

LEGISLATIVE ASSEMBLY INQUIRY INTO CHILD PROTECTION

NOTES on Children's Rights and a Tasmanian Human Rights Bill.

Paul Mason

Introduction

Recognising the rights of the child is fundamental part of creating community-owned, wrap around child protection in Tasmania.

Child protection not based on child rights is paternalist and by minimalising the viewpoint of the child, condemns governments to the crisis management and repeat inquiries into failed policy and failed service provision.

Proposed Right #13 in the "Human Rights Charter Legislative Project, Directions Paper" (2010), Table 3, p 25, reads as follows:

The right to the protection of the family and children.

This paper examines the words of that proposal by reference to the UN Convention on the rights of the Child (UNCROC) and examines whether the Directions Paper conceives the rights of children in families as distinct and potentially in conflict with families themselves and other members of their families.

Discussion

There are two other Rights in Table 3 of the Directions Paper that refer expressly and separately to rights of children, namely

The right of children to be protected from economic and social exploitation; and

The right of children to special treatment in the criminal justice process

The balance of the Rights in the table and in the Table 4 of "Additional Rights" of people with disability, also apply to children as people, as they do to adults in the wider community, or to children as people in ethnic, religious and linguistic minorities.

Each of the other rights protects some interest of individuals, even the proposed "right of minorities to enjoy their culture" as it is a right that can belong to and can be exercised by individuals or groups within those minorities.

The wording of this proposed "Right" #13 highlights three questions, the answers to which are clear in the other "Child" Rights mentioned and in the other Rights in Table, namely:

1. what is the family and are the children to be protected from?
2. what interest of family members is being protected by this "right"?
and,

3. taking each member of each family and taking the family as a whole, whose "right" is it to exercise the right "to protection of the family"?

There is in every family a potential for conflict between the interest of families, and the adults in families, and the interests of children in families. Likewise and most importantly there is a potential for conflict between the protection of the family and the protection of children.

This paper examines two Rights contained in the UNCROC peculiar to children (i.e. not in the UDHR, CERD, ICESCR, ICCPR, CEDAW, UNCAT or CRPWD) and suggests that in order to protect the human rights of children within families, whilst protecting the family, these interests have to be separated out or disaggregated, and replace the proposed Right #13.

UN CONVENTION ON THE RIGHTS OF THE CHILD

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.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

TASMANIA'S HUMAN RIGHTS BILL

PROPOSED RIGHT NO.13:

- * The right to the protection of the family and children.

The draft is predicated on the idea that the protection of "the family" protects children.

It conceals the conflicts of competing interests within every family. It is now well settled research opinion that the greatest risks to children (from Sudden Unexplained Death in Infancy (SUDI), through pool deaths, through motor injuries, to neglect and sexual assault) arise precisely within their families.

The draft is predicated on the idea that "the family" is a discrete being, with which has this right to protection.

Who exercises this "right of the family" within the family: the child or the adults, and which adult? Are there things families do that do not protect children? And how does a child exercise their own right if it might not protect the family?

The draft does not specify what kind of threat or risk "the family and children" are to be protected from.

Are they both, "the family" on the one hand and "children" on the other hand, entitled to protection from the same things, or different sets of things? When children are in more than one family, what things are children protected from within their different families.

The wording is more descriptive of a universally desired outcome than a particular "right".

So, what are the rights that will achieve that outcome of protection?

- * The right of families to be recognised as the fundamental social unit.
- * The right of children to protection from all forms of physical or mental violence, injury or abuse, neglect or negligent maltreatment or exploitation while in the care of parent(s), legal guardians(s) or any other person who has the care of the child.

PARAMOUNTCY PRINCIPLE

It seems that there is political unanimity that children are Tasmania's most important human asset and that for government "Children are at the centre of everything we do". Tasmania's child protection and youth justice statutes have this principle included in their objects or principles, and the reasons for that are trite.

It derives from common law developments over the last 130 years and is enshrined in the UN Convention on the Rights of the Child, article 3 refers to "a primary consideration" rather than "the paramount consideration". Some things do turn on the distinction especially in the international sector, but domestically in Federal and in State statutes and the common law the "Paramountcy Principle" is uniformly expressed thus:

- * That in all actions concerning children the best interests of the child shall be the paramount consideration.

What is now needed in Tasmania as part of primary child protection is to take this principle outside the law of child protection and youth justice and apply it to all law and all policy that is concerned with children.

The Human Rights Bill presents the opportunity to do that which will not present itself in any other whole of government context.

THE DOJ HUMAN RIGHTS CHARTER CONSULTATION

In Section 6.1 the Department writes:

Table 3 presents the rights and freedoms recommended for the model in this paper in comparison with the rights recommend by the Tasmanian Law Reform Institute as well as the rights in the Victorian Charter and ACT Human Rights Act.

The following Section "Additional Rights" sets out the additional rights the Department has decided to include in the Directions Paper after "targeted consultation" (i.e. consulting with people chosen by them). It provides for but does not encourage consideration of any other rights.

The paper does include the questions:

Consultation Points 1. Are the rights recommended by the Institute and listed in table 4 appropriate to Tasmania, and are they sufficient? 2. What rights from the International human rights treaties, not listed here, would you like to see included, if any?

This will I predict be the most hotly and widely argued part of the proposal, because there may be "special pleading" eg from shooters' groups, religious minorities, sex and gender rights advocates and the like.

Children's special rights are not an addition as they are already at least recognised in the Table 3 list, but in my view ineffectually and in a confused manner.

I realise the enormity of the task of re-directing the oil tanker of a government Department in consultation phase, as my experience is that by the time it reaches that stage, government has already decided what it is going to do, and an early draft of the Cabinet Minister and drafting instructions are waiting to be sent off to Parliamentary Counsel.

This is why I have brought this issue to this Committee to articulate unequivocally the rights of children to protection from harmful care and to make their interests the paramount consideration.

Paul Mason

West Hobart

12 November 2010