Briefs

PROFILE

A teacher and reformer

SIMON RICE interviewed RICHARD CHISHOLM after his recent appointment as a judge of the Family Court.

Richard Chisholm was for many years an associate professor of law at the University of New South Wales. He is an expert in family law and children's law, and inveterate law reformer and commentor (and he has been an *Alternative Law Journal* subscriber for 18 years!).

Simon: It seems that three areas characterise your career: children, (as a subset of family law), Aborigines, and education.

Richard: I suppose that's right. In a way education is the key to it. If I had to identify some unifying principle it would be that I think that the law shouldn't be a mystery to people. That is linked with an idea about democracy: the administration and criticism and changes of law should, as far as possible, be based on everybody knowing what the game is and how it is played. The more input into reform the better. It is a great shame if the law on a particular subject is changed in ways that people do not understand, or if everybody's view has not been taken into account.

Simon: Aborigines and families are politically sensitive areas to be involved in.

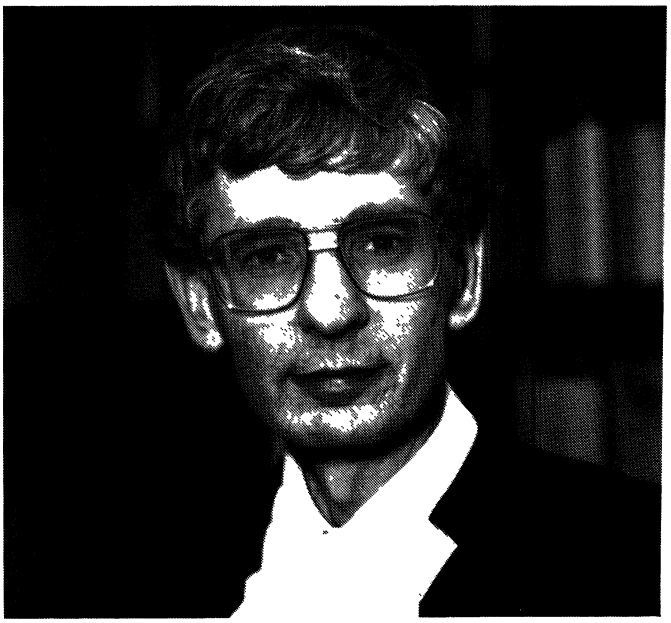
Richard: Yes, but I wouldn't quite know how to characterise my work in terms of a political orientation. I tend to see myself more as getting into these things to try and understand it myself, to help other people understand it, to do whatever I can to ensure that people who are affected have some input into it. I would be hard-pressed to formulate a political position that links the various things that I have done.

Simon: For the last two or three years you have had a public profile on issues of adoption, the *Adoption Information Act* for example.

Richard: Yes, it's terribly important for the law to respond to what is actually happening in people's lives, and it turned out in the work with the Law Reform Commission that the actual experience of people under the legislation was quite different from what it was represented to be by lobbyists.

Simon: You undertook a distinctive process of very broad consultation and submissions.

Richard: We did a lot of empirical work, we traipsed up and down New South Wales having meetings and consulting with people. We encouraged everybody to make submissions and they did in vast numbers, oral and telephone and written; the ordinary ways that Law Reform Commissions tend to do



Richard Chisholm

things, but we did more of it than is common. We also got what we think was a pretty good, although small, random sample of people who had contacted their relatives as a result of the legislation.

Simon: You seem to have an interest in children and children's rights but particularly in Aboriginal children.

Richard: I first got into the whole area of family law because of Aboriginal children. When I started at the UNSW Law School in 1970, the Aboriginal Legal Service was just being developed. A number of lawyers were volunteers trying to help the Aborigines in a fairly ad hoc kind of way, in a way that eventually led to the Aboriginal Legal Service being formed. We were concerned about police harassment of Kooris, and the general problems of the impact of the criminal law on Aborigines. Aboriginal kids were hauled off to the Children's Court and somehow or other I found myself representing some in the Children's Court. I got fascinated in the Children's Court. What kind of a court is this? Where does it come from? What it is doing? What are the consequences of it? I became interested in family law partly because I had been intrigued by the question of the Children's Courts. From then on really I had a kind of parallel interest in Aboriginal issues and family law.

Simon: The idea of children's rights came with new ideas of rights generally in your time as a legal academic. You've taken a positive view, an affirmative view of children's rights.

Richard: Yes, I have. You can run all sorts of fascinating jurisprudential arguments about whether it is useful to speak about children's rights – on the whole I think it is. Whatever you say about that, as a practical political matter an enormous amount of law reform energy is happening under children's rights banners. It is very difficult to deal with reforming children's law without speaking about children's rights.

Simon: So you are not necessarily pursuing the rights for their

own sake: they cover a multitude of things you need to look at in relation to social structures.

Richard: Yes. I think that when people refer to children's rights they mean all sorts of different things. Some people mean children's liberation and argue that you should see children in the same way as other oppressed groups such as blacks or women, and the task is to liberate them. This sort of liberationist view says that all the laws that claim to protect children are a bad thing and, in the extreme version, says children of all ages should have the vote.

Simon: That has not been your view?

Richard: No, that is not my view because that seems to me to be just unrealistic. Small children anyway, are different from adults in their abilities. Their survival and welfare and development require some kind of a protective care-giving relationship with adults. It seems to me that it is the task of the law to provide an appropriate framework for that care-giving relationship.

Simon: It is the unenviable task of the law, if it takes that role on, to decide when a person is no longer a child in need of care and becomes an adult.

Richard: The children's liberationist position is quite useful there. If you think in terms of consent to medical treatment and other such questions it seems to me that it is important that we give appropriate recognition to the capacity of children to make decisions about their own lives and that we respect what they say. Just how we do that, and to what extent, is a matter for debate, but the children's liberationist view is helpful because it keeps saying to us that if you are not going to allow children to make decisions about their lives, then justify that position. It is a healthy thing for us to have to justify restricting children, but we can and actually often do do it.

Simon: The presumption is in favour of children's autonomy and you would have to justify intervention?

Richard: Yes, I think that it is a useful working rule.

Simon: Looking at your interests in relation to children and the family, in some people's minds these matters might be dealt with as social work issues, not necessarily legal ones. Have you ever thought you are on the margins of where law appropriately works in society?

Richard: Oh very much so. What I think Roscoe Pound used to call 'the limits of legal effectiveness' is a very real issue. One idea I found quite helpful in coming to terms with children's law is that it is the law's task to allocate power over children. Children in our sort of society are powerless in lots of obvious ways. Somebody has to make decisions about what they eat, where they live. I see the law as identifying who it is that gets to exercise power over children. That becomes an extremely complicated area because some power is exercised by parents, some is exercised by schools, some is exercised by courts, some is exercised by child welfare authorities. I would say that the power analysis makes that very easy to understand. You ask, for example, how power is to be distributed between parents on the one hand and courts on the other.

Simon: If we went back to the old idea that a child belonged to a parent, and the parent did what the parent thought was correct, the law would have little to say about it. We have created the child as another party in the relationship such that the law recognises children's interests.

Richard: That is true. A major theme of development of recent children's law is the notion that children have interests that are independent from those of parents and it is therefore necessary for laws that allow parents control over children to be challenged in various ways.

Simon: It would be seen by some as a socially disruptive, expensive and damaging line to take. Presumably the children weren't demanding this; it is an academic or intellectual approach that has elevated children to this level. What if you had not bothered at all?

Richard: I think that life would be less good for kids and I would be tempted to say less good for adults as well. I think what has happened with children is consistent with what has happened in other areas where old patterns of authority have been challenged. The authority of a doctor over patients is challenged. This authority of parent over child is challenged. It is a society where previously well-established patterns of authority are being questioned.

Simon: That's consistent with a view you seem to have of the respect to be given to individual autonomy generally. Intervention only occurs when people cannot exercise that autonomy in their own interests.

Richard: Yes that's right. I am generally suspicious of arrangements, whether legal or not, which allow some people to impose their views on others or to require others to live according to some set norm. But sometimes the law must intervene. In relation to domestic violence, for example, it is very important that the law does intervene otherwise the bigger or stronger person has a dominating relationship over somebody else. My argument there would be pro-intervention, typically to protect children against adults, women against men, and elderly and handicapped people against those who are younger and stronger.

Simon: To address a power imbalance?

Richard: Exactly.

Simon: As a Family Court judge, you represent now the law. You *are* the law that intervenes although you do not do it as and when you see appropriate – you do it when people come to you. Are you comfortable with that?

Richard: Yes, on the whole. It can be an uncomfortable task to perform but I am comfortable with it in the sense that the *Family Law Act* absolutely bends over backwards to try and get people to resolve their own disputes. As far as the system can do it, cases only come to a judge when all efforts to resolve them outside the court have failed. The cases that come to me are serious matters that need to be resolved. Someone has got to care for the kids. The property has to be sold and someone has to determine who gets the proceeds. As I see it, the essential role of the Court is to resolve disputes that are brought to it by the choice of the parties.

Simon: So it is not so much legal intervention as having recourse to the law?

Richard: Correct.

Simon: What you are doing now is considerably more passive than you have been inclined to be with the law for the past 20 years.

Richard: Ah, that is interesting. Within the task of deciding cases there are actually some important choices to be made. Judges can be more or less interventionist. There are actually quite a lot of interesting procedural choices within the running of a trial. So with that significant qualification what you say is

true: it is a sort of a passive role. I walk into Court and, whatever case comes before me, I do the best I can to decide. But deciding cases is only part of what judges do. There are a lot of other things going on in the Court. I am involved in a national seminar for the Court; there are all kinds of law reform initiatives happening within the Court.

Simon: Are you a different sort of judge for not having practised in the area?

Richard: Not very, I think. Experienced practitioners are very good at assembling facts and quickly getting on top of them. That is something where I have not had experience; it is a technique that I am in the process of learning. In other areas, to my surprise, lack of legal practice experience does not seem to have been much of a problem. I am very struck by what a close relationship there is between the ordinary rules of evidence and procedure as they are practised in law, and commonsense notions of what fair and sensible.

Simon: Do you miss aspects of being an academic?

Richard: It is too early to say really. At this stage I am revelling in the challenge of learning a new job which is extremely exciting, difficult, important. You are learning the job under the public spotlight, everybody looking at you, so at the moment I am just absolutely flat out doing the job. I am still writing, and there are lots of law reform activities going on. I am hoping to help establish a visiting speakers arrangement in this Court.

Simon: For the education of the judges.

Richard: Yes, and for court personnel, registrars and so on.

A teacher, and reformer, to the end!

Simon Rice is a Sydney lawyer and teaches law at the University of New South Wales.

POLICE POWERS

Detention for questioning

DAVID DIXON is critical of a NSW Bill which will benefit neither police nor suspects.

In *Williams v R* [1986] 161 CLR 278, the High Court confirmed Australian common law did not allow police to detain suspects between arrest and charge for investigative purposes and suggested that legislatures should provide such a power if it was thought necessary. Eight years later (and three years after the NSW Law Reform Commission reported on the matter),[1] the NSW Government has finally brought forward its *Crimes (Detention After Arrest) Amendment Bill.* Despite this long gestation and the possibility of learning from the experience of similar legislation elsewhere, the result is deeply unsatisfactory, misunderstanding or ignoring central aspects of this crucial issue.

The Bill gives police the power to detain suspects between arrest and charge. Objections to this must take account of current practice: NSW police already detain suspects for investigation by bending, finding loopholes in, or simply ignoring the law. Many suspects 'volunteer' to go with officers to stations. Some are arrested out of court hours, when magistrates are unavailable. Others are detained unlawfully by officers who can be confident NSW trial and appeal courts are unlikely to exclude any evidence obtained. While the tactics and gimmicks used by police to evade *Williams* are hardly creditable, they do not undermine the acceptability in principle of investigative detention: the real issue is the conditions under which it is permitted.

Voluntary attendance

A basic deficiency of the Bill is its failure to deal with the practice of 'voluntary attendance'. There is nothing here to prevent or even dissuade officers from relying on suspects' (usually largely fictional) 'consent'. The Bill merely notes it does not affect 'the right of a person to leave a police station or other police custody if the person is not under arrest'. Inadequate as the rights of detained suspects are (see following) they may encourage officers to rely on voluntary attendance rather than formal arrest and custody. 'Detention' has to be defined (as the NSW LRC recommended) to include 'voluntary attendance', so removing the incentive for evasion of the detention regime.

Detention length

The NSW LRC argued strongly for maximum periods of investigative detention to be specified. The Bill instead provides power to detain for 'a reasonable time'. In determining what is reasonable, 'all the relevant circumstances of the particular case must be taken into account', including, where relevant, 15 listed 'circumstances'. The assessment of 'reasonableness' is a matter for the investigating officer: there is no requirement for the involvement of supervisory officers or even the custody officer (see following). The fundamental objection to 'reasonable time' is the lack of certainty for police and suspects alike. Both should know how long detention can last. Instead, the Bill relies on the courts to determine what is reasonable. All the usual problems of courts are relevant: their determination is retrospective; in a system constructed around the guilty plea, challenges to evidence are an ineffective device; and the courts' record in protecting defendants and regulating police by evidentiary controls is weak.[2] The alternative is to specify detention limits: no case has been made (in NSW or elsewhere) against this except that the police consider it inconvenient.

Supervision and regulation

In England and Wales, the *Police and Criminal Evidence Act (PACE)* depends principally on three devices to supervise and regulate investigative detention – custody officers, custody records, and codes of practice.[3] While the Bill borrows these terms, it leaves elaboration of arrangements to police management and subordinate legislation. The Governor 'may' make regulations which 'may' provide a code of practice relating to arrested persons. Passing the Bill without seeing even a draft of regulations and a code would be unwise. Parliament needs to ensure that some of the *substance* as well as the terminology of *PACE* is adopted. This would mean appointing custody officers who will (where possible) be dedicated to the role for extended periods and will have specific responsibility for detained suspects, notably in supervising length of and welfare during detention.