FIRST WORLD CONGRESS ON FAMILY LAW AND HUMAN RIGHTS

SYDNEY, AUSTRALIA 6 JULY 1993

THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD AND THE DECLARATION OF THE RIGHTS OF THE CHILD AS PART OF INTERNATIONAL LAW AND MUNICIPAL LAW*

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The Honourable Justice Michael Kirby AC CMG**

THE CHANGING LANDSCAPE OF INTERNATIONAL LAW

Nearly seventy years have passed since the Assembly of the League of Nations in 1924 endorsed a resolution on a *Declaration of the Rights of the Child* which had been promulgated a year earlier by the council of the Save the Children International Union.[1] That *Declaration* committed the members of the League, including Australia, to be "guided by the principles" of the *Declaration*. It endured for a quarter of a century.

After the Second World War, the establishment of the United Nations in 1945 was quickly followed by the adoption on 10 December 1948 of the *Universal Declaration of Human Rights*. Since that time, more than sixty human rights treaties and declarations have been adopted by the United Nations alone. Australia is a party to many of them. Most notably, it is a party to the *International Covenant on Civil and Political Rights* of 1966 and the *First Optional Protocol* to that *Covenant* which affords a right of

individual complaint to the Human Rights Committee of the United Nations. There is already at least one such complaint before that Committee, brought by Mr N Toonen of Tasmania in respect of the criminal laws of that State of Australia which still punish and stigmatize consensual adult homosexual conduct. Justice Elizabeth Evatt, a past-Chief Judge of the Family Court of Australia and now President of the Australian Law Reform Commission has been elected a member of the Human Rights Committee.

The 1924 *Declaration of Geneva*, adopted by the League of Nations, became the basis for a somewhat expanded *Declaration on the Rights of the Child* which was adopted by the General Assembly of the United Nations in November 1959. It was this text which stimulated the initiative to draft a convention. Such a convention would translate the general principles of the *Declaration* into international law, binding at least upon the States parties to the convention after it came into force.

The actual proposal for a convention originated in an initiative of the Government of Poland in 1978.[2] Its objective was to have a convention adopted in 1979. This was the year which had been designated as the International Year of the Child. The urgency proved a too bold an ambition. Nevertheless, the General Assembly of the United Nations in 1978 urged the Commission on Human Rights to give priority to discussion of such a proposed convention. It was in this context that the Commission established a working group. The working group met intermittently over the ensuing decade. It operated by consensus. At no time during its work was any proposal put to a vote.[3] This resulted in the abandonment of many proposals, notwithstanding a clear majority for them on the committee. The breakthrough came when East-West relations improved. It was stimulated by the completion of the drafting of the

Convention Against Torture in 1984. It was encouraged by a major contribution by non-governmental organisations.[4]

There were four major problems which had to be hammered out. The first was the definition of the "child" including when life begins (at conception or birth) and when childhood ends. This problem was ultimately solved by a decision to delete mention of the "minimum age" in article 1.

The second problem concerned freedom of religion. The Islamic participants, notwithstanding article 14 of the *International Covenant on Civil and Political Rights* objected successfully to the provision by which a child should have the right to choose a religion.

The third problem arose from certain references to adoption. The fourth concerned the age at which children should be permitted to take part in armed conflict. Most participants wanted this to be fixed at 18 years. However, upon the insistence of a number of Asian states, it was dropped to 15 years.

With these compromises and deletions the text of the convention was adopted by the General Assembly on the recommendation of the Commission on Human Rights and ECOSOC on 20 November 1989.

To come into force as part of international law, it was necessary that there be lodged 20 instruments of ratification. The twentieth instrument was deposited on 2 September 1991. Shortly before that date, on 22 August 1991, after a great deal of public controversy, Australia, under the hand of Dr Peter Wilenski (then Ambassador to the United Nations) signed the *Convention*.[5] It has now been ratified by 32 Commonwealth countries.[6] It has attracted ratifications from about two-thirds of the membership of the United Nations.[7] At the Second World Human Rights Conference in Vienna in June 1993 UNICEF (the UN Children's Fund)

launched an appeal for the ratification of the *Convention* by all countries by 1995. It pointed out that 1.5 million children had been killed over the past decade in wars, 4 million had been injured, 15 million were living in refugee camps. Some 12 millions children were said to be homeless.

The *Convention* has been described as "the most complete statement of children's rights ever made and ... the first to give those rights the force of international law".[8] Children constitute about a half of the world's population. But they carry a disproportionate share of hardship, deprivation and abuse. According to one estimate about 155 million children under the age of five years in developing countries live in absolute poverty. Millions, including many in Western countries, such as Australia, are maltreated, neglected and facing problems of drug use and sexual abuse.[9] Such statistics are numbing to the mind Behind them lie young members of humanity who must wonder about their predicament and sometimes doubt the advantages of its existence.

THE AUSTRALIAN CONTROVERSY

During the long period as the *Convention* was being drafted, nobody outside the charmed circle of experts paid much attention to it. Few even knew of its existence. But when, at last, the *Convention* was finalised and presented to nations for signature and ratification, there was a great outcry in some circles in Australia opposing the proposal that Australia should ratify the *Convention*.

Some of the opposition was voiced upon grounds familiar enough to most Australians, namely the Federal nature of the Australian Constitution. Under that Constitution, most (but by no means all) matters pertaining to child welfare and children's rights are governed (as in the United States) by State law and by the common

law. It was therefore feared by some critics that, by dint of ratification of the *Convention* the Federal compact established by the Australian Constitution would be undone or altered without the protective safeguard of the referendum process which is required to authorise changes to the text of the Constitution.[10]

The other source of opposition was from certain church groups and religious organisations. They feared what they saw as the erosion of family rights in respect of children, the adoption of libertarian ideas and the undermining of Christian values. Given the concerns that had already been voiced in the United Nations working group by representatives of countries with fundamentalist Islamic governments, it should not have been surprising that there would have been some Christian groups, with a like or similar fundamentalist approach, who might object to the *Convention*. So it proved.

One Australian lawyer, Mr Charles Francis QC of Melbourne, attacked the Australian signature of the *Convention* for the legal effect which he feared it might bring:[11]

> *"Much of the UN Convention on the Rights of the Child is, of course, unobjectionable but it seems to me that there are five Articles which create grave problems, namely Articles 12, 13, 14, 15 and 16. These Articles will prove a panacea for spoilt brats in the future Western world, which will make it impossible for many parents to exercise proper control or discipline over their children, and will tend to place teachers in a far more dominant position in the determination of the destinies of children. In the final analysis, many of the decisions of parents as to how their children should be brought up will, in future, be determined ultimately not by the parents themselves, not necessarily by teachers but by the bureaucrats in Canberra."*

A similar view was expressed by Mrs Valerie Renkema, National Secretary of the Australian Family Association.[12] She declared the *Convention* a threat to family privacy. She was unconvinced that there was sufficient protection for parental rights in Article 5 of the *Convention*. That Article states:

> *States parties shall respect the responsibilities, rights and duties of parents ... to provide in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present convention."*

She asked who would determine what is "appropriate" - State agencies, the Ombudsman, the child or the parent? Furthermore, she objected to the deletion of the explicit right to life of the unborn child which, she declared, was "the most fundamental of all rights".

You will have observed that it appears to have been accepted by these and like critics that the *Convention*, once adopted and ratified by Australia, would have immediate force of law.

Justifying the commitment of the Government to ratify the *Convention*, the then Prime Minister, Mr R J L Hawke, stressed its symbolic value and the commitment which the Government had to the *Convention*. He stressed that it recognised the:

> *"... central and crucial place of the family as the fundamental unit of society."*[13]

He went on:

> *"I can assure you that no caring parent or guardian need fear that the convention will diminish in any way their traditional rôle. The convention has been endorsed by a wide range of non-government and community organisations working on behalf of children both in Australia and overseas. For example, among Church groups, the Catholic Bishops of Australia and the Social Responsibility Committee of the Uniting Church have expressed their support of the Convention."*[14]

In the face of the campaign of opposition, the Deputy President of the Human Rights and Equal Opportunity Commission (Mr Brian Burdekin) hastened to point out that the *Convention on the Rights of the Child*, whilst creating new legal obligations binding on Australia (and possible opportunities for increased Federal

responsibility) lacked any standing international monitoring mechanism. There is nothing in the *Convention* similar to the Committee established to receive individual complaints under the *International Covenant*. In fact, the only supervision is provided by the United Nations' Committee on the Rights of the Child.

Reflecting the same view a distinguished commentator on the *Convention*, Dr Rose D'Sa of the United Kingdom, drew the defect of this machinery to the notice of the 10th Commonwealth Legal *Convention* in Nicosia, Cyprus in May 1993:[15]

> *"State parties accept the duty to submit regular reports directly to the Committee on the steps they have taken to put the Convention* into effect and on progress regarding implementation of children's rights. These reports are made public and given wide national distribution. However, despite the encouragement of Amnesty International to enshrine a right of individual petition, this was not included and so the Committee is only able to report on progress made by States parties and to be a diplomatic channel through which States can request technical advice and assistance in protecting the rights of the child. In other words, there are no specific international law sanctions for breaches of the *Convention*. It may not therefore be a route of redress for the impatient!"

BRINGING AUSTRALIAN LEGISLATION INTO LINE

As often happens in a country such as Australia, the ratification of the *Convention* mobilised a number of non-governmental organisations concerned to further its objects. A Children's Rights Coalition was established in February 1992 by delegates to a National Conference on implementing the *Convention* in Australia. That conference convened in Adelaide. The Working Party accepted a mission to collaborate and co-ordinate activities on implementing the *Convention* in Australian law and practice; to promote, monitor and report on compliance with its guarantees; to pursue the establishment of Children's Commissioners in all jurisdictions; and to promote sub-branches. Involved in the work of

the Coalition were representatives of Aboriginal and Torres Strait Islander children's interests, leading child welfare and equal opportunity officials. Ms Moira Rayner, Victorian Commissioner for Equal Opportunity became the convenor.

In March 1993 the report of the Coalition *Where Rights are Wronged* was published. It castigated the Australian Government for failing to meet the January 1993 deadline for the delivery of its first report pursuant to its obligations under the *Convention*.[16] Ms Rayner observed:

> *"The community have heard enough rhetoric about respect for the families and children: it was time to do something. Australia should have filed its first report ... Why must it take a photograph of a battered or dead toddler to shake our complacence? There are hundreds of deprived, suffering and alienated children in this country and there will be thousands more unless we respond honestly to the research documented in the findings of this report."*[16]

The Coalition report lists a large number of legislative provisions, Federal and State, which, it says, contravene, or do not meet, the standards laid down by the *Convention*. There have been other, similar examinations of Australian law and practice, tested against the requirements of the *Convention*. Thus, Professor Terry Carney, in a very detailed paper has examined the laws of the State of Victoria and has come up with a mixed report card.[18] This is a typical way by which domestic law is brought into compliance with the standards laid down by international *Conventions*. Another typical way is by enhancement of the jurisdiction of the Australian Human Rights and Equal Opportunity Commission to receive and investigate complaints of suggested derogations from conformity to a convention. Such complaints can sometimes lead to administrative reforms, changes of official practice and proposals for legislative amendment which produce

alterations of municipal law to bring into line with the perceived obligations of the international *Convention*. There is certainly a need for this to be done in Australia. Nowhere more is that need revealed than in the hastily enacted legislation of Western Australia, *The Crimes (Serious and Repeat Offenders) Sentencing Act* 1992 (WA). The Children's Rights Coalition added its voice to that of the Australian Section of the International Commission of Jurists and many judges and other community leaders protesting against this discriminatory piece of legislation. Its genesis arose in the nature of the media coverage which followed a small number of crimes by juveniles that ended in a tragedy. The Act breached a number of Articles in the *Convention on the Rights of the Child*. For example, Article 2 requires that there be no discrimination of any kind. Yet the Act provided for sentencing of some children under an Act other than the *Children's Court Act*. The differential procedure would undoubtedly impinge with particularity upon Australian Aboriginal children. By the imposition of a mandatory sentence, the Act probably fails to ensure the paramountcy of pursuit of the best interests of the child as required by Article 3. By providing for an indeterminate sentence with a review by an administrative official, it probably breached Article 12.

The critics of this legislation were able to invoke in their pressure for change the international convention: drawing attention to the departure of the statute from accepted global principles. An All Party Federal Parliamentary Committee reported that it was opposed to the Western Australian legislation, amongst other reasons, because it would bring Australia into breach of its international treaty obligations assumed by the *Convention*. The immediate point to be made is that the *Convention* afforded a useful tool in the necessary pressure to bring Australian legislation back into

conformity with accepted international law.

Hovering in the background against recalcitrance on the part of State politicians and officials is also the possibility that the Federal Parliament might feel obliged, and constitutionally enabled, to step in to remedy the breach.

In short, whilst the concerns of the critics of ratification were probably (in some cases at least) based upon the misapprehension that ratification would automatically bring the *Convention* into operation as part of Australia's domestic law, they were almost certainly right in judging the likely long-term effect which the *Convention* would ultimately have on our statute law and administrative practice. In a democratic, open and accountable society conforming to the rule of law (such as Australia generally is) a departure from an international *Convention* which Australia has ratified will ordinarily be cured. It may take time, even years. But it is not usual for Australia, at least over the long haul, to accept international obligations which it does nothing to implement. This, then, is the first way in which, through legislative change and alteration of administrative practice, the standards of the *Convention on the Rights of the Child* will come into force in Australia's domestic law.

A NEW ROLE FOR THE AUSTRALIAN COURTS

There is however another, newer, and quite interesting development which needs to be noted. I refer to the application by the domestic courts of the principles of international law enshrined in a ratified treaty.

The traditional view, adopted by common law countries which derived their legal tradition from England (as distinct from the United States) is that international law is not, as such, part of domestic law. In 1948, Justice Dixon of the High Court of Australia

expressed the view that Blackstone's opinion in his *Commentaries* that the law of nations was part of the law of the land was now regarded as being "without foundation".[19] To the same effect was the opinion of the present Chief Justice of Australia in 1982 when he called attention to the difference in this regard of our law when contrasted with that of the United States [and he might have added of most civil law countries] where treaties are self-executing and create rights and liabilities without the need for specific local legislation.[20]

The reason for this dichotomy of lawmaking may be explained. Legislation is typically made, under our system of government, by elected parliaments with the assent of the Crown. In that way both the Executive Government and the legislature take part in the process. Treaties, on the other hand, are typically made on behalf of the country in the name of the Executive Government (or Crown alone). This is a relic of the history of sovereignty at least in countries deriving their legal system from Britain. But it reflects the reality of those who take part in the treaty negotiation process.

Even where the Executive Government controls the Lower House of Parliament, it may not control the Upper House. In the Australian Federal Parliament, it rarely commands both. Thus, the mere fact that the Executive approves a convention does not mean that Parliament necessarily does so. This has provided a reason for a recent Australian practice of often seeking the approval or endorsement of the Federal Parliament for the ratification of a convention.

A further reason for caution lies in the Federal compact to which I have referred above. The Privy Council recognised the danger to the delicate Federal balance of the adoption by the Federal Government of an international convention which might be used to

undermine rights previously thought to be generally belonging to the States. It did so as long ago as 1937 in an appeal from Canada.[21] The same view was expressed in Australia when Federal legislation was enacted to give effect to the *International convention on the Elimination of All Forms of Racial Discrimination*. However, the majority of the High Court of Australia held otherwise.[22] Their approach has been endorsed many times since.

These issues are not entirely academic. In Australia, for more than two decades, there has been a debate about the adoption of a constitutional bill of rights. Australia is now one of the few countries with a written constitution not to have a general *Charter of Rights*. But the fact remains that the last major endeavour to add certain rights to the Constitution by referendum in 1988 failed dismally. Only 33% of the population voting (and none of the States) could be persuaded to support the idea. Australians remain impenitently committed to a Federal polity with a high measure of Parliamentary sovereignty. The foregoing are reasons for caution in the adoption of basic rights by stealth where the people have declined the direct method of doing so.

Nevertheless, there is a growing body of legal opinion which endorses the notion that judges, in their inescapable, creative law-making function, may utilise international law. They may do so in the development of the common law where there is no precedent binding upon them apt for the case in hand. They may also do so in the interpretation of ambiguous legislation so as to ensure that it conforms, as far as possible, to their country's obligations under international law. These principles were adopted by a group of Commonwealth lawyers at Bangalore in India in 1988.[23] They have been reaffirmed since then by similar meetings held in Harare,

Banjul, Abuja and at Balliol College, Oxford. What is more important, the *Bangalore Principles* have gathered an increasing number of judicial affirmations, including in the High Court of Australia, the Family Court of Australia and my own court, the Court of Appeal of New South Wales. These three courts are, by far, the busiest appellate jurisdictions in the country. The High Court is the Federal Supreme Court of Australia.

I have elsewhere described the course which this process of the utilisation of international law in domestic judicial work has taken.[24] In a series of cases, international law, particularly the *International Covenant on Civil and Political Rights*, has been invoked at a critical point in my own reasoning to explain why I prefer one development of the common law to another, one application to a different one or one construction of a statute to the alternative urged on the court.[25] Sometimes the point can be quite important. Thus in a recent application of the confiscation of the proceeds of crime legislation it was certainly a significant aid to my construction of the legislation to take into account the fundamental rights provided by law under the *International Covenant on Civil and Political Rights*.[26] The Australian legislation had to be construed against the backdrop of those rights which (in large measure at least) reflect the fundamental rights of the common law: being both an attribute of universal human rights common to all legal systems and expressed in an international instrument in the development of which Anglophone lawyers played a leading part.

A typical illustration of the way in which a Convention expressing international law may be used in analogous reasoning for the development of the common law is the decision in which I participated in *Gradidge v Grace Bros Pty Limited*.[27] That was a case in which a judge had ordered an interpreter of a deaf mute

to cease interpretation of exchanges between the judge and counsel. The mute remained in court. She was the applicant in a workers' compensation case. The judge refused to proceed when the interpreter declined to cease interpretation of the proceedings as directed. The Court of Appeal unanimously held that the judge had erred. In doing so both Justice Samuels and I referred to the *International Covenant on Civil and Political Rights*. I mentioned, in particular, in criticising an earlier decision in Australia about the entitlement to an interpreter, the provisions of Article 14.1, 14.3(a) and (f) of the *Covenant*. I stated that those provisions are now part of customary international law. It was, in my view, desirable that "the [Australian] common law should so far as possible be in harmony with such provisions".

Justice Samuels said this:[28]

> *"For present purposes it is essential to balance what procedural fairness requires in circumstances such as this against the necessity to permit a trial judge to retain the ultimate command of order and decorum in his or her court. It seems to me that the principle which applies is clear enough: it must be that any party who is unable (for want of some physical capacity or for lack of knowledge of the language of the court) to understand what is happening must, by the use of an interpreter, be placed in the position which he or she could be if those defects did not exist. The task of the interpreter in short is to remove any barriers which prevent understanding or communication ... The principles to which I have referred so far as criminal proceedings are concerned is acknowledged by the International Covenant on Civil and Political Rights ... which is now to be found as part of Schedule 2 to the Human Rights and Equal Opportunity Commission Act 1986 (Cth)."*

International law, in this way, became a touchstone and a stimulus for our decision. There was no binding authority on the point. There was no common law which decided it. The relevant rule about interpreter had to be fashioned by the judges. The case might just as easily have arisen in respect of a child as of a deaf mute. Thus, under the *International Convention on the Rights of the*

Child express provision is made for the right to an interpreter where needed.[29] Had the *Convention* been in force and had a child been involved, the Court could, I believe, have invoked that *Convention* to help it to the conclusion which reason and commonsense - the great wellsprings of the common law - seemed anyway to dictate. In this way, international law reinforces, stimulates and underlines the modern application of the common law.

Before I embarked upon my odyssey of pursuit of this idea the High Court of Australia had, from to time, adopted a somewhat similar view in several cases. In one, concerned with the custody of a child, the High Court drew upon international law for defining the rights of a parent to take part in proceedings affecting such custody. Justice Deane stated that the interests of the parent in such proceedings were not merely indirect or derivative. After referring to the report of the British Section of the International Commission of Jurists, his Honour went on:

> *"Regardless ... of whether the rationale of the prima facie rights and authority of the parents is expressed in terms of a trust for the benefit of the child, in terms of the right of both parent and child to the integrity of family life or in terms of the natural instincts and functions of an adult human being, those rights and authority have been properly recognised as fundamental. See eg Universal Declaration of Human Rights Arts 12, 16, 25(2) and 26(3).*[30]

In the current environment I do not doubt that were that case being decided today reference would be made to the provisions of the *International Convention on the Rights of the Child* in clarifying the elaboration of the common law of Australia.

In the Family Court of Australia, in a case involving a proposed hysterectomy operation upon an intellectually disabled girl, the Chief Justice reviewed international authority, mentioned my opinions and referred to the applicable international convention, the

Declaration on the Rights of Mentally Retarded Persons.[31]

Chief Justice Nicholson concluded:

> *"Contrary to what I said in In re Jane ... I now think it is strongly arguable that the existence of human rights set out in the relevant instrument, defined as they are by reference to them, have been recognised by the Parliament as a source of Australian domestic law by reason of this legislation [the Human Rights and Equal Opportunity Act]."*[32]

He was there in dissent. But his orders prevailed when the matter went to the High Court of Australia.

The High Court of Australia has, even more recently, moved steadily towards embracing the new doctrine on the relationship between Australia's domestic law and international law. In doing so, it has followed a path similar to that which the English courts have been taking in contemporaneous litigation.[33] Thus in *Mabo v Queensland*[38] the High Court reversed the long-held understanding of Australian common law. It decided that a form of native title of the Australian Aboriginals was recognised by the common law. It exploded the previous doctrine of *terra nullius*. Justice Brennan (writing with the concurrence of Chief Justice Mason and Justice McHugh) said, in a critical passage:[39]

> *"The expectations of the international community accord ... with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights."*

Decisions since *Mabo* have shown no evidence of resiling from its important step forward.[40]

CONCLUSIONS: USING NEW TOOLS

The result of this analysis is clear enough. The acceptance by Australia of the *Declaration on the Rights of the Child* and its ratification of the *Convention* of that name does not, as such, import either instrument into Australia's domestic law. In this regard our position is no different from that of the United Kingdom, Canada, New Zealand and other Commonwealth countries. But the *Convention* is undoubtedly now part of international law. It binds Australia as a nation state. Before the international community our country is accountable for compliance with the obligations it has accepted. It will be no excuse that the legal subject in question is conventionally part of the responsibility of State law-making authorities. This is especially so in Australia as the High Court has made it clear that, in most cases at least, such default may be corrected by the Federal Parliament so long as what was involved was a true matter of international concern amongst the nations and peoples external to Australia.

There are many ways in which the *Convention* will stimulate and affect Australia's domestic law. One way is by the processes of a free community pushing and prodding politicians and bureaucrats, now with the added forensic tool of the *Convention* which states the applicable international law. But the new way is provided by the techniques of the common law. Increasingly, I believe that our judges will seek to be informed upon applicable principles of international law, especially where these have been accepted in treaties ratified by Australia. After Hiroshima it is the privilege of lawyers and judges to seek out and to contribute to a developing harmony between international and municipal law. There are many examples where this can be done as the case of the mute and the interpreter show.

Many of the complaints in the report of the National Children's Rights Coalition could quite easily be remedied without legislation. Simply by decision of courts helped to their conclusion by judges and lawyers who are knowledgeable about relevant principles of international law. To take one as an example. It is complained that in Western Australia, although the legislation provides for a closed Children's Court, reports of the names of children sometimes being released by orders of the Supreme Court judges to the media, and thereafter published, presents a probable breach of the right of children to have their privacy respected as enshrined in Article 40(2)(b)(vii) of the *Convention*. I make no comment on the complaint or on the meaning of the Article.[41] I simply point to the kind of case where the modern techniques of the common law set out above can be called in aid to defend the child's rights. Judges and lawyers should therefore familiarize themselves with this important development. Once they are aware of it, they will need to become more familiar with applicable principles of international law. In this way, international law will be brought down from the tablets in the sky to a living daily impact on our laws that is necessary if a true new world legal order is to be build founded on the basic principles of universal human rights accepted by international law.

All lawyers, Australian and otherwise, judges and advocates, should accept the challenge which is inherent in the *Bangalore Principles*, adopted in the case of *Gradidge* and endorsed by Justice Brennan in *Mabo*. And a good place to start will be in the vital area of safeguarding the rights of children. In large measure I believe Australian law already conforms to the *convention on the Rights of the Child*. But where it does not, it is the duty of judges and lawyers within the law, to bring our domestic law and

practice into harmony with international standards. And we now have the common law tools to do precisely that. Use them.

FOOTNOTES

* Parts of this paper draw upon a longer essay of the author to be published in the *University of New South Wales Law Journal*, 1993 General Issue under the title "The Australian Use of International Human Rights Norms: From Bangalore to Balliol - A View from the Antipodes". This was, in turn, based on a paper presented by the author to the Judicial Colloquium held at Balliol College, Oxford, in September 1992. See note (1993) 67 ALJ 63.

** President of the New South Wales Court of Appeal. Chairman of the Executive Committee of the International Commission of Jurists, Geneva.

1. S Detrick (ed), *The United Nations Convention and the Rights of the Child*, Martinus Nijhoff, Dordrecht, 1992, 19.
2. *Ibid*, 21.
3. *Id*, 22.
4. *Id*, 24.
5. Australia, Department of Foreign Affairs and Trade, *The Monthly Record*, August 1990, 564.
6. See *Human Rights Update*, Newsletter of the Commonwealth Secretariat, Human Rights Unit, London, 1992 (October # 12), 5-6.
7. G van Bueren, "The United Nations Rights of the Child: The Necessity of Incorporation into United Kingdom Law" [1992] *Family Law*, 373.
8. United Nations, *Human Rights Fact Sheet #10*, "The Rights of the Child", Centre for Human Rights, Geneva.
9. *Ibid*, 2.
10. Australian Constitution, s 128.

11. C Francis, "The Legal Consequences of the UN Convention on the Rights of the Child" in (1990) 11 *Australian Family*, 23, 25f.

12. V Renkema, "The UN Convention - A Threat to Family Privacy" in (1989) 10 *Australian Family*, 1, 2.

13. R J L Hawke in (1990) 15 *Children Australia* #2, 45, 46.

14. *Ibid*.

15. R D'Sa "The UN Convention on the Rights of the Child", unpublished paper for the 1993 Commonwealth Law Conference, Cyprus, 4.

16. The National Children's Bureau of Australia for the Children's Rights Coalition, report, *Where Rights are Wrong*, Melbourne, 1993. See also P Alston and G Brennan, *The UN Children's Convention and Australia*, ANU, Canberra, 1991.

17. M Rayner in Children's Rights Coalition Media Release, 10 March 1993. See also *The Australian*, 12 March 1993, 3.

18. T Carney, "The Convention on the Rights of the Child: How Fares Victorian Law and Practice?" in (1991) 16 *Children Australia* #1, 22. See also J N Turner, "The Rights of the Child Under the UN Convention" in (1992) Vol 66 Nos 1 and 2 *Law Inst J* (Vic) 38.

19. *Chow Hung Ching v The King* (1948) 77 CLR 449, 477.

20. *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 224-225. See also Gibbs CJ at 193. Cf *Kioa & Ors v West and Ors* (1985) 159 CLR 550, 570, 604.

21. *Attorney General for Canada v Attorney General for Ontario* [1937] AC 326, 348 (PC).

22. *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 200. (Gibbs CJ); *Bradley v The Commonwealth* (1973) 127 CLR 557, 582.

23. The *Bangalore Principles* are published in (1988) 14 *Commonwealth Law Bulletin* 1196 and (1988) 62 ALJ 531. See Bangalore Principle, 9. The *Bangalore Principles* have been re-affirmed successively by *The Harare Declaration of Human rights* 1989; *The Banjul Affirmation*, 1990; and *The Abuja Confirmation* 1991. See Commonwealth Secretariat, *Developing Human Rights Jurisprudence*, Interights, London, 1991 where the four instruments are published.

24. M D Kirby, "The Rôle of the Judge in Advancing Human Rights - By Reference to Human Right Norms", in Commonwealth Secretariat, *Developing Human Rights Jurisprudence - The Domestic Application of International Human Rights Norms*, record of the Judicial Colloquium in Bangalore, February 1988, London, 1988, 67 at 83.

25. See eg *Jago v District Court of New South Wales & Ors* (1988) 12 NSWLR 558 (CA); on appeal 168 CLR 23.

26. *Director of Public Prosecutions for the Commonwealth v Saxon* (1992) 28 NSWLR 263 (CA). 274. Cf *New South Wales Crime Commission v Younan*, Court of Appeal (NSW), unreported, 2 July 1993.

27. (1988) 93 FLR 414 (CA).

28. *Ibid* 425-426.

29. See eg *Convention on the Rights of the Child*, Article 40(2)(b)(vi) ["to have the free assistance of an interpreter if the child cannot understand or speak the language used".] See also Article 29(1)(c).

30. *J v Lieschke* (1987) 162 CLR 447, 463.

31. *In re Marion* (1990) 14 *Fam LR* 427; [1991] FLC 98, 275 at 92-193 (F Fam C).

32. See *Secretary, Department of Health and Community Services*

(NT) v JWB and SMB (1992) 66 ALJR 300 (HC).

37. See eg *Derbyshire County Council v Times Newspapers Limited* [1992] 3 WLR 28 (CA) at 43, 60. Affirmed by the House of Lords [1993] 1 All ER 1011 (HL).

38. (1992) 175 CLR 1 (HCA). The importance of the point has been drawn to the attention of the Australian legal profession in the leading editorial in (1992) 66 ALJ 551 at 552 (September 1992).

39. 175 CLR at 42.

40. See eg *Chu Kheng Lim & Ors v The Minister for Immigration, Local Government and Ethnic Affairs & Anor* (1992) 67 ALJR 125 (HC).

41. See *Where Rights are Wrong*, above n 16 at 51.