

Seen and Heard revisited

By James McDougall, Tiffany Overall and Peter Henley

The *Seen and Heard: Priority for Children in the Legal Process* report ('Report'), published jointly by the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission on 30 September 1997,¹ was prepared in response to a reference from the Attorney-General Michael Lavarch under the previous Keating federal Government on 28 August 1995.²

In the Overview, the co-authors summarised the recommendations of the Report, as follows:

Australia's children are the nation's future. Australia's legal processes have consistently failed to recognise this fact by ignoring, marginalising and mistreating the children who turn to them for assistance. Much must be done to provide for children's access to and appropriate participation in the legal processes that affect them. Changes are needed across all levels of government and across all jurisdictions. The Commonwealth should take on a leadership and co-ordination role in this regard. The recommendations in this report are designed to give full effect to the right of children to be both seen and heard in the legal process. They include:

- o a summit on children to be attended by all heads of Australian Governments;
- o a taskforce on children and the legal process;
- o an Office for Children to be located in the Department of the Prime Minister and Cabinet;
- o national standards in the areas of school discipline, care and protection,

investigative interviewing of children and juvenile justice;

- o child-focused service delivery charters; research to improve agency practice in regard to children and collection and publication of statistics on children's participation in various legal processes;
 - o restructuring current jurisdictional arrangements for dealing with children's issues, and in particular an extended cross-vesting scheme for family law and care and protection matters;
 - o transferring appellate jurisdiction for care and protection matters to the Family Court to develop a national court of appeal for all family law matters;
 - o provision of appropriate legal advice and representation to children in need of legal services, including practice standards for children's legal representatives and establishing a legal advice line, specialist children's legal service units and a visiting solicitors' scheme; and
 - o amendments to federal legislation, including the *Family Law Act*, the *Evidence Act*, and the *Trade Practices Act* and negotiation with and encouragement of the states and territories to similarly amend or enact relevant legislation.
- o If the Office for Children is not established immediately, alternative avenues must be found for the implementation of recommendations that relate to the Office.

Significance of the Report

In the ten years that have elapsed since the Report was published, it has come to be recognised as a landmark in the recognition of the rights of children and young people in Australia. The scope of the Inquiry was



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comprehensive and its vision was clear and practical. The processes undertaken by the team drawn from the two statutory authorities were thorough and included forums with practitioners, public hearings, issues papers and exhaustive research. In what was at the time a significant innovation, the Inquiry encouraged and collected comments from children themselves—through focus groups and surveys.

The Report's summary of the law and its recommendations for reform continue to set the benchmark for research and reform in the area. The Report also sits as a worthy companion alongside two of the most important pieces of national advocacy for children in the last decade—the *Report of the Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* ('Bringing Them Home')³ and the *Report of the Inquiry into Children in Immigration Detention* ('A Last Resort?').⁴

Progress

Yet in the ten years that have elapsed since the Report's publication, little progress has been made in the implementation of the Report's recommendations—largely because the recommendations of the Report have been ignored by the federal Government.

The following is a brief review of some of the substantive issues raised in the Report and the response (if any). It does not aim to be comprehensive, but seeks to give a sense of the work that remains to address the Report's original call for reform. This review focuses on action (or inaction) at a federal level. There have been a range of relevant initiatives at a state and territory level. Those initiatives will not, however, be examined in this review.

Advocacy and Action⁵

The key recommendation in this area (Recommendation 1) proposed that a National Summit on Children be convened, to be attended by Heads of Australian Governments, to discuss a broad range of child and youth issues.⁵

No such event has been held. There has been no comprehensive policy framework at a federal Government level for issues relating to children and no national body to develop, coordinate or monitor policy as it impacts on children.⁶

New Working Federalism⁷

Recommendations designed to streamline state/territory and federal coordination and communication have not been implemented as proposed in the Report. Neither the proposed national Taskforce on Children and the Legal Process nor the Office for Children has been established at the Commonwealth level.

As a result, the coordination of policy development and service delivery has not proceeded in the manner contemplated by the Report.

Advocacy⁸

The specialist children's rights units contemplated for the Human Rights and Equal Opportunity Commission have not been established as the necessary resources for those units have not been provided by the Federal Government.

Notwithstanding the lack of financial support, the Human Rights and Equal Opportunity Commission and the Commonwealth Ombudsman have been active in important areas of the protection of children's rights, in particular regarding the issue of children held in immigration detention. However, the broad-ranging and integrated collaboration between the two offices proposed in the Report does not appear to have been implemented.⁹

While the Commonwealth Ombudsman has developed flexible complaints procedures which make it marginally easier for children and young people to access and understand complaints procedures, and to make complaints, no specific entry points or procedures for children have been established.

No support, either financial or administrative, has been provided for the development of a network of community-based and peer advocates for children with accompanying support for training, liaison and accreditation.¹⁰

Administrative decision making service delivery for children¹¹

The Report noted the potential for the then recently established Youth Allowance to be administered (by the then recently established statutory authority Centrelink) in a manner that would deprive young people without other means of support, of basic income support.¹²

Following a review by Centrelink in late 1997, processes were broadened and simplified

with the intention of adopting a more flexible interpretation of evidentiary requirements for children or young people who are at risk of homelessness or who are homeless and to provide more appropriate support. The effectiveness of such measures will again be reviewed in the context of the current federal Government's recently announced review of homelessness.¹³

The Report's recommendation for the ratification of the Hague Convention on Protection of Children and Co-Operation in respect of Intercountry Adoption¹⁴ was implemented and came into effect in 1998. The federal Government has continued to undertake work in this area.

One of the significant recommendations in this area was for the adoption of child-friendly service delivery standards by all federal Government agencies.¹⁵

The key principles identified included:

- o the timely response to complaints;
- o clear and simple complaints procedures;
- o the ability of children to have supporting friends available; and
- o the development of complaints processes designed for children.

The only Government agencies to have given this matter any attention would appear to be Centrelink, Medicare, the Department of Immigration (in its various incarnations) and the Commonwealth Ombudsman.

Otherwise there has been little evidence of consideration of the key principles, and no further monitoring or evaluation of the current processes undertaken by Federal agencies or departments.

Children in Education¹⁶

There has been progress in relation to a number of the Report's recommendations for research particularly on issues relevant to school attendance or the transitions to employment.

The National Safe Schools Framework¹⁷ has been developed by the Ministerial Council on Education, Employment, Training and Youth Affairs. This has been an important step in addressing bullying and school violence, as called for in the Report's Recommendation 38.¹⁸

There has been little progress towards the goal of abolishing corporal punishment in all schools, as recommended by the Report.¹⁹

The Report had carefully linked the need for better support for student participation to the growing interest in civics education.²⁰ However, while the federal Government has developed materials for schools which provide resources for children and young people to understand the principles of adult citizenship, those materials do not refer to the rights of children and young people in the community, nor do they explain the rights of children in school decision-making.

Children as Consumers^{20*}

The lack of progress in addressing the Report's recommendations in relation to children as consumers has been recently highlighted in the Productivity Commission's recent Report 'Review of Australia's Consumer Policy Framework'.²¹

Legal representation and advocacy²²

The Report gave careful and detailed attention to the question of the appropriate models for effective representation for children. The results of that consideration included a compelling call for the development of standards for the representation of children in all family law and care and protection proceedings (Recommendation 70).²³ The Report also set out some of the fundamental provisions that such standards should address (Recommendations 71–77).²⁴

The standards were to provide for the child to direct the litigation conducted by the representative where the child is willing and able to do so, for the representative to make him or herself available at the comfort and convenience of the child, and to consult with the child in advance of the relevant proceedings.

These recommendations have not been implemented. There remains a low level of direct participation in litigation proceedings by child litigants (in both federal and state and territory jurisdictions).

Children's Involvement in Care and Protection²⁵

The Report presented a compelling argument for action at a federal level.

Australia's commitments to children as

a party to CROC [the United Nations Convention on the Rights of the Child ratified by Australia in 1990] and the consistent and persistent criticism of all care and protection systems in Australia lead the Inquiry to recommend that the Commonwealth undertake to coordinate the various care and protection systems.²⁶

The Report proposed *inter alia*:

National standards for legislation and practice (Recommendation 161) to be reviewed and evaluated in light of national and international initiatives (Recommendation 162); national research and data collection (Recommendations 163 and 166) including on the effectiveness of mandatory reporting (Recommendation 168) and conferencing models (Recommendation 169); and a National Charter for Children in Care (Recommendations 164 and 165).

Apart from funding for research (including the work of the National Child Protection Clearing House which has been operated by the Australian Institute of Family Studies), these recommendations have been given little attention at the federal level.

On 26 May 2008 the federal Government announced a proposal to develop a national framework for the protection of Australia's children.²⁷

Children's Involvement in Criminal Justice²⁸

As noted previously in this Journal,²⁹ the Report's recommendations for national standards for juvenile justice³⁰ have not been implemented.

The Human Rights and Equal Opportunity Commission's further attention to the issue of children in detention in the context of Australia's immigration system³¹ highlighted many of the same international human rights principles considered in the *Seen and Heard* report in the context of criminal justice detention.

Whilst those principles have been given limited acknowledgment in changes to federal Government policy in the area of immigration detention, the same cannot be said for the earlier Report's recommendations.

Crucially, the call for clear national endorsement of rehabilitation as the primary

aim of juvenile detention has not been addressed.³²

Conclusion

This article provides a reflection on the progress made since the report. The challenge for those of us concerned with the status of children in our society is how to move this agenda forward again. A workshop, held in November 2007 at the University of Melbourne Law School,³³ '*Seen and Heard: 10 years on—looking back and moving forward*', aimed to reinvigorate debate and to encourage policy and legislative change in line with the objectives of the Report and in compliance with Australia's obligations under the UN *Convention on the Rights of the Child*.

Endnotes

1. Australian Law Reform Commission and Human Rights and Equal Opportunity Commission joint report. ALRC 84, 1997.
2. Report, pp 3-4.
3. Human Rights & Equal Opportunity Commission, 1997.
4. Human Rights & Equal Opportunity Commission, 2004.
5. Report, chapter 5, p 123.
5. Report, chapter 5, p 123.
6. '*The Non-Government Report on the Implementation of the United Nations Convention on the Rights of the Child in Australia*'. May 2005. National Children's & Youth Law Centre and Defence for Children International (Australia), p 1.
7. Report, chapter 6, pp 139-140.
8. Report, chapter 7, pp 150.151.154.
9. Ibid.
10. Report, chapter 6, pp 157-158.
11. Report, chapter 9.
12. Ibid.
13. On 22 May 2008, the Prime Minister, the Hon Kevin Rudd MP announced the release of the Government's Green Paper. '*Which Way Home? A New Approach to Homelessness*'.
14. Report, p 185.
15. Report, p 165.
16. Report, chapter 10.
17. Available at: <http://www.dest.gov.au/sectors/school_education/publications_resources/profiles/national_safe_schools_framework.htm>.
18. Report, p 196.
19. Report, p 217.
20. Report, pp 192-194.
- 20*. Report, chapter 11
21. Productivity Commission, April 2008, pp303-304.
22. Report, chapter 13.
23. Report, p 274.
24. Report, pp 275-280.
25. Report, chapters 15 and 17.

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- 22 *Children's Court Act 1992* (Qld) s 20(g).
- 23 *Young Offenders Act 1994* (WA) ss 17A, 17B.
- 24 *Young Offenders Act 1997* (NSW) s 27(2).
- 25 *Young Offenders Act 1997* (NSW) s 3(g).
- 26 *Seen and Heard*, pp 518–521.
- 27 *Young Offenders Act 1997* (NSW) ss 7(b), 22(1)(b), 39(1)(b).
- 28 *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) cl 33.
- 29 Arie Freiberg and Neil Morgan, 'Between bail and sentence: the conflation of dispositional options' (2004) *Current Issues in Criminal Justice* 220.
- 30 See, eg, the discussion in NSW Law Reform Commission, *Young Offenders*, Report 104 (2005) at p 257. See also Georgia Brignell, *Bail: An Examination of Contemporary Issues—Sentencing Trends & Issues* No 24 (2002) Judicial Commission of New South Wales.
- 31 NSW Department of Juvenile Justice, *Annual Report 2005–06*.
- 32 See NSW Bureau of Crime Statistics and Research, *NSW Criminal Court Statistics 2006* (2007) summary tables at pp 9 and 4 respectively.
- 33 The proportion of children and young people appearing in court for breach bail conditions rose from 14% in 2003–04 to 20% in 2006–07. In 2006–07 almost one quarter of all Aboriginal children appearing in court in NSW were there for breach of bail conditions.
- 34 *Children (Criminal Proceedings) Act 1987* (NSW) s 9.
- 35 Mark Allerton et al. *NSW Young People in Custody Health Survey: Key Findings Report* (2003). NSW Department of Juvenile Justice; and Dianna T Kenny et al. *NSW Young People on Community Orders Health Survey 2003–06*, (2006). Both reports are available at www.djj.nsw.gov.au/publications.htm.
- 36 The amendments were to the *Evidence (Audio and Audio Visual Links) Act 1998* (NSW).
- 37 See the Second Reading Speech by the Attorney General, the Hon. John Hatzistergos, Legislative Council, NSW Parliament, Full Day Hansard Transcript, 15 November 2007, p 54. Designated government agencies now have standing to apply to the court for a direction about the appearance in person of the child. The court can require the child's presence at court, providing this is in the interests of the administration of justice. The child's legal representative will also be able to make submissions to the court in support of the child's presence at the court during the proceedings.
- 38 Hansard, Legislative Council, 17 October 2007.

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26. Report, p 428.
27. http://www.facsia.gov.au/internet/facsinternet.nsf/family/parenting-child_protection_discussion_page.htm.
28. Report, chapters 18, 19 and 20.
29. Sentencing Young Offenders in Australia. *Reform*, Winter 2005 Issue 86.
30. Report, p 483.
31. 'A Last Resort? The Report of the Inquiry into Children in Immigration Detention' Human Rights & Equal Opportunity Commission, 2004.
32. Report, pp 578–581.
33. For further information, contact the authors of this article.