
CHILDREN'S RIGHTS
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This is an interesting title to the Conference, 'Children, Young People and Communities – The Future is in Our Hands'. Very true, but let us take a look at the title of the Act that created the Office of the Commissioner for Children in Tasmania, the *Children, Young Persons and their Families Act 1997*. In this paper I will focus on the rights of the child and where that leaves their Families now and the role of the community and the State in the context of the new Act.

Let me first give you a short introduction to the Tasmanian Act, which I believe leads Australia, at least in the area of the rights of children to legal representation. This is not simply my view. Lawyers around Australia read the 1998 Australian Law Reform Commission Publication 'Seen and Heard' on the question of the legal representation of children and we noted that the right to legal representation given to all Tasmanian children under the Act, was the most comprehensive in Australia. It is my belief also that the Tasmanian Act more faithfully represents the Convention on the Rights of the Child, with respect to separate legal representation, than any other preceding State welfare legislation in Australia.

When the Convention was ratified on the 17th day of December 1990 by Australia, it was a Convention, which many children's rights activists believed had no context. Especially in a federal system like Australia where we have left it to the States to enact legislation to protect and promote the rights of children. We had federal legislation that quickly fell into line with the Convention, as that was what was expected after, the signature, adoption, and ratification of the Convention. However, Australian States progressed more slowly to adopt the provisions of the Convention into their legislation and their processes.

Many activists concerned with the rights of children in Tasmania started lobbying and working towards the Act that finally arrived on the steps of Parliament in the mid nineties. A Joint Select Committee was formed in 1996, to look at how Tasmania could move away from the child rescue model and move towards legislation that could focus more on the rights of the child. This Committee was convened to inquire into and examine what was needed for the children of Tasmania. It held meetings all round Tasmania and even went interstate to look at what another State was doing. There were numerous submissions from community organisations and individuals, and this was canvassed, so that their concerns and aspirations for children could be properly expressed.

The Act was passed in 1997 by one political party and proclaimed to take effect by another in July 2000. This Act is an excellent example of bipartisan

support, and politicians all over the world could well take note of the approach taken in Tasmania. Political parties and the community here were united in the belief that children's rights should be clearly enunciated and any unmet needs addressed by legislation.

This is the best approach.

This Office has continued this involvement with the community by the setting up of Advisory Councils of Adults and Consultative Councils of Children, as well as the delivery of monthly reports around the State. This process, will ensure that the Office continues to reflect community concerns.

On the 12th March 2001, the Preparatory Committee for the Special Session of the United Nations General Assembly on Children, set for September 2001, stated that the needs and rights of children must always come first. This is a principle that we as a community must be committed to, if we are going to be able to discharge the expectations inherent in that principle. The title of this conference states 'the future is in our hands'. This must mean we are in a position to make an impact on the future of our children and this would also mean that we are in a position to put them first, if we choose to do so. As the Preparatory Committee of the United Nations Special Session stated, investing in children is not about charity, but about laying the foundation for a strong economy, a just society and a world free of poverty.

In July 2000 Tasmania proclaimed its *Children, Young Persons and their Families Act 1997* and this heralded the creation of the Office of the Commissioner for Children. The Office is a remarkable one, as the Parliament of Tasmania delivered a pioneering and rights based model to the community. The Commissioner's role is to protect the rights of children and young people in the areas of health, welfare, care, protection and development. Additionally, if children are under the custody or guardianship of the Secretary of the Department of Health and Human Services, then the Tasmanian Commissioner can look at any matter connected with their education as well.

In pursuance of such powers, the Commissioner can look at the policy and practice of any government agency or person. These are very wide powers indeed, and exactly how the architects of the Act and the Parliamentary Joint Select Committee envisaged the powers of the Office should be. The recommendations made by this bipartisan Parliamentary Joint Select Committee, have by and large been incorporated into the Act. The Committee wanted a proactive Commissioner that would be able to look at systems and deal with them before they developed into issues of concern. This is the vision that they proposed for this Office, and that is how the Office is developing, since it came into being in July 2000.

May I quote the Preparatory Committee of the United Nations Special Session again that has called for the establishment of national mechanisms, such as

independent ombudspersons for children, that will hold us accountable for our obligations to children. We still do not have a national watchdog to watch over children's rights in accordance with our international obligations Australia. However, Tasmania is ahead of the federal government in the establishment of its own Commissioner for Children. I have had inquiries from almost all States in Australia about the Tasmanian model, so I invite the federal government to take a look at our model, as a good one to follow and build on.

Let me now take you to the actual provisions of the Act and the Convention of the Rights of the Child, with respect to the rights of children to legal representation.

Article 12 on the Convention on the Rights of the Child states that we should assure to the child capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

For this purpose then, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Section 59 of the *Children and Young Persons and their Families Act 1997* states that the court must not proceed to hear an application under this Act unless the child is represented by a legal practitioner. The exception to this rule is if the court is satisfied that the child has made an informed and independent decision not to be so represented.

This gives all children a right to their own voice in court. They can give their instructions by way of communicating their wishes to their separate legal representative, who can communicate them to the court. Children no longer have to rely on their parents or the state to transmit their views to the court.

There is also a provision for the child to directly express a view to the court under Section 56 unless the court is satisfied that the child is not capable of doing so. Under the Tasmanian Act, the child has direct access to the court and they can do this in their own right. This former right has been established in the Federal Family Court jurisdiction for some time, but it is new in State jurisdictions. However, the latter right goes beyond even the Family Court. Tasmania has made a great start and the position adopted by the Act is one that is worthy of respect and emulation in the rest of Australia.

What makes the Act in Tasmania so exceptional, is that the rights given are of a proactive nature. Magistrates in the Children's Divisions of the Magistrates Courts in Tasmania are now making orders for the separate legal

representation of children if they do not have a lawyer. These are early days, and it will take time for every part of the system to accept, adopt and fund this proactive approach to children. Fortunately, Tasmania has a mechanism in the Office of the Commissioner for Children to monitor how all this will work and provide advice to the Minister on its progress.

Our new Act allows us to move away from the old child rescue model towards a rights based model of child protection. What the Act requires us to do here is to consider the rights of the child first, when a child is at risk or has suffered abuse neglect or some other harm. What is that right under the Act? It is the right to be in a safe and stable environment to develop a child's full potential. The Act affirms the child's right to be in the child's own home. This means the right to be safe and cared for by the child's parents, not the State via an institution or other adults or substitute parents.

To give effect to this right, the Joint Select Committee and Act envisaged the removal of the source of the danger to the child from the child's home. The Act makes this removal possible by the use of restraint orders and will be especially useful in cases where there are concerns about physical or sexual assault. Such orders could enable children to remain in their own home and not be rescued, from their family.

There is however, one overriding consideration for the court in every case. That is to assess and thereafter act in the best interests of the child. This means that sometimes, remaining at home may not be in the best interest of the child, despite everyone's best efforts. In such cases, the Act states that the Secretary of the Department of Health and Human Services may accept the responsibilities of the parent.

This is when parents become vulnerable and wonder what happened to their rights. For a long time in the past, given the Common Law's origins in the Roman Law and the concept of "paterfamilias", parents had rights over children. Under Roman Law, a father, had what was more or less the right of ownership over his children. Under the Common Law married women, children and lunatics were a class of persons who were considered to have no rights. When man died in the late nineteenth century in England, he could choose a guardian for his children that was not their mother. He could in effect dispose of his children's interest in that manner.

All this changed in the twentieth century, but attitudes take longer to change than the law sometimes. Parents accustomed to thinking they had rights over their children and can parent as they wish, have for some time become aware that things have changed when they seek redress in the Family Court. The law no longer seeks to ascertain what a parent's rights are over children. The first duty of the court is to look at what the best interests of the child are in any particular situation, even if it is in the context of for instance parents "rights"

with respect to guardianship issues. It is the right of the children to have both parents as part of their life, and the courts ensure children these rights, if it is in their best interest. The wishes of the child can be taken into account whatever the child's age may be.

This is similar to the position of parents are under the Tasmanian *Children, Young Persons, and their Families Act*. This is not bad news for parents, as the title of the Act recognises the inextricable involvement of families with children and young people. Families means adults and children, and those adults are parents who are able to provide a safe and stable home where the child can develop his or her full potential. Section 8 of the Act states that the primary responsibility for a child's care and protection lies with the child's family.

What can parents expect from this new Act and where do they now stand with the rights of the child given the recognition it finally deserves? In the English House of Lords case of Gillick in the mid eighties, the court moved away from the view that parents had rights over their children as such. Gillick's case stated that parents had legitimate interests over their child. The preferred view from then on, was that parents had duties, responsibilities and obligations towards their children.

This principle is embodied in the Act now in sections 5 and 6 which state that guardians have the same rights, powers, duties, obligations and liabilities as natural parents have. Those who have custody of a child have the same responsibilities of natural parents for the decisions and the daily care and control of the child.

The rights envisaged in section 5 of the Act, are guardianship rights as well the parent's right of legal administration of the child's estate. The latter is a limited right over a child's estate and both are not like the rights that parents had over children lives in the past.

The Act does not disregard the rights of parents. Even if parents have lost their rights of guardianship over their children to the Secretary of the Department of Health and Human Services, parents have a right to have their views heard in Family Group Conferences. If they are from an Aboriginal background or have particular cultural or other concerns these will be taken account in decisions that affect the child. Parents are also entitled to their own legal representation and information on their child. Parents do have these rights and we must do everything we can to promote those rights. Parents and children's rights together can be a factor that could hold the State accountable for children in their care.

Parents also have the right to expect that they will be supported so that they will be able to care for their children properly in their homes. The right that a

child has to living in their own home, must mean that their parents are given every help and assistance to make that possible.

Section 8 of the Act states that a high priority is to be given to supporting and assisting the family to carry out that primary responsibility.

This is the right of the child too. How many children want to be removed from their home and their parents? How many children or young people who appear to be homeless and on the streets prefer that cold dangerous life to the warmth and comfort of a good home and supportive parents? How many of these young people have difficulties that are similar to those that have even defeated their parents?

How well can you parent when you as an adult possibly suffer from ill health, addiction, trauma, poverty, unemployment or homelessness? There does not have to be abuse in homes for stress levels to become unmanageable when, for example, parents are unable to pay mortgages or make ends meet. When events such as these impact on parents who have children, who else suffers? The problems that children have and the problems that are faced by their parents are often those that are created by our changing environment. Pitting children's rights against parents in such a climate is a futile exercise and the expression of desperation and despair.

The Preparatory Committee of the United Nations Special Session this month had something to say about the difficulties many families now face. It confirms the notion that social and economic pressures are undermining the crucial role of parents and families in ensuring that children grow up in a safe, stable and nurturing environment. If parents themselves are not living in a safe and stable environment, how does that impact on their parenting and their children? Parenting is becoming an increasingly difficult task with all the pressures placed on families now. Can we ensure stability and safety for our children in isolation? May I suggest that we look at this whole issue in the spirit of the Tasmanian Act.

The Act places a responsibility on the state for the furtherance of the objects of the Act by the provision or assistance in the provision of preventative and support services directed towards strengthening and supporting families and reducing the incidence of child abuse and neglect. This is a right and, may I suggest an expectation of a right, that parents can legitimately have for support of their role as the carers of Children. It is an expectation that is underpinned by Australia's international obligations under World Summit for Children in 1990, the Declaration on the Survival, Protection and Development of Children in 1991 and Australia's National Programme of Action, Our Children, Our Future developed in 1994.

In a short period of five months, in a short three years of appointment, it is becoming clear to me that we need a clearer and more visible support system for parents. We have supports spread out in the community, but this Office is seeking to ascertain just what is available to support parents so that too can become an integral part of the child's right to live in a safe and stable environment at home with them.

This State has many good people in the community. They work in this area and have enormous dedication to children. However, children know and they have told me in my former life as a children's lawyer, that home is where they would prefer to be. They want help for their parents to stop the neglect and abuse that they may be subjected to. Even if they have not been physically touched, disharmony, anger and violence between parents can harm children. They want that to stop too, but they do not usually want an end in their relationship with their parents.

The Tasmanian Act embodies all the modern concepts of the rights of children but it has not substituted this for the care and nurture of children in the home. The modern view is also that the state has obligations to its citizens so that they in turn can properly discharge their role as parents. From the 1990's this national obligation has been recognised as also an international obligation.

After 1994, Australia commenced programmes that focussed on domestic violence, youth homelessness, child abuse and family relationships. There were budget allocations that reflected this commitment, and they continue to this day. We saw strategies like 'Stronger Families and Communities' and now 'Strengthening Families'. I constantly ask myself if we do not need more of that national budget allocation in Tasmania for children and families given the realities of our situation.

Much of Tasmania is rural and remote, and pockets of it are suffering from the impact of social and economic pressures that the Preparatory Committee of the United Nations Special Session has noted results in the undermining of the crucial role of parents. Seen in this holistic manner, we can move away from the superficial adversarial position that has pitted parents against children. If we recognise that both have human rights we can re-think this dilemma and properly address the issues that we need to face as a society in the twenty first century. I commend the Tasmanian Act to you as a good start in the right direction.

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