

Introduction

In this the third issue of the *Australian Journal of Human Rights* the focus is on children's rights. In international law it is no longer a matter of controversy that children have rights, witness for example the United Nations Convention of the Rights of the Child to which 180 countries are now signatory. CROC provides a baseline for children's rights, situating the child in the context of the child's family, community and state. Article 3 adopts a variation on an approach much vaunted by family lawyers, that of the best interests of the child. The chief advantage of such an approach is that it requires others to consider "every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier". The question of 'who is a child' is one of the recurring questions addressed directly or indirectly in the articles in this symposium. For example, McLean and Petersen in considering whether a foetus may be considered a patient begin with a consideration of the 'personhood' of the foetus thus raising questions of 'who is a child' and what constitutes a 'right bearer'. The discussion of 'who is a child' raises the further concern that treating all children under the age of 18 years the same creates many difficulties when considering the rights children have or should be accorded. The first 18 years of life are not one uniform phase, rather there are a series of evolutionary stages of development. Many of the authors in this symposium believe that the older child should be accorded some of the rights attributed to adults. Jones and Marks, for example, argue for the adoption of a staged approach to children's rights, some rights arising by virtue of 'personhood' some from the different stages of development of the minor.

Article 9 of CROC provides that 'a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child ...' As one would expect many of the articles in this symposium are concerned with the parent-child relationship and the limits of that relationship. The right of the child to a secure environment and the right to be brought up wherever possible by natural parents is the subject of the first two papers in this symposium. Paul Batley, a solicitor with Kingsford Legal Centre, deals with one of the great dark spots of recent Australian policy — the institutionalised theft of Aboriginal children. His discussion of Joy Williams' case bears consideration for a number of reasons. First, the case has been a catalyst for at least one other legal challenge by 'stolen children' and more importantly, the decision in the case gives rise to the prospect of the development of the doctrine of fiduciary duty in a direction of potential value to other members of the stolen generations — the development of the equitable doctrine of fiduciary duty would clearly have ramifications beyond the case of the stolen generations. Kathryn Cronin of the Faculty of Law at the University of New South Wales also considers the rights of the child to be brought up by her natural parents, this time in the context of Australian immigration law. The problems for migration and deportation of

children have been recognised for some time; international law accords children the right to be with their parents but not in the country of their choice.

The three articles that follow are also concerned with the relationship between the child and the parent. They highlight the role that the medical profession and the courts have had in redefining the relationship between children, parents and the state, particularly with respect to but not confined to medical treatment decisions. Sheila McLean, Professor of Law and Ethics in Medicine at the University of Glasgow and Dr Kerry Petersen, Senior Research Fellow at the University of Glasgow School of Law deconstruct the 'relationship' between the pregnant woman and the foetus. They conclude that as the foetus is not, in law, a person and hence is not capable of being a rights bearer, the illusory nature of the conflict between the pregnant woman and the foetus becomes apparent. In an article on the role of the Family Court in medical procedure cases, the Chief Justice of the Family Court, the Honourable Alastair Nicholson, together with Margaret Harrison and Danny Sandor, discuss the background to the recent Full Court decision of the Family Court in *P and P* (1995) FLC 92-615. Medical treatment decisions by and on behalf of children raise a plethora of issues in any discussion of children's rights, particularly where the decision is found to be beyond the power of the parent or the child. Sterilisation of intellectually disabled young women is one such situation. Nick O'Neill, President of the NSW Guardianship Board confronts these issues in his article which considers anew the recommendations of the Family Law Council in its report *Sterilisation and other medical treatment of children* (AGPS Canberra 1994) which were dismissed by the Family Court in *P and P*.

The next three articles raise some specific areas of concern for anyone interested in children's rights. Jenny Barga from the Faculty of Law at the University of New South Wales considers one aspect of the relationship between the child and the state in the area of juvenile justice. Her article provides an introduction to the schemes for pre-court conferencing as an alternative to traditional criminal justice methods for dealing with juvenile offending. In the course of the article, Barga flags a number of concerns that arise from these schemes which purport to be 'in the best interests of the child' but which in many instances deny children the principles of natural justice. Robert Ludbrook, until recently the Director of the National Children and Youth Law Centre, focuses on the area of political participation. He is concerned about the tendency to treat all children 'the same', and the blanket denial of voting rights and the exclusion from political participation by children by virtue of their status as children. Ludbrook argues that the 'mature minor' should be accorded the right to vote, although voting should be optional under the age of 18 years.

Professor Breen Creighton from the School of Law and Legal Studies at La Trobe University addresses the issue of child labour. He considers ILO Convention No 138 and its applicability in Australia. The ILO Convention seeks to address the more extreme situations of the exploitation of child labour. In his article Creighton raises two important considerations: the appropriateness and effectiveness of the ILO Convention for addressing those situations and the question of whether Australia can or should ratify the Convention — the Convention calls for a prohibition on child

labour under the age of 16 (again raising the issue of different stages of childhood attracting different rights). Doubt is raised about ratification because the law and practice in Australia do not comply and are unlikely to comply with the ILO Convention.

In the final article, Melinda Jones from the Faculty of Law at the University of New South Wales and I touch on the threads that are woven through the previous articles and move towards the provision of a theoretical framework for children's rights. We examine what it means to say that children have rights and the impact of according rights to children on the various relationships children have with their parents, their siblings and wider family, their neighbours, their community and the society in which they live. We argue that despite its limitations, the discourse of rights provides the best means of mediating the relationship between children, parents and the state. In a similar vein to Batley we draw on equitable doctrines and argue for a conceptualisation of the parent – child – state triad in terms of the trust relationship. Throughout the articles in this symposium, the complexity of treating children with equal concern and respect is apparent. Children clearly are not adults and require nurturing, care and love. The fact there are so many areas where it has been difficult both for parents and for the state to achieve an appropriate balance between autonomy and paternalism is not surprising. This symposium is offered as a step towards resolving some of these issues.

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