DINNER ADDRESS

TO THE NATIONAL CHILDREN'S AND YOUTH LAW CENTRE

THE 1999 CHILDREN'S LAWYER OF THE YEAR AWARDS

By

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Chief Justice

Family Court of Australia

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INTRODUCTION

On a Friday night, only hours after returning from Perth where I delivered two invited speeches, you would be hard pressed to find me still in Melbourne's central business district at yet another function delivering yet another speech.

Normally I would have looked at invitation, groaned at my diary, felt guilty about reserved judgments, and asked someone in my chambers to pass on constructive suggestions about who might make a better after-dinner speaker than myself at a Snail n' Bottle dinner ceremony.

Unfortunately, it was an invitation from the National Children's and Youth Law Centre to speak at the Children's Lawyer of the Year Awards.

Unfortunately, I was much too interested to say "no". So here I am like Maxwell Smart in that legendary television show – "and loving it!".

Of course Maxwell had a new secret gadget that assured him victory over the forces of darkness within each thirty minute timeslot. In that time, there were goofy antics and lots of laughs and, of course, a happy ending by the closing credits.

LAWYERING FOR CHILDREN

Lawyering for children can be a far cry from such comedy and it irritates me how little other lawyers and the community at large understand the particular skills and knowledge that are required in providing legal services and representation to young clients.

So I congratulate the National Centre, for getting smart, very smart.

The Centre, its supporters and its sponsors were very smart to develop this series of awards. They are a very significant contribution towards putting children and young people, and most particularly their rights to quality legal representation, firmly on the professional agenda and in the community's consciousness.

I last week attended a joint conference of the Family Courts of Australia and New Zealand in Auckland and was struck by the greater emphasis and funds made available in that country for child representation. One of the speakers at the Conference was the newly appointed Chief Justice of New Zealand, Dame Sian Elias. I noted from the introductory remarks made that she had considerable experience appearing as Counsel for the Child in the New Zealand Family Court. I do not think that any Chief Justice in this country, including myself, could make that claim. The fact that people had this sort of experience seemed to be regarded in New Zealand as something of a "Badge of Honour" and was often referred to when a New Zealand speaker was introduced.

Moss J of the New Zealand Family Court, in a paper delivered to the Auckland Conference summed up the law in New Zealand as to representation for children as follows: -

> *"In New Zealand, the system of providing representation for children is mandatory where an issue in relation to children is to go to hearing, except where the Court considers such representation would serve no useful purpose. In practice such representation is the norm."*[1]

Her Honour further noted that in its 1994 report titled *Equality Before the Law*,[2] the Australian Law Reform Commission recommended that:

> *"The Family Law Act should be amended to list the factors to be considered by the Court in deciding whether to order separate representation. One of those factors should be in terms similar to section 64(1)(bb)(va), that is, whether the child has been or there is a risk that the child will be abused, ill-treated or exposed or subjected to violence or other behaviour which is psychologically harmful to the child."*[3]

This has apparently been ignored by government who have been content to criticise the Full Court's decision in Re K[4] rather taking any legislative action which the Full Court also recommended.

Unfortunately, the commitment of the Federal Government to children's rights issues, at least so far as representation in private family law matters is concerned, would seem to be of a lesser quality than is found in New Zealand. The Australian situation is unsatisfactory in both the private and public family domains, thereby making the job of advocating for the rights of children and young people even harder than it inherently is.

Some examples relevant to tonight's occasion will give you a further taste of what I mean.

WHITHER *SEEN AND HEARD*?

First, it is now about two years since the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission published the wide-ranging and comprehensive report *Seen and Heard : Priority for Children in the Legal Process*.[5] While there were a number of recommendations with which I did not agree in *Seen and Heard*, it was, if I may say so, a most thorough, accurate and meticulous report, unlike the recent discussion paper on the federal civil justice system prepared by the Commission alone.

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1 Moss, J. 'How Can Family courts Best Serve Targets of Violence - Some Legal Responses from the New Zealand Perspective' Paper presented at the Australasian Family Courts Conference, October 1999, Auckland.

2 Australian Law Reform Commission (1994) *Equality Before The Law: Justice For Women - Report No. 69 Part 1*, p. 187.

3 Ibid.

4 (1994) FLC 92-461.

5 Australian Law Reform Commission / Human Rights and Equal Opportunity Commission (1997) *Seen and Heard : Priority for Children in the Legal Process - Report No 84,* A.G.P.S., Canberra.

There has been a deafening government silence in respect of the *Seen and Heard* recommendations since the release of that report.

This approach or lack of it, contrasts starkly with the vigorous reliance on the Commission's civil justice system discussion paper we have seen lately by members of Parliament.

As you may be aware, I have been critical of the Commission's performance in respect of its civil justice discussion paper on many grounds. The only one I wish to mention tonight is my annoyance that it dodged the issue set by its primary term of reference - the operation of the adversarial system - at least in a family law context.

In a powerful paper delivered at the Australasian Family Courts Conference, Judge Jan Doogue of the Family Court of New Zealand and Ms Suzanne Blackwell, a prominent New Zealand psychologist, argued strongly that strict adversarial common law procedures are appropriate in custody, access and care and protection cases.[6] They suggested that the Courts may not have been courageous enough in adopting the significant inquisitorial statutory powers already conferred on them. Time does not permit me to develop their arguments but the question must be asked as to why the ALRC failed to go down this path.[7] It is one which, one would have thought, was a much more appropriate one for a Law Reform Commission than the path that was chosen and might have had the capacity to have achieved something for children.

Most recently, the civil justice discussion paper featured in the Federal Parliament this week during debate about government proposals that I believe will exacerbate existing problems in our jurisdictional arrangements for private and public family law in Australia – the establishment of a new and separate Federal Magistrates Court.[8]

I leave it you to speculate about the reasons for the different levels of interest manifested by government but in my view, the lack of governmental action on the *Seen and Heard* recommendations seems inexcusable.

There has been a local response to *Seen and Heard's* criticisms about the lack of standards for the representation of children that I would like to make mention tonight.

The different nature of proceedings in the Children's Court to those in the Family Court means that lawyers are obliged to respect and act in accordance with the right of children able to express wishes or give instructions. These requirements are not without their dilemmas and have been breached in the past. There has clearly been the need for guidance about thorny ethical issues and difficult practical tasks such as taking instructions.

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6 Doogue, J and Blackwell, S. 'How do We Best Serve Children in Proceedings in the Family Court?' Paper presented at the Australasian Family Courts Conference, October 1999, Auckland.

7 Australian Law Reform Commission (1999) *Review of the Federal Civil Justice System - Discussion Paper 62*, A.G.P.S., Canberra. The Court's response to the ALRC's discussion paper can be viewed at http://www.familycourt.gov.au/court/html/alrc.html

8 The Federal Magistrates Bill is currently before the Commonwealth Parliament. The Court's submission to the Senate Legal and Constitutional Legislation Committee in respect of the Bill can be viewed at http://www.familycourt.gov.au/html/magistrates.html

In the Victorian context, that gap has been filled by the publication of *Guidelines for Lawyers Acting for Children and Young People in the Children's Court* which have been endorsed by the Senior Magistrate of the Children's Court, Ms. Jennifer Coate.[9] I commend the guidelines to you and am very pleased that standards in this area will also be announced during November by the Law Society of NSW.

RESOURCING SPECIALIST ADVOCACY

A tangible measure of the extent of government concern for children and young people's rights is the extent to which resources are devoted to specialist lawyer positions. Looking to Community Legal Centres, one can only draw an adverse conclusion about such commitment.

The funding of a mere two legal positions at the National Children's and Youth Law Centre in Sydney, is plainly inadequate for a national centre with a mandate to provide systemic advocacy. I have watched its progress over the years with a keen interest and admiration for the work of the staff and board members. The sailing has not been smooth not the least because so much energy has had to be devoted to the task of simply securing the funding which is necessary to keep the Centre afloat.

It is about time that government's concern about efficiency and effectiveness translated into security of funding so that energy did not have to be diverted from the true business of the Centre - working with and for young people's access to justice.

THE NEED FOR A UNIFIED SYSTEM

My third point is based on a fact that is nothing new to an audience such as this: a feature of Australian legislative history has been an almost absolute inability to act co-operatively to address common issues thereby creating dangerous access to justice barriers for children and young people, and corresponding difficulties and aggravations for their lawyers.

One of the most obvious areas is the area of child protection and family law in so far as it relates to children.

We have the Family Court of Australia, the Family Court of Western Australia, and courts of summary jurisdiction all exercising jurisdiction under the *Family Law Act* 1975. In addition, we have eight State and Territory children's courts with eight different child protection and young offender laws within eight different systems.[10]

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9 Akenson, L. (1999) *Guidelines for Lawyers Acting for Children and Young People in the Children's Court*, Victoria Law Foundation, Melbourne.

10 See further Nicholson, A. 'Court Management of Cases Involving Child Abuse Allegations' Keynote Address presented to the 7th Australasian Conference of Child Abuse and Neglect, October, 1999, Perth. The paper can be viewed at http://www.familycourt.gov.au.

Unfortunately, there are no indications that Australian governments can see the benefit to children and young people of greater coherence. Worse still for the future, the Federal Government now intends to set up yet another Court, the Federal Magistrates Court to also exercise much of the jurisdiction of the Family Court of Australia. This will initially supply some 16 magistrates exercising family law jurisdiction with a start up cost exceeding $27M over four years.

In opposing this proposal, I pointed out to the Attorney General that given the same sum the Family Court of Australia could not only supply 21 magistrates in the form of its existing Senior Registrars but also fund an additional 14 positions. The result would have been 35 magistrates instead of sixteen for the same cost. It does not need to be said that this would enable the provision of a better and more comprehensive service to all Australians including those in rural and remote areas.

The Federal Government's approach flies in the face of developments in the rest of the world so far as family law is concerned. There is a strong move in the US, supported by the American Bar Association in the direction of what are there described as unified family courts, exercising all types of family jurisdiction, including criminal jurisdiction. New Zealand and Canada are moving in the same direction while here in Australia we are moving to further fragment the system.

My colleague, Justice Linda Dessau has described the concept of advantages of a unified family court system eloquently:

> *"it is clear that if one were blessed with the luxury of starting with a blank canvas, the only sensible way to ensure the most streamlined and best outcome for children, would be to design one single unified family court. To avoid duplication and fragmentation, that is the optimal design.*
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> *It should be a national court with the integrated services presently existing in the FCA. It should incorporate all care and protection matters, adoption and civil and criminal cases where children are victims. But a unified family court must also include juvenile crime. Otherwise, those children charged with offences would be dealt with as the junior part of an adult criminal justice system. To follow that course would be to marginalise those children, who in reality are mostly indistinguishable from the children who are in need of care and protection or suffering family breakdown, family violence or other family problems."*[11]

I do not hold out much hope of Federal Government interest in the unified approach but I would take the opportunity to publicly acknowledge the support that has been given by the Senior Magistrate of the Children's Court of Victoria to both legal and practical ways of improving the way both the Children's Court and the Family Court deal with cases that

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[11] Dessau, L. 'Children and Family Violence Laws in Australia' Paper presented to the conference In the Mainstream: Contemporary Perspectives on Family Violence, September 1999, Belfast.

traverse both jurisdictions. That quality and amount of co-operation would bode well for Victoria as a jurisdiction in which to trial a unified family law system structure and I can say that the Family Court would be most happy to be involved in discussions on that subject if, in due course, it were invited to do so.

CONCLUSION

Given all the difficulties and stresses which face lawyers who advocate for children in both courts and policy fora, it heartening to see the quality of the people who do such work and most pleasing to be associated with the recognition of it through these awards.

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