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As Chief Justice of the Family Court of Australia I have a particular interest in systems which should protect children and adolescents from abuse and neglect. As it does for many of you, my work brings me into constant contact with the dark side of family life – particularly the power imbalances which result in those who are the most vulnerable in society being selected out as innocent victims. Children are often intimidated, hurt, demeaned - and sometimes killed – because they have the misfortune to be members of a family in which violence is a way of life. Research and our own professional experience tell us that frequently these perpetrators were themselves abused as children, and the dangerous cycle therefore continues.

Of course, inter spousal violence is also an all too common thread running through the histories of many of our clients. Separation often precipitates or exacerbates such behaviour; indeed 'separation abuse' is an all too common consequence of relationship breakdown. Children also suffer when they see a parent being abused, and this is increasingly being recognised as a legitimate form of family violence. For example, the Family Law Act now directs the court to consider *the need to protect a child from physical or psychological harm caused by being directly or indirectly exposed to abuse, ill treatment, violence or other behaviour that is directed towards, or may affect, another person.*

Many of the parenting disputes which come before Family Court counsellors, mediators and judges involve serious allegations of child abuse. Although the Court is not required to substantiate such allegations, it must consider whether or not there is an unacceptable risk to a child when it hears applications for residence or contact.

Institutional and systems abuse also threaten many children's rights – and have done so for far too long. We hear about this more now than we did several decades ago. Fortunately many advocates for children, (as well as adults who were abused themselves), have spoken out courageously in order to bring such abuses of power to the attention of the authorities and to prevent their recurrence. Church officials of various denominations, as well as State child protection systems, appear to be the major culprits, both in Australia and in other countries.

Obviously, children have been badly let down by organisations and systems which the public has a right to expect would serve, (rather than compromise), their interests.

And through a wider lens, we are aware of the many ways in which children – in so- called intact as well as separated families – are substantially disadvantaged, even where not actually abused. The poor educational and health outcomes for

many of Australia's children in the twenty first century frequently affect the remainder of their lives and lead to their marginalisation. As with the cycle of violence to which I referred earlier, these are children whose parents may have themselves been deprived of essential services in their own childhoods.

Although we hear much about grey power and our low birthrate, 28% of Australia's population – or nearly 5 million citizens - are aged under 18. Being an affluent industrialised country, many of our children and young people are leading safe, happy and productive lives. But in a country where resources and opportunities are unevenly distributed, and where the gap between rich and poor seems to be widening, many children are facing a variety of disadvantages.

It has been said that 7 out of 10 young Australians will have experienced poverty, physical and/or sexual abuse, homelessness or mental illness before they reach 18[1]. Our youth suicide rate is amongst the highest in the world, and has doubled in the last two decades. If such figures are accurate – or even nearly accurate – this is a terrible indictment of us as a society.

Leaving aside refugee children living in detention centres, indigenous children are probably the most vulnerable of all. Their life expectancy is 20 years less than those of non indigenous backgrounds, they experience disadvantage in relation to

access to education, health services and apprehension by police and incarceration. Their current social circumstances aggravate the on-going legacies of past child removal policies and practices.

Many debates and inquiries have identified and documented the problems facing our youth, and have focussed on the important topic of children's rights – at least from a theoretical perspective!! The irony in much of this is that the rhetoric does not match the reality and these inquiries and debates do not translate into action. This is sometimes because of philosophical - and fiscal – attitudes by governments of all persuasions, who try to sheet home responsibility for the needs and deeds of their children to their families. It would be surely more realistic to adopt a more holistic view and take account of the social and economic forces which put so much pressure on families.

There are a number of ways in which societies/communities/governments can minimise dangers to children and ensure a more equitable provision of essential services to them. Speaking from a legal perspective, I would prefer to have one law relating to child protection across the country rather than the jigsaw of State, Territory and Commonwealth laws that we currently have. This plethora of inconsistent legislation does not serve children well. It allows those who are the

[1] Coalition for Australian Children, Briefing Kit, March 1998.

most vulnerable to slip between systems, provides opportunities for disputes to be litigated in two Courts simultaneously, and thereby allows for systems abuse.

The unfortunate division of legislative responsibility for children is caused by our Federal system of government, and the problems are difficult to recify. But this in itself is no reason to allow the problem to continue.

But I am not naïve enough to suggest that laws in themselves – whether at State/Territory or Commonwealth level - will necessarily improve children's welfare. In fact, they can unfortunately do the reverse. Possibly the most potent example of this is mandatory sentencing legislation. This operates still in Western Australia, and was only repealed in the Northern Territory last October.

Its effects have been shown to be unnecessarily harsh on many young people, and magistrates have expressed considerable concern that the sentences they are required to impose may bear so little relationship to the offences committed. Mandatory sentencing legislation provides a particularly potent example of how law makers can get it wrong, with possibly serious consequences for the young people affected by it.

A broader way of dealing with disadvantage and discrimination – albeit one which finds little favour with governments – is to use a relevant international convention, such as the United Nations Convention on the Rights of the Child (referred to as UNCROC) - as a means of measuring actions against words. Even those who are suspicious about such instruments, or cynical about their ability to do anything practical, should be aware that they can be a useful weapon against inactivity or poor practices; a series of benchmarks in effect.

Australia played a major role in the drafting of UNCROC. It was subsequently one of the first countries to ratify it in December 1990, and it came into force in this country more than a decade ago; in January 1991. However, as with other international conventions to which Australia is a party, it is not in force as a result of changes made to our domestic law. The general approach taken in this country to human rights and other conventions is to ensure (and make assurances) that domestic legislation, policies and practice comply with the Convention prior to ratification and subsequently. In the case of UNCROC compliance was not assessed before ratification, although ratification brings with it clear responsibilities and obligations. Article 4 specifically provides that parties to the convention must

Undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in this Convention.

The Convention is the most widely accepted international instrument ever. Its principles can be grouped into four main categories – the **participation** of children in decisions affecting their futures, the **protection** of children against discrimination and all forms of neglect and exploitation, the **prevention** of harm to children and the **provision** of assistance for basic needs.

It recognises that children have rights, eg to be heard, to freedom of expression, thought, conscience and religion, to protection from physical or mental harm and neglect, including sexual abuse or exploitation, and to an education. Inherent in this and acting as a catalyst to the Convention itself is a recognition that children and adolescents are also uniquely vulnerable and require independent mechanisms to protect and promote their rights. Ratification brings with it obligations to promote the rights of all children, particularly those who in some way or other are disadvantaged.

The Convention takes account of the wide range of resources of the many countries which have ratified it. Whilst principles such as protection from harm and anti-discrimination are absolute, in areas requiring service delivery the feasibility of all

countries attaining high standards is recognised. For example, article 24 says that children have a right to the *highest possible* standard of health.

Australia obviously has considerably more means at its disposal to provide health care to its children than would most African or Asian countries. One would have to conclude that a first world country such as ours would – and would be expected to - attain the highest possible standards. Unfortunately the evidence suggests that we do not doing so, in a number of areas. The 1995 official report to the United Nations spoke in very positive terms of Australia's level of compliance, at State, Territory and Commonwealth levels. Non government agencies have provided well documented reports which strongly contradicted this view.

Indeed, community groups, human rights organisations, law reform bodies and professional bodies have with energetic persistency drawn attention to the areas in which Australia at State, Territory and Federal levels fails to comply with various articles of the Convention.

One area of ongoing concern has been the lack of a national mechanism to coordinate existing policies and programs, and of a mechanism to implement CROC at all levels of government. The UN Committee on the Rights of the Child

recommended in relation to Australia the establishment of independent officers for children such as a children's ombudsman, commission or commissioner.

The UN Committee also noted that Australia did not have a comprehensive policy for children at the Federal level, there were disparities between the legislation and practices of the different States and there was little knowledge in Australia about the Convention and its general principles. In relation to the latter it referred specifically to non discrimination and respect for the views of the child.

Returning now to the issue of a children's commission, there are several models in operation both here and overseas – for example, in New South Wales, Queensland, New Zealand and Norway to name a few.

I would like to elaborate today on what I see as the benefits Victorian children and young people would gain today if this State were to decide to establish such an office. I am aware that Berry Street Victoria sees much merit in such an approach, and I spoke previously in support of it in mid 2001 when Yacvic launched its discussion paper on the topic. I have also previously urged the Federal government to do likewise, but so far to no avail. Were they to do so this would not cut across any State initiatives, but would rather, in my view, give each commission

additional clout and a provide a higher profile to young people's issues across the country.

I see a Children's Commission in Victoria as doing much in the way of providing a voice for our children. It would of necessity be an independent office with its own permanent statutory powers, it should be accountable to Parliament rather than to the government of the day, be adequately resourced and accessible to its young constituents. Its senior officer and public face would need to be a Commissioner with a high profile, as she or he would be called upon to undertake a number of proactive and highly visible tasks. Further, he or she should have the same independence of the Executive as does a judge. I consider that this independence is necessary because it does not always suit government policy to be child focused. With the best will in the world, the responsible Minister may not be in a position to direct public attention to a particular problem because of the principle of cabinet solidarity. Similar considerations apply in respect of a Children's Commissioner who holds a Public Service type appointment.

With UNCROC as its frame of reference, the commission would have a wide range of powers and responsibilities which would include, but not necessarily be restricted to: -

- ❖ reviewing proposed and existing laws, practices and policies which relate to children and young people;

Such an audit would be an essential first step in identifying what we have that is beneficial, damaging, contradictory or unnecessary. Laws, practices and policies have a history of appearing incrementally rather than in any comprehensive or cohesive manner. They are frequently grafted on to their predecessors without any understanding of their overall effects.

- ❖ recommending laws which would ensure and protect the rights of children and young people;

This would be an important role and would allow some thought to be given to consistency with other States' legal systems where this would be beneficial. Alternatively, Victoria may well set a precedent for other States to emulate.

- ❖ conducting inquiries where necessary;

Every few years serious allegations are raised about Departmental practices in relation to areas such as child protection. A specialised independent commission would be able to provide fearless advice, and conduct a comprehensive inquiry.

- promoting public education programs
- performing an advocacy role
- intervening in cases which involve children and young people at a systemic level.
- Developing mechanisms for consultation and the promotion of ongoing communication with children and young people.

Such a commission would give our society a champion to speak out for our children and young people. It could refer children, young people and their families to existing complains mechanisms, and assume the role of support and chaperone where this was needed. By monitoring rather than dealing with complaints, the commissioner would help improve the accessibility and responsiveness of those systems. The comprehensive knowledge thereby acquired would create a unique repository about our children (whether at State or Federal level). It would in turn inform the commissioner's advocacy strategies and priorities and could prompt a formal inquiry to investigate the best way of dealing with a complaint which was common to a number of children and young people.