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Human Rights Law Centre

Rights Agenda Children's Rights Edition

Monthly Bulletin of the Human Rights Law Centre

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2014 CHILDREN'S LAW AWARDS

Promoting the Rights of Children and Young People

Each year, King & Wood Mallesons and the National Children's and Youth Law Centre, work with the Human Rights Law Centre to published a special edition of our Monthly Bulletin, *Rights Agenda*, that focuses exclusively on human rights and legal issues affecting children and young people.

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This edition of Rights Agenda is supported by

KING&WOOD MALLESONS

CHILDREN'S RIGHTS EDITION 2014

Introduction from Matthew Keeley

It is my great pleasure to present this year's children's rights edition of the Human Rights Law Centre Bulletin, developed in collaboration with King & Wood Mallesons and the Human Rights Law Centre. I am particularly pleased that the voice of young people comes through loud and clear in this year's edition with many of the articles written by young people under the age of 25.

This special edition is now in its fifth year. In that time it has reported on significant issues affecting children across Australia. This year's edition continues this tradition, exploring the abuses and harms caused by forced child marriage, cyberbullying and the treatment of young people in the criminal justice system amongst other issues.

The treatment of children in Australia, and elsewhere, requires constant vigilance. We need look no further than the current Royal Commission into Institutional Responses to Child Sexual Abuse for support of that proposition. Articles such as those in this edition serve as a reminder of the many issues affecting children that we must remain attentive to.

These articles call for governments across Australia to ensure the safety and wellbeing of all children in Australia so that they can reach their fullest potential. They also recognise that positive steps have been taken in some areas, including the proposed establishment of a Children's e-Safety Commissioner. And they call for the Commonwealth Government to grant Australian children the ability to access independent, international scrutiny of Australia's child rights compliance by ratifying the Third Optional Protocol of the Convention of the Rights of the Child.

I thank King & Wood Mallesons and the Human Rights Law Centre for their generous support of this project. Since 2010, summer clerks and paralegals at King & Wood Mallesons have written the articles contained in these special editions and I extend my thanks to them for their diligence in shedding light on the inequalities and injustices affecting children across Australia.

The launch of this year's edition also coincides with the 2014 Children's Law Awards. As a practising children's lawyer I am inspired and optimistic for the future by the profiles on this year's finalists for the Awards found in these pages. Congratulations to the winners and all finalists!

Matthew Keeley

Director, National Children's and Youth Law Centre

Introduction from Hugh de Kretser

The 2009 National Human Rights Consultation recommended that education be the highest priority for improving and protecting human rights in Australia. *Rights Agenda* is the Human Rights Law Centre's flagship contribution in this regard.

Our annual Children's Rights Edition is produced, like the vast majority of our work, in partnership with a leading pro bono law firm and not for profit organisation. I sincerely thank King & Wood Mallesons and the National Children's and Youth Law Centre for their collaboration on this project.

This edition is timely as child rights are in the spotlight in Australia. The Australian Human Rights Commission's National Inquiry into Children in Immigration Detention is highlighting the harm being inflicted on children and families by our policies of detaining asylum seekers.

Recently announced moves to release children from immigration detention on the mainland are welcome but also highlight the policy incoherence and ongoing damage being caused with over 300 children detained offshore on Christmas Island and Nauru. There is no doubt that their ongoing, indefinite detention breaches fundamental international human rights guarantees. There is no justification for these practices.

The Human Rights Law Centre is part of the legal team assisting 157 Sri Lankan Tamil asylum seekers, including 50 children as young as one, who the Australian Government intercepted off Christmas Island and detained for almost a month at sea while attempting to return them to India. We are in regular contact with our clients who are now in detention on Nauru in conditions the UNHCR has described as unsafe, inhumane and particularly inappropriate for children. Anyone working with families in this situation knows the despair of parents for their children's wellbeing and future, and the urgent need for a better policy response.

More broadly, the HRLC is actively involved in work to promote education rights for young Aboriginal and Torres Strait Islander people, to stop the transfer of young people to adult prisons, to promote safe and humane conditions in youth justice facilities and to challenge harsh and counterproductive youth justice policies like 'naming and shaming', 'boot camps' and the removal of detention as a last resort.

The articles in this Children's Rights Edition highlight some of the progress that has been made in securing child rights in Australia, but also the setbacks and the many challenges that remain. Importantly, the finalists and winners of the 2014 Children's Law Awards showcase the extraordinary work of many individuals across Australia in tackling these challenges.

We hope you enjoy this special edition.

Hugh de Kretser

Executive Director, Human Rights Law Centre.

WINNERS OF THE 2014CHILDREN'S LAW AWARDS

Congratulations to the winners of the 2014 Children's Law Awards:

The National Award For Outstanding Legal Representation

Winner: Unaccompanied Humanitarian Minor Consortium

Core membership: Sophie McNamara (Russell Kennedy); Renuka Senanyake (Springvale Monash Legal Service); Denise Gardner (Flemington Kensington Legal Service); and Victoria Legal Aid

Nominated by Fiona McLeay, Executive Director of Justice Connect

Many children and young people face numerous difficulties in their applications for asylum in Australia. After experiencing horrific war and dislocation, unaccompanied humanitarian minors in Australia face the prospect of being isolated from their families. This, alongside the lack of social friendships in a new country, and language and cultural barriers, makes them particularly vulnerable.

Formed in 2010, the Unaccompanied Humanitarian Minor Consortium (Consortium) was established as a response to this concern and in an effort to protect the family reunification rights of Afghan child refugees. The Consortium is a unique collaboration between over twenty pro bono lawyers, community legal centres, Victoria Legal Aid and social services. Family reunification has been recognised as one of the most important features of resettlement for young refugees. Over the past four years, the Consortium has assisted over 400 young refugees and their families. This result has only been achieved by the collaboration engaging in advocacy, strategising, developing templates, pooling together their resources, and providing emotional support for its members, amidst a changing and difficult polico-legal climate.

By using a multi-disciplinary approach to solve the problems faced by unaccompanied minors, the Consortium has exhibited a unique and exceptional collaborative method of legal representation, achieving many positive outcomes such as in the High Court case of *Shahi v Minister for Immigration and Citizenship (M10/2011)* in which an Afghani mother was reunited with her child who had turned 18 in Australia.

The current core membership consists of Sophie McNamara (Russell Kennedy), Renuka Senanyake (Springvale Monash Legal Service), Denise Gardner (Flemington Kensington Legal Service) and Victoria Legal Aid.

The other legal members are: Springvale Monash Legal Service, Russell Kennedy Lawyers, Hanna Jackson Lawyers, Flemington Kensington Legal Service, Springvale Community Aid and Advice Bureau, Justice Connect, Law Institute of Victoria and Law Council of Australia, VLAF, Carina Ford Immigration, and Clothier Anderson.

They are supported by: the Department of Human Services (including the Refugee Minor Program), Foundation House for Survivors of Torture, AMES, Diversitat, and Spectrum.

Past members include: Krystyna Grinberg, Dana Krause, and Helen Yandall.

> *"The UHM Consortium's work is of profound significance for the young people who have been reunited with their families in Australia as a result. For many families it has meant the difference between safety and danger, family and loneliness…" - Quote from nominator*

The National Award For Outstanding Contribution To Policy Or Law Reform

Winner: Lucas Moore and the CREATE Foundation

Nominated by Michael Hogan, Director-General at the Department of Communities, Child Safety and Disability Services (QLD)

Recent statistics show that there are over 50,000 Australian children living in out-of-home care. Furthermore, there are numerous young people each year who reach adulthood and therefore are no longer able to remain in the out-of-home care system. Behind these statistics lie the multiple everyday challenges faced by these children and their families, while living in, and after leaving, care. Government inquiries including the Wood Special Commission of Inquiry into Child Protection Services in NSW and the Carmody Inquiry have articulated these issues.

The CREATE Foundation is a national body which represents the voices of all children and young people in out-of-home care and those leaving care. Its mission is to attain a better life for the children and young people in care and CREATE achieves this through connecting children to each other, empowering them to have a voice and be heard, and advocating for the care system to be bettered. Through its Speak Up Program, Young Consultants, and Youth Advisory Groups, CREATE ensures that young people have a voice which has successfully driven change within the out of home care system. CREATE uniquely believes in ensuring the voices of children inform policy and law reform. In Queensland, the 2012/2013 Carmody Child Protection Commission of Inquiry was held. Lucas Moore, the QLD State Coordinator and the CREATE Foundation, made significant submissions to this inquiry, addressing issues which had been identified by young persons themselves as being significant. CREATE also facilitated opportunities for young people with experience in the care system, to give information directly to the inquiry.

> *"…CREATE [went] beyond…in terms of contributing to the inquiries through the eyes of either advocacy, criticism, or as a spectator. They actually participated as a partner with the reform, they were very fair, they advocated and spoke very passionately on behalf of children and young people in the care system, they made sure that children and young people themselves had opportunities to participate at the level they needed to. They were very constructive and creative in finding solutions, rather than just telling the Commission and the public what was wrong with the system…" - Quote from a referee*

FINALISTS OF THE 2014CHILDREN'S LAW AWARDS

Also a big congratulations to al of the finalists of the 2014 Children's Law Awards:

The National Award For Outstanding Legal Representation

Hayley O'Hara

Nominated by Peter Collins, Director of Legal Services at Aboriginal Legal Service of Western Australia (Inc.)

In Western Australia, Aboriginal children and young people are amongst the most imprisoned in Australia, representing the most over-policed section of the Western Australian community. The Aboriginal Legal Service of WA acts for numerous Aboriginal children in custody or often facing serious criminal offences.

Hayley O'Hara has worked as a criminal lawyer with the Aboriginal Legal Service of WA Perth office for the last four years, practicing exclusively in the Perth Children's Court. Prior to this she worked in the Carnarvon office for several years. Hayley faces the challenges of representing these children day in and day out. She treats each Aboriginal child she represents with respect and compassion leading to her exceptional effort to ensure a just outcome for each child.

> *"…her absolute strength is that she's really dedicated and passionate about the young person being heard, and being the medium through which that is done….there's no diminished treatment, she is very respectful of the young person themselves and an issue which they see as important to be raised…" - Quote from a referee*

Murray Watt, Katie Robertson, Jacob Varghese and Maurice Blackburn Lawyers

Nominated by Dr Angus James Francis, Principal Solicitor at Refugee and Immigration Legal Service

Babies born in Australia to asylum-seeker parents face the legal uncertainty of being classified as "unauthorised maritime arrivals", without ever having arrived by boat. The effect of this is the policy that these babies are sent to offshore processing centres at the age of 28 days.

Murray Watt, Katie Robertson, Jacob Varghese, together with a team from Maurice Blackburn lawyers, have been conducting landmark litigation on a pro bono basis on behalf of Baby Ferouz, an Australian-born baby, and his Rohingyan asylum-seeker family, preventing their removal to Nauru this year. The firm's involvement in the Baby Ferouz case has resulted in Maurice Blackburn representing a further 60 children born in Australia to asylum-seeker parents.

> *"Had Maurice Blackburn not come in at that point, we could have lost a huge opportunity to right a wrong... This family is stateless…so, to raise expectations of those people, who have been in and out of camps for the best part of the last 20 years,…it's really dangerous. I think that the commitment to the end game is absolutely something that's very unique about Murray's contribution…" - Quote from a referee*

NAAJA Youth Justice Team - Shaleena Musk, Franky Bain, Kelly Goodwin, and Terry Byrnes

Nominated by Pippa Rudd, PHD Student at Menzies School of Health Research

Aboriginal children and young people in the Top End face disadvantage, cultural barriers, and involvement in the child protection or criminal justice systems. A particular difficulty is the inability to properly understand the legal process and have appropriate support services. Without strong legal representation, these children can find themselves remanded in custody or in other tough circumstances.

The North Australian Aboriginal Justice Agency's Youth Justice Team was formed in 2013. The collaboration of the team members in providing individual case management for children, allows the full circumstances of each young person to be taken into account by the Court. The NAAJA Youth Justice Team works tirelessly, representing Aboriginal children and since being set up, there has been a marked reduction in the number of young people remanded in custody.

> *"The NAAJA team has, I think, acted in that capacity to locate and bring together various services around young people in a way that the government departments have not been able to do so far... they deal with problems that other jurisdictions don't see: young people who don't speak English, who you have to find an interpreter for, who you then have to carefully take instructions from through an interpreter; trying to find family…An outstanding performance…" - Quote from a referee*

The National Award For Outstanding Contribution To Policy Or Law Reform

Elizabeth Handsley

Nominated by Morry Bailes, President of the Law Society of South Australia

A challenge facing Australia is the interaction of children and young people and the media. Given the ever-changing nature of the media, the legal regime surrounding this area is very new and developing.

Elizabeth Handsley, a Professor of Law at Flinders University and the President of the Australian Council on Children and the Media since 2010, has worked tirelessly in, among other things, the creation of children's media law as a recognised legal field including the amendment of the guidelines for MA15+ video games.

> *"She is such a broad minded but quite focussed academic that gets right down to the nitty gritty and is able to spell out what is necessary in terms of reform in relation to children and media...She's a very rigorous researcher. She's very principled. She is a leader in the field. The idea of children and media and keeping children's best interests at heart are central..." - Quote from a referee*

Save the Children, Tasmanian Supporting Young People on Bail Program

Nominated by Stuart Oldfield, Area Manager - Community Youth Justice at the Department of Health and Human Services (TAS)

Tasmania has high rates of youth offending. Many of these children and young people are held in custody before their hearings.

In response to this, the Save the Children Supporting Young People on Bail Program in Tasmania was established. The program supports young people who are on bail by designing individual Bail Support Plans which contain goals and aspirations with regard to educational, vocational/employment and recreational activities. As a result, Tasmanian legislation was amended this year to accommodate the idea of the Bail Support Program to provide the opportunity for a Magistrate to allow a young person to engage in a process called Bail Review.

> *"The magistrate is placing great weight on the written Bail Support Plan and the written progress reports of…young people making proactive social steps to better themselves and keep themselves out of trouble, and not remanding many young people on bail...The numbers of youth on remand has significantly reduced over the last 3 years... by about 25%..." - Quote from a referee*

Antoinette Carroll

Nominated by Peggy Cheong, President of the Law Society of the Northern Territory

On any given night in Alice Springs, close to 100% of the children and young people in detention are Aboriginal. The youth sector is severely under-resourced and governments frequently adopt strategies which are tough on youth offenders. There is therefore a significant need for independent youth justice advocacy in Central Australia.

For 15 years, Antoinette Carroll has been a strong advocate and passionate voice for the Aboriginal children in Central Australia. In 2007, she successfully obtained the funding for a program she developed, known as the Youth Justice Advocacy Project (YJAP). The YJAP is now considered a lead agency of systemic advocacy for the policy and law reform of the youth justice

system by bringing together the needs and voices of Aboriginal children and alerting the government and community to these needs.

> *"I have worked for 17 years on and off as a youth justice lawyer among other things, but [Antoinette] taught me and has given me more perspective on seeing things from a young person's point of view in the time that I have worked with her than I would otherwise have had…"* - Quote from a referee

DISCLAIMER

NATIONAL CHILDREN'S COMMISSIONER

Update from Megan Mitchell

Now, eighteen months into my role as Australia's first National Children's Commissioner, I have had the chance to reflect on what I have learned and set a course for myself in the role.

My initial priority was to conduct a listening tour which I called the Big Banter - to hear directly from children and their advocates about what issues are most important for children, to inform my priorities for action, and to hear about how I could best engage in my future work.

Through this consultation process I met with well over 1,000 children face-to-face, and heard from a further 1,300 or so children online and through the post. I also heard from hundreds of children's advocates. The Big Banter officially concluded in September last year and the Children's Rights Report 2013 has since been tabled in Parliament. I was able to make sure the report reflected the voices of the children I met - a practical demonstration of how children's voices can be put in front of decision makers.

What I learned from children was that they want to be with their family and with their friends, and be safe. They enjoy their freedoms and being able to play, being active and having fun, but they also appreciate fair boundaries and rules. They are particularly concerned about the level of violence, aggression and bullying in the community, and they would like to live free from drugs, alcohol and smoking.

Children worry that some children can't afford to do or have the things they would like, and they want more things to be available for free. They also want people to show more respect for one another, and they want to be respected and listened to. And they definitely want to have a say and to have their voice heard. Many children I spoke to wanted to be more involved in decision making and political processes, and I have no doubt they would be quite capable of this.

The things that children told me directly shaped the five broad priority themes for my future program of work set out in my first report to Parliament. These were: the right to be heard and participate; freedom from violence and abuse; the opportunity for all children to thrive; engaged citizenship; and action and accountability.

As National Children's Commissioner, the Convention on the Rights of the Child provides the main impetus for my work.

The Convention is the most ratified international human rights treaty in the world. It makes clear that children have the same human rights as adults, but that they also are entitled to special protection because of their unique vulnerabilities. By ratifying the Convention in 1990, Australia promised to protect and uphold the rights of children.

The Big Banter was intended to keep faith with Article 12 of the Convention. Article 12 of the Convention gives to every child, including very young children, the right to be taken seriously and be heard in matters affecting them. These views should be given weight in accordance with the child's age and maturity.

Children cannot exercise their rights if they are not recognised, heard and given agency. This is why Article 12 is one of four guiding principles of the Convention. It recognises that the right of children to have their views respected is a gateway to all of the other rights in the Convention, and the key to their active citizenship.

Article 12 is fundamentally about empowerment, and in my interactions with children it is clear that even just having the knowledge that they are rights holders has an empowering effect.

As National Children's Commissioner, I am especially interested in how we can promote meaningful participation of children in the decisions and processes that affect them.

In my 2013 report to Parliament, I made a recommendation that the Government sign on to the Third Optional Protocol to the Convention on a Communications Procedure. Signing on to this Protocol would allow individual children in Australia to submit complaints regarding specific violations of their rights across the whole spectrum of rights under the Convention.

This is especially important for children in vulnerable situations, like those involved in care and protection settings, juvenile justice systems, and family court proceedings, where the decisions that are being made have a significant impact on their lives, both immediately and in the long term.

Being able to be heard, raise concerns, and be taken seriously also acts as a strong safeguarding measure for children.

Hearing from children not only empowers and protects them, but also helps adults to get things right. Every day, policies, programs and laws are being designed and delivered that impact directly or indirectly on children. As the experts in their own lives, ignoring their experiences and perspectives will invariably lead to interventions that just don't work for them.

Privileging the voice of children, really listening to what they have to say and taking it on board, is a powerful message to children about their value.

Children are particularly vulnerable to having their rights and freedoms abused or restricted. In this context, processes for receiving information about breaches of rights and freedoms should be accessible to children. We also need to make sure that existing mechanisms for resolving complaints and concerns are accessible and available to children.

Additionally, children should know the laws and their rights in respect of privacy, cyber-safety and bullying, how they can be protected from exploitation and abuse, and where they can go to for help.

It is my vision that every community, neighbourhood and organisation across the country takes on the challenge to be child safe and child centred. Finding ways to hear from children and genuinely engaging with them is the most fundamental of all building blocks for this to happen.

Building the agency of children goes hand in hand with the need to provide them with adequate protections as they grow and develop. For this reason I am currently undertaking a project on intentional self-harm and suicidal behaviour among children and young people. This project not only arose from some of the feedback I received during the Big Banter, but also because of the alarmingly high rates of suicide and self-harm among Australia's young people today.

Intentional self-harm and suicidal behaviour in children and young people is a serious issue in Australia and overseas. The latest available data from 2012 shows that intentional self-harm was the leading cause of death among Australian children and young people aged 15 to 24.

For the same year, there were 10,699 instances of hospitalisation involving intentional self-harm for children aged between 5 and 24.

We know that many more children and young people intentionally self-harm than present to hospital. In 2012, the Kids Helpline responded to 15,887 contacts by children and young people aged 5 to 25 who were assessed to have self-injury and self-harming behaviours.

The aim of this project is to gain a much deeper understanding about what is happening for our young people, and what can be done to improve supportive interventions and increase help-seeking behaviour.

To date, I have received 140 written submissions, held 12 expert roundtables, conducted a range of individual consultations across Australia, undertaken a review of literature and relevant research and commissioned additional data. The results of the investigation will form the substantive content of my 2014 report to Parliament.

Megan Mitchell *(National Children's Commissioner), Australian Human Rights Commission.*

CHILDREN'S RIGHTS - ARTICLES

Australia's implementation of the Convention on the Rights of the Child

It's been 24 years since Australia ratified the Convention on the Rights of the Child, but there's still a lot of work to be done, write Erica Long and Guy Baldwin.

The *Convention on the Rights of the Child* plays a critical role in the international human rights treaty system by recognising that children have agency as rights holders while acknowledging children's vulnerability as a basis for special protection. Having entered into force on 2 September 1990, its provisions enshrine a child's rights to life, survival, development and non-discrimination, and emphasise the need to consider a child's best interests and views in reaching decisions affecting him or her. The treaty has been widely ratified. Only the United States and Somalia have not ratified the convention, while South Sudan is not a signatory.

Australia ratified the convention in December 1990. Its ratification was subject to Australia's reservation to article 37(c) of the convention which requires that children not be detained with

adults. Due to this reservation and other ongoing issues, such as Australia's detention of asylum seeker children, Australia's implementation of the convention has received a mixed reception from the Committee on the Rights of the Child, the body of independent children's rights experts tasked with monitoring the convention's implementation.

The Committee's Concluding Observations

The Committee monitors implementation of the convention through its reporting and Concluding Observations mechanism. The convention requires the Committee to issue Concluding Observations in response to periodic reports provided by State parties to the convention. Concluding Observations contain an assessment of the State's record in complying with its obligations under the convention and recommend ways in which the State may enhance its implementation of the convention. Concluding Observations are an important means of stimulating systemic improvements to human rights in a State. The Committee has issued Concluding Observations on Australia's implementation of the convention on three separate occasions – 21 October 1997, 20 October 2005 and most recently, 28 August 2012.

Positive aspects of Australia's compliance

In its 2012 Concluding Observations, the Committee commented favourably on a number of recent developments across a range of different areas. These include:

Education: The introduction of the *Education and Care Services National Law Act 2010* (Cth), which creates a national quality framework for early childhood education and care, and the Children's Education and Care Quality Authority's work in implementing the framework.

Bullying: Measures taken to combat bullying in schools such as the National Safe School Framework and the 'Bullying. No Way!' program.

Family law: Amendments made to legislation relating to family law by the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth) in order to prioritise the safety of children.

Data collection: Projects of the Australian Bureau of Statistics to collect data relevant to Australia's implementation of the convention, including its Longitudinal Study of Australian Children and Longitudinal Study of Indigenous Children, and other data collection measures such as the Australian Early Development Index.

Indigenous children: Australia's National Indigenous Education Action Plan 2012–2014 and National Partnership Agreement on Indigenous Early Childhood Development.

Privacy: The Office of the Australian Information Commissioner's guidelines on handling the personal information of children, pursuant to the *Privacy Act 1988* (Cth).

Disability: The assessment of the disability support system conducted by the Productivity Commission in July 2011.

Paid parental leave: Australia's implementation in 2011 of a paid parental leave scheme, although the Committee expressed concern that the scheme was 'fixed at the national minimum wage' and 'is shorter than the required six months to exclusively breastfeed children'.

Since the 2012 Concluding Observations, further initiatives have been undertaken to advance Australia's implementation of the convention, including:

> ***Big Banter* Tour**: The inaugural listening tour of the National Children's Commissioner, Megan Mitchell, which was intended to assist the Commissioner to understand the issues important to children, increase her profile across the nation and facilitate the input of children's voices in setting human rights priorities. The tour should aid Australia in meeting its obligations under article 12 of the convention, which protects the right of children to express their views freely in all matters which affect them.
>
> ***Sex Discrimination Act 1984* (Cth) amendments**: The Commonwealth Government's amendment of the *Sex Discrimination Act 1984* (Cth) to include discrimination on the basis of sexual orientation, gender identity and intersex status (addressing past criticism from the Committee about the lack of such protection).

Areas requiring improvement

Australia has been heavily criticised in respect of some aspects of its implementation of the convention. Two of the most discussed issues are those of asylum seeker children and children detained with adults (addressed below).

In the 2012 Concluding Observations, the Committee reiterated numerous concerns which have failed to be addressed notwithstanding the Committee's previous Concluding Observations. These concerns include:

> **Child rights legislation**: The absence of comprehensive child rights legislation at the national level giving full and direct effect to the convention in Australia's national law. Two states have passed such legislation which has resulted in what the Committee describes as 'fragmentation and inconsistencies in the implementation of child rights across its territory'. The implication of this is that children in similar situations across Australia are subject to variations in the fulfilment of their rights depending on the state or territory in which they reside.
>
> **Disaggregated data**: The lack of disaggregated data on children, analysed according to 'ethnicity, refugee, migrant and internally displaced children, child abuse and neglect and children who are victims of sexual exploitation'.
>
> **Aboriginal and Torres Strait Islander children**: The continuing 'serious and widespread discrimination' faced by Aboriginal and Torres Strait Islander children, including discrimination in relation to the provision of and accessibility to basic services, their significant overrepresentation in the criminal justice system and in out-of-home care, and their treatment under the Northern Territory intervention legislation (discussed in further detail below).

In addition, the Committee noted other areas where action was required, including:

> **National plan of action**: The lack of a national plan of action for implementing the convention.
>
> **Violation of child rights by Australian companies**: Reports of Australian companies' involvement in violations of children's rights in the Democratic Republic of Congo, the Philippines, Indonesia, Fiji and Thailand.

Corporal punishment: The continuing lawfulness of corporal punishment under the defence of 'reasonable chastisement', a practice which has come under continued criticism domestically, including from the Royal Australasian College of Physicians.

Mental health: The low funding level for mental health, with the Australian Institute of Health and Welfare in 2010 highlighting mental health as a leading issue for children.

Queensland's criminal punishment of young people: The criminal punishment of 17-year-olds in the adult justice system in Queensland. Since the 2012 Concluding Observations were released, Queensland has made amendments to the *Youth Justice Act 1992* (Qld) which, among other things, remove the principle that detention is a last resort (see article "Detaining kids in Queensland" in this Bulletin).

Aboriginal and Torres Strait Islander children

The Committee highlighted specific concerns surrounding Australia's protection of Aboriginal and Torres Strait Islander children including:

- The inadequacy of Aboriginal and Torres Strait Islander representation in the existing children's rights independent monitoring mechanisms and other related institutions such as Children's Commissioners or independent guardians.
- The allocation of resources and the lack of budget dedicated to children in disadvantaged situations such as Aboriginal and Torres Strait Islander children.
- The punitive nature of Australia's *Northern Territory Emergency Response Bill* 2007 (Cth) which allowed for punitive reductions to welfare payments for parents whose children truanted.
- The inadequate consultation and participation of Aboriginal and Torres Strait Islander persons in the policy formulation, decision-making and implementation processes of programmes affecting them.
- The difficulties faced by Aboriginal persons in relation to birth registration such as those who are illiterate or are unable to meet the administrative costs of birth registration.
- The large numbers of Aboriginal and Torres Strait Islander children who are being placed into out-of-home care.

The Committee consequently reiterated that Australia must regularly evaluate disparities in the enjoyment by children of their rights and combat discriminatory disparities.

Asylum seekers

The Committee has expressed 'deep concern' about the use of mandatory detention for children who are seeking asylum; the failure to take into account the best interests of the child as the primary consideration in asylum determinations; the attempted 'Malaysia solution' of the former Federal Labor Government; and the risk of conflict of interest when guardianship of unaccompanied minors is vested with the Minister for Immigration and Border Protection. Since the *Concluding Observations* were issued, the *Immigration (Guardianship of Children) Act 1946* (Cth) has been amended so that the Minister is not the guardian of unaccompanied minors moved to a 'regional processing country' under the *Migration Act 1958* (Cth).This has not solved the issue, but rather shifted the responsibility to another country.

The *Migration Act* provides that children should be detained as a last resort, but in practice the system requires children to remain in closed immigration detention until they are removed from Australia or granted a visa, unless the Minister determines that they are allowed to live in community detention. As at 31 May 2014, there were 775 children in immigration detention facilities and 1,507 children in community detention in Australia. Pleasingly, on 19 August 2014, the Minister for Immigration & Border Protection announced that all children under 10 years of age and their families in detention will be released into the community. Nevertheless, young persons still remain in detention, which is problematic. This problematic nature of detention is compounded by the risk of mental harm to children, which has led to attempts of suicide in extreme cases.

Separation of children from adults in detention

The Committee has repeatedly called for Australia to withdraw its reservation to article 37(c) of the Convention, which requires that children in detention be 'separated from adults unless it is considered in the child's best interests not to do so'. Australia has defended its reservation, claiming that Australia's geography and demography make it difficult to always detain children in juvenile facilities while also allowing children to maintain contact with their families.

The Committee's view is that the reservation is 'unnecessary' because Australia's concerns 'are well addressed by article 37(c)', specifically the 'best interests' exception and the statement that the child 'shall have the right to maintain contact with his or her family'.

Conclusion

The Committee's Concluding Observations provide a valuable means by which Australia's compliance with its obligations under the convention may be assessed. In recent years, the Australian Government has taken a number of positive steps towards implementing its treaty obligations, including by facilitating better communication with children, promoting non-discrimination and facilitating paid parental leave. However, the Committee's Concluding Observations indicate that substantial work remains to be done. Further change is needed in a range of areas, including Australia's treatment of asylum seekers, the detention of minors and the disparity in the enjoyment of rights for Aboriginal and Torres Strait Islander children, in order to give effect to international human rights norms and protect children in Australia.

Erica Long *and* ***Guy Baldwin*** *(summer clerks), King & Wood Mallesons.*

The Convention on the Rights of the Child and its new complaints mechanism – Optional Protocol 3

Aleks Sladojevic and Rebecca Stanley take a look at the nuts and bolts of a new complaints mechanism under the convention.

The Convention on the Rights of the Child is the most widely ratified treaty in the world. It is therefore perhaps surprising that it was only relatively recently that a complaints mechanism has been adopted. This mechanism, known as *Optional Protocol to the Convention on a Communications Procedure* (OP3), allows children whose rights have been infringed to communicate and seek an investigation of those alleged violations by the Committee on the Rights of the Child.

Background

The convention came into force on 2 September 1990 and there are currently 194 United Nations (UN) member States that are parties to the convention. It is the "most widely accepted international human rights instrument" and only three States are still yet to ratify the convention: the United States, Somalia and South Sudan.

In addition to the convention itself, there are three Optional Protocols that have been ratified by some member States. The first two protocols entered into force in 2002. They are the *Optional Protocol to the convention on the Involvement of Children in Armed Conflict* (OPAC) and the *Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography* (OPSC). The third is OP3, which came into force on 14 April 2014. OP3 was adopted by the UN General Assembly in December 2011, however it required 10 ratifications before coming into force. It was only on 14 January 2014 that Costa Rica became the tenth country to ratify the Optional Protocol and as a result it became operative in April 2014. Monitoring the implementation and adherence to the convention and its Optional Protocols is the Committee. The Committee consists of 18 independent experts who receive and evaluate reports from States regarding their compliance with the convention and its Optional Protocols. Following the third Optional Protocol's entry into force in April 2014, the Committee also has the additional role of managing a complaints process. The complaints process established by OP3 allows children and their advocates to submit to the Committee "complaints regarding specific violations of their rights" under the convention, OPAC and OPSC.

Optional Protocol 3 – an international complaints mechanism

OP3 is a mechanism for enforcing countries' commitments to uphold the rights enshrined in the convention and its Optional Protocols. It gives the Committee the jurisdiction to investigate complaints and provide reports in relation to:

- individual complaints made by a child or a group of children and their advocates (within the jurisdiction of a state party to OP3) to allege they are the victims of a breach by that State of the convention, or either OPAC or OPSC;
- confidential inquiries by the Committee into alleged grave or systematic violations of the convention, OPAC or OPSC concerning the sale of children, child prostitution and child pornography or on the involvement of children in armed conflict;
- the investigation of a communication by one State party into the conduct of another State party where there is concern that that state has not been acting in conformity with its child rights obligations.

Limitations on complaints

The individual complaints mechanism established by OP3 is not without its limitations. Of particular importance is article 7, which deals with the admissibility of complaints and provides that a complaint to the Committee will not be admissible unless all domestic remedies have been exhausted or the application of domestic remedies has been unreasonably prolonged or is unlikely to bring effective relief. Other limitations on the admissibility of complaints include that complaints cannot be anonymous, must be in writing, repeat complaints are not permitted, ill-founded or unsubstantiated complaints will not be investigated, and alleged violations that occurred before the entry into force of OP3 by the particular state concerned are not admissible. Further, complaints must be submitted within a year of the exhaustion of domestic remedies.

Functions of the Committee

In investigating a complaint (assuming its admissibility), the Committee has several procedures and functions including:

- making a request of a State to implement interim measures pending the investigation of the complaint, to avoid irreparable harm to the victims of the alleged violation;
- making its offices available with a view to reaching a settlement;
- examining the complaint in closed meetings, as quickly as possible, and then transmitting the Committee's views and recommendations to the parties concerned; and
- inviting the State party to follow up upon consideration of the Committee's views.

Where are we now?

As noted above, in April 2014 a milestone was reached with the tenth country to ratify OP3 signifying its entry into force. However, for OP3 to operate as an effective global forum for the investigation and assessment of complaints about children's rights, many more countries need to sign up and ratify this important instrument. Indeed, as explained in our article on the nation's need to ratify OP3 in this Bulletin, Australia is one such country that disappointingly has not yet signed up to OP3. Without the commitment of nations worldwide, including those who are apparent human rights leaders, it cannot be ensured that children can have access to justice at the international level.

Aleks Sladojevic *and* ***Rebecca Stanley*** *(summer clerks), King & Wood Mallesons.*

Give Australian children a voice: the nation's need to ratify the third Optional Protocol to the Convention on the Rights of the Child

Do Australian children have adequate complaint procedures available to them to enforce their rights? Aleks Sladojevic and Rebecca Stanley outline why Australia needs to ratify optional protocols to the Convention.

The protection of children's rights does not only involve the enshrinement of those rights in international instruments and domestic legislation. The power that attaches to those rights is significantly lessened if there are not accessible mechanisms that allow those rights to be enforced. Disappointingly, Australia is still yet to ratify the *Optional Protocol to the Convention on a Communications Procedure* (OP3). Moreover, with the lack of sufficient complaints procedures in Australia, it is vital for Australian children to have recourse to an independent international arbitrator such as the Committee.

Why Australia should ratify OP3

It is concerning that the OP3 still awaits Australia's ratification given over two years have passed since its adoption by the UN General Assembly. Importantly, OP3 does not create new substantive rights for Australia to uphold; it merely creates a mechanism by which to redress violations of rights that Australia has already committed to protect.

The Committee's most recent report to Australia highlights a number of areas in which the country needs to improve, including: the lack of comprehensive child rights legislation at the national level; the "widespread" discrimination against Aboriginal and Torres Strait Islander (ATSI) children; the treatment of asylum-seeker and refugee children, particularly those kept in detention; the continued lawfulness of corporal punishment; discrimination against children with

disabilities; child and youth homelessness; and problems with the administration of juvenile justice.

In 2012, the Australian Government made the claim that it "strongly supports the global campaign for the universal ratification of the convention and its Optional Protocols". To demonstrate its commitment to upholding children's rights and that the nation remains a leader in protecting human rights, Australia should move promptly to ratify OP3.

According to the Australian Government, children "are the heart of Australia's social policy agenda"; yet failing to ratify the OP3 and allowing children recourse to international remedies appears contrary to this sentiment. Children have a "special and dependant" status which may make it challenging for them to pursue remedies when their rights are violated, and domestic remedies may not always be adequate for rights violations. A crucial element of the OP3 complaints mechanism is recourse to remedies in instances where domestic remedies are entirely exhausted, unduly prolonged or not likely to bring effective relief. Moreover, OP3 is drafted and designed to operate in such a way that it complements and supports domestic measures and procedures.

A further reason why Australia should ratify OP3 is the low burden and cost of implementation in doing so. Australia is already party and subject to a number of international human rights treaties with complaints procedures. No new obligations are placed on Australia in ratifying OP3 aside from a "commitment to co-operate" in both the communication and inquiry procedures. The implementation costs are low and ratification is unlikely to lead to an influx of complaints against Australia as the admissibility requirements for a complaint are quite strict.

Ratifying OP3 would help Australia uphold its obligations and commitments under the convention and its Optional Protocols. Under article 3 of the convention, Australia has made a commitment to having the "best interests of a child" as the primary consideration "in all actions concerning children". Ensuring access to a mechanism enabling Australian children to voice rights, violations can convincingly be construed as within the "best interests" test of article 3. Ratifying OP3 would also assist Australia in meeting its obligation under article 42 of the convention, namely that it "undertake[s] to make the principles and provisions of the [convention] widely known…to adults and children alike." The reason being is that, as the complaints mechanism becomes utilised, and awareness of the complaints process conceivably increases, it is more likely that the public will seek and acquire knowledge on the *content* of the rights contained in the convention and its Optional Protocols.

Australia's hesitancy to ratify OP3

Perhaps one of the reasons Australia has not yet ratified OP3 is because the Government anticipates that it will generate increased pressure to change its policy in areas that have been identified by the Committee as problematic, including the standard of living for Aboriginal and Torres Strait Islander children and the treatment of asylum-seeker and refugee children.

The Committee has expressed concern at the "widespread" discrimination against Aboriginal and Torres Strait Islander children. Australia's historical and present treatment of its Indigenous population continues to attract both attention and scrutiny on the international level. The risk of OP3 creating greater scrutiny on the international stage may form one part of the Government's reluctance to ratify.

The treatment of asylum seeker children is also a likely roadblock to the Government's ratification of OP3. The 2004 report by the National Inquiry into Children in Immigration Detention found that Australia's immigration laws and their application created a detention system that "is

fundamentally inconsistent with the convention". The Committee has also expressed its concern about Australia's "inadequate understanding and application of the principle of the best interests of the child in asylum-seeking, refugee and / or immigration detention situations". Perhaps in the case of asylum-seeker children who have been detained, there is the very real potential that a number of individual complaints will be lodged against Australia. Notwithstanding, if Australia truly seeks to remain a leader in international human rights discourse, it should ratify OP3 and transparently address the situations and policies that currently stand in breach of the convention.

Current complaints procedures available to Australian children

While Australia has not ratified the OP3, children and young people have to rely on the domestic measures that are currently in operation. These include the making of complaints to National, State or Territory Commissioners for Children and Child Guardians and to the Australian Human Rights Commission.

State and Territory Commissioners for Children and Child Guardians

All states and territories in Australia have passed legislation creating a Commissioner or Guardian whose role it is to promote and protect the rights and well being of children and young people. Unfortunately, the functions given to these positions are not uniform across the country. Commissioners and Guardians in New South Wales, South Australia and Western Australia are limited to monitoring complaints and cannot act on individual complaints. In Tasmania, the Commissioner can investigate complaints when requested to do so by the Minister for Children. Only Commissioners in the Australian Capital Territory, Northern Territory, Queensland and Victoria have power to investigate and respond to individual complaints related to children. However, the scope of complaints investigated by these Commissioners varies according to the legislative provisions of each state and territory, though generally investigations are limited to services relating to children and young people. While some states have a broad focus, including all children, others are responsible only for children who are at risk or who are vulnerable. In general, the Commissioner will refer young people to an alternative service provider if the Commissioner is unable to deal with the complaint directly. Complaints can usually be lodged by either a young person or an adult on behalf of the child in person, by telephone or by writing to the Commissioner.

National Children's Commissioner

In 2012 the Australian Federal Government passed legislation establishing a National Children's Commissioner. The National Children's Commissioner was appointed to the Australian Human Rights Commission. While the National Commissioner does not directly handle complaints and does not deal with individual children, the Australian Human Rights Commission does hear individual complaints.

The Australian Human Rights Commission

The Australian Human Rights Commission is an independent body that investigates discrimination and human rights breaches, including complaints involving children. The Commission's complaints process aims to be as accessible as possible – individuals can submit written complaints via post or online in any language.

Conclusion

Australia has still not yet ratified OP3 and its reluctance to do so likely stems from contentious policies on and increasing international attention around the treatment of ATSI children and asylum-seeker and refugee children. However, ratifying OP3 is something Australia needs to do,

not only to protect the welfare and rights of Australian children but to revive the nation's status as an international human rights leader. OP3 establishes an important complaints procedure that complements Australia's domestic avenues for recourse to alleged violations of children's rights.

Aleks Sladojevic *and* ***Rebecca Stanley*** *(summer clerks), King & Wood Mallesons.*

Australia must do more to address the over-representation of Aboriginal and Torres Strait Islander young people in youth justice systems

Half of the young people in detention in Australia are Aboriginal and Torres Strait Islander. The HRLC's Ruth Barson looks at the facts, and argues that affected communities must be consulted to find a solution.

Aboriginal and Torres Strait Islander young people are 31 times more likely to be detained, and are 4.5 times more likely to have contact with the criminal justice system (i.e. be subject to police cautioning, police referred conferencing, or court appearances), than the general youth population.

While overall detention rates for young people have remained stable over the four years to 2013, detention rates for Aboriginal and Torres Strait Islander young people continue to increase: the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs found that Aboriginal and Torres Strait Islander young people 'are more likely to be incarcerated today than at any other time since the release of the Royal Commission into Aboriginal Deaths in Custody final report in 1991.'

Accordingly, it is critical to consider ways that the youth criminal justice system can continue to improve, so that reductions in youth detention rates can be celebrated by all.

Too many young people are on remand

For some offences, police will arrest a young person and detain them. Bail is the release of the person from detention upon their agreement to return to court to respond to the charges against them. Various bail conditions may be imposed.

If police refuse to grant bail, the young person must apply to a court for bail. If the court refuses to grant bail, the person will be held in detention – "on remand" – until they either successfully apply for bail or until the conclusion of their case (where, if they are found guilty they may be sentenced to a further period of detention).

Approximately half of the young people in detention nationally are on remand, waiting for their case to be finalised. Over half of the young people on remand are Aboriginal and Torres Strait Islander. These high rates of youth remand contrast with the adult jurisdiction, where approximately 24 per cent of the total prison population is on remand. The fact that so many young people are remanded suggests that bail systems are either not operating effectively for young people, or are being used for punitive purposes.

Remand should not be used for punishment or deterrent purposes: it should only be used to protect the community from further offending; to protect the individual if they pose a serious risk; and to guard the integrity of the trial process. Bail and remand practices should reflect the presumption of innocence and the important weight given to the right to liberty. This is particularly important because the consequences of early exposure to detention can be adverse: removal of liberty without having been found guilty; removal from family and community life; exposure to criminogenic factors in custody; and disruption to school attendance.

High youth remand rates are also concerning because young people on remand do not receive many of the therapeutic or education programs that sentenced prisoners receive, and are often housed in worse conditions. Further, they are often remanded due to unrealistic and onerous bail conditions, which prove very difficult for young people to comply with. For example, curfew conditions requiring a young person to remain within the home throughout the night, do not allow for young people exposed to problematic home environments to take protective measures, such as leaving the house at night when there is fighting or alcoholism present. Likewise, young people might cycle in and out of youth detention, being remanded for a breach of bail conditions, and subsequently re-bailed once conditions have changed. Cycling in and out of custody is highly intrusive on young people's school attendance and social development.

Specific jurisdictional examples

Some jurisdictions have particularly problematic youth justice practices. In all jurisdictions, other than Queensland, a young person is defined as being a person aged between 10 – 17 years, whereas in Queensland, a young person is defined as a person aged between 10 – 16 years. The nature and characteristics of youth offending are different to that of adult offending, and therefore young people should not be exposed to the less rehabilitative adult jurisdiction earlier than is necessary.

Additionally, both Queensland and the Northern Territory allow for the 'naming and shaming' of young people: that is, media outlets are permitted to publish the names of accused and convicted young people. Naming and shaming offends young people's internationally established rights to privacy at all stages of youth justice proceedings. Further, the naming and shaming of young people is likely to undermine their rehabilitative efforts and taint them with criminality.

Critically, Queensland has recently removed the provision in the *Youth Justice Act 1992* (Qld) which requires that detention only be considered as a matter of last resort. In Queensland, Aboriginal and Torres Strait Islander young people are 15 times more likely to be in detention than the general youth population. Accordingly, these amendments have a disproportionate impact on Aboriginal and Torres Strait Islander young people.

Conclusion – we need to do better

The over-representation of Aboriginal and Torres Strait Islander young people in the criminal justice system has been an issue of national concern for a number of years. Unfortunately, respective governments' tough on crime policies entrench rather than address over-representation. To address the over-representation of Aboriginal and Torres Strait Islander young people in detention, governments should be looking to active crime prevention and early intervention strategies; the implementation of non-custodial sentencing options; the provision of community-based dispositions; the resourcing of therapeutic court practices; and they should commit to addressing the underlying socio-economic reasons for offending in the first instance.

Importantly, all Government initiatives should be culturally relevant, and allow for self-determination by ensuring that all programs and policies are developed and implemented in proper consultation with Aboriginal and Torres Strait Islander communities. It is only by working with affected communities that Aboriginal and Torres Strait Islander youth detention rates will decrease.

Ruth Barson *is a Senior Lawyer at the Human Rights Law Centre.*

Forced Child Marriage in Australia: Reported incidence and responses

How common is forced child marriage in Australia and what legal and practical frameworks inform responses? Mel Pudig and Jackie Vorreiter take a look.

In 2011, a 16 year old girl applied to the Australian Federal Magistrates Court to stop her parents from taking her overseas to be married. Against her wishes, her parents had arranged for her to travel to Lebanon to marry a man who she had only met once. By court order, the girl's parents were restrained from removing (or attempting to remove) her from Australia, her passport was surrendered and her name was placed on the Australian Federal Police's airport watch list. This case was one of attempted forced child marriage and was described by presiding Federal Magistrate Harman as 'one that is becoming increasingly common'.

Definition

Forced marriage is where a person is coerced, threatened or deceived into entering a marriage. It is different from arranged marriages (where the prospective spouses consent to the arrangements) and sham marriages (where marriage is used as a vehicle to help a person migrate to Australia as a spouse or partner) due to the lack of consent on the part of the victim. Forced marriage is an offence in Australia and while all instances of forced marriage are concerning, they are particularly so when the victim is a child.

Australian law provides that it is an offence to marry a person under the age of 18 unless that person is aged 16 or 17 and there is both parental and court consent (which will only be granted in exceptional circumstances). The marriage of a person under the age of 18 obtained through coercion, threat or deception constitutes forced child marriage and is an aggravated forced marriage offence, which attracts a penalty of up to seven years imprisonment.

Incidence

Internationally, forced marriage mainly affects young girls, particularly those in poor and rural parts of developing countries. A 2012 report published by the United Nations Population Fund reveals that 33 per cent of girls in developing countries will be married before they turn 18. These figures suggest that by 2030 there will be 15.1 million child marriages globally each year.

In Australia, there is currently no comprehensive research dedicated to the extent of forced child marriage. As a result, knowledge is predominantly derived from anecdotal reports, reports from community workers and a handful of cases that have reached the courts.

> *A recent case to come before the Australian courts concerned a young Australian woman who had been married in India to a man chosen by her parents. The woman's parents had convinced her to travel to India under false pretences, had confiscated her passport, and had threatened to kidnap and rape the sister and mother of the man she loved in Australia. On an application by the young woman to the Family Court of Australia, the marriage was declared void. Kreet v Sampir* (2011) 252 FLR 234

In 2013, the National Children's and Youth Law Centre (NCYLC) published Australia's first research examining the reported incidence of forced child marriage in Australia. From a relatively small sample of service providers across the country, the NCYLC found approximately 250 cases of forced child marriage reported to Australian agencies within a 12 month period. The NCYLC also recommended that further research be commissioned to develop knowledge about the

nature and prevalence of forced child marriage in Australia and what would be effective to prevent its occurrence and to respond to individual cases.

International and national laws addressing forced child marriage

Forced child marriage is not explicitly addressed in the United Nations *Convention on the Rights of the Child*, but the convention does require the best interests of children to be the 'primary concern in making decisions that may affect them' and provides that governments should make sure that children are not abducted or sold. The convention is supplemented by the *Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography*, to which Australia is a party, which requires parties to stop the sexual exploitation and abuse of children.

In recognition of its obligations under these international instruments (amongst others), and in response to the occurrence of forced marriages in Australia, the Commonwealth Parliament enacted the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013* (Cth) in February 2013. The Act amended the *Criminal Code Act 1995* (Cth) to make it an offence to cause 'another person to enter into a forced marriage as the victim of the marriage' or to be a party (other than the victim) to a forced marriage. Penalties include imprisonment for four years or seven years for an aggravated offence (which would cover the forced marriage of a child). While the amendments provided for in the Act were not specifically directed at forced child marriage, the Explanatory Memorandum to the Bill stated that the Australian Government sought to promote the rights of the child through the Bill and the additional offences.

The forced marriage of a child, and the behaviours associated with it, may also constitute a range of offences under other Commonwealth, state and territory laws. In particular, forced child marriage may involve indecent, sexual or physical assault, rape, false imprisonment, emotional or psychological abuse, kidnapping or abduction. These types of behaviours, when perpetrated against a child, constitute child abuse and are mandatory reporting issues for those mandated to report under state and territory child protection laws (for example, doctors and teachers). Once a report has been made, the child protection authorities can implement measures to keep the child safe.

In addition to contacting child protection authorities or police, any person concerned with the welfare of a child – or the child him or herself – can also make an application to the Family Court of Australia for an order dealing with "any aspect of the care, welfare or development of the child" including an order setting out measures to protect the child from forced marriage. Such measures may include that the child be taken into care of the relevant authority, that the parents hand over the child's passport and that the child's details be placed on the airport watch list.

Best practice in identifying and dealing with forced child marriage

What constiutes best practice is likely to depend on the particular circumstances in which forced child marriage has occurred or may occur, and the steps for dealing with one situation may be inappropriate for dealing with another. In January 2013, the NCYLC issued draft Best Practice Response Guidelines for Australia (available here). Internationally, the UK Government's Forced Marriage Unit has published guidelines on what it considers to be best practice for dealing with forced child marriage (available here) and the AHA Foundation in the U.S. has compiled a training curriculum on the topic for law enforcement and child protection professionals (available here).

While there are differences between the principles put forward by each of these organisations – with the AHA focusing on forced child marriage in the context of honour violence, the NCYLC identifying specific steps to be taken where a child is going to be (or has been) sent overseas for the purpose of a forced marriage, and the UK Government's Forced Marriage Unit setting out particular steps to be taken by specific agencies and organisations in situations of forced child marriage – they are generally quite similar in their approaches and reflect the fact that, in dealing with forced child marriage, the child's best interests should be paramount.

Some of the key principles that come out of the organisations' guidelines include:

- taking complaints seriously and not minimising the fears of the child or young person;
- ensuring that the child or young person is seen immediately, on their own and in a safe place where a confidential conversation can be had;
- explaining all of the options available to the child or young person including, for example, developing a safety plan, giving them safety advice and advising them not to travel overseas;
- maintaining communication with the child or young person and reassuring them of the confidentiality of that communication;
- refraining from contacting the child or young person's family or community members;
- ensuring that the child or young person is not placed in foster care with members of their family or persons from the same cultural community; and
- reporting the matter to trained specialists, child protection authorities or police (where appropriate).

International action

In September 2013, the United Nations Human Rights Council (UNHRC) passed a resolution requesting a report to guide discussion on the challenges, achievements, best practices and implementation gaps for preventing and eliminating child marriage. The UNHRC recognised that the occurrence of forced child marriage is widespread and that the collaborative effort of governments, law makers, law enforcement officials, judicial authorities, traditional and religious leaders and others is required to deal with the issue.

The Office of the High Commissioner for Human Rights (OHCHR) prepared the report and it was submitted to the UNHRC at its 26th session in June 2014. The report addressed the factors that contribute to child, early and forced marriage and its impact on the realisation and enjoyment of girls' and women's rights. Using the report as background, a panel discussion was convened at the UNHRC's 26th session to discuss how to prevent and eliminate child, early and forced marriage. Following on from this, the OHCHR has been tasked with drafting a summary of the panel discussions that will be submitted to the UN General Assembly, at its sixty-ninth session, and to the UNHRC, at its 27th session, in September 2014.

Going forward

Establishing global best practice principles is likely to be a difficult task. While persons responsible for forced child marriage and associated violence should arguably be punished, highlighting criminality and retribution to a victim may not always be best practice and could potentially impede investigations. It is possible that children and young people might be dissuaded from reporting incidents of forced child marriage and related violence because the perpetrators are often family members or people the victims do not wish to see punished. The

same issue could arise in respect of civil penalties and protection orders as children and young people may be disinclined to seek such orders against their parents and the effectiveness of a protection order relies on the victim reporting a breach, which might be unlikely.

At the international level, it remains to be seen how the UN General Assembly and the UNHRC will respond to this issue following the panel discussion at the UNHRC's 26th session. At the national level, the NCYLC's draft guidelines are currently being finalised following a period of public consultation. Through the publication of these guidelines, it is to be hoped that Australia, at least, will soon have the necessary guidance to assist non-government and government agencies to deal with individual incidents of forced child marriage wherever in Australia they arise.

Mel Pudig *and* ***Jackie Vorreiter*** *(summer clerks), King & Wood Mallesons.*

Naming and shaming repeat juvenile offenders

Queensland's new 'name and shame' laws targeting young people are in stark opposition and undermine well-established children's rights principles found in the Convention on the Rights of the Child of which Australia is a signatory, write Elouise Flowers and Sarah Hammond.

In September 2013, Queensland's Attorney-General, the Hon. Jarrod Bleijie announced a plan to name and shame juvenile offenders in an overhaul of the *Youth Justice Act 1992* (Qld) (the Act). These reforms were enacted in February 2014, as part of the Newman Government election promise to crack down on youth crime.

The amendments to the Act allow the media to publish identifying details such as names and photos of repeat offenders between 10 and 16 years of age (as in Queensland a child is considered an adult at 17 years, not 18). This includes details of bail hearings where the child appears, which occur before any trial and before the child has even been found guilty or not.

The publication of young offenders' details violates a child's right to privacy, which is recognised by the convention. This is heightened by the fact that these days most publications occur online, making the information accessible by the international community and increasing the risk and scope of potential damage to a young offender's reputation.

Consequences of reforms

Deterring, rehabilitating and essentially 'improving' a young person's behaviour is the primary objective of the juvenile justice process. But publicly naming and shaming a young offender jeopardises these objectives and could cause the young offender's reputation to become irreversibly tainted. For example, naming and shaming could reduce the child's chances of employment and education. The spoiling of a young offender's reputation is likely to occur in varying degrees, depending on where he or she lives and the size of the child's community. Furthermore, the inability of a young person to find employment and engage with his or her community may operate to increase repeat offences by young persons, rather than encourage them to make positive changes.

Such reforms are reactive rather than preventative and do not have regard to the differing size and demographics of communities. A young offender in a smaller community who is exposed to these reforms is likely to be substantially more disadvantaged than a young offender in a much larger community. Whilst the impact of the laws may vary, it is undeniable that they undermine the well-established principle that the best interests of the child are to be at the forefront of all decision making.

The regime is not supported by evidence that it will decrease young-offenders reoffending. Indeed, as children are highly impressionable, labelling may cause them to identify with such a label. This is supported by anecdotal evidence from the Northern Territory that suggests naming and shaming can actually increase and embolden reoffending through a 'badge of honour' effect. Anti-social behaviour may be cemented, preventing children from making efforts to alter their behaviour.

Were such reforms necessary?

It is questionable whether such reforms were required. Although media coverage of juvenile crime has contributed to a belief that such crime is prevalent in Queensland, statistics revealed by Gregory Shadbolt, the Principal Legal Officer for the Queensland Aboriginal and Torres Strait Islander Legal Service, demonstrate that between the 2010 and 2012 financial years, the number of young people who appeared before the Children's Court of Queensland and the Children's Magistrates Court was actually 8.6% and 6.9% less than previous years.

Further, a NSW Parliamentary report conducted in 2008 found that the punitive measure of naming and shaming a young offender did not recognise the inherent impulsivity of a child, and their reduced capacity to fully comprehend the consequences of their actions.

A crime survey undertaken in July 2013 by the Queensland Government showed that 49.9% of respondents believe that naming offenders would be effective in preventing youth crime. This is primarily because some people believe that the threat of public shame will deter young people from committing crime. This argument fails to address the fact that children often act impulsively. The argument also fails to consider the research conducted in the Northern Territory in 2012, which suggests that the ultimate effect of naming and shaming a child will result in children living up to their already tarnished reputations. As part of their rehabilitation, young offenders need to engage with the community, rather be ostracised.

Another reason given in support of naming and shaming young offenders is that it gives the community control. Community members can feel informed, be involved in the surveillance of offenders and it can reassure the community that something is being done about juvenile crime. However, naming and shaming an alleged child offender seems to be clearly against the best interests of the child principle protected in the convention. Children can be put in danger of vigilante revenge, and public identification could negatively affect their ability to engage with the community and reduce their education and employment opportunities in the future. Naming and shaming may also operate to encourage further community scrutiny than is necessary. Such scrutiny may also extend to a young offender's family and friends, who may be 'shamed by association'. One Northern Territory case involved a 13 year old boy who was arrested for shoplifting and a photo of him and his sister was published in the local newspaper. Three years later the sister reported that some people still recognised her and believed she was the offender. Similarly, in the Northern Territory, the Department of Housing tried to evict a mother from her public housing after her son was charged with burglary. Exposing family members and friends to scrutiny by association effectively allows the media to single out and attack certain young people and families, based on 'news value', which is likely to have a disproportionate effect on vulnerable youth such as Aboriginal and Torres Strait Islander young people. Again, anecdotal evidence from the Northern Territory suggests Indigenous people are over-represented in those singled out for public identification.

Other offending states and territories

The Northern Territory and Western Australia are the only other jurisdictions that currently allow young offenders to be named and shamed in Australia. By virtue of Queensland adopting a similar stance, Australia is at risk of further international scrutiny by virtue of its non-compliance with the convention.

In the Northern Territory the media can publish both names and photos of accused young people. In Western Australia there is a much more limited system where serial anti-social offenders aged over 16 can be placed on a Prohibited Behaviour Order (PBO). If placed on a PBO the name, town and photo of the person is published online and anyone is free to republish that information. Similar punishments fail to acknowledge a child's best interests and also abuse a child's right to privacy.

Reforms are likely to have the opposite effect

The amendments to the Act, and the current laws in Western Australia and Northern Territory, which provide for the naming and shaming of young offenders are inconsistent with the convention. Further, research suggests that the reforms and laws are counterproductive to achieving the objectives of rehabilitation, deterrence and reducing recidivism.

The measures are not in the best interests of the child by virtue of their abuse of a child's right to privacy. The reforms not only highlight Australia's failure to adhere to its international child rights obligations, but also reflect a general lack of understanding and research into the psychological *development of a child. A further concern of these reforms is their varying degrees of detrimental* impact across communities, according to their demographic and size. The potential and very real threat for these laws to negatively impact on a child's right to education and prospects of employment pose a threat to the wellbeing of the local community, and the community at large. It is clear that these reforms are counter to the well-established principle that a child's best interests should be at the forefront of decision making. The Queensland community is likely to feel the negative consequences of these reforms, rather than the beneficial effects they attempt to achieve.

***Elouise Flowers** (intern), National Children and Youth Law Centre and **Sarah Hammond** (summer clerk), King & Wood Mallesons.*

Note: In July 2013, the Human Rights Law Centre made a submission to the Queensland Government opposing the 'naming and shaming' of young offenders and other proposed punitive reforms. You can read the media release and submission here.

Detaining kids in Queensland

Locking children up should only be a measure of absolute last resort, but proposals in Queensland will result in prison being the norm, rather than the exception, Melanie McLean and Sian McLachlan report.

The Queensland Newman Government proposed a number of reforms in the *Safer Streets Crime Action Plan* in order to "crack down on crime". This was part of the Government's Six Month Action Plan (January to June 2013) in which the Government committed to a review of the *Youth Justice Act 1992* (the Act). One of the proposed reforms in the plan was to amend the Act by removing the statutory principle of reserving detention as a last resort when sentencing a child. This is inconsistent with Australia's obligations under the Convention on the Rights of the Child.

Law as it formerly stood

Queensland legislation formerly stated that a detention order should only be imposed on a youth as a last resort and for the shortest appropriate period (Last Resort Principle). This conforms with Article 37(b) of the convention, which states:

> *The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.*

UNICEF has summarised this Article to mean that a child should only be arrested or put in prison as a last resort and for the shortest possible time.

Legislative reform

The Queensland Government commenced a formal review of the Act, including the launch of a public survey and discussion paper into the ways Queensland should respond to youth crime. The results of these consultations are being used to develop a '*Blueprint for the Future of Youth Justice'*.One of the discussion points in the Blueprint was whether there should be a removal of the Last Resort Principle.

The Youth Justice and Other Legislation Amendment Bill 2014 was passed on 18 March 2014 and came into force ten days later. This Bill amended the sentencing principles under section 150 to read:

> *This section overrides any other Act or law to the extent that, in sentencing a child for an offence, the court must not have regard to any principle that a detention order should be imposed only as a last resort.*

This amendment not only removes the express legislative reference to the Last Resort Principle as a sentencing principle, but goes even further to expressly oust the Last Resort Principle when sentencing a child. This amendment ensures that the corresponding common law principle is not revived by the courts in sentencing child offenders. Accordingly, when deciding on an appropriate sentence for a young offender for any offence that is punishable by imprisonment, the court is required to *not* consider any principle that a sentence of imprisonment or detention should only be imposed as a last resort.

Why the Government has proposed this reform

The Government argued that removing the Last Resort Principle was justified on the grounds that it 'unduly inhibits courts in making sentencing orders which appropriately reflect the severity of offending, hold offenders properly to account for their offending behaviour and reflect the community's denunciation of serious offending'. In 2012-13, almost half of all offences were committed by approximately ten per cent of young offenders. It is within this context that the Government argued that the community expects more effective responses to youth crime from the Government.

The rationale for removing the Last Resort Principle from the Act and the *Penalties and Sentences Act 1992* is to 'ensure the punishments handed down to both child and adult offenders fit the severity of their crimes, communicate the wrongfulness of offending and protect the community from criminal behaviour'. Queensland's Attorney General and Minister for Justice Jarrod Bleijie said in support of the amendment:

> *These amendments allow authorities to respond quickly and effectively to serious and repeat offenders while ensuring at-risk young people are diverted away from the system through early intervention and reintegration into the community.*

The evidentiary basis for such an assertion is somewhat out-dated. There is commentary from the early 1990s which indicates that detention for children can be effective by removing children from the community where they face pressures to offend. Notably, this commentary discounts the idea that these same pressures can come from within juvenile detention centres.

Is this reform the right choice for Queensland's children?

Opponents of the Bill favour solutions that are "evidence-based", such as rehabilitation and early intervention. South Brisbane MP Jackie Trad said the laws were a step backwards and flew in the face "of decades of learning". Indeed, more recent studies suggest that detention not only fails to increase the chances of successful rehabilitation, but that detaining a child at a younger age can actually increase their chances of reoffending. On the other hand, diversion justice models have generally been effective in decreasing the rate of repeat offending by young people, and have helped children to "accept responsibility for their actions and understand the impact of their actions on others".

Youth offender rates in Queensland have been decreasing over the past five years. If youth crime is not on the increase and detention does not reduce repeat offending, the proposed reforms fail to protect both the community and its children.

Conclusion

The reform that removed the Last Resort Principle is contrary to Australia's international obligations under the convention. Under the Convention, the best interests of the child should be the primary consideration in all actions concerning children. Additionally, other studies have shown that detaining children is ineffective in preventing reoffending. This regressive reform is a populist proposal that appears to cast aside the Queensland Government's obligation to put the interests of the child at the forefront of any legislative reform that affects the State's youth.

Melanie McLean *(law clerk) and* ***Sian McLachlan*** *(summer clerk), King & Wood Mallesons.*

Note: In February, the Human Rights Law Centre and Aboriginal and the Torres Strait Islander Legal Service in Queensland wrote to the United Nations Special Rapporteur on Indigenous Rights requesting intervention against the reforms. You can read the media release here.

Human rights and child poverty – not seen, not heard?

Children's economic, social and cultural rights are easily marginalised. Despite the widespread ratification of the *Convention on the Rights of the Child*, child poverty continues to prevent growing numbers of children from exercising their rights to development and well-being.

Inequality is increasing globally, and in developed nations "far too many children continue to go without the basics in countries that have the means to provide" (UNICEF 2012). Although the reasons for child poverty are complex, a nation's wealth is not prescriptive of well-being. Good outcomes for children are linked to the availability of social protections, including social security and affordable, quality child care.

In a 2012 survey of child poverty in 35 developed countries, the USA had the second highest levels of child poverty (34th place) while the lowest occurrences of child poverty were seen in Scandinavian countries and Cyprus. Australia ranked 18th in this survey. Child poverty rates are

increasing in Australia and are currently estimated to be 17% compared with national overall levels of poverty of 12%.

As recognised in the convention, children's rights are distinguished from adults' rights because of children's vulnerability, dependence and evolving developmental capacity to meet their own needs. Children may suffer serious, irreversible physiological and psychological damage from deprivations from which adults might recover.

The convention has been hailed as ground-breaking for reunifying the full complement of human rights - economic, social and cultural rights, with civil and political rights - which had been split into the two major human rights treaties in 1969. By integrating all rights, the convention reiterates the implied foundational human rights principles of interdependence and indivisibility of children's rights.

In the convention, children's core economic rights are emphasized through an interplay of substantive and instrumental rights and obligations: 'survival and development', the child's best interests, education, health, non-discrimination, an 'adequate standard of living', nurturing, access to culture, social security, the right to play and leisure, protection against all forms of exploitation, and so on. In many ways children's rights are 'welfare rights'.

Although there is no express right to freedom from poverty in international human rights law, poverty is both a cause and consequence of human rights violations and is therefore a central concern. The convention expressly articulates anti-poverty standards. Australia and other signatories to the convention are required to "recognise the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development" and ensure that parents are equipped to provide this, including "nutrition, clothing and housing." If parents lack capacity to address children's needs, States must provide social security and other provisions "to the maximum extent of their available resources."

Under international human rights law, by ratifying the convention Australia promised to respect, protect and fulfil the full range of rights for all children equally. Australia is obliged to "take the necessary measures to achieve the full realization…" of these rights "…to the maximum extent of (its) available resources." This implies the principle of non-retrogression. Once social protection measures are in place, they must not be wound back unless "fully justified". Over recent decades, as governments have steadily dismantled social protections affecting children (such as cuts to single parent payments), full justification has been absent.

According to Australian law, Australia's obligations under human rights treaties must be incorporated into domestic legislation in order to be enforceable. The government's record of incorporation of children's rights has been poor or confined to 'child-specific' policy areas, not mainstreamed across the whole of government. Thus, the impacts on children of cuts to social security and other measures have not been adequately considered.

In the international arena, however, greater emphasis is being placed on the debilitating effects of poverty and the importance of social protections, not least as regards children. Long term policy trends to reduce social protections both increases inequality and impacts disproportionately on society's most vulnerable. In response to these developments, a chorus of international policy analysts in organisations including the OECD, World Bank and UN have urged against dismantling social protections, with G20 states declaring the importance of investing in social protections "to foster growth, resilience, social justice and cohesion."

Jane Doyle *is a Volunteer Lawyer at the Human Rights Law Centre.*

Children's e-Safety Commissioner

Sam Goldsmith and John Arthur search for answers to cyberbullying as they consider the Government's proposed e-Safety Commissioner.

There is little need to detail the variety of beneficial purposes for which children can use the internet, be they social or educational. The internet is central to the life of an Australian child in this constantly connected generation but whilst key to a child's developmental opportunities, the internet also presents new challenges and dangers to children's rights, particularly in relation to cyberbullying.

To address the dangers of the online environment, the Australian Government has proposed to establish a Children's e-Safety Commissioner and to implement rapid removal protocols with large social media outlets for material targeted at and likely to cause harm to an Australian child, through a co-operative regulatory scheme.

Bullying is not a new phenomenon, though advances in technology have renewed the focus on how detrimental bullying can be in a modern context. Cyberbullying may be more detrimental than traditional bullying in its ability to reach a wider audience and the willingness of bullies to surpass limits acceptable in a face-to-face environment.

One of the unique characteristics of cyberbullying as compared to traditional bullying is the permanence of online communication. Once information is posted on the internet, it is difficult to remove, particularly without it being seen and shared or saved widely first. In particular, material that is detrimental to a child but not illegal may be impossible to remove.

Role of the proposed Children's e-Safety Commissioner

It is intended that the Commissioner will provide national leadership on online safety issues for industry, families, and groups responsible for the wellbeing of children. The 2014 Federal budget allocated $10 million of funding over four years specifically to enhance protections for children using the internet, of which $2.4 million has been allocated to the establishment and operation of the Office of the Children's e-Safety Commissioner. The Commissioner's role will include:

- improving co-ordination of the content and online safety messages provided to Australian children;
- engaging with internet service providers, social media outlets and other industry bodies; and
- establishing a single point of contact for online safety issues for Australian children and those charged with their welfare.

The Australian Government proposes that the Commissioner will have the responsibility for implementing a scheme for the rapid removal of material that is harmful to a child from large social media sites, which may include the power to issue formal warnings to individuals and participating social media sites.

Under the proposed scheme, the Commissioner would assess whether material posted to a "large online social media outlet" hosted in Australia meet the defined criteria for whether harm is likely to be caused to a child. If they are met, the Commissioner would then direct the social media outlet in question to remove the material. The outlet would be required to remove the material upon receipt of such a direction. As part of this scheme, large online social media outlets would have to develop processes to receive complaints about content directed at and potentially

harmful to children, as well as for its prompt removal. The scheme may also impose financial or other penalties where there is failure of an outlet to comply with a removal direction.

The proposed regime would expand the range of online material that can be subject to removal requirements. The Australian Communications and Media Authority currently has the power to issue take-down notices, but only for material that is illegal or prohibited by Australia's classification regime. Material that is objectionable, offensive or defamatory, but does not meet these narrow requirements, could become subject to the rapid removal regime. Among the examples of material that could fall within its scope are social media accounts set up in the name of the bullying victim, to which offensive and potentially defamatory content is posted.

The Commissioner would also be responsible for leading consultation processes to develop safety and other standards for online products. For example, in order to simplify software purchasing decisions for parents and schools, the Government proposes to develop national standards for products that help manage children's online safety, such as in-built age-appropriate parental control features.

The Commissioner would also be responsible for providing greater support to schools in the promotion of children's e-safety. The Government has suggested several strategies targeted at building a more proactive and consistent approach amongst schools. Among these is an assessment of how e-safety should be incorporated into the National Safe Schools Framework – a set of principles that guide school communities in the development of effective student safety and well being policies.

A case for rapid removal

In 2011, two Facebook pages which were set up in tribute to two Queensland children were defaced with vulgar content, allegedly including child pornography and bestiality. Despite public complaints, media attention and contact from Queensland police, Facebook took no measures to remove the offensive content until a request made by then-Premier of Queensland Anna Bligh to Facebook CEO Mark Zuckerberg. Unfortunately, there are many similar stories of the difficulty involved in having offensive content removed by service providers. It also remains unclear whether the social media platform (or other platforms) on which defamatory content is hosted can be liable for defamation. Given this uncertainty, a rapid removal procedure would provide clear and direct means by which to ensure the swift removal of such content, and thereby minimise the harm caused.

While Facebook removed the content in question in the scenario above, senior representatives also noted in their response to the then Premier Bligh that they believed the 'complete prevention of inappropriate content…is not something we or any society can deliver'. Others in academia have expressed concern that increasing obligations on internet service providers and online platforms could damage the business model that makes these services possible.

A further key obstacle to the implementation of this plan will be those circumstances where the content is hosted outside of Australia, and the question of the enforceability of an order from an Australian authority to a large social media outlet overseas.

Combatting cyberbullying

The proposal has drawn various competing views on whether the Commissioner would be effective in combatting cyberbullying in Australia.

Some commentators argue parents are the best e-safety commissioners, but many parents feel ill-equipped or do not have the technological know-how to deal with online bullying. The internet

also may compound the traditional difficulties of prevention and enforcement. The Commissioner is likely to be more effective in co-ordinating a national response than leaving prevention and enforcement to parents and teachers.

The proposed rapid removal scheme provides for such sanctions as the Commissioner issuing formal "warning notices" to individuals and participating social media sites. This practice is similar to that currently used by the National Children's and Youth Law Centre as a means to dissuade and stop bullying by informing the bully of the seriousness and potential criminal consequences of their actions, of which many children and young adults may not be aware. This may be an effective tool for the Commissioner to use to address the issue.

One of the most sustainable long term strategies to promote e-safety and prevent or reduce cyberbullying is to empower children to use the internet safely and develop their ability to protect themselves. This necessitates educating children on how to use the internet safely, but also how to take action when things go wrong, and this requires access to the support of others, such as the Commissioner.

Sam Goldsmith *and* ***John Arthur*** *(summer clerks), King & Wood Mallesons.*

Potential and protection: striking a balance

Sam Goldsmith and John Arthur delve into the complexities of balancing the right to free speech and protecting children from harmful online environments.

As outlined in the article "Children's e-Safety Commissioner" earlier in this Bulletin, the internet is central to the life of an Australian child, however it also presents new challenges and dangers to children's rights. There is a balance that needs to be struck. On the one hand, freedom of expression and the potential for innovation should be promoted and preserved. On the other, the dangers of cyberbullying and exposure to offensive online content requires that we do more to monitor and protect children in online environments.

Right to free speech and access to information

Encroachment on the right to freedom of speech is a key argument against developing a governmental removal procedure for harmful online content. The right is enshrined in Article 13 of the convention on the Rights of the Child, which provides that children have the right to freedom of expression, including "the freedom to seek, receive and impart information and ideas of all kinds", through any media the child chooses. However, the right is subject to express restrictions, several of which are relevant to a discussion of e-safety and cyberbullying. An infringement of children's freedom of speech may be justified by law where it is necessary for the "respect of the rights or reputations of others", or for the protection of "public health or morals". In other words, it may be legitimate to limit a child's freedom of speech where other children's enjoyment of various rights is threatened.

Article 17 of the convention provides for the right of the child to have "access to information and material" from a range of sources, "especially those aimed at the promotion of his or her social, spiritual and moral well being and physical and mental health". The free exchange and availability of information is one of the central merits of the internet as an educational and social tool – however, where its use is detrimental to the well being of the child, it clearly falls beyond the scope of this provision.

Countervailing rights

While freedom of speech and information are the most commonly invoked rights in any discussion of government regulation of the internet, there are many other rights that must be taken into account, particularly when the purpose of the regulation is to promote the safety of children and young people. This section discusses some of the rights that are vulnerable to the unconstrained exercise of freedom of speech, through cyberbullying activities and the potential for children to be exposed to other damaging materials online. In order to protect these rights, there will be some circumstances in which freedom of speech should be curtailed by policies such as those proposed as part of the Government's e-safety policy.

The first article of the Universal Declaration of Human Rights establishes that "all human beings are born free and equal in dignity and rights". Bullying in any form is clearly an affront to this fundamental principle. Bullying may also compromise the enjoyment of Article 5, which states that "no one shall be subjected to…degrading treatment or punishment". The indignity suffered by victims of bullying may in some circumstances amount to a contravention of this principle.

Article 16 of the convention also establishes that children have the right to protection of the law against interference with their "privacy, family or correspondence", and against "attacks" on their "honour and reputation". Cyberbullying can infringe these rights in a number of ways. The Government referred to one prominent example of infringements on children's privacy in its Discussion Paper – where a page is set up on which images and videos of children in compromising positions are taken without their knowledge are uploaded. The protection against attacks on reputation is also clearly compromised when potentially defamatory statements are made online – for example, in posts on bullying victims' Facebook pages, or other pages set up by perpetrators of bullying in a victim's name.

Under Article 24 of the convention, States Parties recognise that children have a right to "the enjoyment of the highest attainable standard of health". Several studies have revealed that exposure to offensive online content as the victim of bullying can be associated with severe and long-lasting mental health problems. Furthermore, under Article 2 of the convention, States Parties are to take "all appropriate measures" to protect children "against all forms of discrimination or punishment on the basis of status, activities, expressed opinions", and other matters relating to the beliefs of a child's parents, guardians or other family members. Several of these matters are likely to be the subject of cyberbullying, which can amount to discrimination against its victims, both under the convention and Australia's domestic law. Discrimination, threats and trolling are all examples of 'speech' that falls outside the bounds of freedom of expression, as this type of behaviour tends to silence the vulnerable and shut down beneficial public debate, rather than fostering it.

Conclusion

The children's rights framework is compatible with the introduction of greater protections, such as the introduction of a children's e-Safety Commissioner and the proposed initiatives for the Commissioner to implement. Extensive consultation with stakeholders prior to the implementation of any of these policies will be key to striking the balance between competing considerations around child safety and internet freedoms. It will also be necessary for regulatory schemes to include appropriate safeguards against their use as a means to suppress free speech, other than in accordance with the promotion of the rights they are intended to protect.

Sam Goldsmith *and* ***John Arthur*** *(summer clerks), King & Wood Mallesons.*

For this year's Children's Rights Edition of Rights Agenda, we've selected a collection of case notes from our caselaw database that examine various children's rights issues.

AUSTRALIAN HUMAN RIGHTS CASE NOTES

Victoria's Charter of Human Rights and the child's right to a fair hearing

A & B v Children's Court of Victoria & Ors [2012] VSC 589 (5 December 2012)

Summary

The plaintiffs were two sisters aged nine and 11 who made an application to the Supreme Court of Victoria seeking to quash orders of the Children's Court that they lacked maturity to provide instructions to lawyers and denying them leave to be represented by the same legal practitioner. The main issue was the meaning of the expression "maturity to give instructions" under the *Children, Youth and Families Act 2005* (Vic).

Facts

The plaintiffs were the subject of protection applications under the Act. An Interim Accommodation Order permitted them to live with their maternal aunt until the applications could be heard. Over a period of five months, the plaintiffs were represented by lawyers who considered them as having the capacity to give instructions. There was no evidence that either of the plaintiffs had developmental issues, and a report provided to the Court by an officer of the Department of Human Services described the plaintiffs as being "mature for their years in terms of the language they use and their insight into their childhoods". Separately and on several occasions, the plaintiffs expressed that they wanted to continue living with their aunt, that they did not want any contact with their mother and that they wanted to be able to see their maternal uncle, against whom their mother had made sexual abuse allegations.

At the interim hearing, the magistrate ruled that the plaintiffs were not of an age where they could give instructions and were not mature enough to give instructions, particularly in relation to the serious allegations about their maternal uncle. The magistrate also did not grant leave under the Act for the plaintiffs to be represented by the same lawyer.

Decision

Issue on appeal

The issue was the proper construction of the phrase "mature enough to give instructions" in section 524(4) of the Act, which provides:

> If, in exceptional circumstances, the Court determines that it is in the best interests of a child who, in the opinion of the Court is not mature enough to give instructions, for the child to be legally represented in a proceeding in the Family Division, the Court must adjourn the hearing of the proceeding to enable that legal representation to be obtained.

Justice Garde of the Supreme Court of Victoria considered that the scheme of representation contemplated by this provision for a child who is mature enough to give instructions is direct legal representation. However, the provision also contemplates that where a child is not mature enough to give instructions, the child should be represented by a lawyer who must act in accordance with what he or she believes to be in the child's best interests. The question then becomes, when would a child be mature enough to give instructions?

The plaintiffs argued that the expression "maturity to give instructions" required an individual assessment of each child's capacity to give instructions and that chronological age was not the

sole factor. The plaintiffs also argued that there is a presumption of statutory interpretation that the provision should be determined consistently with international law.

Section 32 of the Charter

The Victorian Equal Opportunity and Human Rights Commission intervened in the proceedings arguing that section 32 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) required section 524(4) to be interpreted compatibly with human rights and consistently with the purpose of the provision. The applicable Charter provisions were the right to equality before the law (section 8(3)), the right of a child to protection as in his or her bests interests (section 17(2)) and the right to a fair hearing (section 24(1)). Justice Garde considered the Commission's submissions concerning international law in construing statutory provisions, and particularly article 12 of the Convention on the Rights of the Child, which provides, inter alia, that a child has a right to have an opinion and to have that opinion heard.

On the effect of section 32 of the Charter on statutory interpretation, Justice Garde followed the High Court's decision in *Momcilovic v R* (2011) 245 CLR 1, which required statutes to be construed against the background of human rights and freedoms set out in the Charter. If the wording of a statute is clear, the court must give them that meaning. However, if the words are capable of more than one meaning, the court should give them the meaning which best accords with human rights.

Approaching the construction of "mature enough to give instructions" in accordance with its ordinary meaning, Justice Garde held that the phrase requires a court to have regard to factors other than the child's age and that it is sufficient that the child be mature enough to give instructions on one or more issues that may arise. Such a construction would be consistent with international law and with the Charter.

On this basis, the magistrate made an error of law appearing on the face of the record, amounting to a jurisdictional error, in interpreting "maturity to give instructions" solely by reference to chronological age. In so misconstruing the phrase, the finding about "maturity to give instructions" was made in the absence of relevant evidence. The plaintiffs also succeeded in their arguments of denial of procedural fairness. Justice Garde held that the plaintiffs were denied procedural fairness, given that they had been directly represented at court on several occasions and it was never suggested at these previous hearings that their legal representation was an issue. When the issue arose at the hearing, the plaintiffs were not given an opportunity to give evidence about their maturity. In addition, the order refusing leave to allow the plaintiffs to be represented by the same lawyer received almost no consideration at the hearing.

Commentary

The case provides a useful analysis of domestic and international jurisprudence on the right to legal representation of children. It is also a good example of the interplay between the principles of statutory interpretation, international human rights law and the Charter.

This decision can be found online at: http://www.austlii.edu.au/au/cases/vic/VSC/2012/589.html.

A blog post by Paula Gerber and Melissa Castan on the decision and mooted law reform can be found at:

http://castancentre.com/2012/12/13/one-size-does-not-fit-all-when-children-come-to-court/

Diana Nestorovska *(solicitor), King & Wood Mallesons.*

The Court's parens patriae jurisdiction allows it to order the deprivation of a child's liberty for protective purposes where statutory powers are inadequate

Re Beth [2013] VSC 189 (23 April 2013)

Summary

The Supreme Court of Victoria has held that a Court's exercise of *parens patriae* jurisdiction can allow it to grant orders substantially restricting the liberty of a child where such orders are in a child's best interests and necessary for the child's ongoing care and protection. The Court further held that neither the statutes in issue nor the Victorian Human Rights Charter operate to exclude the exercise of *parens patriae* jurisdiction.

Facts

Beth (a pseudonym) is a 16 year old girl with an intellectual disability. The Secretary to the Department of Human Services has been Beth's guardian since she was four years old. Beth comes from a dysfunctional family background, has suffered sexual abuse and violence and has exhibited self-destructive and violent behaviour.

Beth was placed in a number of different residential care environments. Each of those placements ultimately saw Beth's behaviour deteriorate.

On 27 November 2012, Justice Cavanough made interlocutory orders that enabled Beth to be placed in a purpose-renovated house where she could be treated and supported by staff. The house can be locked to prevent Beth from absconding and it contains a "calm down room".

After moving to the house, Beth's ability to behave appropriately improved dramatically. The Secretary subsequently sought orders in the *parens patriae* jurisdiction of the Court that would permit Beth to continue to reside in the house at least until a review by the Court 12 months from the date of the orders.

The Court was assisted by the Victorian Equal Opportunity and Human Rights Commission as intervenor and the Public Advocate and Victoria Legal Aid as amici curiae. Those parties did not oppose the primary orders sought by the Secretary. However, they did submit that the orders should provide for independent representation for Beth in future proceedings relating to the orders, although this was opposed by the Secretary.

Decision

The statutory framework

Justice Osborn considered at length the provisions of the *Children, Youth and Families Act 2005* (Vic) and the *Disability Act 2006* (Vic), and looked at the extent to which those statutes permit the Secretary to house Beth in the manner proposed.

His Honour held that the placement fell within the terms of a "secure welfare service" under section 173(2)(b) of the CYF Act. That section limits such placements to a maximum duration of 42 days. In the Secretary's view, Beth's situation required a placement longer than 42 days. His Honour held, therefore, that the orders sought exceeded the statutory powers of the Secretary.

His Honour also considered the Disability Act, and held that provisions of that Act in relation to restrictions on liberty had to be "read as subject to such rights to detention as are created: (a) by an order made in the parens patriae jurisdiction; and (b) by a decision made in the best interests of a child under the CYF Act".

Given the orders sought by the Secretary went beyond what was permitted by statute, his Honour then considered whether the Court could "supplement the statutory schemes" and make the orders in any case.

Parens patriae jurisdiction

The question before Justice Osborn was whether the *parens patriae* jurisdiction of the Court would allow the Court to make the orders sought.

Justice Osborn restated the principles of *parens patriae* jurisdiction emerging from cases like *Marion's Case* [1992] HCA 15. His Honour stated that the exercise of *parens patriae* jurisdiction is "directed to the protection of children who are not legally competent to look after themselves". His Honour held that the authorities established "the essential function of a court exercising jurisdiction of the kind in issue as being that of deciding whether in the circumstances of the case the order sought is in the best interests of the child".

Justice Osborn further held that neither the CYF Act nor the Disability Act displace the Court's *parens patriae* jurisdiction, and that "[b]y its nature the jurisdiction may be invoked to supplement a statutory scheme". On this basis, Justice Osborn granted the orders sought substantially on the conditions proposed as his Honour was satisfied that they were in the best interests of Beth.

Independent representation

Justice Osborn was also required to consider whether the proposed orders should provide for independent representation for Beth.

His Honour considered a range of decisions of the NSW Supreme Court in its *parens patriae* jurisdiction which had all adopted the practice of affording representation to children of the same type as they would receive in child protection proceedings before the Children's Court. His Honour noted the statement of Justice White in *Re Alexis* [2011] NSWSC 1545 that representation was "customary in such matters".

Justice Osborn stated that "[i]ndependent representation is…a significant safeguard against the inappropriate exercise of the disproportionate power which the Secretary will hold in respect of Beth under the proposed order". Further, his Honour stated that the future review of the proposed orders would "be fixed at a time when it may reasonably be expected that Beth's ability to give meaningful instructions will have improved somewhat after a relatively significant period in her current accommodation".

Justice Osborn ordered that the representation proposed be provided to Beth on a "best interests" basis. His Honour referred to the decision of Justice Garde in *A & B v Children's Court of Victoria & Ors* [2012] VSC 589, which described best interests representation as "the legal practitioner [acting] in what he or she considers to be the best interests of the child … even in best interests legal representation, the legal practitioner to the extent that it is practicable to do so must communicate to the Court the instructions given or wishes expressed by the child".

Commentary

The decision is significant in its finding that the Charter does not fetter the Court's powers to make orders in its *parens patriae* jurisdiction. It is of interest that the Commission did not oppose the orders sought by the Secretary, despite the substantial limitations that the orders placed upon Beth's Charter rights to liberty, privacy, freedom of movement and freedom from medical treatment without consent. The Commission conceded that the orders would be compatible with the Charter if they "were only those necessary to achieve the purpose of caring for and protecting Beth and continue to be the least restrictive means reasonably available to achieve this purpose".

As his Honour noted, there is an awareness of the parties in the case that if the orders were not made then Beth would suffer substantial involuntary confinement either within secure welfare services or the youth justice system.

Re Beth is one of a number of decisions like *A & B v Children's Court of Victoria* and *R v Chaouk & Ors* [2013] VSCA 99 that have all emphasised the importance of independent legal representation as a safeguard in court proceedings. This judgment is of particular importance given that amendments to the CYF Act have resulted in children 7–9 years of age losing their right to legal representation in child protection proceedings. This decision will ensure that the issue of legal representation and its importance in the justice system remains a live one.

The decision can be found online at: http://www.austlii.edu.au/au/cases/vic/VSC/2013/189.html

James Apps *(solicitor), King & Wood Mallesons.*

Care and protection of children a relevant consideration in granting bail or sentencing a parent

Aldridge v R [2011] ACTCA 20 (22 September 2011)

Summary

The ACT Court of Appeal has held that, by operation of s 11(2) of the *Human Rights Act 2004* (ACT), the arrangements for care of children is a relevant factor to be taken into account in the grant of bail, sentencing, and the grant of bail pending appeal against sentence.

Facts

Edward Aldridge was sentenced on seven counts involving burglary and aggravated burglary to a term of imprisonment of three years and six months, with a non-parole period of two years. He lodged an appeal against sentence and applied for bail pending determination of that appeal. Due to a range of delays attributable to the prosecution, the court and Mr Aldridge, the appeal against sentence was scheduled to be heard just two months before expiration of the non-parole period.

In applying for bail pending appeal, Mr Aldridge relied, among other matters, on the fact that his partner had recently given birth to their second child, was suffering from post-natal depression and that Mr Aldridge needed to support them.

Decision

The application was allowed and Mr Aldridge was granted bail.

Justice Refshauge reiterated that bail pending appeal against sentence should only be granted in special or exceptional circumstances (see also *Sherd v The Queen* [2011] ACTCA 17), but stated that there were a range of matters in the present case which, together, amounted to such circumstances. In particular, the Court noted that:

> Mr Aldridge's partner…has been sentenced to three months periodic detention. That leaves her new-born and their other child, a two-year-old, without proper care over the time she must be in detention. His partner has no close family to assist.

The proper arrangements for care of children is a relevant factor where, as here, the *Human Rights Act 2004* (ACT) in s 11(2) mandates that "every child has the right to the protection needed by the child". This right has been construed by the Constitutional Court of South Africa to be a relevant matter to be taken into account in sentencing. See *S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18, as refined by *S v The State* [2011] ZACC 7.

The decision can be found online at: http://www.austlii.edu.au/au/cases/act/ACTCA/2011/20.html

Phil Lynch *(former Executive Director) Human Rights Law Centre.*

Adoption by gay men and lesbian women: Two steps forward, one step back…

AB and Victorian Equal Opportunity & Human Rights Commission and Department of Human Services and Separate Representative of J [2010] VCC AD-10-003 (6 August 2010)

A recent decision of the Victorian County Court has opened the door – albeit only slightly – for gay men and women to adopt children in Victoria. Although the decision certainly represents a positive development, it is also problematic in a number of important respects – most significantly, in its level of engagement with the Victorian *Charter of Human Rights and Responsibilities Act 2006.*

By relying on a technical loophole in the *Adoption Act 1984*, her Honour Judge Pullen missed a valuable opportunity to expressly address the discriminatory operation of Victorian laws relating to adoption.

Facts

The applicant (AB) applied to adopt his 11-year-old foster child (J). AB was in a same-sex relationship with his life partner (CD). Notwithstanding this relationship, he applied as an individual to circumvent the current laws in place in Australia prohibiting same-sex couples from adopting a child *as a couple*. Section 11(3) of the *Adoption Act 1984* provides that 'subject to this section, where the Court is satisfied that special circumstances exist in relation to the child which makes it desirable so to do, the Court may make an adoption order in favour of one person'.

The question for the Court was whether s 11(3) would permit the adoption of J by AB, when it was clear that he was in a committed same-sex relationship with CD.

In a persuasive submission, Counsel for the applicant, Kristen Walker, argued that there are three approaches to interpreting s 11(3), all of which support an interpretation that would permit the adoption in this particular case: first, textual; second, purposive; and third, an interpretation guided by the *Charter*.

In the context of the *Charter*, Ms Walker referred to the interpretative obligation in s 32(1) and the recent decision of the Court of Appeal in *R v Momcilovic* [2010] VSCA 50. Ms Walker relied on s 8 of the *Charter* (the right to equality and non-discrimination) and s 17 (the right of every child to such protection as is in his or her best interests). It was submitted that to preclude AB from adoption on the basis that he was in a same-sex relationship would be to treat him less favourably on the basis of his sexual orientation, and thereby be discriminatory under s 8 of the *Charter*. Further, it was submitted that a narrow reading of s 11(3) of the *Adoption Act 1984* would not provide for the protection of a child's best interests and would therefore be inconsistent with s 17 of the *Charter*.

Decision

The Court held that s 11(3) of the *Adoption Act 1984* did not prohibit a gay man from adopting a child *as an individual*, even where it was clear that the individual was in a committed same-sex relationship.

In reaching its decision, the Court applied a strictly literal approach of the *Adoption Act 1984*, concluding that its proper construction 'permits one person in a same sex couple to adopt'. In

taking this route, the Court avoided the more complex question of whether precluding the applicant from adoption on the basis that he was in a same-sex relationship would amount to discrimination.

Her Honour Judge Pullen concluded that having interpreted the statutory provision in a way that is consistent with the relevant human rights, it was not strictly necessary to address the *Charter* – a point made by Counsel for the Victorian Equal Opportunity and Human Rights Commission. Notwithstanding this, however, her Honour might have gone that one step further – if only in *obiter* – and considered how the Charter *might* have applied in this case.

The facts of this case provided an invaluable opportunity for a Court to comment on the discriminatory operation of the *Adoption Act 1984*, an opportunity that seems to have been, at least to some extent, missed.

Discussion

In addition to amounting to blatant discrimination against same-sex couples, the present position in Victoria is entirely devoid of logic. At present, same-sex couples can be approved as short-term and permanent carers for foster children. Indeed, many foster-care agencies actively target same-sex couples. In 2007, the Victorian Law Reform Commission ('VLRC') remarked on this inconsistency in treatment, stating:

It makes no sense that people in same-sex relationships are able to be approved as permanent and short-term carers of children in need, but cannot assume the full range of legal parental powers and responsibilities for these children.

As a consequence of this most recent decision it seems that, in the case of a same-sex couple, the State *might* allow *one* – but certainly not *both* – of the individuals to assume those powers and responsibilities.

How can this possibly be considered to be in the best interests of the child? The logic is deeply flawed. The VLRC acknowledged the concerns of some members of the community that same-sex parenting is contrary to the best interests of a child. These concerns were encapsulated by former Prime Minister John Howard in 2004: 'Children ideally should be brought up by a mother and a father who are married. That's the ideal'.

'Ideals' aside, the VLRC concluded that there was no evidence that parenting by same-sex couples is in itself harmful to children. The VLRC's final recommendation was that the eligibility criteria under the *Adoption Act 1984* be expanded so that a same-sex couple can adopt children in *all* circumstances in which heterosexual couples can.

Three years after the VLRC report, we have had little more than vague commitments for further consultation. Meanwhile, some of Victoria's most vulnerable children continue in a state of limbo and are expressly excluded from the legal and material benefits that flow from adoption, and the emotional security and stability that derive from a recognised legal status.

The current prohibition on adoption by same-sex couples is anachronistic, deeply divisive and in many cases, contrary to the best interests of the child. It is time that the Victorian Government followed the lead of Western Australia, the ACT and now New South Wales and provided same-sex couples equal access to the adoption process.

The decision is available here.

Jason Pobjoy *(PhD candidate), University of Cambridge.*

INTERNATIONAL HUMAN RIGHTS CASE NOTES

What is a 'Child'? Age Determination in Asylum Applications

A, R (on the application of) v London Borough of Croydon [2009] UKSC 8 (26 November 2009)

The difficulty in determining age has become prominent as a consequence of the increased movement of children around the world, and specifically the increased migration of unaccompanied young people. It is an issue of particular significance, for a number of reasons. States often have – or at least, *ought* to have – different policies and procedures in place in relation to the treatment of asylum seekers who are children. These may relate, for example, to the provision of guardianship, the provision of legal aid, conditions of any 'detention', the substantive consideration of whether the asylum seeker satisfies the requisite test (ie the refugee definition), or access to particular social entitlements (housing, welfare, education etc).

A recent decision of the newly constituted United Kingdom Supreme Court considers the role of the court in determining a young person's age in the asylum context. Specifically, the Court was required to consider whether United Kingdom law required that, in cases where a young person's age could not be resolved through administrative processes, the court should make the final determination.

Facts

The decision arose out of a series of cases where young people had been denied accommodation under s 20(1) of the *Children Act 1989* (UK), as a consequence of a contested age determination. Section 20(1) reads as follows:

> Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of –
>
> - there being no person who has parental responsibility for him;
> - his being lost or having been abandoned; or
> - the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care.

In total, there were seven separate claims, however the Court only factually addressed the two lead claims: *A* and *M*.

A arrived in the United Kingdom and claimed asylum in 2007. On arrival he asserted that he was fifteen and a half, however the immigration officer considered that he was eighteen and referred him for an age assessment. He was interviewed by two social workers who assessed him as an adult. He was subsequently treated as such. Shortly afterwards, his solicitors produced a copy of his birth certificate, and arranged for an examination by a paediatrician. Both the birth certificate and the examination supported the fact that A was fifteen and a half. Notwithstanding these findings, a decision was made that A was not entitled to accommodation under s 20(1) of the *Children Act 1989* (UK).

M arrived in the United Kingdom and claimed asylum in 2006. He asserted that he was just under seventeen, however his age was also disputed and he was referred for an age assessment by two social workers who concluded that he was over eighteen. Once again a paediatrician's report was obtained, which concluded that he was under eighteen.

For the purposes of the appeal to the Supreme Court, the three issues for consideration where:

- whether, as a matter of statutory construction, the duty imposed by s 20(1) is owed only to a person who appears to the local authority to be a child, so that the authority's decision can only be challenged on 'Wednesbury' principles, or whether it is owed to any person who is in fact a child, so that the court may determine the issue on the balance of probabilities;
- whether the issue 'child or not' is a question of 'precedent' or 'jurisdictional' fact to be decided by a court on the balance of probabilities; and
- whether s 20(1) gives rise to a 'civil right' for the purpose of art 6(1) of *the European Convention on Human Rights* (the right to a fair hearing) and, if so, whether the determination of age by social workers subject to judicial review on 'Wednesbury' principles is sufficient to comply with the requirement that the matter be determined by a fair hearing before an independent and impartial tribunal.

The appellants submitted that, in cases of dispute, the court must decide whether a person is a child on the balance of probabilities. The respondent local authorities, supported by the Home Secretary, submitted that the authority must decide the matter, subject only to judicial review (on the ordinary bases).

Decision

The lead judgment was delivered by Lady Hale. The case was ultimately disposed of by way of determination of the first issue (issue (i)), however the Court briefly commented on issues (ii) and (iii) (these have not been addressed in this note).

The Court drew a distinction between the use of the terms 'child' and 'child in need' in s 20(1) of the *Children Act 1989*. As regards 'child in need' the Court stated (at [26]):

> The question whether a child is 'in need' requires a number of different value judgments…Questions like this are sometimes decided by the courts in the course of care or other proceedings under the Act. Courts are quite used to deciding them upon the evidence for the purpose of deciding what order, if any, to make. But where the issue is not, what order should the court make, but what service should the local authority provide, it is entirely reasonable to assume that Parliament intended such evaluative questions to be determined by the public authority, subject to the control of the court on the ordinary principles of judicial review. Within the limits of fair process and 'Wednesbury reasonableness' there are no clear cut right or wrong answers.

While the question of whether a child is 'in need' requires a number of different value judgments (although, in the context of child asylum seekers see the comment of Lord Hope noted further below), the Court considered that the term 'child' was objective, allowing for a right or wrong answer. The Court stated (at [27]):

> But the question whether a person is a 'child' is a different kind of question. There is a right or wrong answer. It may be difficult to determine what that answer is. The decision-makers may have to do their best on the basis of less than perfect or conclusive evidence. But that is true of many questions of fact which regularly come before the courts. That does not prevent them from being questions for the courts rather than for other kinds of decision makers.

On this basis, the Court allowed the appeals, the result being that if live issues remain about the age of a person seeking accommodation under s 20(1) of the *Children Act 1989*, then the court will 'have to determine where the truth lies on the evidence available' (at [46]).

Analysis

The decision of the Supreme Court provides an illustration of the need to provide sufficiently tailored protection for children seeking asylum. On this point, an aside from Lord Hope strikes with some resonance (at [56]):

> The question whether the applicant is a child 'in need' must then be for the social worker to deal with. But it is very hard to see how an unaccompanied child who is an asylum seeker could be otherwise than in need.

Notwithstanding the fact that approximately 42% of the world's refugees are under the age of 18 (at current estimates, this equates to approximately 7 million children), States have been remarkably latent in the development of policies specific to children. On 27 October 2009, the Special Rapporteur on the human rights of migrants, Mr Jorge Bustamante, presented his latest report to the General Assembly at United Nations Headquarters in New York. That report focused on the protection of children in the context of migration. In his report, Mr Bustamante identified a 'protection gap' deriving from a lack of specific provisions on children in migration laws, policies and programs: 'Most migration laws do not reflect a child rights perspective, nor do they have specific provisions relating to children'.

There are some exceptions: the United Kingdom's policies regarding the provision of accommodation to children under s 20(1) of the *Children Act 1989* is one. But as this case illustrates, even where child specific policies are implemented, children are faced with an additional hurdle to access those entitlements. In circumstances where age is very much a construct of the developed world, and where children have often fled with little or no thought to obtaining documentary evidence of their age, this hurdle may in many cases prove insurmountable. The United Kingdom has attempted to deal with these difficulties by developing a holistic age determination system carried out by social services. Both Australia and the United States often still rely on one-dimensional physical tests (for example wrist x-rays), despite the fact that these have proven unreliable (and can carry radiation risks).

Whatever the means adopted for determining age (although, in my view, the United Kingdom approach is clearly preferable), it seems entirely appropriate – particularly considering the specific benefits that may (or at least ought) flow from status as a child asylum seeker – that recourse is available to a court for a final determination. In finding such, the decision of the Supreme Court is to be applauded.

The decision is available at here.

Jason Pobjoy *(PhD candidate), University of Cambridge.*

Detention of Children in Immigration Facilities a Breach of Human Rights

Suppiah & Ors, R (on the application of) v Secretary of State for the Home Department [2011] EWHC 2 (Admin) (11 January 2011)

Summary

The High Court of England and Wales decided that two families who had sought asylum in the United Kingdom were detained unlawfully by the Secretary of State for the Home Department (Defendant) because the Defendant failed to have regard to its duty to safeguard and promote the welfare of children.

Facts

Reetha Suppiah and Sakinat Bello (the First and Fourth Claimants) and their young families were Malaysian and Nigerian nationals respectively. After arriving in the United Kingdom and having their applications for asylum refused, both families were arrested by the United Kingdom's Border Agency (UKBA) and taken to Yarl's Wood Immigration Removal Centre to await removal to their countries of origin. The directions to remove both families were cancelled for various reasons shortly after they arrived at Yarl's Wood. There was some evidence that some of the claimants suffered poor health while in detention.

In the United Kingdom, the detention of families with children pending removal or deportation is governed by the *Borders, Citizenship and Immigration Act 2009* (BCI Act) as well as various policies published by the Defendant. Section 55 of the BCI Act requires the UKBA to carry out is functions 'having regard to the need to safeguard and promote the welfare of children'. The Defendant had also issued policies to the same effect. The Defendant also had policies that detention of families with children was to be used as a last resort and for the shortest possible period of time. The UKBA was also directed to have regard to the United Kingdom's obligations under the *European Convention of Human Rights.*

The claimants all contended that they were detained unlawfully. They also contended that their rights under art 3 (the prohibition against torture or to inhuman or degrading treatment or punishment), art 5 (the right to liberty and security of person) and art 8 (the right to respect for private and family life, home and correspondence) of the *European Convention* were infringed. In addition, the claimants contended that the Defendant's policies on detaining families with children were unlawful under the UN Convention on the Rights of the Child (CRC) because they did not expressly say that the detention of families with children should only occur in exceptional circumstances and certain procedural safeguards were absent.

Decision

The First Claimant and her Children

Mr Justice Wyn Williams found that there was no evidence that the decision-maker had properly considered his or her duty under s 55 of BCI Act. Further, His Lordship found that the detention of the First Claimant and her children was in direct conflict with the Defendant's policies, specifically, that the decision-maker have regard to s 55 of the BCI Act; that all reasonable alternatives to detention be considered; and finally, that detention only be used as a measure of last resort. His Lordship found that the decision-maker had failed to act in this manner and that consequently, the detention of the First Claimant and her children was unlawful under domestic law.

His Lordship found that there was no breach of art 3 of the *European Convention* in this case because the 'minimum level of severity' was not reached. His Lordship found that there was a breach of art 5 for the same reasons that the detention of the First Claimant and her children was unlawful under domestic law. His Lordship also found that there was a breach of art 8 because unlawful detention was an unacceptable infringement of a person's private life. However, His Lordship found that there was no breach of Article 8 arising from the treatment they received while in detention.

The Fourth Claimant and her Child

Mr Justice Wyn Williams found that there was no evidence that the decision-maker in this case had considered his or her duty under s 55 of the BCI Act. His Lordship also found that the

detention of the Fourth Claimant and her child was not a measure of last resort since alternatives had not been explored adequately or at all. His Lordship also found that the risk of the Fourth Claimant and her child absconding was not high enough to warrant their detention.

In this case, breaches of arts 5 and 8 of the *European Convention* were proved for the same reasons they were proved in relation to the First Claimant and her children.

Defendant's policies

Mr Justice Wyn Williams found that the polices regarding the detention of families and children were consistent with the United Kingdom's obligations under the CRC and were therefore not unlawful. His Lordship found that upon the proper operation of the policies, detention of families with children must only be used in exceptional circumstances and as a last resort. Although these policies might not always be applied with sufficient rigor the policy itself is not necessarily unlawful.

Relevance to the Victorian *Charter*

The decision that the detention of the claimants was unlawful under United Kingdom's domestic law is unlikely to be directly relevant to the application of the Victorian *Charter* as immigration law is administered by the federal government. However, the Court's interpretation of arts 3, 5 and 8 of the *European Convention* may have implications in Victoria given the close parallels between those articles and ss 10, 21 and 13 of the Victorian *Charter.*

The decision is at www.bailii.org/ew/cases/EWHC/Admin/2011/2.html.

Meg O'Brien *(former secondee to the Human Rights Law Centre from King & Wood Mallesons).*

Exclusion of pregnant students from schools undermines fundamental rights

Head of Department, Department of Education, Free State Province v Welkom High School and Another Case (CCT 103/12) [2013] ZACC 25 (10 July 2013)

Summary

The Constitutional Court of South Africa has ruled that school pregnancy policies that allow the automatic exclusion of pregnant students, violate students' constitutional rights to equality and a basic education and were not in the best interests of the students. The Court ordered that the policies be reviewed.

Facts

In 2008 and 2009 respectively, the governing bodies of Welkom High School and Harmony High School adopted pregnancy policies that provided for the automatic exclusion from school of any student who fell pregnant. In October 2009, a 16-year-old student in grade 10 at Harmony High School fell pregnant and was instructed that she would not be readmitted to school for the remainder of 2010. The following year, a grade 9 student at Welkom High School also fell pregnant and was instructed to leave school pursuant to the school's pregnancy policy.

Following requests from the students' families for assistance in having the students' cases reviewed, the Head of the Department of Education of the Free State Province ('HOD') issued instructions to the principals of the schools to readmit the students who had been excluded in accordance with the pregnancy policies. The schools approached the High Court for interdictory relief, arguing that the HOD did not have the power to issue instructions to the principals requiring them to disregard the schools' policies.

The High Court held that the HOD did not have the legal authority to act as it did. This decision was upheld on appeal, with the Supreme Court of Appeal adding that because the content of the pregnancy policies had not been challenged in the proceedings, it was not necessary to consider the constitutionality of them. The HOD appealed to the Constitutional Court.

The case primarily dealt with the proper exercise of public power by organs of the state and the steps that must be taken by the Executive in order to protect fundamental rights. In addition, the Court took it upon itself to evaluate the human rights implications of the pregnancy policies, as the constitutional rights to education, human dignity, privacy, bodily and psychological integrity, and equal protection and benefit of the law, as well as the prohibition against unfair discrimination were all implicated by the pregnancy policies.

Pending the decisions of the Courts, the two students were readmitted to their schools.

Decision

Justice Khampepe delivered the leading judgment (with Moseneke DCJ and Justice Van der Westhuizen concurring) and began by considering whether the Schools Act authorised public school governing bodies to adopt pregnancy policies. Justice Khampepe concluded that the governance responsibilities placed on school governing bodies, and their authority to adopt codes of conduct, empowered them to adopt pregnancy policies. However, she found that this power was limited by the Schools Act and the Constitution, and did not extend to adopting pregnancy policies that have exclusionary effects: "[n]o governing body may adopt and enforce a policy that undermines, amongst others, the fundamental rights of pregnant learners to freedom from unfair discrimination and to receive an education".

Having made this finding, Justice Khampepe went on to determine what course of action the HOD was empowered to take. Justice Khampepe found that when faced with a school policy that offends the Constitution and the Schools Act, an HOD is obliged to engage in a consultative process with the governing body and, if there are reasonable grounds, take over the performance of the governance or policy formulation function in order to give effect to the relevant constitutional rights and the objectives of the Schools Act. Additionally, the HOD, as an organ of the state, has obligations under section 7(2) of the Constitution to respect, protect, promote and fulfill the rights as enshrined in the Constitution.

Justice Khampepe found that the schools' governing bodies were empowered to adopt pregnancy policies and that in addressing his concerns regarding the policies, the HOD was obliged to act in accordance with the Schools Act, which he did not. The HOD therefore acted unlawfully in issuing instructions to the principals that they readmit the pregnant students, contrary to their schools' pregnancy policies. Justice Khampepe held that the HOD's obligations under section 7(2) of the Constitution did not affect this finding, as the obligation to protect must be discharged in accordance with the rule of law. Therefore, while the HOD was obliged to protect the rights of pregnant students to freedom from unfair discrimination and a basic education, he was obliged to do so lawfully.

Justice Khampepe then considered the unconstitutionality of the pregnancy policies. She found that the policies were discriminatory as they differentiate between students on the basis of pregnancy, which is disallowed under section 9(3) of the Constitution. The policies also limit pregnant students' fundamental right to education, as protected by section 29 of the Constitution, by requiring students to repeat up to a year of schooling. The requirement that students report to the school authority when they believe they are pregnant violates their rights to human dignity (section 10), privacy (section 14), and bodily and psychological integrity (section 12(2)). This is

further compounded by the obligation placed on other students to report to the school authority when they suspect a student is pregnant. Finally, Justice Khampepe considered that the inflexible nature of the policies, which require the automatic exclusion of pregnant students, violates section 28(2) of the Constitution, which provides that a child's best interests are of paramount importance in every matter concerning a child.

In light of these findings, Justice Khampepe ordered that the appeal be dismissed and that the schools' governing bodies review their pregnancy policies in light of the judgment and furnish the Court with a copy of the revised policies. Further, the Court ordered that the parties engage meaningfully with each other to give effect to the revised policies. Justice Froneman and Skweyiya agreed with these orders.

In contrast to the majority's findings on the exercise of public power, Justice Zondo found that the governing bodies did not have the power to make the pregnancy polices, as they were inconsistent with provisions of the Schools Act and the Constitution. As such, he found that the HOD not only had the power to act as he did in instructing the principals not to carry out or implement the pregnancy policies which were in breach of the Schools Act and the Constitution, he was obliged to do so.

Commentary

Article 28 of the *United Nations Convention on the Rights of the Child* recognises the right of the child to education. However, unlike the South African *Bill of Rights*, neither the Australian Constitution nor Victoria's Charter of Human Rights contains a specific right to education. Nevertheless, the Charter provides that every person has the right to enjoy their human rights without discrimination (section 8(2)) and that every child has the right to such protection as is in their best interests and is needed by them by reason of being a child (section 17(2)). State and federal anti-discrimination laws also broadly protect against discrimination on the grounds of pregnancy and parental status (with some exemptions for religious bodies). Accordingly, similar policies in Australia are likely to be unlawful.

In Victoria, the Victorian Department of Education's 'Student Pregnancy and Parenting School Policy' stipulates that students who are pregnant or parenting have the right to continue schooling. Freedom is granted to schools and principals in making local decisions about how pregnant students can be supported to continue their schooling, but the policy guards against the exclusion of pregnant students by reason of their pregnancy.

The Federal *Sex Discrimination Act 1984* (Cth) also protects against discrimination on the basis of pregnancy in the provision of goods and services, including education, although private religious schools do have an exemption under this legislation.

The decision is available at: *http://41.208.61.234/uhtbin/cgisirsi/20130715092443/SIRSI/0/520/J-CCT103-12*

Carmendy Cooper (*Solicitor), DLA Piper Australia.*

Mandatory registration of young sex offenders fails to give proper consideration to best interests of children

J v National Director of Public Prosecutions and Another Case CCT 114/13 [2014] ZACC 13 (6 May 2014)

The Constitutional Court of South Africa has ruled that a law requiring courts to make an order to include the particulars of a sexual offence on a National Register for Sex Offenders (the Register)

is unconstitutional when that offender is a child. The court noted that having particulars of a sexual offence on the Register at a young age could significantly impact on the child's life, including their ability to gain employment. The Court found that the mandatory nature of the law infringes on the right of child offenders to have their best interests considered as a matter of paramount importance and was therefore contrary to section 28(2) of the South African Constitution (the Constitution).

Facts

J, the accused, was 14 years old at the time he committed the following offences:

- rape of a seven year old boy;
- rape of two six year old boys;
- assault with intent to cause grievous bodily harm for stabbing a 12 year old girl.

Procedural history

J pleaded guilty to all charges in the Magistrates Court and was sentenced to five years compulsory residence in a child and youth care centre and a three year prison term thereafter. He was subsequently sentenced with six months suspended imprisonment for the assault charge. In addition, the Magistrate made an order that J's details be particularised on the Register. Section 50(2)(a) of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* (No 32 of 2007) (the Act) mandates that such an order be made where the offence is against a child or a person with a mental illness. Ramifications of being on the register include limitations in employment, in licensing certain facilities and in the care of children and persons with a cognitive disability.

The case was appealed to the High Court. The full High Court declared that s 50(2) of the Act unjustifiably infringes on the rights of offenders whether they are children or adults as it fails to afford the accused an opportunity to make submissions regarding whether their particulars should be put on the Register. The Act therefore limits the Court's discretion to make a decision as to those submissions. The High Court held this was contrary to s 34 of the Constitution which affords the right for everyone to have a fair public hearing before a court or tribunal.

The matter came before the Constitutional Court for confirmation of the finding of constitutional invalidity.

Submissions

Neither party opposed confirmation of the High Court's order completely.

The State acknowledged the provision imposes unjustifiable limitation on the offender's right to be heard and their right to a fair trial. However, the State did argue that the High Court's orders were too broad in that they extended the principle to adult offenders.

Three non-profit organisations that provide support services and programmes to children made submissions to the Constitutional Court as *amici curiae*. They argued that the High Court had erred in not finding the provision unjustifiably infringed on the applicant's rights under section 28(2) of the Constitution. Section 28(2) of the Constitution provides, "a child's best interests are of paramount importance in every matter concerning the child".

Decision

The 11 justices of the Constitutional Court unanimously made a declaration that section 50(2) was unconstitutional but varied the orders of the High Court.

Should the principle extend to adult offenders?

The Constitutional Court held that it was inappropriate for the High Court to consider the provision's constitutional validity in relation to adult offenders as the facts in this case only raise the application of the provision to child offenders.

Does the provision limit constitutional rights?

The Constitutional Court agreed with the *amici*, that the starting point for all matters concerning the child is a consideration of section 28(2) of the Constitution – the child's best interests are paramount. The Constitutional Court considered three key principles when approaching issues involving the best interests of the child offender:

- the law should generally distinguish between adults and children;
- the law ought to make allowance for an individual approach to child offenders;
- the child or her representatives must be afforded an appropriate and adequate opportunity to be heard at every stage of the justice process.

The Constitutional Court also considered the fact that being on the Register would impact upon child offenders after they have served their sentences, with the sanction of exclusion from areas of life and livelihood that may be formative for their personal dignity, family life, and abilities to pursue a living.

As section 50(2) of the Act applies without distinction to both adult and child offenders and gives no discretion to the court on whether they should include the particulars of the offender on the Register, the Constitutional Court found the provision infringes the best interests of the child in terms of s 28(2) of the Constitution.

Is the limitation justifiable?

As sexual violence threatens a victim's rights to freedom and security of person, privacy and dignity in a profound way, the Constitutional Court acknowledged that the aim of the provision is to fulfil a vital function in protecting children and people with cognitive disabilities from sexual abuse. However, as the operation of the provision does not allow the Courts to exercise discretion, it will not always serve this purpose. It follows that the limitation is not justified in an open and democratic society as there are more proportionate alternative methods for achieving the same aim.

The Court confirmed that section 50(2)(a) of the Act is inconsistent with the Constitution to the extent it unjustifiably limits the right of young sex offenders to have their best interests be given paramount importance. The Court provided the Parliament with 15 months in which it could legislate to rectify the Act's invalidity.

Commentary

Legislative provisions that fail to distinguish between adult and child offenders or include mandatory sanctions have the potential to unjustifiably impinge on the right of children as they do not allow for courts to consider what justice requires on a case-by-case basis. Judicial discretion in such cases is important in order to adequately take into account the ability of child offenders to reform. Of particular relevance to this case, recidivism rates for sexual offences vary widely between adult and child offenders.

This judgment reaffirms a number of important principles relating to the treatment of youth offenders in the criminal justice system, many of which have been dealt with previously in the South African Constitutional Court in relation to mandatory minimum sentences for children.

The decision is available online.

***Heidi Edwards** (graduate), DLA Piper.*

Supreme Court of Canada Balances the Right to Freedom of Religion and the Best Interests of Children

AC v Manitoba (Director of Child and Family Services), 2009 SCC 30 (26 June 2009)

On 26 June 2009, the Canadian Supreme Court handed down a decision which discussed in detail the right of adolescents to make their own medical decisions. The Court held that the wishes of the child must be considered when determining what action was in the child's best interests.

Facts

AC was 14 years old. She was admitted to hospital with intestinal bleeding, and needed a blood transfusion. AC was a Jehovah's Witness and was prohibited from receiving blood or blood products. She, and her parents, refused to consent to the transfusion. AC's doctor applied for a court order permitting the transfusion on the grounds that it was medically necessary to prevent death or serious injury to AC.

Under s 25(8) of the *Child and Family Services Act* the Court has power to order medical treatment that is in the 'best interests' of the child, despite the child and/or parents refusing to consent to the treatment. Where a child is 16 or older, s 25(9) provides that the child's views should be determinative, and the Court shall not authorise the treatment without the child's consent unless there is evidence that the child lacks the maturity to appreciate the consequences of their decision.

AC was deemed competent to make decisions about her medical treatment, but because she was under 16, her wishes were not determinative. The Court granted the treatment order as requested by the doctors, and the transfusion was given to AC. In making the treatment order, Kaufman J proceeded on the basis of deemed capacity, and did not investigate AC's actual capacity to make medical decisions. This was done because, in Kaufman J's view, there was no requirement under s 25 for the Court to give consideration to the wishes of a child under 16.

AC appealed the decision to order treatment. Her appeal was denied so she further appealed to the Canadian Supreme Court on the grounds that ss 25(8) and 25(9) of the Act:

- were unconstitutional because they create an irrebuttable presumption of incapacity for minors aged under 16 years and thus infringe the *Canadian Charter of Rights and Freedoms*;
- infringed her liberty and security interests (s 7 of the *Charter*);
- discriminated against her based on age (s 15 of the *Charter*); and
- violated her right to religious freedom (s 2(a) of the *Charter*).

In a 6:1 decision, the Canadian Supreme Court rejected AC's appeal and upheld the validity of s 25 of the Act on all grounds.

Decision

Justice Abella, in the majority, noted the difficulty of adolescent consent cases and said that, 'maturity is necessarily an imprecise standard'. Her Honour argued that the consideration of the particular child's ability to make informed decisions was essential in order to ensure the constitutionality of s 25 of the Act, and said:

It is a sliding scale of scrutiny, with the adolescent's views becoming increasingly determinative on his or her ability to exercise mature, independent judgment. The more serious the nature of the decision, the more severe its potential impact on the life or health of the child, the greater the degree of scrutiny that will be required.

Her Honour noted that this approach was consistent with the common law's 'mature minor' doctrine, which has been developed in both Canadian and international jurisprudence. Under the doctrine, 'an adolescent's treatment wishes should be granted a degree of deference that is reflective of his or her evolving maturity.'

Whilst s 25(8) does not expressly provide for the wishes of a child under 16 to be considered, Abella J said the section must be viewed in the context of the Act. Her Honour referred to s 2 of the Act, which provides that a child of 12 years or more is entitled to be advised of the proceedings and can make their views known. It also provides that children under 12 can have their views considered where the judge is satisfied that they understand the nature of the proceedings. Section 2(1) provides that, in determining 'best interests', consideration should be given to the mental and emotional state of the child, the need for the treatment, the views and preferences of the child, and the child's religious and cultural heritage.

Justice Abella concluded that the 'best interests' test requires consideration of the child's views, and argued that it is, 'by definition, in a child's best interests to respect and promote his or her autonomy to the extent that his or her maturity dictates'.

With respect to s 7 of the *Charter*, her Honour noted that an inability to determine one's own medical treatment constitutes a deprivation of liberty and security of the person. However, Abella J considered that this is constitutional where the deprivation is in accordance with the principles of fundamental justice, including that the provisions must not be arbitrarily applied. Her Honour stated, 'it would be arbitrary to assume that no one under the age of 16 has capacity to make medical treatment decisions. It is not, however, arbitrary to give them the opportunity to prove that they have sufficient maturity to do so'.

With respect to s 15 of the *Charter*, Abella J noted that there are two questions in determining discrimination on the basis of age: (1) Does the law create a distinction based on an enumerated ground?; and (2) Does the distinction cause disadvantage by perpetuating prejudice or stereotyping? Her Honour stated that:

By permitting adolescents under 16 to lead evidence of sufficient maturity to determine their medical choices, their ability to make treatment decisions is ultimately calibrated in accordance with maturity, not age, and no disadvantaging prejudice or stereotype based on age can be said to be engaged.

With respect to the s 2(a) right to religious freedom, Abella J noted that religious heritage forms part of the consideration given when determining the 'best interests' of the child. Accordingly, her Honour did not consider that s 25(8) of the Act violates the right to religious freedom.

Justice Binnie delivered a dissenting judgment and would have allowed AC's appeal. In essence, his Honour argued that s 25(8) of the Act did not specifically provide a child under 16 with the

right to have their opinions heard and taken into consideration by the Court. Justice Binnie considered the approach put forth by Abella J, and said:

> [A] young person with capacity is entitled to make the treatment decision, not just to have 'input' into a judge's consideration of what the judge believes to be the young person's best interests. Under Abella J's approach, the court may (or may not) decide to give effect to the young person's view, but it is still the court that makes the final decision as to what is best for the young person. This mature young person, however, insists on the right to make her own determination about what treatment to receive or not to receive, based on a mature grasp of her perilous situation.

His Honour argued that the limitations on AC's rights were not reasonable as reasonableness relates to the purpose of the limitation. His Honour argued, 'if the legislative net is cast so widely as to impose a legal disability on a class of people in respect of an assumed developmental deficiency that demonstrably does not exist in their case, it falls afoul of the 'no valid purpose' principle …'.

Relevance to the Victorian *Charter*

This decision may be relevant to the interpretation of ss 8, 14 and 21 of the *Victorian Charter of Human Rights and Responsibilities*.

Section 8 of the Victorian *Charter* is similar in effect to the Canadian s 15 provision. Accordingly, the two stage inquiry proposed by Abella J may prove useful in determining the scope of the s 8 prohibition on age discrimination.

Section 14 of the Victorian *Charter* provides for freedom of religion and is, in essence, equivalent to s 2(a) of the Canadian Charter. However, s 14(2) of the Victorian *Charter* provides that a person must not be restrained in a way that limits their freedom to have a religious observance or practice. This additional section may limit the impact of the s 2(a) analysis given by the Canadian Supreme Court.

Section 21 of the Victorian *Charter* protects the right to liberty and security of the person. Unlike s 7 of the Canadian Charter, the Victorian provision does not contain the limitation that the liberty and security can be deprived, 'in accordance with the principles of fundamental justice'. However, s 7 of the Victorian *Charter* imposes limitations of similar effect, and provides that human rights may be subject to 'reasonable limits'. In determining reasonableness, the Victorian *Charter* prescribes that consideration should be given to the relationship between the limitation and its purpose (s 7(2)(b)). Accordingly, the discussion in *AC v Manitoba* may prove highly relevant.

The decision in *AC v Manitoba* may also impact on s 17 of the Victorian *Charter*, which provides for the protection of families and children. There is no corresponding right in the Canadian Charter, but the 'best interests' analysis given by the Canadian Supreme Court may prove useful if an *AC v Manitoba* type case should arise in Victoria.

The decision is available at http://www.canlii.org/en/ca/scc/doc/2009/2009scc30/2009scc30.html.

Victoria Edwards *(former secondee to the Human Rights Law Centre from Freehills).*

Rights of the Child and Minimum Sentencing Legislation

Centre for Child Law v Minister for Justice and Constitutional Development and Others (with the National Institute for Crime Prevention and the Re-integration of Offenders as Amicus Curiae) [2009] ZACC 18 (15 July 2009)

The Constitutional Court of South Africa upheld a decision of the High Court declaring invalid provisions of the *Criminal Law (Sentencing) Amendment Act 38 (*2007) (Amendment Act) that made minimum sentences for certain serious crimes applicable to 16 and 17 year old children. The provisions were found to negate the Constitution's principles that children should only be detained as a last resort and for the shortest period of time.

Facts

In *S v B* 2006 (1) SACR 311 the Supreme Court of Appeal held that a discretion was automatically enlivened in a sentencing court for offenders aged between 16 and 17 years old. The discretion enabled a sentencing court, inter alia, to depart from prescribed minimum sentences. To reverse the decision of the Supreme Court of Appeal, the Amendment Act was enacted, which amended the *Criminal Law Amendment Act 105 of 1997*. The effect of the amendments was to make minimum sentences applicable to offenders who were 16 or 17 at the time of the offence and to make it expressly clear that children under the age of 16 at the time of the offence are excluded from the application of minimum sentences.

The Centre for Child Law at the University of Pretoria challenged the constitutional validity of the Amendment Act. The High Court upheld the challenge finding that applying minimum sentences to children aged 16 or 17 was inconsistent with principles espoused in the Constitution of imprisonment as a last resort and for the shortest appropriate period of time.

The Centre sought confirmation of the declaration of invalidity in the Constitutional Court. The Centre also sought an order that children already sentenced under the amended provisions be identified and have their sentences reconsidered.

Decision

Cameron J, with whom Langa CJ, Moseneke DCJ, Mokgoro, O'Regan, Sachs and Van der Westhuizen JJ concurred, upheld the High Court's judgment. (Yacoob, Ngcobo, Nkabinde and Skweyiya JJ dissenting)

The Court considered the scope and reasons for the protection under s 28 of the Constitution. Section 28(1)(g) stipulates that a child has the right not to be detained except as a measure of last resort and only for the shortest period of time. Subsection (2) provides that a child's best interests are paramount. The Court stated at [32] that section 28(1)(g) requires an 'individuated judicial response to sentencing, one that focuses on the particular child who is being sentenced, rather than an approach encumbered by the rigid starting point that minimum sentencing entails'. The Court held that the minimum sentencing provisions constrain their discretion in the sentencing process, thereby diminishing the courts' power of individuation.

Having found that the Amendment Act limited the rights protection in section 28, the Court went on to consider whether the limitation was justifiable. The Court held that the government had not justified the purpose behind expressly excluding 16 and 17 year olds from the protections in the Constitution. The Court stated, at [55], that 'it could reasonably be expected that the Minister would set out reasons or policies that pertain to what specific conduct and social patterns within the age-group previously exempt, but now encompassed, created the need to impose a limitation

on the rights in section 28'. The government's objective in enacting the Amendment Act was to reverse the effect of *S v B*, which the Court held was insufficient. The government argued that judicial notice should be taken that serious crime in all categories had increased. The Court held, at [60], that 'high crime levels and well-justified public anger do not provide justification for a legislative intervention overriding a specific protection in the Bill of Rights'.

The Court did not grant the relief the Centre sought in relation to children already sentenced under the amended provisions on the grounds (ie that it was inconsistent with the proper approach to retroactivity in criminal proceedings). Instead, the Court ordered the government to identify the number of affected children sentenced under the Amending Act to afford them an opportunity to lodge appeals.

Relevance to the Victorian *Charter*

Section 23 of the Victorian *Charter* protects the rights of children in the criminal process. Section 17 more generally enshrines the rights of children to be protected by society and the State. To date these provisions have not come before the courts, however interpretations of these protected rights could be guided by jurisprudence of the South African Constitutional Court.

The decision is available at http://www.saflii.org/za/cases/ZACC/2009/18.html.

Prabha Nandagopal *(former secondee to the Human Rights Law Centre from DLA Phillips Fox).*

UK High Court of Justice holds 17 year olds should be treated as children in the criminal justice system

The Queen on the Application of HC (a child, by his litigation friend CC) v The Secretary of State for the Home Department and Others [2013] EWHC 982 (Admin) (25 April 2013)

Summary

In the United Kingdom, 17 year olds apprehended by police are treated as adults. The High Court of Justice has held that to treat 17 year olds as adults offends the UN Convention on the Rights of the Child, which informs the UK's obligations under the *European Convention on Human Rights* and the *Human Rights Act 1998* (UK). Accordingly, the UK must adapt its existing practices so that 17 year olds are treated as children. The law should promote the child's best interests and provide special protections appropriate to their age.

Facts

Under some UK laws and the police Code of Practice, 17 year olds apprehended by police are treated as adults. As a consequence, they are denied the benefit of some procedural protections that apply to children. Specifically, where a person aged 16 or less is taken into custody, the police are required to notify an appropriate adult (parent or guardian) as soon as practicable after arrest. Police may not question or take the fingerprints of a child 16 or under until the appropriate adult is present.

The applicant in this case turned 17 years old four weeks before he was arrested on suspicion of robbery. Because he was 17, he was denied permission to contact his mother (the police exercised their discretion, available only in respect of adults, to withhold the right to contact a friend or family member).

When the applicant's mother was told (possibly by relatives) some hours later, she was not allowed to speak to her child. The applicant had never been in trouble with police and ultimately was not charged. Although the police's investigative processes and failures were not central to

the Court's determination, the Court noted that if the police had checked the applicant's phone records it would have been apparent the 17 year old could not have been responsible for the robbery.

Against this background, the applicant asked the Secretary of State to exercise her legislative powers to revise the police Code of Practice so that 17 year olds would be treated as children. As children they would be entitled to have an appropriate adult present during questioning. The Secretary of State refused, on the basis that it was not necessary to treat a 17 year old as a child with special protections.

The question that came before the court was not whether the police had acted improperly when they complied with the code, but rather whether the Secretary of State could lawfully refuse to amend the code. This meant determining whether the Secretary of State is required to afford special protection for children in detention and, if so, whether 17 year olds are considered children.

Decision

Per Lord Justice Moses (Mr Justice Parker concurring) the Court held that the Secretary of State acted unlawfully in refusing to amend the Code of Practice.

Under section 6 of the *Human Rights Act* it is unlawful for public authorities (such as the Secretary of State) to act incompatibly with rights protected under the European Convention, to which the UK is a party. Lord Justice Moses reasoned that the question then was whether any rights contained in the European Convention required a 17 year old to be treated as a child and receive special protection in custody.

The European Convention does not define who is a child and who is an adult. Article 8 does, however, protect the right to privacy and family life. The Lord Justice cited a number of decisions of the European Court of Human Rights which held that article 8 includes the right to develop and maintain familial relationships in prison. Relying on earlier decisions of the High Court and the UK Supreme Court in relation to the rights of minors under the European Convention, he further concluded the right to privacy and respect for family life under the European Convention "must be interpreted in harmony with the general principles of international law".

Turning to international law, Lord Justice Moses considered the rights of children under the Convention on the Rights of the Child. The Convention on the Rights of the Child is the most well-recognised, authoritative international statement on the rights of children. Fortunately, it defines a child as a person less than 18 years of age (article 1). It goes on to set out the specific rights of children to connection with family (articles 5 and 9) and to be treated with dignity and special protection in detention (articles 39 and 40). Article 3 also provides that "the best interests of the child should be of primary consideration" in all actions by administrative or legislative bodies including the police and executive arms of government.

The UK is a party to the Convention on the Rights of the Child and, as Lord Justice Moses noted, has been criticised by the UN Committee on the Rights of the Child for distinguishing between 17 year olds and other children and failing to make domestic laws that prioritise the best interests of 17 year olds. Citing the Committee's authoritative guidance on the interpretation and application of the Convention on the Rights of the Child (General Comment No. 10), the Lord Justice concluded there is broad international consensus that 17 year olds must not be treated as adults in the criminal justice system. 17 year olds "must be treated differently from adults and sheltered by special protection designed to meet their best interest".

Accordingly, the Lord Justice held that the protection of family life under article 8 must be interpreted in accordance with the Convention on the Rights of the Child, which requires states to act in the best interests of children and preserve the right to family. The Lord Justice stated:

> Once it is acknowledged that Article 8 is engaged and that it must be interpreted in harmony with the UNCRC it follows that those who are 17 fall within the definition of children whose best interests must be a primary consideration.

The Lord Justice noted this does not mean it will always be in the child's best interests to have their parent present in custody, but it is the child's best interests that must be paramount and this is not reflected in the Code of Practice and enacting laws as they currently stand.

For these reasons the Lord Justice determined the Secretary of State had breached her obligations under the *Human Rights Act.* As the "fault lies [with the Secretary of State] in failing to distinguish between adults and 17 year-olds when detained", the Lord Justice held it was not necessary to determine whether the Commissioner of Police had acted improperly in applying, to the letter, the Code of Practice that failed to take account of the applicant's rights as a child.

Recognising the potential for abuse of rights in carrying out police roles, the Lord Justice cautioned that while it may be permissible to treat 17 year olds differently to younger children, police treatment must nevertheless prioritise the best interests of the child.

Lord Justice Moses considered briefly in obiter whether the Secretary of State's decision not to amend the Code could also offend article 6 of the European Convention (right to a fair trial) or could be seen as an 'irrational' response under domestic principles of administrative law.

Drawing on domestic jurisprudence and academic literature that emphasises the importance of protecting children in custody, the Lord Justice concluded that there is a domestic obligation to protect juveniles. 17 year olds are particularly vulnerable in the justice system and that imbalance is not cured unless special protections, such as the presence of an appropriate adult, are assured. The Lord Justice did not decide the point but intimated that as the Secretary of State had made a deliberate decision to exclude 17 year olds from the juvenile system on a number of rational grounds (although the Lord Justice dismissed those grounds as reasonable), it would not necessarily be an irrational policy response.

On the other hand the Lord Justice strongly suggested that article 6 of the European Convention was likely to have been engaged and breached based on existing case law suggesting the right to a fair trial may be compromised as soon as a person is taken into custody. The Lord Justice opined:

> "It is difficult to think of an occasion where the need to obtain advice and help from someone who is familiar and trusted is more vital than the very first occasion of detention in a police station on suspicion of an offence".

Commentary

Lord Justice Moses remarked in his opening comments that the irony in the case was that the applicant was not permitted to seek the support of his family in custody but at the same time was not considered to have capacity to bring a legal claim without support from his litigation guardian.

There is a similar irony in the way we treat young people aged 17 in the criminal justice system in Australia. In Queensland, 17 year olds are currently incarcerated in adult prisons and are treated more or less like adults in that system, contrary to Lord Justice Moses' conclusions about the international definition of a child and state obligations to protect the interests of children.

Like the UK, the UN Committee on the Rights of the Child has also criticised Australia for tolerating laws in Queensland that do not prioritise the best interests of 17 year olds in the criminal justice system (*Concluding Observations, Australia*, 20 October 2005, CRC/C/15/Add.268 [Rec.74]).

This case highlights the direct benefit of enforceable domestic protection of human rights under the UK *Human Rights Act*. It also illustrates the important role of enforceable regional human rights mechanisms to build consensus and connection between domestic and international human rights standards. Without an enforceable domestic human rights instrument at federal level, Australia is at risk of falling out of step with international expectations about the treatment of children under domestic law.

Even absent an Australian Human Rights Act, Lord Justice Moses' judgment is instructive as an advocacy tool in the Australian context. The Lord Justice cites a wealth of domestic and international opinion about the need to protect vulnerable 17 year olds in the criminal justice system, including numerous academic findings, governmental statements, judicial pronouncements and international commentary.

As the Lord Justice opined:

> "[T]this case demonstrates how vulnerable a 17 year-old may be… Many 17 year-olds do not believe they need any guidance at all. They demonstrate all the youthful arrogance of which many parents are aware. All the more need, then, for help and assistance from someone with whom they are familiar".

The best interests of 17 year old children, their connection with family, their safety, development and education should also guide Australian decisions about the placement and treatment of children in accordance with Australia's international obligations under the UN Convention on the Rights of the Child.

The full decision can be found here:

Madeleine Forster *(former secondee to the Human Rights Law Centre).*

Criminalising consensual sex between young people breaches their rights to privacy and dignity

Teddy Bear Clinic for Abused Children v Minister for Justice and Constitutional Development [2013] ZACC 35 (3 October 2013)

Summary

The Constitutional Court of South Africa has found that laws criminalising consensual sex between young people are unconstitutional. The Court held the laws unjustifiably violate the dignity and privacy of young people and are not in the best interests of the child.

Facts

Criminal Law

The criminal law in South Africa makes it a criminal offence for a young person (between 12 and 16 years) to engage in a consensual sexual act with another young person. The relevant laws are sections 15 and 16 of the *Criminal Law (Sexual Offences and Related Matters) Act*. Section 15 makes it an offence for a person to commit a consensual act of sexual penetration with a child (Statutory Rape). Section 16 makes it an offence for a person to commit a consensual act of sexual violation with a child (Statutory Sexual Violation). In both cases, if the perpetrator is also a

child, then the DPP has a discretion not to prosecute. However, if the DPP does prosecute then both persons involved in the sexual act must be prosecuted.

Sexual penetration is defined broadly to include oral sex and genital or anal penetration with any body part or object. Sexual Violation is also defined broadly and includes, but is not limited to, kissing on the mouth; touching genitals or breasts; kissing any part of a person which could cause sexual arousal or stimulation or be sexually aroused or stimulated; and masturbation of one person by another person.

A person is not guilty of an act of sexual violation if the age difference between the two people is less than two years.

Children convicted would be registered on a sex offender register, which limits their employment prospects later in life.

Human Rights Laws

The applicants argued that criminalising such conduct is inconsistent with the fundamental rights enshrined in the Constitution, being:

- Right to dignity (section 10);
- Right to privacy (section 14); and
- Best interests of the child are of paramount importance (section 28(2)).

According to section 36 of the Constitution rights may be limited, but any limitation must be reasonable and justifiable in an open and democratic society.

The applicants relied on an expert report of a child psychiatrist, which provided information on the sexual development of children and the potential impact of criminalising consensual sexual acts between young people. The report noted that the majority of adolescents between 12 and 16 engage in a variety of sexual behaviours; sexual experiences during adolescence are not only developmentally significant they are also developmentally normative. The expert report noted that criminal laws are likely to increase adolescents' risk for negative experiences and outcomes by silencing and isolating adolescents, which makes unhealthy behaviour and poor developmental outcomes more likely.

The respondents did not provide any evidence of their own, or question the evidence provided. Rather, the respondents argued that, if the court found that fundamental rights were limited, any limitations to those rights are intended to target the risks associated with particular sexual conduct.

Decision

The Court found that criminalising consensual sexual acts limited young people's rights to dignity and privacy and is not in their best interests.

Dignity

The Court appears to have accepted the expert report in totality and consequently held that it was beyond doubt that the criminalisation of consensual sex is a form of stigmatisation that is degrading and invasive. Even if such provisions are rarely enforced "their symbolic impact has a severe effect on the social lives and dignity of those targeted".

The Court rejected the contention that it is social mores rather than criminalisation that stigmatises adolescents who are prosecuted under the Act. The Court pointed to the shame and stigmatisation that clearly would result from being arrested and prosecuted in public, before family and peers. This stigma is exacerbated by the fact that the person is listed on the Register.

Privacy

The Court noted that privacy includes family life, sexual preference and home environment. As the Act in effect prohibits consensual intimate relationships it intrudes into the core of adolescents' privacy.

Best interests of the child

The Court also held that the laws were against the best interests of the child. In reaching this conclusion the Court relied heavily on the expert report which stated that criminalisation:

- undermines support structures, preventing adolescents from seeking help, and potentially driving adolescent sexual behaviour underground; and
- creates an atmosphere where adolescents cannot freely talk about sex with parents and counsellors.

In addition the Court noted that:

- the criminalisation could lead to imprisonment or diversionary programs, both of which bring adolescents into increased interaction with state institutions for engaging in developmentally normative conduct;
- even though the DPP has a discretion not to prosecute, this discretion cannot save otherwise unconstitutional provisions; and
- the harm created by the provisions is amplified by the irrationality of the mandatory prosecution of both adolescents given that the reason for the laws is to protect the more vulnerable of the two persons, generally the younger child. To prosecute the younger child as well is therefore irrational.

The Court accepted that the purpose of discouraging adolescents from prematurely engaging in consensual conduct that may harm their development and may also increase the likelihood of risks associated with sex is a legitimate and important aim. However, the respondents had failed to show that the Act could be expected to control such risks, while the applicants had shown that the criminalisation of consensual sex actually increases the likelihood of adolescents participating in unsafe sexual behaviour. Victims of non-consensual sexual acts that began as consensual acts may also be discouraged from reporting crimes for fear of being investigated and prosecuted for consensual violations.

Due to the lack of a rational or proven link between the provisions and their purpose, the provisions cannot be considered either reasonable or proportionate. The Court accepted the expert evidence that there are other measures that encourage adolescents to engage in healthy and responsible sexual practices, such as comprehensive sex education programs in schools.

Parliament was given 18 months to remedy the defects in the Act. The Court declared a moratorium on all investigations into, arrests of and criminal ancilliary proceedings against adolescents under the relevant sections of the Act. Any existing convictions should be expunged and names should be removed from the Register.

Children and rights

There is often a tension between the best interests of the child and the rights of the child. In this case, the Court outlined the way in which children's rights should generally be approached. The starting point, according to the Court, is the premise that children enjoy each fundamental right that is granted to "everyone" as individual bearers of human rights. If these rights have been limited then it falls to the Court to determine whether the limitation is justified. It is at this point that

the Court may consider whether there are legitimate reasons for limiting a child's fundamental rights due to his or her stage of development. As such, the fact that the individual is a child is not a consideration when looking at the content of the right, but rather it should only be considered when determining whether a limitation of a right is justified.

Commentary

Laws criminalising sex with young people are present in most countries around the world. They are often enacted in the belief that young people should be protected from sexual acts until a certain age and that it is in their best interests that such acts be criminalised. Interestingly, in this case, it was child rights activists and an organisation that looks after abused children that challenged the laws. They were able to utilise expert evidence to show that, far from protecting young people from having sex "too young", the laws simply served to criminalise acts that were developmentally normal, leading to stigma, greater risk-taking during sex and a lack of guidance and education regarding safe sex. In the face of such evidence it became impossible for the Minister to defend the legislation.

In Australia, the laws regarding consensual sex between children differ from state to state. In some, but not all, states, it is a defence if the age difference of the consenting parties is less than two years. However, not all states have this defence; in South Australia, people under the age of 16 cannot consent to sex at all. Unlike the South African legislation, in Australia there is very little legislative guidance as to what is a sexual act or an indecent act. It is difficult to say, therefore, whether acts such as kissing, touching or masturbating would be considered a criminal act if occurring between two young people.

The Australian Law Reform Commission undertook a review of criminal laws relating to sex and young people in 2010. However, the only recommendation was to make the age of consent uniform across states. As to what the age should be, the ALRC remained silent. No evidence was considered as to the psychological effect on young people of criminalising their behaviour.

This decision is available online at: http://www.constitutionalcourt.org.za/site/Teddy.htm

Emily Christie *(former secondee to the Human Rights Law Centre), DLA Piper.*

'IF I WERE ATTORNEY GENERAL...'

Fairness, equality and the need comprehensive anti-discrimination laws

The consolidation of Australia's anti-discrimination laws needs to be put back on the agenda, writes Australian Youth Representative to the United Nations, Laura John.

I would recognise the right of every young Australian to live free from discrimination and vilification. I would acknowledge the role of the law in building a culture of acceptance and tolerance, and invest in a comprehensive suite of reforms to strengthen the Commonwealth anti-discrimination framework.

It is clear from the thousands of young people I have engaged with this year that our generation believes in fairness and equality, and does not accept discrimination on any basis, particularly race, gender and sexual orientation. This is the generation that does not want to be defined by differences of skin colour or sexuality, but seeks to celebrate our diversity and be united in our

shared humanity. To do this, we require uniform and consistent laws across all jurisdictions that recognise our fundamental right to be free from all forms of discrimination.

The current Commonwealth anti-discrimination legislative framework consists of the *Age Discrimination Act* 2004, *Disability Discrimination Act* 1992, *Racial Discrimination Act* 1975, *Sex Discrimination Act* 1984 and the *Australian Human Rights Commission Act* 1986.

A welcome reform to this framework was the passage of the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill in June 2013, which provided new protections against discrimination on the basis of sexual orientation, gender identity and intersex status. These changes are consistent with the dreams of young Australians that I have heard throughout the year such as “an end to all racial and sexual discrimination” (Nathan, New South Wales) and “for people to accept different sexual orientations” (Sophie, Victoria).

It is also positive that the Coalition Government has backed away from proposed changes to the *Racial Discrimination Act* 1975 that would have seen the weakening of racial vilification laws through the creation of a narrow protection and broad exemption. This is particularly significant given that racism was identified in my consultations as one of the top ten issues of concern for young people.

Despite these recent developments, the current anti-discrimination framework remains unnecessarily complex and fragmented due to its incorporation within five separate Acts that protect different attributes, apply different tests for determining discrimination and cover different aspects of public life.

If I were Attorney General, I would seek to strengthen this framework by consolidating our anti-discrimination legislation.

Such a proposal is not new. It was discussed by the Senate Standing Committee on Legal and Constitutional Affairs in its 2008 report on the *Sex Discrimination Act* 1984 and was considered again in detail in February 2013 after the previous Labor Government released an exposure draft for the consolidation of Commonwealth anti-discrimination legislation in the Human Rights and Anti-Discrimination Bill 2012. The majority of the Committee supported the passage of the Bill with amendments, but the Labor Government deferred consolidation and the issue has not been actively pursued by the current Coalition Government.

Understandably, consolidation of this complex framework requires thorough investigation to ensure that fundamental rights are protected and the appropriate balance is struck between the right to be free from discrimination and the right to free speech. It was this balance that caused community concern in the initial exposure draft released by the previous Labor Government and was a prominent feature of the debate around changes to the *Racial Discrimination Act* earlier this year.

Yet mere complexity should not be a barrier to introducing reforms that will benefit all Australians, particularly young Australians who have shared with me stories of their experiences facing discrimination on the basis of their ethnicity, sexual orientation, gender or disability. For these young Australians, and for future generations, we must do better when it comes to protection against discrimination.

A consolidated anti-discrimination framework should build on the provisions in the exposure draft and respond to concerns raised by the community about the proper limits on free speech. In particular, it is desirable to create one test for discrimination that applies to all attributes and to recognise discrimination on the basis of a combination of attributes.

If I were Attorney General, I would recognise that our anti-discrimination framework must be supported by comprehensive and accessible human rights education. Many young Australians who I have spoken to this year have requested education about life skills including information about exercising their legal rights. This education should be integrated within the school curriculum and compulsory for all students.

If I were Attorney General, I would also recognise that the law plays an important role in setting the parameters of acceptable behaviour and creating a culture of acceptance. I would understand that a comprehensive anti-discrimination framework sends a strong message to the community that discrimination on any basis does an injustice to us all, particularly to young Australians who so strongly desire a society free from prejudice and bigotry.

If I were Attorney General, I would be proud to serve this passionate and committed generation of young Australians and I would strive to create with them the future that they deserve.

Laura John *is the Australian Youth Representative to the United Nations 2014.*

NOTICE BOARD

Justice Connect

Justice Connect is seeking a Manager Pro Bono Relationships to play a key role in the implementation of Justice Connect's development and engagement strategy.

Report Racism trial addresses unreported experiences of racism by Aboriginal Victorians

Australia's first ever third-party reporting mechanism for the Aboriginal community is now online. The project is a partnership between the Victorian Equal Opportunity and Human Rights Commission, Victoria Police and the Victorian Aboriginal Legal Service.

Report Racism is an online tool that enables individuals to report any incident of racism, which may include racial discrimination, racially motivated crime or racially motivated incidents by any member of the community, including police officers.

Reports can be made online at reportracism.com.au or through a reporting place, such as the Neighbourhood Justice Centre. Reports can be made by a witness, victim or a third party. Once a report is made the Victorian Equal Opportunity and Human Rights Commission will be responsible for managing the information.

The trial will be piloted in Northern Melbourne (City of Yarra, Darebin and Whittlesea) and Shepparton.

For more information, go to http://www.reportracism.com.au/

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Stephanie Puris, Emma Bathurst and **Philippa Macaskill**

Editors of this Special Bulletin
Solicitors, King & Wood Mallesons

The Human Rights Law Centre is an independent, non-profit, non-government organisation which protects and promotes human rights. It contributes to the protection of human dignity, the alleviation of disadvantage, and the attainment of equality through a strategic combination of research, advocacy, litigation and education.

The HRLC is a registered charity and has been endorsed by the Australian Taxation Office as a public benefit institution. All donations are tax deductible and gratefully received.

Human Rights Law Centre Ltd
Level 17, 461 Bourke Street
Melbourne, Vic, 3000, Australia
www.hrlc.org.au
www.twitter.com/rightsagenda
ABN: 31 117 719 267

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