Basic children's rights threatened by 'Tort Reform'

Children are the future citizens of our society. We must look after them carefully. For decades society has recognised that the responsibility for the upbringing of children cannot be left to parents or carers alone. Society itself has an overriding duty to maximise the safety and welfare of all children, regardless of their personal circumstances or the advantages or disadvantages of their birth.

The view that society has a non-delegable responsibility to care for children is not unique to Australia. It is common across many cultures, something that is evidenced by the following extracts from the United Nations Convention on the Rights of Children,[1] (of which Australia is a signatory).[2]

'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.'[3]

'State 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.'[4]

The current epidemic of tort reform sweeping Australia has resulted in a push to erode children's rights. The interests of children are being subordinated to the interests of wealthy insurers and powerful professional groups. Mr Justice Ipp and the NSW Labor Government argue that society should step back from key elements of the obligation to care for children by transferring that responsibility to parents,[5] or in certain instances, the nearest adult at hand.[6]

Each of these attacks on children's rights have arisen, either directly or indirectly, from recommendations contained in the Ipp Report.[7] Before considering these issues I shall briefly digress to explain why these (and other) difficulties that have since arisen with the implementation of the report were always going to result from such a flawed process.

First, the terms of reference were patently biased in that they were designed to deliver an outcome to appease the insurance industry, not conduct a true analysis of the case for and against law reform. Second, those who successfully lobbied to stack the panel with people that had an a *priori* commitment to partisan 'tort reform' immediately corrupted the original concept of an 'Eminent Person's Panel'. Third was the unjustified belief of the panel members that their personal beliefs and values could form an acceptable basis for developing credible and considered judicial and social policy. Fourth was the surprising assumption by the authors of the report that they could do better than the courts in redefining the law. Finally was the authors' breathtakingly naïve belief that governments could be trusted to implement according to their recommendations and not go off on a jaunt of their own for political or ideological purposes.

In short, the authors of the report exhibited a blind faith that they, using the imperfect tool of the political process, could do a better and more balanced job of delicately defining the law than the courts.

For example, the report advocates that the current suspension of limitation periods for minors be replaced with a regime that redefines 'incapacity' so as to exclude children that are in the care of adult guardians.[8]

The effect of this change, if it is adopted in legislation, is that children as

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young as three years of age may lose their legal rights to compensation if their parents, for any reason, fail to take action to enforce the child's rights.

Justice Ipp rationalises this recommendation with the observation that children are dependant on parents for many things, so why shouldn't the law simply give effect to this reality?[9] That is, why shouldn't society visit upon children the lifelong consequences of a custodian's irrational or unreasonable failure to act in their child's best interests?

What reasoning lies behind this departure from established international norms that regard the interests of children as paramount? Surely, one might ask, this recommendation could not be intended to protect insurers and others from having to compensate children for injury? Sadly, that is precisely what is intended.

In so doing, the people on the panel, some of them representing vested interests, have sought to encourage legislators to elevate the financial interests of groups such as insurers and obstetricians above the interests of injured children.

This is an example of a flawed recommendation that inevitably resulted from a flawed process. But this is the least of the problems that will inevitably now result from the Ipp Report. The real damage will be caused by politicians who will now treat the Ipp recommendations as license to try their own hand at DIY 'tort reform'. As in most things of this sort, NSW has already taken the early running in an attempt to show other states how it's done.

What follows is an example of things to come.

The Ipp Report recommends that providers of 'recreational services' be exempt from liability for obvious risks[10] and that persons should generally have no 'proactive duty' to warn in relation to those risks.[11] It further recommends that the definition of 'recreational services' should be confined to 'activities that involve significant risks of physical harm'.[12] Sensibly, the report also suggests that what is or is not 'obvious' should be judged according to the subjective criteria of a reasonable person in the position of the injured person.[13] That is, where the person is a young child, then the court would need to consider what may be reasonably obvious to a person of that age.

Enter, at this point, the DIY tort reformers of the NSW Labor Government.

Division 5 of the new *Civil Liability Amendment (Personal Responsibility) Bill 2002* (NSW) provides that there is no liability for harm resulting from a 'recreational activity' that is the subject of a 'risk warning'. Here, however, the superficial resemblance between it and the Ipp recommendations suddenly cease.

Under the NSW *implementation* of the Ipp Report, recreational activity includes 'any pursuit or activity engaged in at a place (such as a beach, park or other open space) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure'.[14] There is no requirement that the activity involve significant risks of physical harm before Division 5 applies. Indeed, there is not even any requirement that the injury result from the recreational activity at all.

Unfortunately, there is more. If the person that suffers harm is an 'incapable person' (which includes a child) then a warning to a 'parent' or 'another person' accompanying the child will preclude recovery of compensation. There is no requirement that the 'other person' be in any position of authority or control over the child before the warning will foreclose the child's rights. All that is required is that the person be accompanying the child at the time the warning is given.

I predict that governments will implement different interpretations of the Ipp recommendations around the country. Some governments, sensibly, are taking a measured and cautious approach to the recommendations, seeking in the process to consider the views of the legal profession in an attempt to avoid a costly mistake.

Others are standing by to see what happens in New South Wales. Some, I fear, may be tempted to look to the NSW legislation as a model. If they do, then the 'tort reform' crisis facing our legal system will be exported to other jurisdictions.

One thing is clear at this point: children, the most vulnerable in our society, appear to be the biggest losers so far in this exercise. Only time will tell whether sanity will prevail and governments will again assume proper responsibility to protect the rights of children under the law. PL

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Footnotes:

1. The full text of this convention may be viewed at www.unicef.org/crc/fulltext.htm.
2. Along with 190 other countries. The only two countries yet to sign this convention are the USA and Somalia.
3. Article 3.1, *United Nations Convention on the Rights of Children*, commenced 2 September 1990, in accordance with article 49.
4. ibid., Article 19.1.
5. Refer to Recommendation 25 of the *Review of the Law of Negligence*, 30 September 2002, Commonwealth of Australia.
6. Refer to section 5M(2) of *Civil Liability Amendment (Personal Responsibility) Bill* 2002 (NSW), which is likely to have become law by the time of publication.
7. *Review of the Law of Negligence*, 30 September 2002, Commonwealth of Australia.
8. ibid., Recommendation 25.
9. Comments by Justice Ipp to APLA representatives at time of oral submissions to the Ipp Panel.
10. ibid., Recommendation 11.
11. ibid., Recommendation 14.
12. ibid., paragraph 4.19 and Recommendation 12, p. 65.
13. ibid., Recommendation 11(a).
14. Section 5K *Civil Liability Amendment (Personal Responsibility) Bill* 2002 (NSW).