THE THIRD WINSTON S. RICKARDS MEMORIAL ORATION

“HUMAN RIGHTS OF CHILDREN AND YOUTH IN AUSTRALIA: IT IS TIME WE GOT SERIOUS”

delivered by
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The Oration deals with the many pressures on children and youth engendered by society, and society’s inadequate response. Discussion will include the impact of cyberspace and social networking; the effects of bullying and denigration on mental health; Indigenous children, refugee children and those disadvantaged by disability and or social circumstances; deficiencies in legal approaches; political and media attitudes to children and youth; and Australia’s failure to properly apply the UN Convention on the Rights of the Child.

Committee on the Rights of the Child 2012
Observations on Australia
"The Committee reiterates its previous recommendation (CRC/C/15/Add.268, para. 10), for the State party to strengthen its efforts in bringing its domestic laws and practice into conformity with the principles and provisions of the Convention, and to ensure that effective remedies are consistently available in cases of violation of the rights of the child. Furthermore, the Committee recommends that the State party consider enacting a comprehensive child rights Act at national level, which fully incorporates the provisions of the Convention and its Optional Protocols and provides clear guidelines for their consistent and direct application throughout the territory of the State party. "

I would first like to pay my respects to the traditional owners of this land, the Wurundjeri people and the Kulin Nation, their elders past and present as the keepers of the spirit of this land.
I would also like to say how honoured I am to be asked to deliver this oration in honour of Dr Winston Rickards.
Dr Winston Rickards was an outstanding national leader in pursuing the right of young people to high quality mental health services. His work in establishing Child Psychiatry as a specialisation of Psychiatry in Australia as head of Psychiatry at the Royal Children’s Hospital Melbourne from 1955 to 1983 was a lasting contribution to the Victorian and Australian community. He additionally is to be honoured for his voluntary contributions in the Royal Australian and New Zealand College of Psychiatrists and in numerous community organisations, such as MHYF Vic which he founded in 2000.
I particularly empathise with him in his role as a powerful advocate for children and young people and their families which is a role that I also attempt, albeit without the great knowledge of mental health issues that he had. Because of this my comment on mental health issues tonight will be general rather than specific, but I hope to deal with matters that raise significant mental health as well as human rights issues.
I will commence tonight's address by first discussing the general issue of human rights, which was very much an interest of Winston Rickards. In this context I noted a comment a few weeks ago from some media pundit discussing the decline of Australian history teaching that the problem was the agenda on the National Curriculum, which emphasised such left wing issues as human rights.

When I read this I began to think about how any intelligent person could say this? Did the two World Wars of the 20th Century never happen? Were the horrors of trench warfare imaginary? Was the Holocaust a myth and were Hiroshima and Nagasaki figments of imagination? What about the Khmer Rouge and the genocides in Ruanda and the former Yugoslavia to say nothing of Stalin's mass murders? Is concern about these matters symptomatic of left wing ideological leanings?

Were all those people who developed such international instruments as the Universal Declaration of Civil and Political Rights, the Convention on the Elimination of Discrimination against Women and the UN Convention on the Rights of the Child deluded? Regrettably the comment quoted is very much the stock in trade of Australian conservatives whose desperate fear of a Bill of Rights has left us as one of the only western democracies without that sort of protection for our people and particularly our minority people. This sort of thinking is evocative of the US Tea Party but even Tea Party members tend to complain about their rights being trampled on rather than seeking to dismantle the US Bill of Rights.

In fact this attitude in Australia is not just confined to conservatives. For example in recent months many Government politicians and their supporters have been looking for comprise with the Opposition on asylum seeker issues rather than addressing the issues of human rights and high principle involved. While some compromise is an essential part of government it should not be at the expense of issues of human rights and high principle. Let us not forget that these issues involve children and families in desperate need, who should never be made the subject of squalid attempts to gain political advantage.

The fact that they are indicates to me that there is a malaise in this country and an overly high degree of complacency and self satisfaction. When this is coupled with natural greed and a slavish belief that the acquisition of money is all that matters then we have a problem.

There are many examples of the results of our failure to pass legislation to protect human rights.

One is the fact that our system has utterly failed to protect asylum seekers and their children to the point where the High Court held, albeit by a narrow majority, that the Executive and not the courts could decide that asylum seekers could be held in indefinite detention as could their children. This decision runs contrary to one of the basic principles upon which our freedom depends, namely that no-one can be imprisoned without trial by a properly constituted court. Let us make no mistake, detention is nothing but a euphemism for imprisonment and is even administered by the same multinational private contractors that run prisons.

I discuss subsequently an attempt by the Family Court to make protective orders in relation to children of asylum seekers which was similarly overruled by the High Court. When the High Court finally did intervene to strike down the Government's Malaysian solution as illegal, it was roundly criticised in the media and by the Government for doing so and the Government continues its immoral pursuit of that solution .

If ever there was a failure to protect human rights in Australia it was the failure to protect our Aboriginal people from the Howard led Intervention in the NT, which has been inexplicably continued by the Rudd and Gillard Governments. If the Racial Discrimination Act had Constitutional protection, this could never have happened. However as an ordinary Act of Parliament it could be easily amended or suspended and the latter is what the Howard Government did in critical areas of the NT.

We have failed the Aboriginal people in so many other ways as well, as is evidenced by the high rate of Aboriginal people in custody and the inability to protect Aboriginal children from harm and neglect.

There are many other examples that can be given of the need to have legal protection for human rights in this country, including mandatory detention laws in WA, new Queensland

Government proposals for 'naming and shaming' children in conflict with the law and draconian anti-terrorist legislation of the Howard era that is more extensive than that of any other western democracy and breaches many international conventions.

I have never regarded myself as particularly radical and yet the inexorable march to the right in this country has left me in a radical position. I know that I have not changed but all too many in the community have. I suppose that I can take some comfort from the fact that people like Malcolm Fraser face the same dilemma.

Perhaps it may interest you for me to share a little of the path that I took to get to the point of becoming an advocate for human rights and the rights of children.

During my time at the Bar, I could not have described myself as either a human rights advocate or a children's rights advocate. However, I saw enough during my early days sitting around either waiting to be heard or appearing in the Magistrate's Courts to feel a sense of deep disquiet at the way many, including children, were treated in the legal system. In those non specialist days I later appeared in a wide range of both criminal civil and family related cases for which deepened that feeling of disquiet.

I first became involved politically after visiting Vietnam in a legal capacity as a member of the RAAF Reserve in early 1967. As a result I formed the firm view that the then Government was wrong and the ALP right in opposing that war and joined the latter on my return and stood as a candidate at the 1972 and 1974 elections. That in it itself was a great educative experience in the course of which I strengthened my views about human rights. The Whitlam Government may have had its faults in the economic area but it did have a firm view about Labor principles and human rights that seems to be sadly lacking today. Similarly, the same can be said about Malcolm Fraser and his Government and the fact that he has so consistently supported human rights principles ever since. His subsequent and current Liberal successors appear to have long abandoned them.

My first five years on the Bench from 1982 were spent on the Supreme Court of Victoria and also as Deputy Chair and later Chair of the Adult Parole Board. There I first encountered the appalling toll that drug usage was taking on our young people which continues. Such is our community conservatism that we do not have the wit to attempt intelligent solutions but continue with a barren 'war' on drugs that has failed and will always do so.

I also encountered the mindset that considers, against all of the evidence, that the answer to crime is the imposition of longer and longer sentences. This tendency has become worse to the point that egged on by the minions of News Limited, we have become a vengeful society despite the fact that this had had no effect on the crime rate. A troublesome by-product is that some political parties see votes in harsher punishments for children. In this regard it was pleasing to see that the Baillieu Government is considering abandoning its election promise to get tough on juveniles in Victoria, which would be an encouraging victory for common sense over politics.

On becoming Chief Justice of the Family Court in 1988 I think it fair to say that it was my experience there that fully converted me into a strong advocate for children's rights as well as human rights generally and the importance of the law taking an entirely different approach to children than it has traditionally done.

I early became concerned about attitudes towards child representation in courts. The UN Convention on the Rights of the Child (CRC) specifically provides that children have a right to be heard in all legal and administrative proceedings that affect them. We have never fully complied with this requirement in our courts or elsewhere. The Family Law Act 1975 provided for the appointment of separate representatives of children by the court but did not specify the circumstances in which an order should be made or set out the duties of the separate representative, later child representative. No training was provided for persons appointed and there were different practices as between judges and registries.

I felt that something had to be done about this and in a case of Re K a Full Court over which I presided set out a list of circumstances where such an appointment should be made. That caused enormous uproar, particularly in Victoria where I was accused of destroying the funding of the then Victorian Legal Aid Commission because in this State such appointments had been rarely made. We later introduced training programs for child representatives in conjunction with the various professional law associations which led to considerable improvements in the standard of child representation.

The Howard Government in one of many ill advised moves in family law, amended the relevant legislation to limit the availability of child representation in international child abduction (Hague Convention) cases. It also abolished the child representative and substituted a children's lawyer. The problem with doing this was that such a lawyer is not appointed until late in the proceedings whereas the former child representative did not have to be a lawyer and was appointed earlier at a time when it was not too late to prevent the dispute escalating. In this area the child representative often played an invaluable role as an honest broker in putting the children's feelings and issues and guarding their rights.

On the issue of a child's right to be heard, I am also troubled by judicial reluctance to interview children in family cases in Australia. There has always been a power to interview children but the practice has been for judges not to do so. I had also followed this practice but later in my judicial career I did interview some children and I must say that when I did so I did not regret it. On at least one occasion I avoided making a decision that would have been wrong as a result of doing so and on others I am sure that the children were much more understanding of the decision.

It is not really good enough to say that it is sufficient for a child to have been interviewed by someone else, particularly if the child is old enough and wishes to speak to the judge. Our studies of the situation in Germany in relation to less adversarial trials revealed that it was normal for German judges to interview children and they found it a very useful tool for resolving parental disputes. It also seems to be much more consistent with CRC provisions on the right to be heard.

It may be that judges need training in techniques for interviewing children but it does not seem to me to be asking too much of judges exercising children's jurisdiction to undergo such training.

I also think that much greater use should be made of less adversarial procedures and the procedures dispensing with the need for technical compliance with the Evidence Act in both family and children's law. In many cases adversarial approaches cloud the real issues and direct attention away from the best interests of the child.

I think that children's rights in the family law area have also been seriously eroded by the gradual tightening of legal aid eligibility that forces many parents to accept solutions that are inimical to their children's welfare because of their inability to afford legal representation.

In addition to these purely family law matters there were a number of catalysts that further activated my interest in human rights and the rights of children. First, I was blessed with high quality staff who opened my eyes to many problems. They included the late Danny Sandor, a brilliant lawyer and dedicated advocate for children's rights who had a deep understanding of the GLBT communities. He brought home to me the appalling discrimination against gay and lesbian people including children and the difficulties of people in cross gender situations; Margaret Harrison, a lawyer who had worked with the Institute of Family Studies and had a keen appreciation of gender issues and discrimination and violence against women and my then media adviser, Bill Jackson whose strong interest in Aboriginal issues and South East Asia that has eventually led me to becoming involved in Aboriginal issues in Australia and child justice issues in Cambodia and Vietnam.

I also had a particular opportunity to become aware of the problems of Torres Strait Islanders through my Torres Strait Islander friends Steve Mam, McRose Elu and others who accompanied me to the Torres Strait in the early 90's and were instrumental in persuading me to attempt to address the problems arising from the law's failure to recognise traditional adoption practices of their people, a project that remains dear to my heart today and upon which I continue to work.

I also became concerned with community attitudes towards of family violence and particularly its effect upon children. In 1988 violence towards women was not treated sufficiently seriously, and this is an attitude that is all too prevalent in our community today as the UN Committee on the Rights of the Child has recently commented. Similarly the effects upon children who are exposed to family violence was and is not fully appreciated. There are some hopeful signs that this is changing under the leadership of the present Attorney-General, Nicola Roxon, but there is long way to go.

It was this factor that persuaded me to accept an invitation from the Alannah and Madeline Foundation to become the inaugural Chair of the National Centre against Bullying in 2002. Through my colleagues at the Foundation and Centre, I have become much more aware of the pervasive problem of bullying that has been accentuated by its extension into cyberspace. The issue has rightly gone from being regarded as a rite of passage associated with schooldays to a serious mental health issue with potentially devastating effects including child and youth suicide. Although we have had some success in raising public awareness of this problem. resistance is still encountered and Government has been slow to take remedial action, particularly in framing and modernising laws to set boundaries in this area.

I hasten to add however that I do not advocate punitive solutions to the problems of bullying which I see to be counterproductive. Bullying is a complex problem requiring complex solutions and there are some exciting initiatives being undertaken in this area such as the e-Smart program of the Alannah and Madeline Foundation and the Jigsaw programme of the Centre for Non-Violence based in Bendigo, Victoria.

The implications of bullying are vast. It does not take too much imagination to think that today's school bullies will eventually bring these attitudes to their workplaces and family life if unchecked. There is already plenty of evidence that they will be over represented in later commission of crimes. Not only are their lives likely to be blighted but also those who have suffered at their hands. I have already mentioned youth suicide but there are many who do not go to that extent but who lose all confidence in themselves and require psychiatric and psychological support for the rest of their lives.

We know that we already have an enormous problem with family violence, usually perpetrated against women and children. Again it is not hard to imagine where these behaviours were learned and how problems of this nature need to be addressed at the source.

There is much evidence that amongst those worst affected by bullying are gay and lesbian children or those who are thought to be. Other frequent victims are the disabled and none of these groups deserve this treatment.

To me however there are two further issues of principle that arose during my time at the Court and still resonate as major political issues and are issues that make me ashamed of the leadership of my country.

These are the treatment of asylum seekers and of the Aboriginal and Torres Strait Islander people of this country. Both issues are intimately bound up with our treatment of children.

I should perhaps preface these remarks with the fact that in my role as Chief Justice of the Family Court I became particularly concerned that there was no official recognition of the rights of children in this country in the form of an ombudsman or human rights commissioner in any of the States or the Commonwealth at the commencement of my

term of office. This has since been largely rectified in the States and is about to be at Commonwealth level.
Early in my term I had the opportunity of meetings and discussions with each of the Children's Ombudsmen in the Scandinavian countries and New Zealand and could see the enormous importance of such an office. In my role as Chief Justice I did not have a brief to perform such a role but at the same time the Family Court did and does have a welfare jurisdiction and I took the view that the Court's jurisdiction over the welfare of children and indeed its general jurisdiction in relation to children at least gave me the right to express views on matters that affected their rights and welfare.
While convention requires judges to make public statements with care, that is all too often used as a justification for saying nothing when one has a duty to say something about important issues in which one has a direct interest and arguably at least for a Chief Justice, a duty to bring them to public notice.
The Beijing Statement of Principles on the Independence of the Judiciary, after indicating that within the bounds of judicial duty judges have a right of freedom of expression, states:
10. The objectives and functions of the judiciary include the following:
(a) To ensure that all persons are able to live securely under the rule of law;
b) To promote, within the proper limits of the judicial function, the observance and the attainment of human rights (emphasis added)
Asylum Seekers
The asylum seeker issue is one that directly affected me as Chief Justice of the Family Court. It will be recalled that it was the Labor Government in 1992 that first acted to provide for mandatory detention of asylum seekers and set up a detention facility at Port Hedland where we began the appalling process of detaining asylum seekers and their children.
The following quotations from a recent article by Pamela Curr, the campaign coordinator of the Asylum Seekers Resource Centre encapsulate the stupidity and cruelty of our policy:
" Last week I received a text message from a man in Indonesia who had just lost his brother in the recent boat tragedy. He said “I come soon by boat. I lost faith in UNHCR. I have no choice.”
This man like many others has been in detention in Indonesia since last year, waiting for the UNHCR to interview him. In June he texted me that 35 people in the detention centre had paid the guards and “escaped”. He said that he would wait and go the “right way”. After nine months he was finally moved out of an Indonesian detention prison to a hostel. He has been anxiously following Australian politics and asking if and when the government may change and whether a new government will “close the door”. Last week he decided to wait no more."
She went on to discuss possible solutions put to the Government, including the immediate reception in Australia of 1000 of the 1200 people in Indonesia already assessed as entitled to refugee status together with another 4000 from Malaysia to be coupled with an increase in numbers to 25000 per annum.
She concluded:
"Political and moral leadership has never been more needed in this area of national responsibility. It is so lacking even while the rancid voices of hate and division grow louder. This multicultural nation of migration may yet rue the day we allowed these voices to be unleashed. Our collective respect for the sanctity of human life is undermined by policies which place lives at risk."
At the time that the Labor Government first introduced the policy of holding asylum seekers in detention and doing so in remote areas like Port Hedland I accepted an invitation to speak on the rights of children. I took the opportunity to criticise the Government for setting up what I described as a virtual concentration camp in a remote area and in particular, for wrongly detaining children contrary to CRC.

That set up a media hue and cry with my remarks appearing on the front page of the Australian newspaper, which surprisingly enough, agreed with me. Then Immigration Minister Senator Bolkus was depicted in a cartoon dressed in Nazi uniform outside of a concentration camp and even Greg Sheridan expressed support for my remarks. How times have changed.

The Government response was of course predictable and I was criticised for speaking publicly as a judge on a political issue. I took the view then and now that human rights issues transcend mere political issues and that they give rise to a duty to espouse them.

Subsequently in 2001 a case came before the Family Court involving asylum seeker children where it was argued that the Court in its welfare jurisdiction should order their release from detention in light of evidence as to their extreme psychological deterioration. The trial judge dismissed the application on the basis that the court lacked jurisdiction, but on appeal the Full Court over which I presided, held by a majority of two to one that the Court did have jurisdiction to make such an order and adjourned the further hearing to enable the presentation of further evidence.

Subsequently another Full Court directed the Minister to release the children. The Minister did so but appealed our decision to the High Court which unanimously held that we lacked jurisdiction to make the order.

Normally one might feel chastened by a unanimous defeat in the High Court but I think that I can say that I have never been as proud of any decision that I have made as a judge as I am of that one. I still think that it was morally and legally correct, even though the High Court thought otherwise. I think that the earlier Mason High Court might have taken a different view as it was far more liberal minded than its successor. The particular constitution of appellate courts can have a significant effect on the outcomes of cases that they hear.

A practical result of our decision was that the children were not returned to detention and revulsion against the practice of detaining children gained force to the point where both major parties have the policy if not the practice of refraining from doing so.

However the immigration debate continues, fuelled by what I believe to be the morally indefensible attitude of both major parties. The Opposition's policy of turning around the boats and reintroducing temporary protection visas is a combination of refined cruelty and criminal disregard for human life, despite the crocodile tears shed in Parliament by its proponents. The Government policy of effectively scapegoating refugees by sending them back to the bottom of a non-existent queue in return for taking others is only marginally better and the so-called Nauru and /or PNG solution that both parties are flirting with is a pathetic return to morally bereft policies of the past.

Let us not forget that the Nauru episode involved wholesale human rights abuse by the Australian and Nauruan Governments and to cover this up the latter Nauru on 26 August 2003 banned lawyers, human rights activists, health care professionals and independent observers leading Amnesty International to issue a global alert about the deteriorating human rights situation on Nauru. The Nauru Government had previously refused visa to Australian media to visit the country.

As Curr points out these so called solutions "require people seeking asylum to place their lives at risk by boarding dangerous boats in order to trigger rescue and removal to an offshore place. This solution is morally repugnant as it is predicated on risk of deaths in order to be a deterrent to others."

As for temporary protection visas, these are also morally repugnant and designed to act as a deterrent by separating families. Those promoting them should pay regard to the possibility that boats such as the SIEV X were so full of women and children because that was the only chance of them joining their husbands in Australia. In my view the use of these visas is an evil policy that has no possible redeeming feature.

It seems that what both parties really want is to appeal to xenophobic views rejecting the arrival of these people in Australia when the solution of receiving them in a humane fashion and processing their applications quickly and efficiently, where necessary after their arrival in Australia is so obvious. The calumnies heaped on the Greens in relation to their immigration policy are pure exercises in hypocrisy because they are the only party with a decent and humane policy towards refugees.

I believe that we must continue to oppose the Government and Opposition policies which, taken together or separately, are the real reason that people find it necessary to expose themselves to the horrible risks associated with travelling by boat to Australia.

It is also time that we put the 'problem' in proportion. As The Age columnist Tim Soutphommasane noted in a 2011 St James Ethics Centre paper last year, Australia received 15,226 boat arrivals, compared with Greece's 56,180, Italy's 91,821 and Spain's 74,317. These are European countries in dire economic circumstances in sharp contrast to ours.

It is more than time that we got rid of such pejorative and inappropriate terms such as 'queue jumping' and 'border protection' and brought some humanity to bear on this issue. These are human beings, many of them families with children who are affected so let us stop talking nonsense about 'stopping the boats', and 'processing' people and get on with helping them.

Aboriginal Policy

Our other great shame is our Aboriginal policy or lack of it.

At the Court I early became concerned about the small number of cases involving Aboriginal and Torres Strait Islander people that came to the Court's attention, particularly in areas like Darwin, Alice Springs and Cairns where these people represent a considerable proportion of the population. We had discussions with a number of communities and came to the conclusion that there was considerable distrust of Courts and a cynical view that our decisions would always favour the white person if there was one involved. We were very successful in overcoming that problem by the appointment of Aboriginal and Torres Strait Islanders as family consultants on the staff of the Court to act as a liaison between the communities and the Court.

As a result of this process all those at the Court at all levels gained a much greater insight into the problems of Aboriginal people and the neglect of them by Governments and the larger community. I believe that this is a process that is worth repeating in other organisations and I well remember other judges and me being deeply emotionally affected by discussing with Aboriginal people, including our own Aboriginal staff, their personal experiences of the 'stolen generation'.

Unfortunately the Family Court no longer has Aboriginal and Torres Strait Island staff performing this function.

The stolen generation report "Bringing Them Home" was a landmark issue which highlighted the negative attitude of the then Prime Minister, John Howard to Aboriginal people and to the question of an apology in particular.

In 1997 I was chairing a World Congress on Family Law and the Rights of Children and Youth in San Francisco. I had arranged for Prof Mick Dodson, one of the authors of the 'Bringing Them Home' report to speak at the Conference and he strongly attacked the Government. When asked by the media I agreed with his view that the PM should apologise. This gave rise to considerable publicity in the media in Australia, accompanied by threats against me in my judicial position coming from sources within the then Government and letters from the AG requesting a withdrawal, which I refused. I was very pleased to see that apology eventually delivered by then Prime Minster Rudd to general acclamation in 2008.

Unfortunately, apart from that apology very little insight into Aboriginal and Torres Strait Islander problems has been evident from our political leaders then or now. We have had

since 2007 the spectacle of politicians of both major parties engaging in a cynical and racist exercise to control the Indigenous people of Australian using policies that have failed throughout the history of white settlement in Australia and are demonstrably failing again.
The 'Intervention' started by the Howard Government, ostensibly to protect Aboriginal children, was continued by the Rudd Government and has now been continued by the Gillard Government in its appalling 'Stronger Futures' legislation for a further 10 years.
The whole exercise has been surrounded by spin rather than substance, more recently involving a series of farcical 'consultations' with Aboriginal people, the validity of which even a Government and Liberal and National dominated Senate Committee found hard to stomach after hearing almost unanimous evidence as to the failure of the Government to engage in proper consultations as defined by the Australian Human Rights Commission or at all. The Committee nevertheless approved the legislation but oddly enough failed to join the dots between its findings about consultations and the fact that if those findings were correct then the Stronger Futures Legislation automatically breached the Racial Discrimination Act in a number of significant ways.
Nevertheless this legislation was passed with minimum debate and the support of the major parties and was not even referred to the Committee appointed by the Government to examine legislation for human rights compliance upon the basis that this was unnecessary.
It has caused untold distress to the Indigenous people of Australia and yet such is the paucity of media coverage and active censorship of opposing views by News Limited outlets, most Australians have no appreciation of this distress or the cynical manipulations of both Government and Opposition over this issue. In my view it is open to attack as contravening the Racial Discrimination Act and there may be other grounds of attack open. Unfortunately our continuing failure to enact a Bill of Rights limits those possibilities.
Report of the UN Committee on the Rights of the Child-August 2012
It is worth saying a few preliminary words about this Committee which is set up under CRC and consists of eighteen independent experts in children's rights of considerable international eminence from different countries. It is common for the Australian media and politicians to attack such committees on the basis that they contain some representatives from regimes with a doubtful human rights record. This they undoubtedly do but the majority of the committee members come from other countries with strong human rights record. Also it is a big assumption that because the committee member comes from a country in the first category, they necessarily espouse the shortcomings of their country.
My experience is that he Committee's reports are usually balanced and fair.
The committee process involves the receipt of reports from the Governments of each member country as to their progress in implementing the CRC together from reports from NGO's in each country putting their own points of view, which often differ from the national report and each group appear and answer questions before the Committee.
I recently had the opportunity of attending a presentation by the Attorney-General's Department on the way it goes about preparing the Government report and I have no hesitation in saying that its approach is competent and highly professional.
However, as one would expect, Government reports usually attempt to depict their country in the best possible light while NGO's are usually much more critical of their own Government, particularly in countries like Australia which enjoy the benefit of freedom of speech.
These NGO Reports are valuable as providing a test against which the Government report can be judged and indeed are valued by both Government and the Committee for that reason.
Representatives of the Committee also visit the country in question and make their own reports to the Committee and all of these reports are factored into the Committee's final report.

The 2012 report of the committee is one of the most highly critical that it has made of Australia's attitude to applying the CRC, which it properly judges against the fact that we are a wealthy and well developed country with more than adequate resources to properly care for our children. We were one of the principal countries behind the preparation of the CRC and in those days were regarded as a world leader in human rights.

However, our more recent attitudes have not escaped international attention. Given the background that I have discussed is it any wonder that this country bears the shame of trenchant criticism in the above report in areas too numerous to name in this presentation?

In relation to asylum seekers the Committee expressed its deep concern about:

"(a) The State party's Migration Act stipulating the mandatory detention of children who are asylum-seeking, refugees or in an irregular migration situation, without time limits and judicial review;

(b) The best interests of the child not being the primary consideration in asylum and refugee determinations and when considered, not consistently undertaken by professionals with adequate training on best interests determination;

(c) The high risk of conflict of interest where the legal guardianship of unaccompanied minors is vested with the Minister of Immigration who is also responsible for immigration detention and determinations of refugee and visa applications; and

(d) Despite the decision of the High Court in the Malaysian case------"the State party continues to pursue its policy of so-called “offshore processing” of asylum and refugee claims. "

It made a series of recommendations urging Australia to effectively rethink its immigration programme so far as children are concerned including ensuring "adequate legal protections for asylum seekers and conclusively abandon its attempted policy of so-called “offshore processing” of asylum claims and “refugee swaps”; and evaluate reports of hardship suffered by children returned to Afghanistan without a best interests determination " .

Similarly in relation to Indigenous issues it expressed concern that racial discrimination in general remains a problem. It expressed particular concern at the:

(a) Serious and widespread discrimination faced by Aboriginal and Torres Strait Islander children, including in terms of provision of and accessibility to basic services and significant over-representation in the criminal justice system and in out-of-home care;

(b) Absence of an independent evaluation of the effectiveness of programmes for the "Closing the Gap‟ targets in the specific context of child protection, development and well-being;

(c) Punitive nature of the State party's Northern Territory Emergency Response Bill (2007), including the student enrolment and attendance measure which allows for punitive reductions to welfare payments for parents whose children are truant;

(d) Inadequate consultation and participation of Aboriginal and Torres Strait Islander persons in the policy formulation, decision-making and implementation processes of programmes affecting them; and

(e) Absence of federal legislation protecting against discrimination on the basis of sexual orientation or gender identity.

There are some other areas of the Committee's Report that I wish to highlight.

Juvenile Justice

The Committee pointed to the juvenile justice system as requiring considerable reform. One of the problems in considering this recommendation is that under the Constitution the responsibility for juvenile justice lies with the States and Territories.

However the Commonwealth cannot escape responsibility because it has the power to override Territory legislation and under its external affairs power it can also override unsatisfactory State legislation, relying on its ratification of the UN Convention of the Rights of the Child (CRC). While successive Federal Governments have shown reluctance

to exercise these powers I think that it is more than time to question this attitude when a number of States and Territories have engaged in flagrant breaches of the Convention.
In particular the Committee has singled out Queensland which treats 17 year olds as adults in its justice system. This has been pointed out by the Committee many times but there is no sign of action from that State. In my view this is a disgraceful situation and given the attitudes of the recently elected Queensland Government it is unlikely to change. It is time for the Federal Government to act to correct this anomaly.
In fact the Queensland Attorney-General has recently been reported as advocating a name and shame process for juvenile offenders which if put into effect would constitute another flagrant breach of the Convention. The Committee has already criticised legislation in Western Australia and the Northern Territory permitting the publication of the names of children engaging in 'anti- social behaviour'.
It has also singled out Western Australia which provides for mandatory minimum sentences for juveniles in relation to certain offences. This is a thinly disguised act of discrimination against Aboriginal Youth whose rate of imprisonment in that State is already far above the national average and is contrary to legal principle and human rights.
It has also pointed to other breaches by all States and Territories in the area of the minimum age of criminal responsibility and in the treatment of children with mental illness and/or intellectual deficiencies who are in conflict with the law.
Our minimum age for criminal responsibility is ten years of age which is about four years below the international norm. It is a hangover from an earlier age and attracts surprise and criticism from many other countries. I find it incredible that we still regard it as appropriate to place very young children on trial and I find it an attitude that does not sit well with any claim to be a civilised western democracy. We should be embarrassed about the continuation of this practice.
There are also appalling differences between the respective rates of incarceration of children in the respective States and Territories and the rates of incarceration of Indigenous and non Indigenous children. In this regard I am pleased to note that Victoria is outstanding when compared to other States and Territories in incarceration rates. It has the lowest incarceration rate and with the exception of the ACT, the lowest youth offender rate. I think it fair to say that it has traditionally led Australia in juvenile justice and continues to do so. I have in the past weeks been hosting a group of Cambodians examining juvenile justice issues and have been impressed with all aspects of the Victorian and ACT approach.
The Victorian system was recently examined in a public inquiry which made some significant recommendations for further improvement involving amongst other things, decentralisation , the setting up the Court as a court of record which would involve the provision of de-identified transcripts and the standard of proof in family division matters. One thing that I can say from my own observations is that we have a high quality Children's Court and child justice system but one that could be much improved by properly resourcing it.
The success or otherwise of many of the recommendations of the recent report will be dependent upon Government providing sufficient funding to enable this to happen. On the basis of past Government attitudes to expenditure on this vital aspect of the child justice system there is room for some concern. All too often Governments expect courts to perform at a higher level without providing sufficient funds for them to do so.
However, there is one recommendation of the recent report with which I would strongly differ and that is the abolition of the Children's Court Clinic and its relocation as a service under the control of the Health Department. The Clinic is an innovative service that has served the court well for sixty years. Some 10 years ago NSW instituted a similar service based on the Victorian model.

Apparently the Inquiry relied upon the findings of an earlier inquiry and report, (the Acton Report) that was critical of the current clinical model and suggested the use of clinical services at an earlier pre-court stage. However this inquiry went a step further and recommended the abolition of the clinic or its location with Health. Again sufficient resources could greatly improve the current model but it is a mistake to blame the shortcomings of the present system on the current model or those administering it. My impression again is that they do a great job under very difficult circumstances.
Accordingly, I think that this recommendation is unfortunate. The great value of the Clinic is its independence and as providing an invaluable resource to the Court in making its decisions. This would not be the case if some similar service was to be located in some other Government Department than Justice, where it is presently located. I should have thought that the Department of Justice would be much more attuned to the needs of a child justice system and the Court in particular.
The Clinic has a very high reputation and can call on some of the most highly qualified professional psychiatrists and psychologists and other professionals available; a situation that would be unlikely to be the case if sourced through some unrelated Government Department.
I am more than conscious of the value of such an independent service to the Court from my Family Court experience. One of the most important components of that Court was its counselling service which engaged in conciliation and provided reports to the Court. For what I regard as inexplicable political reasons the conciliation arm was largely farmed out by the Howard Government but it does retain its independent reporting function, which is a fact that distinguishes it favourably from other Family Courts elsewhere. It also gives the court quality control and the ability to obtain reports as and when it wants them.
The Inquiry's proposal in relation to the Clinic smacks of throwing out the baby with the bathwater.
Mental Health
Children with mental illness and /or intellectual deficiencies are normally most unsuited to be dealt with in the criminal justice system and we must develop suitable alternative methods of dealing with them as the Committee recommends.
The Committee expressed its concern:
" that the State party's level of funding for mental health continues to be substantially below that of other developed countries, with children and young persons seeking mental health services often facing limited access to and substantial delays in receiving such services. In this context, the Committee shares the concerns stated in the health study published by the Australian Institute of Health and Welfare in 2010 indicating that mental ill-health is the leading health issue for children and young people and largest contributor to the burden of disease in children aged 0-14 years (23 per cent) and young people aged 15-24 years (50 per cent). Furthermore, the Committee is concerned about the high rate of suicidal deaths among young people throughout the State party, particularly among the Aboriginal community."
None of those comments would come as a surprise to this audience and anyone who has experienced the lack of services available to people with mental health issues would have no difficulty in supporting such a comment.
Corporal Punishment
Similarly our attitudes to corporal punishment of children are trenchantly criticised by the Committee and particularly our retention of the defence of 'reasonable chastisement'.
It troubles me that, while most of us are rightly concerned about child abuse, we are unable to characterize the hitting of children as falling squarely into this category and, I suspect, the use of the words smacking and spanking have something to do with it. To most, they raise connotations of a gentle correction to a toddler in order to protect or deter him or her from harm, administered by a gentle but loving parent. People advocating law

reform in this area can thus be easily characterized as do-gooders interfering with the legitimate role of parents and potentially criminalizing their actions as part of the much reviled Nanny State.

This stereotype has been used by the media, opponents of reform, and many politicians to trivialize the significance of the issue of the punishment of children and as a means of avoiding it. Any discussion is almost immediately diverted to this issue, with which so many of the public identify, and it is suggested that any limitation on the right of parents to correct a toddler in this way represents a serious interference with their rights as parents to protect their children, leaving them liable to potential prosecution.

Whatever changes are made to the law are not going to result in the loving parent, of the stereotype described, being subject to prosecution. The major law change for which I advocate, namely the removal of “reasonable chastisement” as a defence to a charge of assault, would simply place children in the same position as all others in the community in relation to the law of assault.

I should mention that I do not approve of smacking children of any age. The fact that the gentle correction by a light smack probably does no good, and may carry with it the seeds of long-term harm, is all too readily overlooked. Nevertheless, I think it best eradicated or minimized by a process of education rather than prosecution. The real point is that the defence of reasonable chastisement operates to protect parents from prosecution and conviction for much more serious assaults on children and, in effect, operates as a charter for child abuse. Smacking in this context can, and often does, involve what many would regard as a brutal assault simply because particular parents use it as a licence for such behaviour, either out of cruelty or a misguided belief that they are properly disciplining the child.

Children In Care

Our treatment of children in care is singled out for particular criticism including inappropriate placements, inadequate screening and training of care givers, shortage of care options, abuse of children in care and placement of Aboriginal children outside their communities. We have obviously learned nothing from the stolen generation debacle.

Children with Disabilities

Our treatment of children with disabilities is also criticised and in particular the significant disparity between educational attainments of those with disabilities compare with those without them.

Conclusions

A report such as that of the Committee on the Rights of the Child should have been front page news in our newspapers and leading our electronic news services. It should be the subject of considerable parliamentary debate but such is our complacency that it has sunk like a stone. This says much about our lack of care for our children and particularly children who are otherwise disadvantaged as members of minorities or by reason of economic factors beyond their control.

If we continue to disregard our obligations to children under the UN Convention and if we continue to treat our first peoples and minorities within our community, or outside it in the case of asylum seekers then we are well on track to becoming an international pariah. I do not want to feel ashamed of my country as I do over a number of these issues. I have a vision of it standing tall as a centre of enlighten and freedom throughout the world but the achievement of this requires courage and leadership which are qualities that are sadly lacking at present.

I do not underestimate the capacity of the Australian people to rise above these problems and I believe that there is general empathy for others on the part of most ordinary Australians from whatever background if provided with the right sort of leadership to achieve these goals. If only our leaders were capable of recognising this and showed such

leadership rather than engaging in the petty and vicious squabbles that have characterised our Governments in recent years then this country would be much better off.