How is child abuse defined?**

For the purpose of the Review, abuse is as defined in section 3(1) of the *Children, Young Persons and Their Families Act 1997*:

'Abuse or neglect' means-

- (a) sexual abuse; or
- (b) physical or emotional injury or other abuse, to the extent that-

(i) the injured, abused or neglected person has suffered, or is likely to suffer, physical or psychological harm detrimental to the person's wellbeing; or

(ii) the injured, abused or neglected person's physical or psychological development is in jeopardy.

To assist with assessment of claims, allegations of abuse have been categorized as sexual; physical and mental or emotional. It is of course recognized that the categories are not mutually exclusive and rarely reflect the complexity of circumstances that surround the harm that has occurred to an individual.

### **What progress has the Ombudsman made in respect of the Review to date?**

#### **Number of claims received**

Since the Review commenced on 14 July 2003, a total of 306 telephone calls have been received, of which 233 need a review of claim (as of 5 December 2003). Those not being reviewed include people seeking general information or offering support as potential witnesses.

#### **Number of interviews conducted**

The Review team has interviewed 83 claimants and forwarded eleven completed dossiers to the Department for further action. The Review team has made two visits (each of two days) to the Launceston area to conduct interviews and spent six days in Burnie. Mainland interviews are tentatively arranged for the New Year.

### **What are the time lines for completion of the Review?**

Based on the number of interviews still to be undertaken, it is anticipated that all interviewing will be completed by Easter 2004. This is of course dependent upon the number of claims that continue to come in as no cut off date for claims has been announced.

At the completion of the interviews, a further period of time needs to be allowed for finalisation of all assessments. This should be completed by 30 June 2004.

The Ombudsman's investigation report is already underway, but will not be able to be completed until all claims have been assessed and finalized.

**Jan O'Grady, Ombudsman. 11/12/03**

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## Physical punishment legislation in Scotland

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New legislation came into force in Scotland on Monday 27th October, to make it illegal to punish children by shaking, hitting on the head or using a belt, cane, slipper, wooden spoon or other implement.

The new legislation is not confined to banning the specific types of behaviour mentioned above. In addition, if a court were looking into the physical punishment which a child had received, it would consider:

- The child's age
- What was done to the child, for what reason and what the circumstances were
- The duration of the punishment and the frequency
- How it affected the child (physically and mentally)
- Other issues personal to the child, such as their gender and state of health

How were the changes arrived at?

The new legislation was informed by the results of a detailed consultation exercise<sup>1</sup> followed up by additional research carried out with groups of ordinary parents from across Scotland.<sup>2</sup>

Although there was not widespread support for smacking to be banned altogether, there was near total agreement for the more dangerous forms of physical punishment to be banned.

Previously, the law allowed parents the right of 'reasonable chastisement' in disciplining their children. Parents were able to administer moderate physical punishment to their children without being liable for damages or a criminal conviction for assault. But the concept of 'reasonable chastisement', which dates back to Victorian times, is difficult to define in the

21st century. So to protect children from harsh physical punishment the law has been clarified and brought up to date.

### Promotional and explanatory materials

The Scottish government produced and distributed materials to explain the changes in the law and encourage more constructive forms of discipline. It explains that smacking has not been banned altogether but outlines the reasons why smacking is not advisable as a method of disciplining children since it:

**Can be dangerous** - it is easy to forget how delicate children are, particularly if you are frustrated or angry. What feels to you like a light slap can have the potential to cause real harm to a small child.

**Sets children the wrong example** - rather than correcting misbehaviour, it can teach children to hit out at people who are doing things they don't like or who don't do what the child wants them to do.

**Has effects which last long after the physical pain dies away** - young children will not necessarily associate the punishment with their behaviour. It can make them angry and resentful and can be damaging to their confidence and self-esteem.

**Smacking is not an effective way to teach children discipline.**

Source: *Scottish Executive website*

<http://www.scotland.gov.uk/library5/justice/cppl-00.asp>

See also:

*Children, physical punishment and the law - A Guide for Parents in Scotland*

And for more on discipline, see the Barnardo's booklet '**getting positive about discipline**'.

### Footnotes

1. *The Physical Punishment of Children in Scotland: A Consultation* (Scottish Executive, 2000)

2. *Disciplining Children: Research with Parents in Scotland* (NFO System Three for Scottish Executive, 2002)

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## **“A League Table of Child Maltreatment Deaths in Rich Nations”**

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### **UNICEF Innocenti Report Card No. 5**

**This UNICEF report addresses violence against children, child abuse and maltreatment as central human rights questions and recalls the commitment undertaken at the Special Session on Children to protect children from all forms of violence, neglect and abuse.**

See <http://www.unicef-icdc.org/publications/pdf/repcard5e.pdf>

The report stated that almost 3,500 children under 15 die every year from child abuse in OECD countries. Australia was ranked 9<sup>th</sup> from the top and 19<sup>th</sup> from the bottom on a league table of child abuse deaths in 27 rich countries.

The countries at the very bottom of the league table – those with the highest rate of child maltreatment deaths – are Portugal, Mexico and the United States, while those at the top – Spain, Greece and Italy – have the lowest rate.

The greatest risk is among younger children. And contrary to common perceptions, 80 per cent of child abusers are the biological parents.

The UNICEF report is the first attempt to draw a comparative picture of the physical abuse of children in the 27 richest nations of the world. Inconsistencies in the classification of child deaths and a lack of common definitions of ‘abuse’ mean that there is little internationally comparable data on child maltreatment. The study describes a ‘growing certainty that child deaths from maltreatment are under-represented by the available statistics’.

In an attempt to address variances in the classification of child deaths, the UNICEF researchers constructed a league table that combines national totals of child deaths from known abuse and neglect with those child deaths that are recorded

as being of “undetermined cause”. The assumption made is that when no other cause can be established, the death is likely the result of maltreatment that cannot be proven in a court of law. The revised calculations yield death rates that are more than double in the cases of some countries.

The research also finds a clear relationship between levels of child death from maltreatment and the levels of violence in society as a whole. The countries with the lowest rates of child deaths from maltreatment also have very low rates of adult deaths from assault. Similarly, the three nations with exceptionally high levels of child deaths from maltreatment also have exceptionally high adult death rates.

The UNICEF report draws on a wide range of surveys from different countries to investigate the various factors most commonly associated with physical abuse. Poverty and stress are factors closely associated with physical abuse.

The good news, however, is that child deaths from maltreatment appear to be declining in the great majority of industrialised countries. Nevertheless, the report calls for more vigorous investigation and more consistent recording of child deaths in all nations.

The UNICEF report also presents new research summarising the present legal status of physical punishment in all OECD member countries. Overall it shows that only seven of those countries – Austria, Denmark, Finland, Germany, Iceland, Norway and Sweden – currently have laws explicitly banning physical punishment of children.

All OECD nations have banned the use of physical punishment within the justice system and the majority has made it illegal in schools. In Australia, physical punishment is prohibited in all schools in New South Wales and Tasmania, and in state schools in South Australia and the ACT.

Physical punishment in the home is against the law in Scandinavian countries, Italy, Austria and Germany. It has not yet been achieved by any of the States or Territory government in Australia. NSW has restricted the right to hit children with implements or above the neck, in a move that is similar to the Scottish legislation – see other article p. 40

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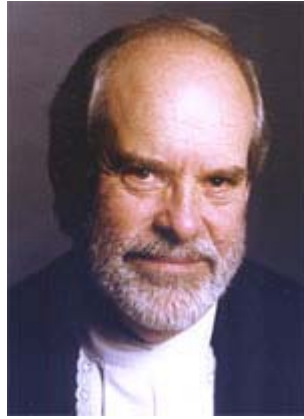
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# From Sydney to Cape Town - The Evolution of the World Congress

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**By the Honourable  
Justice Rodney K.  
Burr, Judge,  
Adelaide Registry,  
Family Court of  
Australia**



**In 1990, Sydney solicitor Stuart Fowler and I were invited to Hong Kong to address the council of LAWASIA, an association which represents lawyers and lawyers' organisations in some 21 countries in the Asian and Pacific region. We thought we would be invited to establish a Family Law Section having had considerable experience doing so in Australia.**

LAWASIA did indeed issue such an invitation but then delivered a challenge that was intimidating in the extreme. The Council of LAWASIA asked us if we would accept a brief for the human rights of families and children in the Asian and Pacific region. Members of the Council then individually and collectively regaled us with tales of the utmost horror. They told us of:

- The plight of some 140,000 children under the age of 14 years sold into prostitution in one small Asian country alone;
- The potential decimation of several generations by the spread of AIDS through child prostitution;
- The appalling conditions in child labour camps and factories in several countries in the region;
- The deliberate mutilation of children in order to use them as beggars;

- The forced removal of children's organs for sale in the organ transplant trade;
- The abduction for adoption of many children; and
- The appalling poverty and health problems of millions of children.

Our instinctive reaction was, "It can't be done". What could a couple of unknown lawyers do about generational problems of the most severe proportions? It seemed impossible.

However, it also became impossible to ignore. No longer was the education and care of our own families and the pursuit of a comfortable retirement the only priorities. There had to be something that could be done. If someone did not accept the challenge, then it certainly would be impossible.

And so, the First World Congress on Family Law and Children's Rights was conceived and ultimately born in Sydney, Australia in July 1993. It was the product of three years of very hard but very rewarding work. The more people we told of the problems and told of our hopes, the more offers we received and the more volunteers "sprang from the woodwork".

From its inception, the World Congress was designed and promoted to be result oriented. It was to achieve outcomes. It was not simply to be a "talk fest" and a gathering for the exchange of views and ideas which would be quickly forgotten once the departure tax had been paid at the airport.

Over 850 delegates from 54 countries of the world answered the initial challenge and worked hard throughout the Congress to educate and inform others from their own experience and expertise, but more importantly to draft solutions and remedies and to establish the momentum for change.

The First World Congress did achieve results and significant results at that:

- The enactment of laws imposing criminal sanctions for the abuse and exploitation of children committed extraterritorially;
- The generation of a climate of international condemnation of the exploitation of children;
- Significant exchange of information leading to new developments in family law, family courts and alternative dispute resolution;
- The creation of a LAWASIA Children's Trust to fund projects consistent with the resolutions of the Congress; and
- The promotion of a protocol to the UN Convention on the Rights of the Child designed to bolster international sanctions for the prevention of trafficking of children;
- The formation of the Lawasia Family Law and Family Rights Section.

Delegates left the conference with an enormous sense of satisfaction but an awareness that a very long journey had only just begun. It was essential that an organisation be found in one of the larger countries of the world which had the capacity to lead by example, to continue and to expand upon the humble beginnings of the First World Congress.

Fortunately Stuart Fowler and I were introduced to the Association of Family and Conciliation Courts in the USA, which warmly embraced the World Congress and agreed to serve as Secretariat for the Second World Congress, held in San Francisco June 3-7, 1997.

The energetic and enthusiastic contributions of the AFCC representatives on the organising committee drawn from many and varied professions ensured the success of the Second World Congress.

Then First Lady, Hillary Rodham Clinton, embraced the project and served as Honorary Chair of the

Second World Congress which attracted 1600 delegates from some 60 countries.

By then it was clear that the momentum could only be carried forward by the continuation of World Congresses on a regular basis. Not only were we encouraged by the results of the first two Congresses but also by the growing body of international support for its aims and objectives amongst the legal profession and related professions worldwide. The enormity of the task of preparing such World Congresses meant though that they could not be held any earlier than each four years. Subsequently, another very successful Congress was held in Bath, England in September 2001.

In the intervening years leading up to each Congress and subsequent thereto the work continues in securing international support for the aims and objectives of the World Congress in addressing human rights abuses of children. The World Congress has been successful in securing support at a Governmental level from the Australian, New Zealand, Canadian, United Kingdom and Irish Governments. Support has also flowed from numerous other individuals, foundations and organisations from around the world, including the United Nations and its various agencies.

As stated, the second Congress in San Francisco attracted the very public support of the First Lady, Hillary Rodham Clinton. For the third Congress, the patron was H.E. Mary Robinson, United Nations Human Rights Commissioner and Former President of the Republic of Ireland.

Palpable benefits were also achieved at the second and third Congresses including:-

- The drafting and promotion of voluntary codes of conduct for multinational corporations employing children in their manufacturing operations off shore
- The building of two schools in Central America
- The establishment of the International Children's Rights Protection Network (now Children's Rights International) using

voluntary advocates to embrace specific cases or general causes for disadvantaged or abused children

- The receipt of “report cards” on the performance of the world’s nations in seeking to implement the resolutions of the World Congress
- The successful continuation of a drive to get as many nations of the world as possible to pass laws mirroring Australia’s child sex tourism laws in imposing criminal sanctions for the abuse and exploitation of children committed extra-territorially.

The planning for the fourth Congress is already underway and is to be held in Cape Town, South Africa from 20 – 23 March 2005.

The World Congress is now a truly international event recognised as one of the most significant events on the world calendar in promoting the protection of children. The World Congress has received a United Nations Award for services to the family. As its work continues, many new and energetic people, too numerous to mention, have asked to be involved to increase the reach and effectiveness of the World Congress. Its future seems assured and hence the hope of achieving beneficial change for many of the world’s children, attainable.

For further information, please visit our website [www.lawrights.asn.au](http://www.lawrights.asn.au)

To be placed on the mailing list, contact:

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The congress is held under the auspices of the Board of the World Congress on Family Law and Children’s Rights Inc.

## Labour News

### 1. ILO Launches Time-Bound Programme for the Elimination of Child Labour in Pakistan

The International Labour Organisation (ILO) launched a four-year programme for the elimination of child labour in Pakistan on November 19, 2003. The programme is intended to complement the efforts being made by an ongoing programme conducted by the Pakistani government on eliminating child labour.

The ILO’s International Programme on the Elimination of Child Labour (IPEC) has been active in Pakistan since 1994 and has been working closely with the labour ministry. According to Saifullah Chaudhry, ILO Senior Programme Manager, an estimated 60 000 child workers have benefited from this collaboration since 1994. With regards to this programme, ILO-IPEC together with the Pakistani government cited several industries as priority areas of action: deep-sea fishing, the glass bangle industry, the surgical instrument manufacturing industry, tanneries, coal mining and rag-picking, wherein which children are exposed to working in the most dangerous conditions. Mr Chaudhry quoted a rapid assessment survey that estimates that 21 769 children are involved in the worst forms of child labour, in six districts, in the above-mentioned sectors.

An estimated 12, 000 out of the officially recognised total of 3.3 million child workers in Pakistan are hoped to be able to benefit from this scheme over the period of four years. They are to be withdrawn from their hazardous occupations and enrolled in schools.

Since Pakistan’s ratification of Convention 182 in 2001, the government has been seeking assistance from ILO-IPEC in implementing the Convention through the formulation of a time-bound programme that involves ‘integrated and coordinated development policies’ for the elimination of child

labour within a set time frame. Education Minister Zobaida Jalal stated at the official launch of the programme that child labour had been an obstacle to primary education and that the Pakistani government was fully committed to implementing Convention 182. She stated that roughly Rs100 million has been established for the education of child workers. Targets of setting up 8250 primary schools; the rehabilitation of 100 000 education facilities; the expansion of non-formal and literacy programmes, amongst other endeavours, are being undertaken through partners across Pakistan.

The time-bound programme is intended to help in reaching the objectives of the EFA 2015 (Education for All by the year 2015) - providing easier access to education for all, especially disadvantaged populations in rural and urban areas. An added emphasis is placed on the access to education for girls and women and to promote community participation in order to improve the quality and relevance of education.

The keynote speaker at the official launch of the programme - Nancy Powell, US Ambassador to Pakistan highlighted that both resources as well as political will should be brought together in order to create 'meaningful change'. The US government is providing the ILO with US\$ 4 million in funding for the time-bound programme and has previously provided US\$ 12 million to fund projects for children found in hazardous industries. Abdul Sattar Laleka, the Labour Minister expressed his concern at the alarming number of children involved in hazardous work but added that there is no 'unique solution or short cut' in solving the problem. He went on to say that the Pakistani government sees the elimination of child labour as a 'high-priority' issue.

Sources: <http://www.irinnews.org> Date last visited: December 18, 2003 <http://www.dawn.com/2003/11/20/local15.htm>

## 2. DCI-COSTA RICA IN 'AULA ABIERTA' (OPEN CLASSROOM) PROJECT: LOOKING FOR A NEW OPPORTUNITY

The 'Aula Abierta' project of the Ministry of

Education in Costa Rica aims at assisting young people who are over the obligatory school-going age to reintegrate into the education system with ease. These children are over the school-going age because they may have joined the education system at a later stage or have repeatedly failed school years. The education system has to consider the most appropriate methods in adapting to meet the needs of children that have not followed the formal education system due to their involvement in child work.

In this context, the Project "Aula Abierta" that began in 2001, is intended to make the education system more flexible and to adapt it to the circumstances in which children are living. A large number of children benefiting from this project are child workers since they have left the education system prematurely in order to become part of the labour market.

Children involved in this project are taught in education centres where they are able to attend classes that are adapted to their particular level and disposal. They are placed in special groups where they can learn at their own pace and use material that is interactive. They can also attend formal school lessons e.g. English classes, Music classes, Computer classes, etc.

The costs of the project are covered by the High Council of Education until 2003. The project has also been supported by UNICEF, IOM and ICER (the Institute of Radio phonic Education of Costa Rica) and since March 2003 IPEC has also become involved. An increasing number of children have been benefiting from this initiative since its inception.

The purpose of the project is to offer an appropriate education to young people in Costa Rica who will be the main actors of the society in the future. This purpose demands an effort from all levels in order to help to provide an integral development and worthy life to young people. Thus, society has the responsibility to give a second chance to those who could not follow the normal education system because of joining the labour market or other setbacks.

Source: DCI-Costa Rica

### 3. NEWS IN BRIEF

**The Global Action Week of GCE (Global Campaign for Education) will be held during April 19-25, 2004.** Events are being organised for children all over the world to share their ideas and opinions on the right to education. It is intended that they will get the chance to make their views known at the State-level in national parliaments and legislatures, state assemblies, as well as at the local level in village councils. The aim of the Global Action Week is to 'make it impossible' for leaders to 'ignore the millions of children who are missing out on education'. GCE has developed a Planning Pack as well as additional campaign materials. Campaign materials are available free of charge but orders must be made by January 5, 2004. For more information on activities being planned, please go to:  
<http://www.campaignforeducation.org>

Source: GCE E-news Action Week Special November 19, 2003

**Multinational seed companies have agreed to work with the MV Foundation (MVF) to eliminate child labour from the cotton seed industry.** MVF is a NGO in the Indian State of Andhra Pradesh, which is dedicated to the enrolment of children in school, thus lowering the number of children workers. Companies such as Monsanto, Advanta, Emergent Genetics and Proagro passed a resolution "to pro-actively discourage directly and through its members the practice of child labour in hybrid cotton seed production and further take effective steps along with other stakeholders towards eradication of this evil from the hybrid cotton seed industry". This commitment came a few months after a report on child labour in hybrid cotton seed production was carried out by the India Committee of the Netherlands (ICN). The report stated that approximately 250,000 children under the age of fourteen were working in the hybrid cotton farms - most of these children were girls. For the first time, these companies have acknowledged responsibility along with their social duty to correct the situation. It was agreed upon by all companies involved to set up a Child Labour Eradication Group, which would include a representative from every company to conduct internal monitoring.

Source: press release of India Committee of the Netherlands. For the full press release, please go to: [www.indianet.nl/cotseed.html](http://www.indianet.nl/cotseed.html)

**The impoverished African country of Guinea is facing an influx of children from the war-torn countries of West Africa including, Sierra Leone, Cote d'Ivoire and Sierra Leone.** It is estimated that more than one million refugees are pouring across Guinea's borders into the urban centres. This estimate includes the 100,000 living in refugee camps and the 50,000 children who are living on the streets in the cities of Guinea. These children, separated from their families must fend for themselves against other West African refugees and Guinean child refugees returning from the civil war in Liberia. UNICEF in collaboration with the International Rescue Committee has been able to reunite 1,000 children with their families but as funds decrease, so does the number of children they are able to help.

Source: [www.unicef.org/media/media](http://www.unicef.org/media/media), for more information, please contact: John Brittain, UNICEF Guinea, Tel: +224 228 746,  
Email: [jbrittain@unicef.org](mailto:jbrittain@unicef.org)

**UNICEF has launched its Back-to-School initiative that hopes to facilitate the return of approximately 750'000 children back into the public school system in Liberia.** Schools in and around the capital were forced to close last June due to rebel attacks. This initiative reinforces the Education Law passed in 2001 that granted Liberian children free access to primary education. UNICEF has helped to coordinate the logistics of the program including, training 20'000 teachers, creating a curriculum and restoring 37'000 schools. The program also includes School-in-a-Box, which is essentially a mobile classroom. This kit includes a teacher's guide, exercise books for children, teaching and writing materials.

Source: [www.unicef.org/media/media](http://www.unicef.org/media/media),  
[www.crin.org](http://www.crin.org)

## Upcoming Events

### 12 – 30 JANUARY 2004

35<sup>th</sup> Session of the Committee on the Rights of the Child  
Organiser: UN Office of the High Commissioner for Human Rights

Location: Geneva, Switzerland

The 35<sup>th</sup> session of the Committee will review the reports of: Indonesia, Guyana, Armenia, Germany, the Netherlands, India, Papua New Guinea, Slovenia and Japan.

Information and Contact: UN Office for the High Commissioner for Human Rights – Committee on the Rights of the Child, Tel: 0041 22 917 90 00, Fax: 0041 22 917 90 22 Website: <http://www.unhchr.ch>

### 18 APRIL – 2 MAY 2004

World Meeting of Working Children's Movements 2004

Organisers: ProNats, ItaliaNats and others

Location: Berlin, Germany

This meeting is being held with the intention of bringing working children's organisations greater visibility within the child labour debate and to attain international recognition as real voices of working children around the world.

Information and Contact: [info@pronats.de](mailto:info@pronats.de)

### 10-13 MAY 2004

Children's World Congress on Child Labour

Organisers: Global March Against Child Labour

Location: Florence, Italy

500 children including former and current child labourers and around 100 child activists from different countries are expected to participate in the event in order to express their ideas and views on their experiences as child workers. NB: deadline for applications to participate in this event is January 15.

Information and Contact: Global March Against Child Labour, Tel: 91-11-2622 4899, Fax: 91-11-2623 8919, E-mail: [worldcongress@globalmarch.org](mailto:worldcongress@globalmarch.org), Website:

<http://www.globalmarch.org/worldcongress/>

## ACTION WEEK 2004 - EVERYTHING YOU NEED TO KNOW

The Global Action Week of GCE (Global Campaign for Education) will be held during April 19-25, 2004. Events are being organised for children all over the world to share their ideas and opinions on the right to education. It is intended that they will get the chance to make their views known at the State-level in national parliaments and legislatures, state assemblies, as well as at the local level in village councils. The aim of the Global Action Week is to 'make it impossible' for leaders to 'ignore the millions of children who are missing out on education'. GCE has developed a Planning Pack as well as additional campaign materials. Campaign materials are available free of charge but orders must be made by January 5, 2004. For more information on activities being planned, please go to: <http://www.campaignforeducation.org>

Source: GCE E-news Action Week Special November 19, 2003

### 19-22 September 2004 Brisbane 15TH INTERNATIONAL CONGRESS ON CHILD ABUSE AND NEGLECT

Conducted every two years by the International Society for the Prevention of Child Abuse and Neglect (ISPCAN), the theme of the event to be held at South Brisbane's Convention and Exhibition Centre from the 19th to 22nd, is "Working Together for a Child-Safe World".

Seven sub-themes have been selected for the workshop and presentation program. These cover responses to the problem of child maltreatment by the medical and public health systems, and by the State, to situations that might infringe laws protecting children, including assessments and investigations by child welfare departments and police.

In addition workshops will focus on responses that aim to remedy the harms caused by abuse and neglect or that aim to minimise the risks of further harm and the development of strategies by governments, communities and non-government agencies to respond more effectively at a societal level to the problem of child maltreatment.

Congress will also look at early intervention and prevention programs, strategies and practices that mobilise and link resources across different sectors, including multi-agency partnerships and whole-of-government or whole-of-community approaches and issues which can only be solved or mediated by a cross border approach such as refugees, child soldiers, and Internet.

With funding assistance contributed by the Australian Commonwealth and Queensland State Governments, Congress will be hosted by the National Association for the Prevention of Child Abuse and Neglect (NAPCAN Australia), an independent charity.

For further information on the 15<sup>th</sup> International Congress on Child Abuse and Neglect, visit the website at [www.congress2004.com](http://www.congress2004.com).

## Resources, Publications and Useful Websites

### CHILDREN IN DETENTION

The Uniting Church agency, Hotham Mission, launched a new report, *Welfare Issues and Immigration Outcomes for Asylum Seekers on Bridging Visa E*, which proves that a community-based system for all asylum seekers can work in Australia. It has called on the Federal Government to consider this community-based system.

The Asylum Seeker Project based at Hotham Mission has operated a project for seven years, assisting more than 300 asylum seekers who live in the community on bridging visas. "We have found in the seven years of working with hundreds of asylum seekers, that not one person has absconded or failed to report or comply with the Department of Immigration requirements," Uniting Church Victorian moderator Reverend Sue Gorman said.

"This project shows that a community-based way of helping people that we would

normally put in detention centres is a far more dignified and honorable way to look after these people."

The project researched the 200 asylum seekers they have worked with for the past 2 years. The findings included:

- No asylum seeker absconded
- All asylum seekers complied with their reporting requirements
- Appropriate welfare and social support assisted asylum seekers significantly in the steps towards settlement or return, depending on their final decision.

The research also highlighted the welfare impact on asylum seekers left in the community with no Medicare, work rights or welfare payment support.

The report was launched on Saturday, 13th December, and can be downloaded from: <http://www.hothammission.org.au/index.cgi?tid=3>

Further information from Grant Mitchell, Project Coordinator, Asylum Seeker Project  
Hotham Mission, 2/579 Queensberry St North  
Melbourne 3051

**DCI – the Netherlands (2003) Kids Behind Bars. An international study on children in conflict with the law: towards investing in prevention, stopping incarceration and meeting international standards.** This report produced by DCI-the Netherlands, was an endeavour to present an international analysis of children being held in detention in order to have a greater understanding of the difficulties faced by children in these situations and to work towards concrete solutions to the problems they face. Information and Contact: DCI-the Netherlands, Tel: +31 20 420 3771, Fax: +31 20 420 3832, Email: [dcinl@wxs.nl](mailto:dcinl@wxs.nl), Website: <http://www.defenceforchildren.nl>

### NZ CHILDREN'S RIGHTS SURVEY

Have your say on human rights for children and young people. Visit the Kids Rights website and fill out the

online survey that will contribute to New Zealand Action Plan for Human Rights. The web site is <http://www.childrensrights.net.nz>

## CHILDHOOD EDUCATION AND CHILDCARE

The DfES has published a series of papers by the Thomas Coram Research Unit on early childhood education and childcare. These include a comparison of the provision, funding, and outcomes of child care in 15 countries, including Australia.

Source: DfES website  
<http://www.dfes.gov.uk/research/programmeofresearch/index.cfm?type=5&x=48&y=11>  
30 October 2003  
<http://www.dfes.gov.uk/research/data/uploadfiles/intevpaper7summary.pdf>

### Early Years and Childcare International Evidence Project: Summary

New research from the US Centres for Disease Control and Prevention concludes that home visits can play a key role in preventing child abuse. The research suggests that 40% of child maltreatment episodes might be prevented by providing home visits to families at risk.

Source: Press Release <http://www.cdc.gov/od/oc/media/pressrel/r031002.htm>  
02 October 2003

Centres for Disease Control and Prevention  
Further Information available online  
<http://www.cdc.gov/mmwr/PDF/rr/rr5214.pdf>  
03 October 2003

Morbidity and Mortality Weekly Report -  
Recommendations and Reports

### UK GREEN PAPER: *Every child matters*

On 8 September the Prime Minister welcomed a Children's Green Paper *Every Child Matters*. *Every Child Matters* sets out for consultation a framework for improving outcomes for all children and their families, to protect them, to promote their wellbeing and to support all children to develop their full potential. It focuses on four main areas:

- Early intervention and effective protection
- Supporting parents and carers
- Accountability and integration - locally, regionally and nationally
- Workforce reform

*Every Child Matters* is being published alongside *Keeping Children Safe*, a detailed response to the practice recommendations made by Lord Laming in the report following his inquiry into the death of Victoria Climbié.

The Green Paper, together with a summary version and a children's and young people's version of *Every Child Matters*, are available at <http://www.dfes.gov.uk/everychildmatters/downloads.shtml>

Source: NSPCC Library & Information Service's CASPAR Email

### UNICEF (2003) Voices of Youth Newsletter

This newsletter compiles the insights, concerns and suggestions of children from 102 countries on issues such as children and war, as represented on the Voices of Youth interactive website.

For an online document, please go to [www.unicef.org/voy](http://www.unicef.org/voy). Information and Contact: Tel: + 1 212 326 7050, Email: [voy@unicef.org](mailto:voy@unicef.org)

### GLOBAL CAMPAIGN FOR EDUCATION (From the GCE E-NEWS)

The Global Campaign for Education is a worldwide alliance of NGOs, teachers' unions and child rights activists. We lobby and campaign for immediate action on the Education for All goals, including free and universal primary education by 2015, a 50% reduction in adult illiteracy by 2015 and gender equity in education by 2005. Please visit the website at: <http://www.campaignforeducation.org>

*The Global Campaign for Education produces GCE E-News as an information resource for activists and practitioners. The following item is reproduced from GCE E-News.*

### **GCE Launches New Research**

The GCE has released two new research reports which can be read and downloaded from the website [www.campaignforeducation.org](http://www.campaignforeducation.org).

**“School Report on Donor Aid to Basic Education”** - grades rich countries according to the quality and quantity of their support for education, including an overall league table and an individual “report card” on each country. “The contrast between rhetoric and reality is staggering,” says the report. It gave the Netherlands, Norway and Sweden top marks in their support for education of the poor, followed by Ireland, Belgium, Luxembourg, Canada and Denmark. Japan, Spain, Italy, Austria, the United States, Greece and New Zealand were the least supportive, it said. It gave US President George W. Bush 12 marks out of 100, just above the leaders of Greece and New Zealand, saying the United States was the least generous aid giver as a share of national income.

**“The Education Fast Track Initiative: a Global Campaign”** review of progress, and recommendations for reform’, by Pauline Rose at the University of Sussex. The report summarises key features of the FTI process to date, the criteria for country selection, and the simulation modelling and benchmarks used in the FTI analysis. The final section sets out some concrete recommendations for improving the transparency and effectiveness of the initiative.

If you are not able to access these reports on the website, you can request a copy by emailing [anne@campaignforeducation.org](mailto:anne@campaignforeducation.org)

## **CHILD POVERTY**

Gordon,D.; Pantazis,C.; Townsend,P./ London School of Economics, Centre of International Poverty Research (2003) *Child Poverty in the Developing World*. Commissioned by UNICEF, this report produced the first scientific measurements of child poverty in the developing world. The report found that over one billion children suffer from severe deprivation and over 674 million children are living in conditions of absolute poverty, with Sub-Saharan Africa being the worst region. The report concluded that blanket remedies would be ineffective, as each

region needs to respond to local issues. For a copy of this report, please contact: The Policy Press: Helen Bolton, Tel: 0117 331 4097, Email: [Helen.Bolton@bristol.ac.uk](mailto:Helen.Bolton@bristol.ac.uk), Website: [www.policypress.org.uk](http://www.policypress.org.uk)

## **CHILDREN AND INTERNET**

Quayle, E., Taylor, M. (2003) *Child Pornography: An Internet Crime*. This publication examines: the use of child pornography on the internet; the social context in which it is used; and draws on extensive research in order to develop strategies to deal with offences.

Information and Contact: COPINE Project, Tel: +353 21 4904519, Fax: +353 21 4270439, Email: [info@copine.ie](mailto:info@copine.ie), Website: <http://www.copine.ie>

A new article online from the American Psychological Association by Linda Jackson, Alexander von Eye and Frank Biocca from Michigan State University provides a more positive aspect of internet use for children who have access, again raising equity issues. The summary of the article, *Children and Internet Use: Social, Psychological and Academic Consequences for Low-income Children*, concludes that home Internet use has no adverse effects on children’s social or psychological outcomes, and has positive effects on their academic outcomes. The mediating mechanisms by which Internet use influences academic outcomes is not yet clear and more research is needed to develop and evaluate interventions designed to maximize the benefits of Internet use for children. “The public policy implications of our findings are clear. Children who may stand to benefit most from home Internet access are the very children least likely to have it. The vision of the Internet as the technology that levels the playing field in education will remain just that - a vision, unless visionary leaders launch a concerted effort to make the Internet available to all”.

## **CHILD LABOUR**

RWG-CL (2003) *Learning to Work Together: a handbook for managers on facilitating children’s participation in actions to address child labour*. This handbook published by the Regional Working Group

on Child Labour (RWG-CL) describes the methods that can be developed for children's participation in child labour projects.

Information and Contact: RWG-CL, Tel: +66 2 243 2266, Fax: +66 2 669 3073 Email: [rwg@loxinfo.co.th](mailto:rwg@loxinfo.co.th)

USDOL and ILO (2002) *Advancing the Global Campaign Against Child Labour: Progress Made and Future Actions*. This report is a summary of the proceedings from the conference held by the U.S. Department of Labour in collaboration with ILO. It is a collection of discussions on raising awareness against child labour; discussions with former child workers; implementation strategies in the workplace and educational opportunities. Information and Contact: U.S. Department of Labour, Bureau of International Labour Affairs, International Child Labour Program, S-5307, Washington, D.C. 20210

Matz, P (2003) *The Costs and Benefits of Education to Replace Child Labour*. This report examines the economic impact of eliminating child labour. The paper examines the 'school versus work' decision that families have to make i.e. if the returns from going to school will ultimately be more than those that the child will make if he/she works instead.

For an online version of this report, please go to: [http://www.ilo.org/public/english/standards/ipecc/publ/download/edu\\_costben\\_2003\\_en.pdf](http://www.ilo.org/public/english/standards/ipecc/publ/download/edu_costben_2003_en.pdf)  
Website: <http://www.ilo.org>

### **UN Committee's response to NZ and Canada on child labour**

New Zealand: Child labour was not discussed directly. New Zealand has made a serious attempt in incorporating child participation in issues that affect them. The CRC has not been fully incorporated into national legislation but its underlying principles are taken into account. The Committee asked the delegation some questions regarding the process involved in ratifying the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict. The Committee then asked specific questions regarding the implementation of the Optional Protocol in particular, the age of recruitment into the armed forces. At the moment, no child under the age of 18

is allowed to actively serve the armed forces, no child under the age of 16 may be recruited except if he is married.

Canada: Child labour was not discussed when the report of Canada was considered. The Committee showed particular concern regarding discrimination, specifically against aboriginal children. The delegation replied that efforts are being made to strengthen relationships with aboriginal governments and institutions and that attempts are being made to support communities. The Committee was also concerned about the trafficking in children for sexual purposes which the delegation acknowledged as being a significant problem in Canada. Canada has not yet ratified the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography but is hoping to do so as soon as possible. The delegation acknowledged that this is a problem that deserves attention and assured the Committee that projects have been developed to combat child trafficking in Canada.

## **TRACKING CHILDREN**

Finland is considering legislation to allow parents to use Global Positioning System technology to keep track of their children, as already happens in the US.

Information from: BBC Online  
<http://news.bbc.co.uk/1/hi/technology/3218473.stm>  
28 Oct 2003

Source: NSPCC Library & Information Service's CASPAR Email

The Crime and Misconduct Commission Queensland has just released its report *Protecting Children: An inquiry into abuse of children in foster care*. It can be downloaded from <http://www.cmc.qld.gov.au/library/CMCWEBSITE/ProtectingChildren.pdf>

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