



**Centre for International and Public Law  
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**THE CONTRIBUTION OF  
CHILDREN TO AUSTRALIAN  
ADMINISTRATIVE LAW**

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Chief Federal Magistrate

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**LAW SOCIETY OF THE AUSTRALIAN CAPITAL TERRITORY  
SIR RICHARD BLACKBURN LECTURE  
13 MAY 2003**

**THE CONTRIBUTION OF CHILDREN TO THE JURISPRUDENCE  
OF THE FEDERAL MAGISTRATES COURT AND THE RELEVANCE  
OF THE 'BEST INTERESTS OF THE CHILD' PRINCIPLE IN THE  
LEGAL WORK OF THE FEDERAL MAGISTRATES COURT**

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**INTRODUCTION**

I am honoured and privileged to have been invited to deliver the 2003 Blackburn Lecture.

I wish to mention, but not to dwell on, the well-known public achievements of Sir Richard Blackburn to the law and society. Suffice to say that his career was one of public service to his country, scholarship, leadership and judicial excellence.

I did not know him personally but I am reliably informed by those who appeared before him that there was much more to Richard Blackburn than simply an outstanding jurist.

Amongst his most admirable qualities I am told was his open-mindedness. Although he may have appeared to come to a firm conclusion during an argument, he was always ready to listen to the contrary argument and to admit any error - he was even apologetic to counsel who had persuaded him of his error.

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<sup>1</sup> I wish to acknowledge the contribution of Cleona Feuerring, Associate to FM Raphael, who has assisted me significantly with research concerning the legal issues discussed in this paper.

Learned Hand in his book *Morals in Public Life*, quoting Cromwell said,

*“I beseech you, in the bowels of Christ, think it possible you may be mistaken. I should like to have that written over the portals of every church, every school and every courthouse, and may I say, of every legislative body in the United States. I would like to have every court begin, I beseech you, in the bowels of Christ, think it possible we may be mistaken.”*

Sir Richard Blackburn was obviously of a similar view.

It is easy to think of notorious cases as providing examples of this; but it is equally important in the seemingly insignificant cases we hear every day.

I am also grateful to the Law Society of the Australian Capital Territory for allowing me license in choosing the topic. The topic I have chosen to speak on is chosen because of its direct relevance to the work of the Federal Magistrates Court, and I hope provides a thread which is common to all of the work of the Court. I observe that the topic of children was the subject of the lecture by Chief Justice Nicholson last year, but my theme is a different one.

I want to commence by making some comments about the model chosen by the government for the establishment of a lower level federal court. Almost three years after its commencement, I hope that there are few lawyers who would not know about the existence of the court and be familiar with at least some of the jurisdiction that it exercises.

The court has been somewhat like an empty vessel, quickly filling with work and attracting new jurisdiction. The capacity of the court to hear and determine all areas of federal law is limited only by the willingness of parliament to confer jurisdiction, and the capacity of the court to undertake its work.

It is interesting to consider the new areas of jurisdiction since the commencement of the court in July 2000:

- Residence jurisdiction - family law (September 2000)
- Increase in family law property jurisdiction<sup>2</sup>
- Migration (October 2001)
- Copyright (May 2003)

The government is intending to legislate for property division between defacto partners in states where powers have been referred, and the Family Court of Australia and the Federal Magistrates Court will have jurisdiction in those matters.

### **AN EXPERIMENT IN COURT ADMINISTRATION**

Unlike the traditional establishment of courts, the Federal Magistrates Court was not funded to establish its own registries, or its own courtrooms, in separate physical locations. The infrastructure of the court (save for a modest administration to directly support its functions) was to be provided by the existing facilities of the Federal Court of Australia and the Family Court of Australia. The services provided by the superior courts include registries and their staffing, allocation of courtrooms and related facilities, and space in existing Commonwealth buildings occupied by the Family Court and Federal Court for chambers. In Melbourne, where the national administration of the court is located, physical space for the housing of administrative staff was provided in an area previously occupied by the Australian Industrial Court.

The model allows for the ultimate transfer of an appropriation from the superior courts to the Federal Magistrates Court, commensurate with the shift in workload. A shift of funding would enable the Federal Magistrates Court to fund its own requirements.

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<sup>2</sup> The monthly limited increased from \$200,000 to \$7000,000.

Consideration of any adjustment of funding has been deferred until an accurate and stable picture of the shift in work could be identified and that work costed.

It is probably too early yet to determine what will ultimately happen with the financial arrangements between courts, but it is important to record that within a negotiated Memorandum of Understanding the superior courts are providing through their existing registry services, registry services for the Federal Magistrates Court in every location where the two courts operate. This simply means that all filing in family law matters takes place in the Family Court Registry, and all filing in general federal matters takes place in the Federal Court Registry.

There are other services provided by the superior courts as part of the Memorandum of Understanding. The Federal Magistrates Court was not funded to have its own Registrars. An officer of the court has been designated as Registrar and performs the administrative functions of Registrar. The superior courts provide Registrars to carry out delegated functions in the same manner as they do in the Family Court or the Federal Court.

In bankruptcy, most creditors' petitions are dealt with by Registrars, those Registrars now exercising powers delegated by the Federal Magistrates, because most of the petitions are now issued in the Federal Magistrates Court. Mediations in general federal matters are frequently dealt with by Registrars who have a dual delegation.

I think it is fair to say that despite initial uncertainties as to how this would operate, and despite the different processes in the courts, it has been an outstanding success.

A great deal of credit must go to the Family Court and Federal Court and it could not have been achieved without a willingness to accept that a new approach to the provision of services was required and possible.

The use of existing space in Commonwealth Court buildings is an obviously sensible use of existing resources. It has only created tensions in places where the existing accommodation is inadequate. Upon reflection, it is an interesting model for court administration and leads into issues of whether ultimately one service provider, into which all courts have input, might be more appropriate.

As far as the work at the court itself is concerned it may be a little early to make firm predictions but there is already sufficient evidence to show that a lower level Federal Court, with less formality and simpler procedures, has a place and fills a need. In family law the Federal Magistrates Court has approximately 40% of the applications (excluding divorces) that are filed in both courts. These are the simpler matters and the Family Court continues to hear the longer and more complex matters. A matter comes to be heard in the Federal Magistrates Court in a variety of ways. The Federal Magistrates Court and the Family Court have agreed that certain matters are more appropriately heard in the Federal Magistrates Court and when those applications are filed, applicants are made aware of the practice. The legal profession itself is advising clients to choose one court or another, depending upon the subject matter, complexity, availability of a hearing, the cost and the type of procedures appropriate. Finally, the Family Court will transfer to the Federal Magistrates Court matters which should more appropriately be heard in the Federal Magistrates Court.

In general, federal law bankruptcy is a large part of the jurisdiction, although much of that work is done by Registrars.

In migration, many cases are transferred from the Federal Court. The number that could be transferred from the Federal Court is limited only by the capacity of Federal Magistrates to hear those cases. Many applicants are now filing directly in the Federal Magistrates Court. This area of work is growing substantially and, in Sydney, the demand of migration work is now exceeding the capacity of the court.

## **STRATEGY**

The establishment of a lower level Federal Court was never a matter of controversy, although its structure may have been. The Chief Justice of the High Court said, in May 2000,

*“Most State jurisdictions have three levels of trial courts; a Supreme Court, District (or County) Courts and local courts. The existence of these three different levels is based on the premise, with which I agree, that different cases require different treatments. The way the system deals with the collision between two ships in Sydney harbour causing massive economic loss should not be the same as the way the system deals with the collision between two taxis in George Street causing minor property damage.”*<sup>3</sup>

The Chief Justice at least seems to have a vision for the court. In April 2003, in his speech to the 13<sup>th</sup> Commonwealth Law Conference<sup>4</sup>, on the State of the Judicature, the Chief Justice repeated an earlier view about the future of the Federal Magistrates Court when he said,

*“... In the short time since it was created it has become even more apparent that there is a great deal of work suitable for its attention... I expect that, in time, it will become one of Australia’s largest courts.”*

If the Chief Justice’s predictions are accurate, my hope is that governments will plan strategically for the growth of the court. I mean by that, consideration of and planning for the size of the court felt desirable to effectively carry its work in a manner consistent with its aims of providing a simple, speedy and affordable means of justice; it’s comparative size to the Federal and Family Courts, and the nature of the work (as between the courts) which it is appropriate for it to undertake.

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<sup>3</sup> Gleeson CJ, “Managing Justice in an Australian Context”, Delivered at the Australian Law Reform Conference, Sydney 19 May 2000.

<sup>4</sup> Murray Gleeson, “The State of the Judicature”, paper delivered to 13<sup>th</sup> Commonwealth Law Conference, Melbourne, 17 April 2003.

For surely it is only by having such a blueprint, that all courts can be appropriately resourced.

## **NOVEL JURISDICTIONS**

At the 13<sup>th</sup> Commonwealth Law Conference held recently in Melbourne I was explaining the jurisdictions of Federal Magistrates Court to a Canadian Judge. She seemed quite familiar with the general federal jurisdictions that I outlined, but expressed considerable surprise when I explained that we had jurisdiction in family law (at least in private disputes). Although it may not seem so surprising to those who recall the time when Supreme Courts exercised matrimonial causes jurisdiction, since the Family Court was created in 1975, and the Federal Court in 1976, the jurisdictions that each court exercise have been almost exclusive and it is not difficult to see why a melding of the two might now seem surprising to generation X lawyers.

## **THE COMMON THREAD OF THE ‘BEST INTERESTS’ PRINCIPLE**

Making parenting orders in family law in children’s matters<sup>5</sup> requires the court to consider the best interest of the child as the paramount consideration, and parts of the Act are based on principles which are consistent with the United Nations Convention on the Rights of the Child (UNCROC).<sup>6</sup>

I want to examine other areas of the court’s jurisdiction in which the principles expressed in UNCROC influence the work of the Court. In doing so I hope to inform, as to some of the work of the court.

My Canadian colleague may yet recognise a synergy.

## **MIGRATION**

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<sup>5</sup> Family Law Act, Section 65E

<sup>6</sup> Objects and Principles of the Family Law Act, described in Section 60B

The Federal Magistrates Court has jurisdiction to hear applications for review of decisions of the Migration Review Tribunal (MRT) and the Refugee Review Tribunal (RRT). The latter in fact forms the bulk of the work with a small percentage of these involving children seeking asylum.

In its simplest form, the *Migration Act 1958* (Cth) provides that if a non-citizen present in Australia does not have a visa authorising stay, that person is an unlawful non-citizen, and is liable to be detained and removed from Australia in due course.<sup>7</sup>

A large percentage of people become unlawful by overstaying temporary visas. Many children are brought to Australia by their non-citizen parents and only later find out that they have no rights to remain here. Katherine Cronin gives an interesting account of the experiences of children who have entered their adult lives having been denied access to proper health care, education and social security as a result of their illegal status.<sup>8</sup>

Prior to August 1986, children born in Australia were automatically Australian citizens yet since then, children born in Australia by parents who are non-citizens have no legal rights to remain in this country indefinitely unless their parents secure permanent residency or citizenship. Since the introduction of these new citizenship laws<sup>9</sup> children born in Australia have had their rights diminished and some even find that they are stateless.

Yet the biggest problem Australia faces is the continuous influx of people arriving in Australia either legally or illegally claiming protection visas. Some of this group are taken into detention and remain there for long periods of time. For children, this can have a devastating effect on their psychological development and there has been much said about the apparent conflict with the principles outlined in UNCROC. In late 2001 an estimated 582 asylum seeking children were held in detention. By mid 2002 this number

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<sup>7</sup> See ss.14, 188-199 of the *Migration Act 1958* (Cth)

<sup>8</sup> Cronin, K, "A Primary Consideration – Children in Australian Immigration Law", (1996) 2(2) *Australian Journal of Human Rights* 195.

<sup>9</sup> See *Citizenship Act 1948* (Cth) and *Citizenship Amendment Act 1986* (Cth)

had reduced to 150 children.<sup>10</sup> Whatever views may be held about the application of international principles of the ‘best interests of the child’, however viewed, these matters are within the confines of the executive’s powers.

## **SOME SIGNIFICANT DECISIONS CONCERNING THE INTERESTS OF CHILDREN**

As background, I will first refer to some decisions of higher courts involving children which show how the principles expressed in UNCROC have been absorbed into the common law in Australia.

The High Court decision of *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh*<sup>11</sup> was the first to give recognition to UNCROC, in particular the notion of the “best interests of the child”.

The applicant Mr Ah Hin Teoh came to Australia from Malaysia and married an Australian citizen, the de facto spouse of his deceased brother. Mrs Teoh had four children from previous relationships and together they had three of their own. Whilst waiting for his permanent residency application to be processed Mr Teoh was convicted on charges of importation and possession of heroin. He was sentenced to six years imprisonment. Consequently, Mr Teoh failed to fulfil the good character requirements and his application for permanent residency was refused by the Minister (“the delegate”). He applied for review of the decision and provided documentary evidence showing that his family would be severely disadvantaged should his residency status not be granted yet, despite his efforts, a recommendation was accepted by the delegate and an order was made to deport Mr Teoh from Australia.

Even though the delegate had balanced the “very difficult and bleak future” of the children against the seriousness of their father’s offence the majority of the High Court

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<sup>10</sup> Bessant, J, “Australia’s child asylum seekers”, (2002) 27(4) Alternative Law Journal at 165.

<sup>11</sup> (1995) 128 ALR 353

found that the delegate had departed from Article 3.1<sup>12</sup> of the Convention by not giving paramount consideration to the interests of the children. Ultimately, it decided that the decision of the delegate was void.

In coming to this conclusion it held that statutes should be construed, so far as their language permits, in conformity with Australia's international obligations. It was accepted that there is a role for international conventions in the development of common law.<sup>13</sup>

Furthermore, the decision was important because it expanded the doctrine of legitimate expectation. In short, the High Court held that a decision-maker who proposes to make a decision that departs from an international treaty, that Australia has ratified but not incorporated into domestic law, will deny an applicant procedural fairness unless that person is given the opportunity of a hearing in this regard.

The government responded to *Teoh* by introducing legislation in Parliament that if passed would have had the effect of reversing the position created by this decision.<sup>14</sup> However the legislation has not been implemented and the question remains one for the courts.

The legitimate expectation in *Teoh* "is not the bestowing of rights, benefits or obligations upon an individual."<sup>15</sup> It is not legally enforceable and it does not compel the decision-maker to act in accordance with the expectation. The nature of the legitimate expectation

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<sup>12</sup> Article 3.1: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

<sup>13</sup> At 358 per Mason CJ and Deane J: "ratification by Australia of an international convention is not to be dismissed as merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent any statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention and treat the best interests of the children as 'a primary consideration'."

<sup>14</sup> The Administrative Decisions (Effect of International Instruments) Bill 1995. Clause 5 of "The Bill" provided that:  
(a) an administrative decision will be made in conformity with the requirements of that instrument; or  
(b) if the decision were to be contrary to any of those requirements, any person affected by the decision would be given notice and an adequate opportunity to present a case against the taking of such a course.

<sup>15</sup> Roberts, S, "Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh: The High Court Decision and the Government's Reaction To It", (1995) 2(1) Australian Journal of Human Rights 135.

espoused in *Teoh* is something less than a legal right.<sup>16</sup> It merely gives rise to a right to procedural fairness where the decision-maker has made it clear that the children's best interests will not be taken into account as a primary consideration. In this instance, an applicant should be offered the opportunity to persuade the decision-maker otherwise. Likewise, the expectation can be defeated by an express indication to do so in the statute and/or if the executive makes it clear that it doesn't intend to comply with the provisions of the treaty.

The "far reaching" implications of *Teoh* have been clarified in the recent High Court decision of *Re Minister for Immigration and Multicultural Affairs; Ex parte Hieu Trung Lam* (2003) 77 ALJR 699 and the Full Federal Court decision of *Untan v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 69. Similar facts to those of *Teoh*'s case arose in *Lam*. The applicant, Mr Lam, a Vietnamese national, had arrived as a refugee when he was thirteen years old and had two children who were born in Australia. He had been convicted of a number of serious criminal offences and an order had been made to deport him. The children did not have any contact with their mother and were being cared for by a friend while Mr Lam was in prison. Mr Lam claimed that he had been denied procedural fairness because the delegate had failed to contact the friend caring for the children. He claimed that he had been denied a 'legitimate expectation' of a fair procedure. The decision is most notable for its discussion of the concept 'legitimate expectation' and its role in assessing whether in this instance there had been a denial of procedural fairness.

McHugh and Gummow JJ held that a failure to meet an expectation would not automatically amount to a denial of natural justice<sup>17</sup> and Gleeson CJ and Callinan J said that it was necessary to show actual unfairness.<sup>18</sup> Hayne J expressed similar views and held that Mr Lam had been afforded full opportunity to be heard. He said that even if the Department's letter had created a legitimate expectation the failure to do what was

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<sup>16</sup> "Case Notes: Minister for Immigration v Ah Hin Teoh" (1995) 20 Melbourne University Law Review 248.

<sup>17</sup> In *Teoh* at [105] Their Honours held that the failure in this particular case did not "reasonably found a case of denial of natural justice. The notion of legitimate expectation serves only to focus attention on content of the requirement of natural justice in this particular case."

<sup>18</sup> *Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Lam* (2003) 77 ALJR 699 at [34] and [148].

expected in this particular instance did not have any effect on the weight given to the consideration of the children's best interests.<sup>19</sup> These views are consistent with the approach of McHugh J in *Teoh* where His Honour emphasised that fairness must be decided on a case by case basis<sup>20</sup> and the expectations need to be 'reasonable'.<sup>21</sup>

In *Untan*, the applicant, of Romanian origin, had been living in Australia since 1984 and had committed various criminal offences over a ten-year period. He had three children to an Australian citizen to whom he had been married to for sixteen years. The two teenage boys were intellectually disabled. In 2002, while serving time in prison, he was notified by the Department that they were considering cancelling his visa and was invited to make comments about any information that he thought the Minister should be aware of. In turn, a recommendation was made to the Minister that Mr Untan be deported.

The applicant claimed that his deportation would have devastating consequences for his family because his wife would not be able to cope looking after the two sons without him. He also claimed that it would have a damaging effect on the mental health of the children because they were close to their father and relied on his support. There had been three separate occasions where the Minister had explored the possibility of deportation in the previous five years and on all of these occasions the applicant and his wife were encouraged to present reasons opposing the order. There were two important factual issues. First, whether it was reasonable to expect that a letter written in May 2000 by the applicant's wife, reiterating the problems she had coping with their two sons, would form part of the material presented to the Minister by the Department in 2002. Second, a physician's report, which the Department requested, was not received by the Department at the time a decision was made. The applicant's wife had knowledge of the request, but had no knowledge whether or not it had been received by the Department. The question was whether it was reasonable for her to assume that it was received and taken into account by the Department in making its decision. In a joint judgment Beaumont, Whitlam and Stone JJ stated at [105]:

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<sup>19</sup> *Teoh* at [122]

<sup>20</sup> *Untan v Minister for Immigration* [2003] FCAFC 69 at [98].

<sup>21</sup> *Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Lam* (2003) 77 ALJR 699 at [61].

*“If the appellant's wife's expectations in relation to the letter of 25 May 2000 and Mr Hudd's report were not reasonable then there is no breach of procedural fairness in them not being drawn to the attention of the Minister. In any event, to meet the criteria for procedural unfairness laid down in Lam it would be necessary for the appellant to show that the failure to present these documents to the Minister resulted in actual unfairness. For reasons that follow we are of the opinion that this is not the case.”*

Further, at [108] Their Honours emphasised the principle outlined by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 44-45 that there cannot be actual unfairness in the Minister's failure to consider a report that the Department did not have. In conclusion, the Full Court decided that in this particular case there had not been a denial of procedural fairness.

*Soondur v Minister for Immigration* [2002] FCAFC 324 and *Odhiambo v Minister for Immigration* [2002] FCFAFC 194 are two cases involving the validity of applications made by minors. In *Soondur* a family application for protection was lodged which included two children, one of whom was approximately seven when a first relevant application was made and the other was only one. The first family application was decided against the mother and the daughters in about 1992. In 2000 the daughters submitted their own separate applications which were rejected pursuant to s.48A of the *Migration Act*. The application which was considered by the Full Bench involved ss.36, 46, 47, 48A, 48B, 50, 55, 65(1) and 69(1) of the Act. The court's three main findings can be summarised as follows:

1. It is necessary to enquire whether a particular non-adult applicant in fact had the capacity (in the sense of sufficient understanding of the nature of the Act involved) to make an application at the time the application was made.
2. If the applicant was found to have sufficient understanding, consideration would have to be given as to whether the fact that she, not a parent or guardian, had signed the

form amounted to substantial compliance with the requirement to complete an approved form.

3. The failure to consider the second appellant's rights (by making the investigation of her capacity) was an error of law that fell within s.476 of the *Migration Act* and effected the jurisdiction of the decision-maker.

In short, this case found that there may be a potential ground of review if the Tribunal failed to investigate the capacity of the applicant to make the application.

In *Odhiambo* the Full Court considered the responsibilities of the Minister in relation to unaccompanied children who arrive in Australia and apply for protection visas. In 2000, the applicant arrived in Australia unlawfully. He claimed to have been born in 1984 in Sudan. He applied for a protection visa and a delegate of the Minister refused to grant him one. The RRT affirmed the delegate's decision and a single judge of the Federal Court dismissed his application for judicial review. On appeal the Full Court raised the issue of the effect of s.6 of the *Immigration (Guardianship of Children) Act 1946* (Cth) and whether the Tribunal had erred by proceeding with the hearing in the absence of a guardian actively representing the interests of the applicant. It also considered the 'best interests' of the child principle.

The Full Court held that in this particular case the Tribunal had not erred and there was no jurisdictional error in its decision. They found that the applicant had been provided with qualified and independent assistance in the formulation of his application and at each stage of the proceedings. It was held that in circumstances where a minor is found to be competent the Tribunal is entitled to hear an application for review from them without requiring that minor to be represented by his or her guardian or representatives appointed by the guardian. As stated at [95]:

*"In neither of the present cases did the Tribunal feel it was necessary for the applicant to be actively represented by the guardian in order that it might conduct*

*the hearing for which Part 7 provides. In all the circumstances, we do not think the Tribunal can be criticised for this. Although both appellants were apparently then under the age of 18, they were not "children" or demonstrably unable to have proper regard for their own best interests. They had, in the most difficult of circumstances, apparently lived independent lives for many years. The Tribunal provided an apparently satisfactory interpreter in each case and it knew that each applicant had received qualified and independent assistance in the formulation of his application for a protection visa and at each stage of the Tribunal's enquiry. That matter, we regard, as extremely important. As Counsel for the Minister submitted, it is difficult to see how the extent or quality of legal assistance would have been any greater if it had been commissioned by an independent guardian of these applicants."*

*Chen Shi Hai v Minister for Immigration* [2000] HCA 19 concerned children and the interpretation of Article 1A(2) of the Refugee Convention. The applicant in this case was a three and a half-year old Chinese national born in Australia to Chinese parents who had been refused refugee status prior to him being born in detention. He was the third child to parents who had not been permitted to marry in China due to them being underage. The Tribunal found that Chen Shi Hai came within the definition of Article 1A(2) as fearing persecution for reasons of his membership to a particular social group, namely, 'black children' of China. This was because he was born outside the parameters of China's one child policy and he was born of an unauthorised marriage.<sup>22</sup> The Tribunal accepted that he would be denied access to food, education, health care and would probably face discrimination. The High Court unanimously upheld the decision of the Tribunal.

These decisions are some of those that have consequently provided the jurisprudence by which decisions are made in the Federal Magistrates Court. This court has also heard applications for review involving children as part of its increasing migration workload.

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<sup>22</sup> Lindsay, R, "Chen Shi Hai: The High Court Decision on China's One Child Policy", (2000) 27(6) Brief 10.

## DECISIONS OF THE FEDERAL MAGISTRATES COURT INVOLVING CHILDREN

In two recent judgments, *SHBB v Minister for Immigration* [2003] FMCA 82 and *VFAY v Minister for Immigration* [2003] FMCA 35, the issue of whether separated children in Afghanistan can be considered to constitute a particular social group was considered. The applicants in both cases are teenagers who arrived in Australia as unaccompanied minors seeking protection visas. Driver FM held that the RRT in both cases had made a jurisdictional error by failing to consider a crucial integer of the claim, that is, whether unaccompanied Afghani minors separated from their families could be described as a social group as defined by Article 1A(2) of the Refugee Convention.<sup>23</sup> In *VFAY* at [20] he stated:

*“It was, in my view, inherent in the High Court decision that children per se are readily identifiable as a particular social group. It would be hard to think of any other group within any human society (with the possible exception of women) who are more immediately recognisable as a separate group. The unifying characteristic is that children are immature and subject to the control and protection of their families, or others. They are persons who are too young to be accepted as full and independent members in society.”*

And at [25] and [26] he continues:

*“In my view, the presiding member erred in reaching this conclusion. Children as a whole plainly do share characteristics which make them recognisable or cognisable as a social group set apart from the rest of the community without any reference to concepts of vulnerability and fear of coming to harm. In my view, it*

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<sup>23</sup> United Nations Convention on the Status of Refugees Art 1A(2): “As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return it.”

*is self evident that children are readily identifiable as a social group in any society. I find that children are a particular social group for the purposes of the Convention and that a subset of children can, in particular circumstances, also constitute a particular social group.*

*Children separated from their parents or guardians are also readily recognisable or cognisable without any reference to fear of persecution. All societies take measures to deal with separated children, for example, through the establishments of orphanages and the concept of wardship. In addition, separated children have been recognised internationally as entitled to special consideration as asylum seekers...”*

In *SHBB* Driver FM made a distinction between this particular case and the decision in *SBBN v Minister for Immigration* [2002] FCA 816 and found that there is a clear difference between “young males without a protector, guardian or other means of support” and the position of children in general, particularly separated children.

A notice of appeal to the Full Federal Court in *SHBB* has been lodged.

Another decision of interest is *WAIK v Minister for Immigration* [2003] FMCA 33. In this case the applicant is an Afghani boy whose age was uncertain. He had come to Australia unaccompanied and was seeking protection because he claimed that he had a well-founded fear of persecution on account of the fact that he had committed adultery with a girl who belonged to another subgroup of his tribe. The subgroup of the applicant’s tribe was in dispute with the one she belonged to. The applicant told the story of how the father of this girl had killed her, and attempted to kill him, because of their association. He also explained that the penalty for adultery in the region where he was from was death by stoning.

There were two main issues in this case. First, whether the Tribunal had made a jurisdictional error by failing to make a positive determination as to the applicant’s age

and failing to consider the applicant's rights as a minor. The relevant question was whether the applicant had sufficient capacity to understand the nature of his application and consequently whether the application was valid. Second, whether the Tribunal had failed to consider whether the applicant belonged to a particular social group.

The Tribunal seemed to accept that he feared reprisal from her family and punishment as an adulterer arising from his association with her.

On the first point Raphael FM distinguished the facts in this particular case from those in *Soondar v Minister for Immigration* [2002] FCAFC 324 and *Odhiambo v Minister for Immigration* [2002] FCFAFC 194 and held that because the applicant had been represented at the hearing there was no utility in remitting it back to the Tribunal for further consideration of this point. At [15] he states:

*"I am not aware of any authority which indicates that a minor's representative must be a counsellor of perfection. It seems to me that there is no utility in referring the matter back to the Tribunal for the investigations which the applicant wishes to have carried out because, even if it was found that the applicant was both underage and did not have the necessary mental capacity to represent himself the steps that would have been taken to assist him would consist of appointing a migration agent to act on his behalf. This is exactly what happened. It follows that I do not hold the Tribunal's decision to be invalid on these grounds."*

With regard to the second issue raised, Raphael FM found that the Tribunal had failed to consider whether the applicant belonged to a particular social group and had therefore made a jurisdictional error. At [17] he defined this as being:

*"a member of that section of his tribe which the governor of the state would not seek to protect from extrajudicial killing by persons such as the parents of Nur Bibi who were members of an opposing faction."*

Further at [18] he states:

*“The sole reason for the Tribunal’s unpalatable decision not to provide protection was that the applicant’s fear was not convention related. It did not address the question of the applicant’s membership of a social group defined by the differences between his subgroup and that of the parents of Nur Bibi. Nor did it consider the governor’s expected failure to prevent the execution in the light of this definition of the applicant’s status.”*

A notice to appeal in relation to this judgment has also been lodged and the case is waiting to be heard by the Full Federal Court.

## **HUMAN RIGHTS**

The Federal Magistrates Court hears unlawful discrimination matters under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), in particular, disability discrimination, racial discrimination and sex discrimination.

Along side family law, the other area where UNCROC plays an important role in the decision-making process is in human rights. The convention has been accepted by some 200 State parties, ratified by Australia in 1990, and has been depicted as the “milestone in the development of civilisation and its recognition of the fundamental importance as a universal concept of the rights of the child.”<sup>24</sup> Van Bueren has also described UNCROC as the:

*“Four ‘Ps’: the participation of children in decisions which affect their own destiny; the protection of children against discrimination and all forms of neglect*

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<sup>24</sup> McGoldrick, D, “The United Nations Convention on the Rights of the Child” (1995) 5 *International Journal of Law and Family* 138.

*and exploitation; the prevention of harm to children; and the provision of assistance for their basic needs.*”<sup>25</sup>

Although Australia has ratified UNCROC, it has made it clear it will not incorporate its principles directly into domestic law. In the First Periodic Report submitted by the Commonwealth Government to the Committee on the Rights of the Child it was stated:

*“Australia does not propose to implement CROC by enacting the Convention as domestic law. The general approach taken in Australia to human rights and other conventions is to ensure that domestic legislation, policies and practice comply with the Convention prior to ratification.”*<sup>26</sup>

## **THE RIGHTS OF THE FOETUS VERSES THE RIGHTS OF THE MOTHER AND THE ROLE OF ANTI-DISCRIMINATION LAW**

An interesting issue that has been decided by the Federal Magistrates Court is whether sports administrators can exclude pregnant women from participating in competition sport for fear of liability to an injured foetus. The controversial question of what rights the foetus has attracted much commentary. One commentator has viewed it as the “Not-One-But-Not-Two Concept”<sup>27</sup> and another describes it as an “invisibly linked model”.<sup>28</sup>

McLean and Petersen<sup>29</sup> on the other hand, have discussed the two models used to describe the unusual relationship that exists between the mother and the foetus. The first is the ‘single entity’ model. This model accords the foetus no legal or moral status and treats the foetus as a part of the women’s body, McLean and Petersen state that:

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<sup>25</sup> Jones, M, “Myths and facts concerning the Convention on the Rights of the Child in Australia” (1999) Australian Journal of Human Rights 28.

<sup>26</sup> Commonwealth of Australia Australia’s Report under the Convention on the Rights of the Child (AGPS 1996) p2.

<sup>27</sup> Karpin, I, “Legislating the Female Body: Reproductive Technology and the Reconstructed Woman” (1993) 3 Columbia Journal of Gender and Law 325 at 329.

<sup>28</sup> Seymour J, “A Pregnant Woman’s Decision to Decline Treatment: How should the law respond?” (1994) 2 Journal of Law and Medicine 27.

<sup>29</sup> McLean, S and Petersen K, “Patient Status: The Foetus and The Pregnant Woman”, (1996) 2(2) Australian Journal of Human Rights 229.

*“The ‘single entity’ approach also denies the way many women experience pregnancy or indeed the way other people view the relationship between the pregnant woman and her foetus.”<sup>30</sup>*

The second approach is the ‘separate entities’ model where the woman and the foetus are viewed as two human beings in a single body, both with individual rights. Yet McLean and Petersen claim that:

*“...this model does not accurately depict the special status of the foetus. Although the foetus is capable of becoming separate at some stage it is not separate from the pregnant woman. ‘The foetus exhibits the potential for separation only’.”<sup>31</sup>*

To date, the rights of the foetus have been considered in a number of circumstances, in particular, where a born child wants to sue for damages sustained pre-birth or to inherit under a will where the testator has died pre-birth (see *Elliot v Joicey* (1935) SC (HL) 57; *Watt v Rama* [1972] VR 353).

The two cases that I am about to discuss appropriately relate Seymour’s “invisibly linked model” because this model “...enables the woman to elect to determine that her interests should prevail over those of the foetus.”<sup>32</sup>

The two cases decided in the Federal Magistrates Court involved the applicant Trudy Gardner who plays professional netball for the Adelaide Ravens. In the first of the two cases<sup>33</sup> heard in 2001, Gardner sought injunctive relief against the National Netball League Pty Ltd (NNL) for imposing an interim ban that prevented pregnant women from playing in the National League. She claimed that the NNL had discriminated against her

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<sup>30</sup> Ibid

<sup>31</sup> Ibid

<sup>32</sup> Seymour, J, “Foetal Welfare and the Law” (1995) A Report of an Inquiry Commissioned by the Australian Medical Association.

<sup>33</sup> *Gardner v National Netball League Pty Ltd* [2001] FMCA 50

under s.7 of the *Sex Discrimination Act 1984* (Cth)<sup>34</sup> by preventing her from playing because she was pregnant. Section 7 outlines the requirements for discrimination on the basis of pregnancy.

The Federal Magistrates Court has the power to grant an interim injunction to maintain the status quo as it existed immediately before the complaint is lodged.<sup>35</sup> Commonly, this is the type of relief sought by most applicants seeking to have their positions maintained until they receive a decision from the Human Rights and Equal Opportunity Commission. Gardner sought relief from the ban imposed and the status quo, that is, to allow her to remain playing in the competition, to be maintained. She claimed that as a consequence of the interim ban she had to announce her pregnancy earlier than she wanted to and the media had made extensive coverage of it. She also had to stand down as captain and suffered a loss of income and sponsorship.

Federal Magistrate McInnis, in weighing up the expert medical evidence presented by both sides, had to decide whether there was a serious issue to be tried and consider the balance of convenience in granting the injunction. A further issue was whether, in the alternative, an order for damages would suffice.

The medical evidence that had been presented by the respondent was less convincing than the evidence of the medical practitioner currently treating Gardner. Since Gardner was only 15 weeks pregnant and damage to the unborn foetus within the first 20 weeks of a

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<sup>34</sup> Section 7 Discrimination on the ground of pregnancy or potential pregnancy:

- (1) For the purposes of this Act, a person (the *discriminator*) discriminates against a woman (the *aggrieved woman*) on the ground of the aggrieved woman's pregnancy or potential pregnancy if, because of:
  - (a) the aggrieved woman's pregnancy or potential pregnancy; or
  - (b) a characteristic that appertains generally to women who are pregnant or potentially pregnant; or
  - (c) a characteristic that is generally imputed to women who are pregnant or potentially pregnant; the discriminator treats the aggrieved woman less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat someone who is not pregnant or potentially pregnant.
- (2) For the purposes of this Act, a person (the *discriminator*) discriminates against a woman (the *aggrieved woman*) on the ground of the aggrieved woman's pregnancy or potential pregnancy if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging women who are also pregnant or potentially pregnant
- (3) This section has effect subject to sections 7B and 7D.

<sup>35</sup> Section 46PP of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

normal pregnancy was held to be remote by the medical expert for the applicant, McInnis FM decided to grant the injunction.

A second application was made by Gardner, but this time it was against the All-Australian Netball Association Ltd (AANA Ltd).<sup>36</sup> This respondent is a federal body which organises the sport of netball in Australia having members that are properly constituted organisations controlling netball in the States and Territory. The particular member involved in this proceeding was the South Australian Netball Association Incorporated (SANA). Both of these are incorporated organisations of which the applicant is not a member.

Similar to the first Gardner case, the respondent in this matter had imposed an interim ban in 2001 to stop pregnant women from playing competition netball. Although, the respondent accepted for the purposes of these proceedings that an interim ban discriminated against the applicant on the grounds of her pregnancy according to ss.7 and 22, it claimed that by reason of s.39 of the *Sex Discrimination Act*<sup>37</sup> this conduct was not rendered unlawful. The case centred on the statutory interpretation of s.39 which provides an exemption for voluntary bodies to discriminate against its members on the grounds of sex, marital status or pregnancy in connection with admission and the provision of benefits, facilities or services. The issue was whether this exemption could be extended to include a class of “de facto” members.

The Sex Discrimination Commissioner was given leave to assist the court as amicus curiae and in its submissions contended that:

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<sup>36</sup> *Gardner v AANA Ltd* [2003] FMCA 81

<sup>37</sup> Section 39 Voluntary bodies:

Nothing in Division 1 or 2 renders it unlawful for a voluntary body to discriminate against a person, on the ground of the person's sex, marital status or pregnancy, in connection with:

(a) the admission of persons as members of the body; or  
(b) the provision of benefits, facilities or services to members of the body.

*“s.39 did not apply to the conduct of the respondent because it was directed at the applicant who was not a member and could not be a de facto member because the limitation on membership to state or federal organising bodies does not conceivably include a human female netball player...[and]...that the use of the words ‘in connection with’ does not extend the exemption to the activities of the respondent towards this particular applicant.”*<sup>38</sup>

Whereas, the respondent argued for a liberal and beneficial construction of the words used in s.39 and attempted to demonstrate how the structure and administration of trophy competition could make the applicant a member. In short, what the respondent seemed to be trying to say was “that there really is just a netball family being federal body/state body/clubs/players who should all fall under the umbrella of protection.”<sup>39</sup>

Raphael FM preferred a narrow construction of s.39 and in mentioning *Teoh* he reiterated the importance of interpreting statutes consistently with the terms of overseas conventions and obligations to which Australia has entered. He found that the respondent had discriminated against the applicant and awarded damages in the sum of \$6,750.

At [26] he states:

*“I note that the Full Bench of the Federal Court did not accept a wide interpretation of s.53 of the Disability Discrimination Act 1992 (Cth) in Commonwealth of Australia v Williams [2002] FCAFC 435 at [34]. The clause offends against the now generally accepted proposition that discrimination in any shape or form is wrong. It does so in order to promote what has obviously been considered a higher purpose, namely the freedom of association. If a voluntary organisation wishes to take advantage of this section then it is entitled to do so. But if it constitutes itself in a way which puts up a barrier towards it taking that advantage the courts should not come to its aid. The exemption is limited to the*

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<sup>38</sup> *Gardner v AANA Ltd* [2003] FMCA 81 at [18]

<sup>39</sup> *Ibid* at [21]

*organisation's relationship with its members. Given the constitutions of the respondent and SANA (produced in evidence in these proceedings) the applicant was not and could never have been a member of the respondent. The applicant was not and could never have been a member of SANA. I do not accept that the provision of the service by the respondent to SANA and the provision by SANA to the applicant of the opportunity to play in the trophy constituted a provision of the service to a member within s.39(b). It strains the construction of the sub-section where clear words are used and it widens the scope of an exemption that is clearly contrary to the purposes of the Act and the convention obligations of the Federal Government which passed it.”*

## **CHILDREN AND DISABILITY DISCRIMINATION**

Melinda Jones once stated that children with disabilities are generally “inadequately accommodated (and educated) within the state education systems.”<sup>40</sup>

Discrimination law has established some mechanisms to combat this in an effort to protect the rights of disabled children. The Federal Magistrates Court has been involved in a number of interesting matters where children have alleged that they have been discriminated against by education organisations as a result of their disabilities. The difficulty with these types of applications is that the statutory and common law proof requirements are set high and it is often difficult for applicants to prove their case. Evidence in these cases is usually extensive and some hearings can take 5 or 6 six days. The issues raised are highly emotive and unfortunately a disappointing result can sometimes leave the applicant feeling disheartened about the whole legal process.

Two interesting cases where children have alleged disability discrimination have been dealt with by the Federal Magistrates Court. In *Travers v State of NSW* [2001] FMCA 18 an application was brought by the mother of a child of twelve years with spina bifida,

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<sup>40</sup> Jones, M, “Myths and facts concerning the Convention on the Rights of the Child in Australia” (1999) 5(2) Australian Journal of Human Rights 28.

Stephanie Travers. The applicant claimed that the respondent had discriminated against her by denying her access to the nearest disabled toilet to her classroom. The particulars of the alleged indirect discrimination were outlined by the applicant in the following way:

*“That the school failed to provide Stephanie with a toilet which she could access within twelve seconds, and this involved the imposition upon her of a requirement or condition (to use the toilets which were more than twelve seconds away) with which a substantially higher proportion of non-disabled persons (the other students) were able to comply and Stephanie was unable to comply without seriously embarrassing and distressing consequences, and this was not reasonable in the circumstances.” [5]*

Raphael FM held that while the respondent did not intend to discriminate against the applicant, and had no malicious motivation, it had failed to make accommodations for her special needs. In coming to the conclusion the applicant had been discriminated against under ss.6 and 22 of the *Disability Discrimination Act 1992* (Cth) (DDA) he assessed whether it was reasonable “in all the circumstances” that a student with the applicant’s disability be required to use the toilet in another building when there was one available just outside the classroom door. Even though the one directly outside the classroom was being utilised by another disabled student, Raphael FM found that it was unreasonable to require the applicant to use the toilet further away as it imposed a condition that she was unable to comply with because she was unable to reach it in time to avoid an accident. He awarded the applicant \$6250 for hurt, humiliation and distress.

In *Minns v State of NSW* (No 1) [2002] FMCA 60, the applicant alleged direct and indirect discrimination under ss.5, 6 and 22 of the DDA by the respondent. He claimed that he suffered discrimination at the two schools that he had attended because of his four disabilities namely, Asperger’s syndrome, Attention Deficit Hyperactivity Disorder, Conduct Disorder and manifestations of these disorders. In short, the applicant, a 14 year-old boy, had psychological disabilities, the manifestations of which were

behavioural problems. He alleged that by requiring him to attend school part-time, by suspending him and by expelling him, the schools had discriminated against him.

The respondent submitted that the applicant could not claim both direct and indirect discrimination because they were mutually exclusive<sup>41</sup> and Raphael FM noted “*that which is direct cannot also be indirect*”. However he held that this did not prevent the applicant from claiming that the same set of facts constitutes direct and indirect discrimination.

In determining whether the applicant had suffered direct discrimination, Raphael FM followed the approach of Emmet J in *State of NSW (Department of Education) v HREOC and Purvis* [2001] FCA 1199 to identify a comparator. As an appropriate comparator didn't exist, Raphael FM decided that the best one was a hypothetical student who had moved into both schools with a similar history of disruptive behaviour to that of the applicant.<sup>42</sup> He concluded that the treatment of the applicant was not “less favourable” to that of the hypothetical student in exactly the same position. At [203] he stated:

*“The applicant argues that the hypothetical comparator would not have been treated in this way... He was known to have ADHD. The treatment was presumably intended to ensure that the best use be made of what little attention span he did have. I am not prepared to say that that treatment was less favourable than the type of disciplinary action which counsel for the applicant suggests. Faced with the choice between a disciplinary measure and a non-disciplinary measure the school chose a non-disciplinary measure. That is not, to my mind, less favourable treatment.”*

Ultimately Raphael FM held that on the basis of the evidence before the court he was unable to find that the applicant had suffered direct discrimination. He also held that the school's disciplinary policies were reasonable as classes would not have been able to

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<sup>41</sup> [2002] FMCA 60 at [173]

<sup>42</sup> Ibid at [197]

function if the student could not be removed for disruptive behaviour and therefore the claim of indirect discrimination could also not be sustained. The application was dismissed.

An important issue in the case was whether the applicant's conduct was itself the disability from which he suffered or the manifestation of it. Raphael FM noted that an application for special leave to appeal on this issue had been made to the High Court.<sup>43</sup> At [267] he stated:

*“The findings which I have made make it unnecessary for me to consider the difficult question of whether Ryan’s conduct is itself the disability from which I have found he suffers or the manifestation of it. I am aware that leave to appeal to the High Court has been sought in Hoggan and that this will be an issue to be taken up by that Court if special leave is granted. If I am found to have been wrong in any of the findings which I have made so that the disability/manifestation dichotomy becomes an issue it is best that I do not appear to have pre-judged it by making any comments thereon in these findings.”*

## **CHILDREN AND RACIAL DISCRIMINATION**

In *AB v NSW Minister for Education* [2003] FMCA 16 the applicant, a young boy of considerable intelligence had been granted a place at a Selective High School. His mother acted as his litigation guardian and claimed that he was discriminated against by the respondent on account of his nationality. The applicant and his parents were non-residents of Australia and one of the criteria for retaining a place at the selective school was that the student must be a permanent resident of Australia. A letter had been sent to the applicant from the respondent that read:

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<sup>43</sup> *Alexander Purvis v State of NSW (Department of Education & Training)* [2002] FCAFC 106 (“Hoggan No 2”)

*"The Department of Education and Training advises that the application package for year 7 entry to selective high schools clearly advises parents and prospective candidates that students enrolling in a selective high school must be Australian citizens or holders of a visa granting permanent resident status in Australia.*

*I understand that you indicated on the application form that AB was either a citizen or permanent resident of Australia. However, I am advised that you have subsequently notified the Department that your son is currently on a Bridging Visa Class E. This is a temporary visa that permits enrolment to a non-selective government high school.*

*I regret, therefore, that AB is currently ineligible for selective high school placement. However, a position will be held for him until 31 January 2003 in the hope that he is granted permanent residency in the intervening period.*

*Moreover, if AB is granted permanent residency at any stage after the beginning of Term 1, 2003 until June 2003, he will be placed on the reserve list at Penrith High School."*

Upon receipt of this letter the applicant took steps to refer the complaint to the Human Rights and Equal Opportunity Commission (HREOC) and lodged an application in the Federal Magistrates Court for an interim injunction that would prevent the respondent from withdrawing the place offered and an order to allow the boy to attend school until the matter had been resolved by the Commission under s.46PP of the *HREOC Act*.<sup>44</sup> In

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<sup>44</sup> Section 46PP Interim injunction to maintain status quo etc:

- (1) At any time after a complaint is lodged with the Commission, the Federal Court or the Federal Magistrates Court may grant an interim injunction to maintain:
  - (a) The status quo, as it existed immediately before the complaint was lodged; or
  - (b) The rights of any complainant, respondent or affected person.
- (2) The application for the injunction may be made by the Commission, a complainant, a respondent or an affected person.
- (3) The injunction cannot be granted after the complaint has been withdrawn under section 46PG or terminated under section 46PE or 46PH.
- (4) The court concerned may discharge or vary an injunction granted under this section.
- (5) The court concerned cannot, as a condition of granting the interim injunction, require a person to give an undertaking as to damages.

deciding whether the policy of the respondent not to allow non-residents entry into selective schools constituted indirect discrimination, Raphael FM looked at the implications of s.9(1) of the *Racial Discrimination Act 1975* (Cth) (RDA) which states:

*“It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.”*

The first issue was whether there was a distinction between “national origin” and “nationality”. The applicant’s case was based on the fact that he had allegedly been discriminated on the basis of the latter. In referring to English and Australian authorities which held that there was a distinction between the two and confirmed the right of the state to make laws or enact policy which differed between people who were its citizens and persons who were not. At [13] Raphael FM stated:

*“It seems to me that the diverse multicultural society found in New South Wales and in particular in Sydney militates against the possibility that requiring a person to comply with the condition of citizenship or residence would have the effect of nullifying or impairing that person's recognition, enjoyment or exercise, on an equal footing, by persons of the same national or ethnic origin as the other person of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.”*

The second issue for consideration was the status quo as it existed immediately before the complaint was lodged to HREOC. After having considered the judgements of Heerey J in *McIntosh v Australian Postal Corporation* [2001] FCA 1012 and *Beck v Leichhardt Municipal Council* [2002] FMCA 331 Raphael FM concluded at [15]:

*“In this case I accept the submission of the respondent that the status quo consists of the offer to the applicant of a place in the Penrith High School subject to his complying with the condition that prior to enrolment he be an Australian citizen or permanent resident. The applicant seeks an injunction which would have the effect of holding open a place to a person who does not comply with such condition. That is not the status quo. These injunctions exist to prevent rights from being taken away from persons who have made a complaint to HREOC. They do not exist to create rights. If I awarded an injunction to the applicant on the basis of the first prayer in his application there would be little utility, because the Minister has indicated no intention of withdrawing the place offered to the applicant on the condition upon which it was offered. It is simply that the applicant cannot fulfil that condition. If I was to grant the applicant an order in the nature of his second prayer I would be doing far more than preserving the status quo; because that requires the Minister to allow the applicant to attend a school that he was not attending at the date upon which the complaint to HREOC was filed.”*

In view of the fact that the applicant had failed to prove the necessary elements of indirect discrimination as outlined by s.9 of the RDA, the status quo criteria, and it had not been necessary to consider the balance of convenience argument, Raphael FM dismissed the application for an interim injunction.

### **AN INTERESTING TWIST ?**

The confluence of the ‘best interests’ principle in the work of the Federal Magistrates Court is, to some extent, emphasised by the decision of the Family Court of Australia in the Bakhtiari case.<sup>45</sup> At the end of July 2002, the two Bakhtiari boys, aged approximately 12 and 14, filed proceedings in the Family Court of Australia through their next friend, their mother. The respondent named in the proceedings was the Minister for

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<sup>45</sup> B (infants) (by their next friend) and B and Minister for Immigration and Multicultural and Indigenous Affairs, Dawe J (unreported) delivered 9 October 2002

Multicultural and Indigenous Affairs. The children sought orders that would bring about their release from the Woomera Immigration Reception Processing Centre and prevent their return to detention. In September, the father of the boys sought certain orders that the boys and their three young sisters reside with him and in the alternative, orders for contact. The Minister sought the dismissal of the proceedings and submitted that the court had no jurisdiction to determine the dispute or make the orders sought.

Dawe J. noted the issues to be determined were the threshold issues surrounding the jurisdiction and power of the Family Court of Australia to make orders and to bind the Minister. As part of the determination the court needed to examine;-

- 1) the interaction between the *Family Law Act* and the *Migration Act*
- 2) the extent of the application of the provisions of the *Family Law Act*
- 3) the extent of the welfare jurisdiction
- 4) the relevance of the External Affairs power to the statutory grant of jurisdiction to the Family Court of Australia.

Dawe J. dealt with each of the issues as follows:

That applying accepted principals of statutory interpretation, on the interaction between the *Migration Act* and the *Family Law Act*, the provisions relating to the welfare of children in the *Family Law Act* fall readily into the category of a statutory power of general application, which should be read subject to the specific, unambiguous terms of the *Migration Act*.

As to the extent of jurisdiction of the Family Court of Australia, Dawe J. held that the Family Court of Australia in South Australia did not have jurisdiction to make orders other than between the parties and therefore cannot bind a Minister of the Crown.

As to the extent of the welfare jurisdiction, Dawe J. held that the welfare jurisdiction does not extend to a power to override the exercise of any statutory power, merely because that power may impact upon the interests of children. She held that there is nothing in the *Family Law Act*, or implied by its provisions, which can give control over the Minister's behaviour or that of his officers to the Family Court, even if the behaviour which it is sought to control was found to be contrary to the best interests of the child. In finding this she did not exclude the possibility that some other court may have jurisdiction over actions of the Minister, but that the welfare jurisdiction in the Family Court does not give such jurisdiction or power to the Family Court.

As to the relevance of the external affairs power to the statutory grant of jurisdiction of the Family Court of Australia, Dawe J. held that even if the *Family Law Act* granted an unfettered jurisdiction in relation to the welfare of children to make orders which bind the Minister, the final problem is the constitutional basis of the power to legislate for such jurisdiction. Dawe J. held that the external affairs power when combined with UNCROC may give the parliament power to make laws implementing the matters in the Convention. However, parliament had not done so. She held that nothing in the *Family Law Act* suggests or supports a conclusion that the Act implements any part of the Convention.

She concluded that the applications by the children and the father were misconceived and fatally flawed.

That case is the subject of an appeal to the Full Court of the Family Court, which has heard, but not yet determined the matter. It would be an interesting result if the Federal Magistrates Court found itself able to exercise migration and family law jurisdiction in the same case. The confluence of the 'best interests' principle may be closer than we think.

*13 May 2003*