The 21st Lionel Murphy Memorial Lecture

Australia's Children: Does the Law Offer Them Sufficient Protection?

By

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Parliament House, Sydney

Wednesday 28 November 2007

Article 2 United Nations Convention on the Rights of the Child

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

I commence by paying my respects to and acknowledging the Gadigal clan of the Eora Nation and its elders, the traditional owners of the land that we stand and meet on today.

I am greatly honoured to be asked to give this lecture tonight, particularly given the distinguished nature of those who have preceded me as lecturers and the stature and reputation of the person that it honours.

Coming as I do from another State, I only met Lionel Murphy several times and appeared before him I think once as a junior in the High Court. They were fleeting meetings only, the first being when I was an ALP candidate in the 1972 election in a safe Liberal seat and therefore not of great political significance. My High Court appearance was equally insignificant, as my leader did all the talking.

However, anyone who was close to the Labor party of those days could not fail to have been affected by him and speaking for myself, I greatly admired him, both as an Opposition politician, Attorney- General and as a High Court Judge.

In each of those capacities he made a significant mark. To mention just a few of his achievements, as Opposition leader in the Senate he pioneered the system of committees in the Senate and made it a much more significant house of review than had hitherto been the case. He was also an integral member of the team that won government in 1972.

As Attorney-General he introduced the *Family Law Act*, which revolutionised family law in Australia, the *Trade Practices Act* and many other reforming statutes during that extraordinary period of reform that characterised the Whitlam government. He was also the driving force behind the introduction of Federal legal aid.

As a High Court Judge I can do no better than to quote from a recent speech by Justice Michael Kirby:

> ***"Would the same basic right to legal counsel for unrepresented indigent accused facing a major criminal trial, upheld by the Mason Court in the Dietrich case (also in 1992) have happened today? Would it have occurred but for Justice Lionel Murphy's famous dissent that shattered the complacent legal consensus of the past in his reasons in McInnis v The Queen. ----------Would the perception that our constitutional democracy necessitates limitations on legislative interference in freedom of the press have come without the Mason Court? Would we have broken the past false claims of the 'sovereignty' of Parliament and recognised the constitutional protection of free speech without Justice Murphy's dissent in Buck v Bavone? It was Lionel Murphy who suggested that the terms and very character of the Australian Constitution implied rights to free expression essential to making our democracy work?' (Footnotes omitted)[1]***

I understand that Lionel's brother Bill and Lionel and Ingrid's two sons, Cameron and Blake are here tonight. I take this opportunity to express my sympathy to the Murphy family on Ingrid's recent death. I had the pleasure of her company some years ago at a dinner to mark the 25th anniversary of the Family Court of Australia. I can imagine how much they miss her.

I now turn to the subject matter of this lecture in which I will argue that the law in Australia has comprehensively failed Australia's children in so many ways that they are too numerous to deal with in any one lecture like this.

In this country it is extremely difficult to get children on to the political agenda in any meaningful way. Politicians on all sides constantly speak of their support for the family, although to so many of them the sort of family

that they are talking about is a very narrow construct indeed. The single parent family or the single sex family are usually excluded from these considerations and under the Howard Government, have been the subject of significant discrimination. Children are useful for photo opportunities, but when it comes to measures that are needed for their welfare or where it is suggested that there should be some recognition of their rights, there is usually opposition or at best indifference. The rights and needs of many of our youth are shamefully neglected and young people are often the subject of repressive laws that contravene our international obligations.

Occasionally, an expressed concern for children is used to cloak a very different agenda, as I will argue has occurred recently in the Northern Territory, an intervention that I regard as particularly reprehensible for that reason.

The Howard Government made a brief foray into the area of children and youth with the appointment of Larry Anthony as Minister for Children and Youth Affairs, but that office ceased to exist upon his losing his seat at the 2004 election. A Parliamentary Under-Secretary was substituted for a period and even that office disappeared before the 2007 election. The appointment of such a Minister was a useful initiative and did provide a focal point for those concerned with issues of children and youth. However, its disappearance provides a good indicator of that Government's priorities.

In my view the appointment of a Minister with specific responsibility for children and youth is essential and it should be a stand alone Ministry, supported by a Department, both at Federal and State and Territory level. This would mean that there would be an accountable Minister and a Department with specific responsibility for children and youth. It would also mean that governments would be less likely to pass legislation that has a detrimental effect upon that sector or to ignore its needs, as they have done to date. Politicians often reiterate that our children are our future. If this expression means anything at all, it is hardly asking too much to suggest that they are of sufficient importance to require the appointment of a Minister and a Department specifically responsible for them.

However the creation of such a Ministry is only part of what is needed. In addition there should be a Federal Children and Youth Ombudsman or Commissioner, with an independent budget, an appointment for a term of years and the power to report to Parliament. The powers of such a person

should be wide and extend to inquiring into the activities of Government Departments, prisons and other corrective institutions, the armed forces, holders of television and radio licences, internet service providers, the alcohol and tobacco industry, other advertisers and commercial institutions whose activities impinge upon children.

This independent person is essential to avoid the sort of abuses that for example we have seen happen to the children of asylum seekers, which were perpetrated by government. A Minister bound by cabinet solidarity would have difficulty in challenging such actions, but an ombudsman would not. Similarly it might not be in a government's interests to examine some of the other areas that I have mentioned, but an ombudsman would be under no such constraints.

I am conscious that some States have appointed Children's Commissioners or Commissions, but there is a real need for such an office at federal level, exercising the sort of powers to which I have referred.

Even if all of the above measures were to be introduced, I consider that there is an additional need for a Bill of Rights, with specific provisions protecting children, coupled with the introduction into domestic law of the UN Convention on the Rights of the Child. (CRC). We have seen over the eleven years of the Howard government a progressive trampling over the rights of all of us, including the rights of children and youth and the attitude of that Government, particularly when it had control of the Senate, was such that only a constitutional safeguard could have protected our rights, including those of children and youth.

Examples of breaches of CRC abound. They include the lengthy detention of the children of asylum seekers, mandatory sentencing laws in the Northern Territory and Western Australia, the Federal intervention in the Northern Territory, anti-terrorist laws in relation to juveniles, alterations to the electoral system to close the electoral roll on the day that writs are issued, curfews and restraining orders in Western Australia and some other States, Family Law provisions that fail to apply children's best interests and the failure to provide proper care and protection and juvenile justice systems. To these can be added failures in Indigenous health and education provision, the high rate of incarceration of Indigenous children and the failure to provide proper representation of all children and youth before courts and tribunals.

It will be noticed that I have been careful to refer to children and youth in the course of these remarks. The reference to 'youth' is no accident. While the CRC definition of children includes those under 18, we all too often neglect the older children when we come to consider the issue of needs. Adolescents are by nature difficult and occasionally behave in a way that we do not like, but it is important to remember that they have rights too and are not to be compartmentalized or neglected as occurs for example with youth homelessness.

There is a strange paradox in public discussion about issues relating to young people in that young children are regarded as an appropriate subject for nurture and protection while adolescents are often regarded with fear and considered to be appropriate subjects for repression and punishment.

What Can a Bill of Rights Achieve?

I see this as an essential underpinning of the rights of children and youth.

First, it is quite obvious that a Bill of Rights is not a universal panacea. In countries without a working legal system and a commitment to the rule of law it may be nothing more than window dressing. Examples of such countries are often used by critics as an argument against the adoption of Bills of Rights. But such countries do not usually have a reliable legal system, with independent judges. Also, in such countries for those and other reasons, any rights that are conferred are usually not justiciable.

A better comparison is with countries that do have a well established legal system and a commitment to the rule of law, such as the USA, Canada, UK, New Zealand and South Africa. In such countries the existence of a Bill of Rights provides real protections to individuals and minority groups, including children.

An interesting example of the beneficial effects of a clause in a Constitution conferring justiciable rights upon citizens is the South African Constitutional Court decision of *Minister for Health v Treatment Action Campaign*[2]. In that case the Court held that on the facts, the Government policy of refusing to administer nivaprine to reduce the incidence of mother to child transmission of HIV AIDS at public hospitals and clinics outside nominated research and training sites was unreasonable and in breach of the rights conferred by the South African Constitution. It therefore forced the

Government to provide treatment to these mothers and children and in the process it seems likely that many thousands of children's lives will be saved. Without such a legal entitlement this could not have been achieved. It is thought provoking that such a result could not have been achieved in Australia.

Australia is now one of the few countries that do **not** have a Bill of Rights. Of countries with a similar tradition to Australia, the United States enacted a Bill of Rights in 1791.Canada has had a Charter of Freedoms since 1982, New Zealand since 1990, South Africa since 1997 and the UK since 1998. Australia is the only western nation without a Bill of Rights and indeed only a few countries such as Brunei and Burma lack such a Bill.[3]

Proposals for a Bill of Rights are anathema to conservatives whose response is usually to say that it involves handing over power to unelected judges. An additional criticism that they make is that such proposals are examples of judges and lawyers seeking to obtain additional power and work for themselves at the expense of the public.

These are curious arguments, because in so many other important areas of the law, including the interpretation of the Constitution, we do hand power to unelected judges. I suggest that we do so for the precise reason that they are independent of the political and electoral process and are therefore more likely to be impartial than any elected official.

It seems to me that there are even stronger arguments that the rights and liberties of individuals should be similarly protected, rather than to be left within the gift or otherwise of elected politicians.

Insofar as the argument about increasing work for judges and lawyers are concerned, we do not appear to worry about this in enacting other legislation such as for example, convoluted and complex taxation legislation. I suggest that there is more than enough work for all and that this argument is little more than an appeal to prejudice against lawyers.

It is of course easy to point to the occasional bizarre case in other jurisdictions that have a Bill of Rights as an example of why we should not have this sort of protection of our rights. Bizarre cases occur in relation to any legislation but the real question is as to whether this sort of legislation is necessary to protect our rights and liberties. I suggest that eleven years of the Howard Government provides the strongest argument in favour of such protection, particularly for our children and youth.

The High Court and the Protection of Children

Conservatives often argue that the protection of liberty can be left to the courts and the common law. The modern High Court has proved itself to be a very doubtful source for the protection of human rights and civil liberties. [4]

For example, in the case of *Minister for Immigration and Multicultural and Indigenous Affairs v B* the High Court has held the detention provisions of the Migration Act apply to children.[5] This was a case involving an appeal from the Full Court of the Family Court. The High Court unanimously decided that the Family Court had no jurisdiction to order the release of asylum seeking children detained under the provisions of the Migration Act, nor did it have power to make orders against the Minister for their protection.

In the course of his judgment Kirby J had this to say:

"Mandatory detention is confirmed: In the light of the foregoing history, it is impossible to draw any inference other than that the Australian Parliament intends a system of universal mandatory detention of unlawful non-citizen arrivals to remain in force, including in respect of children. In the face of the evidence, appearing as it does in the public record supplied to this Court, readily available to all, it is impossible to construe the MA otherwise than in accordance with its terms. It follows that it is impossible to accept that a significant alteration of the MA was introduced, by an undetected, unannounced, unnoticed side-wind, such as the enactment of the FLRA or the amendment of the FLA.

Mandatory detention of unlawful non-citizens who are children is the will of the Parliament of Australia. It is expressed in clear terms in ss 189 and 196 of the MA. Those sections are constitutionally valid. In the face of such clear provisions, the requirements of international law (assuming it to be as the respondents assert and as the UNHRC, in part, has found) cannot be given effect by a court such as this. This Court can note and call attention to the issue. However, it cannot invoke international law to override clear and valid provisions of Australian national law. The Court owes its duty to the Constitution under which it is established. Pursuant to the Constitution, all laws made by the Parliament of the Commonwealth are "binding on the courts, judges, and people of every State and of every part of the Commonwealth". Those laws must be obeyed and enforced, whenever they are valid and their obligations are clear and applicable. They cannot be ignored or overridden, least of all by this Court.

I do not regard it as arguable that the detention of the respondent children under the MA was permanent or indefinite. True, it lasted a long time before their release by order of the second Full Court. However, under the MA, the period of detention had a clear terminus. This (putting it broadly) is the voluntary election of the children (through their parents) to leave Australia or the completion of the legal proceedings brought by the parents on the children's behalf, with necessary consequences for the status of the children." (Footnotes omitted)[6]

The majority of the Full Court of the Family Court had considered that because the children lacked capacity of their own to determine their detention, their detention was indeterminate. The majority thought that they should be treated separately from their parents and their position assessed separately as individuals in their own right.[7] At that time the Federal Court had decided that permanent or indefinite detention of an individual was beyond the power of the Executive.

It is clear from the last paragraph of the passage cited from the judgment of Kirby J that he considered that because the parents were in a position to determine the children's detention, then it was not permanent or indefinite.

This case was followed by Al-Khateb v Godwin, where the High Court held by a narrow majority that a person could be detained indefinitely under the Migration Act in certain circumstances.[8] That decision must be regarded as the *nadir* of the High Court's role as a protector of liberties.

McHugh J, who formed part of the majority said as to a Bill of Rights:

"Eminent lawyers who have studied the question firmly believe that the Australian Constitution should contain a Bill of Rights which substantially adopts the rules found in the most important of the international human rights instruments. It is an enduring - and many would say a just - criticism of Australia that it is now one of the few countries in the Western world that does not have a Bill of Rights. But, desirable as a Bill of Rights may be, it is not to be inserted into our Constitution by judicial decisions drawing on international instruments that are not even part of the law of this country. It would be absurd to suggest that the meaning of a grant of power in s 51 of the Constitution can be elucidated by the enactments of the Parliament. Yet those who propose that the Constitution should be read so as to conform with the rules of international law are forced to argue that rules contained in treaties made by the executive government are relevant in interpreting the Constitution. It is hard to accept, for example, that the meaning of the trade and commerce power can be affected by the Australian government entering into multilateral trade agreements. It is even more difficult to accept that the Constitution's meaning is affected by rules created by the agreements and practices of other countries. If that were the case, judges would have to have a "loose-leaf" copy of the Constitution. If Australia is to have a Bill of Rights, it must be done in the constitutional way - hard though its achievement may be - by persuading the people to amend the Constitution by inserting such a Bill.[9]"

Consistently with the views already expressed in the previous case, in the case of *Re Wooley*, the High Court unanimously held that children had no special position under the Migration Act and that it was permissible to hold them in detention in the same way as adults. [10]

On the subject of international instruments McHugh J said:

"However, the issue in this Court is not whether the detention of the present applicants is arbitrary according to international jurisprudence, whether it constitutes a breach of various Conventions to which Australia is a party or whether it is contrary to the practice of other states. It is whether Parliament has the purpose of punishing children who are detainees so that, for the purpose of the Constitution, the Parliament has exercised or authorised the Executive to exercise the judicial power of the Commonwealth. On that very different issue, the international jurisprudence and the practice of other states do not assist. That is because the purpose of ss 189 and 196 is a protective purpose - to prevent unlawful non-citizens, including children, from entering the Australian community until one of the conditions in s 196(1) is satisfied. If that is the purpose of the provisions, as I think it is, the Parliament has not exercised, nor authorised the Executive to exercise, the judicial power of the Commonwealth. Whether or not Australia may be in breach of its international obligations cannot affect that constitutional question.[11] (Footnotes omitted)"

Similarly Kirby J said:

"However that may be, assuming that there is a breach of international law established by the failure of the Act, and the administration of the Act, to comply with the treaties binding Australia, such a breach does not, as such, affect the validity of the provisions of the Act or the duty of this Court to give effect to those provisions as part of a valid law of this nation. In construing any ambiguities in such law, it is legitimate for a court to interpret the law, so far as its language permits, to avoid departures from Australia's international obligations. However, where, as here, the law is relevantly clear and valid (and is the result of a deliberately devised and deliberately maintained policy of the Parliament) a national court, such as this, is bound to give it effect according to its terms. It has no authority to do otherwise".[12] (Footnotes omitted)

On the issue of parental control Gummow J said:

"It should be added that the subjection of a child to the control of his or her parent or guardian generally has not been seen as depriving that child of liberty. The starting point is the proposition that, at common law, a right of a parent or parents to custody of children who had not reached the age of discretion (14 for boys and 16 for girls) incorporates a "right to possession" of the child which includes the right to exercise physical control over that child."[13]

These decisions highlight the unsatisfactory position of children so far as the law is concerned in that for certain purposes, they are not treated as individuals but as the property of their parents. This would seem to further strengthen the proposition that a Bill of Rights conferring specific rights upon children is desirable. Subsequent to his retirement from the High Court Justice McHugh has strongly supported the concept of an Australian Bill of Rights and has suggested that these cases may well have been decided differently if there had been a Bill of Rights.[14]

The result of *Minister for Immigration and Multicultural and Indigenous Affairs v B* is itself an indictment of the then Australian Government. The

Government's only concern was to pursue jurisdictional issues, without addressing the real plight of the children concerned and for which it had been largely responsible.[15] The case also indicates the legal system does not provide and cannot provide any real protection to children in general. It was interesting to note that while Government supporters in the media exulted in the High Court's decision that the Family Court had acted without jurisdiction, none appeared to be concerned that the children had thereby been left unprotected and defenceless against abuse.

It is against this background that I come to consider the position of children in the context of a Bill of Rights.

The words "child" and "children" are not mentioned in the Constitution. The word "family" appears once. It appears in the grant of legislative power in section 51(xxiiiA) to the Commonwealth Parliament to make laws with respect to the provision of *inter alia* "family allowances", (and that provision was only introduced in 1946).

The Australian constitutional position is far from unique and in fact reflects 19th century attitudes to children and family. In this regard it is I think helpful to examine developments in other countries as to the constitutional position of children.

In this section of my paper I am much indebted to the work of Mr. John Tobin, of the Law Faculty of the University of Melbourne.[16]

Tobin points out that constitutional protection of children has passed through three phases. The first, applicable to the Australian Constitution, made no mention of children at all. This was very much a reflection of prevailing attitudes at the time that these Constitutions were adopted. Tobin says that this does not necessarily mean that their rights are ignored, particularly where, as in the USA, there is a Bill of Rights which the US Supreme Court has held applies to children as well as adults.[17] More recently as he comments, the Court has somewhat retreated from this position. [18]

Whatever be the situation in the United States, Australian children have no protection. Further, as has been pointed out, the High Court has adopted a similar approach to that in the United States of treating a child as the property of its parents.

Secondly, Tobin says that Constitutions adopted after the Second World War and before the finalization of the Convention on the Rights of the Child are more likely to have taken some account of the position of children but have done so from a protective or 'welfarist' perspective.

Tobin is critical of this protective approach and I agree with his view. He comments:

"However, a special protection constitution still falls considerably short of the approach reflected in the Convention in a number of important ways. In the first place, the emphasis is on protection rather than rights, even though it will sometimes be the case that the child is said to have a right to the relevant forms of protection. Secondly, the principal lens through which the special protection approach views the situation of the child is that of the parents, and it is often their rights that are the major concern. Thirdly, the range of child-related issues canvassed in most such constitutions is extremely limited by comparison with the standards set in the Convention. It can be concluded therefore that the great majority of constitutions that are limited in scope to a child protection approach fall short of protecting the full range of children's rights recognized in the Convention."[19]

The third category to which Tobin refers are the 'Children's Rights Constitutions' in which the special recognition of children is addressed in terms of children's rights rather than the welfare approach that characterises their treatment under 'special protection' constitutions. He points out that those constitutions that have been adopted or amended since 1989 when CROC came into effect are most likely to adopt an approach which is premised on the recognition of children's rights.

He points to one constitution notable for both its brevity and the width of the rights that it encompasses, namely the constitution of Timor Leste, which proclaims in its chapter on Fundamental Rights, Duties, Freedoms and Guarantees that:

"Children shall enjoy all rights that are universally recognised, as well as those that are enshrined in international conventions normally ratified or approved by the State."

My comment is that not only is it a remarkable phrase as Tobin says, but one born of bitter experience by that unfortunate country. Such a section appearing in an Australian Bill of Rights passed by the Commonwealth Parliament would be well within constitutional power and would be of immeasurable benefit to Australia's children. Again it is no answer to say that in the present chaotic state of Timor Leste, such a provision provides little practical protection for children. However that may be, the situation would be very different in an Australian context.

As Tobin says:

"In principal the approach of providing constitutional recognition or precedence to international treaties should result in the Convention forming part of domestic law"[20]

The Australian approach to this issue has been described by Professor Hilary Charlesworth as "Janus Faced", i.e. presenting one position to the world and another at home. She has said:

"The internationally-oriented face enjoys the international status it receives from being a party to the treaties; while the nationally-turned face refuses to acknowledge the domestic implications of its international obligations".[21]

In my view our national approach is at best misleading and approaches being dishonest. While much criticism has been directed at the United States for refusing to ratify the Convention on the Rights of the Child, the reality is that those countries like Australia who have failed to incorporate its provisions into domestic law are equally deserving of such criticism.

The Northern Territory Intervention

On 21 June 2007, the Prime Minister and the Minister for Indigenous Affairs announced an intervention in the Northern Territory, ostensibly to protect Indigenous children from sexual and other abuse. The announcement was made in response to the Ampe Akelyernemane Meke Mekarle, "Little Children are Sacred" Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse 2007 of 30 April 2007. That report revealed a shocking situation in relation to the abuse of Indigenous children in the Northern Territory and clearly called for urgent action by the Northern Territory Government. The findings of the report were summarised by its authors, Rex Wild QC and Pat Anderson as follows:

- ***"Child sexual abuse is serious, widespread and often unreported.***
- ***Most Aboriginal people are willing and committed to solving problems and helping their children. They are also eager to better educate themselves.***
- ***Aboriginal people are not the only victims and not the only perpetrators of sexual abuse.***
- ***Much of the violence and sexual abuse occurring in Territory communities is a reflection of past, current and continuing social problems which have developed over many decades.***
- ***The combined effects of poor health, alcohol and drug abuse, unemployment, gambling, pornography, poor education and housing, and a general loss of identity and control have contributed to violence and to sexual abuse in many forms.***
- ***Existing government programs to help Aboriginal people break the cycle of poverty and violence need to work better. There is not enough coordination and communication between government departments and agencies, and this is causing a breakdown in services and poor crisis intervention. Improvements in health and social services are desperately needed.***

- ***Programs need to have enough funds and resources and be a long-term commitment.***
- ***It is impossible to set communities on the path to recovery from the sexual abuse of children without dealing with the basic services and social ills. It is our hope that no Aboriginal child born from this year on will ever suffer sexual abuse.[22]"***

The report contained some 97 recommendations to address the issue and runs to 376 pages. It records significant and extensive consultation with Indigenous people, including children, and is a far sighted and genuine attempt to address the problems of child abuse.

The Report was made public on 15 June 2007. It emphasised the need for real consultation with, 'and ownership by the communities of those solutions. Significantly, the authors said:

"In the first recommendation, we have specifically referred to the critical importance of governments committing to genuine consultation with Aboriginal people in designing initiatives for Aboriginal communities, whether these be in remote, regional or urban settings. We have been conscious throughout our enquiries of the need for that consultation and for Aboriginal people to be involved."[23]

Some 6 days later came the Federal Government intervention. It came entirely without consultation with the Indigenous people and ignored the substantive recommendations of the report to which it was purportedly responding.

Professor Ian Anderson, Professor of Indigenous Health at the University of Melbourne in a contemporary article about the Anderson/Wild report said:

'none of the … measures announced by Prime Minister Howard are… to be found in the strategies recommended by the Anderson/Wild report'.[24]

It is quite obvious that the report was used as a trigger to further the Government's Indigenous policies without regard to the interests of the children concerned but with a view to the forthcoming election. The Government had been in office for eleven years at the time of the launch of this initiative and had done little or nothing for Indigenous people. The Government's refusal to sign the UN Declaration on the Rights of Indigenous People 'makes a mockery of our supposed renewed commitment to addressing the welfare of Indigenous Australians'.[25]

Despite considerable public protest, the *Northern Territory National Emergency Response Act* 2007 was passed by Parliament without amendment and came into effect on 18 August 2007. It is an Act of some

500 pages in which the word ‘children’ does not appear and the responsible Minister, Mr. Brough, admitted that he had not read it before it was passed.

Pat Dodson has recently written:

“The tragedy of the Howard Government’s eleven-year hold on power is that Indigenous policy has focused on destroying the potential for this nation to respect and nurture the cultural renaissance of traditional Indigenous society. Public policy that celebrates Indigenous culture has been shunned.

We are left with a vague sense that the problems of the present-day crisis have no history and that the way forward is for Indigenous people to abandon their identity and be absorbed into European settler society”.

He continued:

“In this conservative world view, population movements from remote communities or welfare dependent towns to urban environments with economies struggling with or sustained by the global market are simply par for the course. Such communities sink or disappear. Forty thousand years of a society founded upon different presuppositions to the Greco-Roman tradition and the Protestant work ethic of industrialisation is finally colliding head on with the believers of the meteor called the global market economy.

The benign use of government language — mainstream services, practical reconciliation, mutual obligations, responsibilities and participation in the real economy — cloaks a sinister destination for Australian nation building.

The extinguishing of Indigenous culture by attrition is the political goal of the Howard Government’s Indigenous policy agenda. Our nation is confronted with a searing moral challenge.”[26]

It is not my purpose today to argue that nothing needed to be done about the problems of sexual abuse and alcoholism in the Indigenous community, but what I do say is that what has been done is about the worst possible approach to the problems of Indigenous people. The policies adopted have demonstrated contempt and lack of respect for Indigenous people and are a reversion to older attitudes that we in the white community will determine what is best for them. The justification adopted by the Government was that its motivation was to protect Indigenous children from sexual and other abuse. This means that anyone criticising the Government could be accused of tolerating such mistreatment of children. This no doubt accounts to some extent for the support given by the then ALP Opposition to the Government’s measures. Whether this was the Government’s real motive is highly questionable. A hint was given in a speech by the then Prime Minister at Hermannsburg Mission on 28 August 2007 where he is quoted as saying:

“Whilst respecting the special place of indigenous people in the history and life of this country, their future can only be as part of the mainstream of the Australian community.”

I can only echo the remarks in the publication that reported this (Crikey) when it said:

"This is much more than a targeted intervention aimed specifically at eradicating sexual abuse. Here the PM is talking about assimilation. About what some would see as the eradication of identifiable, self-reliant, self-determining aboriginality. He is talking about winding back the clock to the nineteenth century. Isn't that something the rest of us should talk about first?" [27]

The breadth of the legislation is frightening and it significantly overrides the rights of many Indigenous people in ways that would not be tolerated by the ordinary Australian community. It is discriminatory and racist and bundles all Indigenous people together as potential pornographers, child molesters and persons habitually addicted to the excessive consumption of alcohol. Professor Mick Dodson made the following comments about what was then the draft legislation:

"But, we now have draft legislation which uses a form of abuse in the name of stopping abuse. What an abuse of process this is. It is an assault on democracy and an abuse of decency. We are asked to accept abusive government behaviour in our name to stop abuse. We are asked to believe these are 'special measures' so we can be comforted that they comply with the Racial Discrimination Act. We are told we need to accept this so that country can meet its international obligations. We are asked to accept that just to be absolutely sure our government needs to 'dis-apply' the RDA." [28]

I think that Professor Dodson was right about this. Discriminatory legislation which singles out one group offends the fundamental principles of constitutional law, in this country, the UK and the US. In the US[29] the principle was stated by Jackson J as follows:

> "The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally ..... Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation."

This statement was referred to with approval by Lord Bingham in the House of Lords in the recent *Belmarsh* case where the Court held that a purported power given to the Executive to imprison without trial foreign, but not British nationals was illegal and discriminatory.[30]

The new federal legislation clearly offends this principle, but unfortunately the present constitution of the High Court makes it unlikely that a challenge would succeed on this ground, particularly in the absence of Bill of Rights protection.

As with its anti-terrorism laws and treatment of asylum seekers, the Howard Government approach was that the end justified the means. It was also ironic to see it attempt to cloak its actions by reference to its international obligations in this case. As usual its response was heavy and punitive and calculated to gain the maximum political capital.

The legislation involves the following measures:

- The acquisition of land and property without provision for proper compensation
- The possible alienation of traditional lands and those lands being made available for private ownership.
- The suspension of the Racial Discrimination Act. (Exceptions to that Act under the previously existing legislation were only permitted when a court sanctioned them as special measures for Indigenous people after consultation with them. This legislation involves the substitution of the Government's own judgment rather than that of a court as to whether measures undertaken are special measures for the benefit of the Indigenous people and without regard to their opinion as to whether they are of benefit to them.)
- The removal of social security benefits (inter alia) where a child is considered to be in need of protection, where the parents reside in specified areas of the Northern Territory, or where a child has an unsatisfactory attendance at school.
- The abolition of the Community Development Employment Projects (CDEP). This will have the immediate effect of throwing at least 5000 Indigenous people out of any form of paid work.
- Compulsory provision for the prevention of the sale or possession of alcohol in certain areas.
- Preventing a court from taking into account Indigenous customary law or practices in sentencing offenders.
- Measures directed at the use of computers for pornographic purposes and possession of pornographic material.
- Abolition of the "permit system" controlling access to remote Aboriginal lands.

It takes only a moment's thought to appreciate the injustice of most of these measures so far as the Indigenous community in the Northern Territory is concerned.

The property and land acquisition powers are very troublesome, particularly given the Government's apparent assimilation agenda.

Most of these measures are a long way from tackling problems of child sexual abuse.

Take for example the power to restrict payment of social security benefits because a person lives in particular areas of the Northern Territory. This is clearly aimed at forcing Indigenous people to live in areas that the Government determines, rather than where they determine. This seems more directed to forced relocation of people to where the Government wants them to live. Such a measure would never be tolerated by the broader Australian community.

Similarly, benefits may be withdrawn in the event of unsatisfactory school attendance. Again this would be unacceptable in the wider community. Further, it involves a complete lack of appreciation of Indigenous culture.

First, the parents may lack the power to force the child or children to attend school. Many parents in the broader community have difficulty requiring children and particularly teenagers to attend school. In many Indigenous communities the birth parents are not even the people who have the final say as to what children will or will not do. These decisions are not uncommonly taken by members of the extended family.

Secondly, it ignores practices such as the child adoption practices of the Torres Strait Islanders, a number of whom live in the Northern Territory, where there is a well established custom for children to be `given' to siblings or other blood relatives which may mean a third or fourth cousin by blood, as well as much closer relatives. So far as the Islander Community is concerned, such children become, for all purposes, the child of the recipient; they are brought up as the child of that person and the fact of adoption is normally kept secret from the child. However, the obligation of making them attend school will fall on the biological parents under this legislation.

Thirdly, there is also a common, different and much looser arrangement amongst many Indigenous people where children are left in the care of particular people for sometimes indefinite periods.

The then Government's legislation was based upon a nuclear family assumption, which has little or no relevance to many Indigenous

communities. It also ignores the fact that through years of neglect of basic services to Indigenous communities, many children will be living in situations where the provision of education services is inadequate and unattractive.

Similarly, the restrictions on alcohol may be entirely unnecessary in some communities, either because they are already voluntarily 'dry', or because alcohol is used just as responsibly as it is used by the rest of society. There is a strong view that the imposition of virtual prohibition may have the result of exacerbating existing alcohol problems as it has done in other societies. What is needed is a much more sensitive approach involving a combination of education and health services coupled with better control of alcohol outlets.

The abolition of the CDEP scheme introduced by the Fraser Government was another retrograde step. It has provided a form of employment for many Indigenous people in places where the concept of anyone being able to obtain a regular job as the then Government promised is no more than a pipe dream. Similarly the abolition of the permit system was hard to justify on any logical ground. I understand that the Rudd government has announced that it will reverse these two measures

The interference with judicial discretion on sentencing to prevent a sentencing judge taking matters of customary law or practice into account is disgraceful. Such an approach does not apply for example to Jewish or Islamic people or to the people of many nationalities that have come to Australia to live who have come from places where there are different customs and practices. It is utterly unjust and stupid for judges to be prevented from taking these matters into account in determining the degree of criminality of the offender and the appropriate punishment. It is nothing more than a Government over-reaction to media publicity about certain sentences that have been imposed by particular judges and magistrates and is highly discriminatory towards Indigenous people.

In this regard Professor Larissa Behrendt, in an article commenting upon the proposal when first initiated by Mr Brough, the former Minister for Aboriginal Affairs said:

"But the federal government has become overly obsessed with the issue of customary law defences. Many Indigenous people like myself have been critical of the way in which some members of the judiciary have accepted evidence that violence against women is an accepted part of our culture and have taken this erroneous representation into account in sentencing.

The appropriate response to this phenomenon was to work with the judiciary to provide a better understanding of the cultural values of the Aboriginal community rather than be fooled by the misrepresentations. (Ironically, Minister Brough contributed to the misrepresentation of Indigenous culture when the issue re-emerged six weeks ago when he blamed the levels of abuse and violence on Aboriginal culture.) To respond to the issue by removing from legislation the ability of sentencing judges to take into account customary factors that may be relevant is a heavy-handed response in the wrong direction. It infringes on the judge's ability to take all relevant factors into account in the circumstances, and this kind of restriction can create more injustice than it seeks to address. Such interference in the practice of sentencing is also an increasing encroachment on the separation of powers"[31].

I agree with Professor Behrendt about the need for judicial education as to Indigenous culture. During my time as Chief Justice of the Family Court of Australia I instituted such programmes with considerable success. They were also received with enthusiasm by the judiciary, who were aware of the need for it.

Another very real concern is the enormous power that this legislation confers upon public servants and Australian Federal Police. Many of them may have very limited experience in dealing with the problems of Indigenous people and may lack understanding and sympathy for them. Worse still, there will be very little to curb their power and a distinct lack of accountability or supervision by courts.

Further there is the highly questionable use of the Australian Army in this exercise. It is difficult to see that their involvement is a legitimate Defence activity and it must send an appalling message to the Indigenous community.

The real problem is that the Government acted in a precipitate way without consultation with the Indigenous people or with people with child protection expertise.

By treating the Indigenous people in this way, the then Government demonstrated a clear lack of respect for them and as such, their co-operation could hardly be expected The situation was exacerbated by the then Government's inability or failure to give any or any sufficient explanation as to why all of these measures were necessary to protect the children.

In a recent article Professor Raymond Gaita commented:

"Could this disrespect be shown to any other community in this country? The answer, I believe, has to be no. If that is true, then it betrays neither cynicism nor insufficient love of country to suspect that, to a significant extent, Aborigines and their children are still seen from a racist denigrating perspective. From that perspective, the (sincere) concern for the children is concern for them as children of a denigrated people, just as

it was when the children whom we now call the Stolen Generation were taken from their parents."[32]

What has also been overlooked is that the problem of sexual abuse of children is by no means confined to the Indigenous community and yet the then Government consistently displayed a complete lack of interest in its control or prevention elsewhere. The same can be said of problems associated with the excessive consumption of alcohol, which the then Government consistently failed to address in the wider community.

It is to be hoped that the Rudd Labor Government will approach the implementation of this legislation in a much more sensitive manner and with real consultation with the Indigenous people. Unfortunately, its past support for the legislation may operate to restrict amendment or repeal of some of its more offensive aspects. However, it is open to it to take a much more inclusive approach to the Indigenous community and to hold proper consultations with it.

In this lecture I make a number of recommendations for reform. In doing so I am conscious of the need to dismantle the effects of a number of retrograde social policies of the Howard government, which have done almost as much damage as its industrial relations policy.

It is important to make the point that in the presence of a Bill of Rights most of the objectionable aspects of the legislation and much of the legislation underpinning that social policy would be liable to be struck down. It would thus act as a real protection against the unwarranted seizure of power that has been involved.

In relation to Indigenous issues, the former Prime Minister had something of a death bed conversion and expressed the intention, if elected, to support an amendment to the preamble to the Constitution in order to specifically recognise Indigenous people. The problem with this approach is that it is entirely symbolic and without legal effect.

It would be much more effective and appropriate to recognise the rights of Indigenous people and Indigenous children in the Constitution itself, or in a Bill of Rights. The plight of Indigenous children remains serious, despite countless reports and other interventions. In 2006 Indigenous children were almost 5 times more likely to be the subject of a substantiated report than other children and they were over 7 times more likely to be in out of home care than other children across Australia.[33]

If there was some Constitutional recognition of a meaningful nature, this might provide an impetus for further and appropriate action to remedy this situation.

Children in Family Law

I feel that a former Chief Justice of the Family Court of Australia giving a lecture in honour of Lionel Murphy could not forbear from comment on family law issues as they affect children.

It is timely that I should do so because the insidious notion of children as property of their parents has also manifested itself in the *Family Law Act* and in particular in the amendments introduced by the Howard Government in 2005. They have also increased the likelihood that children will be exposed to abuse and violence because of the emphasis given by the legislation to the supposed 'rights' of the parents. It is highly questionable whether these changes could have been made in the presence of an appropriate Bill of Rights, or if CRC had been incorporated into Australian law.

There have been many changes to the *Family Law Act* since its introduction in 1975. Often the name of Lionel Murphy has been used by one protagonist or another to support the view that particular changes should or should not have been made.

It is difficult to ascribe views to someone who is no longer with us. It is possible however to look at the general philosophy that lay behind the Act and arrive at some conclusions. For example, I doubt that Murphy would have approved of the emasculation of the Court's counselling and mediation service that occurred under the Howard Government, or the setting up of a separate Federal Magistrates' Court that did not contain a provision that the persons appointed be persons who are, "by reason of training experience and personality, a suitable person to deal with matters of family law."[34]

Indeed the setting up of the Federal Magistrates' Court as a court with a wide general jurisdiction runs contrary to the spirit and philosophy of the *Family Law Act.* That envisaged a specialist court to deal with family law disputes, in contradistinction to what had occurred before where family law was dealt with by a number of courts of general jurisdiction with usually unsatisfactory consequences.

It is sometimes forgotten what a bold and progressive step that was and one for which Murphy can take most of the credit. The concept of a specialist family court, with suitably trained judges assisted by counsellors and

mediators was a world first and the Family Court of Australia remains a world leader in this field, almost despite the efforts of the last two Federal Attorneys-General, Williams and Ruddock. It was unfortunate that the Act's initial implementation was left in the hands of a government elected in 1975, which never had a commitment to it and that subsequently it was beset by the problems associated with attacks on its judges and later again by governments without the same commitment to its success as Murphy had.

Similarly, the provision of appropriate legal aid was very much a lynchpin of the original Act and one that Murphy supported wholeheartedly. Again the gradual whittling back of the availability of aid has been a feature of the last twenty years, which has in turn led to a considerable amount of injustice to litigants in the family law system. In a foreword that I wrote to a book *Trial by Legal Aid* in 1999, I said;

> ***"In the past few years the availability of legal aid throughout Australia has been significantly reduced. This has had an impact on all areas of law, but it has been particularly damaging in family law, where aid for adults and for the representation of children has become subject to stringent and often inflexibly administered guidelines.***
>
> ***It must be assumed that women and men for whom aid is denied must either abandon a claim that may be quite legitimate, or remain unrepresented. This presents inordinate difficulties at a time of great distress, and puts additional pressures on both the Court and the lawyers acting for other people in the dispute. It inevitably increases the opportunities for delay and reduces opportunities to settle disputes.***
>
> ***Family law matters tend to be both bitter and legally technical. They are usually of such a nature that persons acting for themselves can rarely do adequate justice to the case they want to present. In addition to the normal difficulties presented by court appearances and the preparation of the necessary paperwork, the nature of family law disputes makes it almost impossible for previously intimate partners to negotiate with each other, or examine or cross-examine each other in an objective, effective or meaningful way. When there are allegations of violence or child abuse the position becomes even more difficult and the more vulnerable person may be further intimidated. If children's welfare is somehow in dispute and they have no one to act for them, there can be no meaningful cross-examination of witnesses by anyone and their circumstances are extremely difficult to establish.***
>
> ***At an earlier stage of proceedings, settlements can often be reached by lawyers who are skilled in negotiating and are able to argue with objectivity. It is understandable that people with a high level of animosity towards each other cannot take advantage of this opportunity, and they risk pursuing unnecessary litigation as a consequence, with all the difficulties and distress which accompany it."***

The situation has not improved in the ensuing 8 years. Arguably, this deficiency has, as much as anything, increased public dissatisfaction with family law and led to the perpetration of much injustice, particularly to children.

As a devoted internationalist, I doubt that Murphy would have approved of Australia's failure to give legislative effect to CRC or of the flagrant breaches of it that have been permitted by both Federal and State and Territory Governments.

I think his condemnation would also have been directed at the 2005 amendments to the *Family Law Act* and in particular to the background to those changes being made and the effect of parcelling children around the context of time without regard to their rights and interests. He also would have been appalled by the gender discrimination associated with that process.

The Family Law Reform Act 1995 was enacted by the incoming Howard Government in 1996, having been developed by the previous Government. It had a number of features stemming from the UK Children Act of 1989, including the substitution of the words 'residence' and 'contact' for 'custody' and 'access', and also contained a number of confusing and misleading provisions in relation to parental responsibility. These provisions had been introduced in response to pressure from fathers' groups. It is somewhat difficult to discern what the purpose of this Act was. Professor Reg Graycar commented on these 'reforms' as follows:

A major stated aim of the reforms was to create a new normative standard of shared parenting for separated couples. Apparently, it was believed that this might change the long-standing practice of one parent assuming day-to-day responsibility for the children after parents separate. While shared parental responsibility is a laudable aim, what is most significant about the Act, self-consciously labelled a 'Reform' Act, is that, unlike most exercises in law reform, it did not address any particular problem or respond to some identified 'mischief' that apparently flowed from the practice of children being raised predominantly by one parent.

In its publicity material and statements following the introduction of the legislation the Government sought to convey that the new Act would further equal sharing of time. This was quite wrong and it created false expectations by fathers in particular, as to their entitlements. Following its introduction there was an explosion of litigation, particularly in the area of contact applications and applications for contravention of contact orders, mainly by fathers.

There was no systematic evaluation commissioned by Government of the Act's effects or review of the way that it was operating. In the absence of such evaluation, the Court commissioned one in conjunction with Sydney University, which was carried out by Helen Rhoades, Professor Reg. Graycar and Margaret Harrison. [35]

They found that the Act had led to a substantial increase in litigation and also a considerable increase in the making of equal time orders, on the hearing of interim applications for contact. These were being made despite the fact that there were often serious allegations of violence and abuse against fathers. Because of the nature of interim hearings, it was not possible to test these allegations and they were to a large extent ignored. At the same time they found that when cases went to final hearing, the results were no different to what they had been before the Act was passed and when violence and abuse was found to have occurred, the orders would be tailored accordingly for the protection of the child or children involved. This led to the disturbing conclusion that many more children were likely to have been exposed to violence and abuse as a result of these interim orders.

However, the objects and changes contained in the 1995 Act were barely introduced before they were overtaken by a new wave of calls for reform by fathers' groups, who were dissatisfied that the Act did not provide for a presumption of equal sharing of time between parents.

Over the years, these groups have constantly agitated for family law change, asserting that the family law system is biased against fathers. No evidence is advanced beyond assertion and by individuals claiming that they have sustained injustice. Their approach is strongly anti-feminist and indeed discriminates against women and I would argue, children. In relation to the impetus for the 1995 Act, Professor Graycar commented:

"So, if the Part VII reforms were not a legislative response to an identified problem or to research data about what is in the best interests of children, where did they come from? I suggest that they were a response to the anecdotes constantly recounted to politicians; the stories of aggrieved non-custodial fathers who told (and continue to tell) bitter tales of gender bias against them by the legal system, and particularly by the Family Court. The fathers' rights groups have been remarkably successful in capturing the attention of the politicians. This motivation for the reforms is obvious from the Government's Second Reading speech, and from the contemporaneous Parliamentary Debates where there are numerous references to the hope that a shared parenting law would alleviate the distress of non-custodial parents, the majority of whom are fathers The fathers' groups persistently claim that the Court is 'biased' against them. But their claims had (and have) no empirical support: the literature and the available studies show that the Family Court makes orders (in contested cases) in

favour of fathers at twice the rate of those made by consent. The fathers' anecdotes that so captured the attention of the politicians (and I should emphasise that this is a non-party political issue: the legislation was introduced by the previous Labor Government) invoked the discourses of 'victimhood' and 'formal equality' in much the same way as happened in the lead up to the Children Act 1989 reforms in the United Kingdom.[36]"

Through most of the 1980's and 90's fathers' groups were noisy but unsophisticated and often unpleasant, and in the early stages their campaign appeared to have little effect. Similar movements also emerged in the UK, Canada and the US and the themes in those countries were basically the same. In Australia however, they attracted the support of some powerful media commentators such as Bettina Arndt and their approach began to resonate with right wing members of the Liberal and National parties and their supporters from the religious right, together with some Opposition backbenchers. More recently, the historian John Hirst published a diatribe against the Court that was notable for its many inaccuracies and lack of balance.[37]

Their approach was and is not child oriented, but perpetuates the notion of a child as a chattel, whose time is to be equally divided between the parents, for the benefit of the latter, but not necessarily for the child. As Professor Graycar has said, fathers are wrongly portrayed as victims and there is a constant repetition of claims of bias in the system by the Courts and by lawyers.

By the late 90's the approach of fathers' groups began to be more sophisticated. Large numbers of MPs, mainly on the Government side, were lobbied and regaled with stories of alleged injustice. Their assertions began to be backed by 'evidence' and 'research', usually commissioned by similar groups in the US and of doubtful validity. Letter writing campaigns were conducted through regional newspapers together with much talk back radio activity and they began to create a public impression that their complaints had some substance. The villains of the piece in their eyes were the Family Court itself and the lawyers who practiced there.

Eventually the backbench movement sought and obtained direct access to the then Prime Minister, Mr Howard, who was attracted to their complaints, his conservative background clearly impressed by the slogan that every child needs a father. This is nothing more than a mantra, but it does have superficial appeal. It begs the question as to what sort of father the person is when individual cases are examined, as the courts must do. In fact the courts

have rarely excluded a parent from contact with a child and when they do so it is in extreme cases where the contact is likely to endanger the child.

The then Prime Minister in turn announced the establishment of an inquiry into Family Law and the Child Support Agency in late June 2003 and the then Attorney-General and the Minister for Children and Youth Affairs referred the issues to the House of Representatives Standing Committee on Family and Community Affairs.

The composition of the Committee was interesting in that there were no lawyer members, nor being a House of Representatives Committee, were there any representatives of minor parties. The time frame for the Committee to report was short and the report was in fact delivered by the end of 2003, leaving no time for a proper examination of the evidence. The whole exercise was clearly directed at the forthcoming 2004 election.

The terms of reference specifically asked the question as to whether there should be a presumption that children should spend equal time with their parents following separation and, if so, in what circumstances such a presumption could be rebutted.

Ultimately the Committee, surprisingly given the background, rejected the concept of a presumption of equal sharing of time, but did accede to the anti court and lawyer bias of those seeking change by recommending the setting up of a Families Tribunal, from which both lawyers and interpreters were to be excluded, which would make binding determinations in child custody disputes, except for cases involving entrenched conflict, violence or abuse. The decision makers were to be selected from a panel of accredited family relationship professionals. The Government did not accept these recommendations, probably for constitutional reasons.

The recommendation for the exclusion of lawyers is worthy of comment as indicative of the bias of the report. It is difficult to imagine a more disempowering action than to deny the right to a lawyer to a person engaged in a family dispute, often with a dominant male former husband or partner. The fact that it could be contemplated gives considerable force to Professor Graycar's comments about the political influence of fathers' groups.[38]

Although the fathers' groups failed in their attack on the Family Court and family lawyers and in achieving their primary object of enshrining a legislative presumption of the division of children's time equally between their parents, they did achieve significant changes to the legislation in that direction, which I contend is not in the interests of Australia's children and

in fact increases the likelihood of them being the subject of violence and abuse.

The legislation that was introduced is not child focussed and was not fully or thoroughly researched, but was based upon a combination of ideology and political expediency to an even greater extent than the 1995 Act.

A primary 'reform' was the setting up of Family Relationship Centres. During its term of office, the then Government, through a process of financial attrition, had seriously depleted the Court counselling service to the point where it could no longer perform the mediation and counselling role that it had performed hitherto. This had previously included substantial pre-filing counselling and mediation which did much to avoid the necessity for litigation. Apparently for ideological reasons, the then Government did not consider this to be an appropriate role for the Court.

The result was that a void had been created and therefore the advent of the Family Relationship Centres went some way towards filling it. However there are significant limitations to the legislation which derogates from their effectiveness.

First there is a specific provision that prevents the involvement of a person's lawyer in the process. This is an insulting example of anti-lawyer prejudice that effectively denies vulnerable people of a source of advice at a time when they need it most. In fact, most family lawyers are extremely supportive of mediation and conciliation initiatives and actively promote them. I think that this approach understates the need for people in a family law dispute to have someone to whom they can turn that is "on their side". This particularly applies to women, where there is often a power imbalance in the relationship.

Secondly there is no provision for these centres to assist in the resolution of property disputes. Very often these disputes are entwined with the dispute about children, often for the obvious reason that somewhere needs to be provided for the children to live and that is usually the former matrimonial home. To try to mediate one dispute without the other is a recipe for failure.

Thirdly, the legislation is framed in such a way that it is almost impossible for couples to avoid either the centres or another mediation process with a family dispute resolution practitioner as a prerequisite to the commencement of litigation in children's cases.

At first sight this may seem sensible but it ignores the high levels of child abuse and family violence in our community, for which mediation is contra-

indicated. It is now only possible to avoid this process by establishing to a court that there are reasonable grounds for finding that there has been abuse or risk of abuse to a child or family violence or a risk of it by one of the parties to the proceedings.[39] How many people are going to be prepared to make such an application, given the cost and difficulties involved? This approach also ignores the effect of abuse upon its victims. They are notoriously reticent about disclosure and often have to be drawn as to whether abuse has occurred. These people are unlikely to make a preliminary application to a court.

Therefore victims of violence are likely to be forced into mediation with perpetrators, without legal assistance, in circumstances where the power imbalance inevitably favours the perpetrator.

I consider these to be highly retrograde provisions that militate against women and children in particular.

I now turn to the provisions relating to the sharing of parental responsibility. The Act contains a provision that in making a parenting order a court should apply a presumption of equal shared parental responsibility[40], subject to some exceptions. These include reasonable grounds for belief that a parent of a child has engaged in abuse of the child or another child who at the relevant time was a member of the family of the parent or a person who lives with him/her or family violence or other evidence that the application of the presumption would not be in the child's best interests.[41] This imposes a much more stringent test in relation to abuse than that laid down by the High Court in *M and M* in relation to the continuation of contact, where the Court was of the view that it was normally inappropriate to make findings that abuse had occurred, the appropriate test being whether the continuation of contact constituted an unacceptable risk to the child. [42]The Act as now drawn apparently contemplates a presumption of equal shared parenting responsibility even in the presence of such an unacceptable risk, if abuse cannot be established on the probabilities.

Also, this provision leads to misapprehensions about what the Act means, as equal parental responsibility is easily confused with equal sharing of time. The same presumption applies to interim as well as final applications. This perpetuates and exacerbates the problem identified in the 1995 Act of encouraging successful interim applications for equal sharing of time when there are serious allegations of violence and abuse.

The Full Court of the Family Court of Australia found in a recent case that there had been a significant change in the law in relation to such interim

applications and in particular that a previously expressed principle laid down by the Full Court no longer applies. [43]This was:

"where the evidence clearly establishes that, at the date of hearing, the child is living in an environment in which he or she is well settled, the child's stability will usually be promoted by the making of an order which provides for the continuation of that arrangement until the hearing for final orders, unless there are strong or overriding indications relevant to the child's welfare to the contrary. Such indications would include but are not limited to convincing proof that the child's welfare would be really endangered by his/her remaining in that environment." [44]

The departure from this child focussed principle is a strong indictment of the amended legislation. Regardless of the stability of the child's situation, this is overridden by the demands of the legislation for equal sharing. This will often occur at a point where the child's world has already been shattered by the parental breakup.

The Act, prior to this amendment and its predecessors, always contained a provision that each parent had parental responsibility (or earlier guardianship) of a child unless the court otherwise ordered. This affectively amounted to shared parental responsibility and it is difficult to see why there was any need for change. The Full Court of the Family Court has now interpreted the new legislation as meaning something more than provisions for shared responsibility contained in earlier legislation, or the arrangements that exist in intact families, where parental responsibility is usually joint, but can also be exercised individually. It says that the type of responsibility envisaged by the new legislation can only be exercised by both parties acting together in relation to serious matters affecting a child.[45] The practical result of the legislation requires agreement on matters such as this by two persons who may have difficulty agreeing about anything, which must be the antithesis of good parenting.

The situation is made worse by s65DAAA which provides that where a parenting order provides for equal shared parental responsibility, the court must consider whether the child spending equal time with each of the parents would be in the best interests of the child, is reasonably practicable and if it is, to consider making an order for the child to spend equal time with each parent.[46] On interim hearings, where it is not possible to determine the truth or otherwise of the accusations of violence and abuse, this leads to a real danger that the court will feel obliged to provide for equal sharing of time in circumstances where the child is at risk.

If the court does not make an order for the spending of equal time it must go through the same exercise in considering whether the child should spend substantial and significant time with each parent.[47]

'Substantial and significant time' is defined as necessarily including both holiday and non-holiday time and time allowing a parent to be involved in the child's daily routine and occasions of particular significance to the child and the parent.[48]

In considering reasonable practicality, the court must have regard to how far apart the parents live from each other, their current and future capacity to implement the arrangement and to communicate with each other and resolve difficulties that might arise, the impact of such arrangements upon the child and such other matters as the court considers relevant.[49]

The requirement for substantial and significant time appears to have its origins in submissions made to the relevant Parliamentary Committee and accepted by it that the court favoured a principle of division of time of 80% in favour of the residential parent and 20% in favour of the non-residential parent. In fact I had never heard of this so-called principle until I attended a meeting of the Committee and it certainly formed no part of the thinking of judges and magistrates.

In considering this legislation and proposals for a presumption of equal sharing of time, or substantial and significant time, it should be remembered that the needs of children differ depending upon age and other factors. The needs of infants, pre-school children, primary school children and adolescents and late teenagers are all different and contact that is appropriate for one group is quite inappropriate for another, quite apart from individual differences between children within those groups. One must also be careful not to unreasonably disrupt children's lives. As they get older many children value time with their friends as much, if not more, than time with their parents. They also have study and sport and leisure obligations of their own which must be borne in mind in making contact arrangements. It is thus inappropriate to provide for any sort of formula, including a presumption of equal sharing of parental time, if the child's best interests are to be considered.

In intact relationships most children do not share equal time with their parents and it is difficult to see why such a presumption should apply when the parents are separated.

Equal sharing of time is a concept that is focussed on the needs of the parents rather than the child and is one which, despite its superficial appearance of equity, neglects the needs of the child in the equation.

The way that a court goes about determining a child's best interests under the new legislation also presents problems. It is set out in s 60CC which replaces former s 68F, which set out a list of criteria that the court was required to take into account, where applicable, in determining a child's best interests.

The difference is that the new section sets out two primary considerations and a number of additional considerations that a court is to take into account, in contrast to the earlier section, which drew no distinction between the various considerations. The primary considerations are:

"(*a) the benefit to the child of having a meaningful relationship with both of the child's parents; and*

(b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence"

By and large the new section covers the ground of the old one except for the distinction between primary and additional considerations. However it is not at all clear what follows from this distinction. The Act is silent as to what follows from this and one could imagine cases where the primary considerations are in conflict with each other.

Also, while one can accept the need for prioritising the matters referred to in consideration (b), which are self evident in any case where the need is likely to arise, consideration (a) assumes a benefit which in particular cases may not be a benefit at all. It is obvious that in most cases there is such a benefit, but very often the real issue in family law proceedings is whether the benefit exists in the particular case having regard to the behaviour of the parent concerned. Where it does not then this 'need' should not be prioritised.

This provision also has the potential to create real problems in relation to relocation cases. These cases always provide great difficulties for the courts but I think it can be said that the law, prior to the amending legislation had become well settled. The elevation of the principle of *the benefit to the child of having a meaningful relationship with both of the child's parents,* as a primary consideration in determining best interests, coupled with the provisions as to consideration of equal time, may have changed the law in this regard. If the law has been changed, I do not think that it is a change for

the better. In a recent family law relocation case the majority of the Full Court (Bryant CJ and Boland J) said:

"However consistently with what the Full Court said in Goode, the options of the child spending "equal time" or "substantial and significant time" with each parent must now be given separate and real consideration, notwithstanding that a relocation proposal may also have to be given subsequent consideration, with the advantages and disadvantages of that proposal then being balanced against the advantages and disadvantages of an "equal time" or "substantial and significant time" arrangement. Not to approach a case involving a relocation proposal in this way, would devalue the imperative imposed by the Act to consider whether it is in the best interests of a child in a case to spend "equal time" or "substantial and significant time" with each parent."[50]

In the event, the Court did allow the relocation of a child from Canberra to north Queensland, but clearly recognised a change in the law.

Such cases are often heartbreaking, but I would not like to see a situation develop where a party, usually the mother, is more confined in her capacity to move away than was previously the case. As the law stood before the 2005 amendments, it was not uncommon for relocation to be refused and this amendment makes this more likely. There is a paradox about these cases in that the law imposes no restriction upon the non-resident parent moving away and ceasing to see the child. On the other hand, the parent with whom the child resides (usually the mother) is expected to remain with the child in a particular location if the other parent wishes it. This becomes even more difficult if time is being shared equally. Once again the child's perspective and needs are easily forgotten. Forcing the mother to remain in a particular location, for example without a partner or family supports can often have a highly detrimental effect upon the child. Very often the negative effects of a move on the father child relationship can be compensated for to a considerable degree by generous contact arrangements.

Cases decided to date emphasise the convoluted and unwieldy nature of the new legislation in dealing with the issues raised by it.[51]

The reforms relating to a less adversarial approach to the hearing of child cases stand in an entirely different light and represent a real advance in the conduct of those proceedings and family law proceedings generally. A full account of the background to these reforms, which were initiated by the Court, can be found in the booklet "Finding a Better Way", published by the Court in April 2007.[52] There is clearly a need to move to a less adversarial method of resolving family disputes and this initiative is a major step in that direction. Surprisingly, it has received very little public or media attention

and yet it is probably the only genuine reform to family law that has occurred in many years. It also has connotations for legal reform generally.

It is to be hoped that the incoming Government will reform the *Family Law Act* in a more appropriate evidence based way than the Act of 2005 with a particular view to restoring its child focus. The need to do this is I think apparent. Options towards achieving this would include the appointment of a more broadly based Parliamentary Committee than the previous one, or alternatively an expert committee or the Family Law Council to report on the issue. I would favour the second alternative as being the one most likely to arrive at a focussed result.

Other reforms that should be considered in the short term would be the restructuring of the Federal Magistrates Court into a Family Division and a General Division, with the Family Division magistrates selected for their suitability to conduct family law work. This would be similar to the approach taken in the Family Court of New Zealand, which forms part of the District Court of New Zealand. Administratively, they could be assigned to and work as part of the Family Court of Australia under the general direction of the Chief Justice. A similar approach could be taken in relation to the General Division and the Federal Court, or if that was not acceptable they could continue separately.

However in the area of family law I think it essential that the activities of the two sets of judicial officers should be co-ordinated as part of one institution under one leadership. This would remove some of the disparate approaches between the two courts that have developed and provide a better service to litigants and particularly children. An appropriate model might be thought to be the Family Court of Western Australia, where magistrates sit as part of that court and perform a filtering role in dealing summarily with those cases appropriate for such treatment and referring on the others, giving directions and carrying out case management functions as the cases progress to trial before a judge.

Additionally, it should be possible to set up future Family Relationship Centres as adjuncts of the Family Court managed by it as part of its operations, as part of what used to be the counselling service. One of the strengths of the previous arrangement was the capacity to deliver a ‘one stop shop’ service with the associated rationalisation of administration and building overheads, together with quality control. As appears subsequently, this is an essential step towards the development of what is described as a Unified Family Court in the US. (Discussed subsequently). There appears to

be no reason, other than political ideology, to require that they should be physically separated from the Court.

Provisions for the exclusion of lawyers should be repealed as should the restrictive requirements on attending mediation before the making of applications to the Court. Centres should also be empowered to deal with property matters as well as those relating to children.

Child Protection and Juvenile Justice

In the context of a lecture such as this it is impossible to properly cover the broad scope of the problems associated with child protection and juvenile justice. Tonight I propose therefore to concentrate upon one particular aspect, which is the fragmentation of issues relating to children and youth, not only between the States and Territories and the Commonwealth but also as between the States and Territories themselves. I also consider that it is more than time that we moved away from the adversarial model in these areas of the law and adopted a more child focussed approach to the problem.

Whatever else may be meritorious about the Australian Constitution, it tends to fragment the law relating to children and youth; in particular between the Federal Government in relation to issues arising out of marriage, divorce and the custody of children and the State and Territory Governments in relation to the areas of care and protection and juvenile crime.[53]

During the 1990's, a small window opened and then closed between the Family Court of Australia and child protection jurisdictions. It opened with a national cross-vesting scheme which permitted the superior courts of Federal, State and Territory jurisdictions to exercise each others' jurisdiction in appropriate cases. It was shut by the decision of the High Court of Australia in the case of ***Re Wakim*** [54] which struck down much of the cross-vesting scheme as constitutionally impermissible.

One obvious approach would be for the States to refer powers to the Commonwealth. Between 1986 and 1990, all States except Western Australia referred their legislative powers to the Commonwealth in relation to what was then termed custody and access relating to ex-nuptial children, thus enabling the Family Court of Australia to exercise jurisdiction in relation to such children as well as children of a *de jure* marriage. Previously, the authority to decide private disputes concerning children born to unmarried parents had been dealt with under differing legal regimes in State and Territory courts.

Now all private children's law matters are subject to the same governing legislation.[55] While first instance matters may still now be heard by the Family Court of Australia, the Federal Magistrates Court or, much less frequently and only by consent, State and Territory Magistrates Courts, all appeal matters are determined by the appellate division of the Family Court.[56] The national consistency in private family law jurisprudence that results from a single intermediate appellate court is envied by overseas federal jurisdictions.

Given the obvious difficulties that confront the States and Territories in administering this area, I wonder if it would be too difficult to persuade them to refer these powers to the Commonwealth or develop a co-operative model involving mutual reference of powers.

If this cannot be achieved, I also wonder how difficult it would be to persuade the Australian people at a referendum of the desirability of an Australian court system as distinct from the present State based model. It is not so long ago that a general movement was seriously under way to set up an Australian court system. In the context of this lecture, it would be inappropriate to canvass all of the issues relating to that but there are such obvious advantages to such a model that I have little doubt that it will return to the political and constitutional agenda again, as no doubt will the question of an Australian Republic. The court system proposal had some very significant supporters[57].

Similarly I suggest that it may well be even less difficult to persuade the Australian people of the desirability of an Australian court system in relation to children and families as distinct from the present State and Territory based model. While it is true that there is a long history of the defeat of referenda to change the Constitution, it is also worth noting that nearly all of these have been defeated on political grounds because they contained some politically controversial subject matter. I think that referenda relating to law reform issues like this might well be better received.

Unified Family Courts

The concept that I espouse is what the Americans call a "Unified Family Court". In Australia we are not used to the concept that family courts might exercise criminal jurisdiction. That is because we have ascribed a too limited role to what a family court is or should be.[58] However in my view it is less important what the court is called than what it does. The American scholar Professor Barbara Babb has written in the *Family Law Quarterly*:

"Defined most simply, a family court is a single forum with which to adjudicate the full range of family law issues, based on the notion that court effectiveness and efficiency increase when the court resolves a family's legal problems in as few appearances as possible".[59]

In an article in the same journal by Professor Catherine J Ross[60], she says, "The American Bar Association has long endorsed jurisdiction for unified family courts that includes…": [61]

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

This definition was further amplified by the U.S. National Council of Juvenile and Family Court Judges at its 1990 conference on Unified Family Courts.[62]

We all know the problems that arise in families are typically interlocked. The young offender of today was often yesterday's victim of family breakdown, intra familial abuse and multiple other problems,[63] and frequently, but of course not necessarily, then becomes tomorrow's adult criminal offender.

Under our system as it operates at present, the same child can be the subject of proceedings in up to at least three different courts. He/she may be the subject of Family Court and child protection proceedings during which the child will be subjected to repeated interviews by different experts while at the same time, required to be a witness as the victim in criminal proceedings against the alleged perpetrator. Similarly, it is not uncommon for parents to be engaged in simultaneous proceedings in the Family Court in relation to child and property proceedings at the same time as they are engaged in protection proceedings in the Children's Court, domestic violence proceedings in a State or Territory Magistrates' Court and also perhaps in the midst of associated criminal proceedings. The child may himself/herself

become a juvenile offender. This fragmentation leads to considerable delay, is expensive and places intolerable pressures upon the people involved. It is anything but child-focussed.

Under the unified family court model all of these proceedings would be dealt with in one court and if the U.S. precedent was followed, preferably by one judge. Such a court would be equipped with professional staff such as mediators, social workers and psychologists, and have or have ready access to expert medical and psychiatric resources. It would thus have some of the features of the Family Court of Australia and some State Children's Courts but rationalised under one roof.

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

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

Danziger says:[64]

"In order to resolve family problems in a comprehensive and coordinated way, the unified family court considers all of the parties related to the family's legal proceedings, as well as all the agencies, institutions, or organisations that need to be consulted or brought into the case. In addition, the unified family court reviews the delivery of social services to ensure that agreements between families and agencies are implemented; if they are not, the court has the authority to enforce such agreements, monitor them for compliance, and/or order agencies to deliver services. This is a radical departure from the traditional responsibilities of the court: instead of simply adjudicating legal disputes, the court must now oversee services, assessments, evaluations, counselling, outreach, probation, diversion,

attention and community services. This is not the modus operandi of a neutral and independent forum. It is a way of conducting business that renders the court inextricably linked to agencies – and the day to day actions of those agencies. The court is responsible for ensuring that services are appropriate and productive. While the court is independent of the agencies, it acts in concert with them."

This construction of the role and responsibilities of a court and its judicial officers is a departure from tradition. It carries risks such as the actual or perceived loss of judicial independence and calls upon judicial officers to have skills and knowledge that are not conventionally expected of them. These challenges arose with the establishment of the Family Court of Australia and, in my view can be managed. The recent less adversarial changes bear this out. Moreover, I agree with Danziger when she comments in respect of juvenile justice that:[65]

"... it is, in fact, this mandate to integrate a juvenile's behaviour, environment, history – and family – into a service-oriented therapeutic remedy that is the unified family court's greatest strength in addressing delinquency matters. Rather than addressing juvenile delinquency from the perspective of a 'scaled-down, second-class criminal court', the unified family court approach gives the judge authority to fashion an effective solution to that juvenile's problems by managing and directing agencies in their delivery of services to children and families."

These are indeed radical proposals in an Australian context and present additional challenges. In particular, I would hasten to add that my support for blending criminal justice and civil matters in a single court does not mean I am advocating any retraction of the rights of a young person to due process, procedural justice, satisfaction of the standard of proof, or dispositional outcomes which are proportionate to the offence. Indeed, I am a strong proponent of the application of international standards such as the Convention on the Rights of the Child,[66] and, in respect of juvenile justice particularly, the various Minimum Rules and Guidelines which have been developed to facilitate domestic implementation and practice.[67]

The Danziger study to which I have referred makes the very clear point that in those States where unified family courts exercise the young offender jurisdiction, the juvenile arrest rate for violent crime and drug abuse is almost half of those States where there is no such unified approach. Similarly in most States there is also a lowering of the arrest rate for property crimes.[68]

From a perhaps more philosophical than empirical but to my mind equally important perspective, my former colleague Justice Linda Dessau has expressed the following view with which I agree:

"... a unified family court must also include juvenile crime. Otherwise, those children charged with offences would be dealt with as the junior part of an adult criminal justice system. To follow that course would be to marginalise those children, who in reality are mostly indistinguishable from the children who are in need of care and protection or suffering family breakdown, family violence or other family problems." [69]

The Local Context

Save for where matters are removed to higher courts, in Australia the same children's courts deal with both child protection and juvenile crime. There is however a marked distinction drawn between the two jurisdictions in all States and Territories.[70] Among the rationales for the shift that began in juvenile justice in the mid 1970s from a welfare model to a justice model was to clearly distinguish between state intervention based on the needs versus deeds of young people brought before the court and, in a related vein, to tailor distinct forms of orders which, in the criminal justice domain, were in better conformity with the principle of proportionality,[71] a concern which was particularly voiced in respect of young women.[72]

While disentanglement may have been an appropriate response to the intrusive legacies of the welfare model, it is time to consider how a unified forum can retain the best of criminal justice rights protections within a more holistic court context. I would suggest that such rethinking should be informed by matters such as: the infrequency with which alleged young offenders contest the charges laid against them; the relatively low age of criminal responsibility within Australian jurisdictions, and introduction on a broader scale of new justice system techniques such as group-conferencing pre-hearing conferences and other forms of dispute resolution.

In the Family Court of Australia, the advantage of judicial involvement in the coordination of services has been graphically demonstrated in its Magellan project relating to the management of cases involving serious allegations of child sexual abuse or physical abuse. The Family Court of Australia has also pioneered the move away from adversarial procedures with its less adversarial trial project which is now incorporated into the *Family Law Act.*

In my view, it is more than time that we faced the issues of child protection and juvenile justice as a national problem and it is also time to seriously question the continued use of adversarial approaches in that jurisdiction.

The Pathway to Further Reform

To date I have touched upon some of the issues where children and youth are disadvantaged in our legal system and by our laws. There are many others.

Prior to the advent of the Howard Government in 1996, the Australian Law Reform Commission and the Human Rights and Equal Opportunities Commission had been given a reference by the then Attorney-General, Michael Lavarch on 28 August 1995 to carry out a comprehensive inquiry into children and the legal process. Their report '*Seen and Heard'* was delivered in 1997.[73] Thereafter it received little attention from the Federal Government and most of its recommendations have been ignored.

A useful summary of those recommendations and the extent to which they have been followed or otherwise is to be found in a paper prepared for a Seminar held on the subject at the University of Melbourne on 16 November 2007.[74] The paper is a preliminary one and the authors acknowledge that there is much work to be done to fully analyse the recommendations and the response to them.

It must also be remembered that the research and recommendations are more than ten years old and that developments since would have to be taken into account in considering them.

The Report does nevertheless provide a road map for possible reform and is a useful starting point in considering what reforms are needed.

Certain of the recommendations do have immediate relevance.

These include:

- ***A National Summit on children to be convened by the Prime Minister as a matter of urgency, that would be attended by (inter alia) attended by all heads of Australian Governments. The Commissions identified areas requiring particular attention to promote co-ordination as being assistance to children from broken families, child abuse, causes of offending and crime prevention, youth suicide and youth homelessness.*** Obviously the then Prime

Minister did not consider that there was any urgency about these matters.

- ***A small Taskforce on Children and the legal process should be established on the conclusion of the national summit, comprising representatives from relevant State and Territory departments nominated by the Summit, representatives from non-government organisations, specialist academics, practitioners, young people and parents.*** This recommendation has merit, subject to some widening of those categories to include judicial officers, psychologists and psychiatrists specialising in the problems of children and youth.
- ***An Office for Children should be established within the Department of Prime Minister and Cabinet, focussed on providing secretariat services to the Summit and the Taskforce on Children and the legal Process. Upon completion an expanded Office for Children should assume continuing co-ordination and monitoring responsibilities.*** I have already commented on this and subject to my view that there should be a separate Minister and Department, I agree with the substance of the recommendation.
- ***HEREOC should be resourced to establish a specialist children's rights unit to undertake broad national systematic advocacy on behalf of children.*** It is worth noting that not only was this recommendation not complied with but the relevant legislation was amended to prevent HEREOC intervening in legal proceedings without the consent of the Attorney-General. This prevented the Family Court of Australia and other Courts from seeking HEREOC's intervention in various cases where human rights, including the rights of children were involved.
- ***National standards in the areas of school discipline, care and protection, investigative interviewing of children and juvenile justice.*** Achievements in these areas have been very limited.

Interestingly enough, the Commissions also recommended restructuring current jurisdictional arrangements for dealing with children's issues and in particular, extending the cross vesting scheme for family law and care and protection matters. The constitutional demise of the cross vesting scheme stands in the way of the implementation of this recommendation but the spirit of the recommendation accords with the views that I have expressed earlier. In a similar spirit it also recommended transferring appellate jurisdiction for care and protection matters to the Family Court to develop a

national court of appeal for all private and public family law matters. This again accords with the spirit of the Unified Family Court proposal that I have discussed.

Other modern developments affecting children and youth that have occurred since 1995-7 are the explosion in mobile phone and internet technology and its embrace by children and youth. This has created new problems of cyber safety, the use and exploitation of children and youth for child pornography and the use of such technology for the purposes of bullying and exploitation of children and youth. There has also been an extension in the use and misuse of children and youth for advertising purposes and improper targeting of them for such purposes. It is important that these issues be also addressed as a matter of urgency.

Conclusion

It is apparent from what I have said tonight that there is a need for urgent action to produce far more child friendly laws than we have at present in Australia. There also needs to be a much greater focus on children's rights and it is arguable that these should include social and economic rights, which I have not touched on tonight. It is worth noting that we still have some 50,000 homeless children in Australia as I speak and far too many children and in particular Indigenous children, who lack proper health care and educational opportunities. Far too many children are the subjects of abuse and family violence and our care and protection and legal systems are failing them.

If the ALRC and HEREOC thought that these problems were urgent enough to involve the Prime Minister and other heads of Australian government in 1997, they are far more urgent today. At the time of that Report (1995-6) there were 91,734 child protection notifications to State and Territory Departments. Ten years later that figure has risen to 266,745. Over the same period the number of children in out-of-home care has risen from 13,979 to 25,454. There are serious problems in delivery of services, even after notifications are received and problems with children falling through the gap between child protection and juvenile justice identified in the *Seen and Heard* report continue.

There are many other deficiencies in providing alternatives to the court process and mental health services for children and their families. Indeed one noted expert has said, following similar views expressed here and overseas, that it is time for a complete re-think of the current model of child protection.[75]

It is to be hoped that the incoming Rudd government will show a greater sense of urgency about important social issues like this than did its predecessor.

I suggest that the proposal for a National Summit on Children and Youth would be a good starting point. From there a plan of action could be developed, perhaps by a Taskforce of the type envisaged. From there many of the other matters that I have dealt with tonight could be addressed to the long term benefit of our children.

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[1] 10th Annual Hawke Lecture - Consensus and Dissent in Australia; The Hon Justice Michael Kirby AC CMG ,Wednesday 10 October 2007 Adelaide Town Hall
[2] CCT 8/02, 5 July 2002 (Constitutional Court of South Africa Case)
[3] Ibid Williams; The Case for an Australian Bill of Rights pp16-17
[4] Ibid Hawke Lecture per Justice Michael Kirby

[5] *Minister for Immigration and Multicultural and Indigenous Affairs v B [2004] HCA 20 (29 April 2004):*

[6] Ibid per Kirby J at paras 170-171 Similarly Per Gleeson CJ at para 30, McHugh J at paras102-104, Gummow J at para 157, Hayne J at para 226 and Callinan J at para 254. Somewhat surprisingly, Callinan J also postulated that the children may have been more vulnerable outside detention than otherwise. His given the contents of the report of the Commissioner on behalf of the Human Rights and Equal Opportunity Commission.
[7] *B v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FamCA 451;* (2003) 199 ALR 604 at 627.
[8] Al-Kateb v Godwin [2004] HCA 37; 219 CLR 562; 208 ALR 124; 78 ALJR 1099 (6 August 2004)
[9] Para 73
[10] Re Woolley ex parte Applicants M276/2003 by their next friend GS; [2004] HCA 49 (7 October 2004**);** (2004) 225 CLR 1
[11] Para 115
[12] Para 201
[13] Para 157
[14] See http://www.smh.com.au/news/national/our-human-rights-are-poor-judge/2005/10/12/1128796590039.html and
Michael McHugh, *Does Australia Need a Bill of Rights?*
http://www.nswbar.asn.au/docs/resources/lectures/bill_rights.pdf

[15] The children have since been deported with their parents to Pakistan despite the fact that they claimed to be Afghani nationals.
[16] John Tobin 'Increasingly Seen and Heard: The Constitutional Recognition of Children's Rights' (2005) 21 *South African Journal of Human Rights* 86
[17] In re Gault 387 U.S. 1,13 (1967) (United States Supreme Court Case); In Planned Parenthood of Central Missouri v Danforth 428 U.S. 52 (1976) 74 (United States Supreme Court Case)
[18] Schall v Martin 467 U.S. 253(1984) 265 (United States Supreme Court Case)
[19] Tobin ibid pp30-31
[20] Tobin ibid p13
[21] H. Charlesworth (2000) 'The UN and Mandatory Sentencing', *Australian Children's Rights News* (No.25), Defence for Children International-Australia
[22] www.nt.gov.au/dcm/inquirysaac/report_summary.html
[23] www.nt.gov.au/dcm/inquirysaac_final_report.pdf (sorry linked removed)
[24] Ian Anderson, Professor of Indigenous Health and director of the Centre for Health & Society and Onemda VicHealth Koori Health Unit at the University of Melbourne. Australian Policy Online (www.apo.org.au), 26/6/2007
[25] Helen Szoke, Indigenous Rights need to be included in Victorian Charter, The Age, Melbourne 26 September 2007
[26] Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia p*ublished by Arena Publications, is a series of essays edited by Jon Altman and Melinda Hinkson and is the first book to cover the Northern Territory Intervention. These extracts are from a section of an essay written by Pat Dodson published in Crikey.com on 13 September 2007*
[27] Crikey.com 29 August 2007
[28] Dodson Mick : *Abuse is no solution for abuse* Crikey.com
[29] *Railway Express Agency Inc. v New York* (1949) 336 US 106,112-113
[30] *A v Secretary of State for the Home Department* [2005] (2) AC 68
[31] http://www.apo.org.au/webboard/results.chtml?filename_num=88450 (sorry link removed) try http://apo.org.au/commentary/law-and-order-only-part-solution

[32] Raymond Gaita, *Comment;* The Monthly, August 2007, The Monthly Pty Ltd, Melbourne
[33] Australian Institute of Health and Welfare (2007), pp 26,57
[34] S26H(b) *Family Law Act* 1975
[35] Helen Rhoades, Reg Graycar and Margaret Harrison, *The Family Law Reform Act 1995: The First Three Years* (2000)
[36] Reg Graycar, Law *Reform by Frozen Chook: Family Law Reform for the New Millenium?* 2000 MULR 29

[37] John Hirst, '*Kangaroo Court' Family Law in Australia* Quarterly Essay, Issue 17 2005, Black inc. Melbourne, http://www.quarterlyessay.com/qe/currentissue/

[38] For further material on the influence of father's groups see Miranda Kaye and Julia Tolmie, 'Fathers' Rights Groups in Australia and their Engagement with Issues in Family Law' (1998) 12 *Australian Journal of Family Law* 19, 35; Miranda Kaye and Julia Tolmie, 'Discoursing Dads: The Rhetorical Devices of Fathers' Rights Groups' (1998) 22 *Melbourne University Law Review* 162; Regina Graycar, 'Equal Rights *versus* Fathers' Rights: The Child Custody Debate in Australia' in Carol Smart and Selma Sevenhuijsen (eds), *Child Custody and the Politics of Gender* (1989) 158.

[39] Subdivision E -Family Dispute Resolution ss 60I – K Family Law Act 1975
[40] S 61DA(1)

[41] S 61 DA(a)(b) and (d)
[42] (1988) 166 CLR 69
[43] *Goode & Goode* (2006) FLC 93-286
[44] Cowling v Cowling (1998) FLC 22-801
[45] *Goode & Goode (Supra)*

[46] S65DAA(1)
[47] S65DAA(2)
[48] S 65DAA(3)
[49] S 65DAA(5)
[50] *Taylor & Barker* [2007] FamCA 1246
[51] See for example *Goode & Goode(supra)*; *Taylor & Barker(supra); Eddington & Eddington* (NO. 2) [2007] FamCA 1299
[52] M.Harrison, *Finding a Better Way; a bold departure from the traditional common law approach to the conduct of legal proceedings;* Family Court of Australia 2007; www.familycourt.gov.au
[53] Because Australia is a Federation, legislative responsibility in a number of areas is allocated by the Federal Constitution between the States and Territories and the Commonwealth. In relation to family law, the Constitution gave the Commonwealth the power to legislate in respect of "marriage; divorce and matrimonial causes; and in relation thereto, parental rights and the custody and guardianship of infants". In addition, section 109 of the Constitution provides that State laws are invalid to the extent that they are inconsistent with validly enacted laws of the Commonwealth.
[54] (1999) 198 CLR 511.
[55] Save for Western Australia where the *Family Court Act* 1997 mirrors the Commonwealth *Family Law Act* 1975 in relevant aspects.
[56] Save for Western Australia where, due to the absence of a referral of powers, the Full Court of the Supreme Court of Western Australia determines appeals concerning ex-nuptial children.
[57] See Ellicott R.J., "The Need for a Single Australian Court System" (1978) 52 *ALJ* 431; (1992) "Courts System requires Fundamental Reform to Reduce the Costs of Justice" 30(5) June Law Society Journal at 51.
[58] Nicholson, A. and Harrison, M. "Specialist but Not Unified: The Family Court of Australia" *Family Law Quarterly*, forthcoming.
[59] "Where we stand: An Analysis of America's Family Law Adjudicatory Systems and the mandate to establish unified Family Courts" (1998) 32 *Family Law Quarterly* 31 at 35.
[60] "The Failure of Fragmentation: The Promise of a System of Unified Family Courts" (1998) 32 *Family Law Quarterly* 3 at 15.
[61] Institute of Judicial Administration/American Bar Association (1980) *Juvenile Justice Standards relating to Court Organization*, Standard 1.1 part 1, 5. See also (1998) "American Bar Association Policy on Unified Family Courts Adopted August 1994" 32 *Family Law Quarterly* 1.
[62] Katz, S.N and Kuhn, J.A (1991) *Recommendations for a Model Family Court: A Report from a National Family Court Symposium*, National Council of Juvenile and Family Court Judges, Recommendations 13 to 17.
[63] New South Wales Community Services Commission (1996) *The Drift of Children in Care into the Juvenile Justice System: Turning Victims into Criminals*, Sydney, Australia; Keogh, T. (2002) "Juvenile Recidivism: New and surprising possibilities for mental health promotion and prevention" in Rowling, L. *et al* (Eds) *Mental Health Promotion: Concepts and Practice – Young People*, McGraw-Hill, Roseville, Australia writes (at 235):
"More broadly, juvenile offenders have engaged less well in the educational system and tend to have lower verbal IQ than performance IQ, and overall IQs lower than those of age peers. They are more likely to have learning and attention difficulties, be impulsive and have difficulties with regulating emotions, particularly anger. Young offenders have also been shown to be significantly impaired in their problem-solving ability. It is not surprising, therefore, that juvenile offenders are also known to have difficulties with self-esteem and self-concept. Another distinguishing characteristic of this group which is important in terms of prevention is the significant profile of drug and alcohol misuse, with over 70% of all juvenile offenders using illicit drugs (mainly cannabis).
Related to the common experience of depression, difficulties with problem solving and limited coping skills, offenders also have a higher propensity than mainstream adolescents to attempt suicide or self-harm. They also present with significant levels of comorbility, with conduct problems, depression (most common), attention deficit hyperactivity disorder, and post-traumatic stress disorder.

As a group, offenders are significantly more likely to have experienced neglect and various forms of abuse, usually within their own families…"

64 At 4-5,

65 Ibid 6, (footnote omitted).

66 As Phil Scraton and Deena Haydon explain, the implementation of CROC:
"… should be grounded in a welfare approach, its three core principles having significant implications for youth justice. First, children's status requires discrete recognition and different responses from adult status, while taking account of individual experiences and capacities. Second, children's welfare should be prioritized. This implies treatment support and guidance based on individual needs rather than punishment retribution and deterrence. Third, children should participate fully in decisions affecting their lives, having had opportunities to gain confidence, explore issues of importance to them, learn the skills required to actively participate, and take action on their own behalf.": (2002) "Challenging the criminalization of children and young people: Securing a rights-based agenda" in Muncie, J. et al (Eds) *Youth Justice – Critical Readings*, Sage, London at 323.

67 See Nicholson, A. (2003) "Trying to Better See Both Sides of the Coin", A paper presented at the Children Law UK Conference on Welfare and Justice, London, 23 May 2003, available at http://www.familycourt.gov.au/papers/html/london.html (sorry linked removed)

68 Ibid 15 – 19.

69 "Children and the Court System"**,** A paper delivered to The Australian Institute of Criminology conference, Brisbane, 17 June 1999, available at http://www.familycourt.gov.au/papers/html/dessau.html (sorry linked removed)

70 The establishment of separate Family and Criminal Divisions of the Children's Court of Victoria was effected by the *Children's Court (Amendment) Act* 1986 (Vic.) which had as an object: "to ensure that their procedures, standards of proof and dispositions reflect the fundamental difference in the nature of child protection in juvenile justice proceedings.". Parliament of Victoria *Hansard*, Legislative Assembly, 8 December 1988 [at 11.50].

71 See further Naffine, N. (1992) "Children in the Children's Court: Can there be rights without a remedy?" in Alston et al (Eds) *Children, Rights and the Law*, Oxford University Press.

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

73 ALRC Report 84 *'Seen and Heard: Priority of children in the legal process'* 1997

74 *Preliminary review of the Implementation and Status of the 'Seen and Heard Report;* a Discussion Paper prepared by volunteers from the National Children's and Youth Law Centre and Youthlaw together with assistance from the Mallesons Stephen Jaques Human Rights Law Group and NCYLC Volunteer team; 9 November 2007

75 Judy Cashmore, *Children's' Best Interests in Family Law, Care and protection for Child Witnesses;* Paper prepared for a Seminar at the University of Melbourne, 16 November 2007 See also Sharon Bessel and Tali Gal, *Forming Partnerships: The Human Rights of Children in Need of Care and Protection;* Crawford School of Economics and Government, The Australian National University, 2007