Contents

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Australian Law Reform Commission

Children and Young People

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Comment

Prof David Weisbrot AM,
President, ALRC

The Australian Law Reform Commission goes to great lengths to engage the community in its law reform work, following the advice of the founding Chairman, Justice Michael Kirby, that 'law reform is far too important to be left to the experts'.

For example, in the ALRC's recently concluded inquiry into Australian privacy law and practice, the Commission organised over 250 face-to-face meetings, workshops, public forums and roundtables—all over Australia, and a few overseas—and received nearly 600 written submissions. This surpassed the ALRC's efforts in the inquiry into the *Protection of Human Genetic Information* (2001-2003) as the largest ever consultation exercise in the Commission's 33-year history.

While the bulk of the ALRC's energies and budget resources are devoted to the formal inquiries referred to us by the Attorney-General of the day, from the beginning the ALRC also has taken seriously its responsibility to stimulate informed community debate about legal matters of public importance.

ALRC Commissioners are kept fairly busy on the Australian lecture circuit, but publication of the journal *Reform* provides the primary opportunity to fulfil this community education role. With the benefit of the insights and guidance of the Editorial Advisory Board, a topical theme is chosen for each issue, sometimes flowing out of the ALRC's reference work, and sometimes not.

In any case, it appears that recent editions have been especially timely and well received, prompting significant public attention and media coverage. For example, Issue 81 (Spring 2002) on '*Older People and the Law*' highlighted a number of problematic legal issues that are likely to arise as a result of Australia's ageing population. Although there has been considerable discussion to date of the potential social and economic consequences of this phenomenon—and Treasury now deals with 'inter-generational equity issues' as part of the annual federal budget process—relatively less attention had been paid to such looming matters as older people in the workplace, age discrimination, care agreements, assisted decision making, elder abuse, legal rights over the body, and the position of grandparents in child custody cases before the Family Court.

Issue 88 (Winter 2006) '*Life, Law and Leisure*' provoked a great deal of spirited discussion about achieving 'happiness', and especially the means of managing a satisfactory 'work-life balance' in contemporary society—in which the promise of labour-saving technology seems to have been replaced by the reality of never fully disengaging from the reach and responsibilities of the workplace.

Issue 89 (Summer 2006/07) on '*Water*' and Issue 90 (Winter 2007) on '*Juries*' also fed strongly into contemporary debates—and there was such an extraordinary level of interest in Issue 91 (Summer 2007/08) on '*Animals*' that the ALRC took the unusual step of making the entire issue available online almost immediately, rather than following our normal procedure of providing only a summary in the first year of publication for this subscription journal. Issue 91 makes a useful contribution in providing a range of perspectives and experiences from Australia and overseas, and including animal rights activists and legal experts, as well as agricultural industry figures. Overwhelmingly, the response to this edition has been very positive. For example, Major General Peter Davies CB, Director General of

the World Society for the Protection of Animals, wrote to compliment the ALRC for focusing an edition of Reform on this 'vital topic'.

In this current issue of *Reform*, the ALRC revisits an area previously the subject of a major reference and report, and a perennially difficult and controversial area: the legal position of children and young people. It is now a little over ten years since the release of the joint report of the ALRC and the Human Rights and Equal Opportunity Commission (HREOC), *Seen and Heard: Priority for Children in the Legal Process* (ALRC 84, 1997), which explored Australia's international obligations as a signatory to the Convention on the Rights of the Child (CROC).

Thus, it is timely both to consider the impact of that Report—including any implementation to date by the Commonwealth, states and territories—as well as current issues and controversies. Although the ALRC has not worked directly on children and the law since the *Seen and Heard* report, particular issues relating to the legal position of children and young people have continued to run through the Commission's recent reference work.

For example, in *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC 103, 2006), the ALRC had to consider important matters of principle and practice in relation to the sentencing of children and young people. Although this arises much less frequently in federal jurisdiction than under state and territory criminal law, given the particular and limited nature of federal crimes, the ALRC's research did turn up a number of young federal offenders (many of them foreign nationals arrested for illegally fishing in Australian waters). In *Essentially Yours: The Protection of Human Genetic Information in Australia* (ALRC 96, 2003), important issues arose about the ability of children and young people to participate in decision making about consent to clinical genetic testing, to volunteer as a subject in a genetic research study, and to undergo testing to determine parentage. In *Uniform Evidence Laws* (ALRC 102, 2005), considerable attention was paid to the rules regarding children's capacity to testify at trial, children's evidence and expert opinion on children's development and behaviour.

In the ALRC's most recent inquiry, issues relating to the privacy of children and young people often were raised in meetings and submissions. There was manifest uncertainty in the community about the extent to which young people have the capacity to make decisions for themselves about the collection, use and disclosure of personal information. The *Privacy Act 1988* (Cth) is silent on this issue, so reference must be made to the general law or practices and procedures developed in specific contexts. Although arising in a number of circumstances, the greatest concern raised in consultations related to the use and disclosure of health and medical information—for example, whether young people (under the age of 18) could ask their family doctor not to disclose their personal health information to parents, and conversely whether parents could seek access to their teenage children's health records.

The ALRC also went to special lengths to explore whether there is an emerging generation gap in basic attitudes to privacy—that is, do young people have such a fundamentally different approach to privacy that this should be recognised by law and the re-crafting of the privacy principles? It certainly appears that young people are more comfortable than their parents—and certainly their grandparents—in sharing personal information, photos and other material on social networking websites. The question is whether this represents the beginnings of an enduring cultural shift—or simply the eternal recklessness of youth, played out in a new medium and utilising new technology. Put another way, will today's young people be horrified in a decade's time when prospective employers—and prospective in-laws—can easily 'google' intimate and potentially embarrassing images and information? And whereas children and young people normally can seek guidance about moral and ethical standards of behaviour at home, at school or at their place of worship, they may find themselves pretty much on their own when operating at the cutting edge of technology.

In this edition, James McDougall, Tiffany Overall and Peter Henley note that the ALRC's *Seen and Heard* report 'has come to be recognised as a landmark in the recognition of the rights of children and young people in Australia', but that sadly 'in the ten years that have elapsed … little progress has been made in the implementation of the Report's recommendations'. The authors provide a very useful guide to the extent of activity and implementation thus far and the major challenges still ahead.

One of the central recommendations of the Report was the creation of a federal Office for Children, and while this has not yet eventuated at the national level, each state and territory now has an office that is focused on children, children and youth affairs, or children and families. In addition, New South Wales, Western Australia, Tasmania, Queensland and the Northern Territory each has established independent Children's Commissioners with various roles and powers—and I am delighted that the NSW Children's Commissioner, Ms Gillian Calvert, has contributed an article describing their valuable work.

Other key topics include the changing legal framework for intercountry adoption (by ALRC Commissioner, Justice Susan Kenny); children and the juvenile justice system; children in the Family Court; young people in the workplace; and special issues facing Indigenous youth (by Aboriginal and Torres Strait Islander Social Justice Commissioner, Mr Tom Calma).

Commission news

Privacy Inquiry

On 30 May 2008, the ALRC delivered the final report for the Privacy Inquiry to the federal Attorney–General—the largest inquiry in its 33 year history. The report is the product of a 28 month inquiry into the extent to which the *Privacy Act 1988* (Cth) and related laws provide an effective framework for the protection of privacy in Australia.

The Inquiry demanded the largest community consultation ever conducted by the ALRC: with 250 face-to-face meetings with individuals, organisations and agencies; major public forums around Australia focusing on a broad range of privacy issues affecting consumers, business and young people; a series of roundtables with individuals, agencies, and organisations discussing a variety of themes such as credit reporting, telecommunications, the privacy principles, children and young people, health and research; and six workshops for children and young people (those aged13-25).

The community consultation process also involved a National Privacy Phone-In, attracting over 1300 members of the public sharing their views and concerns and ideas regarding privacy protection. A 'Talking Privacy' website was launched specifically to appeal to young people.

The ALRC received 585 written submissions from a broad cross-section of the community and the high level of public engagement was testament to their concern and interest in privacy protection. Submissions from the community and stakeholders were integral in developing the recommendations for reform.

The final report is expected to be tabled in Parliament in August 2008.

2008 Kirby Cup

The Kirby Cup is a competition for Australasian law students which is designed to encourage students to participate in the process of law reform.

To enter, teams of two students were required to provide a submission (maximum of 15 pages) on a topic of law reform currently being considered by the ALRC. The topic for 2008 was:

> Freedom of information laws attempt to achieve a balance between the interest in open, transparent government decision-making, and the need to protect information that may affect interests such as the economy, the privacy of individuals, or the ability of public servants to provide frank and fearless advice. How should exemptions to the Freedom of Information Act 1982 (Cth) be framed in order to achieve this balance?

Based on written entries, three teams were chosen to compete in the Kirby Cup Final, the oral advocacy component of the competition. This year the final was held in July in Hobart, during the Annual Australian Law Students' Association Conference.

The finalists were: Barbara Townsend and Karlo Tychsen (University of Newcastle); Jennifer O'Farrell and Jane Worrall (University of Tasmania); and Nicholas Blaker and Sergey Kinchin (James Cook University). Each team presented their submissions to an expert judging panel convened by ALRC Commissioner Professor Rosalind Croucher.

The ALRC will treat the entries of teams advancing to the oral advocacy round as submissions to the Freedom of Information

Inquiry and they will be recognised formally as submissions in the relevant ALRC consultation papers and final report.

Internship program

As part of its wider role in engaging the community in law reform activities, the ALRC operates an internship program for law students. Internships are voluntary, and provide students with the opportunity to undertake applied legal research work in a professional environment. The program is very competitive, attracting a high standard of applicant.

Recent interns have been students from a wide range of local and overseas universities including the University of Sydney, University of Western Sydney, Macquarie University, University of NSW, University of Queensland, University of Cambridge (UK), University of Maryland (US) and Durham University (UK). Students are usually in their penultimate or final year of an undergraduate or graduate law degree, but in 2007–08 interns included an LLM and a PhD candidate.

Farewell Alan Kirkland and Lani Blackman

The members and staff of the ALRC would like to express their sincere gratitude and best wishes to Executive Director, Alan Kirkland and Research Manager, Lani Blackman—who recently resigned effective 4 July and 20 June respectively.

Mr Kirkland joined the ALRC in September 2004. Alan's enlightened management style helped to ensure that the ALRC maintained a highly professional and collegiate work environment. He oversaw a number of major projects during his time at the ALRC, including the highly successful 2006 Australasian Law Reform Agencies Conference held in Sydney. Alan resigned to take up the position of Chief Executive Office of Legal Aid (NSW).

Ms Blackman joined the ALRC in May 1998. Since that time she has contributed enormously to the work and reputation of the ALRC. Her work has included the implementation of a large number of research policies and procedures, and work on 24 inquiries.

The members and staff of the ALRC thank them for their dedicated service.

Past Reports Update

ALRC102—Uniform Evidence Law

Uniform Evidence Law (ALRC 102, 2005) was a joint report of the Australian Law Reform Commission, New South Wales Law Reform Commission and the Victorian Law Reform Commission. As noted in the last issue of *Reform*, New South Wales has moved to implement the recommended changes to the *Evidence Act 1995* (NSW) with passage of the *Evidence Amendment Act 2007* (NSW). The Bill received assent on 1 November 2007, but the date of commencement of the provisions has not yet been proclaimed.

In May 2008, the Australian Government introduced the Evidence Amendment Bill 2008 to Parliament. The Bill incorporates almost all of the recommendations of the Uniform Evidence Law Report, except for the recommendations in relation to a general confidential relationships privilege and the extension of privilege and immunity provisions to pre-trial proceedings. The Government has indicated these issues will be addressed at the time it responds to the ALRC's report, *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (ALRC 107, 2008). On 18 June 2008, the Senate referred the Evidence Amendment Bill 2008 to the Senate Legal and Constitutional Affairs Committee for inquiry and report by 25 September 2008.

On 24 June 2008, the Victorian Government introduced the Evidence Bill 2008 to the Legislative Assembly. The Explanatory Memorandum to the Evidence Bill 2008 notes that the Bill is based on the Model Uniform Evidence Bill.

The ALRC 102 recommendations have substantially been implemented by proposed amendments to the Commonwealth and NSW Acts and take the form of an amended model uniform evidence Bill (the Model Uniform Evidence Bill). The Model Uniform Evidence Bill was approved by the Standing Committee of Attorneys General in July 2007.

ALRC 84—*Seen and Heard: Priority for Children in the Legal Process*

The creation of a national Office for Children, as a federal coordination office for policy and service delivery for children, was a key recommendation of the report *Seen and Heard: Priority for Children in the Legal Process* (ALRC 84, 1997)—a joint report of the Australian Law

Reform Commission and the Human Rights and Equal Opportunity Commission. The discussion and recommendations of the report also were influential in the development of a 1998 discussion paper by Defence for Children International entitled *Taking Australia's Children Seriously—A Commissioner for Children and Young People*, which was relied on in drafting Labor's A Better Future for Our Kids Bill 2003, which proposed the establishment of a national commissioner for children.

The issue has been revived for discussion with the Democrats introducing the National Commissioner for Children Bill 2008 to the federal Parliament in May 2008. The Bill seeks to establish the National Commissioner for Children and Young People as an independent body with a range of functions to promote and protect the rights, interests and wellbeing of Australian children at a federal level, with a particular focus on child protection. Senator Bartlett's second reading speech indicated that the establishment of a National Commissioner is in accordance with the Labor Party's National Platform, adopted in 2007.

A national children's commissioner, and a number of other issues raised in the *Seen and Heard* report, are being canvassed by the Australian Government as part of its discussion paper *Australia's Children: Safe and Well—A National Framework for Protecting Australia's Children*, which was released for public consultation in May 2008. Some of the options put forward for discussion, which reflect recommendations made in *Seen and Heard*, include:

- national standards and monitoring of the out-of-home care system (Recommendations 161–162 of ALRC 84);
- a solution driven national research program (Recommendation 163);
- improved national monitoring, reporting and accountability, through a national Children's Commissioner or a national reporting function (Recommendation 3); and
- improvement in data collection (Recommendation 166).

The Australian Government has announced that it intends to implement a National Child Protection Framework from 2009.

The Evidence Amendment Bill 2008, which will implement most of the recommendations of the report *Uniform Evidence Law* (ALRC 102, 2005), will also implement a number of recommendations in the Seen and Heard Report that were incorporated into ALRC 102. These include:

- a new test for determining a witness' competence to give sworn and unsworn evidence that focuses on the capacity of an individual to understand a question and to give an answer to a question that can be understood (Recommendation 98 of ALRC 84);
- a prohibition on general warnings about the unreliability of children's evidence, instead permitting a warning to be given only upon request of a party and where the court is satisfied that there are circumstances particular to that child (other than the child's age) that affect the reliability of the child's evidence (Recommendation 100 of ALRC 84); and
- confirmation the court may seek expert opinion evidence to assist it to determine if a witness is competent to give evidence (Recommendation 101).

ALRC 80—Legal Risk in International Transactions

The ALRC's *Report Legal Risk in International Transactions* (ALRC 80, 1996) was completed before the UNCITRAL Model Law on Cross-Border Insolvency was finalised. The ALRC recommended that a high priority be given to involvement in the UNCITRAL Working Group on Insolvency with a view to adoption. This was done, and UNCITRAL finalised and adopted its Model Law on Cross-Border Insolvency in May 1997.

As indicated in the last issue of *Reform*, a Bill to incorporate the UNCITRAL Model Law into Australian law was introduced to Parliament in September 2007. That Bill lapsed when Parliament was prorogued in October 2007, but reintroduced in February 2008. The *Cross-Border Insolvency Act 2008* (Cth) received assent on 28 May 2008, and the substantive provisions of the Act are expected to commence operation in November 2008.

The Act provides that a foreign representative may commence an insolvency proceeding in Australia in relation to a debtor that is subject to a foreign proceeding; and that a foreign representative may participate in an Australian insolvency proceeding in relation to that debtor. The Act also provides that foreign creditors have the same rights as creditors domiciled in Australia regarding the commencement of,

and participation in, insolvency proceedings occurring in Australia.

ALRC 64—Personal Property Securities

In *Personal Property Securities* (ALRC 64, 1993), the ALRC identified the need for a single national system, including a national register of personal property security interests. in. Reform in this area has been under discussion for a number of years, with the Australian Government Attorney-General's Department taking the lead in developing proposals for consideration.

In May 2008, the Australian Government released for public comment draft legislation proposing significant reform to the law and practice relating to personal property securities. The Personal Property Securities Bill would establish a single national law governing security interests in personal property, replacing the existing system governed by more than 70 separate pieces of legislation administered by a range of Commonwealth, state and territory government agencies. It would address the creation and extinguishment of security interests in personal property, set out rules for determining priority among competing interests in personal property and establish a single national online register of personal property securities (the PPS Register). If implemented, the Bill would substantially implement the ALRC's recommendations from ALRC 64.

Seen and Heard revisited

By James McDougall, Tiffany Overall and Peter Henley

The *Seen and Heard: Priority for Children in the Legal Process* report ('Report'), published jointly by the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission on 30 September 1997,[1] was prepared in response to a reference from the Attorney-General Michael Lavarch under the previous Keating federal Government on 28 August 1995.[2]

In the Overview, the co-authors summarised the recommendations of the Report, as follows:

> Australia's children are the nation's future. Australia's legal processes have consistently failed to recognise this fact by ignoring, marginalising and mistreating the children who turn to them for assistance. Much must be done to provide for children's access to and appropriate participation in the legal processes that affect them. Changes are needed across all levels of government and across all jurisdictions. The Commonwealth should take on a leadership and co-ordination role in this regard. The recommendations in this report are designed to give full effect to the right of children to be both seen and heard in the legal process. They include:
>
> - a summit on children to be attended by all heads of Australian Governments;
> - a taskforce on children and the legal process;
> - an Office for Children to be located in the Department of the Prime Minister and Cabinet;
> - national standards in the areas of school discipline, care and protection, investigative interviewing of children and juvenile justice;
> - child-focused service delivery charters; research to improve agency practice in regard to children and collection and publication of statistics on children's participation in various legal processes;
> - restructuring current jurisdictional arrangements for dealing with children's issues, and in particular an extended cross-vesting scheme for family law and care and protection matters;
> - transferring appellate jurisdiction for care and protection matters to the Family Court to develop a national court of appeal for all family law matters;
> - provision of appropriate legal advice and representation to children in need of legal services, including practice standards for children's legal representatives and establishing a legal advice line, specialist children's legal service units and a visiting solicitors' scheme; and
> - amendments to federal legislation, including the *Family Law Act*, the *Evidence Act*, and the *Trade Practices Act* and negotiation with and encouragement of the states and territories to similarly amend or enact relevant legislation.
> - If the Office for Children is not established immediately, alternative avenues must be found for the implementation of recommendations that relate to the Office.

Significance of the Report

In the ten years that have elapsed since the Report was published, it has come to be recognised as a landmark in the recognition of the rights of children and young people in Australia. The scope of the Inquiry was comprehensive and its vision was clear and practical. The processes undertaken by the

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team drawn from the two statutory authorities were thorough and included forums with practitioners, public hearings, issues papers and exhaustive research. In what was at the time a significant innovation, the Inquiry encouraged and collected comments from children themselves—through focus groups and surveys.

The Report's summary of the law and its recommendations for reform continue to set the benchmark for research and reform in the area. The Report also sits as a worthy companion alongside two of the most important pieces of national advocacy for children in the last decade—the *Report of the Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* ('Bringing Them Home')[3] and the *Report of the Inquiry into Children in Immigration Detention* ('A Last Resort?').[4]

△ Yet in the ten years that have elapsed since the Report's publication, little progress has been made in the implementation of the Report's recommendations—largely because the recommendations of the Report have been ignored by the federal Government.△

Progress

Yet in the ten years that have elapsed since the Report's publication, little progress has been made in the implementation of the Report's recommendations—largely because the recommendations of the Report have been ignored by the federal Government.

The following is a brief review of some of the substantive issues raised in the Report and the response (if any). It does not aim to be comprehensive, but seeks to give a sense of the work that remains to address the Report's original call for reform. This review focuses on action (or inaction) at a federal level. There have been a range of relevant initiatives at a state and territory level. Those initiatives will not, however, be examined in this review.

Advocacy and Action[5]

The key recommendation in this area (Recommendation 1) proposed that a National Summit on Children be convened, to be attended by Heads of Australian Governments, to discuss a broad range of child and youth issues.[5]

No such event has been held. There has been no comprehensive policy framework at a federal Government level for issues relating to children and no national body to develop, coordinate or monitor policy as it impacts on children.[6]

New Working Federalism[7]

Recommendations designed to streamline state/territory and federal coordination and communication have not been implemented as proposed in the Report. Neither the proposed national Taskforce on Children and the Legal Process nor the Office for Children has been established at the Commonwealth level.

As a result, the coordination of policy development and service delivery has not proceeded in the manner contemplated by the Report.

Advocacy[8]

The specialist children's rights units contemplated for the Human Rights and Equal Opportunity Commission have not been established as the necessary resources for those units have not been provided by the Federal Government.

Notwithstanding the lack of financial support, the Human Rights and Equal Opportunity Commission and the Commonwealth Ombudsman have been active in important areas of the protection of children's rights, in particular regarding the issue of children held in immigration detention. However, the broad-ranging and integrated collaboration between the two offices proposed in the Report does not appear to have been implemented.[9]

While the Commonwealth Ombudsman has developed flexible complaints procedures which make it marginally easier for children and young people to access and understand complaints procedures, and to make complaints, no specific entry points or procedures for children have been established.

No support, either financial or administrative, has been provided for the development of a network of community-based and peer advocates for children with accompanying support for training, liaison and accreditation.[10]

Administrative decision making service delivery for children[11]

The Report noted the potential for the then recently established Youth Allowance to be administered (by the then recently established statutory authority Centrelink) in a manner that would deprive young people without other means of support, of basic income support.[12]

Following a review by Centrelink in late 1997, processes were broadened and simplified

with the intention of adopting a more flexible interpretation of evidentiary requirements for children or young people who are at risk of homelessness or who are homeless and to provide more appropriate support. The effectiveness of such measures will again be reviewed in the context of the current federal Government's recently announced review of homelessness.[13]

The Report's recommendation for the ratification of the Hague Convention on Protection of Children and Co-Operation in respect of Intercountry Adoption[14] was implemented and came into effect in 1998. The federal Government has continued to undertake work in this area.

One of the significant recommendations in this area was for the adoption of child-friendly service delivery standards by all federal Government agencies.[15]

The key principles identified included:

- the timely response to complaints;
- clear and simple complaints procedures;
- the ability of children to have supporting friends available; and
- the development of complaints processes designed for children.

The only Government agencies to have given this matter any attention would appear to be Centrelink, Medicare, the Department of Immigration (in its various incarnations) and the Commonwealth Ombudsman.

Otherwise there has been little evidence of consideration of the key principles, and no further monitoring or evaluation of the current processes undertaken by Federal agencies or departments.

Children in Education[16]

There has been progress in relation to a number of the Report's recommendations for research particularly on issues relevant to school attendance or the transitions to employment.

The National Safe Schools Framework[17] has been developed by the Ministerial Council on Education, Employment, Training and Youth Affairs. This has been an important step in addressing bullying and school violence, as called for in the Report's Recommendation 38.[18]

There has been little progress towards the goal of abolishing corporal punishment in all schools, as recommended by the Report.[19]

The Report had carefully linked the need for better support for student participation to the growing interest in civics education.[20] However, while the federal Government has developed materials for schools which provide resources for children and young people to understand the principles of adult citizenship, those materials do not refer to the rights of children and young people in the community, nor do they explain the rights of children in school decision-making.

Children as Consumers[20*]

The lack of progress in addressing the Report's recommendations in relation to children as consumers has been recently highlighted in the Productivity Commission's recent Report 'Review of Australia's Consumer Policy Framework'.[21]

Legal representation and advocacy[22]

The Report gave careful and detailed attention to the question of the appropriate models for effective representation for children. The results of that consideration included a compelling call for the development of standards for the representation of children in all family law and care and protection proceedings (Recommendation 70).[23] The Report also set out some of the fundamental provisions that such standards should address (Recommendations 71–77).[24]

The standards were to provide for the child to direct the litigation conducted by the representative where the child is willing and able to do so, for the representative to make him or herself available at the comfort and convenience of the child, and to consult with the child in advance of the relevant proceedings.

These recommendations have not been implemented. There remains a low level of direct participation in litigation proceedings by child litigants (in both federal and state and territory jurisdictions).

Children's Involvement in Care and Protection[25]

The Report presented a compelling argument for action at a federal level.

Australia's commitments to children as

> a party to CROC [the United Nations Convention on the Rights of the Child ratified by Australia in 1990] and the consistent and persistent criticism of all care and protection systems in Australia lead the Inquiry to recommend that the Commonwealth undertake to coordinate the various care and protection systems.[26]

The Report proposed *inter alia*:

National standards for legislation and practice (Recommendation 161) to be reviewed and evaluated in light of national and international initiatives (Recommendation 162); national research and data collection (Recommendations 163 and 166) including on the effectiveness of mandatory reporting (Recommendation 168) and conferencing models (Recommendation 169); and a National Charter for Children in Care (Recommendations 164 and 165).

Apart from funding for research (including the work of the National Child Protection Clearing House which has been operated by the Australian Institute of Family Studies), these recommendations have been given little attention at the federal level.

On 26 May 2008 the federal Government announced a proposal to develop a national framework for the protection of Australia's children.[27]

Children's Involvement in Criminal Justice[28]

As noted previously in this Journal,[29] the Report's recommendations for national standards for juvenile justice [30] have not been implemented.

The Human Rights and Equal Opportunity Commission's further attention to the issue of children in detention in the context of Australia's immigration system[31] highlighted many of the same international human rights principles considered in the *Seen and Heard* report in the context of criminal justice detention.

Whilst those principles have been given limited acknowledgment in changes to federal Government policy in the area of immigration detention, the same cannot be said for the earlier Report's recommendations.

Crucially, the call for clear national endorsement of rehabilitation as the primary aim of juvenile detention has not been addressed.[32]

Conclusion

This article provides a reflection on the progress made since the report. The challenge for those of us concerned with the status of children in our society is how to move this agenda forward again. A workshop, held in November 2007 at the University of Melbourne Law School,[33], '*Seen and Heard: 10 years on—looking back and moving forward*', aimed to reinvigorate debate and to encourage policy and legislative change in line with the objectives of the Report and in compliance with Australia's obligations under the UN *Convention on the Rights of the Child*.

Endnotes

1. Australian Law Reform Commission and Human Rights and Equal Opportunity Commission joint report, ALRC 84, 1997.
2. Report, pp3-4.
3. Human Rights & Equal Opportunity Commission, 1997.
4. Human Rights & Equal Opportunity Commission, 2004.
5. Report, chapter 5, p123.
5. Report, chapter 5, p123.
6. '*The Non-Government Report on the Implementation of the United Nations Convention on the Rights of the Child in Australia*', May 2005, National Children's & Youth Law Centre and Defence for Children International (Australia), p.1.
7. Report, chapter 6, pp139–140.
8. Report, chapter 7, pp150,151,154.
9. Ibid.
10. Report, chapter 6, pp157-158.
11. Report, chapter 9.
12. Ibid.
13. On 22 May 2008, the Prime Minister, the Hon Kevin Rudd MP announced the release of the Government's Green Paper, '*Which Way Home? A New Approach to Homelessness*'.
14. Report, p185.
15. Report, p165.
16. Report, chapter 10.
17. Available at: <http://www.dest.gov.au/sectors/school_education/publications_resources/profiles/national_safe_schools_framework.htm>.
18. Report, p196.
19. Report, p217.
20. Report, pp192-194.
20*. Report, chapter 11
21. Productivity Commission, April 2008, pp303-304.
22. Report, chapter 13.
23. Report, p274.
24. Report, pp275-280.
25. Report, chapters 15 and 17.

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Ten years on: life chances and human rights of Indigenous children

By Tom Calma

In 1987, former Prime Minister Bob Hawke famously pledged 'by 1990 no Australian child will be living in poverty'.[1] In 2008 Prime Minister Rudd declared that he wanted Indigenous peoples to be 'full participants' in society, rather than marginalised Australians.[2] Despite such intentions, the reality for many Indigenous children is that their lives are a repetition of the deprivation and discrimination experienced by previous generations.

As a wealthy country and a signatory to several international conventions including the *Convention on the Rights of the Child*, Australia is required to ensure that Indigenous children have the same life chances as other Australian children. This includes a right to resources to enable Indigenous children to realise their full potential in full equality with other Australians. All children are entitled to a future in which they can thrive, develop and live fulfilled lives.

Unfortunately, Indigenous children continue to experience inequality. The 17 year gap in life expectancy between Indigenous and non-Indigenous Australians is perhaps one of the clearest indications of disparity in resourcing and support for Indigenous Australians during the life cycle. From birth there are disparities in access to health services, and these disparities are greatest in remote areas of Australia. The infant mortality rate is two to three times higher amongst Indigenous infants compared with their non-Indigenous counterparts. Indigenous children continue to suffer higher incidences of preventable diseases such as otitis media which can cause deafness; rheumatic fever which can lead to heart disease; and eye infections which can lead to trachoma. Indigenous children under the age of four are hospitalised for injury and preventable diseases at twice the rate of non-Indigenous children.[3]

The lack of a rights based approach to address Indigenous children's needs has meant that the current status of Indigenous children remains marginalised and compromised. However, some recent advances in the recognition and protection of Indigenous children's rights (particularly at the international level), coupled with commitments made by the current Government to achieving equality in life chances within a generation, present the most promising opportunities to date, provided a rights based framework is adopted.

The situation for Indigenous children in 2008

It has been ten years since the release of the *Seen and Heard* report by the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission. This Report recommended the establishment of an Office for Children to monitor Australia's compliance with its international obligations to children, particularly those outlined in the *Convention on the Rights of the Child*. However, in 2008 there is still a lack of an overarching policy framework to address, guide and monitor the delivery of resources and services to Australian children. An Office with responsibility for the rights of children could bring attention to matters such as the disparity between Indigenous and non-Indigenous children's health and educational outcomes. It could advocate for the rights of children and implement processes to redress disadvantage. It could progress action and solutions to issues such as those raised by a recent *NGO Report to the Committee on the Rights of the*

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Child. The NGO Report found that for many Indigenous children there is a lack of access to adequate healthcare and education services, inadequate housing, over-representation in child protection and juvenile justice systems, and a lack of meaningful participation in decision-making and policy development.[4]

Important life chances indicators

Health and education are both important components of a person's wellbeing. They are also the foundation for other life chances. They affect employment prospects, income levels, likelihood of substance abuse and involvement in the criminal justice system.

Indigenous children's educational outcomes are extremely poor when compared with those of other Australian children. Indigenous students' outcomes in reading, writing, and numeracy are substantially lower than those for non-Indigenous students, and they have not been improving.[5] Whilst there have been improvements in school retention rates, with the Indigenous apparent school retention rate to year 12 rising from 32% in 1998 to 43% in 2007, this statistic still does not compare favourably with the non-Indigenous apparent school retention rate to year 12, which is 75.6%. The impact of these statistics on Indigenous children's life chances is clear. According to the Australian Bureau of Statistics, Indigenous young people aged 18-24 years who have completed year 12 are four times as likely to have full-time employment than those who left school in year 9 or earlier, and a similar trend is evident in relation to non-school qualifications.[7] Low employment levels have an adverse effect on income, living standards, self-esteem, social integration and health.

Indigenous education also plays an important role in preserving Indigenous languages and cultures. Article 29 of the *Convention on the Rights of the Child* states that the education of children should be directed to respect for the child's own cultural identity, language and values. This has been recognised as very important for Indigenous children, not only because culture is an important factor in Indigenous wellbeing, but also because many Indigenous languages are at risk of being lost. According to the *National Indigenous Languages Survey Report* 2005, of over 250 known Australian Indigenous languages, it is estimated that 100 have been lost, about 145 are still spoken, but of these 110 are at critical risk of being lost.[8] Further, whilst there are currently some primary and secondary schools that teach Indigenous studies, there is a wide disparity between different schools' approaches to Indigenous curriculum content and language.[9]

Right to participation

Attempts to rectify the disparity between the life chances of Indigenous and non-Indigenous children are often made in the absence of adequate consultation with Indigenous communities. This in turn affects the ability of Indigenous communities to exercise control over our development. My *Social Justice Report 2007* noted that where there is ownership of policies and programs, there is likely to be greater participation and compliance. We see this in relation to policies such as alcohol management. The management of alcohol and other drugs is essential for the health and wellbeing of all Australian children. In North East Arnhem Land and Groote Eylandt the alcohol management plans are enjoying a high measure of success because they have been developed and implemented with the full participation of the local people. In contrast, the alcohol management aspects of the Northern Territory Emergency Response have been less effective. What is missing from the Emergency Response is collaboration with Indigenous communities so that we can be the architects of the strategies and policies to improve outcomes for our children and our people.[10]

Advances at the international level

In September 2000 at the United Nations Millennium Summit, world leaders agreed to the *Millennium Development Goals* which provided measurable goals and timelines for combating poverty, hunger, disease, illiteracy, environmental degradation and discrimination against women.[11] These goals outline an intention to improve all aspects of disadvantage including improving the literacy rates of children and improving the health and wellbeing for marginalized peoples.

Under the *Convention on the Rights of the Child*, Australia has accepted a responsibility to ensure children's rights in relation to health and education. This means that whilst the status of Indigenous children's life chances is a social justice issue, it is also a human rights issue. Under Article 2(1) of the *Convention on the Rights of the Child*, states must ensure children's rights, irrespective of race, colour, or

ethnic or social origin. According to Article 4 of the *Convention on the Rights of the Child*:

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

So an equal start in life for Indigenous children is a requirement of Australia's international human rights obligations, and the current status of Indigenous children's life chances is especially unsatisfactory given the economic resources available in 21st century Australia.

The UN Committee on the Rights of the Child in its concluding observations of Australia in 2002 noted that it was 'particularly concerned at the discriminatory disparities existing towards Aboriginal and Torres Strait Islander children, especially in terms of provisions of and accessibility to basic services'.[12] It recommended that the Australian Government:

- ensure the full respect of the rights of Aboriginal and Torres Strait Islander children to their identity, name, culture, language and family relationship;
- reduce the significant number of Indigenous children placed in out-of-home care in a time-bound manner, inter alia, by strengthening its support for indigenous families and fully implementing the Indigenous Child Placement Principle;
- provide Indigenous children with adequate support, including counselling, and to facilitate contacts with their parents in prison;
- ensure that all children enjoy the same access to and quality of health services, with special attention to children belonging to vulnerable groups, especially Indigenous children and children living in remote areas; and overcome, in a time-bound manner, the disparity in the nutritional status between Indigenous and non-Indigenous children; and
- provide affordable housing options and take all possible measures to raise the standard of living of Indigenous children and children living in rural and remote areas.[13]

In the last decade there have been some useful advances made in the recognition and protection of the rights of Indigenous people in general, and in relation to Indigenous children specifically:

- The UN Committee on the Rights of the Child held discussions on the rights of Indigenous children and have issued recommendations for States on the realisation of rights of Indigenous children (3 October 2003);[14]
- The UN *Declaration on the Rights of Indigenous Peoples* came into force in 2007, and specifically recognises the rights of Indigenous children with regard to their education and protection from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

Advancements within Australia

There have been encouraging advancements within Australia. In 1997 the Human Rights and Equal Opportunity Commission released the *Bringing Them Home* report, which outlined the experiences of the Stolen Generations and the impacts of the removal of children from their families. The Report made recommendations for making apologies and reparations to the Stolen Generations as well as for improving current child protection systems in Australia.[16]

On 13 February 2008, the Australian Parliament acted on one of the *Bringing Them Home* recommendations when it apologised to the members of the Stolen Generations. In addition to being an important symbolic gesture, the Apology established important foundations for concrete measures to be introduced for future Indigenous generations.

In 2005, I made three key recommendations in my annual *Social Justice Report* including:

1. achieving equality of health status and life expectation between Aboriginal and Torres Strait Islander and non-Indigenous people within 25 years;

2. establishing a process for what would need to occur for this commitment to be met. It called for:

- the governments of Australia to commit to achieving equality of access to primary health care and health infrastructure within ten years for Aboriginal and Torres Strait

△The recent recognition of Indigenous children's rights at the international level, and the commitments at the national level, provide an opportunity to achieve some positive changes towards equalising the life chances and human rights of Indigenous children.△

Islander peoples;

- o the establishment of benchmarks and targets for achieving equality of health status and life expectation—negotiated with the full participation of Aboriginal and Torres Strait Islander peoples, and committed to by all Australian governments;
- o resources to be made available for Aboriginal and Torres Strait Islander health, through mainstream and Indigenous specific services, so that funding matches need in communities and is adequate to achieve the benchmarks, targets and goals set out above; and
- o a whole of government approach to be adopted to Indigenous health, including by building the goals and aims of the *National Strategic Framework for Aboriginal and Torres Strait Islander Health* into the operation of Indigenous Coordination Centres regionally across Australia; and

3. making a National Commitment to achieve Aboriginal and Torres Strait Islander Health Equality.[17]

In March 2008 the Australian Government signed a *Statement of Intent* committing itself to

> a new partnership between Indigenous and non-Indigenous Australians. The core of this partnership for the future is closing the gap between Indigenous and non-Indigenous Australians on life expectancy, educational achievement and employment opportunities. This new partnership on closing the gap will set concrete targets for the future: within a decade to halve the widening gap in literacy, numeracy and employment outcomes and opportunities for Indigenous children, within a decade to halve the appalling gap in infant mortality rates between Indigenous and non-Indigenous children and, within a generation, to close the equally appalling 17-year life gap between Indigenous and non-Indigenous when it comes to overall life expectancy.[18]

The Council of Australian Governments (COAG) on 20 December 2007 made similar commitments to closing the 17 year gap in life expectancy between Indigenous and non-Indigenous Australians by developing a partnership between all levels of government and Indigenous communities to achieve the target of closing the gap on Indigenous disadvantage. COAG committed to:

- o closing the life expectancy gap within a generation;
- o halving the mortality gap for children under five within a decade; and
- o halving the gap in reading, writing and numeracy within a decade.[19]

There are important lessons that we can learn from the last ten years. The lack of a rights based approach to ensuring Indigenous children have access to necessary health care, education, training, housing and other services, and the lack of participation of Indigenous people in the development of policies and programs has led to a disappointing lack of progress in improving the life chances and human rights of Indigenous children.

Changes are needed across all levels of government and across all jurisdictions to provide for children's access to, and appropriate participation in, the legal, social and economic processes that affect them. The recent recognition of Indigenous children's rights at the international level, and the commitments at the national level, provide an opportunity to achieve some positive changes towards equalising the life chances and human rights of Indigenous children.

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The 'Glass Sculpture' has been created by Sam Juparulla and the 'Flowers' image on the previous page has been created by Nora Campbell. Both artworks have been purchased by the Australian Law Reform Commission and are displayed in their offices at Level 25, 135 King St, Sydney.

Demographics of Indigenous Australia

By Tim Goodwin and Adele Cox

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There exists in Australia a new environment for effective debate on Indigenous[1] affairs. Where once a culture of fear, intimidation and hostility existed, new opportunities have arisen. There is greater space for Indigenous people to share their opinions, remark on the state of their communities and begin to contribute to positive work that may create a better future for Indigenous Australia.

This new environment must be harnessed in a way that captures the momentum rather than misses a valuable opportunity. In doing so, we must be aware that new solutions in Indigenous affairs require fresh thinking, innovative solutions and atypical partnerships. A society's capacity to transition from era to era, movement to movement, is best judged by the place of young people in political and social development. This is no different for Indigenous affairs. Young people are the interpreters of change. Accordingly, if meaningful and lasting change is to be achieved in society, or in one particular element of it, young people must be involved, mentored and supported. Therefore, Indigenous young people must be at the forefront of the necessary 'reformation' of Indigenous affairs in Australian society.

Demographics of Indigenous Australia

Indigenous communities and policy-makers are better placed to succeed if they utilise their young people. Approximately 63% of Indigenous Australians are under the age of 30.[2] In non-Indigenous Australia, the corresponding statistic is approximately 40%.[3] A majority of Indigenous Australians are young people. Consequently, Indigenous young people are central to the development of policy and programs and community capacity-building. Unfortunately, Indigenous communities are burdened by an abundance of socio-economic problems that constrain their ability to depend on their own human resources to create and oversee successful solutions. These issues, such as drug and alcohol abuse and misuse, sexual abuse, domestic violence, overrepresentation in the justice system, under representation in education and employment outcomes, are well documented. Our knowledge about what is wrong is not the barrier to success. However, if we do not move from a problem-based approach to a strength-based approach in Indigenous affairs, we will remain unable to ensure equity and justice in Indigenous communities.

In promoting a strength-based approach to Indigenous policy, young Indigenous people must be recognised as assets to their community. Hard fought victories in the fields of education, employment, economic development and legal change by our forebearers have given young Indigenous people more opportunities than our communities have had in the history of Australian colonisation. In order to build on these victories and increase opportunities for the generations to come, the efficient transition of leadership from one generation to the next is critical. Indigenous young people can then utilise the skills they have on the basis of past victories to further development of their communities and more generally, Australian society.

National Indigenous Engagement Workshops

The vast talent amongst Indigenous young people was witnessed by the National Indigenous Youth Movement of Australia

(NIYMA) through workshops held around the country in 2007. In conjunction with Reconciliation Australia, NIYMA held seven one-day workshops with Indigenous people aged 18 to 30, in Canberra, Cairns, Adelaide, Darwin, Perth, Sydney and Melbourne. The workshops were designed to give young Indigenous people space to support and network with each other, share in their own voices what they believed the issues to be in their communities and begin to build the solutions needed.

The young people who attended the workshops proved they had the innovation and fresh thinking required in Indigenous policy. In Perth, a group of participants have begun to use new technology—particularly websites like Facebook and Bebo—to create a virtual space where they can share experiences, keep in touch, work together to effect solutions and branch out to other members of their community. This method of communication is particularly important considering the mobility of young Indigenous people in modern society. One participant suggested the eradication of 'shame job' from the Indigenous vocabulary as a way to halt a lack of higher expectations among our people. In northern Queensland a group created their own foundation to provide a mechanism for young Indigenous people to express their own voice in the environmental and climate change debate. In Sydney, participants from inner city suburbs realised that the divisions between them were unhelpful and destructive. Both communities had buses that they planned to use in the future to bring groups of young people from each community to the other in order to break down barriers. Young people in Adelaide have made the commitment to network locally and stay connected to support those young Indigenous people who are working on ground towards local strategies for effective change.

The workshops also gave NIYMA the opportunity to partner with local and state Indigenous youth organisations that are contributing positively to their communities. Many of these organisations go unnoticed and uncelebrated and yet are making a major impact in the lives of young Indigenous people. Lapa Bummers Youth Haven in Sydney is the creation of a group of young Indigenous people from the La Perouse community who mentor and host activities for school children in order to limit the negative effects of boredom in their community. Danila Dilba Youth Service in Darwin provides a space for young Indigenous people to connect and build self-esteem, leadership and interdependency. Yirra Yarkin Aboriginal Corporation in Western Australia enables Indigenous communities to celebrate their culture through theatre performance and focuses on the involvement and training of young Indigenous people. The Aboriginal Alcohol and Drug Service in Perth is exploring innovative methods of educating young Indigenous people, particularly children, about the harmful effects of drug and alcohol abuse from the perspective of Indigenous people themselves. The Victorian Indigenous Youth Advisory Council is a successful peer network that is able to advise government about the issues of young Indigenous people while also themselves running programs that aim to engage other Indigenous young people in their culture and introduce them to young mentors who can encourage them to succeed. Kurruru Indigenous Youth Performing Arts in Adelaide provide services and support to young Indigenous artists as well as an array of other youth-specific programs. These organisations only represent a small portion of successful youth-run or youth-led organisations or programs that encourage the development of young Indigenous talent, creativity and intellect.

Reformation

There must be a major investment made in young Indigenous people if policy-makers, government, the private sector and the community sector desire real and positive change in Indigenous communities. Firstly, all these groups should be aware of the unique demography of Indigenous Australia and engage with young Indigenous people in developing and implementing any Indigenous policy, program or investment. Secondly, any contribution made by young Indigenous people that requires their time, energy and expertise should be appropriately recognised. There is often the view in Indigenous affairs that Indigenous knowledge should be free, in time and finances, because the goal is good for public policy. However, in other fields, expertise is valued, financially or otherwise. Indigenous young people, who often give up time from their careers or study to provide their expertise, should be treated no differently.

Thirdly, there must be a shift in attitude for policy-makers so that they think about investing in people rather than only in policy and programs. Success in Indigenous communities is dependent on the capacity of Indigenous people themselves to self-determine their own

futures. For this to occur, community capacity-building must involve a degree of individual capacity-building. For the greatest and longest return on an investment, such capacity-building must be focused largely on young Indigenous people.

The Future

There has never been a more critical time for young Indigenous Australians to play a role in shaping and influencing the way the nation views and embraces its Indigenous people. Out of the 400,000 Indigenous Australians there are in the country, 250,000 of them are under the age of 30. When society understands Indigenous demographics then it must realise, as NIYMA has, that the most critical investment that can be made into Indigenous Australia has to be an investment made in Indigenous people.

History has taught us—and our future demands from us—that for Indigenous Australia to improve the quality of life that we live, to bridge the socio-economic divide between us and the rest of Australia, there must be new ideas, new perspectives—new leadership. Indigenous Australia should recognise and value the contribution, sacrifice and struggle of those that have come before us. However, we must also believe in those ahead of us.

Through the Indigenous Youth Engagement Workshops, NIYMA has begun to unearth a new group of leaders—intelligent, educated and earnest in their resolve to improve the quality of life of their peers and the nation in general. It is in this cohort that NIYMA sees an opportunity to effect long term positive change for not only Indigenous Australians, but all Australians.

Endnotes

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Children both seen and heard

By Chief Justice Diana Bryant

As Chief Justice of the Family Court of Australia I am honoured to contribute to this special issue of *Reform*, which marks ten years since the release of the ALRC's and HREOC's seminal report *Seen and Heard: Priority for Children in the Legal Process*.

The report devoted a chapter to children's involvement in family law proceedings and made numerous recommendations to foster children's productive and supportive engagement with the litigation process, encompassing alternative dispute resolution and the adversarial trial. The findings and recommendations contained in *Seen and Heard* provided impetus for highly significant changes to practice and procedure made by the Family Court over the last decade. These changes are outlined in my article.

The context

Since the release of *Seen and Heard*, major changes have been made to the operation of the family law system and to the substantive law.

In 1999, the Federal Magistrates Court was established as a lower-level federal court with jurisdiction in family law matters. I was the inaugural Chief Federal Magistrate of that Court. The Federal Magistrates Court now exercises virtually concurrent jurisdiction with the Family Court.

In 2004, the Howard Government announced major changes to the family law system, including an emphasis on dispute resolution outside the court system and the provision of significant additional funding for community support services for separating families. On 1 July 2006, the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) came into effect. This Act, amongst other things, introduced a rebuttable presumption that it is in the best interests of children for their parents to have equal shared parental responsibility for them,[1] imposed consequential obligations on family courts to consider time spent with parents upon application of the presumption, and established a two-tier system of 'best interest' factors.

Despite these changes, the ALRC's and HREOC's observation, made in 1997, that '[t]he fundamental principle in international and Australian law concerning children is that all decisions made and actions taken should be in their 'best interests' remains a statement of the current law.[2] The 2006 amendments did not alter the application of the principle that children's best interests are the paramount consideration in parenting disputes.[3] Similarly, any views expressed by the child, and any factors the court thinks are relevant to the weight it should give the child's views, remains a relevant consideration for the Family Court in deciding what outcome would be in a child's best interests.[4]

Less adversarial proceedings

In 1997, the ALRC and HREOC noted that the traditional model of adversarial litigation had been modified somewhat in children's cases in the Family Court. They opined however that the focus of family law litigation remained on the parental contest and adversarial processes and, in exacerbating psychological hostility between separated parents, such processes often did not serve children's interests. They recommended that '[j]udges and magistrates deciding family law matters should be encouraged to intervene appropriately to assist the determination of the best interests of the

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* The Hon. Chief Justice wishes to acknowledge the assistance of Dianne Gibson, Director, Child Dispute Services; Murray Green, Registrar; and Kristen Murray, Senior Legal Research Adviser, in the preparation of this article.

child in Family Court children's matters'.[5]

The position is now very different. Between 2002, when my predecessor the Hon. Alastair Nicholson AO RFD QC signalled his intention to explore the use of inquisitorial techniques in the Family Court, and the present, the Family Court has developed, trialled and implemented a less adversarial model for the conduct of parenting disputes, known as the less adversarial trial ('LAT').[6]

The degree of control the trial judge exercises over the proceedings is a critical part of the LAT. He or she plays a leading role in the conduct of the hearing. The trial judge decides, in concert with the parties, their legal representatives, the independent children's lawyer and the family consultant, the matters that are agreed and the issues remaining in dispute. As affidavits are not filed before the first day of trial, the LAT model enables the trial judge to determine, and limit, the form and content of the evidence to be relied on at trial. In this way the needs and wishes of children, rather than parental grievances, remain the focus of the proceedings. Other important features of the LAT include an active exchange between the parties and the bench through the trial judge speaking directly to the parties; the ability of the trial judge to make determinations, findings and orders on discrete issues at any stage in the proceedings; and the rules of evidence not applying unless the trial judge is satisfied special circumstances exist.

△ In the intervening ten years since those observations were made there has been further research into 'child focused' and 'child inclusive' family dispute resolution practice. The benefits of these approaches in the treatment of children involved in separation conflict are largely beyond dispute. △

The LAT was first piloted in two registries as the Children's Cases Program ('CCP'), then evaluated, both as to its impact on parental capacity and child well-being and its effectiveness as a process. The former evaluation found that in enabling a more interventionist judicial role and deliberately focusing on improving parental relationships, CCP delivered outcomes that were significantly more positive for all concerned. The evaluator found '[f]our months postcourt, parents who went through the CCP were significantly more likely to report better management of conflict, less damage to the co-parental relationship, greater satisfaction of parents and children with their living arrangements, and, in association with these, improved children's adjustment'.[7]

Our confidence in the ability of less adversarial proceedings to deliver improved outcomes for children affected by often acrimonious and high-conflict litigation was validated by the enactment of the new Division 12A of the *Family Law Act 1975* (Cth). Division 12A enshrines principles for the conduct of less adversarial child-related proceedings and, as acknowledged by the legislature at the time, was modelled on the Family Court's CCP pilot. The LAT is the way in which we are giving effect to Division 12A and virtually all children's cases commenced after 1 July 2006 are conducted within the LAT framework.

The Child Responsive Program

Our process changes are not merely confined to the trial itself. The pre-trial process, whereby Court-employed family consultants assist parents to explore opportunities for settlement, has also been transformed. We have moved from a largely confidential process, conciliatory in its purpose; to a more forensic model of assessing and reporting on the issues for the children and the family that underpin the dispute before the Court.

When discussing the issue of children's involvement in alternative dispute resolution (now known generally as family dispute resolution) the ALRC and HREOC cited research findings which suggested that children may benefit from involvement in Family Court mediation, conciliation and counselling process, while noting that available research was 'limited'. The ALRC and HREOC cautioned that the degree of children's involvement should be individually determined and commensurate with their age, maturity, wishes and needs.

In the intervening ten years since those observations were made there has been further research into 'child focused' and 'child inclusive' family dispute resolution practice. The benefits of these approaches in the treatment of children involved in separation conflict are largely beyond dispute.[8]

As we moved to LAT as the 'default position' for the conduct of children's cases, it became clear that more seamless integration between the pre-trial and trial processes was required. The increased emphasis on community-based dispute resolution also created the spectre of duplication between the Family Court and community mediation services. We therefore reviewed and reorientated our family dispute resolution service in the form of the Child Responsive Program ('CRP'). In so doing, we were able to incorporate key learnings from various studies about child focused and child inclusive practice.

CRP is predicated on a non-privileged model of family dispute resolution, to avoid duplication of privileged services in the community. It is a staged process involving the same family consultant working with the one family until finalisation of the dispute (whether by agreement or judicial determination) and the provision of expert assessment and opinion to families, legal practicitioners and the courts in a form not available in community-based models.

Children's greater involvement in CRP is highly significant and gives real effect to the findings and recommendations contained in *Seen and Heard*. The first phase of the model (at the pre-trial stage) involves a family consultant conducting a child and family meeting. Children are interviewed separately or in sibling groups, or both, as part of the child and family meeting once the family consultant has assessed that interviewing the children is appropriate. This occurs far earlier in the process than occurred previously, when children only became involved when a matter had proceeded to trial and a family report was being prepared.

The interviews with children are designed to explore their experience of their family situation, ascertain their knowledge of the current and/or proposed arrangements, assess children's responses to their parents' separation and exposure to conflict, and identify secure base attachment figures. Family consultants 'feed back' this information to parents, to raise awareness of the impact of their conflict on their children and to assist them to refocus on their children's needs.

A children and parents issues assessment, similar to a brief family report, is prepared following the child and family meeting. If the matter does not settle and proceeds to a LAT, the issues assessment is available to the trial judge on the first day of the trial. The family consultant is also available on that day to provide assistance to the judge, have input into identifying the key issues in dispute, provide information on children's needs and provide options for case management and assessments.

The CRP also has a post-determination phase to assist parents and children to understand and implement orders.

Similar to the approach we took to the CCP/LAT, the CRP was trialled and evaluated. The evaluation report found that the new process 'impacted significantly on parents' perceptions of their relationships with their children…a core factor in the long-term well-being of children in high-conflict divorce'.[9] Critically, the evaluation found that parents' experience of hearing their own children's story, as relayed to the family consultant, offered many parents lasting insights and acted as an important settlement tool.[10]

Judicial interviewing of children

The direct participation by children in court proceedings through judicial interviewing has been used only sparingly in the Family Court, as the *Seen and Heard* report recognised. Arguably however, the strong emphasis of the LAT process on child-focused outcomes and building parental capacity, combined with its procedural flexibility, creates an environment in which judicial interviews could be more effectively utilised in deciding what arrangements are in the best interests of the child.

As Cashmore and Parkinson observe, talking with children can enable the trial judge to gain an impression of the child's maturity (a relevant 'best interests' factor), assist the judge to gain a better understanding of the depth and intensity of the child's feelings, and allow the judge to address any concerns about the views of the child as previously ascertained.[11]

Questions of procedural fairness and transparency—in particular, confidentiality—have traditionally been seen as an impediment to judicial interviews. In LAT cases where the judge has determined that an interview is appropriate, potential difficulties have been overcome by interviewing a child or children in the courtroom in a private session, which enables the interview to be recorded. Questions are largely asked by the family consultant rather than directly by the judge. At the conclusion of the interview, the family consultant gives evidence to the court of what had occurred and what was said, with a transcript of the interview available to be ordered by the Court and the parties.[12]

Cashmore and Parkinson's research into children's perceptions of their participation in decision making emphasises that children want to be heard but most don't want to have to 'make the decision'.[13] In LAT cases in which children have been interviewed, the trial judge has emphasised to the child or children that

they did not have to be in court if they did not want to, they did not have to express any view and that the decision was that of the judge and not of the children. This conveys to child that the interview is simply an opportunity to ascertain their views if they wish to give them.

Conclusion

Over the past decade the Family Court has embraced the challenge presented by the ALRC and HREOC to reduce the harmful effects of family law litigation on children and to develop supportive processes to enable children to express a definite voice in proceedings that affect them. As these programs continue to mature, I am confident that the centrality of children's views, needs and wishes will become further entrenched in Family Court proceedings. Our ultimate aim remains to quell a controversy brought to court in a way that does not escalate the dispute and, at the same time, brings about an outcome that promotes the best interests of the children.

Endnotes

1. Note that the presumption does not apply if there are reasonable grounds to believe that a parent has engaged in child abuse or family violence: *Family Law Act 1975* (Cth) s61DA(2).
2. Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, 1997, Commonwealth of Australia, ALRC 84, p388.
3. *Family Law Act 1975* (Cth)s 60CA.
4. Ibid s 60CC(3)(a).
5. Recomendation 141, Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, 1997, Commonwealth of Australia, ALRC 84.
6. For a comprehensive account of the development of the less adversarial trial, see Harrison, *Finding a Better Way: A Bold Departure from the Traditional Common Law Approach to the Conduct of Legal Proceedings*, 2007, Family Court of Australia.
7. McIntosh, Bryant and Murray, 'Evidence of a Different Nature: the Child Responsive and Less Adversarial Initiatives in the Family Court of Australia' (2008) 46 *Family Court Review* 125, 130.
8. See, eg, McIntosh and Long, *Children Beyond Dispute: A Prospective Study of Outcomes from Child Focused and Child Inclusive Post-Separation Family Dispute Resolution*, 2006, Attorney-General's Department, Commonwealth of Australia.
9. McIntosh and Long, *The Child Responsive Program, Operating within the Less Adversarial Trial: A Follow-up Study of Parent and Child Outcomes 2007*, Family Transitions, 2007, 23.
10. Ibid.
11. Cashmore and Parkinson, 'What Responsibility Do Courts Have to Hear Children's Voices?' (2007) 15 *International Journal of Children's Rights* 43.
12. See. eg. *Painter & Morley* (2007) FamCA283.
13. Cashmore and Parkinson, 'Children's and Parent's Perceptions on Children's Particiaption in Decision Making After Parental Seperation and Divorce' (2008) 46 *Family Court Review* 91, 94.

The long and the short of juvenile justice

By Rob White

Ten years can be a short time and a long time in juvenile justice. It is short when considered in the context of 130 years of developments in the area. Over time, the same types of tensions, and very often the same debates, have been apparent.

The ambiguities of 'neglect' and 'criminality'—especially when these reside in the same person—continue to present practitioners and reformers alike with dilemmas and disputes. Old problems are reproduced anew, and yet still command varied, but institutional, responses. So the prison hulk is replaced with detention, the reformatory with therapeutic justice. The perennial interface of neediness and criminality likewise sees remand as once again a tool of welfare—a tool that nevertheless represents the first step on to full-fledged punishment.

Ten years is also a long time. Much can happen in a decade of human endeavour and policy toil. Consider what has happened since *Seen and Heard: Priority for Children in the Legal Process* (1997) was first printed, released, discussed and pressed into action. On the plus side, for instance, we now a common national age of criminal responsibility (10 years nationally) and *doli incapax* has survived intact. In one form or another, all states (with the exception latterly of New South Wales), have taken action to work at a community level with ethnic minority groups. The Australasian Police Multicultural Advisory Bureau (now re-named, but still alive) gained important symbolic and practical runs on the board, even as 'ethnic youth gangs' came to dominate the moral panic agenda across much of the country.

In Victoria, the Youth Referral and Independent Person Program (YRIPP) was piloted and is presently expanding to over 100 police stations across the state. The YRIPP is a partnership programme that provides independent volunteers to attend police interviews with young people whose parents or guardians are not available.

Meanwhile, the more atrocious mandatory sentencing laws of the Northern Territory and Western Australia, which violated the dictum that prison be used as a last resort, have by and large disappeared, via legislation or sheer non-use. Alternatively, every jurisdiction has now entrenched some form of juvenile conferencing—the bastion of restorative justice in the Australian context—as a key element of juvenile justice. Diversion is a key part of language and practice, at least in the first instances of formal intervention. Youth drug courts represent another means by which the needs and interests of young people are being constructed in other than criminal terms.

Overall, these are positive developments. But they don't tell the whole story. The anti-social behaviour of youth—tales of binge-drinking, street fighting, drug-taking and general incivilities—have generated interest in zero tolerance policies, police crackdowns and making juveniles responsible for their actions. The Cronulla riots and their aftermath also exposed deep divisions in the Australian social mosaic. They led to increased police powers, ethnic profiling and the creation of the NSW Middle-Eastern Gang Squad. These policies and practices have inevitably translated into, at times, repressive state interventions and extensive state surveillance of specific ethnic minority communities and their young members.

In places like Tasmania, youth are being placed

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in greater numbers on remand, mirroring a general growth in remand nationally. There are many factors that contribute to the locking up of the new young 'neglected' and 'criminal'—lack of resources; welfare uses of criminal processes; failure to provide adequate legal representation; and unnecessarily bureaucratic procedures.

Detention still does not work, even though we lock fewer young people up than we did ten years ago. Youth prisons still provide the step-up to adult systems—indeed the most 'troublesome' offenders in New South Wales are held in ostensibly juvenile premises that are run by adult corrections. The prisonisation process is thus being entrenched early. And post-release still begs the question of release into what? The matter of appropriate services, social connectors and relationship builders continues to confound authorities even as they bemoan the recidivism rates of the most serious and repeating of young offenders.

△ Gang profiling based upon ethnic stereotypes represents the worst sort of offender-specific 'service'. It transforms the 'different' into the 'deviant', while undermining the reputations of communities and cross-community solidarity.△

Three Trends

Juvenile justice has its core issues and ongoing problems. The last ten years has seen important gains for young people, if we consider the overall track record. Sadly, it seems that very often the opposite is true for the adult system (into which many youthful offenders still graduate). For youth, there are three broad trends that capture to some degree the essence of these changes.

Bifurcation: the bad and the serious versus the naughty and the needy

Within the historical cycles in which juveniles have been alternately demonised and pathologised, another pattern has emerged. This is the separation of offenders such that the 'criminal' is categorised and dealt with differently than the 'troubled'. Restorative justice is construed as best benefiting the first time and small time offender. Those needing the most help, the most dialogue, the most attention, are, in fact, relegated to the 'punishment' wings of the system.

While 'successful' in terms of victim satisfaction and offender motivation, juvenile conferences continue to soak up enormous resources and staff time for offenders who, in their majority are also those most unlikely to re-offend. The Children's Court has had its role transformed. It has become the place for the judgement—and punishment—of the 'truly bad', those who now statistically, will repeat offend and end up in the hard end of the adult carceral system. The most damaged, the most vulnerable, and the most disadvantaged of Australia's young people still bear the brunt of a system that cannot see beyond the superficial to the profound injustices at the heart of these young people's lives. They may be tough, they may be dangerous, they may be criminal—but they are young people who nevertheless have potential, who have strengths and who have visions of making a 'good life' for themselves. A master status of 'crim' or 'delinquent' confounds this vision.

Specialisation: the trend toward offender-specific services

There are several developments within juvenile justice that connote either positive or negative forms of client specialisation. Gang profiling based upon ethnic stereotypes represents the worst sort of offender-specific 'service'. It transforms the 'different' into the 'deviant', while undermining the reputations of communities and cross-community solidarity.

On the other hand, the rise of the therapeutic justice movement, as evident in a wide range of problem-solving courts (that deal with drugs, mental illness, domestic violence, neighbourhood issues and so on), is encouraging. Such courts acknowledge that underneath the criminal veneer lie a range of social issues and co-morbidity of problems. Problem people are increasingly being seen as people having problems.

Social rather than simply or exclusively criminogenic understandings of behaviour are also evident in the adoption of novel institutional responses to youth offending. The interests of specific groups and historical collectivities are being acknowledged in some instances—as witnessed in Koorie Courts, the use of Indigenous night patrols, and in the availability of Indigenous alternatives to imprisonment, such as camps and island retreats.

Agency & accountability: active intervention and offenders who are active

The concepts of 'risk' and 'responsibility' permeate all aspects of juvenile justice today. More often than not these combine to lead to

heightened levels of intervention and intrusion into the lives of young people. Perspectives based on these concepts frequently prevent young offenders as having 'deficits', while simultaneously reinforcing the notion that offending is from first to last the responsibility of the offender themselves.

The dominant theoretical and practice model has been that of 'risk, needs and responsivity'. This is a model that tends to entrench expert opinion about what young persons require (based upon actuarial and other methods of evaluation, comparison and professional diagnosis). Responsivity is the forgotten member of the trio, as risk and need assessment is easily mobilised via standardised testing and thereby seamlessly inserted into existing institutional practices.

There are, however, other developments that go beyond the usual 'risk, needs, responsivity' model of intervention. In these cases, there is an emphasis on active agency. This idea holds young people are directly accountable in some way, rather than being passive actors in the criminal justice system. The benefits of rehabilitation, desistance and restoration are thus about capacity building rather than personal deficits.

The point of the latter forms of intervention is to achieve a result whereby the offender will be seen as a community asset rather than a liability. Hence the goal of intervention is to display the talents and skills of the offender in a useful and visible role, giving the person free rein to exercise their individual agency. By focusing on self-empowerment and self-determination through capacity development this model of intervention is based upon the notion that increases in the positives will naturally result in decreases in the negatives, for example, desistance from offending.

If we are to rate the failures and achievements of juvenile justice over the last decade—then surely these sentiments are among the most worthy visions of what could be, and what ought to be, in the field. Juvenile justice without social justice is always bound to be limited. But juvenile justice without a positive vision of those with whom we work is doomed to perpetuate the very thing it is intended to forestall.

Juvenile justice: responding to Australia's children and young people in trouble with the law

By Jenny Bargen

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Prominent researchers in the field of juvenile justice have summarised the major changes in juvenile justice laws and practices over the last decade.

According to Cuneen and White, to date there has been:

> Heightened public concern and moral panics about ethnic minority youths, imposition of mandatory sentences on juvenile offenders, adoption of zero-tolerance policing, especially in public places, persistent over-representation of Indigenous young people within the juvenile justice system, and intensification of intervention in the lives of young offenders and non-offenders alike...Discussion has centred on how best to control, manage, and contain those youth suffering most from the disadvantages of social, economic, and political exclusion.
>
> On the positive side, greater attention is now being given to the basic rights and well-being of young people...There has been a growth in the human rights perspective as a critical perspective by which to evaluate policing practices, the operation of courts and youth conferences, and the conditions under which young people are detained or sentenced to community work...The increasing popularity of 'restorative justice' with an emphasis on repairing social harm, can serve as an important counterweight to traditional retributive methods that emphasise punishment.[1]

Seen and Heard[2] made over 90 recommendations about children's involvement in the criminal justice process, covering the policing of children, legal advice and representation, diversion from court and custody; court design and proceedings, sentencing and detention. It is impossible in a piece of this length to fully canvas whether and, if so, how the responses by all Australian jurisdictions to children in trouble with the law have changed in each of these areas since 1997. Rather than canvassing the changes outlined by Cunneen and White, above, only a few of the most obvious changes are considered here. The focus is largely on NSW, although reference is made to changes in some other jurisdictions, particularly Victoria, Queensland and Western Australia.

National standards

The major recommendation in *Seen and Heard* is that national standards should be established for all areas of juvenile justice. This recommendation has not been implemented and responses to children and young people in trouble with the law remain firmly entwined with the politics of juvenile crime in each jurisdiction.[3] The election of the new federal Labor government in December 2007 was quickly followed by the appointment of a Minister for Youth, and the creation of a new national Youth Forum, together with a call for submissions from children and young people and those working with them about the areas on which the new Forum should concentrate.[4] Whether the new Minister for Youth or the Youth Forum will include children and the criminal law as one of their priority issues or take up the *Seen and Heard* recommendation to create national standards for juvenile justice remains to be seen.

The Australian Juvenile Justice Administrators (AJJA)[5] could perhaps be said to act as a de-facto monitoring body. AJJA has sponsored the creation of National Minimum Data Sets

for juvenile justice, but has excluded police cautioning and youth conferencing. The bail supervision schemes operated by the NSW Department of Juvenile Justice in certain parts means that official statistics do not provide a complete picture of the extent to which Australia's children and young people are involved in both informal (diversionary) responses and in formal court processes. This is disappointing, given that significant proportions of children and young people who come into contact with police are now dealt with by way of formal or informal police cautions in every Australian jurisdiction, and given the dominance in the literature over the last 10 years of issues in restorative justice for juveniles in youth/family conferences.

The Australian Institute of Health and Welfare (AIHW) now publishes biennial reports on the number and rates per 100,000 children of children on community orders and in detention.[6] The Australian Institute of Criminology (AIC) also publishes annual reports on the number and rates of children in custody (both remand and control)[7] for each jurisdiction.[8]

Official statistics must be read with caution, and can never indicate the full extent of offending. Rather, they provide an indication of the activities of police, courts and the various government departments responsible for implementing court orders. Victim surveys, although confined to people over about 15 years old, provide the other side of the coin, and indicate relatively high levels of unreported crime that vary with the nature of the offence, for both children and adults—but also show that children and young people experience relatively high rates of victimisation, particularly as victims of assault.[9]

Seen and Heard estimated that, in 1997, at most, only about 4% of all children and young people aged between 10 and 17 came into contact with Children's Courts, police cautions and youth conferences.[10] More recent estimates by the AIHW suggest that 'around 15–17% of young Australians have been found to have at least one formal contact with police as juveniles'.[11] This may indicate better recording practices, rather than an increase in the incidence of offending by children and young people, or simply that the take up in the use of diversionary options has resulted in significant net widening. What is clear is that in all jurisdictions Indigenous children and young people come into contact with the police at much higher rates and at much lower ages than any other group of Australian children and young people—that they dominate the data for all responses and, in most jurisdictions—overwhelm the data for children and young people in detention.[12]

Upper and lower ages for criminal responsibility as a child

In 1997, the age of criminal responsibility in Tasmania was seven and in the ACT, eight. *Seen and Heard* recommended that there should be a uniform minimum age of criminal responsibility. The age of ten has now been adopted in law by all Australian jurisdictions as the minimum age.

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'*Doli incapax*' is the rebuttable presumption that a child aged between 10 and 13 does not possess the capacity to form criminal intent. All jurisdictions except NSW, Victoria and South Australia had enshrined this presumption in legislation by 1997. *Seen and Heard* sensibly recommended that *doli incapax* should be in legislation everywhere in Australia, but to date this has not happened. In NSW there have been regular, but unsuccessful, calls to abolish the presumption.

Seen and Heard recommended that the age at which a child reaches adulthood for the purposes of the criminal law should be 18 in all jurisdictions. This is now the case everywhere except in Queensland, where, despite advocacy on this point, the upper age remains at 17. The Northern Territory raised the upper age limit to 18 in 2000. Victoria raised the upper age limit from 16 to 17 in 2005.[13]

The age at which an adult can be tried as a child for offences allegedly committed when aged less than 18 and the upper age limit for serving a custodial order for an offence committed as a child continue to vary across the jurisdictions, as was the case in 1997.[14]

Diversion by means of police cautions and youth conferences

All jurisdictions have now introduced legislation governing police cautions and youth/family conferences, usually as a 'front end' response to (generally less serious) offending by children and young people.[15] All jurisdictions permit courts to refer young offenders to a youth conference. Uniquely, Victoria confines family group conferences to a sentencing option for those young people who have a significant history of offending and who would

otherwise be sentenced to a period in a youth detention centre. While police are responsible for the administration of formal and informal cautions in all jurisdictions, the administrative arrangements for conferencing vary between jurisdictions, and the national standards recommended by *Seen and Heard* for both cautions and youth conferences have not yet been developed. Although recommended in *Seen and Heard*, no specific arrangements have been made for Indigenous forms of conferencing for young offenders. NSW has considered introducing circle sentencing for Indigenous young people similar to the circle sentencing schemes for adult Aboriginals. Queensland and Victoria have introduced Murri and Koori [17] youth courts (respectively), in which respected members of local Aboriginal communities sit on the bench with the Children's Court magistrate in deciding on sentences.[18]

Preventive apprehension

The *Children (Protection and Parental Responsibility) Act 1997* (NSW) was the subject of considerable criticism in *Seen and Heard*.[19] While provisions remain in this Act for removing children and young people on the streets who are 'at risk' or about to commit an offence, and for the establishment of safe places to which such children can be removed, the provisions are rarely, if ever, used.[20]

Arrest as an option of last resort

Consistent with the recommendations of *Seen and Heard*, all jurisdictions now have a legislated requirement that children should be dealt with by way of court attendance notice or summons rather than arrest.[21] Most jurisdictions encourage police to consider cautions or referral to conferences before initiating court proceedings. In practice, however, at least in NSW, while police are aware of the need to adopt the least intrusive response when dealing with young offenders, young people are often more likely to be arrested and charged than summonsed or dealt with by way of court attendance notice. Children and young people can also be given a variant of a court attendance notice called a 'bail CAN', which allows compliance with the requirement to proceed by alternatives to arrest while at the same time permitting the imposition of bail. The recent changes to the bail laws in NSW that are canvassed below appear to have encouraged the continuing imposition of conditional bail on many young suspects in NSW.

Special arrangements for Aboriginal children and young people

Most jurisdictions now make provision for special arrangements with respect to Aboriginal children and young people. For example, in Queensland, provisions are made for the presence in the Children's Court of Queensland of members of organisations providing welfare services to Aboriginal and Torres Strait Islander children, or representatives of an Aboriginal Community Justice Group in the child's community, to assist the court in making sentencing decisions about the child.[22] The 2004 amendments to the *Young Offenders Act 1994* (WA) allow the head of the juvenile justice department to make arrangements with Aboriginal Community Councils to supervise Aboriginal children and young people on community based orders.[23.] In NSW, respected members of Aboriginal communities can be invited to deliver cautions to Aboriginal children.[24] In late 2007, the NSW government incorporated into the *Young Offenders Act* a specific object of addressing 'the over representation of Aboriginal and Torres Strait Islander children in the criminal justice system through the use of youth justice conferences, cautions and warnings'.[25]

Legal advice

Seen and Heard expressed strong views about children's right to legal advice and representation at every point at which they are in contact with criminal justice proceedings. The report recommended that children should have a statutory right to legal advice prior to any police interview, and that police should be required by law to inform children of this right before interview. It recommended that duty solicitor schemes should be adequately funded so that the child could meet with a solicitor prior to his or her court appearance to allow time for the solicitor to take adequate instructions. It also considered that duty solicitor schemes should be supplemented by 24 hour free telephone legal advice services, staffed by skilled children's lawyers.[26] Not all states and territories have adopted these recommendations, partly because of the cost. However, since 1999 the NSW Legal Aid Children's Legal Service has operated a very busy free Youth Hotline, which provides legal advice to all children in police custody between 9 am and midnight Monday to Friday, and for 24 hours on weekends and public

holidays. Police are required to advise any child in custody that he or she has a right to legal advice, and where this advice can be obtained.[27] Until very recently, the Aboriginal Legal Service (ALS) in NSW and the ACT offered a 24/7 custody line to both Aboriginal adults and children in police custody. While recent cuts in Commonwealth government funding and the continued unwillingness of the NSW government to provide funding for the service—even though police are required by law to use it—have constituted significant threats to its continuation, the ALS has found ways to continue to provide this essential protection to the legal rights of Aboriginal children and adults in police custody. Victoria and Queensland both have limited free telephone advice schemes for children in police custody.

Most states now have some form of children's court duty solicitor scheme run by the various Legal Aid bodies, with a mix of in-house and private solicitors. However, while most duty solicitors will meet with the child prior to a court appearance, the time available for this meeting continues to be very limited, and, unless the child is facing relatively serious charges, the meeting will be in a room at the court house.

Bail and remand

The *Seen and Heard* recommendations on bail included that national standards for juvenile justice should provide that:

- there should be a presumption in favour of bail for all young suspects. The absence of a traditional family network should not negate this presumption;
- children should be legally represented at bail application proceedings;
- monetary and other unrealistic bail criteria should not be imposed on young people; and
- children should not be subject to inappropriate bail conditions, such as 24 hour curfews, that disrupt their education and have the effect of forcing constant contact with their families or impose policing roles on carers.

This section focuses exclusively on recent changes to the bail laws and the introduction of hearings by way of Audio Visual Links (AVL) in NSW, which have arguably ignored both the spirit and intent of these recommendations.

Over the last 10 years there has been a clear change in ways in which bail has been conceptualised and used in practice.[29] There has been a steady erosion of the understanding that the original and strictly legal purpose of bail was to ensure that an accused person appeared in court to face the charges against him or her.[30]

For children and young people, one result of this tendency has been much closer policing of compliance with bail conditions. The bail supervision schemes operated by juvenile justice in certain parts of the state[31] are helping children to comply with their bail conditions. They are not and cannot be designed to address the appropriateness of the initial imposition of these conditions by police or courts.

While children in NSW are granted bail more frequently than adults, the grant of bail is often conditional.[32] The most common reason for appearances in Children's Courts across NSW in 2006–2007 was 'breach bail conditions'. Unpublished data from the NSW Bureau of Crime Statistics and Research indicates that Aboriginal children and young people were more often subject to onerous bail conditions and arrested for breach of those conditions than were other children and young people.[33]

When a child or young person is refused bail or arrested for breaching bail conditions, they must be brought before a court at the earliest possible opportunity.[34] Recent changes to the law in NSW mean that this appearance is not in person, but via an AVL between the Children's Court in metropolitan Sydney and the detention centre in which the child is held on remand.

To be fair, there are some important practical advantages in appearing via AVL for children and young people in rural and regional areas of NSW. Representation is provided by a specialist children's solicitor. Children do not have to be transported long distances for short court appearances.

On the other hand, taking instructions from a child over the telephone or via an AVL limits the ability of a lawyer to assess the child's capacity to give instructions or understand the proceedings. When *Seen and Heard* recommended that children should be represented in bail applications, legal representation without the child's physical presence in the court room could not have been foreseen. Recent health surveys of children in custody and on community orders in NSW indicate that many of these children are

likely to have mental illnesses or disabilities. Some will have hearing problems. Many have left school before completing year 10, and have low reading ages.[35] Identifying that the child is in one of these high needs categories (and getting appropriate support for the child) is challenging enough for solicitors when children are seen in person on busy list days. Doing so becomes much more difficult when communication is via telephone or by AVL.

Further recent changes to the law in NSW extend the use of appearances by way of AVL well beyond bail hearings. Earlier separate provisions for children have been removed and replaced by provisions that are applicable equally to both children and adults.[36] These changes are inconsistent with both the spirit and recommendations of *Seen and Heard*.

The new laws reverse the presumptions that an accused child will appear in person for committal proceedings, sentencing hearings and appeals.[37] We have yet to see the real impact of these changes on the operation of juvenile justice in NSW. Nonetheless, it is clear that the recommendations of *Seen and Heard* were unremarked when these changes were made.

Further amendments to the *Bail Act* were introduced in NSW in late 2007. These changes mean that arguably NSW now has the toughest bail laws in Australia—laws which make no special provisions for children, and which severely limit the number of applications that can be made for bail by children on remand unless the child was not initially represented by a lawyer, or a court decides that new facts or circumstances have arisen since the previous application.[38]

The protection of children's legal rights, including their right to the least intrusive, most appropriate response to their alleged offending behaviour, is as important as it was in 1997. Where the distinctions between anti-social but non-criminal behaviour and minor public order offences, and between bail and sentence are blurred, then the protections of the law are essential for children in trouble.

Endnotes

1. Chris Cunneen and Rob White, *Juvenile Justice: Youth and Crime in Australia*, Oxford University Press, 2007, p vi.
2. Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84,1997.
3. See Chris Cunneen and Rob White, *Juvenile Justice: Youth and Crime in Australia*, Oxford University Press, Melbourne, 2007, particularly Chapter 9.
4. See http://www.thesource.gov.au/involve/NYR/default.asp.
5. The heads of relevant departments in each jurisdiction are members of the AJJA.
6. See, eg, Australian Institute of Health and Welfare, *Young Australians: Their Health and Wellbeing*, AGPS, 2007, *Australia's Welfare* 2007, AIHW, 2008 at pp 58–63.
7. 'Control' is the NSW term for a court order equivalent to a prison sentence for adults. The terminology varies across jurisdictions.
8. See Natalie Taylor, *Juveniles in Detention in Australia*, 1981–2006, Australian Institute of Criminology, Canberra, 2007.
9. See Cunneen and White, above, Chapter 3, for a full discussion of the extent and nature of contemporary juvenile crime and the difficulties involved in attempting to estimate how many children offend and the most common offences for which children and young people come to police notice. See also Australian Institute of Health and Welfare, *Young Australians: Their Health and Wellbeing,* AGPS, Canberra, 2007, Australia's Welfare 2007, AIHW, Canberra, 2008, pp 56–57 for estimates of the number of people aged 0–24 who were victims of selected offences in 2006. The AIHW found that children and young people are more likely to be victims of violent crimes (assault and robbery) than adults. They report that in 2006, young people aged between 15 and 24 were 2–3 times more likely to be victims of assault and robbery than people in the general population.
10. Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, S*een and Heard: Priority for Children in the Legal Process*, 1997, p 466.
11. Australian Institute of Health and Welfare, *Young Australians: Their Health and Wellbeing,* AGPS, Canberra, 2007, Australia's Welfare 2007, AIHW, Canberra, 2008, p 58.
12. See Cunneen and White, Chapter 6; see also Shuling Chen, Tania Matruglio, Don Weatherburn and Jiuzhao Hua, 'The Transition from Juvenile to Adult Criminal Careers', *Crime and Justice Bulletin*, *Contemporary Issues in Crime and Justice* Number 86, Bureau of Crime Statistics and Research, May 2005.
13. Taylor, above, p 4.
14. Ibid, p 4.
15. See, eg, *Young Offenders Act* 1994 (WA) Part 5; Parts 2 and 3, *Juvenile Justice Act 1992* (Qld), *Young Offenders Act* 1997 (NSW).
16. See s 415 and related sections, *Children Youth and Families Act 2005* (Vic).
17. See Part 7.2, *Children Youth and Families Act 2005* (Vic).
18. See *Children's Court Act 1992* (Qld) and *Children Youth and Families Act 2005* (Vic).
19. See Seen and Heard, at pp 489–491.
20. See, eg, Aboriginal Justice Advisory Council, *A Fraction More Power: Evaluation of the impact of the Children (Protection and Parental Responsibility) Act on Aboriginal people in Moree and Ballina*, Research and Evaluation Series No 1, October 1999.
21. See, eg, ss 12 and 42, *Juvenile Justice Act 1992* (Qld); s 8, *Children (Criminal Proceedings) Act* 1987 (NSW); s 345, *Children Youth and Families Act 2005* (Vic). NSW adds a further requirement that the least intrusive most appropriate response in the circumstances of an alleged offence should be chosen by police.

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A decade later: issues in the care and protection of children

By Judy Cashmore

A decade on from the joint report by the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84, (1997), many of the issues that were of concern in relation to child protection and children in out-of-home care are just as pertinent now as they were then—and some are more urgent and troubling.

In 1995–96, there were 91,734 child protection notifications across Australia to state and territory departments. A decade or so later, that figure has risen to 309,517, an almost threefold increase, and much of it due to the very substantial increase in New South Wales from 28,930 to 189,928.[1] At the same time, the number of substantiated[2] notifications or reports across Australia has nearly doubled from 29,833 in 1995–96 to 58,563 in 2006–07. The proportion of reports that are substantiated has varied from 25% to 60% across jurisdictions over the decade. The reasons for the increases are complex and probably associated with a combination of social problems such as family violence, parental substance abuse, and mental health problems.[3] The variations in the substantiation rate are most likely related to changes in policy and practice.

The trend in the number of children in out-of-home care is similar—it has doubled over the last decade or so, from 13,979 in June 1996—to 28,441 children in June 2007. Some of this increase is due to children remaining in care for longer periods, again a result of an increasing frequency of parents being unable to cope and provide adequate parenting.

There has been greater recognition over the last decade or so of the need for primary and secondary prevention at both the state and federal levels of government, in order to reduce the extent and severity of child abuse and neglect and to promote children's well-being. This has resulted in some investment in various early intervention programs and services that are still being evaluated.[4] But there are serious problems with children not receiving the services they need, partly because of the lack of coordination between departments and other agencies across portfolios and between state and federal jurisdictions. The problems with children falling through the gaps between child protection and juvenile justice outlined in the *Seen and Heard* report[5] continue.

There are still inadequate and insufficient alternatives to the court process, such as family group conferences, pre-hearing conferences and other forms of alternative dispute resolution that involve children and their families.[6] In New South Wales, for example, the *Children and Young Persons (Care and Protection) Act 1998* makes specific provision for alternative dispute resolution processes, but there has been little progress in implementing these. There are often long delays before matters are resolved in the Children's Courts. There are insufficient drug and alcohol and mental health services for parents, especially those that recognise and cater for parent's care-giving responsibilities. There are very limited mental health services for children, a shortage that is exacerbated by the increase in the numbers of children and families needing such services. This means that although many children are being reported to the statutory departments in each state, they are less likely to receive the services that they and their families need to help resolve their problems.

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The investigative process

Where reports or notifications to state departments or to the police concern allegations of criminal offences against children—mostly sexual abuse or child sexual assault—most states and territories in Australia now have specialist investigative units or teams to investigate these cases.[7] In several states, these consist of teams of co-located police and caseworkers such as the Suspected Child Abuse and Neglect (SCAN) teams in Queensland and Joint Investigative Response Teams in New South Wales.[8] In most states there is also now provision for the investigative interviews with child complainants to be electronically recorded and presented as part of the evidence-in-chief in court, as recommended in *Seen and Heard* (Recommendation 93) but there has been no adoption beyond Western Australia of the practice of allowing the whole of the child's evidence to be taken prior to trial and video taped for presentation at trial (Recommendation 94).[9]

Several evaluations and a Victorian Law Reform Commission report have also pointed to a fairly high rate of complaints being withdrawn and not proceeding to prosecution, with some suggestion that police in particular may be discouraging child complainants and their families from continuing with allegations of sexual and physical offences against children, especially where they are young and there is a low expectation of a conviction against an accused who does not plead guilty. Despite the increased recognition of child sexual abuse, it is clear that much remains unreported, with many children not disclosing the abuse for some time, even years, and others not disclosing it at all. Once reported, there is a high level of attrition in the number of cases progressing from the initial report to the police or to child protection authorities, through investigation, the preparation of briefs of evidence and then again before and during the trial process.[10] The estimates suggest that only between five and 10 per cent of cases that proceed to court from initial report and substantiation are finalised by plea or by verdict, and only about half of these result in a conviction.

Children in out-of-home care

Where the state takes action to remove children from the care of their parents and takes on parental responsibility, it is reasonable to argue that the state has a duty of care and obligation to provide better care and to ensure that the various physical and emotional needs of these children are met. There are, however, continuing concerns about the care that many children and young people in out-of-home care receive, as outlined in the *Seen and Heard* report and in the *Non-government Report to the UN Committee* in 2005, and a number of other formal inquiries and reports during this period. These concerns include:

- the lack of stability, permanence and emotional security for children in their out-of-home care placements;
- a limited range of options for placing children in care, especially for children and adolescents with complex needs;
- inadequate contact for children with their families and other significant people;
- the poor educational performance, and inadequate physical, dental and mental health of children in care.

Indigenous children and young people

An intractable and apparently worsening situation is the plight of Indigenous children. The over-representation of Aboriginal and Torres Strait Islander children in the child protection system continues—in 2007 Indigenous children were 5.4 times more likely to be the subject of a substantiated report than other children—and were 8.3 times more likely to be in out-of-home care than other children across Australia.[12] These figures are likely to underestimate the over-representation because there is evidence that children's Indigenous status is not consistently recorded.[13] Despite numerous inquiries, reports, and calls for action to redress the serious problems for Indigenous children over the last decade, there has been little action or federal leadership until the contentious intervention in the Northern Territory in July 2007, now subject to a review.

In its Concluding Observations in 2005, the UN Committee on the Rights of the Child urged the Australian government to:

> prioritise working with, and continue to work with Indigenous community leaders, agencies and communities to establish a range of best practice solutions for Indigenous children and young people.

It also recommended that the Government:

> intensify its cooperation with Indigenous community leaders and communities to find, within Indigenous families, suitable solutions for Indigenous children in need of alternative care.

Clearly, the reaction of numerous Aboriginal women, in particular, the Northern Territory intervention, is testament to the contravention of this recommended consultative approach.

Continuing government responsibility after care

Despite the vulnerability of many young people leaving care, they are expected to become independent earlier than other young people who have not been in care. Most have few social or family supports, are less likely to have completed school, gained employment or have somewhere stable to live. They are more likely to have mental health problems, children of their own at a young age, and difficulty making ends meet. A longitudinal study in New South Wales found, however, that those who were stable and felt secure in care, had completed Year 12, and had social and emotional support beyond leaving care, were faring quite well and much better than their peers without these resources.[14]

While there is some indication that some state departments are beginning to provide more support for these young people, the picture is very uneven across states, and within states between metropolitan and rural and regional areas. Not all young people have leaving and after care plans as recommended (Recommendation 181) or as required by legislation in some states. The recent discussion paper on a National Child Protection Framework (May 2008) released by the Federal Labor government does, however, make recommendations for improved and continuing assistance for young people ageing out of care.[15]

Determining the extent to which children's best interests are being met

On a positive note, most states now have a charter of rights for children in care[16] (including a right to participation) or are in the process of establishing one, and have established complaints or auditing mechanisms for children in care.[17] Whether these provisions have been properly implemented and are operational is unclear.

It is very clear, however, that more effort and investment is needed to bring together systematic data, research and evaluation in relation to the impact of child protection and out-of-home care policies, practices and legislation, to determine the extent to which children's best interests are being met within these systems, and whether the participation principle has had any effect on practice. Relatively recent audits of child protection and out-of-home care research found that there were considerable gaps in the research and indicated that there was a very low level of investment in research compared with the expenditure on services within the systems.[18]

The continuing and increasing concern is the capacity of the child protection and out-of-home care systems to respond to this ever-increasing demand and to be effective in protecting the safety and development of children already within the system and those being reported to it. The *Seen and Heard* report stated that the:

> Claims that the state and territory family services departments are mismanaged, underfunded and failed to care adequately for children' were confirmed by the submissions to that Inquiry (para 17.6).

More recent inquiries in most states, and the clamour for changes following the deaths of children in New South Wales and elsewhere indicate the need for a radical rethinking of the way these systems work. These problems are not unique to Australia but are endemic in jurisdictions across the Western English-speaking countries that have adopted the US–Anglo model. For example:

> It is apparent that at this time, the start of the 21st Century, child protection in Australia and in many places in the world is in a state of crisis. Child death inquiries abound, politicians and populations panic, simple and complex solutions to the 'problem' are accompanied by increasingly strident rhetoric about protecting more and more children from ever more toxic events and families and about punishing offenders. Workers get caught up in a cycle of fear as they undertake punishing hours of hard work working for the welfare of children and young people while desperately trying to avoid being the next media victim themselves. Families become ever more alienated as they undergo assessments of their parenting and receive little help so they don't ask for help again

and expend valuable energy avoiding the arm of the welfare.[19]

A number of academic and other commentators here and overseas[20] have been urging a serious rethink of the system. A 2007 report by PeakCare in Queensland, for example, provides a history and a critique of the need for a radically new direction focusing on a number of principles. The suggestions include developing a public health model; focussing on child and family wellbeing; developing a new ethical framework and value base, not just based on risk; returning to relationship-based practice; developing a renewed emphasis on locality-based services and prevention; and informing management from the frontline. Advocating for children's best interests in the child protection and out-of-home care system now means challenging the very assumptions, policies and practices of the current system and looking for new approaches. It also presupposes a renewed emphasis on early intervention with a particular focus on promoting children's well-being, not just preventing abuse and neglect.

Endnotes

1. These are the figures for 1995–1996 and 2006–07. There was also a numerically smaller but ten-fold increase in Tasmania from 741 in 2002–03 to 7,248 in 2003–04.
2. After an investigation has been finalised, a notification is classified as 'substantiated' or 'not substantiated'. A notification will be substantiated where it is concluded after investigation that the child has been, is being or is likely to be abused, neglected or otherwise harmed. States and territories differ somewhat in what they actually substantiate. All jurisdictions substantiate situations where children have experienced significant harm from abuse and neglect through the actions of parents. Some jurisdictions also substantiate on the basis of the occurrence of an incident of abuse or neglect, independent of whether the child was harmed, and others substantiate on the basis of the child being at risk of harm occurring. (Australian Institute of Health and Welfare (2008).
3. Australian Institute of Health and Welfare. *Child protection Australia 2006–07*, Child welfare series no. 43 (2008).
4. These include the *Federal Communities for Children and Invest to Grow* programs and the New South Wales *Brighter Futures* early intervention program, and the Child FIRST (Child and Family Information Referral and Support Teams) initiative in Victoria.
5. *Seen and Heard: Priority for Children in the Legal Process* (ALRC 86, 1997).
6. Recommendations 169 and 170.
7. Although physical assaults against children are also criminal offences, it seems that they are much less likely to be prosecuted than sexual offences.
8. There has, however, been no move to set up child advocacy centres, similar to those operating in the US and as recommended by the *Seen and Heard* report (Recommendation 92).
9. The aim is to preserve the child's early report of events after disclosure in an accurate and complete format and to allow the fact-finder to see how the child presented at the time, especially where there are long delays before the case gets to court. Where the tape is presented in court as the child's evidence-in-chief, the child does not need to recount viva voce what happened and there is some evidence that this may help to reduce the stress of testifying.
10. P Parkinson, S Shrimpton, H Swanston, B O'Toole & RK Oates. The process of attrition in child sexual assault cases: a case flow analysis of criminal investigations and prosecutions *Australian and New Zealand Journal of Criminology*, 35(3),(2002) pp 347-362.
11. While all states have legislation and/or policies that respect children's right to have contact with their families of origin, the relevant departments and agencies do not have the capacity to ensure that it always happens, that it includes grandparents and siblings, and is adequately supported.
12. Australian Institute of Health and Welfare (2008), pp 29, 62.
13. The *Non-Government Report on the Implementation of the United Nations Convention on the Rights of the Child in Australia* (Alternative Report, 2005) stated, example, that 'two recent audits concerning children on orders in Queensland and in the Australian Capital Territory, for example, found that some Indigenous children who had been wards of the state or in foster care arrangements for many years were not recorded as Indigenous.
14. Cashmore & Paxman, 2006.
15. Australian Government Department of Families, Housing, Community Services and Indigenous Affairs *Australia's children: Safe and well*: *A national framework for protecting Australia's children. A discussion paper for consultation* (May 2008).
16. New South Wales: http://www.community.nsw.gov.au/DOCS/STANDARD/PC_100213.htm; Victoria: http://ocsc.vic.gov.au/publications.htm ; South Australia: http://www.gcyp.sa.gov.au/cgi-bin/wf.pl?pid=&hi=&mode=show&folder=documents/Charter%20of%20Rights&file=20_The%20Charter%20of%20Rights.htm.
17. For example, a Child Guardian in Queensland, the Children's Guardian in New South Wales, a Child Safety Commissioner and an Advocate for Children in Care in Victoria.
18. Cashmore, J. & Ainsworth, F, 'Out-of-home care: Building a research agenda, *Children Australia*, 28 (2) (2003). Special issue. Cashmore, J., Higgins, D.J., Bromfield, L.M. & Scott, D.A, 'Recent Australian child protection and out-of-home care research: What's been done - and what needs to be done? *Children Australia* (2006), 31 (2), 4-11.
19. Harries, M., Lonne, B. and Thompson, J, *Beyond buzzwords – principles and themes for reforming child protection practice. Challenging practices*: Paper presented at third conference on International Research Perspectives on Child and Family Welfare(2005), Mackay.
20. Scott, D, *The Child Protection Crisis in Australia – a Way Forward*, Address to Parliamentarians Against Child Abuse, Parliament House, Canberra, September 5 2006; Harries, M., Lonne, B. and Thompson, J, *Beyond buzzwords – principles and themes for reforming child protection practice. Challenging practices:* Paper presented at third conference on International Research Perspectives on Child And Family Welfare. Mackay(2005); Melton, G. B, (2005) *Mandated reporting: A policy without reason*. Commentary prepared for a virtual discussion sponsored by the International Society for Prevention of Child Abuse and Neglect, October 2003; PeakCare Queensland. *Rethinking child protection: A new paradigm?* (2007).

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Intercountry adoption in Australia

By Justice Susan Kenny

From earliest times, orphaned children have had a central place in the imagination of civilised communities.[1] We empathise with child heroes like Harry Potter because of their loss and vulnerability. They capture our imagination because of their courage in adversity and the intensity of their quest for identity. Outside literature, there remain many millions of children worldwide who have no family to nurture them, usually as a consequence of poverty, war or disease.[2]

Responses within countries and internationally to the need to protect and nurture children deprived of their birth families vary, depending on economic, cultural, social and political factors. They include intra-family adoption or adoption within their country of origin, care in publicly or privately run institutions, foster care and, sometimes, intercountry adoption. Generally speaking, institutionalisation has been found to have significant adverse effects on children, because it fails to meet their emotional and psychological needs.[3] Other options in a child's original country may not be available, or may not afford the long-term care and commitment that children need to flourish. Placement in a family outside a child's country of origin may ultimately offer the best opportunity for children to reach their full potential as secure, loving and productive adults.

Outside the Islamic world, which has its own regimes for orphans, adoption in one form or other is practised around the world.[4] It is a time-honoured way of caring for children. The significant change in adoption practices over the past fifty years has been the growth in intercountry adoption.

The rate of intercountry adoption has risen globally since the late 1960s, with the result that by the 1990s, an international report described it as 'a world wide phenomenon involving migration of children over long geographical distances and from one society and culture to another very different environment'.[5] In modern history, families, particularly in the United States, adopted children from Europe, Japan and China after World War II and again after the Korean War. The Australian programs for intercountry adoption probably began with the airlifts of orphaned children from Vietnam in 1975 and grew from the 1980s.[6]

In 2004, the top 20 receiving countries, led by the United States, recorded 44,872 intercountry adoptions for that year.[7] By international standards, however, Australia has a comparatively low intercountry adoption rate. In Australia, there were 405 intercountry adoptions recorded for the years 2006-2007.[8] For 2004, Australia's adoption rate or intercountry adoptions per 100,000[9] was 1.9, as compared with 15.4 for Norway, 13.0 for Spain, 12.3 for Sweden, 9.8 for Denmark and Ireland, and 8.8 for New Zealand.[10]

Internationally, intercountry adoption increased by 42 per cent between 1998 and 2004 in the top 20 receiving countries.[11] In Australia, the 244 intercountry adoptions recorded in 1998–1999 rose to 370 for 2003–2004 and to 434 for 2004–2005.[12] In 2004, the principal sending countries worldwide, though not to Australia, were China, Russia, Guatemala, Korea, Ukraine, Colombia, Ethiopia, Haiti, India and Kazakhstan.[13] In 2007, the principal countries of origin for Australian adoptions

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△Central to the Convention is the principle that the best interests of the child are paramount and intercountry adoption is only to be pursued in these circumstances.△

were China (30.9%), South Korea (19.8%), Ethiopia (11.6%), Philippines (11.1%), Thailand (6.9%), Taiwan (6.4%), India (6.2%), Hong Kong (2.2%), Sri Lanka (1.2%), Colombia (1.2%) and Guatemala (0.5%), with the remaining 2% coming from a diverse group of other countries.[14]

When a child moves from a birth family and country of origin, there are deep and life-long consequences for the child, as well as for the birth and adoptive families. Intercountry adoption begins with profound loss—loss of birth family and often birth identity. It involves entrusting a child to another family to nurture outside the child's country of origin, in order that the child can grow up 'in an atmosphere of happiness, love and understanding'.[15] Plainly enough, the process needs very careful national and international regulation, and a multilateral approach. Without this, the opportunities for child abuse, through various forms of child trafficking, are clear.

The *Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption* of 29 May 1993, was ratified by Australia on 25 August 1998, and entered into force here on 1 December 1998. The main aims of the Convention are to: ensure intercountry adoptions take place in the best interests of children; standardise intercountry adoption processes, in order to prevent trafficking in children and related forms of child abuse; and secure the recognition in ratifying States of adoptions in accordance with the Convention.[16]

The Convention recognises that intercountry adoption may offer the advantage of a permanent family to a child, when a suitable family in the child's country of origin cannot be found.[17] Central to the Convention is the principle that the best interests of the child are paramount and intercountry adoption is only to be pursued in these circumstances.[18] The key provisions of the Convention ensure that:

(1) The competent authorities in the child's country of origin must establish that:[19]

(i) the child is adoptable;

(ii) a suitable family for the child cannot be found within the country of origin;

(iii) intercountry adoption is in the child's best interests;

(iv) the persons, institutions and authorities whose consent is required have been counselled before giving their consent;

(v) no consent has been induced by payment or compensation;

(vi) consents have been freely given; and

(vii) consideration has been given to the child's wishes and opinions.

(2) The competent authorities of the receiving State must ensure that:[20]

(i) the prospective adoptive parents are eligible and suited to adopt;

(ii) the prospective adoptive parents have been counselled; and

(iii) the child is or will be authorised to enter and reside permanently in the receiving State.

(3) Ratifying States must designate a central authority or authorities to manage intercountry adoption.[21]

(4) Central authorities have a duty to facilitate, follow and expedite proceedings with a view to obtaining the adoption.[22]

(5) Central authorities may delegate their functions to accredited bodies.[23]

(6) Ratifying States are required to recognise each others' adoption orders.[24]

(7) There must be no improper financial or other gain from intercountry adoption.[25]

The Convention is given effect in Australia by the *Family Law (Hague Convention on Intercountry Adoption) Regulations 1998* (Cth), made under s 111C of the *Family Law Act 1975* (Cth), as well as by means of an agreement between the Commonwealth, the states and territories with respect to implementation of the Convention. The agreement did not result in much change to then existing State and territory practices. The states and territories continued to be primarily responsible for intercountry adoption in Australia. The Commonwealth did not use its power under the Constitution to introduce national legislation to implement the Convention. Presumably, one reason for this was that, historically, the states and territories have assumed responsibility for adoption, including intercountry adoption, and have suitably experienced and qualified staff.

The Commonwealth, state and territory statutory framework reflects the distribution of responsibility between the various governments. The *Family Law (Hague Convention on Intercountry Adoption)*

Regulations 1998 (Cth) apply, unless and until a state or territory passes legislation to the same or comparable effect. In this event, the Commonwealth regulations do not apply in that state or territory. [26] New South Wales, Victoria, Western Australia and Queensland have each passed mirror legislation.[27] The Commonwealth regulations make provision for the establishment of central authorities, the making of adoption orders, and the recognition of adoption orders made in Convention countries. The functions of the Commonwealth central authority include co-operating with central authorities outside Australia, consulting with the authorities in the states and territories, and taking appropriate measures to ensure compliance with the Convention.[28]

The states and territories are mostly responsible for the practical aspects of processing intercountry adoptions. The functions of competent authorities in the states and territories include receiving applications from prospective adoptive parents and preparing reports as to their suitability; transmitting the reports to a child's country of origin; counselling the prospective parents; providing information to the authorities in other Convention countries, either directly or through other bodies; taking measures to prevent improper financial or other gain in connection with adoptions; ensuring that the transfer of children between countries takes place in secure and appropriate circumstances; and providing post-placement reports to the authorities in the countries of origin.[29]

Several years ago, a Commonwealth Parliamentary report highlighted numerous deficiencies in the process of intercountry adoption in Australia.[30] There have been numerous reforms as a consequence, including the establishment of a National Peak Overseas Adoption Support Group and an amendment to the citizenship legislation. The *Australian Citizenship Act 2007* (Cth) now confers citizenship automatically on an adopted child once a final adoption order has been made in a state or territory court.[31] Further, following the report's recommendation that the Commonwealth take a more active role, the Commonwealth, the states and territories are currently negotiating a new agreement to improve the collaborative framework for intercountry adoptions.

Areas for reconsideration and possible reform remain. The first area concerns Australia's health requirements. Children enter Australia pursuant to adoption visas issued under the *Migration Act 1958* (Cth) and *Migration Regulations 1994* (Cth). Under this regime, children are required to satisfy stringent health requirements, with the result that only healthy and able-bodied children are permitted to enter. A child, therefore cannot enter on an adoption visa if suffering from a condition that would be likely to require health care or community services unless the condition is waived by the Minister. The Minister can waive the condition in limited circumstances only, including that the grant of the visa would be unlikely to result in undue cost to the Australian community. These strict requirements render many children ineligible for adoption in this country. Their stringency is difficult to justify, given Australia's comparative wealth, the fact that the excluded children are often in particular need in their countries of origin, and that there are suitable Australian families with the commitment to care for them.

Secondly, state and territory adoption requirements and processing practices differ, often for no discernible good reason. For example, the Parliamentary report referred to earlier indicated that the process in some of the states was unjustifiably slow.[32] The Report may well have promoted improved performance, but there is a need for regular reviews of state and territory practices in order to ensure that these practices are reasonably harmonized and working in children's best interests. Moreover, more resources would probably be needed if Australia's adoption rate were to improve and perhaps approach that of its neighbour, New Zealand.

Thirdly, different legislative requirements between the states and territories with respect to age, family composition, marriage and the like, have significant effects on the eligibility of prospective adoptive parents to provide a family for a child, regardless of their apparent suitability to adopt.[33] It would appear preferable for the governing legislation not to stipulate such matters in detail, but rather to state the general principles for determining eligibility and suitability, leaving the ultimate decision in a particular case to skilled and knowledgeable persons. The decision as to whether a child's best interests would be served by placement in a particular family may be best left to expert evaluation on a case by case[34] basis.

Fourthly, attention should also be given to encouraging and assisting adoptive parents to preserve and enhance cultural links with their

child's country of origin.[35] Intercountry adoption children are entitled to know about and be at home in the culture of their birth. Fostering knowledge about children's culture of origin, and promoting pride in this and their biological inheritances, is a fundamental duty of every intercountry adoption parent. Its importance is such that it should be recognised in governing legislation. This recognition might, for example, usefully be incorporated in a legislative statement of the principles of suitability to adopt.

Of course, in this complex area there are many other areas for active consideration, including the extent of publicly funded support for post-placement assistance, the nature of improper financial and other gain from adoption, the place of accredited non-government agencies in the delivery of adoption services, and the development of new intercountry adoption programs. In the future, these issues may become even more pressing in Australia than now.

For those involved, intercountry adoption is a bitter-sweet process, commencing in losses at the deepest level for which there may be no sufficient recompense. It is also a process of hope, in which a new family undertakes to cherish their new member not only for themselves, but also in trust for the people and the country the child has left behind.

At its best, intercountry adoption celebrates the inestimable value of children and recognises the myriad potentialities a child has for goodness and happiness. At its worst, intercountry adoption becomes a vehicle for child abuse—for child trafficking and exploitation—and as just another way of wasting human life. If intercountry adoption is to be fruitful and provide an environment for children to flourish, the adult participants in the process in countries of origin and in receiving countries, whether government officials, social workers, or private citizens, must place the interests of children first every time. The Convention provides a very good framework for this, but there must also be adequate and well-resourced national regulation, and a responsible and respectful multilateral approach.

Endnotes

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2. Joint United Nations Programme on HIV/AIDS (UNAIDS), the United Nations Children's Fund (UNICEF), and United Nations Agency for International Development (USAID), Children on the Brink 2004: A Joint Report of New Orphan Estimates and a Framework for Action (4th ed, 2004), 7.
3. Ibid, 19–20; *Hague Conference on Private International Law*, *Report on Intercountry Adoption* (1990), 64. (Report on Intercountry Adoption 1990).
4. *Hague Conference on Private International Law, Report on Intercountry Adoption* (1990), 20.
5. Ibid, 6.
6. J Degeling, National Report for Australia (2003) Colloque Sur L'Adoption Internationale en Droit Comparé, 2.
7. P Selman, 'Trends in Intercountry Adoption: Analysis of Data from 20 Receiving Countries, 1998–2004', (2006) 23(2) *Journal of Population Research* pp 183–185.
8. Australian Institute of Health and Welfare, Adoptions Australia 2006–07— *Child Welfare Series No 44* (2008), 43 (Table A10: Intercountry Adoptions, by Country of Origin, 1997–98 to 2006–07).
9. Adoptions per 100,000 population: P Selman, 'Trends in Intercountry Adoption: Analysis of Data from 20 Receiving Countries, 1998–2004', (2006) 23(2) *Journal of Population Research* pp 183–189.
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11. P Selman, 'Trends in Intercountry Adoption: Analysis of Data from 20 Receiving Countries, 1998–2004', (2006) 23(2) *Journal of Population Research* pp 183–187.
12. Australian Institute of Health and Welfare, Adoptions Australia 2006–07— *Child Welfare Series No 44* (2008), 43 (Table A10: Intercountry Adoptions, by Country of Origin, 1997–98 to 2006–07).
13. P Selman, 'Trends in Intercountry Adoption: Analysis of Data from 20 Receiving Countries, 1998–2004', (2006) 23(2) *Journal of Population Research* pp183–191.
14. Australian Institute of Health and Welfare, Adoptions Australia 2006–07— *Child Welfare Series* No 44 (2008), 43 (Table A10: Intercountry Adoptions, by Country of Origin, 1997–98 to 2006–07). These other countries included Azerbaijan, Bolivia, Burkina Faso, Canada, Chile, Croatia, Honduras, Italy, Lebanon, Lithuania, Macedonia, Malta, Nicaragua, Papua New Guinea, Poland, Tonga, Uganda, United Kingdom and United States of America.
15. *Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*, 29 May 1993, [1998] ATS 21, (entered into force 1 May 1995), Preamble.
16. Ibid, art 1.
17. Ibid, Preamble and art 4. See also P Pfund, 'Intercountry Adoption: The 1993 Hague Convention: Its Purpose, Implementation, and Promise', (1994) 28 *Family Law Quarterly* p 53–54.
18. *Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*, 29 May 1993, [1998] ATS 21, (entered into force 1 May 1995), art 1.
19. Ibid, art 4.
20. Ibid, art 5.
21. Ibid, arts 6 and 7.
22. Ibid, arts 9 and 35.
23. Ibid, arts 10 and 11.
24. Ibid, art 23.

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Children, young people and federalism

By Patrick Parkinson

Children's lives are not divided neatly into state and federal aspects, and nor are the lives of the families of which they are a part. The federal system of governance in Australia has presented some challenges in providing a regulatory framework for family life in Australia and providing a ready means for the resolution of disputes. There has nonetheless been a great deal of cooperation between the states and the Commonwealth on resolving these problems.

Most aspects of children's lives that are the subject of laws are matters of state and territory responsibility. This starts with issues around conception and birth—the regulation of assisted reproduction and the recording of parenthood on birth certificates are both state matters. The states and territories have responsibility for most other aspects of children's lives as they grow up—the regulation of child care centres, the provision of schools and health services, the child protection system, foster care, adoption, juvenile justice and the regulation of children's employment. The states and territories also provide a regulatory framework for the network of councils that provide other services such as children's play areas in parks and library facilities. These services are to a greater or lesser extent funded by the federal government, but not always in rational ways. In particular, the funding of Australian schools defies sensible explanation.

Federal responsibility for children derives from the Constitution to regulate marriage, divorce and matrimonial causes and in relation thereto, parental rights and the custody and guardianship of infants. 'Infants' in this context, means children under the age at which the status of adulthood is conferred, which is currently 18 years of age. Intially federal responsibility for children was closely connected with marriage and divorce, and this led to many complexities in terms of family disputes where the parents were not married at the time of birth of their child. If the child was born to parents in a de facto relationship, or the parents had not lived together at all, the state courts had to resolve the matter. In a case where there were children in one family born in different circumstances, for example, one child born ex-nuptially to the mother from a teenage relationship and the other the child of the marriage of the husband and wife, the complexities were even greater.

These issues were largely resolved in the late 1980s by a reference of powers from all the states except Western Australia over the custody and guardianship of ex-nuptial children. Western Australia did not need to make such a reference as it has a state court—the Family Court of Western Australia—which is able to exercise both state and federal jurisdiction. That cooperation between the states was extended to child support. The consequence is that, since the late 1980s, there has been an effective national approach to parenting disputes and child support operating at the federal level through the *Family Law Act 1975* and child support legislation. This is an outstanding example of cooperative federalism.

Child protection and adoption, however, remain matters for the states. While there have been issues concerning the regulation of intercountry adoption, and a recent move to take over that area by the Commonwealth, few problems have been encountered in leaving the regulation of adoption with the states.

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△When the responsibility for investigating child abuse concerns is with state authorities, and the resolution of disputes about child abuse is with federal courts, there is plenty of opportunity for cost-shifting and for cases to fall between the cracks.△

The major problem of federalism in relation to children is child protection. The states and territories have responsibility for the child welfare departments. If there are concerns about the safety and wellbeing of children, it is the state child welfare department or the state police that will conduct an investigation. If the problems are in the family—then a range of services—mostly provided by the states—may be involved in providing support. These include drug and alcohol treatment services, supports for parents with mental illness or an intellectual disability, financial counselling and gambling addiction services, and other forms of family support. If legal action is needed to remove the children from the care of the parent or to put in place a supervision order, that matter will be heard by the Children's Courts in the various states and territories applying the state or territory child protection laws.

Where then is the interface with federal responsibility? There are two issues. The first is overlap between state and federal responsibilities. A case may be running in the family courts federally concerning the parenting arrangements for a child. At the same time, a case may be running in the Children's Court to remove parental responsibility from the parents or from one of them due to abuse or neglect. There have been cases where inconsistent orders have been made in the state and federal proceedings—or cases where parenting disputes have been determined in the Family Court of Australia and because the state child welfare department was not satisfied with the outcome, it went to the Children's Court to overturn the federal court's order and to remove the child from the care of the parent. The federal family courts cannot make orders that interfere with the authority of the state courts to give parental responsibility of a child to the government.

The greater problem however, is when neither state nor federal system operates effectively to protect children. It is very common indeed for serious child protection concerns to be raised in family law proceedings run in the Family Court or the Federal Magistrates Court. These are private law proceedings. That is, the dispute is between the parents or a parent and grandparent. The state has no involvement unless it intervenes specially. If the case were being brought in the Children's Court of a state or territory, then the government would have the responsibility for marshalling the evidence and would bear the expense of bringing the matter to trial. In many cases, a parent who is seeking to protect a child from the other parent would be only too pleased for the state to take responsibility for running the case. However, state child welfare departments, hard-pressed to prioritise between different cases, may well take the view that as long as there is one parent prepared to protect the child from the other one, the Family Court can sort it out, or it may decide that the concerns about the child's safety, while serious, are not as pressing as other serious cases.

Often, cases get to the federal courts—the Family Court or Federal Magistrates Court—where there has been no effective investigation by state or territory child protection authorities, perhaps because there is no current risk of abuse. The Department may take the view that because the alleged abuse occurred while the parents were living together, and no new incidents have occurred since separation, there is no current risk to the child. The issue of future parenting arrangements can be left to the federal courts to determine.

And there is the Catch 22 of child protection. The Family Court and the Federal Magistrates Court have no capacity to investigate cases of child abuse or domestic violence. The courts can only respond to the evidence that is presented to them. That depends in turn on whether the parents can afford to litigate the matter through to trial, to commission expert reports and to have legal representation in the proceedings. Using private lawyers to run family law cases often costs $30,000-$40,000 for each parent. Child protection cases can be particularly complex, requiring more court time and therefore more expense. That is unaffordable for many parents who have serious concerns about their children's safety. If they cannot get Legal Aid, they may not be able to take the case to court at all. If the child welfare department has investigated the matter thoroughly and is prepared to make its report available to the court, then it can help resolve issues and avert the need for litigation. In many cases, the matter has not been investigated by the child welfare department because the case has not been given priority in relation to other matters.

When the responsibility for investigating child abuse concerns is with state authorities, and the resolution of disputes about child abuse is with federal courts, there is plenty of opportunity for cost-shifting and for cases to fall between the cracks.

An initiative of the Family Court, with the support of the federal government, has helped to improve the handling of child abuse cases. The Magellan program involves cooperation with state child protection authorities, who provide a brief written report to the court on the outcomes of any investigation that may have been conducted concerning allegations of child abuse in families who have disputes in the court. This has greatly improved the level of cooperation between the two systems, but the program only operates in the Family Court, and the Federal Magistrates Court—which is now the largest trial court in family matters—and does not have quite the same arrangements. The Magellan program improves cooperation and information sharing where there has been an investigation by the child welfare department, but there remain many cases where for one reason or another there has either been no investigation or the information on the file is very limited.

In 2002, the Family Law Council recommended a more comprehensive reform. It proposed the establishment of a Federal Child Protection Service to investigate child abuse concerns arising in family law proceedings where there had been no investigation of the matter by other authorities. The cost of such a service would be modest, since the Family Law Council recommended that the court itself act as a scrutineer of the need for such an investigation and it would only request such a report when it was really required. The Council also recommended the establishment of better protocols between state governments and the family courts to ensure that only one court dealt with the matter.

The report met with some resistance at the federal level because of the argument that child protection was a matter for the states. A state government, considering the issue might say equally that the resolution of parenting disputes in federal courts is a matter for the Commonwealth. The Labor government now has a fresh opportunity to examine the issue.

More than a century after Federation, the cost-shifting and buck-passing continues—but this should not overshadow the positive ways in which state and federal governments have worked together to improve the lives of children over the last thirty years.

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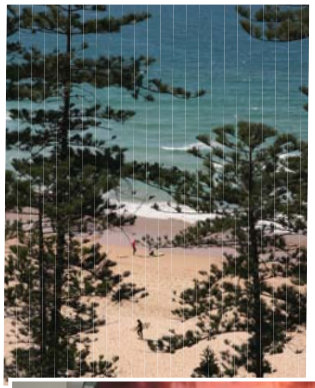

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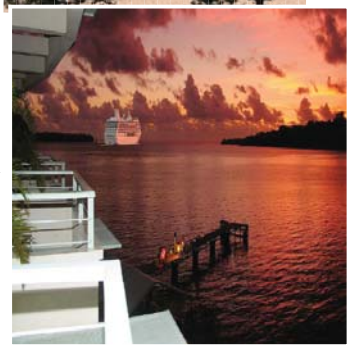

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ALRA 2008

It's time: federal representation for young Australians

By Gillian Calvert

More than ten years ago the Australian Law Reform Commission (ALRC) concluded in its inquiry into children and the legal process that children and young people across the nation are largely ignored, marginalised and mistreated.

The conclusion of the joint report by the ALRC and HREOC for the inquiry, *Seen and Heard: Priority for Children in the Legal Process* (1997) was clear and compelling. It stated that:

> Much must be done to provide for children's access to and appropriate participation in, the legal processes that affect them.[1]
>
> Changes are needed across all levels of government and across all jurisdictions. The Commonwealth should take on a leadership and co-ordination role in this regard. [2]

One of the report's main recommendations to help address this situation was for Australian children to be provided with a formal representative (referred to in the report as an Office for Children). The purpose of this official role would be to advocate on behalf of Australian children and young people and represent their interests at the nation's highest political level.

Ten years later the nation is still waiting for the establishment of an independent, national 'voice for children' to represent their interests at the nation's highest political level through direct access to the federal government and the Australian Parliament.

While the Australian Parliament is there to govern for all Australians—not just for adults—the current anomaly highlights a real lack of representation and citizenship. Until this discrimination is directly addressed, with an agency providing a coherent overarching strategy on behalf of all Australian children, the needs and views of younger Australians will continue to have a lower priority than those of other members of our community.

Adults organise themselves in many ways to represent their own particular interests—they lobby, form membership organisations, and donate funds to political parties. Other organisations, agencies and groups can advocate and campaign on their own or their members' behalf for changes to legislation, policies, funding, programs and practices that affect their lives. These interests often win out because of access to things like money, influence and voting power.

Children have neither the capacity nor the resources for such activities to influence the decisions that are made affecting their lives. Kids can't vote and don't have the resources to set up lobby groups. Families and parents advocate for individual children or groups of children with similar concerns, but not for the entire child population. Under the current arrangements, federal representation for the interests of children and young people will remain limited, variable and sporadic.

The states and territories have made a positive start and all now have independent advocates on behalf of kids. Some of these involve a Children's Commissioner—a unique and independent role that occupies space between government and society and forms a bridge between the two sectors.

In New South Wales, Western Australia, Tasmania and Queensland Children's Commissioners play an overarching advocacy

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role and cover everything that affects children and young people in their state. This involves legislation, policies, programs and services—and is not limited to single issue areas of interest. They also act as conduits for information and policy within and between children and institutions and bring together people and sectors to generate new ideas and knowledge.

However there are crucial issues which have an impact on kids' lives and well-being that cannot be achieved by the states alone. While they bring benefits at a state level, the influence of state-based Children's Commissioners on federal policy and legislation is limited in family law, immigration, communications, climate change, the economy, productivity and industrial relations, taxation and income support systems.

△As an independent advocate for children, an Australian Children's Commissioner could speak up on these broader issues and co-ordinate with the state Children's Commissioners to advocate for the well-being of our children and young people—in effect— bringing children into the federal government and Australian Parliament.△

As an independent advocate for children, an Australian Children's Commissioner could speak up on these broader issues and co-ordinate with the state Children's Commissioners to advocate for the well-being of our children and young people—in effect— bringing children into the federal government and Australian Parliament.

An independent Australian Children's Commissioner could represent kids' interests and speak up for them without fear of upsetting other powerful lobbies and interests such as churches, business, industry and the media. Having a Minister or Office for Children would be a positive step in giving children's issues some federal recognition. They are not, however, an independent voice for our children.

A statutory base underpinning the work of independent Children's Commissioners gives them authority, enabling them to go to Parliaments on behalf of children as citizens. In turn, that statutory base places an obligation on those Parliaments to listen to what the Commissioner has to say about decisions that could impact on kids' lives.

An Australian Children's Commissioner is positioned to influence the critical federal levers that set the stage for children's well-being. Without independent advocacy, children's interests and needs usually take a back seat or are overlooked when decision making takes place.

Improvements to children's lives require long-term political commitment and independent authority and leadership. An Australian Children's Commissioner, with no political ideologies, vested interests or agendas, could provide this.

At an international level, the United Nations Committee on the Rights of the Child has called on governments around the world to appoint Commissioners for Children, arguing that these appointments are vital in keeping children's rights on our political agenda and linking this to their well-being.

An Australian Children's Commissioner would be in a position to monitor and evaluate children's well-being at a national level—in turn—assisting the Australian Government to report on our progress as a signatory to the United Nations Convention on the Rights of the Child.

Children's development is strongly linked to our economic and social progress. Investing in our kids is important, because of the value they have both here and now and for Australia's future.

This time in our political and economic history provides an ideal opportunity to make the most of the strengths we have, and to elevate children so that we can work towards making our nation stronger and more prosperous for all its citizens.

Appointing an independent Australian Children's Commissioner sends a clear and powerful message to this and every other nation that we want all our citizens to have genuine, meaningful and effective representation.

It's time that Australia 'stepped up to the platform' and demonstrated to its children and young people that their interests will be given their proper legal, economic, political and social representation at a national and international level.

Endnotes

1. Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process* (ALRC 84, 1997, p 5)
2. Ibid.

A new chapter in youth participation

By Luke Bo'sher

Australia is often identified as a pioneer when it comes to democracy and democratic processes. Australians are often proud to state that Australian women were enfranchised to vote and stand for election before other western democracies. Yet this suggestion that Australia is a leading light of democracy obscures the fact that just 35 years ago, Australia did not afford even those aged 18 to 21 years of age the right to vote.

The mainstream discourse in Australian society has not yet moved to entrust young people aged less than 18 years with the ability to participate in Australia's democratic system. Australians younger than 18 years—who are passionate about their communities—remain disenfranchised and without adequate platforms to convey their concerns and aspirations to the Australian Government. Even many of those aged between 18 and 24 who have the right to vote, are often marginalised in the political discourse and struggle to find effective ways to contribute to national debates.

In this context of young people's marginalisation from the political system, this article considers what alternatives should be put in place to ensure young people's ideas and views are communicated to government and that young people's rights and interests are recognised and upheld.

Why consider young people's perspectives?

What is the virtue in considering young people in decision-making? The first reason is that the democratic deficit identified above excludes young people from the formal democratic system or highly marginalises those who are able to vote. Without the ability to influence Australia's political system through voting, young people under the age of 18 are unable to hold Ministers, Governments or Parliaments accountable for decisions they make that impact on young people. Obviously, this falls far short of our democratic ideal.

The second reason is that young people also occupy a unique space in Australia's society. Young people experience a high level of regulation from government—from requirements mandating what they must do (for example, attend school) and what they must not do (for example, driving or purchasing alcohol until a certain age).

The unique space young people occupy also includes the particular 'problems' they pose policy makers and Australia's 'community leaders' who are responsible for fighting the many 'wars' currently underway, such as those against binge drinking, homelessness and obesity. Young people are identified as a central part of these, and other issues, currently being debated in the Australian community, and they deserve to be heard in the discussions.

Additionally, by virtue of their age, young people are inherently more likely to have less life experience, hold fewer positions of influence and rely on adults, whose views—regardless of whether or nor they have been informed by expertise or experience—are often regarded as more authoritative. These barriers diminish the power of young people's voices being heard, and perhaps more importantly, being listened to by those making decisions affecting young people's lives.

In short, young people attract a significant amount of attention when it comes to 'problem

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creating', but less attention when it comes to problem-solving. If Australia wants to create effective responses to these problems, and not further marginalise young people, it is vital that young people are involved in the development and delivery of solutions.

Imagining a space for youth participation

There is an enormous challenge for young people and those who wish to create a society where young people's voices are not only heard and listened to, but are actively sought in national debates and decision-making.

There are three types of voices that can advocate for the views and interests of young people:

- Government: positions and institutions that are designed to provide advice or to advocate on behalf of young people within government processes.
- Non-government: bodies and organisations independent of government that exercise collective advocacy on behalf of young people. These bodies and organisations can be entirely youth run or run by adults with the involvement of young people.
- Individual: young people engaging individually, speaking on their own behalf about issues that affect them and others they identify as being similar to themselves.

We can use these three levels of young people's voice to examine the strengths and weaknesses of previous mechanisms for young people's participation and identify some learning for the future.

Looking backwards to learn from the past

The current state of youth participation in Australia belies a history not merely of disinterest in young people's views and ideas, but also, at times, active attempts to silence dissent amongst young people and their advocates.

At a government level, representation has been minimal, with a Minister for Children and Youth Affairs established and then abolished following the Hon Larry Anthony MP losing his seat in the 2004 election. This left young people without a Ministerial voice in decision-making.

Importantly, it also lessened the accountability of government in youth affairs matters. Without a Minister, there was no one directly responsible for young people and thus the intersection and interactions of issues impacting on young people became fragmented along departmental lines. This moved away from a whole-of-government approach to young people and further removed the already limited voice that young people had in government.

Additionally, there has never been a federal Commissioner for Youth, a position which exists in almost every state and territory with statutory responsibilities relating to the wellbeing of children and young people. This furtherer highlights the of accountability of the Australian Government on youth affairs issues.

The Youth Bureau, located in the Department of Families, Community Services and Indigenous Affairs remained, administering many youth programs and providing some policy advice on youth affairs, albeit limited. The Bureau was responsible for four programs that related to young people's participation: the National Youth Roundtable, the National Indigenous Youth Leadership Group, the Australian Forum of Youth Organisations and the Youth Consultative and Advisory Committee.

The National Youth Roundtable was the centerpiece of the Howard Government's approach to youth participation. The Roundtable was an annual program, bringing 50 young people from Australia together to discuss youth issues. Young people would be flown to Canberra for a week of induction and meetings with Ministers and develop the model for a research project that they would undertake in the following months. They would then return to Canberra to present their findings and conclude the program.

In many ways, the Roundtable offered the young people involved a highly valuable experience. Access to senior Ministers and public servants and the opportunity to meet other young people were often cited as very positive experiences by the young people involved.

However, the Roundtable model was also widely criticised by members of the opposition and minor parties, academics, youth workers and young people themselves. The model was highly limited in its membership—with just 50 young people each year—and faced serious limitation as it was delivered within government.

The model minimised the independence of young people to set their own agenda, develop collective positions on issues and then systemically advocate for these over time.

Research undertaken by Jude Bridgland-Sorrenson from the University of Western Australia with Roundtable participants exposed the dangers of engaging young people in a process which was (in young people's words) 'so fake' and where young people found themselves 'crashing back to reality' and becoming 'jaded'.[1]

In addition to the National Youth Roundtable and National Indigenous Youth Leadership Group (a similar program for young indigenous Australians), the Australian Forum of Youth Organisations and the Youth Consultative and Advisory Committee were established to engage with youth service delivery organisations. The membership of these groups was highly limited and handpicked by government. The majority of youth organisations were unaware of their existence. For these reasons, these bodies were largely seen as token efforts of engagement with the youth sector, and indeed, over time, their agenda diminished until they stopped meeting altogether.

Non-government level representation was fragmented following the defunding of the Australian Youth Policy and Action Coalition (AYPAC) in 1998. As the peak body for youth affairs, AYPAC advocated on behalf of young people and the youth sector. It was a forum that brought together the voices of young people from around the country and was able to systematically advocate on these issues over long periods of time.

AYPAC also represented youth organisations and created a space for organisations to engage in discussion and debate with each other over the direction of issues such as community services funding and the viability of the sector.

The defunding of AYPAC was a significant loss to young people and to the youth sector. The existence of a body whose core business is advocating for the interests and wellbeing of young people was—and remains—essential. Without a peak body, young people have lacked a national voice and the youth sector has suffered from a lack of coordination and coherence in both policy development, youth participation and sector development.

A range of other youth organisations have undertaken selected advocacy with many

service delivery organisations advocating on youth homelessness, welfare changes and mental health funding. These have been useful but have not been able to provide sustained advocacy across the myriad of issues relating to young people.

At the individual level, young people remain largely unsupported to undertake individual advocacy. There are no coordinated programs or mechanisms in place to support young people to speak out on issues important to them. Some youth advocates are fortunate enough to have the support of mentors—many of whom work within organisations whose core business is not advocacy. However, for the majority of young people who wish to speak out on issues, they must either become involved in an existing organisation with its own policy positions and values, or go it alone.

Young Australians have been largely sidelined from a variety of important national debates, including, most recently, those around changes to laws governing the Australian electoral roll; the introduction of WorkChoices; plans for a new health and social services access card; and the reform of Australian higher education.

A new chapter in youth participation

The election of the Rudd Government has led to a number of election commitments being fulfilled. These included a Minister for Youth (the Hon Kate Ellis MP), the establishment of an Office for Youth with greater responsibility for policy advice and an Australian Youth Forum (AYF) as a peak body for youth affairs. Other important measures—including a Commissioner for Children and Young People— have not yet been addressed.

The AYF is especially significant. It was announced as a peak body for young people and those who work with them, acting as a direct communication channel between young people and the Australian Government.[2] The 2008–09 Budget announced $2 million per year for the AYF and the Government has produced a discussion paper and invited submissions on the proposed AYF model.

As the unfunded peak body for young people and those who support them, the Australian Youth Affairs Coalition (AYAC) has developed a submission to the discussion paper that builds on the lessons from the past.

To develop an AYF which strengthens young people's voice in national debates and truly represents the views of young people, the AYF must:

- be delivered external to government;
- adopt a social justice perspective and actively include young people who currently experience a high level of marginalisation and disadvantage;
- involve young people at every level of organisation—including on the board, staff and advisory groups;
- be structured as a single peak body which represents both young people and the youth sector, as the sector's existence is predicated on the issues young people face in society;
- engage in partnerships to build on the existing structures and knowledge that individual organisations have with particular groups of young people;and
- work collaboratively with government while maintaining a healthy level of independence.

The AYF presents an exciting new chapter in youth participation and representation, and will see the re-establishment of a peak body which is able to support young people to speak out about issues affecting them and communicate directly with government decision makers.

Conclusion

There is little debate that our society is enriched and better decisions are made when all members of a community—both young and old—can participate in designing and building its future. Young people are entitled to be heard on issues that impact on their lives and that are important to them, but have often been neglected in our public discussions. But whilst the problems of the past are clear, the wealth of discussion, research and experience in the sector also defines clear ways forward. The Rudd government appears to be listening—let's hope the progress continues.

Endnotes

1. Bridgland-Sorrenson, J (2007) *The Secret Life of the National Youth Roundtable*, paper presented at the national Youth Affairs Conference, Are We There Yet?, May 2007, p 16.
2. Plibersek, T. (2007) *Labor Commits To Australia's Youth*, Media Release 3 May 2007.

2020 Youth Summit

By Hugh Evans

From around Australia, 100 young people were invited to Canberra to attend the 2020 Youth Summit—to offer their ideas about the future of Australia—their future. This unique opportunity was met with great enthusiasm and commitment.

The 2020 Youth Summit was an outstanding initiative of the Australian Federal Government. It required the delegates to ask questions, with answers that have the potential to lay a strong foundation for future policy.

It aimed to harness the vision and ideas of Australian youth, to help lay the foundation of the future in both the local and global community. The challenges of tackling climate change, Indigenous health, mental health and global poverty were at the forefront of discussion.

Representation was broad, as the 100 delegates consisted of indigenous Australians, refugees, migrants, second, third and fourth generation Australians, young mothers, people with disabilities, exceptionally gifted students and young carers. The young people were from various faiths and cultures, and residing in both country areas and the city. They brought their voices, experiences and energy to the task of formulating a national vision for 2020.

There was, however, some cynical comment of the 2020 process. I believe that dialogue defines us, what problems we are facing and what kind of solutions we have for them. But the cynics are half right—though ideas without action are meaningless—action without thought is positively dangerous.

Through the Youth Summit many creative and practical policy proposals were developed, addressing the critically important issues of: paid parental leave; sustainability and climate change; communities and families; and Australia's future in the world.

It was proposed that a national paid parental leave program be established for both working men and women that includes incentives to promote affordability and accessibility of childcare. This would help to address the challenges of workplace participation designed to increase productivity at work, provide incentives for employers to accommodate a healthy work/life balance, and to help address gender imbalances in the work place.

Climate change is a global problem but can have various local solutions. The delegates proposed 'The Australian Sustainability Challenge' to create incentives for local governments to improve their sustainability through competition. Councils would be accredited points on measurable improvements in areas such as: renewable energy; use of public transport (foot/bicycle); solar heating (water/gas); native vegetation and tree planting; and an improvement in sustainable building codes. The local government, with the most points, would win a substantial federal grant as well as communities with the most innovative approaches to sustainable development being rewarded.

Migration and refugee issues were also discussed, specifically, managing and accommodating the increasing levels of migration into Australia. Delegates stressed the need to develop a national migrant and refugee settlement strategy, providing essential services to help settle and include newly arrived migrants and refugees into Australian society. This strategy would also highlight the

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number of migrants using health, language and capacity building services, as well as evaluate literacy levels and measure employment rates and the length of employment. Importantly this holistic approach will help wider Australian communities accommodate migrant and refugee settlement through a process of widespread consultation with local migrant and refugee service providers, state government and relevant stakeholders.

Enhancing the participation of civic society in electoral processes is vital in ensuring our political representatives reflect the aspirations of the Australian people. Particularly important is achieving a greater engagement of disadvantaged and marginalised people in the electoral processes. To this end, the 2020 Youth Summit delegates envisioned an Australia where citizens are automatically enrolled to vote, a process crucial to removing existing barriers to electoral participation. Automatic enrolment would necessitate co-operation between the Australian Electoral Commission and national agencies such as the Australian Taxation Office, Centrelink and Medicare. The Australian Electoral Commission would therefore significantly invest in electorally disadvantaged Australians such as those people who are homeless or without a fixed address.

Some delegates proposed lowering the voting age to 16 to give young people a more participatory role in society in order to affect government policy and future direction. This stand is supported by the fact that they will then be enfranchised so they can have a say in Government policies that affect them.

It was agreed that voting via computers would both accelerate vote counting to save paper. The delegates at the Summit believed this aspect of our proposed electoral reform should be optional if we are to achieve a stronger, more democratic 2020.

Ideas can and do shape reality—good ones as well as bad. A powerful idea can radically change our nation's future. The ideas mentioned are just some of the hundreds discussed over the weekend—every idea was given time and consideration.

Over the course of the weekend we strived to move beyond mere sentiment and move towards practical ideas with real outcomes. I believe this was achieved.

Delegates embraced the possibility of new solutions, both to enduring problems and to emerging ones. The creative and practical policy proposals developed by the 100 Youth Summit delegates confirm they will be able to achieve those visions. In 2020, Australia will be in capable hands.

Genetic testing of children

By Margaret Otlowski

As a result of the joint Australian Law Reform Commission and the Australian Health Ethics Committee Inquiry into the protection of human genetic information which culminated in a major report released in May 2003, increasing attention is being given in Australia to legal, social and ethical issues associated with predictive genetic testing and the use of an individual's genetic information. The predictive genetic testing of minors raises particularly difficult problems and poses some dilemmas for law and policy makers.

This article addresses only the issue of predictive genetic testing of children as opposed to genetic testing for diagnostic purposes, or other DNA testing such as parentage testing.[1]

Predictive genetic testing of children is undertaken on children who are asymptomatic but who—because of family history—may be at risk of developing a genetic disease or disorder in the future. The defining feature of such testing is that it is relevant to the person's future health status, identifying a condition or disorder which the person may present with at some later time. In the case of some rare, single gene, late onset conditions, inherited on an autosomal dominant basis, such as Huntington's Disease, testing may reveal that the person has the mutation that will lead to the development of that genetic disease virtually as a matter of certainty. More commonly, however, predictive genetic testing identifies predisposition or susceptibility to a genetic condition or disorder rather than pinpointing pre-symptomatic status. Whether or not the condition or disorder ultimately manifests will depend on the complex interplay between the individual's genes and his or her environment. In some circumstances, lifestyle or other prophylactic interventions may be possible, however for many conditions and disorders no preventive or therapeutic treatments are presently available. Particularly in such situations, the impact of genetic test information can be significant, with potentially harmful psychosocial consequences for individuals resulting from this information. This is recognised by key organisations and health care professionals in the field who seek to promote the importance of informed and free choice with regard to genetic testing, facilitated by the availability of appropriate pre-testing counselling by qualified professionals.[2] Underpinning this view is the recognition of the significance of the right to know as well as its corollary, namely the right not to know as encapsulated in major international instruments.[3]

The regulatory framework for the predictive genetic testing of children

Few would dispute that decisions about predictive genetic testing can have profound consequences for an individual. Ideally, these decisions should be made by the individual concerned at a time that they are in a position to weigh up all the issues. This may not always be feasible and there are, undoubtedly, some situations where predictive genetic testing of minors is justified, and ultimately in that person's best interests because it allows appropriate interventions to be undertaken. There is, however, considerable debate about the circumstances in which parents should be able to initiate predictive genetic testing of their children, and growing awareness and concern about the potentially harmful effects of predictive genetic testing of minors if inappropriately carried out.

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Currently, there are no laws in Australia which directly regulate the predictive genetic testing of children. Further, there is nothing to restrict laboratories performing predictive genetic tests where parents have consented on behalf of the child, and the availability of direct-to-consumer genetic testing via the internet has expanded the opportunity for parents to access genetic testing. Although there is no direct regulation of this area various professional bodies and health organisations have developed guidelines regarding the acceptability of predictive genetic testing of children, including the World Health Organisation,[4] the Nuffield Council on Bioethics,[5] the American Society of Human Genetics[6] and the Human Genetics Society of Australasia.[7]

These organisations have overwhelmingly concluded that predictive testing for adult onset diseases—for which there is no known treatment or preventive strategy has no immediate benefits and should not be performed on children but deferred until adulthood—or at least until the person is able to appreciate the relevant genetic facts as well as the emotional and social consequences of what predictive genetic testing entails. Where, however, direct benefit to the child can be demonstrated through medical surveillance or intervention, predictive genetic testing of children is generally regarded as acceptable. For example, children in danger of contracting familial adenomatous polyposis (leading to colon cancer) can establish whether they carry the genetic mutation responsible for the disease. They can, thereby, decide whether they need to undertake ongoing surveillance which is usually offered to at risk individuals between the ages of 10-15 years.

Underpinning these guidelines on predictive genetic testing on children are ethical concerns about the effects of such testing, in particular the potential of psychological damage to the child. Testing may result in diminished self-esteem, difficulties in interpersonal relationships and altered parental perception of, and behaviour towards, the child.

Testing children—who cannot give their informed consent—breaches their autonomy and interest in genetic privacy and their right to choose not to know about their long-term health prognosis. This may create difficulties in coping with the knowledge of the likelihood of disease in later life. It can also potentially lead to detriments such as discrimination in insurance and employment. It is recognised, however, that testing may bring some psychosocial benefits such as relieving anxiety about possible early signs of the disorder, reducing uncertainty about the future, providing the possibility of appropriate forward planning of matters such as education, housing and family finances, including estate planning, and, in the context of later reproductive choices, identifying children who might benefit from predictive genetic testing in the future.[8] Currently, fears about the possible harms that could be caused by testing in childhood are believed to outweigh any potential advantages,[9] particularly at the present time when there is a lack of evidence-based research demonstrating the psychosocial consequences of predictive genetic testing of minors.

Notwithstanding the strong support for the prevailing approach against predictive genetic testing of minors, there does appear to be recognition that opinions on this issue do differ, and that the circumstances in which these matters arise are variable. This has resulted in general support for the position that there should not be a categorical prohibition on predictive genetic testing of children which offers no immediate therapeutic benefit. Rather, it is regarded as preferable to allow health care professionals and genetic counsellors to work through the problems with the families, and to be permitted to make exceptions in individual cases, in situations where it is believed to advance the welfare of a particular child. Most of the guidelines on this subject are couched in strong but not absolute terms, thus permitting flexibility in appropriate cases. There is, however, a consensus that predictive genetic testing of children must be undertaken with care.

Role of parents in decision-making about genetic testing of their children

Parents have parental responsibility in respect of their children (unless a court orders otherwise),[10] so potentially they may have the legal authority to authorise the predictive genetic testing of their child or children. Parental decisions about predictive testing for genetic disorders should be made according to whether, objectively assessed, the child will benefit from such testing, not in order to relieve the anxieties of the parents. In other contexts (for example, cases of non-therapeutic sterilisation to be performed on mentally retarded girls), the courts have indicated that children should be given the chance to make choices about medical care for themselves if it

is possible to wait until they are able to do so without risking their health.[11]

Circumstances in which parental decision-making may come under legal scrutiny

Whilst one might hope that sensitive counselling could resolve most potential disagreements amongst family members, or between family members and health care professionals, about the desirability of predictive genetic testing for individual children, there may be situations where it is necessary to resort to the courts in an effort to safeguard the best interests of a child. A number of possible scenarios can be put forward. One possibility is that parents want to have the child tested but the child objects. In these circumstances, other persons (for example, a social worker or health care professional) may become involved as advocate for the child, with a view to assisting the child to withstand inappropriate parental pressure to be tested.[12] Even in the absence of objection from the child, a third party may intervene because they believe that the course proposed by the parents in relation to predictive genetic testing is not in the child's interests.

Another possibility is that the child may wish to undergo predictive genetic testing but the parents object. It is also conceivable that parents are in conflict about whether or not predictive genetic testing should be carried out on their child. In each of these scenarios, the jurisdiction of the Family Court could conceivably be invoked to determine whether a particular child should be tested. There is specific provision in the *Family Law Act 1975* (Cth) to deal with applications for an order in relation to the welfare of a child[13] which clearly would encompass the issue of predictive genetic testing of children. In deciding whether to make such an order, a court must regard the best interests of the child as the paramount consideration.[14] The process of assessing the child's best interests would need to take account of a whole range of matters, going well beyond the question of health benefits of predictive genetic testing. Amongst other things, the Court would be required to take into consideration any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the Court thinks are relevant to the weight it should give to the child's wishes.[15] In cases of conflict between parents and the child, it is likely that an Independent Children's Lawyer (ICL) would be appointed on behalf of the child.[16] The role of the ICL would *inter alia* be to present information to the Court about the child's wishes, but also to submit his or her own assessment of what is ultimately in the child's best interests. It is difficult to predict the outcome of such cases—the child's level of decision-making competence would obviously be a significant factor—but even where it could be shown that the child is of an age and maturity to express well founded wishes and views, this would not necessarily be decisive. The Family Court would need to assess whether these wishes are consistent with the child's best interests which are the paramount consideration.[17] This would inevitably involve a process of weighing up the harms and benefits for that particular child of proceeding with testing. In view of the complexity of this assessment of pros and cons of testing, caution would be required in acting on the decision of a child.

Whilst the availability of this jurisdiction is useful as a possible check on inappropriate decision-making on the part of either parents or children, it does have inherent limitations. Invoking this jurisdiction is time consuming and expensive and in practice, it will often depend on health care professionals, social workers or others becoming drawn in to bring the matters in conflict before the court. There are also constitutional constraints due to the fact that the State referral of power in respect of ex-nuptial children extended only to matters of custody, guardianship and access. Accordingly, this welfare jurisdiction only applies to children of married parties.[18]

What form of regulation is appropriate?

Questions remain about the most appropriate course of action for the regulation of this area—whether to rely on the 'soft' approach of professional guidelines underpinned by the potential intervention of the Family Court in circumstances where the testing may be regarded as contrary to the child's best interests—or whether a more structured, interventionist strategy is required providing some form of independent vetting of decisions for predictive genetic testing to be undertaken, at least in circumstances where there are no immediate or clear health benefits for the child.

It must be acknowledged that the current arrangements are by no means foolproof, and will not necessarily protect a child from inappropriate predictive genetic testing which

may be perceived objectively to be against the child's interests (eg a doctor may be inappropriately influenced by wishes of the parents, testing may be contrary to a child's interests, possibly even going against the child's expressed wishes, no third party to raise objection etc.) However, for the majority of cases, the combined effect of professional guidelines, professional practice, and the safety net of the family law legislation which can be invoked to protect a child's interests will suffice to ensure that predictive genetic testing is not undertaken inappropriately. From a practical point of view, it would in any event be impossible to effectively prohibit or regulate access to genetic testing for children, due to the availability of direct-to-consumer genetic testing which transcends national boundaries.[18]

Introducing a more interventionist approach, requiring oversight of family decision making, would probably be anathema to believers in family autonomy, implying as it does, that families working together with their genetic counsellor and doctor/geneticist cannot be trusted to make wise choices in the best interests of their children. Whilst objectively, this course of action would be more protective against the risk of inappropriate predictive genetic testing, the costs of such intervention must also be weighed in the balance—in particular, the negative aspects of disempowering parents as decision makers, and the bureaucracy and inevitable financial burden associated with such a system of oversight. In these circumstances, it seems far more appropriate to acknowledge the need for some flexibility in decision-making, to try and educate and support families as much as possible, and to encourage responsible use of predictive genetic testing of children.

Conclusion

Where predictive genetic testing is performed on a child, that person's freedom of choice, in particular, the right not to know, is taken away, as is any claim to confidentiality about their genetic status. The position taken in this article is that there are compelling reasons why the use of predictive genetic testing on children should be confined to situations where it is clearly justifiable in the child's best interests. The existing regulatory framework, although somewhat open textured and non-mandatory, is probably, on balance, preferable to a more interventionist model. This is not to say, however, that there are not areas where improvements can be made, for example, stepping up requirements for pre-testing genetic counselling for the families involved, so that the full range of issues, including potentially negative consequences for the child, can be addressed.

Endnotes

1. On the subject of parentage testing, see the Australian Law Reform Commission/ Australian Health Ethics Committee, Report, *Essentially Yours: Protection of Human Genetic Information in Australia*, ALRC 96, (2003).
2. See, NHMRC, *Ethical Aspects of Human Genetic Testing: An Information Paper* (2003).
3. See, the Council of Europe, *Convention on Human Rights and Biomedicine*, Strasbourg, November (1996), Article 10; United Nations Educational, Scientific and Cultural Organization (UNESCO), *Universal Declaration on the Human Genome and Human Rights* (1997) Article 5.
4. World Health Organisation, *Proposed International Guidelines on Ethical Issues in Medical Genetics and Genetics Services* (1997).
5. Nuffield Council on Bioethics, *Mental Disorders and Genetics* (1998).
6. ASHG/ACMG Report, 'Points to Consider: Ethical, Legal and Psychosocial Implications of Genetic Testing in Children and Adolescents' (1995) 57 *American Journal of Human Genetics* 1233.
7. Human Genetics Society of Australasia, *Predictive Testing in Children and Adolescents* (1999).
8. Holland, J., 'Should Parents be Permitted to Authorise Genetic Testing for Their Children?' (1997) 31 *Family Law Quarterly* 321.
9. Clarke, A. and Flinter F., 'The Genetic Testing of Children: A Clinical Perspective' in Marteau, T. and Richards, M., (eds) T*he Troubled Helix: Social and Psychological Implications of the New Human Genetics* (1995) 164.
10. See s 61C and s 61D *Family Law Act 1975* (Cth) dealing with parental responsibility and the effect of parenting orders.
11. *Secretary, Department of Health and Community Services v JWB and SMB* (1992) FLC 92-293 ('Re Marion'); *Re D* 1976 Fam 185.
12. Under the *Family Law Act 1975* (Cth), any person concerned with the care, welfare or development of the child can bring proceedings in respect of that child: s 69C(d).
13. Section 67ZC *Family Law Act 1975* (Cth) .
14. Section 67ZC(2) *Family Law Act 1975* (Cth).
15. Section 60CC *Family Law Act 1975* (Cth).
16. Sections 68L and 68LA *Family Law Act 1975* (Cth). Note also the Family Court's Guidelines for Child Representatives: Practice Directions and Guidelines.
17. *H and W* (1995) FLC 92-598, R and R: *Children's Wishes* (2000) FLC 93-000.
18. But see the case *In the Marriage of Schorel and Elms* (2000) 26 FamLR 88 which is authority for the proposition that the reference of power in respect of ex-nuptial children by the state of Victoria encompassed welfare matters arising under the wardship jurisdiction of the Supreme Court of Victoria, such that children who are wards of the Supreme Court would be covered by the state referral of power. Given the similar terms of the referral of powers legislation, this reasoning could apply more generally to referring states.

The new sexualised childhood: a case of corporate creep

By Barbara Biggins and Elizabeth Handsley

When the Australian Law Reform Commission (ALRC) and the Human Rights and Equal Opportunity Commission (HREOC) published their joint report *Seen and Heard: Priority for Children in the Legal Process*[1] just over ten years ago, there was no mention of any problems regarding the sexualisation of children and young people in the media.

The chapter that resulted from the brief to inquire into 'the appropriateness and effectiveness of the legal process in protecting children and young people as consumers' covered topical issues, but this was not one of them.

And it's not surprising. This form of exploitation of children had barely begun. Gradually over the past ten years, sexualised marketing to the young has become common practice—and we have barely seemed to notice. If we had been confronted then with what is all around us now, we would have been shocked—but it has crept up on us.

Because it has been recognised so recently, sexualised marketing to children is difficult to pin down. Sometimes it is mistakenly interpreted as being a matter of adult sexual attraction towards children. One leading sceptic has said 'if you see a little girl in bikini and find it sexual, you are the one with the problem'.

But to understand the issue, we need to imagine that the bikini is black, high cut and studded with rhinestones, with a certain 'bunny' logo across the seat, and padded cups in the top (this doesn't necessarily describe a bikini we've seen, but it incorporates elements in clothing marketed to young children in recent years). This is not the kind of thing that normal people would see as 'sexual' in the sense of sexually attractive, but it is the kind of thing that many find inappropriate on a little girl. Why? It is because the bikini described uses emblems that our culture associates with adult sexuality. The adults who designed and marketed it to the little girl (and those who bought it for her) have encouraged her to associate these elements with the things she wants—to be noticed, to be cool and popular, to be loved and accepted.

In this sense, sexualised marketing to children sends a message that the happiness of children (often of very tender years) depends on being 'sexy', and 'sexy' equates with how you look, what you wear, what you listen to—in short, what you consume. The message that links sexual attractiveness to commercial behaviours and to emotional security imbues our whole society. The issue is whether it serves the interests of little children to be roped into this world view before they get a chance to explore the alternatives.

As the Australian Psychological Society (APS) put it in its recent submission to the Senate Committee on Environment, Communications and the Arts Inquiry into the Sexualisation of Children in Contemporary Media:

> The values implicit in sexualised images are that physical appearance and beauty are intrinsic to self esteem and social worth, and that sexual attractiveness is a part of childhood experience.[2]

Referring to the cognitive effects of exposure to an array of sexualising messages, the APS stated:

> Girls learn to see and think of their bodies as objects of others' desire, to be looked at and evaluated for their appearance.[3]

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△Henson's photos are just the work of one individual, and it is far easier to take on an art gallery than the massive retailing and other corporations are marketing to children.△

They found that research links sexualisation to three of the most common mental health problems of girls and women: eating disorders, low self-esteem, and depression or depressed mood.[4]

For those of us who have longstanding concerns about children's well-being and the media, it is ironic that the recent closing of a Bill Henson art exhibition that included photographs of naked 13 year old girls received so much media attention.The community has been questioning the capacity of minors to give informed consent to being photographed in that way, the possible use of the images by paedophiles, the legality of such portrayals (given the prohibition in the Classification Guidelines for Publications[5] of 'sexualised nudity involving minors'), and their artistic merit.

However, Henson's photos are just the work of one individual, and it is far easier to take on an art gallery than the massive retailing and other corporations who are marketing to children. The possible harm caused to the girls who posed for the photographs is a legitimate concern, but what about the harm to thousands and possibly millions of even younger children affected by sexualised marketing?

The Senate Inquiry mentioned above accepted written submissions up until 18 April 2008 and held public hearings on 29 and 30 April 2008. Its establishment has been a major step forward in raising awareness and debate about the issue, and we look forward to the report, which was due to be delivered in the Senate on 23 June 2008.

Prominent among the many community groups and individuals who figured in the list of 163 submissions received is Julie Gale of *Kf2bK: Kids Free 2b kids*. Her submission cites examples from family-style stores around Melbourne; magazines aimed at six to twelve year-olds; TV music video programs in General viewing time and Parental Guidance viewing time; and advertising in a range of media—including billboards.[6] She also cited relevant complaints rejected by the Advertising Standards Board. The submission builds up a convincing picture of pervasive sexualisation in all these media—both in the images and information to which children are subjected when they inevitably encounter 'adult' media—and in the way the media represent children to themselves. Moreover, the discussion of the outcomes of complaints makes it very clear that the rules being applied were not well-adapted to recognising the issues that the Inquiry is seeking to address. The rulings seem more concerned with whether a nipple is showing in an advertisement than with the overall message the advertisement sends about sexual attractiveness and the role this should play in children's lives.

A wide range of children's professionals provided evidence of harm, with many referring to the 2007 report of the American Psychological Association Working Party on the sexualisation of girls in media and advertising.[7]

In addition to the submission from the Australian Psychological Society mentioned above, Joe Tucci of the Australian Childhood Foundation[8] tabled ongoing research on children's stresses and anxieties. Many children felt the adult world was intruding too much into their lives, leaving them concerned and worried. The Foundation's view was that the preponderance of sexualised messages is contributing to an increase in the number of children that are engaging in problem sexual behaviour with other children.

Industry groups also made submissions to the Inquiry, indicating scepticism as to the issue's existence, coupled with the view that existing regulation was sufficient. Perhaps more significantly, just two days before submissions closed, the Australian Association of National Advertisers (AANA) released a revised Code for Advertising & Marketing Communications to Children.[9] This attempted to address community concerns about the sexualisation of children. Young Media Australia (YMA), in a submission to the AANA's review of its Code,[10] had argued that, firstly, children should not be carelessly exposed to sexual material; secondly, children should not be presented in sexualised ways; and thirdly, there should be a range of measures to identify the problems—train key stakeholders—and pilot different approaches. We also submitted that the definition of advertising to children should be broadened to cover that advertising to which children are likely to be exposed. The current narrow definition requires the advertising to be such that it appears to be aimed at children, and to be for a product of primary appeal to children.

The AANA Revised Code contains the following provisions on sexualisation:

Advertising or Marketing Communications to Children:

(a) must not include sexual imagery in contravention of Prevailing Community Standards;

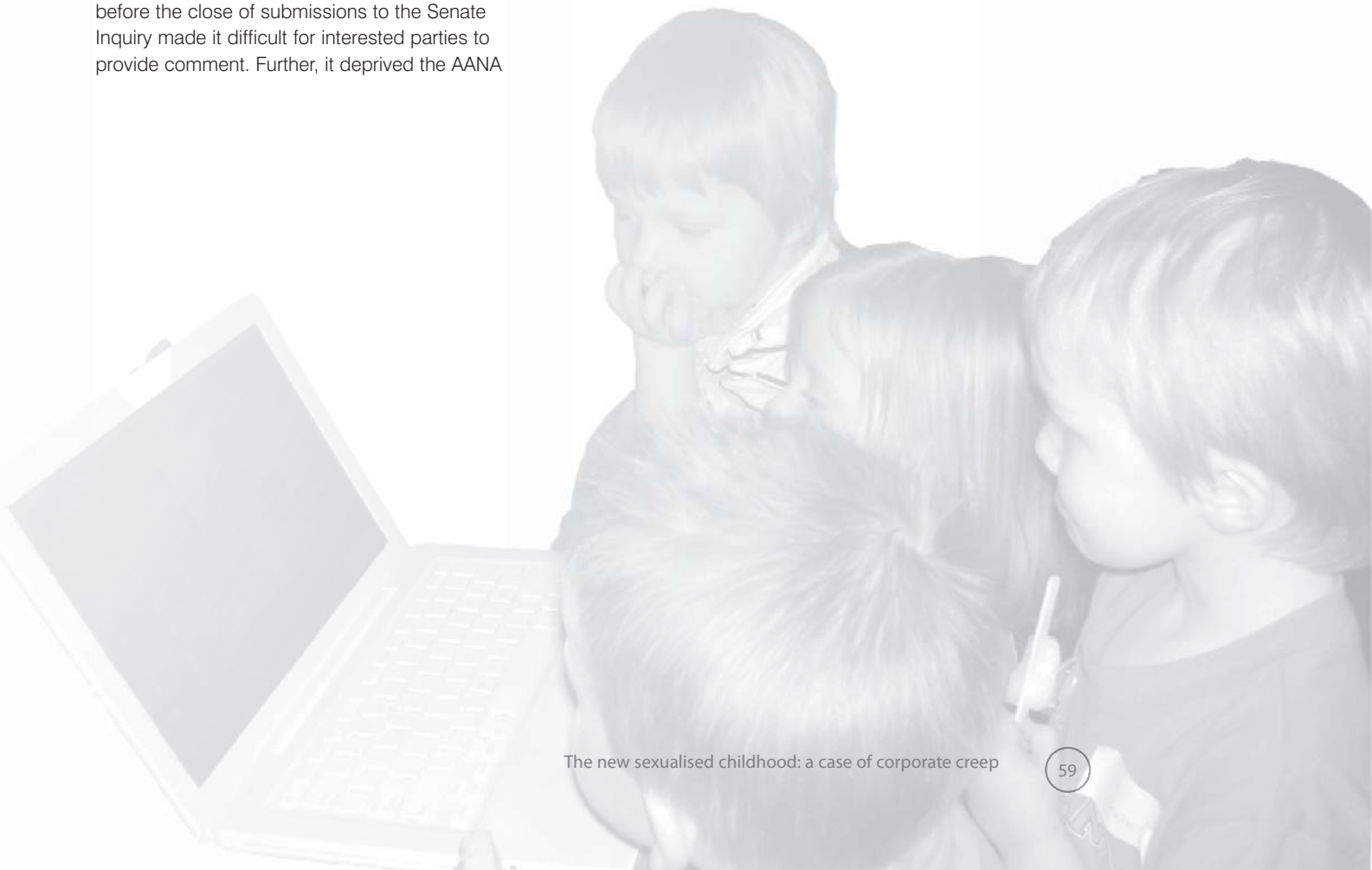
(b) must not state or imply that children are sexual beings and that ownership or enjoyment of a product will enhance their sexuality.

The AANA has been unable to identify any actual advertising to children that would be caught by these tests, especially considering that the 'Product' in paragraph (b) must be one of primary appeal to children. Moreover, the provisions miss the point of concern about sexualised images of children, which has nothing to do with whether children are presented as 'sexual beings'. Rather, as discussed above, it is about the way the trappings of adult sexuality are linked to the things that children desire.

Additionally, the AANA Revised Code does not deal with general advertising in places where children are bound to be exposed to it. Because the narrow definition of advertising to children remains, the sexualisation provisions, like the rest of the Revised Code, apply only to a very small proportion of the advertisments that children see.

The release of the Revised Code so soon before the close of submissions to the Senate Inquiry made it difficult for interested parties to provide comment. Further, it deprived the AANA of the benefits of the exploration of the issues that emerged.

Despite some community urging, the AANA did not avail itself of the benefits of consulting with the Australian Competition and Consumer Commission (ACCC) before and during its code review process. As a matter of legal structure there is much to be said for the ACCC taking on a 'backstop' role in advertising to children, similar to that which the Australian Communications and Media Authority plays in relation to children's television. The television industry has developed its own code of practice, which is then registered by the regulator under the *Broadcasting Services Act 1992* (Cth). The industry essentially runs its own complaints, but consumers who are dissatisfied with the outcome of this system can take their concerns to the regulator. We see no reason why a similar balance between industry and government could not be struck, and there is much potential for sharpening up the regulatory tools in such a process.



It's interesting to note here Recommendations 63, 65 and 66 from the ALRC and HREOC joint report[11] which, if they had been implemented, might have prevented not only problems evident in 1997 but some of the above. These called for research on media and advertising impacts on children at different stages of development to determine what is harmful to child consumers. Further, the joint report recommended that a summary of this research be distributed to legislators and regulators and media, and be used to support the development of best practice guidelines for advertisers. Further, the Advertising Standards Board should take into account the needs of the child consumer when considering complaints about advertising.

Young Media Australia's submission to the Senate Inquiry[12] emphasised the need for careful definition of which sort of portrayals and experiences constitute 'the sexualisation of children', and for education of the industry about these issues. YMA also urged a review of all of Australia's regulatory systems to assess if they adequately provided protection of children from harm.

Further, YMA strongly supported the Australia Institute's recommendation in its 2006 report 'Letting children be children' that:

> As different media (print, radio and television) become less distinct due to technological advances, it will become increasingly desirable to bring all media regulation together in one statutory system. At this point a new opportunity to stop children's premature sexualisation will emerge. An all-encompassing office of media regulation could include a division with the primary responsibility of protecting children's interests in the contemporary media environment. With oversight of all media modes, the children's division would be well aware of the wide range of sexualising material to which children are exposed on a daily basis. The case-by-case approach currently used by media regulators is inadequate. Children rarely suffer harm as a result of exposure to a single case of sexualising material. Rather, harm is caused by cumulative exposure to sexualising material from a range of sources. Ideally, the children's division would be partly staffed by experts in areas relevant to the potential harms caused by the premature sexualisation of children, for example, child psychology, paediatrics, primary teaching, and criminology.[13]

Marketing to children is immoral because children can't understand or counter-argue the persuasive intent behind it. It harnesses massive resources to prime children to see their happiness and self-worth as depending on consumption and products, before they have a chance of encountering other viewpoints.

Using sex to sell to adults is questionable as it preys on some of people's deepest insecurities, and peddles a superficial and selfish view of acts that are best understood in a mutually respectful environment.

Using sex to sell to children simply needs to be stopped. It's as simple as that.

Endnotes

1. Australian Law Reform Commission and Human Rights and Equal Opportunity Commission *Seen and Heard: Priority for Children in the Legal Process.* ALRC 84 (1997).
2. Australian Psychological Society *Submission to the Senate Committee on Environment, Communications and the Arts Inquiry into the Sexualisation of Children in Contemporary Media* (2008), p 3.
3. Ibid, p 3.
4. Ibid, p 3.
5. Australia. Office of Film and Literature Classification, Guidelines for the Classification of Publications (2005), p 15.
6. Gale, Julie Submission to the Senate Committee on Environment, Communications and the Arts Inquiry into the Sexualisation of Children in Contemporary Media (2008) pp 5-11.
7. American Psychological Association—task force. Report on the Sexualisation of Girls in Media and Advertising, APA (2007).
8. Australian Childhood Foundation *Submission to the Senate Committee on Environment, Communications and the Arts Inquiry into the Sexualisation of Children in Contemporary Media* (2008) p 2.
9. Australian Association of National Advertisers Code for Advertising & Marketing Communications to Children (2008).
10. Young Media Australia Submission to the AANA on the review of the Code of Advertising to Children (2007) p 11.
11. Australian Law Reform Commission and Human Rights and Equal Opportunity Commision *Seen and Heard: Priority Children in the Legal Process ALRC 84 (1997),* Recs 63, 65 and 66. See 1, above.
12. *Young Media Australia Submission to the Senate Committee on Environment, Communications and the Arts Inquiry into the Sexualisation of Children in Contemporary Media* (2008), p 9.
13. E Rush, Emma and A La Nauze*, Letting Children be Children: Stopping the Sexualisation of Children in Australia* (2006).

Bullying and violence: young workers still exposed

By Zana Bytheway and Vera Smiljanic

When we raise the issue of workplace bullying and violence it is always ugly, and sometimes in order to give the terminology its full purport, only an example of it will suffice.

Jason—a 15 year old JobWatch client—started working as an apprentice for a car body repair shop. His 'workmates' began a daily ritual of jamming a screwdriver into his fingers until they bruised. On one occasion, these workmates tied a rope around his neck and made him stand on his tiptoes while they tied the rope over a beam on the ceiling. They stood back and watched, laughing because Jason couldn't put his feet on the floor. He suffered bruised ribs after being punched while holding up a car bonnet. He was kicked twice in the calf for allegedly making a mistake. One of Jason's workmates wrapped masking tape across his forehead and eyes then ripped it off. Jason was also the subject of verbal abuse such as being called a 'worthless idiot'.[1]

In the late 1990s, JobWatch received an increasing number of calls about workplace bullying and violence incidents. These incidents in some cases involved acts of brutality against young workers—primarily apprentices—of such gravity that many would not have believed they were happening at workplaces.

These reported incidents helped to expose the existence of a workplace culture where it was acceptable to bully and be violent towards workers. They also revealed that one of the most vulnerable groups that were subjected to this type of treatment were young workers.

What is workplace bullying and workplace violence?

Workplace bullying is defined by WorkSafe Victoria as repeated, unreasonable behaviour directed towards an employee, or group of employees, that creates a risk to health and safety.[2] Examples of bullying behaviour include verbal abuse, excluding or isolating employees, psychological harassment, intimidation, assigning meaningless tasks unrelated to the job, giving employees impossible assignments, deliberately changing work rosters to inconvenience particular employees and deliberately withholding information which is vital for effective work performance.[3]
Workplace violence—also known as occupational violence—is defined independently as any incident where a worker is physically attacked or threatened in the workplace.[4]

JobWatch does not differentiate between the concepts of workplace bullying and violence. For our data collection purposes we define workplace violence as comprising either: physical assault, sexual assault, physical harassment, psychological harassment, verbal harassment or sexual harassment.

The vulnerability of young workers

As a group, young workers are more vulnerable to workplace bullying and violence due to a variety of factors:

- A significant number tend to be employed in precarious arrangements such as casuals and apprentices/trainees and therefore have limited employment rights and bargaining power.
- Young workers in general have very limited knowledge of their employment rights and what recourse is available to them if problems arise. This vacuum in knowledge means that in some instances young workers believe that there is nothing they can do about the bullying or violence and just put up with it.

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- Even if armed with knowledge, young workers are reluctant to pursue their rights—which of course is difficult enough for adults. Often young, inexperienced workers feel that they have everything to lose and nothing to gain in standing up for their rights.
- Young workers tend to be in subordinate or low-level positions in the workplace and this makes them the target of perpetrators—which research has shown—are likely to be supervisors or those who occupy positions of authority in the workplace. This silence means perpetrators can be confident that there is little chance of them being held to account for their behaviour and so the behaviour continues.

Young workers' experience of bullying and violence

> The security guard grabbed my bra strap. He and the manager thought it was funny and were laughing. I felt very upset.

Megan (gaming attendant), 19 years old.

> I and the other apprentices were beaten up by the head chef in the downstairs room of the hotel and we were made to bleed into a bucket rather than being allowed to get first aid.

Toma (apprentice chef), 20 years old.

> My regional manager treats me badly. She calls me a 'mole' and 'slut'. One day I was with a customer when she came in swearing and screaming at me.

Caroline (retail manager), 21 years old.

Although the graphic type of workplace bullying and violence has gained public prominence this is not the main type of behaviour experienced by young workers. According to data from JobWatch's telephone information service (see Figure 1) verbal harassment is the main type of behaviour that young workers are exposed to. This view is supported by other research. A study from the NSW Commission for Children and Young People on 'Children at Work' showed that nearly 48% of children aged between 12 and 16 years of age (out of a sample of nearly 11,000) experienced verbal harassment at work.[5] While a JobWatch study into the experiences and problems of young workers in the fast food industry showed that of the 35% of respondents who experienced bullying or violence, a third involved verbal harassment.[6]

Research and data also reveals that there are gender differences between the types of workplace bullying and violence experienced by young workers and workers in general. For instance, according to data from JobWatch's telephone information service, sexual harassment and sexual assault is more commonly experienced by females—males are more likely to experience physical abuse and assault.

Effects of workplace bullying and violence

The effects of workplace bullying and violence on all workers, can be wide-ranging and far-reaching—and includes psychological and physical effects—as well as career and financial. Some of the physical and psychological effects include anxiety, depression, sleep difficulties, headaches, weight loss, loss of self-esteem and confidence, stress, inability to work, reduced concentration and an adverse impact on relationships with family and friends.[7] These effects can be compounded for young

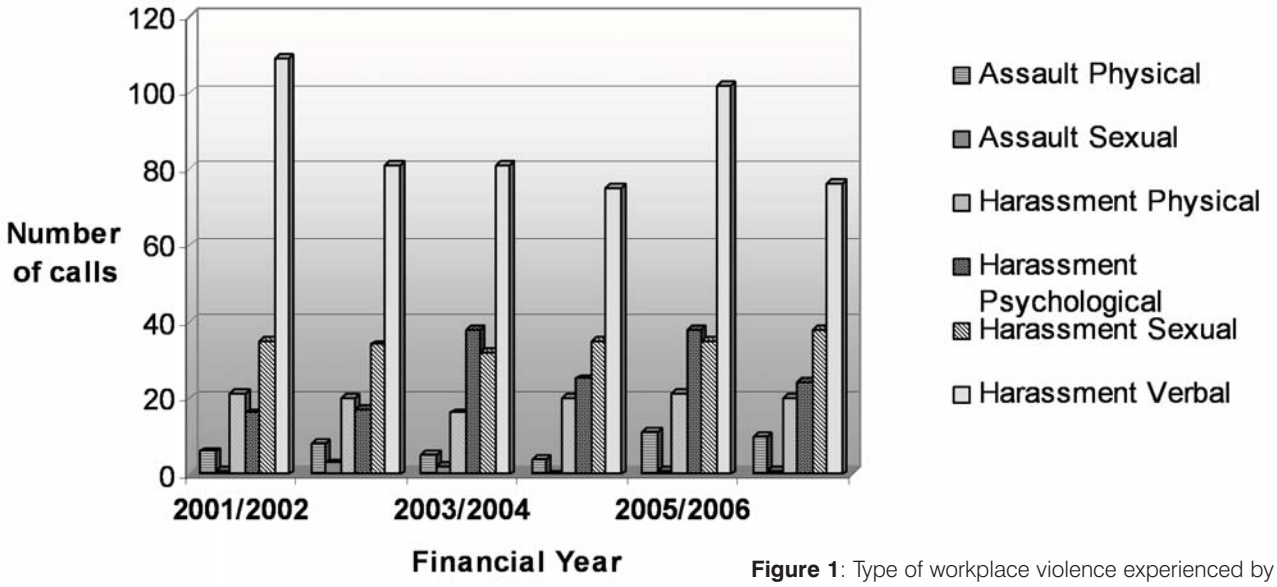

Figure 1: Type of workplace violence experienced by young workers contacting JobWatch

people because of their lack of physical and psychological maturity. Financial and career effects include lost or reduced wages resulting from absenteeism, poor work performance, resignation or dismissal, career stagnation, costs of counseling and/or medical treatment and waiting periods for social security payments.[8]

Workplace bullying and violence not only costs the worker, it costs business. The financial cost of workplace bullying to business in Australia is estimated to be between $6–13 billion a year.[9] This includes indirect costs such as absenteeism, labour turnover, loss of productivity and legal costs.

How has workplace bullying and violence been dealt with?

In response to an increasing number of calls, JobWatch commenced an ongoing campaign in the late 1990's which aimed to:

- expose the existence of workplace bullying and violence;
- assist workers experiencing it; and
- reduce and ultimately eliminate its occurrence.

Governments and authorities at the state and territory level—which have prime responsibility for occupational health and safety in the workplace—began to take action to address the issue in response to community and stakeholder pressure.

In Victoria, the WorkCover Authority (now known as WorkSafe) launched a major media advertising campaign about the issue, using the example of an apprentice having paint thinner thrown on him and set alight while in the toilet. They initiated prosecutions under the *Occupational Health and Safety Act 1985* (Vic) and its replacement *Occupational Health and Safety Act 2004* (Vic) against employer and the employees who participated in workplace bullying and violence, particularly in cases involving young workers. WorkSafe Victoria developed a *Guidance Note on the Prevention of Workplace Bullying and Violence at Work*, which was released in 2003.

WorkSafe Victoria developed occupational health and safety material targeting students and young workers incorporating information about workplace bullying and violence. Secondary schools in Victoria introduced information about workplace bullying and violence into their work experience curriculum.

Unions and community groups raised awareness about the problem and provided information and education about rights and avenues of recourse to workers.

The major employers implemented workplace bullying and violence policies and staff training.

Are young workers still being subjected to workplace bullying and violence?

Recent studies of young people and work show that between a third and a half of young people experience some form of workplace bullying and violence.[10] Data from JobWatch's telephone information service shows that over the last six years workplace violence is consistently amongst the top five enquiries for people under 25 years of age seeking assistance. Young workers today are still being subjected to workplace bullying and violence despite the efforts made and action taken over the last ten years.

As long as there is evidence that workplace bullying and violence exists, there is evidence that more needs to be done.

Endnotes

1. Apprentice left to hang by the neck on a rope, *Herald-Sun*, 16th July 1996.
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3. Ibid.
4. Ibid, p 18.
5. NSW Commission for Children and Young People, *Children at Work, Sydney* (2005), p 199.
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Young people in the workplace

By Joel Fetter

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Most young people are in some form of work by the time they are in secondary school, whether it is a paid job or helping out in a family business or farm. Of course, this definition does not include the other unpaid work that children do in the home, at school or in the community.

Work, of any sort, is an important part of a young person's life, helps them to develop new skills, decide what it is they like doing, form valuable social bonds and (in the case of paid work)—earn and save money. However, starting working life also raises a number of new challenges for young people, including learning how to balance work, study and family commitments; how to develop good relationships with bosses and co-workers (including developing strategies for managing conflict); and how to protect and advance their own rights and interests in the workplace.

The purpose of this article is to briefly review the position of children and young people in the workplace, the protections given to them by law, and some of the problems that they may face at work.

Statistics

In 2006, there were 175,100 children aged five to 14 years of age in some form of work, representing 7% of all children in that age group. Most (54%) were in paid employment, a third worked in a family business or farm, and 16% were working for themselves. About a quarter of working boys deliver leaflets or newspapers, and another quarter work on farms. About a quarter of young female employees work in shops, and another quarter work as carers. Most working children work less than five hours per week during school term (although 27% of 10–14 year olds worked six or more hours per week during term), usually on weekends or after school, and pick up additional shifts during holidays (when 43% of working children aged 10–14 are working six hours or more per week). A significant proportion of working children (14%) work late nights (after 7pm) during school term. The main reason for working is to earn spending money (51%), or to save money (24%).[1]

In the 15–19 year age group, there were 749,600 young people in employment in 2008 (as well as 119,000 people looking for work)—representing 52% of young people of that age. Most of these young people are working in the retail (31%) or hospitality (27%) industries, and close to 90% of the jobs in those industries are casual or part-time. Young casual and part-time workers complete an average of 12 hours work each week, even though 63% of young working women and 49% of young working men are also undertaking full-time education while working.[2] The average full-time junior employee (under 21) earns $411 per week in ordinary time earnings, equivalent to a wage of $10.82 per hour.[3] The average part-time or casual worker between 15 and 19 years of age earns $149 per week.[4]

Legal regulation of the work of children and young people

A range of general laws relating to employment operate to protect children and young workers, including industrial relations legislation, occupational health and safety laws, and laws against discrimination and harassment.

In addition, most states and territories have legislation specifically regulating the work of children. For instance, in Victoria, the *Child Employment Act 2003* provides a general

minimum working age of 13 (or 11 years for certain delivery work). Children under 15 must only be given 'light work', and must not be permitted to work during school hours (unless exempted by the Minister). Hours of work are capped at 12 hours per week during school term, and 30 hours per week during holidays (including a half-hour rest break after three hours work); work may not generally be performed outside of the hours of 6am to 9pm. There are exceptions for children working in family businesses (where there is no minimum age of employment, and no regulation of working hours) or in the entertainment industry (where there is no minimum age but the employer must obtain a permit to employ the child, and there is also no regulation of working time).

Young people working in jobs covered by industrial awards are generally entitled to 'junior rates', which are a fraction of the adult rate. For example, in the fast food industry, the minimum ordinary hourly rate for adults is about $15 per hour; however, children under 17 generally receive only 40-50% of the adult rate.[5] Higher 'penalty' rates (up to 2.5 times the regular rate of pay) are generally available for work performed on weekends, evenings, nights and public holidays. Children working as casual employees are also entitled to an additional loading (generally between 15–30% of the ordinary rate), to compensate them for the fact that they are generally not entitled to paid personal leave, paid annual leave or notice of termination. Short-term casuals—and many other workers—are generally excluded from statutory unfair dismissal schemes, and so may have no remedy in the event that they are sacked unfairly.

In some states and territories, for children working in award-free areas—such as those delivering leaflets—there is no legal minimum rate of pay. The same applies to children who do not work as 'employees', such as those working as 'contractors' and volunteers (including, potentially, those working in family businesses). In some parts of Australia, there is a nominal payment made to students on work experience or structured workplace learning programs ($5 per day in Victoria),[6] but in other jurisdictions no payment is made.

Wages are also low for young people completing traineeships and apprentices. For example, a person who leaves school after year 10 to undertake a basic traineeship will only earn about $9 per hour worked.[7]

However, trainees and apprentices may have other conditions of their employment regulated, for their protection, by state training legislation, which may impose maximum probationary periods, minimum guaranteed hours of employment, restrictions on working overtime or shiftwork, and (for apprentices) protection against termination of their employment.[8]

Of course, these are only minimum wages and conditions of employment. Employees may be able to achieve better outcomes by individual negotiation with their employer or (much more likely) through collective negotiations, usually conducted by a union on behalf of all the workers in a particular workplace. For example, in the Victorian hospitality industry, collective bargaining delivers wages that are 9% higher than the award, on average. In other industries where workers have greater collective power (such as manufacturing, utilities, transport and health) the wage premium for those workers covered by collective bargaining is generally in the order of 40 or 50%![9]

Problems facing children and young workers

Children and young people face a special range of issues at the workplace. First, there is the potential for work to interfere with education. The figures above show that almost a third of children under 14 are working more than six hours per week during term, and that the average part-time or casual employee over 15 works for 12 hours each week. This is a significant workload, and it may be undermining their capacity to concentrate on their studies.

The second problem is the low rates of pay that young people receive. Although most children have other forms of income or support (usually their parents), some older children who have left home, or who cannot rely on their parents for adequate support, are at risk of poverty if they were to rely solely on junior wages. Another problem with our system of junior wages is that many young workers find that, as their wage increases, their security of employment falls, as their employers are tempted to replace them with younger, and cheaper, staff.

A third issue is that children in employment are particularly vulnerable to exploitation at work, since they often lack the awareness of their legal rights, and the confidence to challenge their employer (particularly given

that many, if not most, young workers do not have protection from unfair dismissal). This problem is exacerbated in workplaces where young people may not be aware of the right to join a union and bargain collectively with their employer about their employment conditions.

The vulnerability of young workers has been made especially apparent over the last few years. Under the former Howard government's industrial relations laws, employers could make Australian Workplace Agreements ('AWAs') with their staff which significantly cut their pay and conditions. These AWAs were most widely used in the retail and hospitality industries, and the evidence suggests that they were mostly used to cut (young) workers' casual loadings; cut penalty rates for working on weekends, evenings or public holidays, and also to make their rosters and working hours subject to greater levels of managerial control.[10]

Even though the new federal government has abolished AWAs, there is a significant risk that some employers will not fully restore loadings and penalty rates, but will continue to pay the low rates of pay that they have been accustomed to paying over the last ten years. Because the chances of detection by government inspectors are low, it will be up to young workers to ensure they are receiving the correct rate of pay, with the assistance of their parents, their union or the relevant government's workplace authorities.

Finally, it goes without saying that the best protection that any worker, young or old, can have in the workplace is the advice, representation, and collective bargaining services which unions offer to their members. Membership starts from $3.30 per week, for example, for someone who works less than 10 hours per week in the retail sector. Young people interested in joining a union can contact Unions Australia on 1300 486 466 for more information.

Endnotes

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2. ABS, *Labour Force* (January 2008) cat 6202.0, table E14.
3. ABS, *Employee Earnings and Hours* (May 2006) cat 6306.0.
4. ABS, *Employee Earnings, Benefits and Trade Unions Membership* (August 2007) cat 6310.0.
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Children and the law in the Solomon Islands

By Houlton Faleomanu Faasau, Kathleen Kohata and Kate Halliday.

Currently the Solomon Islands Law Reform Commission (SILRC) is focusing on a significant review of the *Penal Code* and *Criminal Procedure Code*. This review of the criminal laws will need to consider a number of issues relevant to children and young people who may be accused of criminal offences, or be involved in the legal system as witnesses or victims of crime.

One of the primary functions of the SILRC is to review laws, 'with a view to the systematic development and reform of the law including the modernisation of the law by bringing it into accord with current conditions'.[1] Other functions of the SILRC are to make recommendations in relation to the 'restatement, codification, amendment or reform of traditional or customary laws' and 'the development of new approaches to, and new concepts of, the law in keeping with changing needs of Solomon Islands society and individual members of that society.'[2]

Constitutional and legal framework

The Solomon Islands Constitution identifies customary law as a source of law in the Solomon Islands. Customary law has effect subject to it being consistent with the Constitution or Acts of Parliament.[3] In addition, the Constitution contains a number of fundamental rights and freedoms, including rights to: life; liberty; security of person; freedom of conscience, expression, assembly and association; and protection from torture or inhuman or degrading treatment.[4]

Fundamental rights and freedoms are subject to both general and specific restrictions. In the case of the right to personal liberty a person under the age of 18 years might be deprived of his or her personal liberty as authorised in law by an order of a court or with the consent of his or her parent or guardian for the purpose of his or her education or welfare.

The Solomon Islands ratified the Convention on the Rights of the Child (CRC) on 10 April 1995. A number of recommendations regarding implementation of the Convention were identified in 2003 following the Solomon Islands' first report to the Committee on the Rights of a Child. They include raising the minimum age of criminal responsibility and of marriage, addressing corporal punishment practices, more effective prosecution of offences committed against children, and addressing child prostitution and other forms of sexual exploitation of children.[5]

The two main penal statutes, the *Criminal Procedure Code* and the *Penal Code*, both pre-date the Constitution. The former was enacted in 1962, the latter in 1963, and both have remained in much the same form even after independence. In addition, the common law of England as at the date of independence[6] also applies to some areas of criminal law. While there have been some amendments to the two Codes, both are in need of reform. The structure and content of the *Penal Code* has been attributed to the Griffith Code of Queensland and adaptations from the Indian Penal Code. However, a closer analysis suggests the *Penal Code* is an odd mixture of both these influences, as well as common law offences in force at the time of the development of the Code.

Social context

The Solomon Islands is a developing country and experienced significant civil unrest and

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Photos by Roland Woolmer.

breakdown in law and order leading up to the intervention by the Regional Assistance Mission to Solomon Islands (RAMSI) in 2003. Children and young people were also involved as both alleged perpetrators and victims of crimes that occurred during the period of social and ethnic trouble between 1999 and 2003.

The country is made up of more than 900 islands and people speak at least 87 local languages and dialects.

Many of the provisions in the *Penal Code* are inadequate in dealing with offences relating to, or affecting, children. At the same time the criminal law, as set out in the *Penal Code* and applied by the courts, is largely remote from the everyday life of many people in the Solomon Islands, and customary values and law provide more meaningful and better known norms and dispute resolution processes at the village level. As with most other countries in the world, the Solomon Islands also needs to modernise its criminal law so that it can deal adequately with transnational crime, such as child pornography.

△Currently the minimum age of criminal responsibility is eight years of age. A child under the age of 14 years is not criminally responsible for an act or omission[7] unless he or she had the capacity to know that he or she ought not do the act or make the omission. △

Issues for reform

Currently the SILRC is preparing an issues paper on the *Penal Code*. So far it has identified a number of important issues regarding children and the criminal law that require consultation and reform as part of the review of the *Penal Code* and *Criminal Procedure Code*. Following is an overview of some of these issues.

Age of criminal responsibility and ascertaining the age of children

Ascertaining the age of a child is important to determine whether he or she might be held responsible for an offence, or to determine whether a particular offence has been committed against the child.

Currently the minimum age of criminal responsibility is eight years of age. A child under the age of 14 years is not criminally responsible for an act or omission[7] unless he or she had the capacity to know that he or she ought to not do the act or make the omission. The Committee on the Rights of the Child (CRC) has recommended that the minimum age of criminal responsibility in the Solomon Islands be raised to internationally accepted standards.[8]

Customary attitudes to the coming of age and age of responsibility are important and will impinge upon any reform in this particular area of the law. Similar to many other traditional societies, there are customary rites and initiation ceremonies that determine the coming of age and the transition of an individual from the stage of being a child to that of adulthood. An example of such a practice might be a feast to celebrate when a girl experiences the first signs of menstruation. In the criminal process, ascertaining an individual's age often has practical difficulties.

The lack of resources and capacity in the Solomon Islands means that often a proper register of all births is not kept. Geography and the inability to access an adequate medical centre means that home births are not uncommon as it is often difficult to get to the major centres where clinics and hospitals are located.

> In traditional Papua New Guinea custom, there was no such thing as a chronological age and many of the country's customs are reported to be incompatible with the definition of child under the CRC.[9]

It would not be untrue to say that such also applies in the Solomon Islands.

Sexual offences

A recent report about commercial sexual exploitation of children, and newspaper articles about reported cases of sexual assault of children in the Solomon Islands, have highlighted the need to consider offences regarding sexual abuse of children and young people in the Code, as well as the procedural laws that apply to these offences.[10] The report examines the incidence of commercial sexual abuse and non-commercial sexual abuse of children in communities close to logging camps in Makira Province. The report documents cases of child prostitution, 'sale of children for marriage' or 'early marriage,[11]' child sexual abuse and the production of, and exposure to, child pornography.

Sexual offences in the *Penal Code* are mostly gender specific. Rape is defined as unlawful sexual intercourse with a girl or woman.[12] There are a range of specific offences which prohibit sexual intercourse with girls under the age of 13 years, and girls under 15 years, regardless of the consent of the girl.[13] The offence of sexual intercourse with a girl under the age of 13 years is very serious (it is classified as a felony, as is rape) and the

maximum punishment is life imprisonment. The offence of sexual intercourse with a girl under the age of 15 years is less serious (it is classified as a misdemeanor) and carries a maximum penalty of imprisonment for five years. A defence can also be raised to the second less serious offence based on the belief of the accused, on reasonable grounds, that the girl was above the age of 15 years. Indecent assault of a woman or a girl is an offence.[14] It is unlikely that this offence would cover many situations where a person deliberately exposes a child to pornography.

The only offence that might cover sexual abuse of a male child is the the offence of committing buggery. This offence carries a maximum penalty of 14 years' imprisonment.[15]

There are no provisions in the *Penal Code* that deal directly with the production, possession or dissemination of child pornography. The offence of 'traffic in obscene publication' is only directed at production and dissemination of obscene material, which is not defined.

The *Penal Code* also contains some offences of abduction of a girl under the age of 18 years for the purpose of marriage or sexual intercourse.[16] The first of these requires the abduction against the will of the girl, and the second requires it to be against the will of her mother, father or other guardian.

Assault

The law regarding assault is derived from the common law and a defence of corporal punishment is available. The scope of the defence of corporal punishment is limited by the prohibition in the Constitution against torture, or inhuman or degrading punishment or treatment. The *Penal Code* also contains an offence of cruelty to children under the age of 15 years. However, this provision also states that it does not affect the right of any parent, teacher or other person having lawful control of a child or young person to administer reasonable punishment.[17]

Solomon Islanders continue to uphold many traditional values of which child discipline is an important part of socialising children into the community on the behaviours and attitudes approved or disapproved by their society. In most cases, a reprimand would involve some form of physical punishment. Public punishment, though not encouraged, is not uncommon. According to custom, it is acceptable and sometimes necessary to punish or correct a child in what may at times be viewed as a harsh manner by today's standards. In some cases this may result in conflict between customary law and the principles contained in the Constitution and the Convention on the Rights of the Child. At a recent RAMSI workshop in the village of Rarumana in the Western Province, attended by SILRC staff, women asked whether the law prevented whipping of children.

Corporal punishment is now prohibited in schools in a number of Pacific states although it does happen in practice despite these prohibitions. The High Court of the Solomon Islands considered corporal punishment in a case where two 10-year old boys were caned by their school teacher within the view of other children who were in the assembly. It was decided in that case that corporal punishment was not unlawful but it was a matter of degree.[18]

In 2006, a traditional practice of whipping adults and children with coconut lashes was re-introduced in a remote Solomon Islands community following a surge in law breaking.[19] Offenders were required to sit in a meeting house of 2000 villagers where they were then whipped. Adults were subjected to 24 lashes while children were subjected to half that number. The practice ceased after the community became aware that it infringed national law.[20]

Evidence of children

There are currently no specific laws that provide for support or special arrangements when children give evidence, including evidence as a complainant in a trial for a sexual offence. Evidence must be given in open court although the courts appear to have the power to arrange for a screen to be put in place when a child gives evidence in a sexual offence case.

The common law rules regarding corroboration of children's evidence continue to operate in the Solomon Islands. An accused cannot be convicted on the basis of a child's unsworn evidence unless that evidence is corroborated, and a warning is required before a person can be convicted on the sworn but uncorroborated evidence of a child.

Conclusion

We anticipate that these issues will attract attention and debate during consultation for

the review of the criminal laws of the Soloman Islands. The final recommendations of the SILRC will need to be informed by those views, as well as the Constitution of the Solomon Islands, its international obligations and legal developments in comparative jurisdictions.

Endnotes

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3. *Solomon Islands Constitution* s 76.
4. *Solomon Islands Constitution* Ch II.
5. Committee on the Rights of the Child CRC/C/15/Add.208 6 June 2003.
6. Solomon Islands gained independence from Great Britain in 1978.
7. *Penal Code* s 14.
8. Committee on the Rights of the Child CRC/C/15/Add.208 6 June 2003, in response to the initial report of the Solomon Islands.
9. The New Zealand Law Commission, *Converging Currents: Custom and Human Rights in the Pacific*, Study Paper 17 September 2006.
10. Tania Herbert, *Commercial Sexual Exploitation of Children in the Solomon Islands: A Report Focusing on the Presence of the Logging Industry in a Remote Region*, Christian Care Centre, Church of Melanesia, Solomon Islands.
11. This includes 'marriage' below the legal age of 15 years, and marriage of children between the age of 15 and 18 years.
12. *Penal Code* s 136.
13. *Penal Code* ss 142, 143.
14. *Penal Code* s 141.
15. *Penal Code* s 160.
16. *Penal Code* ss 139, 140.
17. *Penal Code* s 233.
18. *Regina v Rose, High Court of Solomon Islands,Criminal Case* No 43 of 1987.
19. 'End to Whipping Boosts Crime' (5 June 2008).
20. Ibid.

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Continued from pp 32: 'Juvenile justice'

22 *Children's Court Act 1992* (Qld) s 20(g).

23 *Young Offenders Act 1994 (*WA) ss 17A, 17B.

24 *Young Offenders Act 1997* (NSW) s 27(2).

25 *Young Offenders Act 1997* (NSW) s 3(g).

26 *Seen and Heard*, pp 518–521.

27 *Young Offenders Act 1997* (NSW) ss 7(b), 22(1)(b), 39(1)(b).

28 *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) cl 33.

29 Arie Freiberg and Neil Morgan, 'Between bail and sentence: the conflation of dispositional options' (2004) *Current Issues in Criminal Justice* 220.

30 See, eg, the discussion in NSW Law Reform Commission, *Young Offenders*, Report 104 (2005) at p 257. See also Georgia Brignell, *Bail: An Examination of Contemporary Issues—Sentencing Trends & Issues* No 24 (2002) Judicial Commission of New South Wales.

31 NSW Department of Juvenile Justice, *Annual Report 2005–06*.

32 See NSW Bureau of Crime Statistics and Research, *NSW Criminal Court Statistics 2006* (2007) summary tables at pp 9 and 4 respectively.

33 The proportion of children and young people appearing in court for breach bail conditions rose from 14% in 2003–04 to 20% in 2006–07. In 2006–07 almost one quarter of all Aboriginal children appearing in court in NSW were there for breach of bail conditions.

34 *Children (Criminal Proceedings) Act 1987* (NSW) s 9.

35 Mark Allerton et al, *NSW Young People in Custody Health Survey: Key Findings Report* (2003), NSW Department of Juvenile Justice; and Dianna T Kenny et al, *NSW Young People on Community Orders Health Survey 2003–06*, (2006). Both reports are available at www.djj.nsw.gov.au/publications.htm.

36 The amendments were to the *Evidence (Audio and Audio Visual Links) Act 1998* (NSW).

37 See the Second Reading Speech by the Attorney General, the Hon. John Hatzistergos, Legislative Council, NSW Parliament, Full Day Hansard Transcript, 15 November 2007, p 54. Designated government agencies now have standing to apply to the court for a direction about the appearance in person of the child. The court can require the child's presence at court, providing this is in the interests of the administration of justice. The child's legal representative will also be able to make submissions to the court in support of the child's presence at the court during the proceedings.

38 Hansard, Legislative Council, 17 October 2007.

Continued from pp 12: 'Seen and Heard revisited

26. Report, p 428.

27. http://www.facsia.gov.au/internet/facsinternet.nsf/family/parenting-child_protection_discussion_page.htm.

28. Report, chapters 18,19 and 20.

29. Sentencing Young Offenders in Australia, *Reform*, Winter 2005 Issue 86.

30. Report, p 483.

31. '*A Last Resort? The Report of the Inquiry into Children in Immigration Detention*' Human Rights & Equal Opportunity Commission, 2004.

32. Report, pp 578–581.

33. For further information, contact the authors of this article.

Reviews

Law and the Human Body: Property Rights, Ownership and Control

Questions concerning the legal status of the human body arose in the English common law in the late seventeenth and eighteenth centuries. At that time, the practice of grave-robbing had become more common as corpses had acquired commercial value for use in anatomy, medical and surgical training.

Fast-forward one century to the present, and the potential commercial interests in the human body and biological materials have multiplied, primarily because of advances in medical and genetic science. Biological materials are used in human tissue collections and genetic databases to assist in medical research, and as blood, tissue and organs for transfusion or transplantation.

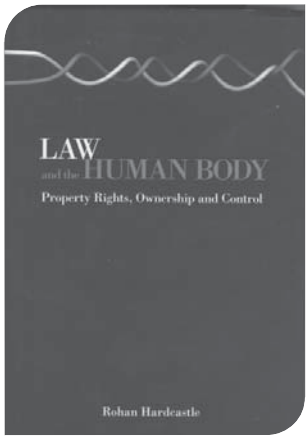
In Part I of this book, Rohan Hardcastle analyses the evolution of English, Australian, United States and Canadian law in relation to human tissue separated from living persons and dead persons. The common law of England established that there is 'no property' in human corpses. This left ecclesiastical courts with exclusive jurisdiction in matters relating to human corpses, including disposal by burial. The common law also came to protect certain 'non-proprietary' interests in biological materials removed form dead bodies. For example, Australian, English and US common law all recognise the right of possession and associated duty of the executor or next-of-kin to bury a corpse.

Exceptions to the 'no property' principle were developed where biological materials separated from dead bodies are subjected to 'work or skill'. In Australia, for example, the High Court found, in *Doodeward v Spence* (1908) 6 CLR 406, that property could exist in collections of anatomical and pathological specimens. In practice, the law recognises at least possessory interests in preserved samples of tissue held, for example, in hospitals and clinical laboratories, and laboratory samples that have been commercially developed, such as cell lines.

Statute law has stepped in to regulate many aspects of interests in biological materials. In Australia, the Human Tissue Acts were enacted, from 1979 to 1985, in all states and territories. These Acts deal with the donation of blood, tissue and organs for transfusion, transplantation, and other therapeutic purposes; the removal of tissue after death; and the regulation of commerce in human tissue. Importantly, the legislation requires that individuals or their next-of-kin must consent before biological materials may be taken and used in research, transplantation or other medical treatment.

Hardcastle's analysis of the current law demonstrates that, while property rights and non-proprietary interests in separated human tissue are recognised in limited circumstances, no principled basis has been accepted at common law or in legislation for the recognition of these rights and interests.

His solution, discussed in Part II, is to develop a rational foundation for the creation and allocation of property rights to separated biological materials based primarily on the 'detachment principle'—where the physical separation of biological materials from the body creates property. Property rights in biological materials separated from a living



Law and the Human Body: Property Rights, Ownership and Control

By Rohan Hardcastle, Hart Publishing, 2007

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person would be allocated to those from whom those materials are removed; and where the person is dead, to the deceased's next-of-kin. Subject to other applicable law, this property may be sold.

Hardcastle concedes that 'a tide of legislative policy is running against individuals selling biological materials'. In Australia, for example, the Human Tissue Acts make it illegal for individuals to sell blood or organs; and businesses supplying some forms of human tissue, notably blood and blood products, are subject to a licensing regime. Hardcastle maintains, nevertheless, that such policy considerations are secondary issues concerning the content of property rights. The law, in his view, should initially determine who has the legal right to own and control separated biological materials.

While this conclusion may be intellectually rigorous, the practical impact of such an approach deserves further scrutiny. As Hardcastle concedes, there are significant policy barriers to the recognition of property rights in separated biological material, especially those based on concerns about the 'commoditisation' of the human body. The ALRC, in the context of human genetic samples, has identified some of the problems with applying property principles to human tissue. These included the following:

- Allowing people to exercise the rights to income and capital of human tissue might be regarded as allowing the human body to be commoditised. This may alter community attitudes towards bodies and their parts, and as a result alter how communities perceive and treat living humans.
- Allowing people to exercise property rights might alter the current situation in which individuals freely donate their tissue. Altruistic participation could be eroded.
- Sale of tissue samples would burden research by increasing costs, which would in turn be passed on to consumers.
- The recognition of property rights would also undermine the current system of ethical approval for research, where consent to use can be waived in some situations by a Human Research Ethics Committee. It is questionable whether it would be lawful to waive consent where a person holds property rights over tissue.
- Property rights are difficult to apply to genetic material, which can be copied and reproduced.

Property rights are an important prism through which to view the development of the law relating to human tissue, and Rohan Hardcastle's book is a valuable guide in this respect. In practice, however, the starting point for dealing with future issues concerning the control of human tissue is not likely to be the application of overarching property theory. Rather, legislation will continue to deal with issues as they emerge—and not necessarily in a comprehensive or systemic way. In Australia, the Human Tissues Acts, and other legislation that deals with the handling of human tissue, are likely to be to the focus of reform efforts; and consent, rather than property rights, the central touchstone of regulation.

△ Bruce Alston, ALRC

Recapturing Freedom

Dot Goulding provides a narrative-driven insight into the physical and mental world of long-term prisoners. By charting a small group of prisoners' thoughts, hopes and fears immediately preceding, and a short time following their release from prison, this book questions why, rather than recapturing freedom, this population so often is re-imprisoned and thereby recaptured by the system. It is a compelling and provoking read.

When Goulding initially embarked on this project, she aimed to identify the difficulties and obstacles that long-term prisoners faced when transitioning from prison life to life on the outside. To this end, she interviewed 10 long-term prisoners a short time prior to their release, and scheduled a further interview for a short time after their return to society. However, as her research progressed, she was increasingly struck by the extent to which incarceration sentenced persons to being enculturated within a distinct social subculture of 'brutality, isolation and deprivation'. The results of such mental imprisonment were brought into sharp relief by the reimprisonment of nine of the 10 prison participants by the time of the scheduled post-prison interviews. Accordingly, what began as a hope of finding practical solutions to the problems experienced by long-term prisoners on release into the community transformed into the far more daunting question of 'what do we do to people' —or, alternatively, 'what do we as the community allow the state to do to people in our name?'.

Recapturing Freedom is structured in three main parts. The first chapter provides background information on Western Australian penal history and trends, as well as theoretical underpinnings of crime and punishment more generally. Chapters two to five draw heavily on the prisoners' narratives to consider: the physical and social environment of prisons and its impact on prisoners; surveillance and control in the prison environment; violence and brutalisation; and the participants' experience of 'freedom'. Finally, the author proposes a number of avenues for change, including the introduction of a restorative and transformative element to the prison system.

The principal emphasis of this book is the voice of the prisoners themselves. Through frequently heartwrenching stories, set out verbatim in italics throughout the book, a clear picture is given of prison life and the process of becoming 'a prisoner'. These narratives are given additional depth and meaning through Goulding's interlinking discussions of relevant sociological and criminological research. Goulding's background as a prison advocate and activist, as well as the ex-partner of a long-term prisoner, gave her a strong basis on which to forge emotional links with the participants. This connection comes through clearly in the prisoners' stories. In this way, Goulding gives expression and dignity to the typically silent voice of the prisoner, linking the participants to the reader on a personal, as well as merely a theoretical, level.

Nowhere is this image more striking than in the chapter dealing with brutality and violence in the prison system, an issue independently initiated by each of the male prison participants. The prisoner consultant, for example, commenting on an incident where one prisoner cut another prisoner's throat, remarked:

> He almost had his head cut off—it was held together by one single verterbra. I'll give you my personal reaction first. My first reaction was it's about time it happened. The guy who was killed was a child molester ... the word was that one of his victims was that bloke's (the perpetrator's) son. So my reaction was 'about time' ... the reaction that was most common was that it was about time he got it. There might have been a few (prisoners) who weren't child molesters who felt stressed enough to need medication, but not many and nearly the entire prison population saw it.

Other prisoners further describe the prevalence of violence in prison, including its role in the distinct prison hierarchy.

At the time of writing, only one of the participants had remained consistently out of prison. Goulding identifies a number of factors that are relevant to this seeming inability among the long-term prison population to 'recapture freedom', including logistical difficulties such as combining the demands of a job with meeting parole conditions; and a lack of support networks outside the prisoner and ex-prisoner community. However, the challenge of reintegrating into society is best expressed perhaps by the prisoners themselves.

Recapturing Freedom

By Dot Goulding,
Federation Press, 2007

$49.95

The participant identified as 'Linda' states:

> The system sucks. It turns you into this robotic being who can't think for themselves. Who just exists every day by being told when to eat, when to sleep, when to be punished and then lets you out into a world where you no longer fit.

As Goulding extrapolates, the prison system, as it presently operates, 'deliberately and systemically strips individuals of their social identity in order to institutionalise them into manageable prisoners and ... just as systematically, ignores the need to re-skill and re-communalise those same individuals as they prepare to re-enter the community'.

Goulding makes a number of recommendations for reform of the prison system. Some of these reforms are capable of working within the broad structure of the penal system. These include, for example, additional post-release prisoner support, such as reasonable and affordable housing; sufficient money upon release for necessities such as rent and food; adequate clothing; and drop-in centres for further assistance. More radically, Goulding proposes a rethinking of the principles upon which the penal system is modelled. In particular, she recommends including principles of restorative justice, which involves factors such as active victim participation and requiring offenders to take responsibility for the harm that they have done, and transformative justice, which is modelled on a process of mutually-agreed plans, involving the participation of offenders together with their support networks.

In summary, *Recapturing Freedom* highlights the interconnectivities between prisoners and those of us who constitute the 'community'. As Goulding notes, the vast majority of our prisoners have come from local communities, and, at some point in time, will return to them. It is in all of our interests that the men and women who so return have the best chance possible at re-integration. For that to occur, there must be a greater understanding of the prison world, and of the barriers that this experience creates for those seeking to rejoin society. This book provides a valuable contribution for such understanding.

△ Lisa Eckstein, ALRC

Penal Populism, Sentencing Councils and Sentencing Policy

In recent years, sentencing policies and practices in a number of Western countries have come under intense public scrutiny. There is a general perception that sentences are too lenient, that the sentencing process privileges the offender over the victim, and that judges are 'out of touch' with views of the general public.

Penal Populism, Sentencing Councils and Sentencing Policy examines the relationship between public opinion, politics and the development of sentencing policy. It is the product of a conference held in Australia in 2006 and consists of a collection of essays written by academics, judges, and other experts in criminal law and penology. While not formally divided into parts, the chapters are arranged in such as way so as to separate the book into two distinct sections.

The first five chapters of the book examine the relationship between public opinion and sentencing policy and practice. The authors of these chapters raise and attempt to answer a number of interesting questions. How did public opinion on sentencing, a previously insignificant political consideration, become a driving force in the development of sentencing policy? How is public opinion on sentencing matters actually taken into account by judges and politicians? And is the public really as punitive as the media would lead us to believe?

There is a general consensus among contributors to this book that public opinion on sentencing is often misrepresented by the media and misinterpreted by politicians. Research has consistently shown that, in the abstract, members of the public believe that sentences are too lenient. However, when provided with more information about crime and the criminal justice system, their views become less punitive. In fact, when provided with detailed information about a specific case, members of the public tend to be both constructive and rational in their approach to sentencing.

Contributors note that one response to the perceived crisis of confidence in sentencing has been the establishment of sentencing advisory bodies. Sentencing advisory bodies are bodies that sit somewhere between legislatures and the courts. They have a number of roles, one of which is to act as a 'policy buffer'—that is, to counter the forces of penal populism by allowing sentencing policy to be considered in a calm and rational environment.

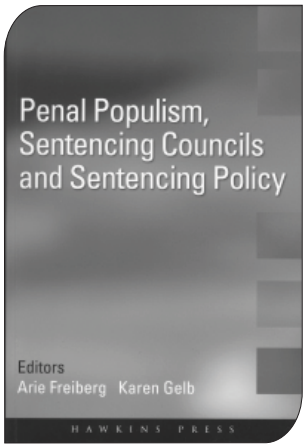
Chapters in the second section of the book examine the development of sentencing advisory bodies in a number of jurisdictions, such as the United States, the United Kingdom and Australia. They describe the functions and powers of a number of specific sentencing advisory bodies, such as the Minnesota Sentencing Guidelines Commission, the New South Wales Sentencing Council and the Victorian Sentencing Advisory Council.

The focus of the second section of the book is on the ability of sentencing advisory bodies to contribute to rational policy development and to engage with the public on sentencing issues. Contributors to this part of the book examine the ways in which sentencing advisory bodies incorporate community views in the development of sentencing policy; gauge community views on sentencing; and attempt to educate and inform the public on sentencing laws and practices.

All of the chapters in this book are concise, well-structured and well-written. While the chapters are scholarly, they are written in a clear and accessible style. In addition, they are replete with contemporary and interesting examples of the influence of public opinion on sentencing in a number of different jurisdictions. A number of chapters provide the reader with 'behind-the-scenes' accounts of the workings of sentencing advisory bodies, and the authors of some chapters are candid about factors that have undermined or diminished the success of sentencing advisory bodies.

The role of public opinion in sentencing is an important and complex issue. *Penal Populism, Sentencing Councils and Sentencing Policy* is a timely and valuable contribution to the discussion of the influence of public opinion on courts and legislatures, and the role of sentencing advisory bodies in assessing, reflecting and informing public opinion on sentencing issues.

△ Althea Gibson, ALRC



Penal Populism, Sentencing Councils and Sentencing Policy

By Arie Freiberg and Karen Gelb, Federation Press, 2008

$59.95

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Reform roundup

Articles in Reform Roundup are contributed by the law reform agencies concerned.

Administrative Review Council

Report on Government Agency Coercive Information Gathering Powers

This latest Administrative Review Council report, (ARC 48), focuses on the coercive information-gathering powers of six agencies: the Australian Competition and Consumer Commission; the Australian Prudential Regulation Authority; the Australian Securities and Investments Commission; the Australian Taxation Office; Medicare Australia; and Centrelink.

The report identifies 20 best practice principles covering a range of important practical issues including who should exercise the powers, the conduct of hearings and the content of notices.

These principles seek to strike a balance between agencies' objectives in using coercive information-gathering powers and the rights of individuals in relation to whom the powers are exercisable. The principles will provide valuable guidance to all government agencies in their use of these important powers.

Report on Administrative Decisions in areas of Complex and Specific Business Regulation

This project considers adaptations to merits review processes and other accountability mechanisms that are appropriate to complex business regulation. It examines the adoption of public sector mechanisms such as the ombudsman model, and the efficacy of private sector adaptations such as peer review and stakeholder consultation practices. The report concludes with a framework of guideline principles, consistent with administrative law values, which the Council believes will promote efficient, effective and accountable business regulation. The Council is proposing to seek ck on a draft of the report later this year. It is

Contents

Entries to Reform roundup are welcome.

Please contact
the Editor at:
reform@alrc.gov.au

anticipated that the final report of the project will be presented to the Attorney-General in September 2008

Updating reports on the ARC website

The ARC Secretariat has recently reformatted a number of older ARC reports to make them available for download from the Council's website. These reports cover a wide range of topics including: government business enterprises; rule making by Commonwealth agencies; environmental decisions and the AAT; and merits review tribunals. The reports will be placed on the Council's website shortly.

Best Practice Guides

In late 2007 the Council launched a series of best practice publications for administrative decision makers. The subject matter of each publication in the series reflects a key stage in the decision making process. The guides are generic and have been designed as a general training resource and reference for Commonwealth agencies, which can be supplemented with agency-specific material regarding policies, practices and legislative frameworks. Since the release of the guides, a number of government agencies have worked with the Council to finalise annotated versions of the guides specific to their requirements.

Copies of Council publications can be obtained by contacting the Council Secretariat on (02) 6250 5800 or e-mail .The Council's latest reports are also available on the Council's website atwww.ag.gov.au/arc.

Alberta Law Reform Commission

History

In 1967, representatives of the Province of Alberta, the University of Alberta and the Law Society of Alberta signed the first agreement to establish the Alberta Law Reform Institute [ALRI], formerly known as the Institute of Law Research and Reform. The Institute commenced operations and held its first board meeting in January 1968. Forty years on, ALRI is Canada's senior law reform agency.

Since its inception, ALRI has maintained the institute model for law reform rather than a commission structure. Under the institute model, the core work of research, policy analysis, and project management is carried out by full-time legal counsel who report to a governing board of lawyers and judges. The board brings diverse perspectives and expertise to the law reform process. Over the past 40 years, 127 individuals (58 legal counsel and 69 board members) have contributed to the success of 127 projects – a curious but scholarly balance.

Legal Change (a.k.a. the "I" word)

The goal of law reform work is to bring about legal change, most often through implementation by legislation. For the most part, ALRI selects its own projects. Government concerns and priorities are taken into account in the project selection process and ALRI takes on some government-initiated projects. The ALRI approach to projects has lead to a comparatively high implementation rate that consistently exceeds 60%.

The past four decades have also seen an increasing use of law reform materials by Alberta courts. Currently, ALRI's work is cited in over 20 cases per year. The fact that a statute is before the court for interpretation suggests the possibility of a defect in either the recommendations or their implementation. In other words, judicial citation does not necessarily represent the endorsement of law reform work. However, the use of ALRI reports for interpretation purposes is overwhelmingly positive. In addition, a number of cases champion ALRI recommendations that have yet to be implemented.

Celebrations

ALRI marked its anniversary with a public lecture presented in the ceremonial courtroom of the Court of Queen's Bench in Edmonton. Chief Justice Alan Wachowich welcomed members of the bar, bench and the public. ALRI's Director, Peter Lown QC, introduced the distinguished guest speaker, the Hon Justice Michael Kirby. Justice Kirby delivered a thought-provoking paper title "Law Reform– Past, Present, Future". The paper paid tribute to Dean Wilbur Bowker, ALRI's founding Director, whose reputation for scholarship grounded ALRI's first decade. Justice Kirby also recognised, Bill Hurlburt QC, Director Emeritus, both for his work within Alberta and for his enduring contribution to the international community of law reform.

Justice Kirby noted the research challenges faced by modern law reform agencies.

Evidence-based research is now essential and has surpassed former reliance on case law and legislative histories. Consultation that is limited to the legal profession will usually be inadequate. Law reformers must now be able to master topics in the spheres of science and technology which once lay well beyond the scope of legal research. In light of these and many other challenges, Justice Kirby questioned whether institutional law reform continues to be worth the cost and if it can deliver the goods.

ALRI also hosted a forum for policy lawyers from both government and Canadian law reform agencies. The forum was an opportunity to reflect on the career path from law school graduate to policy advisor and the skills that need to be picked up along the way.

Recognising that all work and no play would make a for a dull celebration, anniversary events were capped off by a black tie dinner. The dinner was held both to recognise ALRI's achievements over the past 40 years and to recognise the contributions of the individuals who made those achievements possible.

British Columbia Law Institute

The British Columbia Law Institute (BCLI) has been very active in its project work. The following is a selection of some of its current projects.

Society Act Reform Project

The *Society Act* provides for the incorporation, organisation, governance, financial affairs, amalgamation, and dissolution of societies in British Columbia. A society within the Act is an incorporated body that is created to pursue public, not-for-profit purposes.

The current *Society Act* was largely based on the 1973 *Company Act*, the organizational statute for for-profit companies. In 2004, the *Company Act* was repealed and replaced with the more streamlined *Business Corporations Act*. However, the *Society Act* has seen little change since its enactment in 1977. The three primary reasons a new *Society Act* is needed are:

- the not-for-profit sector has grown increasingly prominent and sophisticated, rendering inadequate the 30-year-old legal framework;
- some onerous provisions continue to apply to societies that no longer apply to for-profit companies for which they were originally designed; and,
- reform initiatives are underway or completed in other jurisdictions, giving British Columbia an opportunity to enact both modern and harmonised legislation.

The project is being carried out by a volunteer committee comprised of lawyers, consultants, and society executives prominent in the not-for-profit sector. The consultation phase for the project opened in September 2007, with the publication of the *Consultation Paper on Proposals for a New Society Act*. The consultation phase closed in February 2008. The BCLI was pleased with the level of response to the consultation paper. The comments received from the legal community, the not-for-profit sector, and the general public will assist in the final, drafting phase of the project. The BCLI aims to complete this phase by publishing a final report containing a draft of a new *Society Act* and commentary in July 2008.

Probate Rules Reform Project

The Probate Rules reform project is a sequel to the Succession Law reform project, and aims to reform the rules of court governing contentious and non-contentious probate procedures.

The three specific objectives are to:

- harmonise the probate rules with proposed reforms to estate administration legislation emerging from the Succession Law reform project;
- revise the probate rules to better reflect the reality of computerisation of the British Columbia Supreme Court's civil registry and eliminate obsolete procedures; and,
- ensure that the reformed rules are compatible with the general reform of the British Columbia *Supreme Court Rules* currently underway.

The project committee is continuing to examine procedure in uncontested applications for probate and administration of estates. A consultation period of three to four months is planned. The BCLI's final report will include draft probate rules and commentaries to be submitted to the Attorney–General and

published in our usual manner.

Predatory Lending Research Project

Predatory lending is a practice whereby a lender deceptively persuades a borrower to agree to abusive loan terms. A lender may be expected to require less favourable loan terms in exchange for dealing with a comparatively more risky borrower *(i.e.*, an individual with a poor or non-existent credit history or low income). If the surrounding circumstances include a vulnerable borrower easily taken advantage of due to their financial circumstances, the situation may be characterised as predatory. Although anyone could be a victim of predatory lending, older adults are often sought out as they frequently fit the profile of having scant credit history, low income and financial need.

While predatory lending is a well-known phenomenon in the United States, it has received much less attention in Canada. The development of the Canadian subprime mortgage market has been relatively cautious. Seniors may nevertheless find themselves victims of predatory lending without legal recourse or remedy.

The extent to which predatory lending occurs in Canada is still largely unknown. Research in this area is necessary before the need for law reform can be properly assessed. The Canadian Centre for Elder Law (a division of BCLI) has published a study paper that explores the underlying assumptions that the structure established by both the Canadian mortgage market and Canadian legislation are such that there is little cause for concern. The aim of the paper is to provide a point of departure for further discussion, analysis, and investigation.

The study paper is available online, at: <http://www.ccels.ca>.

Family caregiving

The BCLI is reviewing the current legal framework governing family caregiving employment leave and other entitlements available to employees and other working people who are engaged in providing care for family members. The project examines employment standards, employment insurance, tax, human rights and other relevant legislation and case law, as well as the practices of a cross-section of employers and a comprehensive literature survey.

Consultations with major stakeholders will take place; as this is a legal research project rather than a law reform project, consultation is largely for the purpose of fact-finding. The project will culminate in a study paper examining the issues with recommendations for future study and reform.

This two-year initiative will be completed in September 2009.

The Vanguard Project

A coalition of not-for-profit organisations is reviewing capability in the broad inter-jurisdictional and cross-disciplinary context of law and policy. The group is identifying and critiquing legislation governing capability and extracting best practices from existing policy and protocols currently guiding capacity assessment.

The collaborative project will also develop an interdisciplinary provincial protocol, draft comparative legal summaries and make recommendations for law reform and increased access to justice. The goal is to clarify the law and harmonise practice in this area.

The BCLI will write the project's final report and the two-year project will be completed in December 2008.

Elder Law Clinic

The BCLI is assisting in the creation of an Elder Law Clinic to serve seniors in British Columbia. The objective of the clinic is to provide access to justice for older adults in British Columbia who cannot otherwise obtain legal services. The clinic will be the second legal clinic in Canada with a mandate to specifically serve older adults, and is scheduled to open in the summer 2008.

Real Property Review

British Columbia is moving closer towards a fully electronic system of land registration and conveyancing. It is therefore appropriate to review and modernize the substantive legal principles on which that system depends. To this end, the BCLI has embarked on a project pertaining to reform of the law of real property and completed an assessment of the feasibility and scope of the project. Phase 1 of the project identified the following areas, not currently under review by another body, where reform may be needed:

- the effect of section 29 of the *Land Title Act* and notice of an unregistered interest;
- section 35 of the *Property Law Act* and judicial extinguishment of incorporeal interests;
- severance of joint tenancy and other issues of co-ownership, including the four unities rule, and the *Partition of Property Act*;
- restrictive covenants; and,
- the doctrine of implied grant.

Phase 2 will involve research in these areas and generation of consultative documents and a final report.

British Columbia Privacy Act

The BCLI completed this project in early 2008. The *Privacy Act* of British Columbia makes the violation of privacy a tort. The project is directed at updating and revising this statute in light of the many technological changes and evolution of social attitudes since it was passed in 1968. These changes include the promulgation of the Uniform Privacy Act as well as various federal and provincial enactments regulating particular aspects of privacy. A specific objective was to bring stalking within the scope of the Act.

A consultation paper was issued in July 2007. A consultation period followed, and a final report was submitted to the Attorney General in February 2008.

Defective contracts relief

The BCLI is examining issues connected with the implementation of the *Uniform Illegal Contracts Act* in British Columbia. The *Uniform Illegal Contracts Act* deals with the alleviation of hardship resulting from the rigidity of the common law rule that a contract affected by illegality gives rise to neither rights nor liabilities. The *Uniform Illegal Contracts Act* would empower superior courts to mitigate harsh and unjust results sometimes produced by the common law rules on illegality in contract.

The BCLI's report will be completed in the fall 2008.

Public Legal Education and Information Portal

The BCLI began activities in late 2007 to prepare for the advent of a Public Legal Education and Information Portal for British Columbians on the world wide web.

There are currently two projects related to the activities, one being "content development" and the second "technical support." Content development goals include commencing cataloguing and summarizing the BCLI publications for ease of use by the public. Technical support goals include the redesign of the BCLI's web site to make it more modern and user-friendly.

Both projects are to be completed by October 2008.

Canadian Journal of Elder Law

The BCLI will publish the Canadian Journal of Elder Law, the first Canadian periodical considering the issues of older adults and the law. The journal is a peer-reviewed publication supported by an editorial committee with international membership. The first issue, to be published this year, will feature leading papers presented at past Canadian Elder Law Conferences as well as contributions from national and international scholars.

Commercial Tenancy Act reform project

Commercial leasing and tenancy in British Columbia is subject to some of the most outdated legislation in the province. The *Commercial Tenancy Act* remains largely unchanged since its first enactment in 1897, which was comprised of a consolidation of British legislation from the 17th and 18th centuries.

The BCLI is examining the creation of a new and relevant legal framework for commercial leasing and tenancy in British Columbia. To this end, the BCLI is engaged in the study of topical reforms and will present tentative recommendations to the public for comment. A final report, including a draft of a new *Commercial Tenancy Act*, will be complete in June 2009.

Unincorporated Nonprofit Associations

The unincorporated nonprofit association is the default structural model of nonprofit activity. When individuals form a group to carry out one or more nonprofit purposes and do not incorporate or create a charitable trust, they form an unincorporated nonprofit association. Currently, the legal framework is fragmented and inconsistent across the country and throughout North America.

The BCLI is part of the Joint Project to

Create a Harmonized Legal Framework for Unincorporated Nonprofit Associations in North America, which is comprised of: the Uniform Law Conference of Canada; the Uniform Law Commission (formerly the National Conference of Commissioners on Uniform State Laws); and, the Mexican Center of Uniform Law.

The primary aim of the Joint Project is to provide unincorporated nonprofit associations with a modern legal framework to harmonize rules found in North America's two legal traditions and three national jurisdictions. To date, each of the national teams has drafted legislation based on a set of harmonized principles that were developed earlier in the project.

Board and Staff Changes

The BCLI welcomes new Chair Ron Skolrood, and thanks outgoing Director and past Chair Ann McLean for her invaluable contributions over a ten-year period.

The BCLI is pleased to welcome new distinguished Directors:

Geoff Plant, Q.C., Prof. Joost Blom, Q.C., and R. C. (Tino) Di Bella.

The BCLI is also pleased to welcome Carolyn Laws as a staff lawyer.

More information on the BCLI and all of its projects and activities is available online, at: <http://www.bcli.org>.

Law Reform Commission of Hong Kong

Publications

In January 2008 the LRC published a consultation paper on ***Criteria for Service as Jurors***. The paper proposed reducing somewhat the categories of persons exempt from jury service and defining more clearly some of the criteria for eligibility for jury service set out in the Jury Ordinance, including the definitions of "resident" and "good character".

In March 2008 we published a final report on ***Enduring Powers of Attorney*** which recommended the relaxation of the execution requirements for an EPA by removing the need for a medical witness.

Current Projects include:

- Hearsay in criminal proceedings
- Criteria for service as jurors
- Double jeopardy
- Sexual offences (including consideration of a sexual offenders register)
- Causing or allowing the death of a child
- Class actions
- Charities (specifically, the regulatory

Law Commission for England and Wales

> One of the hallmarks of an advanced society is that its laws should not only be just but also that they should be kept up-to-date and be readily accessible to all who are affected by them.
>
> English Law should be capable of being recast in a form which is accessible, intelligible and in accordance with modern needs

These statements are as true today as when they were made at the time the Law Commission for England and Wales was created in 1965, perhaps even more so.

Our principal objective is to seek to achieve a body of law that is accessible to those who are affected by it. The task that faced our predecessors in 1965 was daunting, but the inexorable increase in the pace of legislation, and the increasing readiness of Government to seek legislative solutions to problems, has made the need for ongoing law reform so much greater.

We have recently begun our 10th Programme of Law Reform. In selecting the projects we wanted to include in the programme, we gave attention to those areas of the law most in need of reform and where reform would deliver real public benefit.

The list of projects on which we are now engaged includes:

- reforming the criminal law—topics such as bribery, conspiracy and attempt, corporate criminal liability, expert evidence, and other areas where the present criminal law might be simplified;
- property, trust and family law – topics such as easements, rights of third parties against trustees, intestacy rights, and marital property agreements;
- commercial law and common law—topics

such as rights of redress against unfair commercial practices, consumer remedies for faulty goods, insurance contract law, and illegal transactions;

- public law—topics such as adult social care, remedies against public bodies, and legal obligations relating to level crossings on the railways;
- statute law—keeping the statute book up-to-date and repealing obsolete provisions that serve only to complicate the application of the law both for practitioners and for the citizen.

Over the last year, we have completed projects on participating in crime; cohabitation rights; resolving housing disputes; and statute law repeals. In each case, we have recommended reform, or repeal, and our recommendations are awaiting a response from the Government. At the time of writing, our proposed Statute Law (Repeals) Bill has completed its 3rd Reading stage in the Upper House (House of Lords). It will then go to the Lower House (House of Commons), and we are expecting Royal Assent to be given in June/July 2008. This will be the latest in a series of 18 Statute Law (Repeals) Acts that the Law Commission has promoted.

Also during the last year, we have begun, and in several cases completed, public consultations on subjects relating to criminal conspiracy and attempts; bribery; insurance contract law; easements; the High Court's jurisdiction over criminal proceedings; and ensuring the responsible letting of property. We are continuing to work on these projects, with a view to formulating recommendations that we will in due course lay before Parliament.

During 2007–08, we have met with most Government departments, and we have been reassured that there is a continuing need for the work that we do. Unsurprisingly, this is particularly acute for those departments for whom we are actively working, who find the work we do useful and relevant to their plans for the future.

During 2008–09, we hope to publish recommendations on criminal conspiracy and attempts; bribery; intoxication; illegal transactions; ensuring the responsible letting of property; and capital and income in trusts. We also hope to begin new public consultations on remedies against public bodies; the admissibility of expert evidence in criminal proceedings; and consumer remedies against faulty goods.

Recent changes in the law resulting from Law Commission recommendations include:

Mental Capacity Act 2005, which came into force in April 2007, and implements the recommendations contained in our 1995 report.

Corporate Manslaughter and Corporate Homicide Act 2007, which includes the recommendations made in our 1996 report.

Serious Crime Act 2007, which includes the recommendations on inchoate liability for assisting and encouraging crime contained in our 2006 report.

On 28 March 2008, the Government announced that it accepted the recommendations we published in 2006 on the post-legislative scrutiny of new legislation.

The implementation rate for our recommendations, standing at 70%, is quite high. However, we currently still have 14 of our previous reports that the Government has accepted but not yet implemented. There have recently been two welcome announcements. First, on 25 March 2008, the Lord Chancellor announced in Parliament that he intended to introduce a statutory duty on the Lord Chancellor to report annually to Parliament on the Government's view on all of the Law Commission's outstanding recommendations which have not yet been implemented, and also a statutory basis for the protocol which governs the Commission's relations with Government departments. Secondly, on 3 April 2008, the United Kingdom Parliament approved a new procedure for uncontroversial Law Commission Bills, under which a significant part of the legislative process in the House of Lords would be taken in Committee off the floor of the House. We intend to work closely with Government to develop these new arrangements, so as to accelerate the pace at which our recommendations may be considered and, where accepted, brought into force with much less delay than in the past.

The Law Commission currently has an extensive stakeholder database of those to whom we look for informed comment on our provisional proposals, based on many years of building up invaluable contacts in the legal, academic and judicial worlds. We cultivate good ongoing relations with the media and

press, so as to reach the wider community of the public and all the people who are affected by, and whom we believe will benefit from, our proposals. In the coming year, we intend to expand into even wider stakeholder fields, using online technologies to assist in this process.

As we look forward, we feel that we are entering a more encouraging environment for successful law reform than we have known for many years.

New South Wales Law Reform Commission

Reports completed

Six reports have been released in the last 12 months.

Disputes in Company Title Home Units (Report 115)

Under its Community Law Reform Program, the Commission undertook a review of the current law regulating disputes in company title home units. The review commenced in May 2006, and the Report was completed in April 2007. It was tabled in the Legislative Council in October 2007.

Prior to 1961, when strata title legislation was introduced in New South Wales, company title was the common method used for horizontal subdivision of space. It involved a form of community ownership. A person became entitled to live in a residential home unit by purchasing shares in an incorporated body (either a company or association). Company title units were often governed by restrictive constitutions, and disputes between owners could result in the Equity Division of the Supreme Court being required to adjudicate.

The Commission's Report 115 recommended that the Consumer, Trade and Tenancy Tribunal should be given jurisdiction to hear disputes arising in company title home unit buildings in relation to most types of disputes.

Uniform Succession Laws: Intestacy (Report 116)

Report 116 on intestacy was released by the Attorney General in July 2007. The Report was produced as part of the development of uniform national succession laws. All states (except South Australia) and territories participated in this review. This Report, written by the NSW Law Reform Commission on behalf of the National Committee, recommends a new, easier-to follow, set of provisions that:

- Give the whole estate of a deceased person to the surviving spouse or partner in cases where there are no children from another relationship. This accords with current practice in wills, and the general expectation that the surviving spouse or partner will leave the estate to the surviving children when he or she dies.
- Allow property to be divided between surviving spouses or partners and surviving descendants where some of the children of the deceased are offspring of another relationship.
- Broaden the rights of the surviving spouse or partner (where there are also surviving descendants of the deceased who are entitled) to elect to obtain particular items of property in the deceased estate. The current law in NSW only allows the spouse or partner to elect to obtain the matrimonial home.
- Extend the categories of relatives entitled to take on intestacy to first cousins of the deceased. In NSW, the categories of relatives entitled to take are limited to the deceased's aunts and uncles (but not their children). This brings NSW broadly into line with other States and with societal expectations that cousins should be entitled to take from an intestate estate in preference to the government.
- Allow a special regime for the distribution of estates of Indigenous people, where members of the deceased's family request it.

The final stage of the Uniform Succession Laws project, which deals with administration of estates, is being done by the Queensland Law Reform Commission. It will be completed during 2008.

Role of Juries in Sentencing (Report 118)

In February 2005, the Commission was asked by the Attorney General to investigate whether current sentencing procedures would be improved by involving juries in sentencing decisions. The Commission was asked to investigate the merits of allowing the presiding judge in a criminal trial to canvass the views of the jury when sentencing an offender. In addition, the Commission was asked to take into account whether allowing jury input in sentencing would enhance the public

confidence in the administration of justice. The suggestion for this inquiry was made by the Chief Justice of New South Wales, the Honourable James Spigelman AC.

The Commission's Report, which was tabled in Parliament in October 2007, recommended that there should be no changes to the current practice in New South Wales, and that jurors should not be involved in the sentencing process. It also recommended that further empirical studies should be done on public perceptions of the sentencing process.

The Attorney General has announced that the Government accepts the Commission's recommendations.

Young Offenders (Report 104)

Report 104, dealing with the sentencing of young offenders, was tabled in Parliament on 14 November 2007. The Report was completed in December 2005. At the time of release, the Government also published a statement outlining a detailed response to each of the Report's recommendations.

The main focus of the Report was the *Young Offenders Act 1997* (NSW) (YOA) and the *Children (Criminal Proceedings) Act 1987* (NSW). In New South Wales, young people between the ages of 10 and 17 years are sentenced under a separate system to adults. The Report examines the philosophy, practice and procedure of the juvenile justice system.

The Report strongly endorsed the objectives and approach of the YOA, which establishes a scheme for diverting young offenders from formal court processes through the use of warnings, cautions and conferencing. It recommends extending the scope of the YOA to make youth justice conferencing available in all but the most serious of offences. The Report also recommends:

- young offenders who commit serious offences should be sentenced in the usual way, but a sentencing judge should have a discretion to make an order that an offender be re-sentenced at a specified time in the future before the end of the non-parole period;
- the Children's Court should be renamed the Youth Court, with a District Court judge as its head (instead of a magistrate);
- separate criteria relating to the granting of bail should apply to young people.

While accepting a number of the detailed recommendations in Report 104, the Government has indicated that it does not support changing the name of the Children's Court, or the provisions relating to bail affecting young people.

Relationships (Report 113)

In 1984, NSW enacted legislation to deal with aspects of the breakdown of de facto relationships. The legislation was based on recommendations put forward by the Commission in a Report in 1983. This legislation, now called the *Property (Relationships) Act 1984* (PRA), was amended in 1999 to include same sex relationships and other close personal relationships. The legislation uses the phrase "domestic relationships" to incorporate the various relationships covered by it.

The Attorney General referred this review to the Commission in 1999, and its principal aim was to consider the adequacy of provisions dealing with financial adjustment orders that courts can make between persons in domestic relationships.

The nature of the review changed significantly when the decision was taken by NSW (as well as some other States) to refer its constitutional powers over de facto relationships to the Commonwealth in 2003. However, the Commonwealth then indicated that, if it legislated, it would only do so with respect to opposite sex de facto relationships. The Commission suspended work for a number of years, awaiting clarification on the scope of any proposed Commonwealth legislation. When it became apparent that legislation may take some considerable time to develop, the Commission decided to proceed to prepare a Report, but essentially limited to same sex de facto relationships and close personal relationships.

The major recommendations in the Report were as follows:

Financial adjustment orders. The PRA should follow more closely the approach in the *Family Law Act 1975* (Cth) and allow the court to consider both past contributions as well as the current and future needs of the parties.

- Definition of de facto relationship. Cohabitation should not be a prerequisite to establish the existence of a de facto relationship. However, generally a

relationship should exist for two years before property adjustment proceedings can be brought.

- Registration. There should be a system for de facto couples to register their relationships. This would not be the same as the "civil union" approach favoured by the ACT and adopted in NZ and the UK.
- Children and same sex relationships. For the purposes of the PRA, a 'child of a domestic relationship' should not be defined in the biological sense, but as 'children for whose day-to-day care and long-term welfare both parties exercise responsibility'.
- Financial agreements. Parties should be able to make their own financial agreements before, during and on termination of a relationship.

The NSW Government has announced that it will implement a number of the Commission's recommendations, including that a lesbian co-mother of an artificially-conceived child should be the parent of a child. Further implementation is likely to be considered in consultation with the other States and Territories and the Commonwealth.

Jury Selection (Report 117)

In this project, received in August 2006, the Commission had to review aspects of the *Jury Act 1977* (NSW), focusing in particular on the qualifications for jury service in NSW and the options for excusing a person from jury service.

The Commission published an Issues Paper in November 2006. The Report was completed in late 2007 and was released by the Attorney General on 8 January 2008. The Report contained 74 recommendations directed at significantly expanding the categories of persons eligible for jury service. The main recommendations are set out below.

Lawyers should generally be eligible for jury service unless they work in the provision of legal services in criminal cases.

People employed in the public sector in the administration of justice should be eligible.

No person should be entitled to be excused from jury service solely because of his or her occupation, profession or calling (eg, doctors, dentists, pharmacists).

Potential jurors should be allowed an opportunity to defer jury service and nominate another date within the next 12 months.

The Report also recommended increasing the attendance and travel allowances for jurors, strengthening the employment protection provisions for jurors, giving the court the power to appoint up to three additional jurors, and giving the court the power to discharge a juror without discharging the whole jury in special circumstances.

Other projects

Jury Directions in Criminal Trials

In February 2007, the Attorney General requested that the Commission inquire into the directions and warnings given by a judge to a jury in a criminal trial. The Commission is required to have regard to:

- the increasing number and complexity of the directions, warnings and comments required to be given by a judge to a jury;
- the timing, manner and methodology adopted by judges in summing up to juries (including the use of model or pattern instructions);
- the ability of jurors to comprehend and apply the instructions given to them by a judge;
- whether other assistance should be provided to jurors to supplement the oral summing up;
- any other related matter.

The Commission has invited preliminary submissions, and is preparing a consultation paper which will be published in mid-2008.

Consent of Minors to Medical Treatment

In June 2004, the Commission published Issues Paper 24, *Minors' Consent to Medical Treatment,* as part of a review which is considering when young people, below the age of 18, should be able to make decisions about their medical care by themselves. The Paper examines who should be able to make medical decisions for minors on their behalf, and what the legal liability of medical practitioners should be who treat minors without valid legal consent.

The Commission conducted consultations in the second half of 2006, and conducted a full-day seminar in November 2006, jointly organised with the Law School at Macquarie University.

The Commission's Final Report should be available in mid-2008.

Privacy

The Commission published Consultation Paper 1 (CP 1), entitled *Invasion of Privacy*, in May 2007. The Paper considers the question whether a new cause of action based on invasion of privacy should be enacted in New South Wales. The Paper considers the elements of such a cause of action, the defences and the remedies.

Since the publication of CP 1, the Australian Law Reform Commission (ALRC) has published Discussion Paper 72, a very detailed review of Australian privacy law which tentatively supports a new cause of action based on invasion of privacy. The ALRC completed its review on 31 March 2008.

The NSW Law Reform Commission will publish a Report in July 2008 dealing with the issue of whether there should be a new cause of action.

The Commission will also be publishing another Consultation Paper in June 2008 which examines aspects of New South Wales privacy legislation (primarily the *Privacy and Personal Information Protection Act 1998* and the *Health Records and Information Privacy Act 2002)*.

People with Cognitive or Mental Health Impairments

The Commission commenced two projects in early 2007 under its Community Law Reform Program relating to people with cognitive or mental health impairments coming into contact with the criminal justice system. The first was to review section 32 of the *Mental Health (Criminal Procedure) Act 1990.* This provision gives a magistrate very broad powers (including diversion from the criminal justice system) when dealing with a defendant who is developmentally disabled, or suffering from a mental illness, or suffering from a mental condition for which treatment is available in a public hospital (but is not mentally ill within the meaning of Chp 3 of the *Mental Health Act 1990*. The second project was to review the principles of sentencing offenders with cognitive or mental health impairments.

In September 2007, the Attorney General issued the Commission with new, expanded terms of reference. As well as the matters already being considered, the Commission is now also required to consider 'fitness to be tried' and the 'defence of mental illness'.

The Commission will be publishing a Consultation Paper in July 2008.

Complicity

In January 2008, the Commission published a Consultation Paper on the law of complicity. Complicity refers to rules that widen criminal liability beyond the main perpetrator of a criminal act to another person or persons who may have assisted the main perpetrator to commit an offence. The secondary participant can be held equally guilty of the crime committed. The concept is often referred to as derivative or secondary liability. The law of complicity in NSW is still based on the common law, unlike most states, territories and the Commonwealth, which have codified the relevant principles.

The Commission's Paper focuses on two types of complicity: (1) extended common purpose; and (2) accessorial liability. The third type, which is not considered in any detail, is concerned with joint criminal enterprise.

The Paper outlines the criticisms which have been directed at these aspects of the law of complicity, particularly by Justice Kirby in a number of High Court cases.

The Commission will complete a Report on complicity in the latter half of 2008.

Queensland Law Reform Commission

A review of the provisions of the *Criminal Code* (Qld) relating to the excuse of accident and the defences of provocation

In April 2008, the Queensland Law Reform Commission received a reference to review the excuse of accident under s 23(1)(b) of the Criminal Code (Qld) and the partial defence of provocation under s 304 of the *Criminal Code* (Qld).
The review's main focus is the operation of these provisions in murder and manslaughter trials. In particular, the Commission is required to have regard to the results of an audit commissioned by the Queensland Attorney-General in 2007 into homicide trials in which the excuse of accident or the partial defence of provocation was raised as an issue for the jury. The Commission is also required to consider whether these provisions reflect community expectations.

The Commission has also been asked to review: the complete defence of provocation for assault offences under sections 268 and 269 of the *Criminal Code* (Qld);

- the use of alternative counts to charges of manslaughter, including whether section 576 of the *Criminal Code* (Qld) should be redrafted;
- whether there is a need for new offences, for example, assault occasioning grievous bodily harm or assault causing death; and
- whether the current provisions dealing with the excuse of accident and the complete and partial defences of provocation are readily understood by a jury and the community.

The Commission will release a Discussion Paper in June 2008 and complete its final report by 25 September 2008.

Reviews of jury directions and jury selection

In April 2008, the Commission also received two new references in relation to juries. The first reference is a review of the directions, warnings and summings up given by judges in criminal trials. The Commission has been asked to recommend changes that will simplify, shorten or otherwise improve the current system. The final report for this review is required by 31 December 2009.

In the second reference, the Commission has been asked to review the operation and effectiveness of the provisions in the *Jury Act 1995* (Qld) relating to the selection (including empanelment), participation, qualification and excusal of jurors. The final report for this review is required by 31 December 2010.

A review of the Peace and Good Behaviour Act 1982 (Qld)

The Queensland Law Reform Commission has recently completed its review of the *Peace and Good Behaviour Act 1982* (Qld).That Act presently enables a magistrate to make an order requiring a person to 'keep the peace and be of good behaviour'. The Act is very brief and leaves many issues unaddressed or in need of clarification. The Commission was asked to undertake a comprehensive review of the Act to establish whether it provides an accessible and effective mechanism for protecting members of the community from violent or threatening conduct. If the Act was found to be inadequate, the Commission was also asked to recommend whether the Act should be amended or replaced with new legislation. The final report will be available on the Commission's website once the report has been tabled in the Queensland Parliament.

Scottish Law Reform Commission

Criminal law

The Scottish Law Commission's Report on *Rape and Other Sexual Offences* (No 209) was published in December 2007, and is available on the Commission's website. The Scottish Government consulted on the Commission's proposals between December 2007 and March 2008, and is expected to introduce implementing legislation in the near future.

In November of 2007, the Commission received a new reference from the Scottish Government, in which it was asked to consider the law relating to: (1) judicial rulings that can bring a solemn case to an end without the verdict of a jury, and rights of appeal against such; (2) the principle of double jeopardy, and whether there should be exceptions to it; (3) admissibility of evidence of bad character or of previous convictions, and of similar fact evidence; and (4) the *Moorov* doctrine (that is, the doctrine that evidence of the commission of a crime from a single witness can corroborate evidence of the commission of another crime from a single witness provided that the crimes are sufficiently connected in time, character and circumstances to suggest that they form part of a single course of criminal conduct).

The Commission has commenced work on the first two projects to arise from this reference. Our Discussion Paper on *Crown Appeals* (No 137) was published in March 2008 and is available on the Commission's website. The Commission expects to submit its report on this, the first aspect of the reference, in the summer of 2008. Work is also underway on a discussion paper on double jeopardy, to be published towards the end of 2008. We currently expect to report on the remaining aspects of the reference in 2010 or 2011.

Consumer remedies

The Department for Business, Enterprise and Regulatory Reform has asked us to look at simplifying the remedies which are available to consumers when they purchase goods which do not conform to contract because, for example, they are faulty. We have also been

asked to look at remedies relating to the supply of goods. This is a joint project with the Law Commission for England and Wales.

The Davidson Review, which reported in November 2006, concluded that this area of law is unnecessarily complex due to an overlap of domestic and EU remedies. One result of this complexity is that consumers, sales staff and consumer advisers find the law difficult to understand.

The EU Commission is currently carrying out a general review of consumer directives, including the Consumer Sales Directive which was implemented in the UK in 2002. As part of this project, the Department has asked us to advise it on any issues which appear to be of relevance to that review.

Our aim will be to recommend appropriate remedies which make this area of the law easier for all users to understand and use. We plan to publish a joint consultation paper before the end of 2008. Meanwhile, an Introductory Paper is available on our website.

Insurance law

The Commission is working with the Law Commission for England and Wales on this project.

Insurance law in the United Kingdom has been criticised as outdated and unduly harsh to policyholders.

A joint scoping paper was published in January 2006 to seek views on areas of insurance contract law which should be included within the scope of this project. As a result of the helpful comments submitted in response to that paper, the project includes topics such as misrepresentation, non-disclosure, warranties, insurable interest and unjustifiable delay.

We intend to publish two joint consultation papers, the first of which was published in July 2007. It deals with misrepresentation, non-disclosure and breach of warranty by the insured. The aim is to publish the second paper around the end of 2008. It will deal with insurable interest, damages for unjustifiable delay and post-contractual good faith.

Unincorporated associations

We are currently examining the law relating to unincorporated associations. Such bodies exist for a wide variety of purposes and in a wide range of sizes and structures. At one end of the scale they may be substantial organisations with property, employees and contractual commitments. At the other end, they may be informal groupings of individuals joining together for temporary and specific purposes.

In Scots law, such associations are not recognised as having a separate legal personality. It is this absence of personality which can create difficulties and injustices. For example, problems have arisen in the following areas:

- The extent of liability of association members, and of association officials, under contracts with third parties, including staff, is uncertain.
- The extent of liability of association members, and of association officials, under the law of delict is uncertain.
- Title to heritable property must be held in the name of individuals who may cease to be members of the association's governing body, or of the association itself.

Under the present law, a non-profit making organisation which wishes to escape the consequences of the absence of legal personality has little choice but to incorporate. In many jurisdictions whose common law of associations was based upon English law, there have been statutory interventions by virtue of which clubs and associations have ceased to be treated as legal non-entities. The jurisdictions of the United Kingdom have been left behind in this respect. We think that it may be time to propose legislative change for Scotland which would accord some form of legal status to clubs and associations. We will look at various options and put some forward for consideration in a discussion paper which we hope to publish by the autumn of this year.

Damages for wrongful death

We received a reference from Scottish Ministers at the end of September 2006 inviting us to review the provisions of the *Damages (Scotland) Act 1976* relating to damages recoverable in respect of deaths caused by personal injury and the damages recoverable by relatives of an injured person.

Our Discussion Paper on *Damages for Wrongful Death* (DP No 135) was published on 1 August 2007 inviting comments by the end of November. The next stage in the project will be to analyse the responses and prepare a report and draft Bill, which we aim to complete

in 2008.

Property

The Commission continues to work on the review of the *Land Registration (Scotland) Act* 1979. This project looks at the difficulties that have arisen in practice with the 1979 Act and considers the need for a conceptual framework to underpin its provisions. A discussion paper (No 125) on void and voidable titles, dealing with the policy objectives of a system of registration of title, was published in February 2004. A second discussion paper (No 128) was published in August 2005. This paper looks at the three core issues of registration, rectification and indemnity against the background of the conceptual framework set out in the first paper. A third discussion paper (No 130) was published in December 2005. It considers various miscellaneous issues such as servitudes, overriding interests and the powers of the Keeper of the Register. The Commission is now working on the report.

The Commission's Report (No 208) on *Sharp v Thomson* was published in December 2007. At present someone buying property can, in certain circumstances, lose the property if a corporate seller becomes insolvent before the purchaser registers title to it. While the current law is satisfactory at protecting someone who purchases property against the risk that an individual seller might become insolvent, it is less satisfactory in the case of a corporate seller. With the aim of reducing the risk where a company sells property, the Report recommends that the rules be tightened; (1) to ensure that buyers can readily find out whether winding-up proceedings against a corporate seller have been initiated; and (2) to ensure that floating charges cannot attach to the property without the attachment having been publicly registered—the 'no attachment without registration' principle.

Succession

A new project has started on the law of succession. The Commission last reviewed this area 15 years ago, although its recommendations have not been implemented. In its view, the law does not reflect current social attitudes nor does it cater adequately for the range of family relationships that are common today. A public attitude survey was commissioned and a report of the results 'Attitudes Towards Succession Law: Finding of a Scottish Omnibus Survey' was published by the Scottish Executive in July 2005. The Commission's Discussion Paper on Succession (No 136) was published on 16 August 2007. It contained many proposals for reform on: intestacy where there was a surviving spouse or civil partner, stepchildren's rights on intestacy, and whether (and, if so, how) spouses and civil partners, cohabitants, children (including stepchildren) and others should be protected from disinheritance. The consultation period ended on 31 December 2007 and, after considering the responses, we are in the process of drawing up a report and draft bill. We are aiming at a publication date early in 2009.

Trusts and judicial factors

The Commission is undertaking a wide-ranging review of the law of trusts. The project is being tackled in two phases. The first concentrates on trustees and their powers and duties. Two discussion papers were published in September 2003 as part of this phase—one on breach of trust (No 123) and one on apportionment of trust receipts and outgoings (No 124). A third paper dealing with the assumption, resignation and removal of trustees, their powers to administer the trust estate and the role of the courts (No 126) was published in December 2004. The final Phase 1 discussion paper, *The Nature and the Constitution of Trusts* (No 133), was published in October 2006. It considered the dual patrimony theory, the possibility of conferring legal personality on trusts and what juridical acts are required to constitute a trust as between the truster and the trustees/ beneficiaries and as between the truster and third parties. It dealt also with latent trusts of heritable property.

The second phase of the project will cover the variation and termination of trusts, the restraints on accumulation of income, and long-term private trusts. It also looks at trustees' liability to third parties, on which we published a Discussion Paper (No 138) in May 2008, and enforcement of beneficiaries' rights. The Commission published a Report (No 206) on *Variation and Termination of Trusts* in March 2007 following a Discussion Paper in December 2005. The Report makes several recommendations for removing current obstacles to variations of private trusts and for providing a uniform process for reorganising public trusts.

The Commission's recommendations regarding

the investment powers of trustees contained in the Report on *Trustees' Powers and Duties* (1999, jointly with the Law Commission for England and Wales) have been implemented by the *Charities and Trustee Investment (Scotland) Act 2005*. Trustees can now invest in any kind of property and also buy land for any purpose.

The Commission also has a project concerning the law relating to judicial factors. A judicial factor is an officer appointed by the court to collect, hold and administer property in certain circumstances; for example, there may be a dispute regarding the property, there may be no one else to administer it or there may be alleged maladministration of it. The Commission believes that a radical overhaul of this area of law is necessary because judicial factory is a cumbersome procedure involving disproportionate expense. We have carried out empirical research into the current use of judicial factory and have consulted practitioners experienced in this field. Unfortunately, the project is currently suspended due to the need to give priority to other work but we hope to be able to publish a discussion paper by the summer of 2008.

Further information about the Scottish Law Commission's work and its publications may be found on its website at www.scotlawcom.gov.uk.

South African Law Reform Commission

Review of Administration Orders

Under the *Magistrates' Courts Act 32 of 1944*, a debtor who is unable to pay debts that do not exceed R50,000 may apply to a magistrate's court for an administration order. An administration order makes provision for the payment of debts in instalments or otherwise, and for the administration of the debtor's estate.

It has been argued that there are problems with administration orders. For example, it has been argued that: administrators overcharge for remuneration and expenses; unsuitable persons are appointed as administrators; administrators do not distribute funds regularly or account to creditors properly; administration orders are not regulated properly; and that administration orders can keep debtors in bondage for life.

Before the Commission could publish a discussion paper or other documents, the Project Committee was briefed on the National Credit Bill, which later became the *National Credit Act 34 of 2005*. A number of provisions of the *National Credit Act* have a significant effect on administration orders.

Accordingly, the Commission has invited comments from the public on its recommendation that administration orders should be abolished if certain changes are made to the National Credit Act. These changes will address over-indebtedness because of delictual claims; failure by a debtor whose debts have been rescheduled to comply with the debtor's obligations according to the rescheduling; and the duration of administration orders.

Review of the Law of Evidence

The Commission has completed has published an Issues Paper designed to generate debate about the issues to be considered during the review and to provide stakeholders with the opportunity to identify additional issues that should be considered by the Commission.

The Issue Paper contains a brief overview of the current law. It will be followed by Discussion Papers that analyse the issues identified for review and reform in detail and contain preliminary recommendations for reform.

The topics addressed in the Issues Paper include: the scope of the law of evidence; codification of the rules of evidence; the burden of proof and the duty to adduce evidence; the standard of proof; the cautionary rules; competence and compellability; private and state privilege; previous statements; hostile witnesses; similar fact evidence; opinion evidence; expert evidence; and informal admissions and confessions.

The Commission has also released a Discussion Paper on hearsay evidence and relevance. In the Discussion Paper, the Commission discusses the underlying rationale for the hearsay rule, and examines the nature of the rule in some other common law jurisdictions. It discusses a number options for reform of the rule in detail and invites comments and views on these options. Options for reform of the hearsay rule include: retaining the status quo (with, or without, the introduction of a notice requirement); removing the rule and allowing the free admission of hearsay evidence (with, or without, decision

rules pertaining to weight); and amending the rule so that there are different approaches to hearsay evidence in civil and criminal trials.

It its Discussion Paper, the Commission also outlines the concept of legal relevance. It discusses the difficulties with ascertaining relevance in the absence of a legislative definition of the concept. It proposes that legislative guidelines be introduced to define relevance and specify when relevant evidence is inadmissible.

Customary Law of Succession

The *Black Administration Act of 1927* did not codify or define African customary law. It simply singled out Africans as a separate segment of society, subject to a different, discriminatory set of rules and laws, under the apartheid system. It provided that all Africans were subject to African customary law. Therefore, the African customary law rule of male primogeniture applied.

The recommendations in the Commission's Report aim to reform the customary rule of male primogeniture, which the Constitutional Court has ruled to be unconstitutional. Prior to the release of the Report, the Commission published a Discussion Paper, which was widely distributed and elicited comments from interested parties. It also held a series of workshops which were attended by, among others, traditional leaders in all the provinces.

The Commission considers the approaches that have been taken to reform of the customary law of succession in other African countries—namely, Malawi, Ghana, Zimbabwe and Zambia. It then considers the legislation that governs the application of the customary rules of succession in South Africa, including the *KwaZulu Act on the Code of Zulu Law 16 of 1985* and the *Natal Code of Zulu Law, Proc R151 of 1987*.

In its report the Commission recommends the repeal of s 23 of the Black Administration Act of 1927. It also recommends that property rights relating to certain customary marriages be protected, that is, that the protection afforded to a widow whose customary marriage was dissolved by her husband entering into a civil marriage with another woman be retained (section 22(7) of the *Black Administration Act of 1927*). The discarded widows and children of these marriages should inherit on par with the civil marriage widows, provided that such customary marriages were contracted before 2 December 1988 (before the coming into operation of the Marriage and Matrimonial Property Law Amendment Act of 1988).

The Commission also discusses various customary law arrangements that fall outside the customary marriage, including all related and supporting marital unions (ukungena, ukuzalela, ukuvusa and ancillary unions entered into by women) that are found in all African communities, in order to clarify the status of women in these unions. The Commission recommends that the women and children in such unions should share in the estate of the deceased, who, or on whose behalf, the union was entered into.

Generally, Africans do not adopt children in accordance with the prescripts of the *Children's Act 38 of 2005*. The *Intestate Succession Act, 1987* places adopted children of a deceased in the same position as other children for purposes of intestate succession. It is recommended that children adopted in terms of customary law should also inherit from their adoptive parents.

Provision is made for property accruing to a woman or her house under customary law by virtue of her customary marriage to devolve in terms of a will. If she dies without a will, her property will devolve in terms of the Intestate Succession Act, 1987. Any reference in a will of such a woman to a 'child' and any reference in s 1 of the Intestate Succession Act to a 'descendant' in relation to such a woman who dies without a will, will be interpreted to include any child born out of any ancillary union entered into in terms of customary law for the purpose of raising or increasing children for such woman or her house.

In Western societies, the law emphasises the interests, rights and liberties of individuals. On the contrary, African customary law is general, traditional and aimed at preserving group interests. Accordingly, it is foreseen that the rigid application of rules of succession will not always meet the needs of the persons concerned. The Commission has recommended a procedure for resolving disputes and uncertainties about the devolution of family property, among others. These disputes or uncertainties will be determined by the Master of the High Court having jurisdiction.

The report contains draft legislation which is intended to modify the customary law of

succession so as to provide for the devolution of certain property in terms of the law of intestate succession; to clarify certain matters relating to the law of succession and the law of property in relation to persons subject to customary law; and to amend certain laws in this regard. The adoption of this draft Bill by Parliament will go a long way in creating legal certainty with regard to the intestate succession of women and children.

Trafficking in Persons

The Commission is in the process of completing its report on trafficking in persons. The trafficking investigation seeks to develop specific legislation to combat human trafficking. Currently human trafficking provisions have been integrated into laws relating to children, while trafficking of persons for sexual exploitation is covered in the new *Sexual Offences Act*.

There is no integrated trafficking statute that covers trafficking offences that transcend children's rights violations and sexual offences. This means that South Africa only partially complies with its international obligations under the *Convention for the Suppression of the Traffic in Persons and of Exploitation of Prostitution of Others*, the Palermo Protocol and related international treaties. The Commission's Report, which will be released in the next few months, will include draft legislation and administrative measures which will assist South Africa to achieve a holistic response to human trafficking.

Other current investigations

The Commission will also soon be releasing reports on the following:

- Protected Disclosures;
- Assisted Decision-making: Adults with Impaired Decision-making Capacity;
- Sexual Offences: Adult Prostitution;
- Privacy and Data Protection;
- Stalking (Submitted).Other developments

Commission processes reviewed

In the past year, the Commission decided to review its research, consultation and reporting processes, within the ambit of the enabling statute. The main focus of the process review is to enhance public participation, including participation of historically marginalised communities, in law reform processes. The Commission's process review also seeks to improve the turnaround time between the referral of an investigation by the Minister for Justice and Constitutional Development and the finalisation of the Commission's Report. In summary, the process review involves:

- aligning the Commission's research programme to South Africa's legislative priorities as a developmental state;
- ensuring that the process of compiling the Commission's research agenda is inclusive;
- streamlining research processes to reduce turn-around time; and
- enhancing inclusive participation in research processes.

Recent laws based on commission reports

The following Commission reports have formed the basis of recent statutes and Bills:

- The Domestic Partnerships Report (formed the basis of the Domestic Partnerships Bill 2007 and the *Civil Unions Act*);
- The Sexual Offences Report (formed the basis of the *Criminal Law (Sexual Offences) Amendment Act)*;
- The Child Care Report (formed the basis of the *Children's Act* and Children's Amendment Bill); and
- The Juvenile Justice report (formed the basis of Child Justice Bill)

Ismail Mahomed Law Prize

A few years ago the Commission, in partnership with Juta, established the Ismail Mahomed Law Prize (honouring the late Chief Justice). The aim of the competition is to encourage critical legal writing by students while generating ideas for the reform of the law in our new constitutional democracy.

The competition involves essay writing, and the winning essay is selected by a panel of judges. The prizes for 2008 include a laptop valued at R15, 000, credit vouchers, a year's subscription to South African Law Reports 1947–date on CDRom, and a one year subscription to Juta Statutes and Regulations of South Africa and the Juta Statutes in print. Entries will soon be invited for the 2008 competition.

Personnel Changes

President Thabo Mbeki appointed a new group of Commissioners at the beginning of January 2007. Justice Yvonne Mokgoro (Constitutional Court) retained her position as Chairperson.

Justice Willie Seriti (Pretoria High Court) was appointed Vice-Chairperson. The new Full-time Commissioner is Ms Thuli Madonsela (Waweth Law and Policy Research Agency).

Part-time Commissioners are:

- Justice Dennis Davis (Cape Town High Court);
- Prof Cathi Albertyn (Witwatersrand University);
- Mr Thembeka Ngcukaitobi (Attorney);
- Advocate Dumisa Ntsebeza SC (Cape Bar)
- Prof Pamela Schwikkard (University of Cape Town);
- Advocate Mahlape Sello (Johannesburg Bar).

The Commission also welcomed three new Senior State Law Advisers to its full-time staff. Mr Linda Mngoma was appointed on 1 February 2008 and Ms Nerisha Singh and Mr Tshepang Monare on 1 May 2008.

Tasmanian Law Reform Institute

Completed Projects

Human Rights Project

In 2006, the Tasmanian Government invited the Tasmanian Law Reform Institute to investigate how the fundamental rights Tasmanians hold as significant might be further enhanced and legally secured. As part of the community consultation process, the Institute released an Issues Paper in September 2006 and members of the Human Rights Consultation Committee undertook 66 community consultation meetings, briefing sessions and presentations with a wide range of community groups.

In October 2007, the Institute released Final Report no 10 that recommended that a Charter of Human Rights be enacted to enhance human rights protection in Tasmania. The Institute received 407 submissions from individual citizens and organisations. This is the largest number of original submissions received on any project undertaken to date by the Institute. The majority of submissions received (94.1%) supported the enactment of a Charter of Human Rights. The Institute considers that a Charter of Rights will provide a single, comprehensible statement of the fundamental rights applicable in Tasmania, foster community awareness of human rights and encourage the systematic development and observance across all arms of government of processes responsive to human rights. The Report contains 23 recommendations, including recommendations that:

- economic, social and cultural rights be included in the Charter as well as civil and political rights;
- the Charter only bind 'public authorities';
- the Charter contain specific enforcement provisions;
- establish an independent office of Tasmanian Human Rights Commissioner;
- the most appropriate form for a Tasmanian Charter would be an ordinary piece of legislation.

Ongoing projects

Criminal liability of drivers who fall asleep causing motor vehicle crashes resulting in death or other serious injury: *Jiminez.*

In September 2007, the Institute released Issues Paper No 12 that considered the appropriate role for the criminal law in cases where a driver falls asleep and causes death or serious injury as a result of a motor vehicle crash. The Issues Paper examined the application of the principles articulated in *Jiminez* to the framework currently in place in Tasmania. An examination of the legal consequences of falling asleep at the wheel highlights the tension between two competing views. On one hand, there is a reluctance to apportion criminal liability to acts over which a person has no conscious control. On the other hand, the community is becoming increasingly aware of the dangers posed by drivers affected by tiredness or some other medical condition which may cause a person to fall asleep. The community has an interest in seeing that drivers are deterred from driving in circumstances where they pose a danger to themselves and other road-users, and are punished if they do so and cause harm or death to others. A final report is being prepared.

Evidence Act 2001 Sections 97, 98 & 101 and Hoch's case: Admissibility of 'Tendency' and 'Coincidence' Evidence in Sexual Assault Cases

This project considers the operation of sections 97, 98 and 101 of the *Evidence Act 2001* in the context of sexual offence cases. The rules governing the admissibility of tendency or coincidence evidenlce continue to cause difficulties for complainants, prosecutors and

judges, particularly in cases of sexual assault involving multiple complainants with some association. Consideration will be given to the need for amendments to the law in order to lessen the exposure of complainant's to repeated cross-examination, and to avoid repeated voir dires, appeals and retrials. An issues paper will be prepared for release in 2008.

New projects

Easements and analogous rights

The project was approved by the Board in August 2007 and commenced in March 2008. It will review the current laws of easements and analogous rights to determine whether they currently meet community expectations and needs. The review will provide a report of the current law of easements and outline possible areas for reform, consider the current legislative requirements in Tasmania for the creation, variation and termination of easements, and consider the interaction of the legislation with the current common law requirements. An issues paper will be prepared for release in 2008.

Male circumcision

The project was approved by the Board in February 2008. It will review the current law regulating the circumcision of male children in Australia, with particular reference to Tasmania. The project will examine the criminal and civil responsibility of those who perform, aid or instigate the procedure. In relation to civil responsibility, the project will examine the requirement of informed consent and the unique nature of the procedure. Questions of who may consent or authorise the procedure when children are involved will also be addressed. The possible constitutional, equal protection from the law and discrimination issues that arise depending on whether circumcision is lawful or unlawful currently will also be investigated. In examining these issues, the project will take account of the law in foreign jurisdictions and international law. An issues paper will be prepared for release in 2008.

Clearing house

Recent law reform publications and areas of law under review

Recent law reform publications and areas of law under review

Clearing house is compiled by the Australian Law Reform Commission. Entries can be made by emailing details of law under review to reform@alrc.gov.au. A list of abbreviations is available at the end of this document.

This edition of Clearing house covers ongoing inquiries and publications released from December 2007 to May 2008.

Abortion

VLRC

Law of Abortion, March 2008 [released May 2008] (R 15).

Administrative Law

ALRC

Review of the Freedom of Information laws and practices—WIH on new inquiry.

ALRI

Revised model code of procedures for Administrative Tribunal—CP expected mid-2008.

ARC

Government agency coercive information-gathering powers—final report expected June 2008.

Administrative review mechanisms in areas of complex and specific business regulation—WIH on inquiry.

COmb

Notification of Decisions and Review Rights for Unsuccessful Visa Applications, December 2007 (R 15/2007).

NCCUSL

Revised Model State Administrative Procedure Act—new draft April 2008.

Administrative procedures for interstate compact entities—WIH by study committee.

QLCARC

Accessibility of Administrative Justice, April 2008 (R).

Adoption

HMCS(UK)

Public Law Family Fees, December 2007 (CP).

ILRC

Aspects of Intercountry Adoption Law, February 2008 (R 89).

Agriculture

ACIP

Enforcement of plant breeder's rights—final report expected late 2008.

Animals

VLRC

Legal status of assistance animals—WIH on inquiry.

Associations

BCLI

Proposals for a new Society Act—WIH on inquiry.

HKLRC

Charities—WIH on inquiry.

NCCUSL

Omnibus Business Organizations Act—new draft February 2008.

Regulation of charities—WIH by drafting committee.

Uniform Unincorporated NonProfit Association Act—new draft March 2008.

Scot Law Com

Unincorporated associations—DP expected 2008.

Bankruptcy & Insolvency

CAMAC

Issues in External Administration, February 2008 (DP).

Long-tail liabilities: the treatment of future unascertained personal injury claims—WIH on inquiry.

Shareholder claims against insolvent companies: implications of the Sons of Gwalia decision—WIH on inquiry.

Scot LRC

Report on Sharp v Thomson (Protection of Purchasers Buying from Insolvent Sellers), December 2007 (R 208).

Child Protection

AGD(SAust)

Children in State Care Commission of Inquiry: Allegations of Sexual Abuse and Death from Criminal Conduct, March 2008 (R).

HMCS(UK)

Public Law Family Fees, December 2007 (CP).

Children and Young People

AGD(SAust)

Children in State Care Commission of Inquiry: Allegations of Sexual Abuse and Death from Criminal Conduct, March 2008 (R).

DoFP(NI)

Contact with children—WIH on inquiry.

FLC

Improving Post-Parenting Order Processes, September 2007 [released February 2008] (R).

HKLRC

Causing or allowing the death of a child—WIH on inquiry.

ILC

Proposal to Amend the Prohibition of Child Marriage Act, 2006 and Other Allied Laws, February 2008 (R 205).

MoJ(UK)

Children and Adoption Act 2006—Court Rules, May 2008 (CP).

NCCUSL

Hague Convention on the Protection of Children—WIH by study committee.

Relocation of Children Act—WIH by drafting committee.

NSWLRC

Minors' consent to medical treatment—report expected 2008.

NSWLCLJ

The Prohibition on the Publication of Names of Children Involved in Criminal Proceedings, April 2008 (R).

TLRI

Male circumcision—WIH on new inquiry.

WALC

Surrogacy Bill 2007, May 2008 (R).

Commercial Law

Man LRC

Franchise law—WIH on inquiry.

MoJ(UK)

Rome I—Should the UK Opt In?, April 2008 (CP).

NCCUSL

Record Owners of Business Act—new draft January 2008.

Commissions of Inquiry

ALRC

Privilege in Perspective: Client Legal Privilege in Federal Investigations, December 2007 [released February 2008] (R 107).

NZLC

A New Inquiries Act, May 2008 (R 102).

Compensation

Law Com

Remedies against public bodies—consultation paper expected mid-2008.

LRCWA

Compensation for injurious affection—WIH on report.

Consumer Protection

PC

Review of Australia's Consumer Policy Framework, May 2008 (R).

Scot LRC

Report on Sharp v Thomson (Protection of Purchasers Buying from Insolvent Sellers), December 2007 (R 208).

Treasury

Criminal Penalties for Serious Cartel Conduct, January 2008 (DP).

Contracts

ALRI

Privity of contract and third party beneficiaries—WIH on inquiry.

ILRC

Privity of Contract and Third Party Rights, February 2008 (R 88).

Man LRC

Waiver and personal liability—WIH on inquiry.

MoJ(UK)

Rome I—Should the UK Opt In?, April 2008 (CP).

Corporations Law

CAMAC

Issues in External Administration, February 2008 (DP).

Long-tail liabilities: the treatment of future unascertained personal injury claims—WIH on inquiry.

Shareholder claims against insolvent companies: implications of the Sons of Gwalia decision—WIH on inquiry.

PJCCFS

Inquiry into shareholder engagement and participation—WIH on inquiry.

Corrections

MoJ(UK)

Securing the Future: Proposals for the Efficient and Sustainable Use of Custody in England and Wales, December 2007 (R).

NSWSC

Review of Periodic Detention, December 2007 (R).

Court Rules and Procedures

(see also Evidence, Juries)

AGD (SAust)

South Australian Dust Disease Regulations: Discussion and Proposals for Amendment, March 2008 (DP).

ALRI

Court rules and procedures—report expected June 2008.

Criminal appeals—WIH on inquiry.

HKLRC

Class actions—WIH on inquiry.

ILRC

Limitation of actions—WIH on inquiry.

JCS(ACT)

Reforms to Court Jurisdiction, Committal Processes and the Election for Judge Alone Trials, May 2008 (DP).

Law Com

The High Court's jurisdiction in relation to criminal proceedings—WIH on inquiry.

LRCWA

Problem-Oriented Courts, March 2008 (Research Paper).

Review of coronial practice—WIH on new inquiry.

Man LRC

Limitation of actions—WIH on inquiry.

MoJ(UK)

Forced Marriage (Civil Protection) Act 2007—Relevant Third Party, December 2007 (CP).

Administration and Enforcement Restriction Orders, January 2008 (CP).

Forced Marriage (Civil Protection) Act 2007—Court Rules, January 2008 (CP).

Children and Adoption Act 2006—Court Rules, May 2008 (CP).

NZLC

Draft Limitation Defences Bill, December 2007.

Habeas Corpus Refining the Procedure, February 2008 (R 100).

Development of comprehensive Criminal Procedures Act—WIH on inquiry.

SALRC

Review of administration orders—WIH on inquiry.

Use of electronic equipment in court proceedings—WIH on inquiry.

Scot Law Com

Personal Injury Actions: Limitations and Prescribed Claims, December 2007 (R 207).

Crown Appeals, March 2008 (DP 137).

Damages for wrongful death—report expected late 2008.

TLRI

Contempt of court—WIH on issues paper.

VLRC

Civil Justice Review: Report, May 2008 (R 14).

Jury directions—WIH on new inquiry.

Courts

HMCS(UK)

Public Law Family Fees, December 2007 (CP).

ILRC

Consolidation and reform of the Courts Act—WIH on inquiry.

Law Com

The High Court's jurisdiction in relation to criminal proceedings—WIH on inquiry.

LRCWA

Problem-Oriented Courts, March 2008 (Research Paper).

NCCUSL

Hague Convention on Choice of Court Agreements—WIH by study committee.

VLRC

Civil Justice Review: Report, May 2008 (R 14).

VPLRC

Vexatious litigants—report expected late 2008.

Criminal Investigation

ARC

Government agency coercive information-gathering powers—final report expected June 2008.

HO(UK)

Investigation Code of Practice Issued under the Proceeds of Crime Act 2002, December 2007 (CP).

Search Code of Practice Issued under the Proceeds of Crime Act 2002, December 2007 (CP).

NCCUSL

Electronic recording of custodial interrogations—WIH by study committee.

Criminal Law

(see also Sentencing; Sexual Offences)

ALRI

Criminal appeals—WIH on inquiry.

HKLRC

Causing or allowing the death of a child—WIH on inquiry.

Double jeopardy—WIH on inquiry.

Review of sexual offences—WIH on inquiry.

HO(UK)

The Consent Regime; Obligations to Report Money Laundering, December 2007 (CP).

ILC

Section 438 of the Code of Criminal Procedure (Anticipatory Bail), December 2007 (R 203).

ILRC

Homicide: Murder and Involuntary Manslaughter, January 2008 (R 87).

Inchoate Offences, February 2008 (CP 48).

Defences in criminal law—WIH on report.

Law Com

Conspiracy and attempts—WIH on inquiry.

Reforming bribery—WIH on inquiry.

MCLOC

Identity Crime, March 2008 (R).

NSWLRC

Complicity, January 2008 (CP 2).

Jury directions in criminal trials—WIH on inquiry.

People with cognitive and mental health impairments in the criminal justice system—WIH on inquiry.

NZLC

Admissibility of previous convictions—WIH on inquiry.

Criminal defences, insanity and infanticide—WIH on inquiry.

Development of comprehensive Criminal Procedures Act—WIH on inquiry.

Public safety and security—WIH on new inquiry.

QLRC

Review of the excuse of accident and the defences of provocation—DP expected June 2008.

SALRC

Stalking—WIH on inquiry.

Trafficking in persons—WIH on inquiry.

Scot Law Com

Crown Appeals, March 2008 (DP 137).

TLRI

Contempt of court—WIH on issues paper.

Criminal liability of drivers who fall asleep causing motor vehicle crashes resulting in death or serious injury—WIH on inquiry.

Treasury

Criminal Penalties for Serious Cartel Conduct, January 2008 (DP).

WACDJC

Inquiry into the Prosecution of Assaults and Sexual Offences, April 2008 (R).

Customary Law

SALRC

Customary Law of Succession, April 2004 [released March 2008] (R).

De Facto Relationships

NSWLRC

Relationships, June 2006 [released April 2008] (R 113).

SALRC

Domestic partnerships—WIH on inquiry.

Death

HKLRC

Causing or allowing the death of a child—WIH on inquiry.

LRCWA

Review of coronial practice—WIH on new inquiry.

MoJ(UK)

Sensitive Reporting in Coroners' Courts, March 2008 (DP).

Scot Law Com

Damages for wrongful death—report expected late 2008.

Debt

BCLI

Study Paper on Predatory Lending Issues in Canada, February 2008 (Study Paper).

DoFP(NI)

Missing Persons: Consultation on Draft Presumption of Death Bill (Northern Ireland) 2008, January 2008 (CP).

MoJ(UK)

Administration and Enforcement Restriction Orders, January 2008 (CP).

NCCUSL

Uniform Debt Management Act—amended finalised Act February 2008.

Defamation

Man LRC

Defamation—WIH on inquiry.

Designs, Patents and Trade Marks

ACIP

Post-grant patent enforcement strategies—DP expected mid-2008.

Review of patentable subject matter—WIH on new inquiry.

Discrimination

VLRC

Legal status of assistance animals—WIH on inquiry.

Dispute Resolution

FLC

Arbitrating family law property and financial matters—WIH on inquiry.

ILRC

Alternative dispute resolution—WIH on inquiry.

Law Com

Housing: Proportionate Dispute Resolution, May 2008 (R 309).

NCCUSL

Collaborative Law Act—new draft April 2008.

SALRC

Arbitration: family mediation—WIH on inquiry.

VLRC

Civil Justice Review: Report, May 2008 (R 14).

VPLRC

Alternative dispute resolution—WIH on inquiry.

Domestic Violence

DoJ(NT)

Mandatory Reporting of Domestic and

Family Violence by Health Professionals, January 2008 (DP).

FLC

Family violence—WIH on report.

HKLRC

Causing or allowing the death of a child—WIH on inquiry.

NZMJ

A Review of the Domestic Violence Act 1995 and Related Legislation, December 2007 (DP).

QLRC

Review of the Peace and Good Behaviour Act—report completed, not yet released.

Drugs

NCCUSL

Model Drug Dependence Treatment and Rehabilitation Act—WIH by study committee.

NZLC

Review of the Misuse of Drugs Act 1975—WIH on new inquiry.

Elder Law

HKLRC

Enduring Powers of Attorney, March 2008 (R).

Electoral System

NCCUSL

Presidential Electors Act—WIH by drafting committee.

QLCARC

Electronic voting and other electoral matters—WIH on inquiry.

Employment

NCCUSL

Misuse of Genetic Information in Employment and Insurance Act—new draft February 2008.

SALRC

Protected disclosures—WIH on report.

Environment

NCCUSL

Environmental controls and hazards notice systems—WIH by study committee.

Evidence

ILRC

Documentary evidence and technology—WIH on new inquiry.

Hearsay in civil and criminal cases—WIH on new inquiry.

Law of expert evidence in criminal and civil matters—WIH on inquiry.

NCCUSL

Certification of Unsworn Foreign Declarations Act—WIH by drafting committee.

Electronic recording of custodial interrogations—WIH by study committee.

NZLC

Admissibility of previous convictions—WIH on inquiry.

SALRC

Review of the Law of Evidence, January 2008 (IP 26).

Review of the Law of Evidence (Hearsay and Relevance), March 2008 (DP 113).

TLRI

Tendency and coincidence evidence in sexual assault cases—WIH on inquiry.

Family Law

DoFP(NI)

Contact with children—WIH on inquiry.

FLC

Improving Post-Parenting Order Processes, September 2007 [released February 2008] (R).

Arbitrating family law property and financial matters—WIH on inquiry.

Family violence—WIH on report.

ILC

Proposal to Amend the Prohibition of Child Marriage Act, 2006 and Other Allied Laws, February 2008 (R 205).

Man LRC

Divorced spouses survivors' pension benefits—WIH on inquiry.

MoJ(UK)

Forced Marriage (Civil Protection) Act 2007—Relevant Third Party, December 2007 (CP).

Forced Marriage (Civil Protection) Act 2007—Court Rules, January 2008 (CP).

Children and Adoption Act 2006—Court Rules, May 2008 (CP).

NCCUSL

Amendments to Uniform Interstate Family Support Act—new draft May 2008.

Collaborative Law Act—new draft April 2008.

Hague Convention on the Protection of Children—WIH by study committee.

Relocation of Children Act—WIH by drafting committee.

NSWLRC

Relationships, June 2006 [released April 2008] (R 113).

SALRC

Arbitration: family mediation—WIH on inquiry.

Divorce—WIH on inquiry.

Matrimonial property law—WIH on inquiry.

WALC

Surrogacy Bill 2007, May 2008 (R).

Financial Services

BCLI

Study Paper on Predatory Lending Issues in Canada, February 2008 (Study Paper).

HMT(UK)

Financial Stability and Depositor Protection: Strengthening the Framework, January 2008 (CP).

FSMA Market Abuse Regime: A Review of the Sunset Clauses, February 2008 (CP).

NCCUSL

Bank deposits—WIH by study committee.

Implementation of the UN Convention on Independent Guarantees and Stand-alone Letters of Credit—WIH by drafting committee.

Payment systems—WIH by study committee.

Treasury

Simple Superannuation Advice, May 2008 (CP).

VPLRC

Property Investment Advisers and Marketeers, April 2008 (R).

Freedom of Information

ALRC

Review of the Freedom of Information laws and practices—WIH on new inquiry.

QLCARC

Accessibility of Administrative Justice, April 2008 (R).

Genetics

NCCUSL

Misuse of Genetic Information in Employment and Insurance Act—new draft February 2008.

Government

ARC

Government agency information-gathering powers—final report expected

June 2008.

Law Com

Remedies against public bodies—consultation paper expected mid-2008.

NCCUSL

Administrative procedures for interstate compact entities—WIH by study committee.

Guardianship

HKLRC

Enduring Powers of Attorney, March 2008 (R).

QLRC

Guardianship laws: general principles—report expected late 2008.

SALRC

Adults with impaired decision-making capacity—WIH on inquiry.

Health Care

ALRC

For Your Information: Review of Australian Privacy Law and Practice, May 2008 [yet to be released] (R 108).

ILRC

Legal aspects of bioethics: advance care directives—WIH on new inquiry.

NCCUSL

Health care information interoperability—WIH by study committee.

Sask LRC

Vaccination and the law—WIH on inquiry.

Housing

Law Com

Housing: Proportionate Dispute Resolution, May 2008 (R 309).

Encouraging responsible letting—WIH on report.

Human Rights

SALRC

Trafficking in persons—WIH on report.

Immigration

COmb

Notification of Decisions and Review Rights for Unsuccessful Visa Applications, December 2007 (R 15/2007).

Indigenous People

NZLC

Maori legal entities—WIH on inquiry.

Insurance

Law Com; Scot Law Com

Insurance Contract Law: Insurable Interest, January 2008 (IP).

NCCUSL

Misuse of Genetic Information in Employment and Insurance Act—new draft February 2008.

Intellectual Property

ACIP

Enforcement of plant breeder's rights—final report expected late 2008.

Post-grant patent enforcement strategies—DP expected mid-2008.

Review of patentable subject matter—WIH on new inquiry.

Judiciary

MoJ(UK)

Tribunals, Courts and Enforcement Act: Eligibility for Judicial Appointment, February 2008 (CP).

Juries

HKLRC

Criteria for Service as Jurors, January 2008 (CP).

ILRC

Consolidation and reform of the Courts

Act—WIH on inquiry.

LRCWA

Selection, eligibility and exemption of jurors—WIH on inquiry.

NSWLRC

Jury Selection, September 2007 [released January 2008] (R 117).

Jury directions in criminal trials—WIH on inquiry.

VLRC

Jury directions—WIH on new inquiry.

Justice of the Peace

NCCUSL

Revision of the Uniform Law on Notarial Acts—WIH by drafting committee.

Landlord & Tenant

BCLI

Commercial tenancy—WIH on inquiry.

Law Com

Encouraging responsible letting—WIH on report.

Law Enforcement

ALRC

Privilege in Perspective: Client Legal Privilege in Federal Investigations, December 2007 [released February 2008] (R 107).

ARC

Government agency coercive information-gathering powers—final report expected June 2008.

NCCUSL

Electronic recording of custodial interrogations—WIH by study committee.

QCMC

How the Criminal Justice System Handles Allegations of Sexual Abuse: A Review of the Implementation of the Recommendations of the Seeking Justice Report, March 2008 (R).

Senate LCC

Telecommunications (Interception and Access) Amendment Bill 2008, May 2008 (R).

TLRI

Consolidating powers of arrest—WIH on report.

Legal Profession

ALRC

Privilege in Perspective: Client Legal Privilege in Federal Investigations, December 2007 [released February 2008] (R 107).

Legal Services

AGD

Review of the Commonwealth Community Legal Services Program, March 2008 (R).

NCCUSL

Hague Convention on Choice of Court Agreements—WIH by study committee.

Legislation

NCCUSL

Authentication of online state legal materials—WIH by new study committee.

NZLC

Presentation of New Zealand statute law—WIH on inquiry.

Media Law

MoJ(UK)

Sensitive Reporting in Coroners' Courts, March 2008 (DP).

Medical Law

ILRC

Legal aspects of bioethics: advance care directives—WIH on new inquiry.

NSWLRC

Minors' consent to medical treatment—report expected 2008.

Sask LRC

Vaccination and the law—WIH on inquiry.

TLRI

Male circumcision—WIH on new inquiry.

Mental Health

FLRC

Mental Health Act review—WIH on inquiry.

NSWLRC

People with cognitive and mental health impairments in the criminal justice system—WIH on inquiry.

Negligence and Liability

AGD (SAust)

South Australian Dust Disease Regulations: Discussion and Proposals for Amendment, March 2008 (DP).

CAMAC

Long-tail liabilities: the treatment of future unascertained personal ijury claims—WIH on inquiry.

ILRC

Civil liability of good samaritans and volunteers—WIH on report.

Law Com

Remedies against public bodies—consultation paper expected mid-2008.

Man LRC

Waiver and personal liability—WIH on inquiry.

Scot Law Com

Personal Injury Actions: Limitations and Prescribed Claims, December 2007 (R 207).

Damages for wrongful death—report expected late 2008.

Power of Attorney

ALRI; BCLI; Man LRC; Sask LRC

Powers of attorney—report expected June 2008.

HKLRC

Enduring Powers of Attorney, March 2008 (R).

NCCUSL

Uniform Power of Attorney Act—amendment to final Act May 2008.

QLRC

Guardianship laws: general principles—report expected late 2008.

Sask LRC

Corporate fiduciary services—WIH on inquiry.

Privacy

BCLI

Privacy Act of British Columbia—report expected 2008.

HO(UK)

National Identity Scheme: Delivery Plan 2008, March 2008 (CP).

MoJ(UK)

Data Sharing Review Consultation, December 2007 (CP).

NCCUSL

Health care information interoperability—WIH by study committee.

NSWLRC

New South Wales privacy legislation—WIH on inquiry.

NZLC

Privacy Concepts and Issues, February 2008 (Study Paper).

Public Registers: Review of the Law of Privacy Stage 2, February 2008 (R 101).

SALRC

Privacy and data protection—WIH on inquiry.

VLRC

Surveillance in public places—consultation paper expected mid-2008.

Public Order

JCS(ACT)

Review of the Liquor Act 1975, March 2008 (DP).

NZLC

Public safety and security—WIH on new inquiry.

NZMJ

Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003, May 2008 (R).

QCMC

Policing Public Order: A Review of the Public Nuisance Offence, May 2008 (R).

QLRC

Review of the Peace and Good Behaviour Act—report completed, not yet released.

SALRC

Adult prostitution—WIH on inquiry.

Real Property

BCLI

Real property review—WIH on inquiry.

HKLRC

Adverse possession—WIH on inquiry.

Law Com

Easements, Covenants and Profits à Prende, March 2008 (CP 186).

NCCUSL

Amendments to Uniform Common Interest Ownership Act—new draft February 2008.

Draft Partition of Tenancy-in-Common Real Property Act—new draft March 2008.

Transfer on Death of Real Property Act—new draft March 2008.

Uniform [Home Owner Bill of Rights] Act—new draft February 2008.

NZLC

Review of the Land Transfer Act 1952—WIH on inquiry.

Scot LRC

Report on Sharp v Thomson (Protection of Purchasers Buying from Insolvent Sellers), December 2007 (R 208).

Land registration—WIH on report.

TLRI

Easements and analagous rights—WIH on new inquiry.

VPLRC

Property Investment Advisers and Marketeers, April 2008 (R).

Regulatory law

HMT(UK)

UK Discussion Paper on the Commission's Review of Financial Regulatory Framework for Commodity and Exotic Derivatives, December 2007 (DP).

PC

Review of Australia's Consumer Policy Framework, May 2008 (R).

Treasury

Simple Superannuation Advice, May 2008 (CP).

VPLRC

Property Investment Advisers and Marketeers, April 2008 (R).

Same Sex Relationships

NSWLRC

Relationships, June 2006 [released April 2008] (R 113).

Securities & Exchange

AGD

Personal Property Securities Bill, Consultation Draft, May 2008.

HMT(UK)

UK Discussion Paper on the Commission's Review of Financial Regulatory Framework for Commodity and Exotic Derivatives, December 2007 (DP).

NCCUSL

Certificate of title system for boats—WIH by study committee.

Revised Uniform Federal Lien Registration Act—WIH by study committee.

Security

NZLC

Public safety and security—WIH on new inquiry.

Senate LCC

Telecommunications (Interception and Access) Amendment Bill 2008, May 2008 (R).

Sentencing

NSWSC

Review of Periodic Detention, December 2007 (R).

Reduction in penalties at sentencing—WIH on inquiry.

NCCUSL

Uniform Collateral Consequences of Conviction Act—new draft February 2008.

TLRI

Sentencing—WIH on final report.

VSAC

Provocation in Sentencing, February 2008 (Research Paper).

Suspended Sentences and Intermediate Sentencing Orders: Final Report Part II, April 2008 (R).

Sexual offences

HKLRC

Review of sexual offences—WIH on inquiry.

QCMC

How the Criminal Justice System Handles Allegations of Sexual Abuse: A Review of the Implementation of the Recommendations of the Seeking Justice Report, March 2008 (R).

Scot Law Com

Rape and Other Sexual Offences, December 2007 (R).

WACDJC

Inquiry into the Prosecution of Assaults and Sexual Offences, April 2008 (R).

Social Welfare

COmb

Application of Penalties under Welfare to Work, December 2007 (R 16/2007).

Superannuation

Man LRC

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Treasury

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NCCUSL

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NCCUSL

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Sask LRC

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Man LRC

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NCCUSL

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Scot Law Com

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ACIP

Australia. Advisory Committee on Intellectual Property

AGD

Australia. Attorney-General's Department

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South Australia. Attorney-General's Department

ALRC

Australian Law Reform Commission

ALRI

Alberta Law Reform Institute

ARC

Australia. Administrative Review Council

BCLI

British Columbia Law Institute

CAMAC Australia.

Corporations and Markets Advisory Committee

COmb Australia.

Commonwealth Ombudsman

CP

Consultation Paper

DoFP(NI)

Northern Ireland. Department of Finance and Personnel

DoJ(NT)

Northern Territory. Department of Justice

DP

Discussion Paper

FLC

Australia. Family Law Council

FLRC

Fiji Law Reform Commission

HKLRC

Law Reform Commission of Hong Kong

HMCS(UK) United Kingdom. Her Majesty's Court Service

HMT(UK)

United Kingdom. Her Majesty's Treasury

HO(UK) United Kingdom. Home Office

ILC

Law Commission of India

ILRC

Ireland. Law Reform Commission

IP

Issues Paper

JCS(ACT)

Australian Capital Territory. Department of Justice and Community Safety

Law Com

England and Wales. Law Commission

LRCWA

Law Reform Commission of Western Australia

Man LRC

Manitoba Law Reform Commission

MCLOC Australia.

Model Criminal Law Officers' Committee

MoJ(UK)

United Kingdom. Ministry of Justice

NCCUSL

United States. National Conference of Commissioners on Uniform State Laws

NSWLRC

New South Wales Law Reform Commission

NSWLCLJ

New South Wales. Legislative Council Standing Committee on Law and Justice

NSWSC

New South Wales Sentencing Council

NZLC

New Zealand Law Commission

NZMJ

New Zealand Ministry of Justice

PC

Australia. Productivity Commission

PJCCFS

Australia. Parliamentary Joint Committee on Corporations and Financial Services

QCMC

Queensland Crime and Misconduct Commission

QLCARC

Queensland. Parliament. Legal, Constitutional and Administrative Review Committee

QLRC

Queensland Law Reform Commission

R

Report

SALRC

South African Law Reform Commission

Sask LRC

Saskatchewan Law Reform Commission

Scot Law Com

Scottish Law Commission

Senate LCC

Australia. Senate Legal and Constitutional Standing Committee

TLRI

Tasmania Law Reform Institute

Treasury

Australia. The Treasury

VLRC

Victorian Law Reform Commission

VPLRC

Victoria. Parliament. Law Reform Committee

VSAC

Victoria. Sentencing Advisory Council

WACDJC

Western Australia. Legislative Assembly Community Development and Justice Committee

WALC

Western Australia. Legislative Council Legislation Committee

WIH

Work In Hand

Abbreviations

ACIP	Australia. Advisory Committee on Intellectual Property
AGD	Australia. Attorney-General's Department
AGD(NSW)	New South Wales. Attorney-General's Department
ALRC	Australian Law Reform Commission
ALRI	Alberta Law Reform Institute
ARC	Australia. Administrative Review Council
BCLI	British Columbia Law Institute
Cal LRC	Californian Law Revision Commission
CAMAC	Australia. Corporations and Markets Advisory Committee.
COmb	Australia. Commonwealth Ombudsman
CP	Consultation Paper
DCA(UK)	United Kingdom. Department of Constitutional Affairs
DP	Discussion Paper
FLC	Australia. Family Law Council
FLRC	Fiji Law Reform Commission
HKLRC	Law Reform Commission of Hong Kong
HMT(UK)	United Kingdom. Her Majesty's Treasury
HO(UK)	United Kingdom. Home Office
HoRLCA	Australia. House of Representatives Standing Committee on Legal and Constitutional Affairs
HREOC	Human Rights and Equal Opportunity Commission
ILRC	Ireland. Law Reform Commission
IP	Issues Paper
JLC	Jersey Law Commission
Law Com	England and Wales. Law Commission
LCC	Law Commission of Canada
LRCWA	Law Reform Commission of Western Australia
Man LRC	Manitoba Law Reform Commission
MCLOC	Australia. Model Criminal Law Officers' Committee
MLC	Malawi Law Commission
NCCUSL	United States. National Conference of Commissioners on Uniform State Laws

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Next issue...

In recent years, issues of mental health have received greater public attention than in the past. But have our response to mental health issues improved?

The summer 2008-09 edition of Reform will examine the interface between mental health and the law, with articles on topics such as: mental health and the criminal justice system; the role of mental health courts and tribunals; the challenges of diagnosing mental health issues; the rights of people with a pscychiatric disability; legal capacity and mental health; and the place of mental health within the broader health services system.

This edition will also carry in-depth articles on the work of law reform agencies around Australia and overseas, as well as the regular Reform 'Round-Up' and Clearing house features.

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