State vs parent: whither the child?

Greg Connellan

Raids on 'The Children of God' raise legal implications in terms of both domestic and international law.

The recent simultaneous dawn raids conducted by police and Community Services social workers in Victoria and New South Wales resulting in at least 120 children being seized and taken into the protective custody of the state have already attracted a great deal of public comment.

It would be of grave concern if such actions did not attract much public criticism and comment. One of the tragedies of our history in Australia has been the failure to challenge the removal of children from their parents. The systematic treatment of indigenous children under the banner of 'protection' since the brutal imposition of European settlement is but one example of a deplorable history of wilful neglect and outright inhumane cruelty to children in this country.

It is easy to be moved to anger towards police and government authorities, when dramatic and highly controversial action such as the dawn raids against 'The Children of God' take place in full public view. We must not let these traumatic events overshadow the truth about the treatment of children in this country. Governments in Australia have proved to be very poor parents to children in need of their protection. Further, governments in Australia have a disastrous history of intervention in families, and a woeful record of failure to take proper preventive measures to ensure that children and their families are protected from the ravages of poverty.

While focusing on these particular events, we must not allow our attention to be drawn away from less public and controversial interventions occurring on a regular basis.

It would be wrong to assume that children would necessarily have been better off if the state did not intervene to 'protect' them. However, in relation to Koori and other indigenous children, there can be no doubt that the intervention was unnecessary, extremely harmful, and motivated by policies better suited to the extermination of the indigenous people than the protection of children.

In other cases, a study of the institutions used to 'house' children removed from their families for their own protection, suggest that in many cases those children would have fared much better at home.

In Victoria, the State Government has worked very hard during the past ten years to correct this disastrous situation. To this end, the Carney Report was produced which resulted in the enactment of the *Children and Young Persons Act* in 1989. The changes brought about by this Act have been slowly introduced during 1990-91 and the beginning of 1992.

The Victorian Government has also worked very hard to reduce the number of young people being placed in institutions as a result of protection applications, and has placed an emphasis on creating and supporting community-based programs for those young people. The resources committed to these programs are inadequate.

UN Convention on the Rights of the Child

Australia is now a signatory to the United Nations Convention on the Rights of the Child. This Convention provides the basic principles to be applied in ensuring that the rights of children are protected. The Victorian *Children and Young Persons Act* is in many ways an attempt by the Victorian Government to implement at least part of the United Nations Convention.

In the preamble to the Convention, we are reminded that everyone is entitled to all the rights and freedoms set out in the Universal Declaration of Human Rights without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, poverty, birth or other status.

The preamble goes on to say that 'the family, as the fundamental group of society, and the natural environment for the growth and well-being of all its members, and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community'.

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Note: The law applying in New South Wales has not been discussed as the author is not familiar with the appropriate legislation.

It further states that the child, 'for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding'. The child 'should be fully prepared to live an individual life in society and be brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity'.

The preamble also makes clear that children, by reason of their physical and mental immaturity, need special safeguards and care, including appropriate legal protection, before as well as after birth.

The Articles of the Convention, some 54 in total, set out the requirements to be adopted by all nations to ensure the protection of children's rights.

Article 3 stipulates that the interests of the child shall be a primary consideration in all actions undertaken by welfare or legal bodies concerning the child. Governments have a responsibility to 'ensure the child such protection and care as is necessary for their well-being, taking into account the rights and duties of the parents'.

Articles 5 and 18 stipulate that parents have the primary responsibility for the upbringing and development of the child, and that governments shall respect the responsibilities, rights and duties of parents to provide appropriate direction and guidance in the exercise by the children of their rights.

It is essential that we recognise that the Convention is talking about the right of parents to protect the rights of the child. The rights of the parent in this regard are clearly seen as part of the responsibilities and duties of the parents to protect the rights of the child. The United Nations Convention does not provide unfettered rights to parents over their children. Clearly it could not do so, as this would be in contravention of the Universal Declaration of Human Rights previously adopted by the United Nations.

It is also clear that the Convention on the Rights of the Child requires governments to respect the primary responsibility of parents to care for their children, whilst retaining an overriding responsibility to protect the rights of the child. In recognition of this, Article 9 provides that governments shall ensure 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'.

Other rights of the child provided for in the Convention include:

- The inherent right to life, survival and development of the child (Article 6).
- The right to know and be cared for by his or parents (Article 7).
- The right to preservation of identity (Article 8).
- The right of a child to express their own views freely in all matters affecting the child (Article 12).
- The right of the child to freedom of expression (Article 13).
- The right of the child to freedom of thought, conscience and religion (Article 14).
- The right of the child to freedom of association and peaceful assembly (Article 15).
- The right of the child to protection from all forms of physical, mental and sexual abuse, violence, neglect (Article 19).

Application to 'The Children of God'

With respect to the controversy surrounding the dawn raids and the removal of the children from their families as the intended outcome of those raids, Articles 16 and 9 are of particular interest.

Article 16 provides that 'no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour or reputation'.

Article 9 provides, in addition, that children not be separated from their parents against their will without 'all interested parties being given an opportunity to participate in the proceedings and make their views known'.

There can be no doubt that the Convention on the Rights of the Child provides for the protection of the human rights of children. These are separate, inalienable rights, which require extra responsibilities of both parents and government to ensure the protection of those human rights in the best interests of the child.

There is a great danger that 'The Children of God' case will degenerate in the public debate to a competition between parents' rights and the responsibilities of the government authorities. The essence of the issue is the responsibility of various parties to protect the human rights properly afforded to children in the best interests of those children.

It will be a long time before the courts determine whether the children in this case were in need of protection as asserted by Community Services Departments and the police of the two States.

Unfortunately the controversial nature of the events which initially put the children into protective custody has ensured that the government authorities will be turning every stone to find evidence to support their initial action and to establish that these children are in need of protection. It would be tragic if 'proving we are right' is allowed to interfere with the rights of the children. The traumatic start to their cases appears to have created a situation in which the battle is over who is right rather than the rights of the children.

Victorian legislation

It is s.63 of the *Children and Young Persons Act* 1989 (Vic.) that provides the guidelines to determine when a child is in need of protection. Without being privy to the particular details of this case, it would seem that s.63(c)(d)(e) and (f) are likely to be relied upon by Community Services Victoria in making out its Application for Protection. Given the large number of children involved (reported to be 56 children in Victoria) it may be that different children are considered under different sections. It is also possible that, before the case comes to court, proceedings with respect to some of these children may be withdrawn. Section 63(c)(d) and (e) deal with situations where the child has suffered or is likely to suffer either significant harm as a result of physical injury, as a result of sexual abuse, or emotional or psychological harm of such a kind that the child's emotional or intellectual development will be significantly damaged, and the parents have not protected, or are unlikely to protect, the child.

Section 63(f) deals with situations where parents fail to provide effective medical, surgical or other remedial care where a child's physical development or health has been, or is likely to be significantly harmed.

We will have to wait on the determination of the Children's Court to see whether the assertions of the Community Services Departments in Victoria and New South Wales with respect to these children are valid.

The case of each family unit should be dealt with separately, although there have been suggestions by solicitors for the children of a 'test case' being chosen. Lawyers for Community Services Victoria have also suggested that the cases of all of the children should be heard together.

It is paramount that the legal action arising from the protection applications with respect to these children does not result in further trauma and harm to the children. A test case approach may assist in this regard. However, each child has the right to have his or her case determined on its merits. To deal with all the children in one case creates an unacceptable spectacle, and would seem to unnecessarily expose the children to trauma, and loss of confidentiality and privacy.

Sections 68 and 69 of the *Children and Young Persons Act* 1989 (Vic.) provide legislative authority for protective interveners, where satisfied on reasonable grounds that a child is in need of protection, to take the child into safe custody pending the hearing of the protection application, or serve a notice directing that the child appear or be produced before a court for the hearing of a protection application.

Conclusions

In 'The Children of God' case, the authorities have determined that the situation was so critical in their view as to require a dawn raid for the purpose of taking the children into immediate safe custody. Not only do we have to assess the reasonableness of the grounds on which they acted, but we have to assess the impact of this action on the rights of the children provided for in Articles 9 and 16 of the Convention.

It is difficult to see how a dawn raid provided any opportunity for all interested parties to participate in the proceedings and make their views known as required by Article 9. It is difficult to understand why it was not possible to serve a notice on the parents directing that the child be brought before the Children's Court on a certain date, as provided for by s.68(1)(b) of the *Children and Young Persons Act.*

While it is clear that the action of the police and Community Welfare Departments cannot be described as unlawful interference, it may well be argued that it is in contravention of Article 16 of the Convention as being arbitrary. The distress caused to the children and their families could have been substantially reduced by using the alternative procedure provided for by the *Children and Young Persons Act.*

We may have come a long way in the last ten years, but there is clearly a need for ongoing vigilance in the protection of the rights of children. That vigilance must be directed not only to the parents and guardians who are at times physical, sexual and emotional abusers of children, but also to the government authorities with responsibility for implementing the Convention on the Rights of the Child. It is often government policies and decisions that are directly responsible for many of our children living in poverty. Our history in protecting the rights of children has not been a good one, and the improvement of that record in the future requires ongoing scrutiny of actions designed to prevent abuse of children's human rights, intervention to protect those rights, and the treatment of children as a consequence of that intervention.