Law Reform and Children's Rights

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I wasn't born a Commissioner for Equal Opportunity. I spent my formative years as a child, and my re-educative years as a lawyer, a teacher of law, and a law reformer.

As a child I swore that I would never be as insensitive to children's needs and desires as adults were being to mine. As I became an adult I realised the seductive truth that it is much more reasonable, and pleasurable it was, to assert my assessment of children's best interests over their own.

As a lawyer I often acted for children accused of criminal acts; for parents and on the instructions of children in Family Law disputes about custody, guardianship or access; defending children or their parents against State welfare interventions; and for children who had been harmed by the criminal or negligent acts of others. I again had the opportunity of putting my views about their best interests from the point of view of a powerful adult with a professional advantage, as well.

But as a law reformer I played a significant part in recommending new law about the giving of children's evidence, their participation in decisions about their own health care, and child sexual assault. I found my assumptions and experiences did not coalesce into a coherent whole. This experience forced me to try to come to terms with my values and how I viewed children's human rights.

I suppose that I have had a very thorough experience of the strongly opposed views about the rights of children in Australia. I have concluded that we are very poorly placed to make decisions about how the law should regulate the duties and responsibilities of adults to children and

children to society, when we have such different concepts of childhood and children's status, depending on how young the child is.

Until very recently books about "children's law" were books about parents' rights. Parent's legal claims to control their children were developed by common law principles originally meant to protect social stability by protecting the land to which children had claims, and later by ensuring that children were adequately maintained by someone other than "the Parish". It's been quite recently that the "welfare principle" has come to underlie legal rules about the State's supervision of parents' child care responsibilities.

The common law recognises the fundamental autonomy of the individual. This principle may conflict with decision-making and legal rules based on "welfare" considerations. Children already have legal rights to look after their own welfare based on their incremental development of maturity. Their social and legal incapacity is fluctuating. Adult power over children gradually diminishes over time.

My basic approach to legal rules about children is that they should be based on children's participating, to the extent that they can, in the decisions that most affect them most intimately. I don't recommend or envisage children as miniature adults. They do have the full range of civil and human rights, but a more acute vulnerability to their abuse or loss because of their lack of social experience and security. Merely providing legal rights and traditional enforcement and dispute-resolution processes, as we do for adult citizens, isn't appropriate for children. They do not take into account the on-going relationship needs of children, and their lack of access to formal systems.

Our legal and social structure is based on the idea of individual autonomy. Human beings who live in association with one another need "space". The obvious boundary is your own body. As we develop the boundaries of our consciousness we also claim the property we use as "ours".

Children have no space of their own. We control their bodies and their property, give or withhold the essentials of life at our discretion; and we do so with the authority of law.

We have made legal rules about the rights and responsibilities of children. Because they can't defend their own boundaries we have given others rights and responsibilities to do so, or to respect the boundaries we have set.

Recognising children's rights is sometimes resisted because it mistakenly seen as undermining parents' rights or authority. The Law has always recognised that children gradually acquire the basic common law rights of self-determination. Ages were set only for pragmatic reasons - 21 was the age at which a knight's son could physically withstand the wearing of a full set of armour; a burgess's son could become

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"of full age" as soon as he could "count pence and measure cloth" – a practical test.

Parents have never had an **absolute** right to make all decisions for their children. Parents have a special responsibility and, because of the trust vested in them by their own children, and their considerable control, the Community also has an interest in how they exercise those powers.

Parents and children don't, therefore, have conflicting rights. Parents have actual power over their children, which they must exercise for the benefit of the child. But there is a shifting balance of power and gradual loss of influence – from the right of parental control, to the offering of advice. Parent/child relationships are kinetic. Children's dependency is not permanent or static. They grow up, learning by their mistakes as much as example how to accept responsibility, gradually acquire other resources than the parents, and leave.

We have to talk about children's rights in terms of the **balance** of rights and responsibilities among guardians, children and the State – that is, your and my representatives of community interests – and in terms of the equality of opportunity of every human being.

Over the last 150 years the simple concepts in the laws developed about children, which were meant to preserve social order, have been overlaid with moral and quasi-religious concepts of child, parental and family rights and with quasi-scientific tenets of good child-care or welfare practices – which keep changing – and "objective" tests of good parenting practice and children's best interests.

This has confused our thinking about children. We have very different views at different stages of children's social and emotional development.

We think that small children need love, play, care and protection – but we're not quite as gentle with **older** children, such as difficult teenagers at home or on the streets. We expect them to decide on their future careers by the time they are fourteen or fifteen (whatever happened to fun?) and to get work, even when the unemployment rate is around 30% for the under twenty-five – or at least not look unemployed.

We are tolerant of **small** children's need to learn by their mistakes, but not in teenagers. We tolerate the social failings of young children because we know they'll grow out of it. We are not so accepting of the failings of older children who we treat as offenders against the criminal law but who also, statistically, "grow out of it".

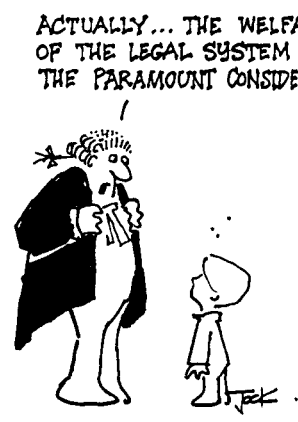
In August this year a radio show host in Western Australia called for a public meeting about "juvenile crime" outside the Western Australian parliament. The "crime wave" is, I might add, no greater in Western Australia than the rest of the country, though that State has almost, if not the, highest rate of incarceration of offending children in Australia. Twenty-five thousand people turned up, demanding not only five year prison terms for repeat car thieves, but the return of flogging and the death penalty: they hung the Judge of the Children's Court in effigy. Those twisted faces were "ordinary" men and women I'd seen on the beach in Cottesloe. They were, almost literally, a lynch mob who simply hated "juveniles".

Yet most of these "hard-core" offenders they wanted flogged were aged between thirteen and fifteen, unemployed, under-educated, and far too many of them, Aboriginal. That mob shares our communal responsibility for the tragedy that hangs over some Aboriginal youth. The cause is firmly found in our own inconsistent approach to childhood, and especially evident in the history of our treatment of Aboriginal children.

State **welfare** authorities "rounded up" Aboriginal children and placed them in white foster care of institutions to, as they saw it, protect them from neglect and abuse and give them a better chance in life by their assimilation and loss of their cultural identity. As they reached the age of criminal responsibility, ten years old, the **criminal** law was used to control and detain the same children and young people, for their committing offences precipitated by alienation, anger and poverty that an alien society had created.

We make other distinctions among children which are ethically and logically unjustifiable. We commit money for the relief of starvation in Ethiopia, Eritrea, Iran, but we tolerate the Commonwealth and States' allocation of resources which leaves Australian children at a life-long disadvantage. For Aboriginal children, of course, that's a rather shorter lifetime.

We apply double standards to children. Recently the Victorian government enacted changes to the juvenile justice system that allow children to be imprisoned for certain kinds of crimes. If we are to replace the welfare model with justice-model juvenile criminal systems, we have to provide proper legal advice and representation for those children. We have to provide it in a way that recognises that they don't have the resources and skills to seek it out for themselves.



It is a basic principle of justice that people charged with criminal offences understand their obligations and rights. Children most certainly are not. We either provide nothing or we grossly underfund existing generic services which might deal with them. We don't even train legal advocates in the skills needed to advise and represent children, how to separate their values and judgments from the child's instructions. We do not in practice respect the rights of children to "due process".

We expect people to stand up for their own rights. Children can't. They do not have the means to protect themselves, whether they are very young or adolescent children – perhaps especially the latter, because they give the occasional appearance of competence. They are restricted in the extent they can make decisions about their own futures. It seems to me that the course of secondary education has become so formal and constrained and charted that there's no fun in it any more.

We do not even accept children's right to bodily integrity. The indemnity given to a caregiver who hits a child as "discipline" is, or ought to be, thoroughly outdated. It is an assault, not a "smack". We know that the experience of violence teaches children how to use violence; it gives them the experience of pain, rage, humiliation and, often, a deep sense of injustice. Any society which tolerates violence to children cannot be heard to recognise their rights.

The law regulates relationships between dependents because of the risk of exploitation inherent in them. We have not yet found a proper way to prevent further error or abuse in State intervention, and I believe it is because we do not mandate children's participation in the decisions that affect them most.

For example, in a variety of "welfare" interventions, such as in Cleveland in 1987 and most recently the South Ronaldsey ritual abuse claims in March 1991, children who were honestly, but perhaps not reasonably, believed to be to be at risk of sexual abuse were removed without notice from their homes. In the Orkneys they were whisked off in a dawn helicopter raid in circumstances of great trauma, without consultation with the children themselves (some of whom were old enough to be required, by Law, to be involved). Their removal and interrogation and placement in foster homes has done as much or more damage than the actual or alleged abuse. The adults either refused to listen to what the children themselves said or failed to ask them at all.

Refusal to take children seriously appears to be to be an Australian blight. We need to return to first principles, to acknowledging the right of children – the same right of all humans – to be treated with respect. The preamble to the Convention on the Rights of the Child expressly recognises "the inherent dignity and...the equal and inalienable rights of all members of the human family".

Any new legislation about children should focus on the child's rights and not on other people's rights over them. We need a framework for understanding our ambivalence to children. I need this framework, both to come to terms with the child in me, and to make sense of the rights and protections anti-discrimination law and processes try to give to people who are peculiarly powerless to enforce their "rights" and use those very processes.

Fundamentally, we should look carefully and quizzically at any new laws affecting children, our sentimental attachment to the idea and ideal of "childhood", and the quality of Australian social structures and economic systems in the light of what is, or is not, a tolerable way of life for any human being.♦