Edition 116 – Children's Rights Edition – April 2016

Rights Agenda

Monthly Bulletin of the Human Rights Law Centre

Children's Rights Edition

The National Children's and Youth Law Centre at The University of New South Wales and King & Wood Mallesons present this special Children's Rights edition of Rights Agenda

HRLC News

The HRLC calls for the Western Australian Government to adopt justice targets to address the State's appalling rates of Aboriginal peoples' over-imprisonment.

Opinion

25 years since the Royal Commission, and Aboriginal imprisonment has doubled, writes the HRLC's Ruth Barson.

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This edition of *Rights Agenda* has been prepared with the assistance of KING & WOOD MALLESONS

ANNUAL HUMAN RIGHTS DINNERS – TICKETS ON SALE

UN Expert Maina Kiai is announced as this year's keynote speaker

We're thrilled to announce that tickets are now on sale for our Annual Human Rights Dinners in Melbourne and Sydney.

The dinners bring together friends, colleagues and supporters from across the human rights, justice and philanthropic sectors to celebrate recent human rights progress and energise the movement to tackle upcoming challenges.

They are important fundraisers for the Human Rights Law Centre and offer a great night out.

This year we welcome Maina Kiai – an inspirational Kenyan lawyer and human rights advocate who is the United Nations Special Rapporteur on the Rights to Peaceful Assembly and Association.

For two decades, Mr Kiai campaigned for human rights and constitutional reform in Kenya where he won a national reputation for his courageous and effective advocacy, often at great personal risk. He was Chairman of Kenya's National Human Rights Commission and Director of Amnesty International's Africa Programme amongst other positions. Mr Kiai now leads work to protect and monitor the vital democratic rights of assembly and association worldwide.

Mr Kiai has a wealth of knowledge on addressing some of the world's most serious cases of political repression and is a compelling public speaker.

Tickets sold out early last year, so please get in quick and book your spot.

Melbourne
Friday 3 June from 6.30pm
The Plaza Ballroom under the Regent Theatre at 191 Collins Street.
Book now >>

Sydney
Friday 27 May from 6.30pm
The Hilton Sydney, 488 George Street.
Book now >>

Ticket price: $220

We also keep a limited number of tickets at cost-price of $170 for not-for-profit organisations and students.

If you have any questions please contact our Fundraising Coordinator Rachael Hambleton at events@hrlc.org.au

We hope you can join us!

Big thanks to our sponsors The Saturday Paper and Colin Biggers & Paisley.

CHILDREN'S RIGHTS EDITION OF RIGHTS AGENDA

Introduction from Professor Thomas Crofts

Following on from Youth Week last week, this edition of the *Rights Agenda*, compiled and edited by the National Children's and Youth Law Centre at The University of New South Wales and by King & Wood Mallesons, draws together a range of articles exploring important recent issues and developments in children's rights. The articles show that while progress continues to be made throughout Australia in protecting children's rights and implementing obligations under the UN Convention on the Rights of the Child (CRC) there is still room for improvement. The young authors, most of whom were summer clerks at King & Wood Mallesons at the time of writing, highlight where more can be done and make valid, practical and achievable recommendations on how the identified shortcomings can be remedied. A clear theme through many of these articles, the topics for which were suggested by members of the Australian Child Rights Taskforce (the peak body for child rights in Australia), is that children need to be given a stronger voice in matters affecting them.

The importance of giving children a voice and listening to their views is highlighted in the article *The Children's Champion – A Children's Commissioner for South Australia* by Christopher Kew and Henry Sit. As the authors point out, all Australian jurisdictions other than South Australia now have a Commissioner for Children. South Australia's Child Development and Wellbeing Bill 2014, which would introduce a Commissioner, has been postponed in order to take account of the forthcoming report of the South Australian Child Protection Systems Royal Commission. The article explores the ways in which the Bill might be amended to ensure children's voices are heard and respected. In particular the authors consider the findings of a *Conversations Report 2015* by The Council for the Care of Children, in conjunction with Save the Children Australia and the Office for Children and Young People, Department for Education and Child Development, and with the support of the Guardian for Children and Young People, which sought to canvass children's views on what qualities a Commissioner should have and what the work of a Commissioner should be. The authors echo the single recommendation in the *Conversations Report 2015* that children be involved in the recruitment, selection and subsequent work of the Commissioner. While this could be done informally, the authors appropriately argue that the requirement should be formally anchored in the Bill.

On the broad theme of listening to the voices of children the article *Whither universal suffrage?* by Will Bartlett and Kritika Rampal considers the case for lowering the voting age to 16 or 17 years of age. The authors argue in favour of such a change because it would allow young people to participate on matters affecting them and bring the voting age in line with the age at which a child incurs other civic rights and responsibilities. This article highlights the issues with fixing rigid age levels in law given that it is well established that young people develop and mature at different and inconsistent rates. The authors acknowledge that the political maturity of 16 and 17 years olds may vary significantly and sensibly recommend that this be addressed by making voting for this age group optional rather than compulsory.

The difficulties of inflexible laws in relation to age also becomes apparent in setting the age of consent, particularly in relation to sexual acts between consenting children. The article *Age of Consent and the Criminal Law* by Amber Hu and Chris Andrews highlights how varied the laws relating to the age of consent for sexual acts are across Australia. The authors explain the South African *Teddy Bear* case, in which the Constitutional Court found that laws which criminalize consensual sexual activity between children aged 12 to 16 infringe the rights of children to dignity

and privacy, are not in the best interests of children and in fact cause harm to children. They argue that Australian jurisdictions with inflexible laws, particularly NSW, have not demonstrably curbed sexual activity between minors, but have had the undesirable effect of discouraging them from talking about those activities, which may lead to unsafe practices. The authors call for a more liberal and flexible approach, as is the case in Tasmania, throughout Australia that protects children who consensually engage in sexual activity from prosecution while allowing the prosecution of exploitative sexual activity by minors.

Out of home care & child abuse by Meena Mariadassou and Georgia Feltis turns attention away from the inappropriate legal responses to consensual sexual behaviour between minors to inadequate responses to exploitative child-to-child sexual behaviour. The authors consider the *Out-of-home care Consultation Paper* recently released by the *Royal Commission into Institutional Reponses to Child Sexual Abuse* and explore in particular the growing problem of child-to-child abuse in out-of-home care, what factors contribute to the incidence of such abuse and what can be done to improve responses to such abuse. Some of the factors they identify as obstacles to addressing abuse are the lack of consistent and reliable data and record keeping, inadequate information exchange between departments, agencies and foster care providers as well as limited carer training. Improvements suggested include better data collection, information exchange, career-training as well as the establishment of an independent body to whom children can talk about abuse.

It is now five years since the *Doing Time – Time for Doing* Report was released and it is therefore timely that *Doing Time – Time for Doing, 5 years on* by Amelia Achterstraat and Jordan Gifford-Moore takes stock of the relatively slow progress made in reducing the imprisonment of young Indigenous people and explores what can be done to further reduce the rate of overrepresentation. They focus on two successful strategies which specifically target children: Alice Springs Youth Drug Rehabilitation Services and Remote Schools Attendance Strategy. While noting the importance of these strategies the authors note that such top-down strategies are likely to be not as effective as community-led programs developed in close collaboration with local members of Indigenous communities, as recommended in the *Doing Time – Time for Doing* Report.

In the final article, *Children and consumer product safety: Current regime and scope for reform*, Hannah Lippmann and Sarah Rodrigues take the rate at which children are injured, even fatally, by consumer products as a reason to examine the current Australian consumer protection regime and what can be done to strengthen protections for children. The article examines the three mechanisms for protecting consumers – safety standards, bans and recalls and makes solid recommendations for improvements. This is a particularly timely article because the Australian Consumer Law is currently under review.

The development of a framework of children's rights – albeit a work in progress – is an important project of law reform. The articles in this Bulletin contribute to this project, but also clearly indicate the complexities of law reform that seeks to enhance the protection and empowerment of children.

Professor Thomas Crofts, Director of the Sydney Institute of Criminology, School of Law, The University of Sydney

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CHILDREN'S COMMISSIONERS

The children's champion for South Australia?

The role of a children's commissioner

In a General Comment made in 2003, the UN Committee on the Rights of the Child (Committee) expressed the view that every State needs an independent national human rights institution (NHRI) with responsibility for protecting the rights of children and young people (referred to collectively as 'children' in this article). The Committee noted that a broad-based NHRI should include within its structure an identifiable commissioner specifically responsible for children's rights or a specific section or division responsible for children's rights. In 2009, in a further General Comment relating to the right of children to be heard, the Committee noted that State parties should establish independent human rights institutions, such as children's ombudsmen or commissioners with a broad children's rights mandate, in order to fulfil their obligations under the *Convention on the Rights of the Child* (Convention).

Australia has largely heeded these calls. Since 1996, independent children's commissions have been established nationally and in each Australian state and territory with one exception – South Australia. In that state there is currently an Office of the Guardian for Children and Young People (Guardian) which has advocacy functions for children under the guardianship of the Minister for Education and Child Development, and a Council for the Care of Children (Council) which is empowered to advocate for children's issues and to report and consult with the government. However, while these offices play an important role, they do not have the reach and power that a children's commissioner would have in protecting the rights and interests of children and monitoring the laws, policies and programs that affect them.

A children's commissioner for South Australia

A proposal for a children's commissioner in South Australia was first made in 2003, but more than a decade later has still not come to fruition. The *Child Development and Wellbeing Bill 2014* (Bill), which was introduced into Parliament in 2014, does provide for the creation of a Commissioner for Children and Young People in South Australia (Commissioner) but, in March 2015, the South Australian Government decided to delay the legislation so as to take into account any potentially relevant recommendations from the South Australian Child Protection Systems Royal Commission. The final report of this Royal Commission is expected to be released on 6 August 2016. As a result, there is currently an opportunity to consider whether there are any ways in which the Bill could be amended to ensure that the rights and views of children are effectively taken into account in relation to the appointment and role of the Commissioner.

The Council, along with Save the Children Australia, the Office for Children and Young People of the Department for Education and Child Development and the Guardian, have taken up this opportunity by consulting with children across South Australia to obtain their views on what the qualities and work of a Commissioner should be. The results of this consultation are contained in the *Conversations Report 2015: Rights and a Commissioner for Children and Young People* (Conversations Report) which was provided to the Minister for Education and Child Development in September 2015 with the aim of informing the recruitment, selection and operation of the Commissioner's office in South Australia.

The Conversations Report – Giving children a say

One of the purposes of the Conversations Report was to give South Australian children a voice in relation to what sort of person the Commissioner should be and how the Commissioner should carry out their role. To canvass children's opinions on both this issue and their rights more broadly, the Conversations Report attracted a total of 1654 responses from children across the state aged 4-18 years through a variety of mediums, including online and hard copy quizzes, self-mailers, short stories and written submissions. The methods employed included open answered questions and offering respondents the ability to use drawing rather than writing. This enabled the authors to obtain feedback from a broadly representative group, and overcome some of the barriers to participation posed by factors such as age, ethnicity and ability. In this way, it appears that the report and its methodology were seeking to accord with Article 12 of the Convention which provides that children capable of forming their own views have the right to freely express those views in all matters affecting them and that those views shall be given due weight in accordance with the age and maturity of the child.

Recommendations and possible amendments to the Bill

The sole recommendation from the Conversations Report was that the feedback from children be taken into account in informing the recruitment, selection and work of the Commissioner. This feedback included that children want the Commissioner to be:

- someone who understands and respects them, will listen to what they have to say and take them seriously;
- visible and approachable;
- someone who will listen to their views and opinions and use this feedback to make life better for children in South Australia;
- inclusive of those who are vulnerable and in rural and remote areas; and
- someone who they can trust and who they can feel safe speaking to.

As the Bill is currently drafted, the Commissioner will be appointed by the Governor on the nomination of the relevant Minister and on conditions determined by the Governor. Before nominating a person, the Minister must call for expressions of interest in accordance with a scheme to be published by the Minister. The engagement and consultation of children in relation to or by the Commissioner is not specifically mentioned in the Bill except for clause 16 which provides that the Commissioner *should* engage children in the performance of his or her functions under Bill (including, in particular, those children who have a limited ability to make their views known), and that the Commissioner must develop or adopt strategies to ensure that this requirement is satisfied.

There has been little formal recognition of the need to include children in the selection process of children's commissioners across Australia but there have been some positive steps in this direction. For example, at a Federal level, when Megan Mitchell was appointed as the inaugural National Children's Commissioner in early 2013 the selection process was in part directed by children themselves in that their views about the criteria and characteristics required for the role were taken into account and they participated in Ms Mitchell's interview process. Although the Act that enabled the appointment of a National Children's Commissioner did not specifically require this (all that was required was that the person have appropriate qualifications, knowledge or experience), what was done in practice provides a positive guide for other jurisdictions. Such steps would align with the recommendation made in the Conversations Report and could be incorporated into the Bill itself to ensure that they are carried out.

In addition, the feedback from children in the Conversations Report – that they want their views to be heard and the Commissioner to act as a strong advocate for them – does not seem to be adequately reflected in the current Bill. While the functions of the Commissioner are defined broadly in the Bill, including to promote and advocate for the rights of children in South Australia, there are some limitations to this. In particular, as the Bill is currently drafted the Commissioner is limited to inquire into and advise on matters relating to children at a systemic level, not an individual level.

While most Australian jurisdictions have adopted a similar approach, moving away from the ability to inquire into and advise on individual matters, this is not the case in all jurisdictions. For example, in the Northern Territory the *Children's Commissioner Act 2013* (NT) gives the relevant commissioner power to deal with complaints from persons who are or have been vulnerable children, or adults acting on their behalf, and make reports to the relevant Minister if appropriate. Similarly, in Tasmania the *Children, Young Persons and Their Families Act 1997* (Tas) allows the commissioner (albeit on the request of the relevant Minister) to investigate a decision or recommendation made, or an act done or omitted, under that Act in respect of a child. The Commissioner in South Australia may be less able to act as an advocate on behalf of individual children by not having such powers, but it appears this has been a deliberate decision by the legislature. The Commissioner's office is likely to have limited resources which may not permit the broader remit of inquiring into and advising on individual matters. Confining the Commissioner's role to inquiring into systemic matters may, on one view, actually enable the Commissioner to better serve all South Australian children including, in particular, those who are most vulnerable and least likely to be heard at an individual level.

Conclusion

The Bill is a positive step towards introducing a children's commissioner in South Australia and bringing the state into line with the other Australian jurisdictions. However, given the delay in progressing the Bill through parliament there is an opportunity for the provisions relating to the appointment of the Commissioner to be further considered and amended, including to provide for future expansion of the role and resources. The findings of the Conversations Report provide useful insights into the views of children on this issue and, as the report itself recommends, should be taken into consideration in relation to the recruitment, selection and work of the Commissioner. While this could be done on a more informal basis, through the way in which the Bill is implemented once passed, it could also be done in a more concrete way by amending the Bill. In particular, the South Australian legislature could consider making the participation of children a legislative requirement for the recruitment and selection of the Commissioner.

Christopher Kew and Henry Sit, Summer Clerks, King & Wood Mallesons.

VOTING RIGHTS

Whither universal suffrage? The case for lowering the voting age in Australia

This article argues that the disenfranchisement of Australian young people under 18 years of age is not a valid head of disqualification from the franchise. It considers leading Australian cases on the ambit of the franchise, the statutory frameworks regulating voting in Australia, Australia's obligations at international law, empirical evidence and leading commentaries to evaluate the competing arguments for and against lowering the voting age to 16 or 17 years of age.

Framing this article's argument are the positive civic experiences of countries such as Austria and Brazil that have lowered their voting age to 16. The article concludes that the Australian franchise should be extended to young people who are 16 and 17 years old, as this gives effect to extant legal child rights (both domestic and international) and would have a positive impact upon young people's participation in Australian civic life.

Enfranchisement and disqualification

The Australian Human Rights Commission considers political participation to be the 'basis of democracy and a vital part of the enjoyment of all human rights'. The right to vote without discrimination is reflected in the International Covenant on Civil and Political Rights, the International Covenant on the Elimination of Racial Discrimination and the Universal Declaration on Human Rights. The right to vote is one of the 'most fundamental of all human rights and civil liberties'. Notwithstanding this, in Australia a significant number of individuals are disqualified from this fundamental human right to vote, most notably persons under the age of 18 years and individuals who are incarcerated, with the former being the subject of this article.

Section 93(1)(a) of the *Commonwealth Electoral Act 1918* (Cth) (Act) currently provides that only those who have attained the age of 18 years are eligible to vote in Federal elections. This statutory limitation is mirrored in State and Territory legislation and all jurisdictions exempt such limitations from the ambit of unlawful age discrimination. To apply the language used by the High Court in one of the leading franchise cases, *Roach v Electoral Commissioner* (2007) 233 CLR 162, the key issue therefore is whether disallowing 16 and 17 year olds the vote is a valid head of disqualification from the franchise.

Arguments in favour of lowering the voting age

The overarching position in favour of lowering the voting age to include young people who are currently disenfranchised includes arguments centred around the competence of young people aged 16 and 17 to handle this responsibility, the utility of bringing the right to vote into line with other responsibilities they hold and the benefits of their ability to participate actively in civic and political discourse.

Lowering the voting age to 16 and 17 will bring young people's right to vote into line with other rights they enjoy at that age. From the age of 16 (with some State or Territory specific variations), young people are able to drive, work, consent to sexual activity, participate actively as consumers, have disposable income, make decisions about their education, health and employment and pay taxes in a similar manner to persons over the age of 18.

Enfranchising young people from the age of 16 would allow them to actively participate in matters that significantly affect them. Indeed, one of Australia's obligations at international law is provided by Article 12(1) of the UN Convention on the Rights of the Child (UCROC), which provides that

each child has the right to express his or her views 'in all matters affecting the child'. As such, proscribing young people from having a voice in key election issues such as taxation, education, health, justice, child protection and employment may not be a reasonable restriction from the franchise. In addition, on this point of the degree of appropriate restrictions, two separate majority judgments in the leading electoral case *Rowe v Electoral Commissioner* (2010) 243 CLR 1 based their reasoning on a proportionality analysis. This means that Australian law on the point is guided by the concept of whether any restriction on the extent of the franchise is appropriate and adapted.

Although the legislature has limited the ability to vote to individuals above the age of 18, such a limitation does not reflect competence or maturity in all young people. For many young people, competence is achieved much earlier and, as such, exclusion from the franchise may be unreasonable. A criticism of the competence argument is that it places an unreasonable burden on the Australian Electoral Commission in determining whether a young person is competent or incompetent at that age. This article reflects current dialogue in the enfranchisement discussion by recommending that the right to vote for young people should be an 'opt-in' process. Such optional, or 'opt-in', voting would acknowledge that the political maturity of 16 and 17 year olds would vary significantly, and as advocated for by Robert Ludbrook, this would remove the current electoral disqualification without forcibly enfranchising all 16 and 17 year olds.

Arguments against lowering the voting age

The disqualification of certain groups of people from the Australian franchise was ultimately justified by Gummow, Kirby and Crennan JJ in *Roach* as being necessary to 'protect the integrity of the electoral process. This justification underwrites the following arguments against lowering the voting age: that young people do not have sufficient maturity to vote; that the general public do not support lowering the voting age and that young people can be highly apathetic to politics.

A stronger argument against lowering the voting age is the one put forward by Ian McAllister. He argues that lowering the age 'does not stand up to empirical scrutiny'. His comprehensive Australian modelling finds that extending the vote to 16 and 17 year olds would have 'likely partisan consequences'. That is, there are distinctive partisan biases inherent in the voting practices of different age groups and lowering the voting age would only exacerbate this, with higher numbers of young people tending to vote for progressive political parties – conservative parties are likely disadvantaged by such a proposal.

However McAllister's argument is based upon two assumptions: (i) that 16 and 17 year olds' voting patterns will be similar to 18-19 year olds, and; (ii) that enrolment of 16 and 17 year olds will be similar to 18-19 year olds. The validity of McAllister's argument therefore turns on whether these assumptions are correct. It is submitted that the second of these assumptions may be an incorrect methodological variable however, because, as argued by George Williams, it is notoriously difficult to get 18 year olds to enrol and vote, in part because this can be a time of great upheaval in their lives. Therefore the number of enrolled 16 and 17 year olds may be significantly higher as they are often in a 'more stable family environment, and still at school'.

This analysis is mirrored by Richard Berry, who argues that 'the lives of most 16-17 year olds are markedly different to those aged over 18'. Berry's analysis is a direct response to McAllister's modelling that first-time voter turnout will be reduced if the voting age is lowered. To the contrary, empirical research in Austria has shown that first-time voters are more likely to vote if they are 16-17 years old, as opposed to 18-20.

Conclusion

Despite McAllister's critique, it can be argued that extending the franchise would have positive effects upon the legal status of young people's rights in Australia. It is submitted that the best way to effect this change would be by the method of voluntary (or 'opt-in') voting, thereby extending voluntary voting to a class of voters. This would not only enable young Australians to have greater political agency by giving them a voice on serious issues affecting them, but would also empower wider participation in civic life and tangibly incentivise youth participation in the electoral process. It follows that there would be a normative affect upon extant child rights in Australia, because such agency would give increased legitimacy and efficacy to the rights and responsibilities given to children in Australia at international law and under domestic law.

Will Bartlett and Kritika Rampal, Summer Clerks, King & Wood Mallesons.

CRIMINAL LAW

Age of consent and the criminal law

'[I]t strikes me as fundamentally irrational to state that adolescents do not have the capacity to make choices about their sexual activity, yet in the same breath to contend that they have the capacity to be held criminally liable for such choices.' - Teddy Bear Clinic for Abused Children v Minister for Justice and Constitutional Development [2013] ZACC 35 (*Teddy Bear* case), 73 [79] (Khampepe J)

In Australia, consensual sexual activity between children is treated differently by the criminal law in each state and territory. Australia, having ratified the UN Convention on the Rights of the Child (CRC), has a duty to ensure that the rights of children are protected. In this article, we suggest that most legislative approaches to consensual sexual activity between minors in Australia are, on balance, counter-productive and infringe the rights of the children they seek to protect. The jurisprudence of the Constitutional Court of South Africa provides a starting point for our analysis and a strong example of a rights-focused analysis of the issues.

The South African experience

The 2013 decision of the Constitutional Court of South Africa in the *Teddy Bear* case involved a challenge to laws imposing criminal liability for engaging in consensual sexual activities with children between the ages of 12 and 16 to the extent that those laws applied to criminalise consensual sexual activities between children.

To the extent that the laws exposed children under the age of 16 to criminal liability, the nine members of the Court unanimously found that:

a) the rights of children to their inherent dignity and privacy were infringed;

b) the existence of the laws was not in the best interests of children; and

c) far from generating any benefit which justified these infringements, the impugned laws actively created additional harm.

As such, the laws were found to be inconsistent with the South African Constitution to the extent that they imposed criminal liability on children under the age of 16 for engaging in consensual sexual acts with another child aged between 12 and 16.

Below, we consider how the reasoning of the Court in the *Teddy Bear* case can be applied to the CRC and the Australian context.

The Australian legal framework

In Australia, laws criminalising consensual criminal activity between children differ significantly between the various states and territories. Although not exhaustive, the following table outlines some of the key offences operating to (potentially) criminalise consensual sexual activities between children.

Jurisdiction	***Age of Consent***	***Offences***	***Relevant defences***
New South Wales	*16*	*Sexual intercourse – child between 10 and 16;* *Act of indecency;* *Indecent assault.*	*None.* Note that consent of the alleged victim is no defence to these charges where the alleged victim was under the age of 16 years at the relevant time.
Tasmania	*17*	*Sexual intercourse with young person;* *Indecent act with or directed at a young person under the age of 17 years.*	*Where the alleged victim was:* *of or above the age of 15 and the defendant was not more than 5 years older; or* *of or above the age of 12 and the defendant was not more than 3 years older.*
Victoria	*16*	*Sexual penetration of child under the age of 16;* *Indecent act with child under the age of 16.*	*If the alleged victim was aged 12 or over and:* *the defendant believed on reasonable grounds that the child was aged 16 or over; or* *the defendant was not more than 2 years older than the alleged victim.*
Queensland	*16, but 18 for anal sex*	*Carnal knowledge with or of children under 16;* *Unlawful sodomy;* *Indecent treatment of children under 16.*	*If the alleged victim was aged 12 or over and the defendant believed, on reasonable grounds, that the alleged victim was of or above the age of 16 (or 18 in the case of a charge of unlawful sodomy).*
Western Australia	*16*	*Child under 13, sexual offences against;* *Child of or over 13 and under 16, sexual offences against.*	*Where the alleged victim was of or over the age of 13, and the defendant proves that:* *they believed on reasonable grounds that the alleged victim was of or over the age of 16; and* *that they were not more than 3 years older than the alleged victim.*

Jurisdiction	*Age of Consent*	*Offences*	*Relevant defences*
South Australia	*17*	*Unlawful sexual intercourse;* *Indecent assault.*	*Where the alleged victim was of or above the age of 16 and the defendant either:* *was under the age of 17 years on the date of the offence; or* *believed on reasonable grounds that the alleged victim was of or above the age of 17.*
Australian Capital Territory	*16*	*Sexual intercourse with young person;* *Acts of indecency with young people.*	*The defendant believed on reasonable grounds that the alleged victim was of or above the age of 16; or* *At the time of the alleged offence:* *the alleged victim was of or above the age of 10; and* *the defendant was not more than two years older.*
Northern Territory	*16*	*Sexual intercourse or gross indecency involving child under 16 years;* *Indecent dealing with child under 16 years.*	*If the alleged victim was of or above the age or 14 and the defendant believed on reasonable grounds that the alleged victim was of or above the age of 16.*

The most significant differences between the legal positions of the various states and territories relate to the defences available to those who engage in consensual sexual activities with children under the age of consent.

On one end of the spectrum, New South Wales offers no statutory defence for any person who engages in sexual activities with a person under the age of consent. This means that where two children under the age of 16 engage in sexual activities, both will be committing a criminal offence.

At the other end of the spectrum, Tasmanian legislation provides significant protection to children who engage in consensual sexual activities with people of similar age.

Moreover, while minor, differences between the applicable age of consent create undesirable complexity and lack of uniformity.

Quite aside from any rights-based analysis, and as has been previously noted by the Australian Law Reform Commission in its 2010 Report *Family Violence – A National Legal Response*, a more cohesive and consistent approach would be strongly desirable.

The rights of the child

A key distinction between the South African context and the Australian legal landscape is the lack, in Australia, of a bill of rights. However, the Australian executive has adopted and, in 1990, ratified the CRC. While the CRC has not been incorporated into Australian domestic law through legislation, ratification results in obligations being undertaken at an international level, and to the Australian people, to implement and abide by its terms.

The key to the present analysis is to determine the intended effect of relevant laws and the actual effect of those laws. In Australia, just as in South Africa, laws prohibiting consensual sexual activities between young people were designed to protect children from physical and emotional harm.

It was decided in the *Teddy Bear* case that the laws in question infringed upon the right to privacy. A right to privacy is expressed also through Article 16 of the CRC which states that '[n]o child shall be subjected to arbitrary or unlawful interference with his or her privacy.' It is clear that the offences noted in the table above allow an invasion of the privacy of children suspected of committing them. As said by the Court in the context of the similar laws impugned in the *Teddy Bear* case, 'the offences allow police officers, prosecutors and judicial officers to scrutinise and assume control of the intimate relationships of adolescents, thereby intruding into a deeply personal realm of their lives'. Whether Article 16 is infringed therefore depends on whether this invasion of privacy is arbitrary, or whether it is, in all the circumstances, justified.

The Court in the *Teddy Bear* case labelled the impugned laws as being a 'degrading and invasive' form of stigmatisation. This is clearly true as imposing a stigma, which in some respects is degrading and invasive, upon convicted criminals is one of the functions of the criminal law generally. While this stigma may harm the individual children who are subjected to it, this does not alone mean that the laws cannot be justified if there is some benefit to children more generally.

It is important to recognise that the obligations assumed by Australia under the CRC do not all flow one way. They include obligations to protect children as well as obligations to respect children's rights. Signatory states are required under Article 34, for example, to take all appropriate measures to protect children from sexual exploitation or abuse. They undertake pursuant to Article 3.2 to 'ensure the child such protection… as is necessary for his or her well-being'. There is great potential for these different priorities to conflict and a solution which satisfies all obligations simultaneously may not be possible in every scenario. In such cases, the overriding requirement that 'the best interests of the child shall be a primary consideration' in all actions concerning children provides valuable guidance.

Evidence tendered in the *Teddy Bear* case, and corroborated in the Australian context by research undertaken by Anne Mitchell et al in *National Survey of Australian Secondary Students and Sexual Health 2013* (La Trobe University, 2014), suggests that engagement in sexual activity is both common and developmentally normal for adolescent children. La Trobe's survey found that over two thirds of Australian school students surveyed had engaged in some sort of sexual activity (although noted that many of those surveyed were above the age of 16). Of these, most felt positive about their past sexual experiences.

In light of this evidence, the foundations of the perceived need to protect children from consensual sexual activities with other children are weakened. It is surely not the case that consensual sexual activities between children constitute the kind of sexual exploitation or abuse that the CRC requires that children be protected from. Further, the prohibition of developmentally

normal consensual sexual activities, and the invasions of privacy and impositions of stigma which go along with enforcing such prohibitions, appear to harm rather than enhance the wellbeing of children.

These conclusions are in line with those reached by the Court in the *Teddy Bear* case. There the Court referred to evidence that the existence and enforcement of the impugned laws exacerbated harm and risk to children by 'undermining support structures, preventing adolescents from seeking help and potentially driving adolescent sexual behaviour underground'. The normative impact of the criminal law inevitably contributes to a needless sense of shame and secrecy around the issue of consensual underage sex between children.

These various harms strongly suggest that the invasion of privacy effected by the laws is indeed arbitrary and therefore infringes upon the CRC. Further, the laws do not appear to be in the best interests of children, and any protection they provide is certainly not positively required under the CRC.

Despite the above, the use of the criminal law likely operates to prevent sexual activities between children occurring in some instances. Doing so would necessarily avoid some negative impacts such as the transfer of STDs or unwanted pregnancy. Evidence suggesting that the impugned laws had little impact on participation rates, but a real impact on the likelihood of children engaging in unsafe sexual practices, led the Court in the *Teddy Bear* case to conclude that they increased overall risk and were not in the best interests of children. Here we suggest that reducing the participation of children in consensual sexual activities should not, itself, be the focus. Instead, emotional and physical risks should be managed directly through education, communication and referral outside the criminal justice system, without the stigma and punishment inherent to it.

Conclusion

The reasoning in the *Teddy Bear* case strongly suggests inflexible laws compromise children's rights to dignity and privacy. Moreover, Australian empirical data suggests that the current laws have been largely ineffective in preventing sexual activities between children. Viewed in this light, the current Australian position, as epitomised by the laws of NSW, capture the worst of both worlds, not only failing to prevent most children from engaging in sexual activities, but also discouraging them from discussing those activities. Taking into account the best interests of children and in line with ALRC recommendations, a more liberal and flexible model, akin to that currently in place in Tasmania, should be adopted across all states and territories. Of course, exploitative sexual activity perpetrated by a minor that vitiates the consent of another would continue to attract the full force of the criminal law.

Amber Hu and Chris Andrews, Summer Clerks, King & Wood Mallesons.

CHILD SEX ABUSE

Out of home care and child abuse

The Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) has uncovered a host of deficiencies in the way that public and private Australian institutions have responded to child sexual abuse. Victims of child abuse face an increased risk of drug addiction, homelessness, mental and physical health issues, educational disadvantage and unemployment. These often lifelong implications make it an issue requiring constant reconsideration to ensure the chance of its occurrence is minimised. One area where child abuse can occur is out of home care (OOHC), such as when a child is placed with a foster family. Child abuse in OOHC can be perpetrated by adult carers, other adults in or outside the household, or other children in or outside the household. This article will consider the specific phenomenon of child-to-child sexual abuse (that is, sexual abuse of children perpetrated by other children) in OOHC and will examine its incidence, prevention and institutional responses to it.

OOHC covers a significant range of services, including residential care, family group homes, home-based care (relative/kinship care, foster care and other home-based OOHC) and independent living arrangements. OOHC is provided both by State Governments and by non-government organisations (NGOs). Children may enter OOHC when the children's parents are unable to care for them, which may be for any number of reasons: mental or physical health problems, drug addiction, or a history of abuse in the home. Child-to-child abuse represents a growing problem in OOHC and was in urgent need of attention when the Commission commenced its investigation in 2013. One of the first obstacles faced by the Commission was the absence of consistent and reliable data collection and record-keeping, as they criticised the inability of some states to produce records for requested periods and the differing methods used by states when "counting" incidents. The UN Committee on the Rights of the Child reached the same conclusion earlier in their 2012 report on Australia after noticing that despite the growing number of children placed in OOHC, data on placements, abuse in care, and complaints was sparse. State governments are ultimately responsible for children in OOHC, though they may outsource the provision of OOHC to NGOs, and State governments do not publish data on the number of children who are sexually abused while in OOHC. It was the Committee's recommendation that data collection mechanisms be improved – yet it appears that systemic deficiencies remain.

The Commission acknowledged the extreme difficulty they consequently faced in accurately assessing the prevalence of child-to-child abuse and holding governments and service providers accountable for abuse suffered by children in OOHC. Counsel assisting the Commission, Gail Furness SC, initially asserted that that child-to-child abuse represented the "*vast majority* of observed sexual abuse cases in out-of-home care" according to US research. However this was strongly refuted by victim advocacy group CLAN, with Vice-President Frank Golding arguing that "care leavers…know that's not true". The scoping review commissioned by the Royal Commission has since been amended, acknowledging that the use of the word 'majority' was an error and that "its prevalence has not yet been established". The review now reflects that child-to-child abuse occurs at "substantial levels". Studies in 1995 and 2000 indicate that around 1 in 3 sexual offenders in Australian society broadly are juveniles (mostly adolescents, although 7% of sexual abuse is perpetrated by youth under the age of 12). Statistics from state police in 2003-2005 suggest that youth perpetrate 9-16% of all sexual abuse. According to Bernie Geary, former

Victorian Principal Commissioner for Children and Young People, 31% of sexual abuse in residential care in Victoria can be characterised as child-to-child abuse.

In Australia, the number of children placed in OOHC arrangements has risen threefold between 1990 and 2010, to 36,000. Those numbers have tended to increase each year since. Almost half of all foster-carers have multiple children placed in their care. It was hoped the investigation conducted by the Commission would uncover the factors contributing to the incidence of child-to-child abuse and elicit possible solutions to these problematic statistics. Several factors contributing to rates of child-to-child abuse in OOHC were identified during the Commission's public hearing, although not all of these will be discussed in this article.

The Commission heard that foster-care providers are making poor decisions in the placement of children, resulting in risky combinations of children with varying needs placed under one roof. The placement process has been characterised by a chronic shortage of carers, coupled with a focus by the providers on the availability of beds, to the detriment of young people requiring safe OOHC. In particular, submissions highlighted that emergency or last-minute placements often result in the absence of proper and detailed assessment of the needs of children being introduced into the home and those already residing there. Emergency placements also often occur before the completion of background checks, with children usually placed in informal kinship care arrangements often without the same level of scrutiny as other forms of placements.

This approach to emergency care disregards the commitment made by the Australian government in ratifying the UN Convention on the Rights of the Child including the right to protection from sexual abuse and the right of children to be looked after properly by people who respect them. Article 19 further mandates that governments institute effective "social programmes to provide necessary support for the child and for [carers]" and the incidence of child sexual abuse in Australia reflects significant deficiencies in the national child protection system.

The Commission also heard that state government departments and other agencies are providing insufficient background information to foster care providers to enable them to properly assess risks. These omissions occur when state governments outsource the provision of OOHC, and children and carers are transferred from one provider to another, where the new providers are not given important case histories. Submissions highlighted the failure to provide information on a young person's history of sexual behaviours was a recurring feature of child-to-child abuse incidents and one that could be easily avoided. This was confirmed by research conducted by the Commission. Beverley Orr, President of the Australian Foster Carers Association criticised these inadequacies, noting that withholding information about previous sexual abuse is unfair to both the carer and child and prevents the carer discharging their duty of care to keep all children in their home safe.

Not only are carers often seemingly ill-informed about the history of trauma and possible problem sexual behaviour of children in their care, but the Commission heard most caseworkers receive only limited training on how to identify signs of child-to-child sexual abuse. Training usually comprises of a three-day program called 'Shared Stories, Shared Lives' and includes a component on sexual abuse. Furthermore, no states or territories require that their carers possess a minimum level of qualification. The training of staff and carers is a critical step in the prevention of child-to-child sexual abuse. This training and support should arguably include equipping caregivers with skills required to identify and respond to "problem" sexual behaviours. Despite this, many governments and service providers acknowledged it as an area requiring significant improvement and training of this nature is not mandatory for carers in several states. An understanding of age-appropriate or "developmentally-expected" behaviour may enable

caregivers to recognise inappropriate behaviours before they culminate in child-to-child sexual abuse. These concerns were echoed in a Consultation Paper into child abuse in out of home care released by the Royal Commission in early March 2016 (OOHC Consultation Paper).

Ideas were canvassed over the course of the public hearing on methods for eliminating the occurrence of child-to-child sexual abuse in OOHC. As well as improvements in information-exchange and carer training, carer advocates called for further funding to enable better services to be provided to those children who exhibit problem sexual behaviours. The OOHC Consultation Paper also drew attention to the inability of current treatment programs for children exhibiting sexually-problematic behaviours to meet demand within the community. Further to this, the Paper noted that not all programs currently operating are adequately prepared to deal with the particular perspectives of children from an ATSI background, a migrant background, or children who have a disability. Regional areas in particular require further funding and attention to ensure that child victims who go on to display problematic behaviours receive support in a timely manner. Dr Joe Tucci, CEO of the Australian Childhood Foundation highlighted the injustice in the "geographical bingo" which currently determines whether a child will receive a therapeutic response that meets their needs.

In line with this was the suggestion that all children in OOHC should have access to an independent body to whom they can discuss trauma and disclose abuse. This establishment of this external agency would likely require further government funding to ensure children in OOHC in all metropolitan and regional areas receive access to a third party who provides support to them throughout their placements and movements over time. Such a body would, of course, have limitations. Child abuse victims, especially the younger children, would likely have difficulty reporting abuse to this independent body, who would generally be unknown to them. It is therefore crucial for children in OOHC to develop more secure, long-term relationships with their caseworkers as well, to build trust and provide a reliable channel to engage with any independent body.

The importance of surrounding the child with dependable relationships in which they feel comfortable to disclose abuse is crucial to addressing the needs of a child victim, and may ultimately prevent them going on to abuse another child in care. In order to strengthen the relationships which surround the child in OOHC, Dr Tucci further suggested that OOHC providers be funded on longer-term contracts to eliminate the need for casual staff and ensure children have continuity of support and can build trust. He went on to highlight the need for children to have "consistent, high-quality pool of carers around them who have been caring for a period of time" – an outcome that becomes less achievable with a casual workforce trained to care for only a short period.

Further improvements also needed to be made in terms of providing follow-up support to child victims. Governments and service providers were unable to satisfactorily describe the support offered to child victims following sexual abuse in OOHC, once again due to poor data recording. Tasmania (one of the few states with available records) acknowledged that roughly 20% of children were offered counselling after experiencing sexual abuse, which represents a contravention of Article 39 of the UN Convention on the Rights of the Child. In its report on residential care services provided in Victoria, the Commission for Children and Young People noted that many children received inadequate care following abuse. A lack of recognition of the event, failure to report incidents to the police, poor counselling support and an absence of compensation for the child victim were all identified as issues in the Victorian context, and most likely reflect concerns in all States and Territories.

Currently three Australian jurisdictions have specialist therapeutic treatment services for children who exhibit sexually harmful behaviours, designed to prevent recidivism:

New South Wales: New Street Adolescent Services
Provides a coordinated response to children aged 10-17 who have sexually harmed others. The program involves the family members of the children. It is located in a select number of metro Sydney areas and some rural areas in NSW. It has a more limited capacity and geographical reach than the Victorian programs.

Victoria: Sexually Abusive Behaviour Treatment Services
Incorporates 12 funded services in every region of Victoria, ensuring that the program has a broad and consistent capability across the state. In Victoria, Therapeutic Treatment Orders (TTOs) are engaged for children aged 10 – 14 years who have exhibited sexually abusive behaviour. The Services treat children who have received TTOs as well as children who voluntarily engage with the Services (including children under 10, and up to 18).

Queensland: Griffith Youth Forensic Service
Has limited capacity and geographical reach compared to Victoria.

Other jurisdictions treat child-to-child sexual abuse through generalist counselling services. While some programs are rolled out in the context of a criminal punishment, others are voluntary in nature, whereby a child (and/or their family/carer) will opt for treatment if their behaviour has been flagged. This encompasses children under 10 who are too young to be considered criminally responsible.

Generalist programs in states without specialist services may not have sufficient skill to respond adequately to such children and their families. The expertise required to effectively reduce recidivism is a fairly unique skill set, and without appropriate support, carers are forced to shoulder the majority of the burden of caring for children in this situation. According to the OOHC Consultation Paper “this can contribute to the breakdown of the placement”. Furthermore, not all programs are adequately prepared to deal with the particular perspectives of children from an ATSI background, a migrant background, or children who have a disability.

The consistent failure of Australian governments and service providers to record and respond to the incidence of child-to-child sexual abuse has resulted in significant levels of child-to-child sexual abuse in OOHC. This also represents a failure to abide by our central obligation under the UN Convention on the Rights of the Child, encapsulated in Article 3, which implores organisations concerned with children to work towards their best interests. It is hoped that the implementation of some of the measures discussed throughout the public hearing will ultimately see improvements in the rate of child-to-child abuse in OOHC and produce more positive outcomes for the thousands of children placed in child protection arrangements every year. The Royal Commission is expected to release a report into child sexual abuse in OOHC in early 2016 based on the evidence tendered at their public hearing into OOHC. It is hoped that this report will continue to fuel improvements in the improvement of training and services for both children and carers and the placement of children in the nurturing environment they are entitled to as a child.

As a first step to rectifying some of the problems in this area, State governments should commit to publishing annual data on the reports of sexual abuse in OOHC, and how those reports have been responded to. OOHC providers should also ensure they are provided with full background information on all their contracted carers and children before implementing any care arrangements to ensure that they are able to make informed decisions about where vulnerable children should be placed.

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INDIGENOUS YOUTH IMPRISONMENT

Doing Time – Time for Doing, five years on

The *Doing Time - Time for Doing* Report ('the Report'), released by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs in 2011, provided 40 recommendations aimed at reducing the prison rates of young Indigenous people. Since the release of the report, the ratio of Indigenous to non-Indigenous youth imprisonment has continued to improve at an extremely slow rate, with little change from the previous decade. While Indigenous youth were 28 times more likely to be in detention in 2011, in 2013-14 they were still 26 times more likely to be in detention than their non-Indigenous counterparts. This slow rate of improvement is due to a lack of implementation of the 40 recommendations in the Report.

Under the broad themes of justice reinvestment and Indigenous-led solutions, the Report called for a range of reforms, coordinated at a national level. The recommendations were targeted at addressing the inequalities leading to the commission of crimes, sentencing, and outcomes to reduce recidivism. It was recommended that the Federal Government increase funding to support community programs, Indigenous health initiatives, education, workplace participation, and access to justice. The Report also recommended that the Federal Attorney General work with state and territory counterparts to develop state-based solutions for imprisonment rates of young Indigenous people.

Australia faces ongoing criticism from bodies such as the UN Committee on the Rights of the Child and the UN Committee Against Torture for the severe over-representation of Indigenous people, particularly young people, in prisons. With 2016 being the fifth anniversary of the release of the Report, this article discusses the progress that has been made in reducing imprisonment of young Indigenous people, and the continuing major gaps in implementation.

Areas of positive development

There have been some key areas of positive implementation by the Federal Government, mostly involving funding for general Indigenous health and education programs. The most successful programs are those that specifically target children. This article will focus on two examples of successful implementation.

Alice Springs Youth Drug Rehabilitation Services

Recommendation 8 of *Doing Time - Time for Doing* recommended that the Commonwealth Government, in collaboration with state and territory governments, increase funding for locally based alcohol, anti-smoking and substance abuse programs. This recommendation is based on early intervention on Indigenous health as a key strategy in closing the gap on outcomes in health and reducing the rate of Indigenous youth imprisonment. This recommendation reflects the

obligations and standards contained in the UN Convention on the Rights of the Child ('Convention'), specifically Article 24(1):

> States Parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

On 16 September 2015, the Minister for Indigenous Affairs, Nigel Scullion, announced funding for Alice Springs youth drug rehabilitation services. This funds Bushmob Incorporated, an organisation based in Alice Springs to provide enhanced access to clinical services for young people aged 12-25 years suffering substance abuse. $1.5 million over three years funds the continuing operation of 20 beds at the Bushmob Youth rehabilitation centre. The centre also has a full time doctor and psychiatrist, and runs outdoor activities such as a bush camp, horse program and sport. In addition to the $1.5 million, over $300,000 supports the media room, which promotes literacy and education with clients, by providing access to computers, graphics and music for the youth as they undergo treatment.

This funding is welcomed, particularly as the centre incorporates a multi-disciplinary approach in addressing holistic health, education and sporting arrangements for youth. While this funding does help improve Indigenous youth health and rates of imprisonment, a longer-term investment and a program specifically for *Indigenous* young people is required in conjunction with a health program for Indigenous youth who enter the criminal justice system (recommendation 15 of the Report). While it is unclear whether this scheme was implemented as a direct result of the Report, it is welcomed. More initiatives such as this need to be supported by federal, state and territory governments to ensure implementation of the Report's key recommendations.

Remote School Attendance Strategy (RSAS)

As Robert Somerville of the WA Department of Education told the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs in January 2011, "With regard to education, there is no doubt that there is an absolute correlation between a child failing at school and a child entering the justice system" (see *Committee Hansard*, Sydney, 28 January 2011, p. 77). The Report recommends that the Commonwealth Government provide funds and administrative assistance to establish and expand school attendance incentive programs across Indigenous communities. This is consistent with Article 28(1)(e) of the Convention on the Rights of the Child:

> States Parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: …take measures to encourage regular attendance at schools and the reduction of drop-out rates.

In 2014, the RSAS was established by the Federal Government, appointing school attendance officers to ensure all children, particularly in remote communities, attend school every day. RSAS has been implemented in Queensland, Western Australia, South Australia, New South Wales, and the Northern Territory. The strategies in each state and territory are driven by the community to suit local needs. Local teams consist of appointed officers and members of the community who work together to provide practical assistance, such as:

- educating children and families about the importance of regular school attendance;
- providing practical support, such as driving children to school or helping to organise school lunches, uniforms, homework and after-school care; and

- working with the school to monitor attendance and follow up on student absences.

On 25 September 2015, the Minister for Indigenous Affairs, Nigel Scullion, announced that the RSAS will be extended for another three years. The Federal Government has invested $80 million to support the program, which is currently operating in 73 schools across 69 remote Indigenous communities. This program is praised by some, but has also been criticised for its 'top down' and punitive approach that does not engage with and support local communities and the underlying reasons why students do not attend school.

Key gaps in implementation

Despite the UN Committee on the Rights of the Child stating in 2012 that Australia's youth justice system 'requires substantial reforms for it to conform to international standards', implementation of the Report continues to progress slowly. The focus of lawmaking continues to be on top-down funding efforts, rather than the community-led initiatives which were at the heart of the Report. Particularly at a state level, legislation continues to be introduced which is specifically contrary to the Report's recommendations.

Youth Sentencing Framework (Recommendations 27-32)

The Report canvassed a range of problems with Australia's youth sentencing culture, stemming from the failure of the 'tough on crime' approach to reduce recidivism. While it was recommended that the Australian Institute of Criminology study sentencing options for Indigenous youth, and the Attorney-General explore alternative sentencing options, these recommendations have not yet resulted in concrete change.

Across Australia, states and territories continue to impose criminal responsibility on children from 10 years of age, despite consensus from the Committee on the Rights of the Child that 12 is the acceptable minimum age of criminal responsibility.

Specifically in WA, contrary to recommendations from the Committee on the Rights of the Child and the Committee Against Torture, the *Western Australian Criminal Code Act 1913* (WA) continues to impose mandatory minimum sentences on some young offenders. Rather than scaling back mandatory sentencing, the range of offences for which a mandatory sentence will be imposed was increased in late 2015, with the passage of the *Criminal Law Amendment (Home Burglary and Other Offences) Act 2015* (WA).

In order to properly implement the Report, states and territories need to abolish sentencing laws, such as mandatory sentencing, which remove the ability of judges to take into account the particular circumstances of each case.

Funding a national approach to reducing imprisonment (Recommendations 2, 24-6, 39-40)

Longstanding calls for further funding toward Indigenous initiatives have been met with only intermittent support, and where funding has manifested, it has often taken the form of a top-down approach, imposed on local communities, rather than led by them. From 2000-1 to 2010-11, combined real funding per person for the Aboriginal and Torres Strait Islander Legal Services (ATSILS) and Family Violence Prevention Legal Centres (FVPLS) had declined by 20 percent. Following the publication of the Report, and a recommendation of an immediate $200 million annual injection from the Productivity Commission in 2014, these bodies are yet to receive guaranteed long term funding approaching this recommendation.

While funding is crucial for increasing Indigenous access to justice, the real thrust of the Report was to support community-led early intervention to reduce initial contact with the legal system. These initiatives require local expertise, national cooperation, and sustained commitment to real

change, rather than just funds. The thrust of these recommendations have been reiterated in recent reports and campaigns, including the Change the Record campaign and Amnesty International's 'Community is Everything' campaign.

Conclusion

Regrettably, the Federal Government has taken limited steps to support local solutions to youth incarceration. Programs which are community-led and created in close collaboration with local members of Indigenous communities appear to be particularly effective. However, despite some instances of success, the majority of recommendations in the Report have not been fully implemented, raising concerns with many of Australia's obligations under the Conventions on the Rights of the Child.

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CHILDREN AND CONSUMER PRODUCT SAFETY

Current regime and scope for reform

In 2014, the Australian Institute for Health and Welfare reported that from 2011 to 2012 over 130,000 children were hospitalised for injuries. Common causes of injury included falls, burns or the ingestion of foreign objects. Such injuries are frequently associated with consumer products, such as trampolines, cots and polystyrene beads. The high incidence of child injuries, and the link with consumer product safety, calls for a consideration of product safety regulation and how it promotes and upholds child rights. In particular, it raises a question about the extent to which Australia is upholding the fundamental right of children to life, survival and development as provided for under Article 6 of the *Convention on the Rights of the Child* (Convention).

This article considers these issues from the perspective of children as consumers and the product-related injuries affecting them. It analyses the consumer product safety regime in place under Australian domestic law, as set out in Part 3-3 of the Australian Consumer Law in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (ACL), to assess whether it goes far enough in relation to children and to identify possible areas for reform.

The ACL is set to be reviewed this year and product safety has been flagged by Rod Sims, Chairman of the Australian Competition and Consumer Commission (ACCC), as a key area for review. We hope that in addition to addressing the product safety protections afforded to consumers generally, this review will specifically consider and strengthen the protections afforded to children who represent one of the most vulnerable consumer groups.

The current consumer product safety regime and areas for reform

There are three key tenets of the consumer product safety regime under the ACL – safety standards, bans and recalls. The operation of each of these and their applicability to children is considered below, along with suggestions of possible areas for reform.

Safety standards

Under the ACL, the Commonwealth Minister who administers Part XI of the *Competition and Consumer Act 2010* (Cth) (Commonwealth Minister) has power to impose mandatory safety standards (mandatory standards). These standards may be made for consumer goods of a particular kind and can regulate aspects such as the design, method of manufacture, or packaging of goods. Mandatory standards specify the minimum requirements of particular goods

in order for them to be safe. If a supplier supplies, manufactures, possesses or has control of consumer goods that do not comply with mandatory safety standards, they may face penalties. At the time of writing, mandatory standards exist for 41 types of consumer goods. Nineteen of these goods relate to children's items, which include prams and strollers, children's nightwear and baby dummies.

In addition to mandatory standards, the ACL provides a consumer guarantee that goods will be safe, and independent bodies such as Standards Australia (the national peak non-government standards organisation) formulate voluntary standards for particular categories of goods.

The current safety standards are somewhat limited in their operation. Consumer goods that do not fall under the purview of the mandatory standards may pose a risk to children, as suppliers have little legal incentive to incorporate safety standards into the design, manufacture process or labelling of the goods. Voluntary standards may go some way to address this, but they are not a legal requirement and are complied with at the discretion of the supplier. In the absence of clear, approved standards, a considerable burden is placed upon parents and child consumers themselves to 'buy safe'.

The safety standards provisions in the ACL could be improved by implementing a general safety requirement mirroring the *European Union General Product Safety Directive (GPSD) 2001/95/EC* (Directive). The Directive provides a generic definition of a 'safe product' applicable to all member States and obliges all producers to place safe products on the market. The Directive is complementary to specific safety requirements. It applies in its *entirety* to products that aren't covered by specific standards, and applies partially to those that are.

Implementing similar legislation in Australia would fill the gaps between the existing mandatory standards for particular products and all other products by providing a general definition of a 'safe product'. As in the European Union, suppliers would be legally required to comply with minimum safety requirements for all products, prior to supplying goods for sale.

The Directive also requires producers and distributors to report to national authorities when goods fall short of the general safety definition. This applies to products that pose a serious risk in addition to those that pose a moderate/low risk. Introducing similar provisions into the ACL, requiring suppliers to report safety-related concerns for all injuries (not just serious injuries), could address concerns about the limited scope of current reporting requirements which only obliges suppliers of consumer goods to report deaths or serious injury/illness related to those goods. As Associate Professor Kirsten Vallmuur identified in a presentation given at the *Rights of the Child Consumer* conference in Sydney on 20 November 2015, the resulting lack of data on primary care representations, injuries not requiring treatment at a health facility and near miss injuries is one of the key problems in the Australian product safety regime. The imposition of broader reporting requirements and more proactive investigation by authorities through information-sharing with other jurisdictions could ensure that Australia develops a comprehensive database of injuries, thereby enabling quick responsive action.

Bans

The ACL provides for two types of product bans. Both the Commonwealth Minister and responsible State and Territory ministers, such as the NSW Fair Trading Minister, are able to impose a 60 day interim ban on products (which may be extended). The Commonwealth Minister may also impose permanent bans on products. Once a ban is made, it is an offence to supply, manufacture, possess or have control over the banned goods. Just over 20 products are currently subject to a permanent ban in Australia, almost half of which are directed at children. The review

of the ACL should consider whether bans could be used more frequently to prevent product-related injuries, particularly for children.

Recalls

Recall measures are more frequently used than bans to limit the supply of unsafe goods in Australia. Under the ACL, a product may be recalled if it appears that it may cause injury to any person. The Commonwealth Minister and responsible State and Territory ministers may publish a compulsory recall notice on the internet for consumer goods of a particular kind where it becomes apparent that a product presents a safety risk or is non-compliant with a mandatory standard or ban. However, most recalls are made voluntarily by suppliers and then communicated to the Commonwealth Minister. If a recall notice is in force, the consumer goods to which is relates must not be supplied in trade or commerce. Since 2010, the ACCC has reported a steady increase in the number of recalls in Australia, with a 14 per cent increase seen from 2013 to 2014.

One of the main difficulties with recalls is ensuring consumer compliance. On average, only half of all recalled goods are returned. For toys, this figure is less than one in five. There is clearly room for the recall regime to be improved. Three additional measures which could be considered in the upcoming review of the ACL are:

- First, establishing a “Recall Registry” which allows purchasers to leave their contact details at the time of purchasing particular goods such as toys. This would enable the relevant authority to directly contact consumers who are in possession of recalled items.
- Second, further promoting existing initiatives such as the Recalls Australia smart phone application, which notifies users of newly recalled items and allows consumers to report products they think are unsafe.
- Third, using information drawn from other jurisdictions, such as the European Union and the United States of America, to issue recall notices for products of concern before they lead to injuries or even deaths in Australia.

Conclusion

The significant number of recalls for consumer goods and frequent instances of child death or injury linked to consumer products indicates that not enough is being done to prevent unsafe goods from reaching vulnerable consumers. This article has considered the three key aspects of the ACL’s consumer product safety provisions – safety standards, bans and the recall process – which, if strengthened could assist with preventing product-related death or injury of children. In turn, this would assist with the fulfilment of Australia’s obligations under the Convention. The upcoming review of the ACL is an opportune time to reconsider the role of suppliers and Australian government authorities in the protection of child safety.

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AUSTRALIAN HUMAN RIGHTS CASENOTES

Responding to and preventing family violence: The need for a comprehensive and integrated system

Finding – Inquest into the Death of Luke Geoffrey Batty (28 September 2015)

Summary

Luke Geoffrey Batty (Luke) was killed by his father, Gregory Anderson (Mr Anderson), on 12 February 2014. An inquest was held into Luke's death in late 2014. The inquest did not focus on the immediate cause of Luke's death – this was plain on the facts. The State Coroner, Judge Gray, instead investigated the interactions that Luke and his mother (Ms Batty) had with the family violence system in Victoria in the 18 months prior to Luke's death. Judge Gray found that no one person or organisation caused or directly contributed to Luke's death. However, his Honour did recognise some systemic flaws and made a number of recommendations for improvement.

Facts

The facts of Luke's death were highly publicised in the weeks following his death. In the late afternoon-early evening of 12 February 2014, 11 year old Luke and his father were playing cricket in the nets following Luke's cricket practice. While in the nets Luke's father deliberately hit Luke in the head with a cricket bat and then proceeded to stab him in the neck with a knife. Ms Batty was present at the cricket grounds, heard Luke and ran to the cricket clubrooms for someone to call an ambulance. Mr Anderson intentionally prevented ambulance officers from accessing Luke to provide assistance and when they were able to access him he was pronounced deceased. Mr Anderson was shot by police attending the scene, and died in hospital in the early hours of 13 February 2014.

Evidence and observations

Throughout his life, Luke witnessed his father being physically and psychologically violent towards his mother. Judge Gray wrote:

> "A number of matters in the 18 months prior to Luke's death are related to his death… they pointed to the likelihood that Luke would continue to be exposed to family violence from his father and that active risk management of Mr Anderson was necessary".

From his review of these matters, his Honour identified a number of shortcomings in the family violence system. Brevity prevents us from canvassing the entire history of family violence experienced by Luke and Ms Batty but, for the purposes of this case note, these shortcomings are clearly demonstrated by three incidents addressed at the inquest:

(A) The first incident

On 16 May 2012, Senior Constable Kate Anderson responded to a violent outburst by Mr Anderson. It was alleged that he had threatened Ms Batty with a vase in front of Luke in Ms Batty's home. On the same day SC Anderson arrested Mr Anderson. However, charges were not authorised until 1 August 2012 due to workload issues. There were difficulties serving Mr Anderson, and the charges had to be re-issued on 8 January 2013. At the time of Luke's death, the charges against Mr Anderson had still not been heard by a Court. Judge Gray noted that such delays "can lead to an increasing risk of escalating problematic behaviours on the part of the perpetrator".

Also in response to the 16 May 2012 incident, SC Anderson issued Mr Anderson with a Family Violence Safety Notice (FVSN) and completed a risk assessment (titled an "L17" form). Both Ms Batty and Luke were identified as "protected persons" on the L17 and the probability of exposure to future harm was assessed as being "likely". On 17 May 2012, a Family Violence Intervention Order (FVIO) was formally made against Mr Anderson by the Magistrates' Court naming Ms Batty and Luke as the affected family members. This was the first time that Luke was named as an affected family member on an FVIO. The FVIO also stipulated that, subject to his agreement, Mr Anderson contact a men's referral service. Judge Gray drew attention to the fact that the court could not require Mr Anderson to attend counselling, or to participate in a family violence program, without his agreement.

(B) The second incident

On 3 January 2013, Mr Anderson threatened to kill Ms Batty. Luke was not present when the threats were made. Ms Batty reported the threats to police and the following day Mr Anderson was arrested and police bail was refused. The Magistrates' Court subsequently granted bail on strict conditions, including that Mr Anderson was banned from the suburb of Tyabb (where Luke attended football training). The strong protections afforded by the bail conditions were implemented largely as result of evidence given by policeman, FC Topham. He requested stricter bail conditions than what Ms Batty could achieve by varying her FVIO. FC Topham suggested that this would afford the Battys with greater protection and enable police to bring Mr Anderson back before a magistrate in the event of a breach, unlike a breach of a FVIO which would have only given rise to an interview with police and a possible summary offence charge.

(C) The third incident

Ms Batty gave evidence that in April 2013 Luke told her that Mr Anderson had pulled a knife out while they were sitting in his car and told Luke that "It could all end with this". This incident alarmed Ms Batty and she sought to amend the FVIO issued on 17 May 2012. On 24 April 2013, the Magistrates' Court ordered "no contact" between Mr Anderson and Luke or Ms Batty. However, this order did not prevent Mr Anderson attending Luke's football and other sporting events. The Magistrate and Ms Batty discussed this in Court, with Ms Batty concluding that there was less risk in such public forums.

At the same Court appearance, the Magistrate issued two bench warrants for Mr Anderson's arrest (one relating to a family violence charge and the other relating to a criminal charge), with the intention that he be served with the warrants and the amended FVIO when he reported to police under his bail conditions. However, by issuing the warrants, the Magistrate cancelled Mr Anderson's bail conditions. Mr Anderson did not report for bail and the warrants were not executed. Judge Gray noted:

> "*It is obviously an unintended consequence of the issue of warrants following a non-appearance on bail. It can be exploited, and was by Mr Anderson*."

Indeed, Mr Anderson attended one of Luke's football training sessions in the suburb of Tyabb in the days after the warrants were issued. When Ms Batty contacted the police to report the breach of his bail conditions, the police informed her that the conditions were no longer in effect.

Judge Gray's comments and recommendations

After a full review of the family violence perpetrated by Mr Anderson in the 18 months prior to Luke's death, Judge Gray noted a number of systemic problems seen in the responses to Mr Anderson's violence and made 29 recommendations to address these issues. Below is a broad summary of some of the key points made by Judge Gray:

1. *Failure to engage Mr Anderson in the family violence system and make him accountable for his actions*

Judge Gray noted that "This case has dramatically highlighted the need for an emphasis on perpetrator accountability". His Honour found that delays and disjoints in the system made it difficult to hold Mr Anderson accountable for crimes he allegedly committed or to require him to engage with support services and counselling. Further, Mr Anderson was never the subject of a comprehensive mental health assessment, such that he never received a formal diagnosis nor any targeted medical care.

His Honour recommended that perpetrator engagement will be strengthened by reducing delays in serving family violence charges and FVIOs, and in executing warrants. He also recommended that consideration should be given to amending the *Bail Act 1977* (Vic) to ensure that a warrant for arrest does not have the effect of cancelling bail and that bail should be refused where the accused cannot demonstrate that the failure to appear was not due to causes beyond their control. In addition, his Honour suggested that there should be a judicial power to mandate that a perpetrator can be assessed by a forensic psychiatrist where there are safety concerns, particularly in relation to children.

2. *Risk assessments*

On the evidence, Judge Gray found that no single agency held or assessed all of the information for the purposes of conducting risk assessments, and managing the risks posed by Mr Anderson. The risk assessments done by various agencies were performed in "silos" and were not shared or updated. His Honour recommended that the State of Victoria undertake empirical validation of the Common Risk Assessment Framework and that all agencies operating within the integrated family violence system should use that framework once validated. Judge Gray emphasised the importance of greater uniformity between agencies who perform assessments and an improved process of sharing previous assessments between agencies.

3. *FVIOs and the intersection of the family violence and family law systems*

Judge Gray agreed with evidence and submissions made that FVIOs can be unclear and that they should be written in plain English to ensure their effect can be easily understood. His Honour also noted that the interaction between family law, and in particular parenting orders under the *Family Law Act 1975* (Cth), and FVIOs is complex and should be made plain by the terms of the relevant FVIO.

4. *Magistrates' Court – Family violence cases*

Judge Gray commended the pilot of the Family Violence Division of the Magistrates' Court of Victoria which ensured integration of relevant jurisdictions and enabled the listing of charges arising out of family violence incidents to be expedited. His Honour recommended that access to the Family Violence Court Division be expanded across Victoria.

5. *Agencies operating within the integrated family violence system*

Judge Gray recommended that steps be taken to facilitate the sharing of information between all agencies operating within the integrated family violence system, and that the roles of all agencies

working in the family violence system should be clearly delineated and contained in legislation and/or documented in publicly available policies.

Commentary

The findings of the inquest highlighted a number of problems with Victoria's family violence system. While Judge Gray concluded that none of these caused Luke's death, his Honour did recommend improvements that would hold perpetrators of family violence more accountable and afford families greater protection. The central messages of the inquest's findings are the need for more cooperation between family violence agencies and for a coordinated approach to updating information systems. This will enable first responders, Magistrates and the relevant agencies to understand the family violence history and make a comprehensive assessment of the risk to families.

A thorough review of the Victorian family violence system has since been conducted by the Royal Commission into Family Violence which tabled its report in Parliament on 30 March 2016, and largely addressed the issues raised by the Coroner in this inquest.

A copy of the inquest findings is available here.

A copy of the Royal Commission's findings is available here.

Kate Boyd, Solicitor at King & Wood Mallesons.

Three convicted and sentenced in Australia's first female genital mutilation trial

***R v A2; R v KM; R v Vaziri (No. 23)* [2016] NSWSC 282 (18 March 2016)**

Summary

The first three people in New South Wales to stand trial for female genital mutilation (FGM) related offences have been convicted and sentenced. Following a nine week trial, and a series of pre-trial applications dealing with evidentiary and procedural questions including the compellability of the child victims to give evidence for the prosecution against their mother (one of the defendants), the defendants were convicted of offences under section 45 of the *Crimes Act 1900* (NSW) (the Act). Each was sentenced to 15 months' imprisonment (with a non-parole period of 11 months) and referred for assessment as to suitability for home detention.

Facts

The defendants are members of the Dawoodi Bohra community, a world-wide sect of Shia Islam. Contrary to section 45(1)(a) of the Act, the girls' mother (known as A2 in the case) was accused of arranging for a retired midwife (known as KM) to carry out FGM on her two daughters (known as C1 or C2) in 2009 and 2012 when they were each seven years old. Mr Vaziri, a religious leader of the Dawoodi Bohra community, was charged with being an accessory after the fact to the primary offences by encouraging witnesses to lie by telling police that they did not believe in or practice female circumcision.

The Crown argued that, on each occasion, what occurred was a form of FGM where some injury was caused by KM to the genitals of each child. The defence denied that any injury was caused to either child, but rather asserted that it was a form of symbolic ceremony where metal (said to be forceps) was laid upon the outside of the child's genital area, but no injury was caused. The issue to be determined by the jury was what the nature of the procedure performed on C1 and C2 by KM was.

Decision

The jury found each of the offenders guilty of the primary counts brought against them. The jury was therefore satisfied that the procedure performed on C1 and C2 amounted to FGM as prohibited by section 45 of the Act.

Compellability

A key issue in the proceeding which was dealt with in *R v A2; R v KM; R v Vaziri (No. 4)* [2015] NSWSC 1306 was whether C1 and C2 could be compelled to give evidence for the prosecution against their mother. Section 18 of the *Evidence Act 1995* (NSW) (**Evidence Act**) extends to a child the right to object to being required to give evidence as a witness for the prosecution in a criminal proceeding against the child's parent if certain tests are satisfied.

After considering evidence given by psychologists, the Court was satisfied that there was a likelihood that psychological harm might be caused to each of C1 and C2, and to the relationship between each of those girls and their mother, if C1 and C2 were called to give evidence. However, having undertaken the balancing exercise required by section 18(6) of the Evidence Act, the Court did not find that the nature and extent of this harm outweighed the desirability of C1 and C2 giving evidence, so that such evidence is available to the jury at trial. Each of C1 and C2 was therefore held to be a compellable witness. In reaching this decision, Justice Johnson considered factors including that:

- the children had already been interviewed on the matter as part of investigations;
- there was a public interest in the Crown having available to it all evidence touching upon the question of guilt of persons accused of serious offences; and
- the children continued to live with their mother, and there had not been a breakdown in the relationship between the children and the mother as a result of the allegations.

This finding of compellability is of particular relevance as most prosecutions involving FGM will almost always involve child complainants being required to give evidence against family members given the context in which such conduct is likely to occur.

Sentencing

In the case of each defendant, an aggregate sentence of 15 months' imprisonment with a non-parole period of 11 months was ordered. The Court referred each defendant for assessment as to suitability to serve the sentence by way of home detention. Some of the principal considerations of the Court with regard to sentencing were:

- the breach of trust implicit in offences by a mother upon young daughters;
- KM's abuse of her professional vocation;
- Mr Vaziri's use of his position of authority and responsibility to seek to undermine and deflect the law, rather than to promote it;
- the importance of personal and general deterrence;
- medical evidence indicated there was no permanent scarring or other residual physical injury to either C1 or C2 but there were likely to be some adverse psychological consequences for each girl as a result of the offences;
- A2 had also been subjected to FGM during childhood;
- the fact that Family and Community Services officers assessed A2's family and concluded that none of the children needed to be removed from the care of their parents; and
- the impact on the children if A2 was to receive a full-time custodial sentence.

Justice Johnson expressed that he was satisfied there would be significant hardship for A2's children if an immediate custodial sentence was imposed. He stated that "a sentencing outcome which would see these children (who are victims of these offences) being punished in a practical way, would not serve the interests of justice in this case".

Commentary

This is a significant case in which the Court was called upon to make legal determinations in an array of areas where little (if any) precedent exists. The jury at the trial of the defendants was the first in Australia to determine the question of guilt of persons charged with FGM offences since the provisions were brought in 12 years ago.

After the commission of these offences, the maximum penalty for FGM related offences was increased from seven to 21 years' imprisonment. The intention behind this amendment was to bring the maximum penalty in New South Wales into line with the penalties applicable for performing FGM in other Australian states as well as into line with similar offences in New South Wales such as intentionally causing grievous bodily harm.

The full text of the decision can be found here.

Melanie McLean, Solicitor at King & Wood Mallesons.

NSW Supreme Court holds adoption order may be enforced by concerned non-parties, but not reviewed or amended

***Secretary, New South Wales Department of Family and Community Services by his delegate Principal Officer, Adoptions, Barnardos Australia; Re JLR* [2015] NSWSC 926 (14 July 2015)**

Summary

Justice Bergin, the Chief Judge in Equity in the NSW Supreme Court, found that a person not party to an adoption (in this case, a paternal grandmother) may have standing to enforce an adoption plan if the plan is registered under the *Adoption Act 2000* (NSW) (Adoption Act), but not to review or amend it.

Facts

JLR was born in Sydney in February 2011 to BM and BF. The couple had previously had a son, JR, born in 2007, who had been removed from their care in 2010 due to concerns about domestic violence and drug and alcohol misuse. Responsibility for JR's care had been allocated jointly to the Minister of Community Services and JR's paternal grandmother PGM (i.e. BF's mother), with JR's day to day care provided by PGM.

The Department of Family and Community Services (**Department**) assumed care of JLR while she was still in hospital. JLR's birth father, BF, had visited JLR in hospital immediately after birth but had not had any contact with her since then. PGM advised the Court that BF did not wish to have any contact with JLR in future.

In June 2011, JLR was placed in the care of P1 and P2, by orders of the NSW Children's Court. While in their care, PGM and JR (JLR's birth family) had had opportunities for supervised visits with JLR, with a view to ensuring the development of a relationship between them (and, in particular, between the siblings).

In late 2012, case management and parental responsibility for JLR was transferred from the Department to Barnardos, a designated agency and accredited adoption provider under the *Children and Young People (Care and Protection) Act 1998* (NSW) which provides a service of permanent family care and adoption for children unable to live with their birth parents. P1 and P2 applied to Barnardos to adopt JLR, pursuant to an adoption plan which was supported by the Principal Officer of Barnardos. PGM learned of the adoption plan, and initially opposed it, seeking orders under the *Family Law Act 1975* (Cth) (Family Law Act) in her favour for the care of JLR. In particular, PGM was concerned that she would not be a party to the adoption (notwithstanding that it provided for her to spend time with JLR) and so she would be unable to enforce any aspect of it. The orders PGM sought made provision for her and JR to spend a greater amount of time with JLR than was proposed under the adoption plan.

Decision

The main question Justice Bergin had to consider was whether the adoption order should be granted under section 90 of the Adoption Act. As part of this, her Honour also had to consider whether, given that PGM was not a party to the adoption, PGM would be able to enforce those aspects of the adoption plan granting her visitation rights.

Section 90 of the Adoption Act states that the Court may not make an adoption order unless the arrangements proposed in an adoption plan are agreed by the parties to the adoption, or the Court is satisfied that the plan is in the best interests of the child. The Court may not make an adoption order unless it considers that order would be clearly preferable for the interests of the child. The Adoption Act Dictionary defines a “party to an adoption” as the child, the birth parent or parents that have consented to the adoption, the person or persons selected to be the prospective adoptive parents, the Director-General (now Secretary) of the Department, and the appropriate principal officer.

Her Honour found that JLR’s relationship with P1 and P2 was stable and loving and that JLR felt secure and happy. JLR’s relationships with her birth family (including JR and PGM) were facilitated through P1, P2, and PGM’s efforts to maintain contact. Her Honour held that the certainty of having P1 and P2’s relationship with JLR as parents (as opposed to JLR being “in care”) was in her best interests, and preferable to PGM’s proposed orders under the Family Law Act, so her Honour granted orders to approve the adoption plan.

Her Honour noted that while PGM was not a “party to the adoption” under the definition in the Adoption Act, section 50 of that Act gave the adoption plan the same force as an order of the Court, once registered. In *Director-General, NSW Department of Family and Community Services; Re JS* [2013] NSWSC 306, Justice Brereton had stated that “a person having the benefit of a deemed order … even though not party to the plan, as a result of section 50(4) would have standing to apply for enforcement of the deemed order…”. Justice Bergin considered that this would enable PGM to enforce the adoption plan. To the extent that a review of the plan was required in the future, PGM would be able to approach Barnardos or even BF to have them call for a review of the plan.

Her Honour also considered two other issues – first, whether the Court should dispense with the requirement for BF and BM to consent to the adoption (including dispensing with the requirement to give notice to BF) and secondly, whether the Court should make an order changing JLR’s name. Her Honour held that it was in the best interests of JLR to dispense with the need for her birth parents’ consent to the adoption, as BF was not able to be located and was not involved in JLR’s life, and there was no prospect for JLR to be returned to BM’s care. Her Honour also noted

that BM had stated she supported whatever legal decision was in JLR's best interests, though she had not given formal consent to the adoption. Second, the Court made an order to change JLR's name, as her Honour was of the view that JLR would benefit from having P1 and P2's surnames when she started school.

Commentary

This case appears to broaden the scope for persons not party to an adoption to apply for enforcement of an adoption plan. Provided that a person "has the benefit" of a court order, including a deemed order (such as a court-registered adoption plan), they may apply to a court to enforce that order. However, they would not ordinarily have standing to bring a review or change to that order – they would need to ask the Department or appropriate principal officer of the adoption provider to do so on their behalf.

This is of particular note for non-parents who maintain visitation rights in relation to adopted children, such as extended family.

The full text of the decision can be found here.

Charles Davies, Solicitor at King & Wood Mallesons.

Family Court finds 15 year old "Jamie" competent to make own decision about stage two treatment for gender dysphoria

***Re: Jamie* [2015] FamCA 455 (16 June 2015)**

Summary

The Family Court of Australia has found that 15 year old "Jamie", the subject of the often-cited decision of the Full Court of the Family Court in *Re: Jamie* [2013] FamCAFC 110 (*Re Jamie 2013*), was competent to consent to the stage two treatment for gender dysphoria and authorised her to make her own decision in relation to that treatment. This case is one of many being heard by the Family Court following the decision in *Re: Jamie 2013* that whilst court authorisation is unnecessary for stage one treatment for gender dysphoria, the nature of stage two treatment requires the Court to determine the child's "*Gillick* competence" to make the decision.

Facts

Jamie was assigned as a male at birth but identified as a female from a very young age. She was diagnosed with gender dysphoria in 2007 and wished to undergo stage two treatment for that condition (involving the administration of oestrogen and endogenous testosterone blockers). Jamie commenced stage one of the treatment (involving the administration of puberty suppression hormones) in around 2011, following a decision of the Family Court permitting her parents to consent to Jamie undergoing that treatment.

The 2011 decision was appealed by Jamie's parents who argued that it should be set aside because the Court went beyond its jurisdiction in authorising them to consent to Jamie's treatment. The Full Court handed down its decision on the appeal in *Re: Jamie 2013*, determining that court authorisation was unnecessary for stage one treatment, but that the nature of the stage two treatment required the Court to determine that the child is "*Gillick* competent". The term "*Gillick*" refers to the English case of *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 (later held by the High Court of Australia in "Marion's case" to be applicable in Australia) where Lord Scarman held that "the parental right to determine whether or not their minor child below the age of 16 will have medical treatment terminates if and when the child

achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed".

In the present case, Jamie's parents sought orders (among others) that Jamie be declared competent to give informed consent to the stage two treatment. The application for stage two treatment was particularly urgent as Jamie was becoming increasingly distressed about the physical differences she experienced between her own non-feminised, pre-pubertal body and that of her age peers. Jamie's parents also sought a declaration that a court authorisation would not be required where there was no controversy regarding the diagnosis, the child's wishes, and the child's competence to consent (as in this case), contrary to the decision in the *Re: Jamie 2013* appeal.

Decision

Justice Thornton found, on the balance of probabilities, that Jamie was competent to consent to stage two treatment for gender dysphoria and authorised her to make her own decision in relation to that treatment. Her Honour accepted the unchallenged evidence of Jamie's parents and treating doctors in finding that she was *Gillick* competent. Jamie was found to have demonstrated the intellectual capacity and sophistication to understand the information relevant to making the decision and to appreciate the potential consequences of the stage two treatment, which included infertility.

Evidence of Jamie's parents and treating doctors on competence accepted

Her Honour accepted the evidence of Jamie's parents and treating doctors in support of a finding that she was *Gillick* competent. In respect of the evidence of Jamie's mother, the Court noted that although she "was not a medical expert", she "has had the advantage of observing and interacting with Jamie since her birth". Jamie's mother deposed that Jamie first began identifying with the female gender as a toddler and that her family had been discussing the advantages, disadvantages and risks of stage two treatment with her treating doctors for many years. Jamie's mother also attested to Jamie having "a full understanding of what the treatment entails, its risks and benefits and how it will affect her".

Her Honour also accepted the evidence of Jamie's treating doctors (one a child and adolescent psychiatrist and the other the Head of Gender Dysphoria at Jamie's treating hospital) that Jamie met the diagnostic criteria for gender dysphoria and was *Gillick* competent in that she was able to give thorough, thoughtful and mature consideration to the risks and benefits of the proposed treatment. The doctors also warned that if the treatment was not permitted, Jamie's anxiety symptoms would increase and she would be at an increased risk of depression and self-harm behaviour. Justice Thornton accepted their evidence that Jamie was *Gillick* competent, understood the risks of the oestrogen treatment "as well as any other person could, including that of an informed adult" and had decided to proceed with the treatment as an independent agent without pressure from her parents or others.

Interestingly, her Honour took into consideration a letter written by Jamie to the Court, imploring them to allow her to commence stage two treatment. Although her Honour did not consider the letter as evidence, she stated it was "important because it articulate[d] Jamie's views".

Application that court authorisation not required absent controversy rejected

Counsel for the applicants did not press the argument that where the diagnosis, and the child's wishes and capacity to consent, were not in dispute. Her Honour noted that she would have been bound by the Full Court decision in *Re Jamie 2013* to reject that application, and counsel

accepted that at the outset. Accordingly, her Honour did not grant the declaratory relief sought. Her Honour also noted that, in any event, it is not clear that the Court has the power to make such a declaration without a statutory conferral of such a power under the *Evidence Act 1995* (Cth).

Commentary

This case is particularly noteworthy as we see Jamie, the subject of the significant and often-cited *Re: Jamie 2013* decision, back before the Family Court to seek approval for further treatment in accordance with the process mandated by the Full Court.

It is one of a number of cases which have been brought seeking declarations that a child is competent to consent to stage two treatment for gender dysphoria following the Full Court's decision in *Re: Jamie 2013* that stage one treatment does not require court approval, but stage two treatment does. Jamie's case is an interesting example of this not only because she was the child in issue in *Re: Jamie 2013* but also because: (a) Jamie was on the younger end of the spectrum of those seeking declarations of *Gillick* competency for stage two treatment; and (b) the Court considered Jamie's own views as expressed in her letter to the Judge, when usually the Court only considers the evidence of the child's parents and treating doctors.

The outcome of most of these decisions has been in favour of the child. In all of the reported cases in 2015, it was found that the children (aged between 15 and 17 years old) were competent to consent to the stage two treatment. However, the Family Court itself has questioned the need for it to be involved in these decisions at all and has acknowledged the possibility of law reform in this area, particularly noting the high burden of the legal process on children and their parents/guardians.

The issue of whether a court authorisation to a medical procedure is required absent controversy around the issue remains controversial.

See the case note on *Re: Martin* [2015] FamCA 1189 for further discussion on these points.

The full text of the decision can be found here.

Laurice Elten, Solicitor at King & Wood Mallesons

Gender dysphoria treatment: Capacity to consent and the role of the court

***Re: Martin* [2015] FamCA 1189 (23 December 2015)**

Summary

The parents of a 16 year old child (identifying as male) sought a declaration that their son was competent to consent to stage two cross-sex hormone treatment for gender dysphoria. Justice Bennett of the Family Court of Australia followed the approach set out by the Full Court of the Family Court in *Re: Jamie* [2013] FamCAFC 110 ('*Re: Jamie*') of considering whether the child was competent to consent to the treatment according to the test in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 ('Gillick'). While considering herself bound by *Re: Jamie*, her Honour expressed strong criticism of the Full Court's decision and of the current position under Australian law which requires a court authorisation before stage two treatment for gender dysphoria can be undertaken.

Facts

The application was brought by the child's mother and father and was supported by the child's treating medical practitioners, including a paediatrician and adolescent medicine practitioner, and a consultant child and adolescent child psychiatrist. The evidence was uncontested and both the parents and treating medical practitioners were supportive of the child undergoing stage two testosterone hormone therapy treatment.

The parents gave evidence that the child identified as male and had expressed "stereotypically male" characteristics and interests from an early age. Further, the parents described the child as becoming "introverted, a recluse, depressed and dark" around the age of 12, and telling his mother in mid-2014 that he was assigned as a girl at birth but felt that he was a boy. Evidence was also given of the child having expressed suicidal ideations. In late 2014, the child was diagnosed with and underwent counselling for gender dysphoria. The child's psychiatrist attested to the child having "a strong persistent and enduring experience of himself as a boy at his core" and being acknowledged by his family, friends and the broader community as male.

As a result, the child wished to undergo stage two treatment with testosterone to facilitate his physical transition from female to male. Both doctors agreed that the treatment sought was necessary for the ongoing welfare of the child and that without treatment the child would be at risk of increasing depression and suicidal ideation.

Decision

Justice Bennett noted that the treatment for gender dysphoria is generally administered in two stages, the first being reversible and the second involving some irreversible elements. In this case the hormone treatment being sought was designed to bring about physical changes from female to male – notably the development of male secondary sex characteristics such as the growth of facial and other body hair, masculinisation of voice and appearance, and a suppression of the development of female organs and characteristics.

Following the decision of the Full Court in *Re: Jamie*, her Honour noted that the position under Australian law is that while the first stage of gender dysphoria treatment does not require court authorisation provided there is no controversy between the child, the parents and the relevant medical practitioners, the irreversible nature of the second stage of gender dysphoria treatment means that the child must be *Gillick* competent to consent to the procedure or, if such competence is lacking, that the court (rather than the parents) must give consent.

Her Honour noted that in accordance with the principles set out in *Gillick*, the court's assessment of competency must be based upon whether the young person has the requisite intelligence and appreciation of the contemplated procedure to be able to give informed consent. In assessing whether to make the declaration sought in this instance, her Honour took into account the following:

- the fact that the child met the diagnostic criteria for gender dysphoria with an "affirmed male gender identity";
- evidence given by the child's psychiatrist that the treatment would lead to various improvements in the child's social and psychological experience;
- evidence given by the parents and doctors regarding the child's capacity to consent to the treatment sought, in particular that which addressed the child's understanding of the risks inherent in the treatment; and

- the fact that there was no less invasive treatment that would allow the masculinisation of the child's body.

On this basis her Honour found that the child had the requisite intelligence and understanding of the procedures involved to give his informed consent within the meaning of *Gillick* and that it would be in the child's best interests to make the declaration sought.

Commentary

While the court's decision in this case was based on uncontested evidence and followed the existing law, her Honour raised an important question as to the role of the court in such cases. In particular, her Honour queried whether the requirement set out by the Full Court in *Re: Jamie* that the court must consider a child's capacity to consent to stage two gender dysphoria treatment is based on a proper reading of the High Court of Australia's decision in *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218 ('*Marion's case*') which accepted *Gillick* into Australian law.

Her Honour was critical of the Full Court's reasoning in *Re: Jamie*, stating that it equated stage two gender dysphoria treatment (which she considered to be a "therapeutic" procedure) with the "non-therapeutic" sterilisation of a child who could not consent to such irreversible treatment at issue in *Marion's case*. Her Honour noted that in apparent reliance on the plurality's decision in *Marion's case*, the Full Court in *Re: Jamie* concluded that because stage two gender dysphoria treatment is "irreversible medical treatment" and "there is a significant risk of the wrong decision being made as to the child's capacity to consent to treatment and where the consequences of such a wrong decision are particularly grave…", the question of a child's *Gillick* competency to consent to it remains a question for the court. Her Honour considered this to be an incorrect reading of *Marion's case* and noted that the Full Court's conclusion was contradictory:

> *On the one hand, the Full Court accepted that gender dysphoria in adolescents and adults is a recognised psychological or psychiatric condition for which there is a recognised regime of therapeutic treatment. On the other hand, the Full Court decided that there was a need for the court to authorise and consent to the treatment in the event of a finding that the young person lacks* Gillick *competency. As* Marion's *case makes clear, and as the Full Court in* Re: Jamie *found, the treatment of a disease (including a psychiatric condition) does not call for Court authorisation.*

Her Honour suggested that given that the treatment of a disease (including a psychiatric condition such as gender dysphoria) does not require court authorisation, the only relevant question should be whether the child has capacity to consent or whether the parent(s) should be asked to do so (a question which, she suggested, can be answered by the medical practitioners who are accustomed to making such judgments on a daily basis).

Her Honour further noted in relation to the procedure for assessing *Gillick* competency set out by the Full Court in *Re: Jamie*, which requires the court to make a declaration "as an issue of fact to be determined by the court on the material presented", that in reality it was difficult to see what the court would do other than to approve the treatment which is explained and recommended to it by competent and qualified clinicians. Her Honour suggested that in a case such as this, where the application was uncontested and uncontroversial, it was difficult to see how the interests of the child were served by compelling the child's parents to make an application to the court to approve the treatment being recommended. Her Honour also criticised the emotional and financial costs for families, children and medical practitioners in requiring such applications to be made.

It is worth noting that this is not the first time the court has felt compelled to query its role in such applications. In *Re: Jamie* itself, Chief Justice Bryant noted that:

> *"[i]t seems harsh to require parents to be subject to the expense of making application [sic] to the court with the attendant expense, stress and possible delay when the doctors and parents are in agreement but I consider myself to be bound by what the High Court said in* Marion's case*…".*

Based on Justice Bennett's criticisms of the Full Court's interpretation of *Marion's Case*, it seems that further consideration of these issues by another appeal to the Full Court or legislative intervention may be warranted.

The full text of the decision can be found here.

Emily Rich, *Solicitor at King & Wood Mallesons*.

INTERNATIONAL HUMAN RIGHTS CASENOTES

Flawed funding found to be discrimination against First Nations children and families

First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada [2016] CHRT 2 (26 January 2016)

Summary

In a significant decision handed down by the Canadian Human Rights Tribunal, it was found that the Canadian Government discriminated against First Nations children and families living on reserve and in the Yukon Territory by failing to provide them with equitable child welfare services.

Facts

The Canadian federal government department, Indian and Northern Affairs Canada (INAC), is responsible for managing the First Nations Child and Family Services Program (the FCNFS Program) and a number of other provincial and territorial agreements, which provide funding for child and family services to First Nations children and families living on reserve and in the Yukon Territory.

The First Nations Child and Family Caring Society of Canada and the Assembly of First Nations (the Complainants) made a complaint against INAC pursuant to section 5 of the *Canadian Human Rights Act*, which provides that it is a discriminatory practice in the provision of services available to the general public to deny or deny access to a service or adversely differentiate any individual on a prohibited ground of discrimination.

The Complainants alleged that INAC had provided inequitable and insufficient funding for the child and family services for First Nations children and families on reserve and in the Yukon, and therefore discriminated against them on the basis of their race and/or national ethnic origin.

Decision

The Tribunal found that the complaint was made out in that there was sufficient evidence to establish a prima facie case that INAC had discriminated against First Nations children and families living on reserve and in the Yukon.

The Tribunal noted that INAC provided not only funding, but policy and oversight, which allowed it to have a direct impact on the provision of the child welfare services. As such, the Tribunal found

that INAC's design, management and control of the FNCFS Program resulted in a denial of services and adverse impacts to many First Nations communities on reserve.

The Tribunal also found that the adverse impacts in the provision of child and family services to First Nations communities perpetuated the historical disadvantage and trauma suffered by the First Nations people, in particular as a result of the Residential Schools system (a historical Canadian policy with some similarities to the Stolen Generation policies in Australia).

Flawed funding formulas

The FNCFS Program was developed to address concerns over the lack of child and family services provided by the Provinces to First Nations reserves. The aim of the FNCFS Program was to ensure that First Nations children and families on reserve and in the Yukon received the assistance or benefit of culturally appropriate child and family services reasonably comparable to the services provided to other provincial residents in similar circumstances.

The Tribunal found that the two main funding formulas used by INAC for the FNCFS Program were based on flawed assumptions and population thresholds which did not accurately reflect the actual service needs within many on-reserve communities. This created funding deficiencies, particularly for small and remote agencies which did not meet the population threshold.

There was also no adjustment of the funding formulas (or of other related provincial agreements) to account for inflation or increased costs of living over time. This not only created a further shortfall between the funding provided and the actual amount required, it also meant there was a disparity with funding for child welfare services off reserve, which accounted for these increased costs.

As well, the funding for operations and prevention (services to maintain children in their family homes) were provided on a fixed cost basis, while maintenance budgets for taking children into care were covered at cost. This meant if a FNCFS agency did not have the necessary funds in its operations budget, the only option to provide the relevant services was to bring the child into care. This therefore created an incentive to remove children from their families.

Lack of coordination and Jordan's Principle

The Tribunal also found that there was a lack of coordination between federal programs on First Nations reserves which resulted in service gaps, delays and denials. This was exacerbated by INAC's view that Jordan's Principle only applies to inter-governmental disputes and to children with multiple disabilities.

Jordan's Principle provides that where a government service is available to all other children but a jurisdictional dispute arises between federal and provincial/territorial governments or even between departments in the same government as to who is responsible for providing the service to a First Nations child, the government department of first contact pays for the service (and can later seek reimbursement from the other governments or departments if required). This is intended to prevent First Nations children from delays and denials of service. The Tribunal held that Jordan's Principle applies to all First Nations children, and INAC's narrow interpretation and implementation of the principle contributed to the overall adverse impacts suffered by First Nations on reserve.

Failure to reform

Despite numerous reports and recommendations pointing out these issues, INAC failed to significantly modify its FNCFS Program. The Tribunal noted that reforms introduced by INAC did not resolve the adverse impacts caused.

Remedies

The Tribunal ordered INAC to:

- cease its discriminatory practices;
- reform the FNCFS Program and related provincial agreements to reflect the findings in the decision;
- cease applying its narrow definition of Jordan's Principle; and
- take measures to immediately implement the full meaning and scope of Jordan's Principle.

The Tribunal reserved its ruling on further remedies sought by the Complainants, including how immediate and long-term reforms can be best implemented, compensation for those affected by the discriminatory practices, and allocation of costs, pending the provision of additional information from the parties. At the time of writing, the final decision on these outstanding remedies has yet to be made.

The Canadian Government has stated it will not appeal the decision.

Commentary

This decision sets an important precedent and should give pause to other countries such as Australia to reconsider the funding of services to their Indigenous populations. However, Australia's equivalent racial discrimination provisions contained in the *Racial Discrimination Act 1975* (Cth) and related state and territory legislation do not impose the same obligations on governments to ensure substantive equality, unless the obligation can be characterised as a "special measure". Notwithstanding, the case acts as a reminder that the provision of funding – and the formulas used to calculate such funding – can have a significant impact on the quality and accessibility of services being provided.

The full text of the decision can be found here.

Sun Hoon, Solicitor at King & Wood Mallesons.

UK welfare benefits cap infringes Convention on the Rights of the Child, but still lawful

R (on the application of SG and others (previously JS and others)) v Secretary of State for Work and Pensions [2015] UKSC 16 (18 March 2015)

Summary

By a majority of three to two, the UK Supreme Court held that the *Benefit Cap (Housing Benefit) Regulations 2012* (UK), which limited the total amount of welfare payments a beneficiary may receive to an amount equal to the average earnings of working households, was valid despite having a discriminatory impact on women (in particular, single mothers). A different majority of three judges held that the cap breached the United Nations Convention on the Rights of the Child (UNCRC), but only two of those judges found that this was relevant to the question of the discrimination against the mothers and meant that the cap was invalid. The decision reveals a significant range of views on the status and interpretation of the UNCRC in the UK.

Facts

The UK government introduced the concept of a cap on welfare payments in the *Welfare Reform Act 2012* (UK). The cap was implemented by the Secretary of State through the *Benefit Cap (Housing Benefit) Regulations 2012* (UK) (the Regulations). The Regulations capped specified welfare benefits at an amount equal to the net weekly earnings (excluding any benefits) of a working household. The cap was set at £350 a week for single claimants without dependent children and £500 for other claimants.

The appellants in this case were two single mothers who had suffered domestic violence and each of their youngest children. Their entitlement to benefits had been significantly reduced following the introduction of the cap.

The issue in this appeal was whether the Regulations breached the *Human Rights Act 1998* (UK) (HRA) because they discriminated against women in their impact on affected women's right to the peaceful enjoyment of their possessions (as prohibited by Article 14 of the European Convention on Human Rights (ECHR) in conjunction with Article 1 of the First Protocol to the ECHR (A1P1)).

It was accepted by both sides that the cap indirectly discriminated against women as it applied to a much greater number of women than men. This is because the majority of non-working households receiving the highest benefits are single parent households and the great majority of these households comprise single mothers and their children. It was not argued that the welfare benefits were not "possessions" under A1P1. The question for the court to determine was whether the discrimination was justifiable and proportionate having regard to its aims. The aims put forward by the Government included:

1. setting a reasonable ceiling on welfare for non-working families to make the system fairer between non-working and working households;
2. providing non-working families with a stronger incentive to work; and
3. reducing government expenditure, particularly in a time of strong budgetary pressures.

Several arguments were raised with respect to the UNCRC. The most significant of these was that Article 3(1) of the UNCRC can be taken into account in making the assessment of the proportionality of the cap. The UNCRC has not been specifically incorporated into UK domestic law, but can be relevant as an aid in interpretation of relevant parts of the ECHR and the HRA. Article 3(1) provides that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

Decision

The Court held that the cap was valid, dismissing the appeal by a majority of three to two, with each of the judges issuing a separate judgment. The majority (Lords Reed, Carnwath and Hughes) held that the cap was not manifestly without reasonable foundation because the Government's aims in introducing the cap were legitimate and the cap was a proportionate means for achieving these aims. The resulting gender discrimination was, therefore, justifiable.

The majority held that, in the context of the cap, the rights of the parents were separable from the best interests of their children. Because of this, Article 3(1) of the UNCRC did not have a role to play in this case because the alleged discrimination was not against children, but against women.

A different majority of three judges (Lady Hale, Lord Kerr and Lord Carnwath) held that the Secretary of State had failed to show how the Regulations were compatible with the obligation under Article 3(1) of the UNCRC to treat the best interests of children as a primary consideration

(not just as a factor to take into account). The Regulations, in essence, deprived many of the affected children of basic necessities. Consequently, there had been a breach of Article 3(1) of the UNCRC. This majority of judges was scathing in assessing the cap's impact. Lady Hale stated that the "prejudicial effect of the cap is obvious and stark. It breaks the link between benefit and need. Claimants affected by the cap will, by definition, not receive the sums of money which the state deems necessary for them adequately to house, feed, clothe and warm themselves and their children. … It cannot possibly be in the best interests of the children affected by the cap to deprive them of the means to provide them with … the basic necessities of life."

Only Lady Hale and Lord Kerr, however, considered that this breach of the UNCRC was relevant to the assessment of the proportionality of the accepted gender discrimination and, therefore, would render the Regulations invalid. In Lord Kerr's dissent, he stated that "[t]he particular species of discriminatory impact here is on women who, *by reason of their position as lone mothers*, claim to suffer a disproportionate interference with their Convention rights."

Lord Kerr went further still, seeing no reason why the UNCRC should not be directly enforceable in UK domestic law even though it has not been specifically incorporated into law by Parliament. In Lord Kerr's view, "[i]f the government commits itself to a standard of human rights protection, it seems to me entirely logical that it should be held to account in the courts as to its actual compliance with that standard."

Commentary

This case demonstrates the disputed position of international conventions (and the UNCRC in particular) in UK domestic law. The five judgments in this case ranged from viewing the UNCRC as directly enforceable in the UK, to holding that failure to comply with the UNCRC could lead to legislation being invalid on the grounds of gender discrimination against mothers, to seeing the UNCRC as entirely irrelevant to the question of whether single mothers were discriminated against.

The case also illustrates the many different views (including within the UK judiciary) on how the UNCRC obligation to have the best interests of the child as a primary consideration in all actions concerning children can be satisfied. Three of the judges held that the obligation was clearly breached by denying children the basic necessities of life. Despite this, Lord Hughes stated that there was no breach of Article 3 because the Government had taken the interests of children into account and made a value judgement – in fact, Lord Hughes specifically noted that the best interests of the child was only "a primary consideration", and not the paramount consideration as reflected by the formulation in other areas of law (the so-called "paramountcy principle").

In the Australian context, the applicability of the UNCRC and other international conventions in domestic law is more limited. Laws in the ACT and Victoria mandate that, as far as possible, laws must be interpreted consistently with human rights and international law may be considered in performing this interpretation (see *Human Rights Act 2004* (ACT) sections 30 and 31; *Charter of Human Rights and Responsibilities Act 2006* (Vic) section 32). So, the UNCRC can have a direct role to play in interpreting relevant Victorian and ACT laws, but only where there are multiple interpretations open (see *Momcilovic v The Queen* (2011) 245 CLR 1). In the other Australian jurisdictions, international conventions such as the UNCRC may also be taken into account where there is ambiguity in the interpretation of a law (see, e.g., *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273).

This case provides fascinating reading around interpretation of the UNCRC and its interaction with laws allegedly discriminating against mothers, but it cannot be directly applied in Australia because of a fundamental difference between UK and Australian law: namely the fact that no Australian jurisdiction empowers a court to declare legislation invalid simply for infringing human rights.

The full text of the decision can be found here.

Phil Marr, Solicitor at King & Wood Mallesons.

OTHER HRLC EVENTS

Art & Activism Debate

Wednesday 20 April 6-730pm at NGV International

“I think art can change the world. If anything can change the world, it is art.”(Ai Weiwei)
Is Ai Weiwei right, can art change the world?

Join Hugh de Kretser, Executive Director, the Human Rights Law Centre and others to explore this topic.

Book now >>

Human Rights Watch: The Politics of Fear, Wheeler Centre

Thursday 21 April 2016, 11.00am-12.00pm at The Wheeler Centre

Human Rights Watch report executive director Kenneth Roth and HRLC’s Director of Advocacy and Research Emily Howie will explore the politics of fear at a time when the world is grappling with the greatest number of refugees since the Second World War.

Book now >>

The Sport of Human Rights, Wheeler Centre

Thursday 5 May 2016, 6.15pm-7.15pm at The Wheeler Centre

Sport is supposed to unite people across races and cultures, deliver us role models and to provide a common talking point across social divides. What happens when we examine these expectations through the lens of human rights?

Join the Executive Director of the Human Rights Law Centre, Hugh de Kretser, former Australian Cricketer Belinda Clark and Managing Director of Alcaston Gallery Beverly Knight to explore this issue.

Book now >>

HRLC POLICY AND CASEWORK

Calls for WA Government to address crisis of Aboriginal peoples’ over-imprisonment, on eve of 25th anniversary of RCIADIC

14 April, 2015

On the eve of the 25th anniversary of the Royal Commission into Aboriginal Deaths in Custody, the Western Australian Government was urged to adopt justice targets to address the State’s appalling rates of Aboriginal peoples’ over-imprisonment.

Dennis Eggington, CEO of the Aboriginal Legal Service WA, said that the primary recommendation of the Royal Commission into Aboriginal Deaths in Custody was that governments must reduce the rates at which Aboriginal people are locked up.

"Western Australia's justice system is at a crisis point. It perpetuates inequality and injustice – which is exactly the opposite of what it is intended to do," said Mr Eggington.

Nationally Aboriginal imprisonment rates have doubled since the Royal Commission and Western Australia is the worst performing jurisdiction. WA's Aboriginal imprisonment rate is close to 70 percent higher than the national imprisonment rate.

The Human Rights Law Centre's Senior Lawyer, Ruth Barson, said that governments should be held to account for this injustice by adopting Justice Targets – measurable goals to reduce Aboriginal imprisonment rates.

"Justice Targets will ensure governments commit to and publicly report against efforts to reduce Aboriginal peoples' over-imprisonment. They will help to ensure governments can't just continue to turn a blind eye to this crisis," said Ms Barson.

In WA Aboriginal people are 17 times more likely to be locked up than non-Aboriginal people. Aboriginal people represent approximately three percent of the general population, yet close to 40 percent of WA's prison population.

Last month the WA Coroner examined the tragic death in police custody of Ms Dhu, a 22 year-old Yamatji woman, who was locked up in a South Headland police station for failing to pay her fines. She died three days later.

Carol Roe, grandmother of Ms Dhu, said that having her granddaughter die such an inhuman death has caused her and her family immeasurable grief.

"When Aboriginal people, like my granddaughter, die in custody, families and communities are destroyed. My heart will never stop bleeding. My family will never stop hurting… My granddaughter should have never been locked up. She should be here with me, rather than in a grave. WA should stop locking people up for unpaid fines," said Ms Roe.

Dennis Eggington said that twenty-five years ago the Royal Commission told governments that Aboriginal people like Ms Dhu should not be locked up for minor offences, but the WA Government has not listened.

"The WA Government should choose to right this wrong. We should be strengthening communities rather than destroying them," said Mr Eggington.

Aboriginal Justice Agency seeks High Court appeal to set safeguards around police powers

31 March, 2016

The North Australian Aboriginal Justice Agency (NAAJA) today sought permission from the High Court to appeal a Northern Territory decision concerning police powers of 'protective custody'.

NAAJA's principal lawyer, Jonathon Hunyor, said that in the Northern Territory the protective custody powers are used approximately 10,000 times each year, with over 90 percent of the people locked up being Aboriginal.

"Locking drunk people up cannot simply become routine. Standards should be in place to ensure police turn their mind to other options. At its heart, this case is about how police should apply the

long-standing principle that arrest and detention should be an action of last resort," said Mr Hunyor.

The *Police Administration Act* allows police to lock someone up for protective custody if the person is intoxicated and they pose a risk to themselves or other people, even if the person has not committed a crime.

"It is critical that we don't allow protective custody to be used as a way of removing Aboriginal people from public places. Our case is about making sure police use their protective custody powers in a fair and proper way, and that people are not being locked up unnecessarily," said Mr Hunyor.

NAAJA is seeking leave to appeal a decision of the NT Court of Appeal, *Mole v Prior,* concerning an Aboriginal man who was detained for protective custody purposes on New Years Eve after drinking in public and making an obscene hand gesture at police. He is alleged to have committed a number of offences following being taken into protective custody.

The Human Rights Law Centre's senior lawyer, Ruth Barson, is coordinating the legal team and said the laws clearly have a disproportionate impact on Aboriginal people and that it is important for the High Court to have an opportunity to consider whether the NT Court of Appeal was wrong in failing to set appropriate policing benchmarks.

"Locking someone up who has not committed a serious crime is a drastic step. Given how frequently these powers are used in the Northern Territory, we need ways to ensure they're not being misused or overused, and that they are not being applied in a discriminatory way," said Ms Barson.

The Royal Commission into Aboriginal Deaths in Custody made clear that to reduce the risk of Aboriginal people dying in custody, governments must reduce the rates at which Aboriginal people are locked up.

"Locking up drunk people in police cells should only ever be done as an absolute last resort. We need properly resourced alternatives to detention, like sobering up shelters, which are a far better and less risky option," said Ms Barson.

NAAJA's client is being represented by counsel from the Victorian Bar, Brian Walters QC and Emrys Nekvapil.

Ms Dhu's family call on the Premier to meet with them, as the coronial inquest concludes

24 March, 2016

As the coronial inquest into Ms Dhu's tragic death in police custody concludes, her family has called for a meeting with Premier Barnett to ensure he is taking action to address Aboriginal deaths in custody.

Carol Roe, grand-mother of Ms Dhu, said that the Premier made a direct promise to her and Ms Dhu's mother, Della Roe, that he would address Aboriginal peoples' over-imprisonment and related deaths in custody.

"It's been over a year since Premier Barnett promised us he would do the right thing. The Premier should now show us the courtesy of meeting with us to explain what his Government is doing to make sure no other family has to endure such a tragedy," said Ms Roe.

Ms Dhu, a Yamatji Aboriginal woman, was 22 years old when she was locked up in a South Headland police station for failing to pay off her fines. She died three days later.

“I want the world to know how badly my daughter was treated. She should have never been locked up in the first place. I still can’t believe something like this can happen in this day and age. The mistreatment and hurt of Aboriginal people must end,” said Ms Della Roe.

Over a period of four weeks, the Coroner has heard alarming evidence of how both police officers and hospital staff dismissed Ms Dhu as faking her pain and illness.

“People involved in my daughter’s death should be held properly accountable – instead we’ve heard how some police officers have been promoted. This is so hurtful to us,” said Ms Della Roe.

Ruth Barson, senior lawyer at the Human Rights Law Centre, said that such an egregious example of system failure should be a wake-up call for Western Australia.

“The Coroner has heard shocking evidence of cruel, inhuman and degrading treatment. Premier Barnett now has a choice – he should take immediate steps to address this grave injustice. He must stop locking people up for unpaid fines,” said Ms Barson.

It’s time for a Queensland Human Rights Act

24 March, 2016

A Human Rights Act would be a force for good in protecting the rights of all Queenslanders and would deliver significant benefits, the Human Rights Law Centre has told the Queensland Parliament’s Human Rights Inquiry.

Human Rights Law Centre’s director of advocacy and research, Emily Howie, said it’s time for Queensland to enshrine the values of freedom, equality, respect and dignity in law.

“We know from experience that when human rights are not protected in law, they are always in danger of being taken away. This is a particularly serious concern for people on the margins – people experiencing homelessness or mental illness, Aboriginal and Torres Strait Islander peoples, people with disabilities and more,” said Ms Howie.

Human Rights Acts introduced in Victoria and the ACT in the last decade or so have been proven to deliver significant benefits to people living in those places.

“It’s great to see how Human Rights Acts have helped to address disadvantage and improved law making and public service delivery. The major impact of these laws was not felt in the courts, but seen in the development of a broader rights-respecting culture in government and the wider community,” said Ms Howie.

Ms Howie said that Queensland should seize the opportunity not just to introduce a human rights law, but also to improve upon existing models, in particular ensuring that an Act contains a free-standing cause of action to allow people to access justice for the violations.

“A Human Rights Act would clearly set out what Queenslanders’ human rights are, guarantee a process for how the Queensland’s government will respect those rights and provide avenues to seek justice when rights have been violated. Without access to justice for violations, the government is sending mixed messages about the importance it places on its people’s human rights,” said Ms Howie.

The Human Rights Law Centre’s submission can be found here.

OPINION

NSW anti-protest laws are part of a corrosive national trend

4 April, 2016

This piece was first published by the Sydney Morning Herald.

NSW's harsh and unnecessary new anti-protest laws are the latest example of an alarming and unmistakeable trend. Governments across Australia are eroding some of the vital foundations of our democracy, from protest rights to press freedom, to entrench their own power and that of vested business interests.

The NSW laws give police excessive new powers to stop, search and detain protesters and seize property as well as to shut down peaceful protests that obstruct traffic. They expand the offence of "interfering" with a mine, which carries a penalty of up to seven years' jail, to cover coal seam gas exploration and extraction sites.

They also create a tenfold increase in the penalty applying to unlawful entry to enclosed land (basically any public or private land surrounded by a fence) if the person "interferes" or "intends to interfere" with a business there. At the same time as ratcheting up this penalty for individuals who protest, recent changes made by the NSW government mean that resource companies that illegally mine can receive a $5000 penalty notice instead of a potential $1.1 million fine.

Disturbingly, these laws aren't isolated.

Tasmania last year targeted environmental protest with broad and vague new offences including "hindering" access to business premises or "obstructing" business operations, with penalties of up to $10,000 and four years' imprisonment. In Western Australia, proposed legislation contains extremely broad new offences of "physically preventing a lawful activity" and "possessing a thing for the purpose of preventing a lawful activity" with proposed penalties of up to two years in prison and fines of up to $24,000.

Common to these anti-protest laws are harsher penalties, excessive police powers and the prioritisation of business interests (particularly mining and forestry operations) over the rights of Australians to gather together and protest about issues they care deeply about.

Our democracy doesn't start and end on election day. Its enduring success rests on vital components like press freedom, the ability of NGOs to advocate freely, the rule of law, watchdog institutions like the Australian Human Rights Commission and the right to peacefully protest.

We can't take these foundations for granted. They are critical components of the democratic system that has helped to make Australia one of the safest, most stable and prosperous places on the planet.

But just as protest rights are being undermined, so too are many other vital democratic foundations.

Governments across Australia are deliberately using a range of funding levers to suppress advocacy by NGOs including gag clauses, targeted funding cuts and threats to the ability of environmental organisations to receive tax deductible donations from supporters – a tax status which is often critical to financial sustainability.

Secrecy laws and an increasingly aggressive attitude to whistleblowers mean that people who expose even the most serious human rights abuses face unprecedented risks of reprisals, including prosecution and jail. Press freedom is being eroded by new laws and policies

jeopardising journalists' ability to maintain the confidentiality of sources and to report on matters of public interest. All the while, in critical areas governments are undermining or sidelining the courts and institutions that were created to keep them in check.

Last month, I was joined in Canberra by leaders from across Australian civil society to launch our Safeguarding Democracy report. The report documents this corrosive trend and outlines ways to reverse it.

Leaders who spoke out in support of issues raised in the report included representatives from the nation's peak community agency, peak Indigenous body, faith-based agencies, the media, unions, philanthropy, international development and the environment movement.

They share a common concern for the health of our democracy. It's a concern that should be shared by political leaders across the spectrum.

Encouragingly, the work to stop the damage has begun in some places. The Queensland government has removed gag clauses from NGO contracts imposed by its predecessor and is looking to protect fundamental human rights, including protest and assembly rights, in a Queensland Human Rights Charter. Victoria has repealed excessive move-on laws that threatened peaceful protest and is strengthening its charter. At the federal level, the government recently agreed to wind back certain aspects of ASIO laws that undermine press freedom and is looking to reset its relationship with the Australian Human Rights Commission after the extraordinary political attacks last year.

We need more.

We need to call out regression like the NSW anti-protest legislation for what it is. We need to recognise the cumulative democratic harm being inflicted by particular environment, counter-terrorism or refugee policies. Ultimately, if we truly care about protecting our democratic rights and freedoms, we need to guarantee them in an enforceable national Human Rights Charter.

***Hugh de Kretser** is the Executive Director of the Human Rights Law Centre. You can follow him on Twitter @hughdekretser*

OPINION

WA's failure to implement Royal Commission's recommendations

15 April, 2016

This piece was first published by The West Australian

This week marks the twenty-fifth anniversary of the handing down of the Royal Commission into Aboriginal Deaths in Custody recommendations. The recommendations provide Australia with a roadmap for reducing Aboriginal peoples' imprisonment rates and related deaths in custody – a roadmap as relevant today as it was then.

The key lesson from the Royal Commission is that the surest way to reduce Aboriginal deaths in custody is to reduce the rates at which Aboriginal people are locked up.

Ms Dhu's death in police custody is painful evidence of Western Australia's failure to fully implement the Royal Commission's recommendations. And, West Australians should be reeling from the evidence uncovered during the recent coronial inquest into her death.

Ms Dhu, a 22 year-old Yamatji woman, was locked up for three days for unpaid fines. During that time the hospital and police force – institutions we collectively place our trust in – failed her.

Worse, she was dismissed, sworn at, dragged and ignored. Ms Dhu was treated in an utterly cruel and degrading way, before dying a most inhuman death.

Premier Barnett should be doing everything within his power to make sure such a tragedy never happens again.

Western Australia has the highest Aboriginal imprisonment rates in the country, with Aboriginal women being the fastest growing prisoner demographic.

While the Premier's Justice Working Group, recently established to address over-imprisonment and deaths in custody, has taken some important steps, they do not go far enough. Deaths in custody like Ms Dhu's demand a profound rethink of how justice is administered in Western Australia.

In the short term, and in addition to existing Government commitments, there are five key changes the Government should implement which would go some way to addressing systemic failings and meeting the standards set by the Royal Commission.

First, people who cannot pay their fines should not be locked up.

No other Australian jurisdiction locks up fine defaulters at rates that come even close to WA.

Second, the WA Government recently announced the expansion of a 24-hour hotline for Aboriginal people in custody, operated by Corrections. This is a step in the right direction, but a far better approach would be for the Government to introduce a Custody Notification System (CNS) operated by the Aboriginal Legal Service.

A CNS is a dual welfare and legal service. It allows all Aboriginal people taken into police custody to talk to an Aboriginal Legal Service lawyer to ensure they are okay; that they are being treated fairly by police; that their health and legal needs are being met; and that there is a level of oversight when it comes to their detention.

We know from other states that a CNS operated by the Aboriginal Legal Service works to prevent deaths in police custody.

Third, there should be a 24-hour nurse on call available in all WA police lock-ups. Currently this service is only available in Perth. Justice based on geography should not be tolerated in Western Australia.

Fourth, increased independence and accountability are needed.

This involves having both independent investigations into police-related deaths (currently police investigate other police); and extending the mandate of the Independent Inspector of Custodial Services to include police lock-ups. Mechanisms of independent oversight ensure accountability and transparency. They ensure proper standards are maintained and poor practices are stamped out.

Finally, WA desperately needs a plan for comprehensively implementing the recommendations of the Royal Commission into Aboriginal Deaths in Custody. While the Government's recent commitment to invest in early intervention and diversion programs is a significant step forward, this now needs to be translated into action and results.

As it stands, WA's justice system is utterly out of balance – it is destroying families and communities. The above proposals for much needed reform are about valuing and saving lives.

The inescapable truth is that Ms Dhu should have never been locked up, she should have never died in custody, and she certainly should not have suffered such an undignified and inhuman end.

Twenty-five years since the Royal Commission into Aboriginal Deaths in Custody, Western Australians should not tolerate such devastating injustice.

Ruth Barson is a senior lawyer at the Human Rights Law Centre. She worked closely with the family of Ms Dhu throughout the coronial inquest. You can follow her on Twitter @RuthHRLC

The Human Rights Law Centre would like to thank everyone who contributed to the production of this Bulletin.

Philippa Macaskill and Charles Davies, Solicitors, King & Wood Mallesons and Editors of this Special Children's Rights Edition of the HRLC Bulletin.

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