[2003] FamCA 451

FAMILY LAW ACT 1975

IN THE FULL COURT OF THE FAMILY COURT OF AUSTRALIA AT SYDNEY

Appeal No. SA82 of 2002
File No. AD3433 of 2002

IN THE MATTER OF B and B (Appellant/Infants) (Appellant/Intervener) MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS (Respondent)

REASONS FOR JUDGMENT

Coram: **Nicholson CJ, Ellis and O'Ryan JJ.**

Date of Hearing: **17 & 18 December 2002**

Date of Judgment: **19 June 2003**

Appearances:

Dr Churches with Mr Ower of counsel, instructed by Jeremy Moore & Associates, Solicitors, 10 Albyn Terrace, Strathalbyn SA 5255, appeared on behalf of the Appellant/Infants.

Mr McQuade of counsel, instructed by Boylan & Co Solicitors, 138 Florence Street, Port Pirie SA 5540, appeared on behalf of the Appellant/Intervener.

Mr Bennett QC with Mr Kennett of counsel, instructed by Australian Government Solicitor, Level 23/133 Castlereagh Street, Sydney NSW 2000, appeared on behalf of the Respondent.

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B (Infants) and B (Intervener) and the Minister for Immigration & Multicultural & Indigenous Affairs
SA82 of 2002
Coram: Nicholson CJ, Ellis and O'Ryan JJ
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JURISDICTION OF FAMILY COURT OF AUSTRALIA – children – matrimonial cause –powers of Family Court in its welfare jurisdiction – applicability to ex nuptial children - welfare of child – parens patriae jurisdiction – injunction powers – constitutional law - marriage, divorce and incidental powers, external affairs power –United Nations Convention on the Rights of the Child- migration- children held in immigration detention – whether children's detention in immigration detention is the subject of the jurisdiction of the Family Court – release of children in immigration detention

In July 2002 two boys, A and M aged 14 and 12 applied, by their mother as next friend to the Family Court for orders that the Minister for Immigration & Multicultural & Indigenous Affairs release them from a particular immigration detention centre. The grounds upon which A and M relied were, broadly speaking, because the continuing detention was harmful to their welfare. The father also intervened in the proceedings, seeking orders that the two boys and their three younger sisters reside with him; or, in the alternative, that he have regular contact with them and that certain orders be made to protect the children whilst they remain in detention.

In October 2002, the trial Judge found that the Family Court had no jurisdiction to make orders in respect of children held in immigration detention, and accordingly dismissed the application.

The appeal to the Full Court of the Family Court was initially brought on behalf of the two boys and the father as appellant intervener. Although not parties to the original application, the mother also was given leave to add A and M's three younger sisters aged 11, 9 and 6 as appellants.

At the time of the trial, the children and their mother were detained at one particular immigration detention centre but, by the time of the hearing of the appeal, had been transferred to another. At the time of the trial, the father was living in the general community but, by the time of the hearing

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of the appeal, was also detained. All family members are unlawful non-citizens within the meaning of s.14 of the *Migration Act* 1958.

Held:

1. Per Nicholson CJ, Ellis and O'Ryan JJ:-

- The jurisdiction of the Family Court is not limited by the State's referral of power in relation to ex-nuptial children.

- The welfare jurisdiction of the Family Court extends to all children of marriages in Australia, including children in immigration detention, where the particular orders sought arise out of, or are sufficiently connected to the marriage relationship.

- The welfare jurisdiction is similar to the *parens patriae* jurisdiction formerly exercised by the Court of Chancery in England and also exercised by the Supreme Courts of the States and Territories.

- The welfare jurisdiction derives its constitutional validity from the marriage, divorce and incidental powers contained in ss.51(xxi) and (xxii) of the Constitution which are to be broadly construed.

- The Family Court, in exercising the welfare jurisdiction, may make orders for the protection of children of marriages directed at third parties, where the orders sought are sufficiently connected to the relevant constitutional heads of power.

- The Family Court, in exercising the welfare jurisdiction, may make orders for the protection of children of marriages in immigration detention, where the orders sought are sufficiently connected to the relevant constitutional heads of power.

- Section 196(1) of the *Migration Act* should not be interpreted as permitting the indefinite detention of children in circumstances where there is no real likelihood or prospect in the reasonably foreseeable future of the children being removed and thus released from detention.

- *SMB and JWB; Secretary, Department of Health and Community Services (Re Marion)* (1992) 175 CLR 218 and *P v P* (1994) 181 CLR 583 applied.

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2. Per Nicholson CJ and O'Ryan J, Ellis J dissenting:-

- The trial Judge erred in finding that the Family Court of Australia lacked jurisdiction to hear the applications.

- The children in this case did not appear to have any means of bringing an end to their detention and in particular appeared to lack the capacity to make a request for repatriation pursuant to s.198(1) of the Migration Act.

- Subject to the findings of a trial Judge as to the children's capacity to bring an end to the detention, their continued detention was unlawful.

- If their continued detention is unlawful, the Family Court could, in the exercise of its welfare jurisdiction, order the Minister to release the children.

- *Minister for Immigration and Multicultural Affairs v VFAD* [2002] FCAFC 390 and *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 197 ALR 241 applied.

3. Per Nicholson CJ and O'Ryan J:-

- Should the finding that the Family Court has the power to order the release of the children be incorrect, the Court may still give directions about the nature and type of detention in which children are held.

- *VLAH v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1554 (13 December 2002) discussed.

- If the marriage, divorce and incidental powers contained in the Constitution were insufficient to justify the assumption of jurisdiction by the Court to make orders pursuant to s.67ZC of the *Family Law Act* 1975, then resort could be had to the external affairs power by reason of the ratification by Australia of the United Nations Convention of the Rights of the Child (UNCROC). UNCROC was incorporated into domestic law by the *Family Law Reform Act* 1995. Consequently and insofar as it did not otherwise do so, s.67ZC applies to all children in Australia, including ex-nuptial children.

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4. Per Ellis J:-

- In exercising its welfare jurisdiction, the Family Court has power to make orders for the welfare of children of a marriage, insofar as the subject matter(s) of the orders sought are sufficiently connected with the relevant heads of constitutional power. An order releasing children from a particular form of immigration detention is not so connected. However, the provision of adequate, proper and prompt medical treatment for the children and of ensuring they are not exposed to violence and trauma are matters directly related to their protection and welfare. Such matters arise out of and are aspects of the relevant marriage relationship.

- The Parliament of the Commonwealth did not, in enacting the Reform Act, implement UNCROC or the relevant parts thereof, and thus the provisions of Part VII of the Act, in particular s.67ZC, are not laws with respect to external affairs under s.51(xxix) of the Constitution. Accordingly, the Court does not have the power to make the orders sought by reference to s.51(xxix).

Appeal allowed and remitted for rehearing.

Reportable.

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INTRODUCTION

1. **NICHOLSON CJ AND O'RYAN J:** These are appeals brought against the orders of Dawe J made on 9 October 2002. They are brought by the mother of two boys, A and M aged 14 and 12 as their next friend. By leave she was permitted to add their three sisters who are aged 11, 9 and 6 who were joined *nunc pro tunc* as additional appellants. The father of the children, her husband, intervened in the proceedings and is also an appellant.

2. The proceedings arise out of the continued detention of these children. They were at the time of the hearing of the appeal detained in Woomera Immigration Reception and Processing Centre, an immigration detention centre at Woomera in a remote part of South Australia. By letter of the Australian Government Solicitor dated 28 April 2003, we have been informed that the mother and children were transferred to Baxter Immigration Reception and Processing Centre, another immigration detention centre. The father is also now detained at Baxter.

3. The central issue that arises in the present appeal is whether the Court, in the exercise of its welfare jurisdiction and injunction powers, has the power to make orders to release these children from detention. If it does not have the power to order the release of the children, it then becomes necessary to consider what other type of orders, if any, the Court has jurisdiction to make, for the protection of the children.

4. The issue arises for the first time in this Court.

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THE TRIAL PROCEEDINGS

5. The applications before Dawe J were made under the *Family Law Act* 1975 (Cth). The named respondent to each application was the Minister for Immigration & Multicultural & Indigenous Affairs ("the Minister").

6. The father, mother and children are not citizens of Australia and do not hold visas under the *Migration Act* 1958 (Cth). According to the Form 41B Notice of a Constitutional Matter filed by the Minister on 10 December 2002:

> "6. On 21 February 2001 the Appellants [A and M] their mother and sisters lodged an application for protection visas. On 26 July 2001 the Refugee Review Tribunal (RRT) affirmed a decision by a delegate of the Respondent to refuse that application. On 2 April 2002 the Respondent decided not to exercise his power under s.417 of the *Migration Act* to substitute a more favourable decision."

7. Both at the time of the proceedings before Dawe J and at the time of the hearing of the appeal, the mother and children were detained at Woomera.

8. It was common ground that at the time of the proceedings before Dawe J, the father held a temporary protection visa (issued 3 August 2000) and was not detained. However at the time of the hearing of the appeal, the father's visa had been cancelled and he was detained at Villawood Immigration Reception and Processing Centre in New South Wales.

9. As we have mentioned, as at 28 April 2003, the family were all detained at Baxter Immigration Reception and Processing Centre.

10. The common aim of the two applications was to bring about the release of the children from detention at Woomera. Her Honour found against both the applicant children and the father. She concluded [166] that the applications were *"misconceived and fatally flawed"* and that "*[t]he Family Court does not have any jurisdiction to make any of the orders sought against the Minister."*

11. Both applications were founded on the premise that the Family Court of Australia has the jurisdiction and the powers that are capable of achieving that result.

ISSUES

12. The core question in this appeal is whether Dawe J was correct as a matter of law to dismiss the applications of the children and of the father. In order to determine that question we must consider for ourselves a number of difficult issues. The issues as we see them are:

    A. Whether the welfare jurisdiction contained in s.67ZC of the *Family Law Act* applies to children in South Australia.

    B. Whether the constitutional basis provided by the marriage and divorce and incidental powers contained in the Constitution is sufficient to enable the Family Court to make orders against third parties for the protection of the children.

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C Whether the external affairs power contained in the Constitution forms an additional source of Commonwealth power that would enable the Court to make orders against third parties for the protection of children.

D Whether, the welfare jurisdiction of the Family Court is to be equated with the parens patriae jurisdiction, and in particular, whether it extends to the making of orders against third parties for the protection of children.

E Whether having regard to the provisions of the *Migration Act*, the Family Court of Australia has the power to

(a) order the Minister to release the children or

(b) to make orders supervising the Minister's detention of the children.

13. We should make it clear at the outset that these appeals do not call upon or authorise the Court to adjudicate upon the Government's policy in respect of immigration detention generally. We appreciate that this is a matter of controversy but whatever its significance, the present appeal is centred upon legal issues about the powers of the Family Court of Australia in respect of the five subject children.

14. The appeal does not raise any disputed issues of fact as the factual background to the applications was not considered by Dawe J. Accordingly, as we pointed out in the course of hearing the appeal, if we find that Dawe J fell into error and allow the appeal, it will be necessary to remit the applications for determination by a single judge of the Court.

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HISTORY OF THE PROCEEDINGS

15. On 31 July 2002, A and M (the two older children), by their next friend filed proceedings in the Family Court of Australia against the Minister. At the hearing before Dawe J they sought the following specific orders:

> "1. An injunction pursuant to section 68B of the Family Law Act that the respondent, whether by himself, his servants or his agents, be required to release the applicants from detention at the Woomera Immigration Reception Processing Centre.
>
> 2. An injunction pursuant to section 68B of the Family Law Act that the respondent, whether by himself, his servants or his agents, be restrained from detaining the applicants pursuant to section 189 of the Migration Act.
>
> 3. Alternatively, an order pursuant to section 67ZC of the Family Law Act that the respondent, whether by himself, his servants or his agents, be required to release the applicants from detention at the Woomera Immigration Reception Processing Centre.
>
> 4. An order pursuant to section 67ZC of the Family Law Act that the respondent, whether by himself, his servants or his agents, be restrained from detaining the applicants pursuant to section 189 of the Migration Act.
>
> 5. A declaration pursuant to section 68B and/or section 67ZC of the Family Law Act that the detention of the applicants pursuant to section 189 of the Migration Act is contrary to the welfare of the applicants."

16. On 12 August 2002, Burr J granted the father leave to intervene in the proceedings.

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17. On 6 September 2002, Dawe J gave directions in the matter including directions that the father file his application by 13 September 2002. On that day, her Honour also delivered two *ex tempore* judgments and made orders on two matters.

- Her Honour dismissed an application by the Minister to state a case in relation to the legal issues associated with the matter.
- The other application was brought by a local newspaper seeking orders pursuant to s.121(9)(d) of the *Family Law Act* that would permit publication of accounts of the proceedings that may contain material that may identify the parties and persons associated with the proceedings. Her Honour dismissed that application save for permitting the identification of the Minister as a party to the proceedings.

18. On 10 September 2002 the Minister filed a Form 41 B Notice of a Constitutional Matter in the following terms:

> "1. Whether the provisions of Part VII of the Family Law Act 1975 (Cth) are to be construed as not conferring jurisdiction on the Court to determine the present case, or as not giving the Court power to make the orders sought, by reason of:
>
> (a) the limited nature of the power in s.51(xxi) and (xxii) of the Constitution and of relevant references of power under s. 51 (xxxvii) of the Constitution; and/or
>
> (b) the limited nature of the judicial power of the Commonwealth which the Court exercises.
>
> 2. Whether, contrary to 1(a) above, the provisions of Part VII are laws with respect to external affairs under s. 51(xxix) of the Constitution and therefore not limited in their

construction by the subject matters of s. 51(xxi) and (xxii) and the references of power."

19. On 16 September 2002 the Minister filed a Notice objecting to jurisdiction.

20. On 19 September 2002 the father filed his application out of time. The orders sought in the application were as follows:

"1. That the Applicants A and M and their three sisters; N (aged 11 years, born in 1991), S (aged 9 years, born in 1993) and A (aged 5 years, born in 1997) do reside with the Applicant Intervener.

2. In the alternative:

(a) That whilst the five said children, or any one or more of them remain in immigration detention, the Respondent do give and the Applicant Intervener have contact to each of the five said children on such terms and conditions and at such places as this Honourable Court deems just and expedient.

(b) That whilst the five said children, or any one or more of them remain in immigration detention, the Respondent do give and the Applicant Intervener do have telephone contact with each of the five said children on no less than two occasions each week.

(c) That whilst the five children, or any one or more of them remain in immigration detention, the Respondent provide each of the five said children with adequate and proper medical treatment and attend promptly to the emotional and medical needs of each of them.

(d) That whilst the five children, or any one or more of them remain in immigration detention, the Respondent accommodate each of the said five children, in such community housing or other accommodation and at

such place and upon such terms and conditions as this Honourable Court may deem just and expedient.

(e) That whilst the five said children, or any one or more of them remain in immigration detention, the Respondent, and each of them, his servants, employees, agents or contractors be restrained and an injunction granted restraining them from assaulting the five said children, or any one or more of them.

(f) That whilst the five said children, or any one or more of them remain in immigration detention, the Respondent be restrained and an injunction is hereby granted restraining him from placing the five said children, or any one of them, in the Woomera Detention Centre, or such other environment likely to induce trauma, developmental delay and suicidal behaviours in the five said children, or to any one or more of them."

21. On 23 September 2002 Dawe J heard the application of the children and the application of the father contained in paragraph 2(f) above. She otherwise adjourned the remainder of the father's case to 18 November 2002. Her Honour explained at [4-5] the reason for taking this approach in the following way:

"4. The procedural orders made on the 6th September were designed to ensure that no-one was taken by surprise by the orders sought or the matters to be argued before the court on the 23rd of September. The father's application was not filed until the 19th of September and the summary of argument on his behalf not filed until a facsimile was received in the afternoon of Friday the 20th of September.

5. I agreed to hear counsel for the father notwithstanding that the application was not filed within the time ordered. At the hearing before me on the 23rd September counsel for the father suggested that counsel for the Minister should have been in a position to respond to different issues concerning

> *jurisdiction and power raised by part of the father's application and summary of argument. The Solicitor-General submitted that insufficient time had passed for a proper response to those matters. On the 23rd September I declined to hear all arguments concerning the father's application. Those matters which were common to the applications of the children A and M and the father were heard by me on the 23rd of September. The matters referred to in Paragraph 11 of the summary of argument of counsel for the father, which were not related to the arguments in common with other matters, were adjourned to the 18th of November before me with liberty to apply about the suitability of the date."*

22. On 9 October 2002 Dawe J delivered judgment finding that the Court does not have the jurisdiction to make any of the orders sought against the Minister. Her Honour dismissed the applications of the children and the father and vacated the further hearing date set aside for the hearing of the balance of the father's applications.

23. On 6 November 2002 a Notice of Appeal was filed on behalf of the children A and M.

24. On 29 November 2002 there was a directions hearing before the Chief Justice via videolink. His Honour ordered that the appeal be listed for hearing by the Full Court in Sydney on 17 December 2002. Costs were reserved.

25. On 4 December 2002 the father filed:

- An Amended Notice of Appeal; and

- An application by the father for extension of time to file a Notice of Appeal, expedition of the appeal and consolidation with the appeal of the children.

There was also filed an application by the children to join the three younger sisters (by their next friend) to the proceedings *nunc pro tunc*.

26. On 5 December 2002, Dawe J heard argument concerning an application by the Minister for costs against both the applicants through their next friend, the mother, and the intervener father. She delivered judgment the following day refusing the Minister's application. Her Honour also refused an application by the father for the costs of the application for costs. The costs orders are not under appeal.

27. On 9 December 2002 there was a further Directions Hearing before the Chief Justice by video-link. His Honour granted the applications then sought by the father and the children. Leave was granted to the father to amend the orders sought to include, in the alternative, that if the appeal is successful, that the matter be remitted for hearing before a single judge. The original orders sought had asked the Full Court to determine the matter.

28. For the sake of completeness we would also note that the nature of the issues suggested that the Court might be assisted by the Human Rights and Equal Opportunity Commission. We caused enquiries to be made of the Commission and were advised that it did not seek to be heard on the appeals.

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THE REASONS OF THE TRIAL JUDGE

29. Dawe J's judgment was tightly structured and economically worded. It very clearly set out her reasoning on the complex legal issues in this case.

30. After setting out the statutory provisions which she identified as necessary for consideration, Dawe J dealt with each of four issues she identified as follows *seriatim*.

    A. The interaction between the *Family Law Act* and the *Migration Act.*
    B. The extent of the application of the provisions of the *Family Law Act.*
    C. The extent of the welfare jurisdiction of the Family Court.
    D. The relevance of the external affairs power to the statutory grant of jurisdiction to the Family Court of Australia.

31. Her Honour's determination of the first two of those issues against the applicants was sufficient to dispose of the applications. However she also proceeded to express her conclusions on the remaining two issues in case she was wrong on the first two issues. Given the technical nature of the issues, it will be necessary to refer extensively to her Honour's reasoning at first instance to explain the arguments that were advanced on appeal.

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Relevant Legislation

32. All of the statutory provisions considered by her Honour were the subject of argument in this appeal.

33. Her Honour said:

> *"16. By the Migration Act the Commonwealth Parliament has made provisions relating to the entry into, and presence in, Australia of aliens.*
>
> *17. The Family Court of Australia was created by statute. It has the jurisdiction and powers given to it by the Commonwealth Parliament primarily in the Family Law Act.*
>
> *18. The Commonwealth Parliament has power to make laws within the bounds set out in the Constitution.*
>
> *19. The Parliament of South Australia referred to the Commonwealth certain matters by the Commonwealth Powers (Family Law) Act 1986 (SA). This expanded the powers of the Commonwealth Parliament because of the provisions of S 51(xxxvii) of the Constitution."*

34. Her Honour then referred to what she considered to be the most relevant sections of the Migration Act, these being ss.5, 189 and 196 of the *Migration Act*.

35. Her Honour then set out ss.67ZC, 68B, 31(1)(d), 60B, 61B, 69H(1), 69M and 69E to 69ZH of the *Family Law Act*.

36. Her Honour then referred to the most relevant portions of the Constitution as follows:

> *"22. The Constitution provides:*
> *In **s 51***

> *The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:*
>
> *(xxi) marriage;*
> *(xxii) divorce and matrimonial causes; and in relation thereto, parental rights,*
> *(xxix) external affairs;*
> *(xxxvii) matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopts the law;*
> *(xxxix) matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth."*

37. Her Honour noted that by s.3(1)(b) of the *Commonwealth Powers (Family Law) Act* 1986 (SA), South Australia referred matters to the legislative power of the Commonwealth which included "*the custody and guardianship of, and access to, children*".

A. The interaction between the Migration Act and the Family Law Act.

38 Her Honour assumed that the Family Court of Australia has a wide jurisdiction concerning the welfare of children generally (s 67ZC *Family Law Act*) and can grant injunctions in a wide variety of circumstances (ss 68B and 67ZC *Family Law Act*).

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39. Counsel for the children and counsel for the father asserted that there is a conflict and ambiguity created by the existence of the two pieces of Commonwealth legislation (the *Family Law Act* 1975 and the *Migration Act* 1958) and that the timing of relevant enactments was significant.

40. It was agreed that ss.68B and 67ZC were inserted in the Family Law Act by the *Family Law Reform Act* 1995 whilst ss.189 and 196 of the *Migration Act* were inserted in 1992. However, the applicants relied upon the fact that the later Act is the *Family Law Act* as amended by the 1995 Reform Act to justify a submission that the mandatory detention provisions of the earlier *Migration Act* must be read as subject to the welfare jurisdiction of the Family Court. Dawe J said at [25]:

> *"This submission overlooks the fact that provisions containing reference to a welfare jurisdiction existed after the 1983 amendments to the Family Law Act."*

41. Dawe J applied the approach to statutory construction whereby a later Act overrides an earlier Act subject to the exception that a general provision does not impliedly repeal a specific provision. She noted at [26]:

> *"The applicants' submission recognises the validity of the exception but attempts to designate the Family Law Act as the special enactment."*

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42. Her Honour held:

> *"27. ... Without hesitation I reject the submission ...that the Migration Act is the general statute and the Family Law Act the specific or special.*
>
> *28. The Migration Act is a specific statute dealing with a defined limited group of people in particular circumstances. The Family Law Act (and especially Part VII,) is a general statute dealing with many matters which concern the parenting of children. (see the objects of Part VII as set out in s 60B)."*

43. In reaching this opinion, her Honour relied upon the decisions of Bray CJ in *McLean v Kowald* (1974) 9 SASR 384 at 387-8; Gaudron J in *Saraswati v R* (1991) 172 CLR 1 at 17 and McHugh J at 24; Brennan, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38.

44. Dawe J next rejected the proposition that *"The welfare jurisdiction as an aspect of judicial power is untrammelled by executive decisions"* on the basis that ss.189 and 196 of the *Migration Act* are not *"executive decisions"*. She said at [33]: *"Without doubt they are part of the law of the Commonwealth enacted by Parliament and held to be valid."*

45. In support of this proposition, her Honour cited *NAMU of 2002 v Secretary, Department of Immigration, Indigenous & Multicultural Affairs* (2002) FCA 907 (Federal Court) per Beaumont ACJ at par 15.

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46. She next drew attention to the stringent wording of s.196(3)of the *Migration Act*:

> *"35. The Migration Act provides for the detention of unlawful non-citizens. S196(3) uses the words "to avoid doubt". It then makes it clear that the provisions prevent release "even by a court" except in the situations provided. This is very clear and specific. It is not ambiguous.*
>
> *36. The provisions of the Migration Act are specific and unambiguous about the requirement of detention and the removal of any court's jurisdiction to bring an end to the detention of unlawful non-citizens except in specific circumstances."*

47. Her Honour then said at [38] that she agreed with the submissions on behalf of the Minister that:

> *"…the existence of limits upon the powers of the Minister (such as the limits upon s 198 of the Migration Act discussed in the recent decisions of the Federal Court in Al Masri v Minister for Immigration & Multicultural & Indigenous Affairs (2002) FCA 1009) does not assist in determining whether the Family Law Act prevails over the Migration Act."*

48. She also found at [39] that Parliament has not declared an intention to affect the *Migration Act* by anything in the *Family Law Act* nor at [43] was there any suggestion of it impliedly having done so. In support of this view, her Honour cited *Northern Territory of Australia v GPAO* (1999) 196 CLR 553 ("*GPAO*") Gleeson CJ and Gummow J (with whom Hayne J agreed) at 602 and McHugh and Callinan JJ at 628.

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49. Her Honour concluded at [48]:

> *"[t]he provisions relating to 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" and [49] "the application of the children A and M, so far as it seeks orders releasing them from detention or injunctions restraining the Minister from placing them in detention, be dismissed for want of jurisdiction."*

B. Extent of the jurisdiction of the Family Court of Australia

50. Her Honour approached the issue at [50] on the basis that the declaration sought by the children *"would be a hollow finding if the Court cannot make any orders based on the finding. Such a declaration would serve no proper purpose."* Her Honour distinguished declarations as to paternity and validity of marriage as serving *"obvious legal purposes"* and *"supported by specific provisions in the Family Law Act."* She cited in support *Thorpe v Commonwealth of Australia (No 3)* (1997) 144 ALR 677 per Kirby J.

51. Her Honour held at [51] that *"The Family Court cannot make the declaratory order sought by the applicants."*

52. Her Honour then considered arguments that:

- some of the orders were seeking release from detention at Woomera but not release from other forms of immigration detention permitted by the Migration Act at [53].

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- the father sought orders against the Minister that the children reside with him or that he have contact with them. He sought these orders not against the mother but against the Minister to be orders binding on the Minister. Of the orders sought by the father for contact even if the children were in detention, it appears that her Honour accepted at [53] *"[t]hese orders sought would not necessarily be in direct conflict with the specific provisions of the Migration Act, in particular s196(3)."*
- the court *"has power to investigate and scrutinise the condition in which these children have been placed, and ought to exercise it"* [54].

53. Her Honour considered at [55] it was necessary to determine *"if the Family Law Act does give the Family Court such wide powers or a welfare jurisdiction similar to parens patriae jurisdiction to make orders concerning the welfare of children in South Australia."*

54. Looking to the original jurisdiction of the court, Dawe J found at [58] the only relevant provision to be s.31(1)(d) – *"matters (other than matters referred to in any of the preceding paragraphs) with respect to which proceedings may be instituted in the Family Court under this Act or any other Act"* and at [59], Part VII of the *Family Law Act*.

55. Her Honour said at [60] that *"An obvious clue to the purpose of Part VII is s 60B(1)"* and that [61] *"The emphasis is upon parenting and the responsibilities of parents."* Her Honour said at

[62] that "*S69H(1) confers jurisdiction on the Family Court "in matters arising under this Part"* and [63] *"S 67ZC(1) confers jurisdiction to make orders relating to the welfare of children* "in addition to the jurisdiction that a court has under this Part."*"* She took this to mean *"in addition to" "the jurisdiction that a court has to make orders such as those for residence, contact and specific issues set out in the earlier provisions."*

56. Dawe J then considered at [64] the application of s.69ZE which *"extends Part VII (of which s 68B and 67ZC form part) to South Australia"* noting that *"such extension is subject to the rest of that section."* and at [65] dependent upon the matters that have been referred by the Parliament of South Australia. Her Honour found:

> "*Welfare" is not a matter included in the referral of powers by the S.A. statute. This means that the jurisdiction given to the Family Court under s 69H(1) and by s 69ZE (setting aside for the moment s 69ZH) does not include (for South Australia) any reference to the "welfare" of children."*

57. Relying upon the majority judgment in *Secretary, Department of Health and Community Services and J.W.B and S.M.B.* (1991-1992) 175 CLR 218 (*Marion's case*) at 255 Dawe J found at [66] that prior to the enactment of s.67ZC the welfare jurisdiction did not exist in respect of South Australia.

58. Her Honour proceeded at [70] on the basis that *"[t]he restrictions contained in s 69ZE(4) mean that that section cannot extend a jurisdiction relating to welfare of children to South Australia"* and that [71]:

"*[t]herefore the extent of the welfare jurisdiction of the Family Court must be ascertained from the provisions of s 69ZH. S69ZH is the saving clause which applies certain parts of Part VII by providing that Part VII "also has effect" for the particular matters referred to in that section."*

59. After identifying at [72] that ss.67ZC and 68B are within the areas identified by s.69ZH, she said at [73] "*this means that the Family Law Act applies as if s 67ZC read* "…the court also has jurisdiction to make orders relating to the welfare of children of a marriage"*."* Her Honour found at [74] that such orders contained an important limitation, saying:

"S69ZH(3) goes much further. It says that the provisions of s 69ZH(2) only have effect "so far as they make provision with respect to the parental responsibility of the parties to the marriage for a child of the marriage…"*"*

60. Her Honour then appears to have found at [75] that the expression "parental responsibility" used in s.69ZH(3) is defined in s.61B and that [76] *"The jurisdiction conferred by s 69ZH is one which only has effect if the provisions are restricted to parental responsibility of the parties to the marriage."*

61. Dawe J distinguished *Marion's case* (supra), *P v P* (1994) 181 CLR 583, *Smith; St. James; Smith v Wickstein* (1996) FLC 92-714 and *GPAO* (supra).

62. Her Honour at [84] rejected the submission of counsel for the applicants *"that Part VII operates regardless of the sections in*

subdivision F but "if needs be" it operates as well through subdivision F." She said at [84]:

"I cannot accept this interpretation of s 69ZE and s 69ZH. The heading for subdivision F does refer to "additional operation of Part" *(as submitted by counsel) but this is preceded by the words "Extension" and "application.""*

63. Her Honour found at [87] that *"Part VII (including s 67ZC and 68B) does not apply to South Australia except as provided in subdivision F."* She said at [89] that *"[t]he arguments about the extension of constitutional legislative power using the external affairs power are irrelevant*".

64. Her Honour then referred at [90] to Callinan J. in *AMS v AIF* (1999) 199 CLR 160 at p 250 and stated at [91] *"in the case before me there is no ambiguity so there is no need to resort to any treaty as an aid to construction."*

65. On the basis of the above reasoning her Honour concluded:

"92. The provisions of s 69ZE and s 69ZH are crucial in determining the extent of the jurisdiction of the Family Court. The welfare provisions of Part VII (including ss 67ZC and 68B) do not apply in South Australia except to make such orders in respect to the parental responsibility of the parties to a marriage for children of a marriage.

93. The children in these proceedings are alleged to be children of a marriage.

94. The application of the father for orders that the children reside with him or have contact with him comes within the jurisdiction of the Family Court to determine only in so far as it does not bind the Minister or his officers. The Family

Court could make orders relating to parental responsibility of the husband and the wife as parties to a marriage within the confines of s 69ZH. If the Migration Act did not apply to the children this court would have jurisdiction to determine with whom they are to reside and with whom they have contact within the usual provisions of the Family Law Act.

95. *However, the children A and M and the father do not seek orders about parental responsibility. They seek orders which bind the Minister who is the respondent. Using the words "residence", "contact" or "injunction" cannot magically bring the proceedings against the Minister within this court's jurisdiction or change the fact that the orders are sought against the Minister*

96. *The father also seeks orders including injunctions directing the Minister to provide medical treatment, house the children in a particular way and restraining the Minister and his officers from assaulting the children*

97. *The Family Court must obtain jurisdiction to make such orders from the sections discussed above.*

98. *However, the proceedings instituted by the children A and M and the father against the Minister cannot be described as, or categorised as, being "in respect to the parental responsibility of the parties to a marriage for a child of a marriage". The orders sought against the Minister are all orders which seek to direct the Minister and his officers in the manner they deal with the children.*

99. *The Family Court of Australia in South Australia does not have jurisdiction to make the orders sought to bind the Minister because of the provisions of s 69ZE and s 69ZH."* (emphasis in the original)

~~Dra~~

C. The extent of the welfare jurisdiction

66. Dawe J next considered the possibility her previous conclusions were wrong and whether the existing provisions such as ss.67ZC and 68B enabled the orders sought by the applicants and the father against the Minister.

67. Looking first to the *parens patriae* jurisdiction, her Honour considered a number of English cases dealing with the limitation upon the use of the wardship jurisdiction in matters governed by statute: *In re B (Infants)* 1962 1Ch. 201 (C.A.); *In re Arif, In re Singh* 1968 1 Ch. 643 per Lord Denning at 662; *Re X (a minor)* (1975) 1 All E R Fam Div 697 at 706 per Sir John Pennycuick. Her Honour rejected at [107] the submission for the father that the English cases could be distinguished because the *parens patriae* jurisdiction in England was one founded in common law which could therefore be overridden by statute (in contrast to the jurisdiction of the Family Court which is founded in statute).

68. She said at [108] that s.67ZC does not grant a greater jurisdiction than *parens patriae* and that [109]:

> *"...neither the parens patriae jurisdiction nor s 67ZC give power to the Family Court "to make any order to avert a risk to a child's welfare". The jurisdiction is not unfettered, unlimited or unrestricted. It can be overridden by statute."*

69. In support of this view, her Honour cited: *In re Arif, In re Singh* (supra) Russell L.J. at 662; *Re L.S.H.; Ex Parte R.T.F. and another* (1987) 164 CLR.91 per Dawson J at 120; *Abebe and The*

Commonwealth of Australia (1999) 197 CLR 510; *Marion's case* (supra) *P v P* (supra); *GPAO* (supra) at 608 per Gaudron J.

70. At [116] her Honour did not find assistance in the applicants' reliance upon the decision of the majority of the Full Court of the Family Court in *Re Z* (1996) FLC 92-694 which decision was reversed by the High Court under the name *GPAO* (supra) or the applicants' reliance on the remarks of Kirby J. in *GPAO* who dissented from the majority view.

71. Dawe J then considered: *AMS and AIF* (supra); *L and T* (1999) FLC 92-875 and *Molisi v Minister for Immigration & Multicultural Affairs (2001)* 108 FCR 516 per Drummond J at [17] and [19].

72. Her Honour found at [125-131]:

> *"125. The Family Court exercises its jurisdiction concerning the welfare of children in the context of the general law. The welfare jurisdiction does not extend to overriding other laws even if obedience to that law might be a risk to the child's welfare. See Gaudron J. in GPAO (supra) at page 608.*
>
> *126. There is no substance to the argument presented on behalf of the applicants that the Family Court's welfare jurisdiction is unfettered if it means unfettered by any circumstance including other laws.*
>
> *127. Although the jurisdiction is wide it is a jurisdiction which exists in the context of the Family Law Act as a whole.*
>
> *128. Section 69H(4) gives the same jurisdiction under Part VII to the Federal Magistrates Court (except for proceedings under s 60G which relates to adoption proceedings). S 69J also*

gives such jurisdiction to state courts of summary jurisdiction with certain conditions irrelevant to this matter.

129. The welfare jurisdiction granted by the Family Law Act does not authorise the Family Court (or a State magistrates court or the Federal Magistrates Service exercising family law jurisdiction) to make any orders relating to the welfare of children even if it might be in the best interests of that child for those orders to be made. The welfare jurisdiction to be exercised must be exercised within the usual field of family law.

130. 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.

131. 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 were found to be contrary to the best interests of a child."

73. Her Honour concluded this portion of her judgment saying at [132]:

"*Even if the welfare jurisdiction granted by the Family Law Act is not restricted by the Migration Act or ss 69ZE and 69ZH (as I assert it is) that welfare jurisdiction is not completely unfettered nor wide enough to make orders binding on the Minister."*

D. The relevance of the external affairs power to the statutory grant of jurisdiction to the Family Court of Australia

74. In the final section of her judgment, Dawe J addressed at [134] the following issue:

"If all the above are incorrect (and the Family Law Act does grant an unfettered jurisdiction in relation to the welfare of children to make orders which bind the Minister) a final problem is the

constitutional basis of the power to legislate for such a jurisdiction."

75. Her Honour recorded at [138] that "*[t]he applicants and the father maintain that the existence of this power to make laws with respect to external affairs, combined with the coming into force of the Convention on the Rights of the Child (UNCROC) in 1991 provides the Family Court with wide powers to make orders relating to the welfare of children."* She said at [139] there were many errors in such reasoning.

76. She said at [140] that there is nothing in the *Family Law Act* to suggest that Parliament had granted jurisdiction using the external affairs power.

77. Contrary to the submission of the applicants at [141], her Honour did not accept at [142] that the existence of the Convention alters the character and effect of the individual sections of the legislation itself. Her Honour referred to *Industrial Relations Act Case* (1995-1996) 187 CLR 416 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ at pp 486 to 487 as support for the proposition that the domestic law must resemble the international treaty with sufficient specificity to be a law with respect to external affairs and that "aspirational" treaties do not meet this standard.

78. Her Honour also referred to the terminology used in *B and B; Family Law Reform Act 1995* (1997) 21 Fam LR 676 at 683 where the Full Court discussed the Second Reading Speech and Explanatory Memorandum to what became the 1995 Act. Her

Honour considered at [146] that *"*[t]*he Reform Act may have been influenced by some of the sentiments in the Convention but this is far from indicating that the Family Law Act implements the Convention.*"

79. Dawe J observed at [147] that in *AMS v AIF* (supra) the wife relied upon the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Discrimination against Women and that Gleeson CJ, McHugh and Gummow JJ said at [180] that the instrument was aspirational and that Kirby J at [218] did not find international instruments of assistance in that case.

80. Her Honour said at [149] that "*[m]uch of the UNCROC is aspirational*."

81. Dawe J appears to have applied at [151] the following test:

"For the provisions granting jurisdiction to the Family Court "to be a law with respect to" "external affairs," the Family Law Act or relevant parts of it "must be reasonably capable of being considered appropriate and adapted to implementing" the UNCROC or some other treaty."

82. She would appear to have found at [152] this test was not met because:

"A form of welfare jurisdiction existed in the Family Law Act after the amendments in 1983. The restructuring of this welfare jurisdiction by placing it in a separate section was not based upon anything in the Convention."

~~Dra~~

83. She held at [154] that "*[t]he Convention has not expanded or altered the parameters of the welfare jurisdiction"*. She further held at [155] that "*[t]he aspirational provisions of the Convention cannot possibly repeal the specific provisions of s 69ZE and s 69ZH."*

84. Her Honour concluded at [156-7] that "*[n]othing in the Family Law Act suggests or supports a conclusion that the Act implements any part of the Convention. ...The Reform Act was merely influenced by the Convention"*. She said at [158]:

> *"The Family Law Act does not contain any provision which can be interpreted as using the Convention to apply the welfare provisions to "all aspects relating to children" without limit (as claimed by the applicants)."*

THE APPEALS

85. The Notice of Appeal filed on behalf of the children on 6 November 2002 set out the following grounds:

> "The learned Judge at first instance erred in law in finding that:
>
> 1. The provisions of sections 67ZC and 68B of the Family Law Act 1975 (Cth) ("the welfare jurisdiction provisions") did not have constitutional validity by reference to the external affairs power and the Convention on the Rights of the Child, ratified by Australia, with the inferred consequence that the welfare jurisdiction provisions can only apply in South Australia for the purpose of making orders in respect to the parental responsibility of the parties to a marriage for children of a marriage, so that consequentially this Court

does not have jurisdiction in South Australia to make orders binding the respondent.

2. The provisions of section 69ZE and 69ZH of the Family Law Act 1975 (Cth) ("the extension and addition provisions") operate so that the welfare jurisdiction provisions can only apply in South Australia for the purpose of making orders in respect to the parental responsibility of the parties to a marriage for children of a marriage, so that consequently this Court does not have jurisdiction in South Australia to make orders binding the respondent.

3. The welfare jurisdiction provisions are "not wide enough to make orders binding the" respondent.

4. The welfare jurisdiction provisions "must be exercised within the usual field of family law", from which it is inferred that the learned judge at first instance intended that the welfare jurisdiction provisions could only have validity when exercised in the context of orders in respect to the parental responsibility of the parties to a marriage for children of a marriage, so that consequently this Court does not have jurisdiction in South Australia to make orders binding the respondent.

5. The exercise of the welfare jurisdiction provisions as sought by the appellants was to be characterised as an issue of (1) over-riding the powers under Migration Act 1958 (Cth) vested in the respondent or (2) giving control over the respondent's behaviour to this Court even if such behaviour were found contrary to the best interests of the child, when that exercise should have been characterised as an issue of exercising this Court's jurisdiction in conformity with the power vested in the respondent under the Migration Act in respect of the detention of the appellants."

~~Dra~~

86. The orders sought by the children if the appeal is successful are as follows:

A. The appeal be allowed.

B. The respondent pay the costs of the applicant's costs at first instance and on the appeal.

C. The matter be remitted for hearing by the trial judge in accordance with law.

87. The Notice of Appeal ultimately relied upon by the father by our leave was filed on the first day of the appeal hearing. It contained the following grounds:

"1. That the learned Judge at first instance erred at law in failing to find that the orders sought by the Appellant Father were within the jurisdiction of the Family Court.

2. The learned Judge at first instance erred at law in failing to find that the orders sought by the Appellant Father were within the welfare jurisdiction of the Family Court and in failing to find that the orders sought by the Appellant Father were orders capable of being made pursuant to the provisions of Section 67ZC of the Family Law Act and Section 68B of the Family Law Act.

3. The learned Judge at first instance made an error at law in finding that the Family Court of Australia in South Australia did not have jurisdiction to make the orders sought by the Appellant Father.

4. The learned Judge at first instance erred at law in finding that the welfare jurisdiction granted by the Family Law Act is restricted by the Migration Act.

5. The learned Judge at first instance erred at law in finding that the welfare jurisdiction granted by the Family Law Act was restricted in its operation in the State of South Australia

by virtue of Sections 69ZE and 69ZH of the Family Law Act.

6. The learned Judge at first instance erred at law in finding that the Family Court of Australia did not have jurisdiction in South Australia to make the orders sought by the Appellant Father to bind the Respondent Minister because of the provisions of Section 69ZE and 69ZH of the Family Law Act.

7. That the learned Judge at first instance erred at law in dismissing the applications of the Appellant Father.

8. That the learned trial Judge at first instance erred at law in failing to take into account or adequately take into account the assessment report of Karen Fitzgerald.

9. In dismissing the application of the father without hearing argument thereon, the learned Judge at first instance denied the Appellant Father, both procedural fairness and natural justice."

88. The orders sought by the father if the appeal is successful are as follows:

"1. That A and M and their three sisters N (aged 11 years, born in 1991), S (aged 9 years, born in 1993) and A (aged 5 years, born in 1997) do reside with the Appellant Father.

2. In the alternative:-

(a) That whilst the five said children or any one or more of them remain in immigration detention the Respondent Minister do give and the Appellant Father have contact to each of the five said children on such terms and conditions and at such place as this Honourable Court deems just and expedient.

(b) That whilst the five said children, or any one or more of them remain in immigration detention, the Respondent do give and the Applicant Intervener do

have telephone contact with each of the five said children on no less than two occasions a week.

(c) That whilst the five children, or any one or more of them remain in immigration detention, the Respondent provide each of the five said children with adequate and proper medical treatment and attend promptly to the emotional and medical needs of each of them.

(d) That whilst the five said children, or any one or more of them remain in immigration detention, the Respondent accommodate each of the said five children, in such community housing or other accommodation and at such place and upon such terms and conditions as this Honourable Court may deem just and expedient.

(e) That whilst the five said children, or any one or more of them remain in immigration, the Respondent, and each of them, his servants, employees, agents or contractors be restrained and an injunction granted restraining them from assaulting the five said children, or any one or more of them.

(f) That whilst the five said children, or any one or more of them remain in immigration detention, the Respondent be restrained and an injunction is hereby granted restraining him from placing the five said children, or any one of them, in Woomera Detention Centre, or such other environment likely to induce trauma, development delay and suicidal behaviours in the five said children, or to any one or more of them.

(g) In the alternative that the matter be remitted for hearing before a single judge."

~~Dra~~

APPLICATION BY NATIONWIDE NEWS PTY LIMITED

89. This media organisation filed an application seeking the following orders:

> "1. That the court grant leave to the Applicant/Intervener to Intervene in these proceedings;
>
> 2. That publication of these proceedings be permitted pursuant to Section 121(9) of the Family Law Act 1975;
>
> 3. In the alternative to Order 2, that publication of these proceedings be permitted pursuant to Section 121(9) of the Family Law Act 1975 limited to:
>
> a) The names of the parties to the proceedings;
>
> b) The subject matter of the proceedings;
>
> c) Matters relating to any conflict between the *Family Law Act* 1975 and the *Migration Act* 1958;
>
> d) Matters relating to the conditions prevailing in detention centres for refugees;
>
> 4. That the Applicant/Intervener have leave to apply to the Full Court for further directions in respect of the publication of these proceedings;
>
> 5. Such further or other orders as the Court sees fit."

90. For reasons we delivered *ex tempore* on 17 December 2002, we granted leave on the application of the applicant and ordered that publication of the proceedings be permitted pursuant to s 121(9) of the *Family Law Act* 1975 limited to:

(a) the name of the respondent, namely the Minister for Immigration & Multicultural & Indigenous Affairs;

(b) the subject matter of the proceedings; and

(c) any matters relating to any conflict between the *Family Law Act* 1975 and the *Migration Act* 1958."

The Application of the Welfare Jurisdiction to Children in the State of South Australia

91. The Solicitor General argued and her Honour accepted that whatever jurisdiction was conferred by s.69ZC in respect of children, it was not conferred upon the Court in the State of South Australia.

92. This argument depends upon the proposition that the Family Court of Australia exercises jurisdiction in relation to children who are children of marriages only because of the State's reference of power over ex nuptial children to the Commonwealth in 1987. This proposition depends upon a particular interpretation of the sections now contained in Subdivision F of Division 12 of Part VII of the Act which were inserted into the *Family Law Act* in 1995 by the *Family Law Reform Act* 1995 but which were originally inserted by the *Family Law Amendment Act* 1987.

93. Before her Honour and before us, no one was able to point to any expression of legislative intention by the Parliament in 1987 or 1995 seeking to achieve this seemingly unusual result.

Legislative History of Subdivision F

94. Subdivision F is a re-enactment of sections that were introduced into the Family Law Act by the *Family Law Amendment Act* 1987 in association with the reference of power by the States (then excepting Western Australia and Queensland) in relation to ex nuptial children. Those sections were as follows:

"Extension and application of Part

60E. *(1) Subject to subsections (4) and (5), this Part extends to New South Wales, Victoria, South Australia and Tasmania.*

(2) If:

(a) the Parliament of Queensland or Western Australia refers to the Parliament of the Commonwealth the following matters or matters that include, or are included in, the following matters:

(i) the maintenance of children and the payment of expenses in relation to children or child bearing;

(ii) the custody and guardianship of, and access to, children; or

(b) Queensland or Western Australia adopts this Part; then, subject to subsections (4) and (5), this Part also extends to Queensland or Western Australia, as the case may be.

(3) This Part applies in and in relation to the Territories.

(4) This Part extends to a State by virtue of subsection (1) or (2) only for so long as there is in force:

(a) an Act of the Parliament of the State by which there is referred to the Parliament of the Commonwealth:

(i) the matters referred to in subparagraphs (2) (a) (i) and (ii); or

(ii) matters that include, or are included in, those matters; or

(b) a law of the State adopting this Part.

(5) This Part extends to a State at any time by virtue of subsection (1) or paragraph (2) (a) only in so far as it makes provision with respect to:

(a) the matters that are at that time referred to the Parliament of the Commonwealth by the Parliament of the State; or

(b) matters incidental to the execution of any power vested by the Constitution in the Parliament of the Commonwealth in relation to those matters.

Additional application of Part

60F.*(1) Without prejudice to its effect apart from this section, this Part also has effect as provided by this section.*

(2) By virtue of this subsection, Divisions 3 to 6 (inclusive) (other than section 66G) and Divisions 10 and 13 have the effect that they would have if:

(a) each reference to a child were, by express provision, confined to a child of a marriage; and

(b) each reference to the parents of the child were, by express provision, confined to the parties to the marriage; and have that effect only in so far as they make provision with respect to the rights and duties of the parties to the marriage in relation to the child, including, without limiting the generality of the foregoing, provision with respect to:

(c) the rights and duties of those parties in relation to:

(i) the maintenance of the child and the payment of expenses in relation to the child; or

(ii) the custody, guardianship and welfare of, and access to, the child; and

(d) other rights and duties in relation to the child:

(i) arising out of the marital relationship;

(ii) in relation to concurrent, pending or completed proceedings between those parties for principal relief; or

(iii) in relation to the dissolution or annulment of that marriage or the legal separation of the parties to that marriage, being a dissolution, annulment or legal separation effected in accordance with the law of an overseas

jurisdiction, where the dissolution, annulment or legal separation is recognised as valid in Australia under section 104.

(3) By virtue of this subsection, Divisions 1, 7, 8, 11, 12 and 14, and this Division, have effect according to their tenor.

Additional jurisdiction of courts

60G. *In addition to the jurisdiction that, apart from this section, is invested in or conferred on a court under this Part, the court is invested with jurisdiction or jurisdiction is conferred on the court, as the case requires, in matters arising between residents of different States, being matters with respect to:*

(a) the maintenance of children and the payment of expenses in relation to children or child bearing; or

(b) the custody, guardianship and welfare of, and access to, children."

95. It can be seen that these sections are in the same terms as the sections comprising Subdivision F of Division 12 of Part VII of the present Act. The relevant part of the explanatory memorandum that accompanied that legislation said of these sections:

"*Division 2 - Extension, application and additional operation of Part*

New section 60E - Extension and application of Part

New section 60F - Additional application of Part

69. The present provisions of the Principal Act in relation to children are confined to children of a marriage in reliance upon the Commonwealth's constitutional power in marriage and matrimonial causes. Four States, (New South Wales, Victoria, South Australia and Tasmania) have enacted legislation referring powers to the Commonwealth Parliament in respect of the maintenance of children and the payment of expenses in relation to children and child

bearing and the custody and guardianship of, or access to, children. Placitum 51(xxxvii) of the Constitution provides for the Commonwealth to make laws with respect to matters referred by the Parliaments of any State or States but so that the laws extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.

70. ***The purpose of new Division 2 is to extend the operation of the Principal Act consequent upon the references of power. The scheme of the Division is as follows. New section 60E extends the operation of new Part VII to the referring States and, if Queensland or Western Australia also refer the relevant legislative powers to the Commonwealth or adopt the provisions of Part VII, to those States also.*** *New Part VII is also to apply in and in relation to the Territories, where there are no constitutional limitations on the Commonwealth's power to legislate with respect to ex-nuptial children.* ***New section 60F will have the effect that the provisions of the Principal Act relating to children will continue to apply in Queensland and Western Australia as at present in reliance upon the constitutional power with respect to marriage and to matrimonial causes.***

New section 60G - Additional jurisdiction of courts

71. New section 60G extends the jurisdiction of the Family Court and other courts having jurisdiction under the Family Law Act to children's matters where the parties to the proceedings are residents of different States, in reliance upon the provisions in section 75(iv) of the Constitution. The purpose of this section is to avoid some of the jurisdictional problems that may arise because the new provisions relating 'to ex-nuptial children can constitutionally extend only to the referring States. For example, the provision will enable the Family Court to continue to exercise jurisdiction if the parties to the proceedings are residents of different States in respect of a child who is taken from a referring State to a non-referring State and who may therefore fall outside the extended operation of the Act. In such a case the Court could continue to exercise jurisdiction but may be required to apply as the substantive law the law in force in the relevant State." (our emphasis)

~~Dra~~

96. The relevant sections upon which the Solicitor General relies are to be found in Sub-division F of Division 12 of Part VII, which is headed *"Extension, Application and Additional Operation of this Part"*.

97. Under that heading and immediately prior to s.69ZE appears the heading *"Extension of Part to the States"*.

(a) Section 69ZE

98. Section 69ZE(1) provides:

> *"Subject to this section and section 69ZF, this Part extends to New South Wales, Victoria, Queensland, South Australia and Tasmania"*

99. The Solicitor General argued that this sub-section is the source of all of the jurisdiction of the Court under Part VII of the Act.

100. Sub-section (3) prescribes that the extension of the Part to a State applies only for so long as there is in force a State Act which refers to the Parliament the maintenance etc of children or parental responsibility for children or matters included in those matters, or a law of the State adopting this Part.

101. The Solicitor General argued that this meant that **any** exercise of power by the Court under Part VII of the Act was therefore dependent upon such power being conferred by the Parliament of the States. He also argued that since the States had not specifically conferred welfare jurisdiction in relation to children upon the Commonwealth, that s.69ZC had no application in South Australia.

102. It appears to us to be quite clear that the meaning of this and succeeding sections was to give effect to State references of power in respect of **ex-nuptial** children. We do not consider that sub-section (1) is the source of power for the court to exercise its jurisdiction over children of a marriage. This is to be found in Subdivision C of Part VII and particularly in s.69H(1) and s.69M We consider that such an interpretation is further supported by the fact that Western Australia is treated separately in sub-section (2) of s.69 ZE. This is significant because Western Australia did not refer powers in respect of ex-nuptial children.

(b) Section 69ZH

103. This Section appears under the heading *"Additional Application of this Part"*. Sub-section (1) provides:

> *"Without prejudice to its effect apart from this section, this Part also has effect as provided by this section."*

104. This sub-section would appear to make it clear that an additional power is being conferred by the section and supports the view that it is concerned to confine the operation of the Act in those States that had not referred power in respect of ex nuptial children to matters that lie within the constitutional power of the Commonwealth. This explains the references in the section to children of a marriage and parties to a marriage. The language of the section is convoluted and its meaning not immediately apparent, no doubt because of the complexity of the situation

caused by some States not having referred power. We think it apparent that the section was not intended to derogate from the powers of the Court in relation to children of marriages, but rather to give them as much force as possible within constitutional limits in relation to those States where no reference of power had taken place.

105. This view gains further support from sub-section (2), which gives various portions of the Act including s.67ZC and s.68B the effect they would have as if each reference was confined to a child of the marriage and reference to parents was confined to parties to a marriage.

106. As we understand it, the Solicitor-General argues that it is this section that makes Part VII of the Act referable to children of a marriage as distinct from ex-nuptial children. We reject this argument for we consider that such a section would be otiose in relation to children of a marriage. Jurisdiction in respect of matters arising under Part VII is quite clearly conferred by s.69H(1). In so far as it relates to children of a marriage this conferring of jurisdiction is clearly within constitutional power. We think that the purpose of the sub-section is to make it clear that in those States that have not referred power, the operation of Part VII is not intended to extend it beyond the limits of power conferred by the Constitution and this is apparent from the Explanatory Memorandum.

107. Sub-section (3) has the similar object of confining the operation of the Part in non-referring States by providing that the provisions of

sub-section (2) only have effect so far as they make provision with respect to the parental responsibilities of the parties to a marriage for a child of the marriage.

108. Sub-section (4) provides that various portions of the Act have effect according to their tenor.

109. The Solicitor-General points out that the portions of the Act referred to in this subsection do not include s.68B or s.69ZC. We think that nothing turns upon this, because the section is concerned with conferring additional powers upon the Court, which already has the welfare and injunction jurisdiction in relation to children of marriages.

110. Again however, the opening portion of the explanatory memorandum to the Family Law Amendment Bill 1987 is of some assistance:

> *"2. The implementation of the reference of powers means that the provisions of the Act relating to the custody, guardianship and maintenance of children may now cover ex-nuptial children within the limits of the enlarged legislative power of the Parliament resulting from the referral of powers. Apart from the operation of the Act in the Territories to which it applies, the provisions of the Act as so enlarged may for constitutional reasons extend only to the referring States. In relation to Queensland and Western Australia, the Act will continue to operate as in the past. To accommodate this extended operation of the Act, it has been found convenient to bring together in a single part of the Act - proposed new Part VII - the provisions relating to children.*
>
> *3. Insofar as the Act will extend to the four referring States and will apply in the Australian Capital Territory, the Northern*

> *Territory and Norfolk Island, the provisions relating to children will apply generally to all children, whether children of a marriage or not, and their parents, whether married or not. In relation to the non-referring States, those provisions will be confined, as at present, to children of a marriage and to parties to a marriage. In particular, this means that the procedures under the Act, including the provisions for counselling and conciliation, will be available in disputes concerning ex-nuptial children except in relation to the non-referring States. In these two States, existing procedures under State law will continue to apply and the Family Court of Australia will have no enlarged jurisdiction over ex-nuptial children."*

111. These sections have hitherto received limited judicial consideration.

112. Callinan J in *AMS v AIF* (supra) said at [250 – 263]:

> *"250. One of the purposes of the Family Law Amendment Act 1987 (Cth) was to implement the reference of powers from New South Wales, Victoria, South Australia and Tasmania relating to the custody and guardianship of, and access to, children in those States and to apply the Family Law Act 1975 (Cth) as amended to the Territories to which the Family Law Act 1975 (Cth) applied."*

His Honour then set out s.60E and said:

> *"252. The express provisions of s 60E of the Family Law Act 1975 (Cth) therefore contemplated that the law applying in Western Australia to custody, guardianship and access issues in respect of ex-nuptial children would apply in that State, if, but only if there were a reference or an adoption of the Commonwealth provisions by that State, to the Commonwealth and the Family Court, but the Family Law Act 1975 (Cth) would apply to children in the Northern Territory."* (Our emphasis)

His Honour continued at [256]:

"256. The very broad definition of "child" in Part VII of the Family Law Act 1975 (Cth) is relevantly affected in certain important respects by s 69ZH(2) which states that particular divisions and sections of Part VII have the effect they would have, as if each reference to a child were confined to a reference to a child of a marriage. This restriction on the Act's reach is an acknowledgment of the Constitutional limitations on the Commonwealth's power contained in s 51 (xxii) as interpreted by the High Court in earlier cases decided in respect of similar provisions.

257. Questions as to the extent of the Commonwealth's power in this respect are now largely academic as a result of the referral of power by every state (except Western Australia) to the Commonwealth: see for example Commonwealth Powers Family Law - Children) Act 1986 (NSW). The New South Wales legislation refers to the Commonwealth matters relating to the "custody and guardianship of, and access to, children" (s 3(1)(b)). "Children" in this context are defined to mean persons under the age of 18 years.

258. It is against the background of these referrals by nearly all of the States that the Family Law Act 1975 (Cth) is stated to apply to New South Wales, Victoria, Queensland, South Australia and Tasmania. The referrals, however, do not make any express references to "welfare"."

After discussing the parens patriae jurisdiction His Honour continued [at 263]:

"263. It is unlikely that against the background of the long history of the exercise of the parens patriae jurisdiction over children essentially based on residence that the Commonwealth would have set out to legislate for the guardianship and custody of ex-nuptial children no matter where they might be resident at any time during infancy. (No question arises in this case as to the operation of the principle in those cases which might attract the diversity jurisdiction)." (footnotes omitted)

113. His Honour's comments make it clear that he regards the purpose of the 1987 legislation as relating to the reference of powers over ex-nuptial children by a number of States to the Commonwealth. He also points to the fact that the States did not specifically refer welfare jurisdiction over such children. He clearly regards the *Family Law Act* as having no application to ex-nuptial children in Western Australia because it has not referred powers to the Commonwealth despite the apparently broad scope of s.63F. However, his comments are inconsistent with and provide no support to the argument of the Solicitor General.

114. In *GPAO* at [103-105], Gaudron J said of the Family Court's jurisdiction in relation to children:

> *"The Family Court's jurisdiction*
>
> *103. The Family Court is created by s 21(1) of the Act. By s 39(1), jurisdiction is conferred on it in matrimonial causes, defined in s 4(1) of the Act to include various proceedings between or by parties to a marriage, including proceedings for the dissolution of marriage, maintenance and property settlement. Jurisdiction is also conferred on the Family Court by s 69H(1) of the Act "in relation to matters arising under [Pt VII]", which, in general terms, is concerned with matters affecting children. And s 69ZJ, which is in Pt VII, confers jurisdiction "in matters between residents of different States, being matters with respect to:*
> *(a) the maintenance of children and the payment of expenses in relation to children or child bearing; or*
> *(b) parental responsibility in relation to children.*
>
> *104. Subject to exceptions in ss 69ZE and 69ZF (which are not presently relevant), Pt VII of the Act extends to children of a marriage and ex-nuptial children in New South Wales, Victoria, Queensland, South Australia and Tasmania, those*

States having referred power to legislate in that regard to the Commonwealth ***to the extent that it does not otherwise have that power****. Provision is made in s 69ZE(2) for the extension of Pt VII to children in Western Australia in the event that it, too, refers that power to the Commonwealth. Until that happens, the effect of s 69ZH is that various provisions of Pt VII operate in Western Australia in relation to the children of a marriage.*

105. By s 69ZG of the Act, Pt VII "applies in and in relation to the Territories." The jurisdiction invoked in this case is jurisdiction under Pt VII as applied in the Territories by s 69ZG. In its application to ex-nuptial children, s 69ZG is a law under s 122 of the Constitution and not a law under ss 51(xxi) or (xxii) which are concerned, respectively, with "marriage" and "divorce and matrimonial causes". It is convenient to refer to the jurisdiction conferred by s 69ZG with respect to ex-nuptial children as "s 69ZG jurisdiction".'' (our emphasis, footnotes omitted)

115. We think that the argument of the Solicitor General is also inconsistent with Gaudron J's views as expressed in this passage.

116. Gleeson CJ and Gummow J said at [25]:

''25. Section 65C states that a parenting order in relation to a child may be applied for by either or both of a child's parents, or the child, or any other person concerned with the care, welfare or development of the child. There is no requirement that the child be the child of a marriage within the meaning of the decisions expounding the reach of the power of the Parliament to make laws under s 51(xxi) of the Constitution with respect to "Marriage". However, the effect of the provisions for extension, application and additional operation of Pt VII, made by subdivision F (ss 69ZE-69ZK) of Div 12, is to confine provisions such as s 65C in certain circumstances. This is achieved by identifying as a criterion the continuation of references of power by the Parliaments of the States under s 51(xxxvii) of the Constitution (ss 69ZE and 69ZF) and by reference to the limitations attending the

> *marriage power (s 69ZH). Section 69ZJ should also be noted. This is an investment of jurisdiction pursuant to s 77(i) and s 75(iv) of the Constitution. The section states:*
>
> > *"In addition to the jurisdiction that, apart from this section, is invested in or conferred on a court under this Part, the court is invested with jurisdiction or jurisdiction is conferred on the court, as the case requires, in matters between residents of different States, being matters with respect to:*
> >
> > *(a) the maintenance of children and the payment of expenses in relation to children or child bearing; or*
> > *(b) parental responsibility in relation to children."*

117. This passage seems to us to indicate that their Honours' view was that these sections confined the operation of Part VII within constitutional limitations in those States that did not refer powers. Unlike Callinan J in *AMS v AIF* (supra), Gleeson CJ, Gummow J and Gaudron J did not specifically advert to the issue of the referring States not having specifically transferred welfare powers in relation to ex-nuptial children. Gaudron J would appear to have left open the application of the *Family Law Act* in non-referring States to ex-nuptial children in those States.

118. We can see nothing in these statements of principle that lends support to the proposition advanced by the Solicitor General or the findings of Dawe J as to the proper construction of Subdivision F. On the contrary, they appear to assume the conferring of jurisdiction upon the Court in respect of children of marriages without limitation. They also appear to confirm, as does the Explanatory Memorandum, that the purpose of Subdivision F was to provide a legislative framework to accommodate the reference of powers in relation to ex nuptial children by some, but not all, of

the States and to give the *Family Law Act* such operation as the Constitution permits in the States that have not referred powers. So far as the Territories were concerned the position was much simpler because, as Gaudron J pointed out, the conferring of jurisdiction in relation to ex-nuptial children involved the exercise of power under s.122 of the Constitution.

119. The construction suggested by the Solicitor General really involves the proposition that the Parliament, having determined in 1975 to exercise its constitutional power in respect of marriage and divorce, to set up this Court and to confer jurisdiction upon it in respect of children of marriages, inadvertently removed that original jurisdiction in 1987. We are unable to accept that proposition.

120. In our view, the operation of the welfare jurisdiction and the injunction power is in no way confined by State references of power in respect of ex-nuptial children.

121. We think that her Honour was therefore incorrect in her conclusion that the welfare jurisdiction of this Court has no operation in South Australia.

The Welfare Jurisdiction and Injunction Powers of the Family Court of Australia

106. The welfare jurisdiction is conferred by s.67ZC and the injunctions power by s.68B of the Family Law Act. The sections are as follows:

"S67ZC - Orders relating to welfare of children

(1) In addition to the jurisdiction that a court has under this Part in relation to children, the court also has jurisdiction to make orders relating to the welfare of children.

(2) In deciding whether to make an order under subsection (1) in relation to a child, a court must regard the best interests of the child as the paramount consideration."

"S68B – Injunctions

(1) If proceedings are instituted in a court having jurisdiction under this Part for an injunction in relation to a child, the court may make such order or grant such injunction as it considers appropriate for the welfare of the child, including:

(a) an injunction for the personal protection of the child; or

(b) an injunction for the personal protection of:

(i) a parent of the child; or

(ii) a person who has a residence order or a contact order in relation to the child; or

(iii) a person who has a specific issues order in relation to the child under which the person is responsible for the child's long-term or day-to-day care, welfare and development; or

(c) an injunction restraining a person from entering or remaining in:

(i) a place of residence, employment or education of the child; or

(ii) a specified area that contains a place of a kind referred to in subparagraph (i); or

(d) an injunction restraining a person from entering or remaining in:

(i) a place of residence, employment or education of a person referred to in paragraph (b); or

(ii) a specified area that contains a place of a kind referred to in subparagraph (i).

(2) A court exercising jurisdiction under this Act (other than in proceedings to which subsection (1) applies) may grant an injunction in relation to a child, by interlocutory order or otherwise, in any case in which it appears to the court to be just or convenient to do so.

(3) An injunction under this section may be granted unconditionally or on such terms and conditions as the court considers appropriate."

Legislative History

123. In its original form the welfare jurisdiction first appeared in the Family Law Act in 1983 and was subsequently amended in 1987. It appeared in s.64(1)(a) as follows:

"64(1) In proceedings with respect to the custody, guardianship or welfare of, or access to, a child of a marriage

(a) the court shall regard the welfare of the child as the paramount consideration;"

124. There followed a series of factors for the Court to consider when determining the issue. These are now to be found in s.68F of the *Family Law Act*, with some variations.

125. Section 64(1) of the Family Law Act was further amended in 1987 and in 1991, but continued to make the same provision.

126. Section 64(1) was repealed by the *Family Law Reform Act* 1995. The new Part VII which it inserted specifically refers to the paramountcy principle in a number of sections: see the Full Court

decision *B and B (Re Jurisdiction)* [2003] FamCA 105, per Holden, Coleman and Warnick JJ at [18-20]. So far as what used to be known as "custody", "guardianship" and "access" is concerned, these matters now fall under the rubric of "parenting orders". Section 65E applies to parenting orders. It states:

"In deciding ***whether to make a particular parenting order*** *in relation to a child, a court must regard the best interests of the child as the paramount consideration." (our emphasis)*

127. Notably, unlike predecessor sections, the application of the paramountcy principle in s.65E is not expressed to apply "in proceedings in relation to" what might now be termed parenting orders. The principle is expressed to apply to "deciding whether to make a particular parenting order".

128. Section 67ZC, which is relied upon in the present case, was also inserted by the *Family Law Reform Act* 1995. This section establishes what we identify in these reasons as a distinct additional welfare jurisdiction. It would appear that an order in respect of the welfare of a child made under s.67ZC is **not** a parenting order (see s.61D which defines parenting orders). However, the best interests test also applies to such orders because s.67ZC(2) states: *"In deciding whether to make an order under subsection (1) in relation to a child, a court must regard the best interests of the child as the paramount consideration."*

129. Clause 319 of the Explanatory Memorandum stated:

"New section 67ZC – Orders relating to welfare of children

The new section 67ZC provides the court with jurisdiction relating to the welfare of children in addition to the jurisdiction that the court has under Part VII in relation to children. This jurisdiction is the parens patriae jurisdiction explained by the High Court in SMB and JWB; Secretary, Department of Health and Community Services [sic] *(Re Marion) (1992) 175 CLR 218."*

130. Section 68F provides guidance as to how a court determines the best interests of a child. It sets out a number of relevant factors including the following:

"(2) The court must consider:

(g) the need to protect the child from physical or psychological harm caused, or that may be caused, by: being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or
being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person;"

131. It is clear that, if the Court does have jurisdiction in this case the matters set out in ss.68F(2)(g) are likely to be highly relevant to the issue of determining the child's best interests.

Section 68B(1)

132. Since 1975 the Act has always provided for an injunctive power in relation to children. It was originally contained in s.114, which was replaced by s.70C as a result of the *Family Court of Australia (Additional Jurisdiction and Exercise of Powers) Act 1987*. The Explanatory Memorandum records that this was done to bring all proceedings relating to children within Part VII of the Act. The present s.68B was substituted by the *Family Law Reform Act 1995*.

133. The injunction powers are conferred as an aid to the exercise of the jurisdiction of the Court in relation to children. They are couched in wide terms and are obviously intended to enable the Court to make protective orders in relation to children against third parties as well as parents and those acting *in loco parentis*.

The *Parens Patriae* Jurisdiction

134. It is quite clear from the decision of the High Court in *Marion's case* that the Court's role in respect of a child when exercising its welfare jurisdiction is akin to the *parens patriae* jurisdiction of the State and Territory Supreme Courts - see also Gaudron J in *AMS v AIF* (supra) at 189.

135. The historical basis of the *parens patriae* jurisdiction is extensively discussed in the reasons for judgment of La Forest J in *Re Eve* (1986) 31 DLR (4^{th}) 1 at (13-22). In particular, we note his Lordship's reference to the remarks of Lord Eldon in *Wellesley v Duke of Beaufort* (1827), 2 Russ. 1, 38 E.R.236 at 2 Russ. (at 20), 38 E.R. (at 243) where the latter said in relation to the *parens patriae* jurisdiction:

> *"...it belongs to the King as parens patriae, having the care of those who are not able to care for themselves, and is founded on the obvious necessity that the law should place somewhere the care of individuals who cannot take care of themselves, particularly in cases where it is clear that some care should be thrown around them."*

136. La Forest J also referred to the remarks of Latey J in *Re X (a minor)* [1975] 1 All E.R. 697 (at 699) where he said:

> *"But I can find nothing in the authorities to which I have been referred by counsel or my own researches to suggest that there is any limitation in the theoretical scope of this jurisdiction; or, to put it another way, that the jurisdiction can only be invoked in the categories of cases in which it has hitherto been invoked, such as custody, care and control, protection of property, health problems, religious upbringing and protection against harmful associations. That list is not exhaustive. On the contrary, the powers of the court in this particular jurisdiction have always been described as being of the widest nature.* ***That the courts are available to protect children from injury whenever they properly can is no modern development.****"* (our emphasis).

137. As La Forest J pointed out, Latey J (at 700) went on to indicate that the Court will interfere to provide protection against prospective as well as present harm. Although the Court of Appeal in that case disagreed with Latey J's exercise of discretion Lord Denning said (at 703): *"No limit has ever been set to the jurisdiction. It has been said to extend "as far as necessary for protection and education": see Wellesley v Wellesley by Lord Redesdale.* ***The court has the power to protect the ward from any interference with his welfare, direct or indirect****."* (our emphasis). Roskill LJ and Sir John Pennycuik made statements to similar effect (at 705 and 706-7 respectively).

138. La Forest J said (at 28):

> *"The parens patriae jurisdiction is, as I have said, founded on necessity, namely the need to act for the protection of those who cannot care for themselves. The courts have frequently stated that it is to be exercised in the "best interest" of the protected person, or again, for his or her "benefit" or "welfare".*

The situations under which it can be exercised are legion; the jurisdiction cannot be defined in that sense. As Lord MacDermott put it in J. v C., [1970] A.C. 668 at p. 703, the authorities are not consistent and there are many twists and turns, but they have inexorably "moved towards a broader discretion, under the impact of changing social conditions and the weight of opinion…". In other words, the categories under which the jurisdiction can be exercised are never closed. Thus I agree with Latey J. in Re X, supra, at p. 699, that the jurisdiction is of a very broad nature, and that it can be involved in such matters as custody, protection of property, health problems, religious upbringing and protection against harmful associations. This list, as he notes, is not exhaustive.

What is more, as the passage from Chambers cited by Latey J. underlines, a court may act not only on the ground that injury to person or property has occurred, but also on the ground that such injury is apprehended. I might add that the jurisdiction is a carefully guarded one. The courts will not readily assume that it has been removed by legislation where a necessity arises to protect a person who cannot protect himself."

The Limits of the *Parens Patriae* Jurisdiction

139. In the course of these reasons, we discuss in some detail *Marion's case* and *P v P* in the context of constitutional issues. We have also noted the comment of the majority in the former case that any limitation on the exercise of the welfare jurisdiction must be found in the Constitution (see par 151). We also note the remarks of Gleeson CJ and Gummow J in *GPAO* where their Honours said at [63-65]:

*"**[63]** In M v M, Marion's Case, P v P and ZP v PS, this Court considered the jurisdiction conferred upon the Family Court by the previous Pt VII of the Family Law Act. In ZP v PS, Mason CJ, Toohey and McHugh JJ observed that it was established by Marion's Case and by P v P that Pt VII invested the Family Court with a welfare jurisdiction which*

was similar to the parens patriae jurisdiction exercised by the Court of Chancery but which was freed from the preliminary requirement of a wardship order. Their Honours also pointed out that in the exercise of the parens patriae jurisdiction the Court of Chancery had always been guided by the principle that the welfare of the minor was the first and paramount consideration.

[64] *The history of this principle is examined in the speech of Lord Guest in J v C. It developed as a recognition of the welfare of an infant as a "first and paramount consideration" to which other considerations, such as the claims of a father or a mother, were subordinate. Section 1 of the Guardianship of Infants Act 1925 (UK) gave legislative recognition to the rule by stipulating that a court should "regard the welfare of the infant as the first and paramount consideration".*

[65] *This important and salutary principle of substantive law, adopted by courts exercising parens patriae jurisdiction for more than a century, was not applied in an adjectival vacuum, although its identification of the principal issue to be tried had important practical consequences for the application of the rules of procedure and evidence, especially where there was a discretion to be exercised, where competing interests were to be weighed in the balance, or where there was a question of dispensing with strict compliance with the ordinary rules."*

140. We now turn to a discussion of the Australian cases which have involved an exercise of the *parens patriae* and/or welfare jurisdiction directed at public officials relating to the welfare of children.

141. In *Minister for the Interior v Neyens* (1964) 113 CLR 411, the High Court affirmed the view that the *parens patriae* jurisdiction could only be ousted in the clearest terms by statute. Barwick CJ said that a conclusion that it had been ousted could only be reached

by *"necessary, indeed inescapable, implication"* [at 419]. In that case the Court found that the jurisdiction had been ousted.

142. In *Carseldine v Director of Children's Services* (1974) 133 CLR 345 the majority of the High Court re-affirmed the need for the ouster of jurisdiction to be in the clearest terms. Importantly for present purposes, as emerges from the judgment of Mason J (as he then was), who delivered the principal judgment:

> *"....it may be possible to say that the inherent jurisdiction is not wholly ousted and that it remains available to be exercised, not in competition with the care and protection which is vested in the Director by the Act, but in aid of his statutory responsibilities, and if need be, when the Director is not performing his duties and exercising his powers in accordance with the Act."*(at 364)

143. His Honour concluded (at 367):

> *"I make no comment on the facts of the present case otherwise than to say that if the evidence remained in its present state the Supreme Court would be amply justified in exercising the jurisdiction which in my view it possesses, for the conclusion would be irresistible that the Director has failed to apply himself to the welfare of the children."*

144. His Honour went on to note that as in the present case:

> *"... the Director has thus far refrained from adducing evidence by way of answer to the appellants' allegations so that the question of jurisdiction may be determined at the threshold."* (at 367)

145. Similarly in this case we note that there is nothing in the *Migration Act* which specifically ousts the jurisdiction of this Court. It may be, as we discuss later, that the Court's jurisdiction is limited in

that it cannot order the release of the children from detention who are lawfully detained. However, this leaves open the questions of whether the children are being lawfully detained and whether if they are lawfully detained the Court can act to protect the children if they are being subjected to harm by reason of their detention.

146. In *Johnson v Director General of Social Welfare (Vict)* (1976) 135 CLR 92, the issue related to the powers of the Supreme Court of Victoria to exercise its protective jurisdiction over children in the care of the Director-General of Social Welfare in order to supervise such persons and to place such children in the custody of any person.

147. Barwick CJ, who delivered the principal judgment said [at 97]:

> *"This Court has been quite emphatic in expressing its view that, if the Parliament wishes to take away from the Court its power of supervising the guardians, and protecting the welfare, of children, it must do so in unambiguous language, in language which is either express or such as inescapably implies that expression of intention on the part of the Parliament: see Minister for the Interior v Neyens, and Carseldine v Director of Children's Services. It is, of course, to be conceded that in these more populous and complex days the courts may not be able themselves to attend to the detail involved in the protection of children and in ensuring their welfare. Consequently, it has become necessary for statutes to provide for departmental officers and staff to take care of children who are in need of care and attention. But it is to my mind supremely important that there should remain in the courts the ability in appropriate cases to supervise the actions and the performance of the duties of the public servants to whose care such children are committed. If the legislatures, in their wisdom, should decide that the court ought to be entirely excluded and the matter be left entirely to department officers then, of course, Parliament can say so. For my part, it will need to do so in the clearest language."*

148. Murphy J said (at 100):

> *"If the parental power of the court were excluded by statute, the Director-General could still be supervised by the courts. But this power of supervision, if exercised according to the usual principles of review of administrative decisions, would be severely confined. These principles are so limited that, unless they were extended in this area, they would not always provide justification for interference where a court is satisfied that a decision made in good faith by the Director-General was against the best interests of the child. If, however, traditional parental power is retained, it would without doubt enable the court to make orders which it considers are in the best interests of the child."*

149. It is to be noted that these cases all involved discussion of the *parens patriae* jurisdiction in the context of it having no statutory recognition. The courts nevertheless made it clear that any statute purporting to abrogate the jurisdiction must do so in the clearest terms. By way of distinction we are now considering a statutory jurisdiction. We think that the fact that it has statutory recognition provides a greater imperative for any statute purporting to oust the jurisdiction to do so in the clearest possible terms.

150. In *T and F; The Commissioner of the Australian Federal Police and the Children's Representative* (1999) FLC 92-855, the Full Court of this Court (Nicholson CJ, Lindenmayer and Kay JJ) considered the interaction of the *Family Law Act* and the *Witness Protection Act 1994 (Cth)*. The matter came before the Court on a case stated.

147. The relevant issue for present purposes was as to whether the Family Court had the power to make residence and contact orders in relation to children who were covered by the National Witness Protection Program, which is established under the *Witness Protection Act*. It was argued on behalf of the Commissioner of the Australian Federal Police that Family Court custody and access orders should not be regarded as derogating from the absolute discretion of the Commissioner in the manner in which protection is offered to protected witnesses under that program.

152. The Court rejected this proposition, citing *Neyens, Carseldine and Johnson*, upon the basis that there was nothing in the *Witness Protection Act* that suggested that Parliament had intended to oust the jurisdiction of the Court in relation to persons participating in the program.

153. The Court clearly took the view that its jurisdiction was not ousted by the *Witness Protection Act* and that any decisions by the Commissioner relating to the need for protection were subject to the orders of the Court.

154. The Court recognised that there were limitations upon its powers under the Act, such as directing the release of a prisoner undergoing a lawful custodial sentence for the purpose of enhancing contact that such a person might have with a child.

155. However, it rejected an argument that in order to make an informed decision it would need to have access to confidential information in the possession of the Commissioner, finding that it could, if

necessary, give priority to the welfare of the child in question in considering the competing public interests involved This is important in that unlike the situation in England, the Court asserted the primacy of its own jurisdiction over discretions exercised by public officials under other legislation.

156. In England, the development of cases involving the *parens patriae* jurisdiction appears to have been strongly influenced by the fact that because the jurisdiction in England was one founded upon common law principles, it could therefore be overridden by statute and could not limit actions of the Executive when such actions are carried out with statutory authority.

157. The modern English cases in this area have not adopted the approach taken by the High Court of Australia in cases such as *Johnson* as to the need for a clear indication in the relevant statute that the *parens patriae* jurisdiction has been ousted.

158. In *Re W (A Minor) (Wardship Jurisdiction)* [1985] AC 791, sub nom *Re W (A Minor) (Care Proceedings: Wardship)* [1985] FLR 879, at 797C and 882 respectively, Lord Scarman said:

> *"The High Court cannot exercise its powers, however wide they may be, so as to interfere on the merits in an area for concern entrusted by Parliament to another public authority."*

159. In *Re Z (A Minor)(Identification: Restrictions on Publication)* [1997] Fam 1, sub nom *Re Z (A Minor) (Freedom of Publication)* [1996] 1 FLR 191, at 23A and 207 respectively, Ward LJ said:

"The wardship inherent jurisdiction of the court to cast its cloak of protection over minors whose interests are at risk of harm is unlimited in theory though in practice the judges who exercise its jurisdiction have created classes of cases in which the court will not exercise its powers. An obvious case is where Parliament has entrusted the exercise of competing discretion to another, for example:

(a) the local authority, as in A v Liverpool City Council [1982] AC 363, (1981) FLR 222;

(b) the immigration authorities, as in Re Mohamed Arif (An Infant) [1968] Ch 643 and in Re A (A Minor) (Wardship: Immigration [1992] 1 FLR 427;

(c) another court of competent jurisdiction as in Re R (A Minor) (Wardship: Restrictions on Publication) [1994] Fam 254, [1994] 2 FLR 637."

160. One of the recent cases where the Court of Appeal has dealt with this question is *R v Secretary of State for Home Department, ex parte T* [1995] 1 FLR 293, which helpfully summarises the preceding authorities in relation to immigration matters.

161. In that case, the Court said that the Family Division could entertain an application to invoke its wardship jurisdiction/equivalent powers under the *Children Act* 1989 made by or in respect of a person liable to removal or deportation (i.e. it has the notional jurisdiction), but that such a jurisdiction should be exercised very sparingly.

162. The Court held:

1. That it could entertain an application to invoke its wardship jurisdiction or powers under the *Children Act* made by or in respect of a person liable to removal or deportation.
2. The jurisdiction would be exercised very sparingly because:

(a) a wardship or *Children Act* order cannot deprive the Secretary of State of the power conferred by the Immigration Act 1971 to remove or deport the child or any other party in the proceedings, although it may be something to which the Secretary of State should have regard in deciding whether to exercise the power; and

(b) in cases where there is, apart from immigration questions, no genuine dispute concerning the child, the court will not allow itself to be used as a means of influencing the decision of the Secretary of State.

163. The following points are of interest.

164. The Court's first proposition is derived from the general principle that every person within the jurisdiction is entitled to the equal protection of the law, see Lord Scarman in *R v Home Secretary, ex parte Khawaja* [1984] 1 AC 74 at 111 where his Lordship said:

> *"Every person within the jurisdiction enjoys the equal protection of our laws. There is no distinction between British nationals and others. He who is subject to English law is entitled to its protection. This principle has been the law at least since Lord Mansfield freed `the black' in* Sommersett's Case *(1777) 20 St. Tr. 1"*

165. This view has been reflected in Australia. In *Kioa v West* (1985) 159 CLR 550, Deane J said [at 631]:

> *"An alien who is unlawfully within this country is not an outlaw. Neither public officer nor private person can physically detain or deal with his person ... without his consent except under and in accordance with the positive authority of the law. ..."*

See also *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, per Brennan, Deane and Dawson JJ [at 19] and *Oates v Attorney-General (Cth)* [2003] HCA 21.

166. The rationale in England for deciding that the exercise of powers expressly conferred by statute overrides the court's decisions made in the exercise of its wardship/*Children Act* jurisdiction (albeit that jurisdiction is now derived from statute) appears to be that the judge hearing an application in wardship or under the *Children Act* 1989 (UK) cannot have regard to immigration policy. He or she is guided solely by the interests of the child. It was said that it is therefore inappropriate for a judge to make orders preventing the Secretary of State from exercising a power based on altogether different considerations (see *ex parte T* at 297).

167. In Australia the Full Court of this Court took a different view of such an argument in *T and F; The Commissioner of the Australian Federal Police and The Child's Representative* (1999) FLC 92-855 as discussed previously.

168. Somewhat paradoxically in England, in cases of adoption the court's adoption order can override the law in relation to immigration matters because the effect of the adoption order is to change the child's status: see *Re J (Adoption: Non-Patrial)* [1998] 1 FLR 225, CA , following *Re W (Adoption: Non-Patrial)* [1986] 1 FLR 179.

169. It would appear that the English approach is based upon the non-exercise of a discretion rather than lack of power. We are not

persuaded by the rationale that has been adopted for the non-exercise of such a discretion where statutory authority has been conferred upon another public official. The assumption appears to be that once this is done then it is a matter for the relevant Minister and not the Courts to supervise the activities of such an official. This seems to us to ignore the fact that the greatest danger to children may arise from the failure of such a public official to pay proper regard for the welfare of children under his/her care and control. This is not intended as a generalised criticism of public officials, the vast majority of whom perform their functions with competence and probity. The same can of course be said of Ministers. However there are some public officials who do not meet these standards and there are some Ministers who do not for various reasons, properly supervise them. Where the welfare of children is involved we are of the view that there are strong reasons why the courts have and should exercise their powers to protect children in such circumstances.

170. In any event, we are not persuaded that the law in Australia is in accordance with that in England. We are in no sense bound by the English authorities that we have discussed, which in our view are inconsistent, both with earlier English authorities as to the scope of the jurisdiction and with the decisions of the High Court of Australia and this Court that we have reviewed.

171. The English cases in relation to immigration can also be distinguished in that they deal with the Minister's powers to deport rather than detain individuals. As cases such as *R v Governor of Durham Prison; ex parte Hardial Singh* [1984] 1 WLR 704, where Woolf J

(as he then was) (at 706) indicated the English courts have taken a far more robust approach to interfering with the Ministers in relation to cases of detention.

Part VII and Third Parties

172. We turn to the Solicitor General's broader proposition that the exercise of power by the Court under Part VII cannot extend to third parties such as the Minister. This argument fell into two parts. The first part related to limits imposed by the Constitution that we discuss subsequently. The other part was based upon statutory interpretation of the relevant sections of the *Family Law Act* and upon what he said were the historical limits of the *parens patriae* jurisdiction.

(a) Section 67ZC

173. The Solicitor-General advanced an argument before her Honour, which she accepted, that on the proper construction of the *Family Law Act* the welfare jurisdiction conferred upon the Court by s.69ZC and the jurisdiction to grant injunctions contained in s.68B did not enable the Court to make orders at large for the protection of children.

174. While one might accept this broad proposition, the more difficult question is to determine the limits of the jurisdiction. Her Honour seems to have been attracted by the argument that the jurisdiction was limited to the "traditional" areas of family law, namely related to residence and contact and like matters.

~~Dra~~

175. An examination of s.67ZC makes it clear that it is intended to confer an **additional** jurisdiction and the words of sub-section (1) make this quite clear. That additional jurisdiction is to make orders for the welfare of children. It is something additional therefore to what might be described as the traditional family law orders that a court can make. *Marion's case* (decided in relation to former s.64(1)(c)) made it clear that the jurisdiction extended to restraining and permitting the performance of certain medical procedures upon children, including measures of such gravity as the sterilisation of children with intellectual disabilities. These are not "traditional family law orders". Further, there is nothing in the legislation that supports such a restrictive interpretation.

176. In his second reading speech introducing the Family Law Reform Bill 1995, the Minister made it clear that the section was intended to give legislative effect to the decision of the High Court in *Marion's case*. This statement of intention also appears in the Explanatory Memorandum to the Bill. This does not suggest that the section should be subject to a restrictive interpretation. Rather, it suggests that Parliament intended the section to have an extremely wide operation and to confer a jurisdiction similar to the *parens patriae* jurisdiction. The decision of the High Court in *Marion's case* that we discuss in detail subsequently, confirms this.

177 The broad thrust of the Solicitor General's argument was that when regard is had to the object of Part VII, it is confined to what might be described as traditional family law issues and should not be interpreted as extending into wider areas of child welfare and child

protection. He relied in particular on s.60B where the object of Part VII of the Act is set out as follows:

"The object of this Part is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children."

178. He stressed that the object of the Part as expressed in that section is to ensure that children receive adequate and proper parenting. He said that the section goes on to qualify and explain what that means and sets out principles which underlie that object, all of which he said, are concerned with parenting. He argued that the Part was therefore confined to regulating the activities of parents, or persons acting in the capacity of parents. He therefore said that the Court had no power to direct orders at third parties who did not have parental responsibility for children.

179. We reject this proposition for the following reasons.

180. First, we think that his reliance on s.60B omits other relevant matters. In particular, we refer to s.43 of the Act which appears under the heading "*Principles to be Applied by Courts"*.

181. The relevant parts of that section for present purposes are:

"The Family Court shall, in the exercise of its jurisdiction under this Act, and any other court exercising jurisdiction under this Act shall, in the exercise of that jurisdiction, have regard to:

(a) the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life;

(b) the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children;

(c) the need to protect the rights of children and to promote their welfare;

(ca) the need to ensure safety from family violence; …"
(our emphasis)

182. We draw particular attention to pars (b) and (c) but we think that the other principles may have varying degrees of relevance to this case. On any view, we think that s.60B must be read in conjunction with s 43 and once this is done we think that it is clear that the Court's jurisdiction in relation to children should not be confined by a narrow interpretation of s.60B.

183. Secondly, s.60B itself is concerned with children receiving adequate and proper parenting. This is obviously not confined to controlling the actions of biological or adoptive parents. We see "parenting" as having a much wider meaning. As we discuss subsequently, the objects set out in the section are derived from and implement the United Convention on the Rights of the Child (UNCROC).

Parenting

184. The situation of children in this case is that both they and their parents are subject to a particular form of confinement. If such a

confinement is detrimental to the children's welfare, and the *prima facie* evidence before us to which we will refer suggests that it is detrimental to their welfare, then it may well operate to prevent the attainment of the objects of the Act as set out in s.60B.

185. Similarly, when one examines the principles set out in s.60B(2), it is at least arguable that where children's parents are so confined as to be unable to properly carry out their parental duties, then that would seem to involve the negating of those principles.

186. In order to achieve the objects set out in s.60B we think it follows that the Court must have powers to ensure, so far as possible, that those who are either parents or *in loco parentis* to the child should have a proper opportunity to exercise their functions as parents.

187. Further, they must be entitled to receive the assistance of the Court in protecting the child from harm as the father seeks to do in this case. Therefore we consider that s.60B should not be read as limiting the Court's powers to make orders for the protection of children but rather as broadening them.

188. Historically, the law has viewed "parenting" as characterised in terms of the adult having "guardianship" of the child; "guardianship" was a concept rooted in the feudal system, and thus was initially concerned with succession and property: Cretney, S.M. & Mason, J.M., *Principles of Family Law*, 5th Edition, Sweet & Maxwell, 1990, p483ff.

~~Dra~~

189. By the 19th Century, numerous varieties of guardianship had evolved – one of which was "natural" or "parental" guardianship. Initially, parental guardianship was conferred only upon the father of a legitimate child and it was not until later legislative amendments introduced in the early 20th Century that mothers were given like powers in respect of their children.

190. As the scope of "guardianship" did not extend to include all children, the Courts of Chancery developed the concept of the Crown as guardian – *parens patriae* – for children in need of protection. This is in itself a form of parenting as the name suggests.

191. Under Australian law prior to enactment of the *Family Law Act*, the concepts of guardianship, and the rights of custody, choice of education or other decisions affecting the welfare of the child were governed by s.85 of the *Matrimonial Causes Act* 1959 (Cth). Prior to that time the relevant State and Territory Acts dealt with the guardianship and custody of children.

192. Upon passage of the *Family Law Act*, the concepts of "guardianship, custody and access" in relation to parental rights were initially retained.

193. Following enactment of the *Family Law Act Reform Act* 1995 terminology dealing with the "guardianship, custody and access" of children was instead substituted with terms that emphasised the responsibility owed by parents to their children, rather than those suggestive of ownership.

194. A detailed discussion of the events leading up to the enactment of the Reform Act and its relationship with similar United Kingdom legislative provisions is given by the Full Court of the Family Court *In the Matter of: B and B: Family Law Reform Act* 1995 (1997) FLC 92-755 at [3.9 – 3.26].

195. The Act as it now appears refers to "parental responsibility" for children, rather than "guardianship, custody and access" as rights of parents in relation to their children. Section 61B of the Act relevantly provides:

"*Parental responsibility… means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children".*

196. Section 61C provides that each parent has parental responsibility, subject to Court orders, such orders being dealt with by Divisions 4 and 5 of Part VII of the Act.

197. Orders in relation to parenting arrangements are now described as "Parenting Orders". Section 64B(2) provides that:

"A Parenting Order may deal with one or more of the following:

a) the person or person with whom a child is to live;
b) contact between a child and another person or other persons;
c) maintenance of a child;
d) any other aspect of parental responsibility for a child."

198. Significantly, Parenting Orders need not be made in favour of a parent.

199. Despite the considerable amendments made by the 1995 Reform Act, the Act has retained the concept of "guardian", which is defined in s.60D as:

> " *...in relation to a child, includes a person who has been granted (whether alone or jointly) with another person or other persons) guardianship of the child under the law of the Commonwealth or of a State of Territory."*

200. "Parenting" thus now finds expression in terms of "parental responsibility" pursuant to s.61B, which is conferred upon both parents pursuant to s.61C.

201. However, regardless as to the extent, if any, that a parents "rights" at common law in relation to their child have survived the various amendments to the Act, it is clear that under the current legislative framework, parents have a responsibility to make all such decisions as are necessary to ensure the child's care needs are met.

202. The responsibilities and matters a parent may lawfully decide upon in relation to their child would necessarily include:

- the right to determine where the child shall live and attend school;
- to decide which religion (if any) the child should be educated in;

- to ensure the child receives appropriate medical treatment where necessary;
- to socialise the child in a culturally appropriate manner; and
- to protect the child.

203. In considering arrangements for the care of children, the Court, in making its orders, must do so in a manner that ensures the objects as outlined in s.60B of the Act are met.

204. It is important to bear in mind therefore the normal rights and duties of parents when considering the circumstances of this case.

205. However we reject the concept that the Court's powers to protect children are confined to orders directed at parents or persons *in loco parentis*.

206. The Solicitor General suggested that the Court could not exercise its powers to grant an injunction against persons such as the landlord of the premises where the child may be living or any other third person, regardless of the effect that their behaviour might be having upon the children's welfare. We find this to be an unsatisfactory proposition, because it suggests that the Court has no power to protect a child from a potential abuser, unless that person is *in loco parentis* in respect of the child. We can find nothing in the Act and particularly the language of s.68B that would support such a restrictive interpretation. It is true that Gaudron J left this question open in *GPAO* at [142] upon the basis that it was

unnecessary to determine it in that case. We are unaware of any authority that would operate to so confine the jurisdiction.

207. We think that to adopt such an interpretation would seriously weaken the Court's capacity to protect children from potential abusers who may be, and often are, persons within a family who are not *in loco parentis* to the child. For example, children are frequently abused by persons other than their parents from within and outside the family circle. It is not uncommon and often essential for the Court to make protective orders in such cases.

208. While it might be said that this area is the province of State and Territory child protection departments and juvenile courts, the fact is that this court is often called upon to make such protective orders. This may be because the particular State or Territory legislation more narrowly defines children "at risk" or it may simply be because those authorities are either unable or unwilling to take steps to protect children in particular cases. Further, there are many situations involving the abuse or potential abuse of children which never come to the attention of such authorities but do emerge in proceedings before this Court.

209. The terms of s.68F(2)(g) are a clear recognition that in the best interests of the child, a highly relevant matter is to protect the child from abuse. The section is not confined to abuse by persons who are *in loco parentis* to the child.

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Constitutional Issues

210. In this Court, it is apparent that the extent of the welfare jurisdiction conferred by s.67ZC is circumscribed by the Constitution. We leave aside for present purposes the extent to which it is also circumscribed by particular statutes, such as the *Migration Act*.

211. In the present case, her Honour did not specifically consider this issue, except in the context of the external affairs power. This was no doubt because of her view as to the restrictive effects of ss.69ZE and 69ZH and her view as to the non applicability of the welfare jurisdiction to children in South Australia, that we have found to be incorrect.

212. However, before us, the Solicitor General argued that the welfare and injunction jurisdictions must be read in the light of the heads of power upon which they were intended to be based. He contended that the making of orders against the Minister, directing him to exercise statutory powers in a certain way in relation to someone merely because that person was a child would not invoke the power.

213. It thus becomes necessary to consider, not only the ground of appeal relating to the external affairs power, but also the issue of whether the welfare jurisdiction is sufficiently underpinned by the marriage/divorce and incidental powers to enable orders to be made against the Minister.

~~Dra~~

The Constitutional Basis of the Court's Welfare Jurisdiction:

1. The Marriage, Divorce and Incidental Powers

214. In *Marion's case* their Honours forming the majority observed (at 255) that in order to determine the Court's jurisdiction it is necessary to examine what was described as two major amendments to the Act, one being in 1983 and another in 1987. Before the 1983 amendments the Family Court had by virtue of s.3(ii) of the *Family Law Act*, jurisdiction over matrimonial causes. A matrimonial cause was defined in s.4(1) of the Act to include:

> *"proceedings between the parties to a marriage with respect to –*
>
> *(i) the maintenance of one of the parties to a marriage; or*
> *(ii) the custody, guardianship or maintenance of, or access to, a child of the marriage.*
> *(iii) proceedings by or on behalf of the child of a marriage against one or both of the parents to the marriage with respect to the maintenance of the child."*

215. Their Honours pointed out that at that time there was no independent reference to welfare in the Act and it was clear that as the Act stood before 1983 there was no general power in the Court to make orders relating to the welfare of a child. Orders were confined to those concerning custody, guardianship or access.

216. They also recorded that the amendments to the *Family Law Act* made in 1983 were the result of recommendations contained in the Watson Committee Report (*Watson Committee Report (Wardship, Guardianship, Custody, Access, Change of Name) November 1982,*

AGPS, Canberra, 1982). Their Honours' judgment continues (at 255):

"Significantly, the Act was amended to enable orders to be made for the protection of the welfare of a child of a marriage."

217. At the same time, the definition of a matrimonial cause in s.4(1) was amended to include *"….proceedings with respect to the welfare of a child of the marriage"*.

218. Their Honours pointed out that the Attorney General, in the second reading speech introducing the Family Law Amendment Bill 1983, said that the intention of the Bill was to expand the Act's jurisdiction concerning children to permit proceedings concerning the welfare of a child. This reflected the Government's decision to implement the Watson Committee recommendation, thereby investing courts exercising jurisdiction under the Act with a power similar to the wardship powers of the State Supreme Courts.

219. Their Honours observed that the Attorney General said that the Government accepted the Watson Committee's view that while the substance of the jurisdiction was desirable the concept of wardship was archaic. The judgment records at [256] that the Attorney General concluded:

"In accordance with the Watson committee's views, the Bill does not use the language of wardship but instead provides that proceedings concerning the welfare of a child of a marriage that involve at least one of the parties to the marriage are a matter, indeed an exclusive matter, to the Family Court."

~~Dra~~

220. Their Honours continued at [256]:

> *"It seems clear that the 1983 amendments were intended to, and did, confer jurisdiction on the Family Court similar to the parens patriae jurisdiction, without the formal incidents of one of the aspects of that jurisdiction, the jurisdiction to make a child a ward of the Court."*

221. They noted that the 1987 amendments involved the repeal of the relevant portions of the definition of "matrimonial cause", including the provision relating to proceedings with respect to the welfare of a child. However they made it clear that the removal of the welfare jurisdiction was not the intention of the 1987 amendments, which were intended to gather provisions relating to children in one part of the Act together with the further aim of effecting the reference of powers from four states to the Commonwealth in relation to matters concerning ex-nuptial children.

222. Their Honours continued at [257]:

> *"What was achieved by the amendments of 1983 and was not rescinded by the change to the Act in 1987 was a vesting in the Family Court of the substance of the parens patriae jurisdiction, of which one aspect is the wardship jurisdiction and we agree with McCall J in the present case that the fact that the Family Court may not have the power to make a child a ward of the Court does not prevent it exercising the general parens patriae power with respect to children."*

223. Their Honours at [261] referred to an argument that was advanced before us in this case to the effect that the apparent width of the welfare jurisdiction would render state criminal laws unworkable.

It was therefore put that this would indicate that the welfare jurisdiction of the Family Court was or should be limited. Their Honours rejected this argument. They said:

"Ultimately, however, any limitation on the jurisdiction of the Family Court conferred or apparently conferred by the Family Law Act must be constitutional. The Act is limited in its operation by reference to the constitutional powers under which it is enacted: "marriage" (s.51 (xxi)) "Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants" (s.51 (xxii)) and, so far as the Northern Territory is concerned the territories power (s.122). In the present case the emphasis was naturally on the marriage power and, as well, the territories power.

In Fountain v Alexander Gibbs CJ said:

> *'The power of the Parliament to make laws with respect to marriage does not extend to laws for the protection or welfare of the children of the marriage except in so far as the occasion for their protection or welfare arises out of, or is sufficiently connected with, the marriage relationship.'*

Clearly there are limits on the scope of the welfare jurisdiction, as with the custody and maintenance jurisdictions, though the scope of the jurisdiction will nevertheless be very wide. So long as an order of the Family Court is constitutional, there can be no limitation on the Court's powers emanating from the need to preserve the scope of state legislative powers. To hold otherwise would be, as counsel for the Commonwealth said, to take the law back beyond the Engineer's case.

It is clear enough that a question of sterilization of a child of a marriage arises out of a marriage relationship and that the sterilization of a child arises from the custody of guardianship of a child. Therefore, jurisdiction to authorise the sterilisation is within the power of the Commonwealth, quite apart from the operation of Section 122 of the Constitution." (footnotes omitted)

~~Dra~~

224. Deane J at [294] agreed that the jurisdiction conferred upon the Court corresponded with the welfare jurisdiction of the Court of Chancery in England so far as it related to minors, freed from the preliminary requirement of the wardship order. At [301] his Honour commented that:

> *"... the welfare jurisdiction of the Chancery Court was supervisory in the sense that it was exercisable only when actual threatened abuse or neglect of that parental authority justified the making of the wardship order."*

225. His Honour continued at [301-302]:

> *"While the jurisdiction of the Family Court to make orders for the welfare of the child is not structured upon a wardship order, it nonetheless remains, in a case where the parents retain full parental authority, primarily supervisory in its character. In its exercise, the Family Court must give due weight to genuine parental views about what is and what is not in the interest of the welfare of the particular child and, in an appropriate case, recognise that there is scope for parental decision. The welfare jurisdiction of the Chancellery Court was not, however, exclusively supervisory. It was neither derivative from the rights and responsibilities of parents nor confined to what lay within parental - or paternal - authority.* ***It could for example, be invoked, at the suit of the parents themselves, to make binding orders for the protection of the child which were plainly beyond the powers of the parents.*** *It could be invoked to override and determine the authority of the parents. Similarly, the fact that the jurisdiction of the Family Court is primarily supervisory in the case of an infant in the custody of her or his parents does not preclude the Family Court from intervening in a case where it considers that, giving due weight to genuine parental views, the gravity of the question involved in the protection of the welfare of the child requires its intervention."* (footnotes omitted; our emphasis)

226. McHugh J at [318] expressed the opinion that the Family Court does have a jurisdiction similar to the *parens patriae* jurisdiction and agreed in general with the views expressed by the majority.

227. Brennan J dissented both as to the extent of the jurisdiction and as to the power of a court to authorise the sterilisation of a child.

228. We consider this decision as important to the determination of the issues in this case. We refer in particular to Deane J's remarks above in this regard.

229. The issue of the welfare jurisdiction was again considered by the High Court in *P v P* (1994) 181 CLR 583. That case involved the consideration of the extent of the Court's welfare jurisdiction in relation to the authorisation of sterilisation of children in circumstances where State law also provided for an administrative procedure for the authorisation or otherwise of sterilisation of such children.

230. The majority judgment was given by Mason CJ, Deane, Toohey and Gaudron JJ. Their Honours pointed out that *Marion's case*, although it arose in the Northern Territory, did not depend upon, nor was it founded upon, s.122 of the Constitution but rather on consideration of federal legislative powers conferred upon the parliament by s.51(xxi) with respect to marriage and by s.51(xx) with respect to *".....divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants."*

~~Dra~~

231. The majority judgment at [600] referred to the statement in *Marion's case* to the effect that it was clear enough that a question of sterilisation of a child of a marriage arose out of a marriage relationship and that the sterilisation of a child arose from the custody or guardianship of a child and was therefore within the reach of power of the Commonwealth. Their Honours in *P v P* said at [600]:

> *"Those comments constitute an integral part of the reasoning of the majority in Marion's case. They are, in any event, plainly correct."*

233. They went on to say that the relevant provisions of the Constitution were cumulative and each must be given its full scope and effect and neither should be read down by reference to the other. They then said at [600]:

> *"Paragraph (xxi)'s grant of legislative power with respect to 'Marriage' encompasses laws dealing with the protection or welfare of children of a marriage in so far as the occasion for such protection of welfare arises out of, or is sufficiently connected with the marriage relationship. To a significant extent, that operation of par (xxi) overlaps par (xxii)'s express conferral of legislative power with respect to "parental rights, and the custody and guardianship of infants" in relation to "Divorce and matrimonial causes". The authorization of medical treatment of an incapable child of a marriage, including medical treatment of a kind involved in Marion's case and in this case, is something which is directly related to the welfare and protection of the particular child and which arises out of, and is itself an aspect of, the relevant marriage relationship."*

233. Their Honours therefore concluded that the authorisation or withholding of authorisation of sterilisation was within the power with respect to marriage. At [602] their Honours said:

> *"A law of the Parliament conferring jurisdiction upon a federal court in general terms will, in the absence of a clear legislative intent to the contrary, ordinarily be construed as not intended to confer jurisdiction to make an order authorising or requiring the doing of an act which is specifically prohibited and rendered criminal by the ordinary criminal law of the State or Territory in which the act would be done. Of course, the nature of the jurisdiction or the matters which have been historically determined in the exercise of that or a like jurisdiction may suffice to make clear such a contrary intent."*

234. These cases make it clear that the Court's welfare jurisdiction is akin to the *parens patriae* jurisdiction and they also make it clear that this is a valid exercise of constitutional power depending on the subject matter of the order. Therefore, it is necessary for a court exercising such jurisdiction to satisfy itself that the subject matter of the order is connected with the appropriate heads of constitutional power.

235. In the present case the Solicitor General argues that it is not so connected. In our view this is incorrect. The children's father and the children in this case seek the assistance of the Court to protect the children from harm which they are said to be suffering as a result of the nature of the detention imposed upon them. The children themselves similarly argue that as a result of having been brought to this country by their parents they, being children of the marriage between their parents, are being detained in circumstances contrary to their welfare. The children are in fact in detention as a result of them being brought to this country by their parents.

236. The authorities to which we have referred make it clear that the issue of whether the making of an order is supported by the marriage, divorce and matrimonial causes power is one to be construed broadly and cumulatively.

237. It was said by the Solicitor General that the parents in this case retain their parental authority. In the present case we think that it is clear that the parents do not retain their full parental authority. Both are confined in immigration detention. The Solicitor General sought to distinguish the position of the Minister upon the basis that he was not a lawful guardian of the children. This may be so but as we understand it, what was being put was that the Minister had no responsibility for the welfare of the children. As we note subsequently the Minister has conceded in other proceedings that he does owe a duty of care to persons in detention.

238. Given his powers under the *Migration Act*, we find the Solicitor General's proposition extremely difficult to accept. After all, it is the Minister and not the parents who determines where the children will reside and with whom. He also determines what contact should take place between the children and their parents. He also decides whether and what form of eduction is offered to them and what sort of health care is available to them. All of these decisions are normally part of the responsibility of parents. We think that the reality must be that the limitations on the parental authority resulting from the detention and confinement of the parents and of the children must of necessity derogate from their parental authority. Further, the powers of the Minister and/or his Department over the placement and manner in which the children

are detained constitute in our view a type of de facto parental authority and certainly affects their parenting.

239. We also note Deane J's comment that the jurisdiction can be invoked at the suit of the parents themselves "*…to make binding orders for the protection of the child which were patently beyond the powers of the parents*"

240. We consider that the present situation fits neatly into such a category.

241. It seems to us that the circumstances of the present case are sufficiently related to the marriage of the parents to activate the constitutional power of the Commonwealth to protect the children. As Deane J makes clear in the passage quoted from *Marion's case*, the *parens patriae* jurisdiction may be invoked by a parent to protect a child from the actions of others.

242. This is also clear from the English decisions and from other Australian decisions such as *Johnson v Director General of Social Welfare (Vict)* (1976) 135 CLR 92 to which we have referred.

243. The Solicitor General argued that the limitations of the marriage and divorce powers were such that the Court had no jurisdiction to protect children from the actions of persons who were not *in loco parentis*. This seems to us to involve an extremely limited view of the breadth of the constitutional provisions. As we have pointed out, if the Solicitor General is correct, this would seriously hamper the court from taking appropriate steps to protect children from

abuse. It would mean for example, that the Court could take no steps to protect a child who is being abused by a grandparent or a sibling, or a person with whom one or other parent has formed a relationship to name but a few.

244. This submission seems to be inconsistent with *Marion's case*. This would mean that in that case, the Court could only have made an order directing the parents to either consent or refuse to consent to the medical procedures in question. However in that case the parents were agreeable to the procedure. The issue was whether their consent was sufficient. The High Court held that it was insufficient and that the Court's approval was required. It would follow that the power lay with the **Court** and not the parents to consent to or refuse the procedures. If the Court's power to approve needed to be invoked it follows that the Court could have ordered injunctions against any hospital or medical practitioners restraining them from carrying out such a procedure.

245. It also seems to be a view that is inconsistent with the above quoted statements from the majority of the High Court of Australia in *Marion's case* and *P v P* as to the nature of the welfare jurisdiction. We think it apparent from those cases and from the specific provisions of the Constitution as to marriage and divorce, coupled with the incidental power, that the Court does have jurisdiction to protect children of a marriage from abuse by third parties

246. It may be that different considerations apply to children who are not children of a marriage. The States did not specifically confer a welfare jurisdiction upon the Commonwealth when they referred

powers over ex nuptial children to the Commonwealth in 1986-7. Therefore it would seem that s.67ZC may only apply to ex nuptual children if it is supported by the external affairs power and UNCROC.

247. This is not merely an academic question. In cases such as this it may be that the States have no child protection powers by reason of the operation of the *Migration Act* in conjunction with s.109 of the Constitution. Even if they have such powers, it appears they do not exercise them unless called upon by the Commonwealth to do so (see pars 316ff). Accordingly, the only hope that ex nuptial children have of receiving protection from the courts would be from this Court in the exercise of its welfare jurisdiction.

THE EXTERNAL AFFAIRS POWER

248. We think, that the welfare jurisdiction of the Court also gains constitutional support from the external affairs power. If this is so then it extends to all children and not simply children of the marriage. This issue had not been determined prior to the matter coming before her Honour.

249. Having regard to the views that we have expressed it does not form an essential aspect of our decision. On the other hand, if we are wrong as to the extent of the marriage, divorce and incidental powers, it then becomes relevant to consider this issue.

250. On behalf of the children in this case, it was submitted that her Honour was wrong in finding that the United Nations Convention on the Rights of the Child ("UNCROC") is not a

foundation for the welfare jurisdiction of the Court. She so held because, in her opinion UNCROC is a treaty *"expressed in terms of aspiration"*, rather than, using the language of the *Industrial Relations Case* (1996) 187 CLR 416, *"defined with sufficient specificity"* to direct a general course to be taken by ratifying States Parties.

251. UNCROC was ratified by the Commonwealth of Australia on 17 December 1990 and entered into force for Australia on 16 January 1991. Unless it is found to have been incorporated by subsequent legislation, UNCROC does not have direct and justiciable domestic force in Australia. It may however be referred to for the purposes of interpreting ambiguities in statutes and for other purposes as we discuss subsequently in the course of these reasons.

252. It may also have significance as a declared instrument pursuant to s.47(1) of the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth). That provision states:

> *" (1) The Minister may, after consulting the appropriate Minister of each State, by writing, declare an international instrument, being:*
>
> *(a) an instrument ratified or acceded to by Australia; or*
>
> *(b) a declaration that has been adopted by Australia;*
>
> *to be an international instrument relating to human rights and freedoms for the purposes of this Act."*

253. The interpretation section of the Act, s.3, provides:

> *"human rights* means the rights and freedoms recognised in the Covenant, declared by the Declarations or recognised or declared by any relevant international instrument."

254. Motions for the disallowance of the declaration were the subject of a vote by the Commonwealth Parliament. The disallowance motions failed: See *House of Representatives Hansard* 1 September, 1993, pp.691-701*; Senate Hansard* 30 September, 1993 pp.1473-98 and 1595-8; 5 October pp.1682-85.

255. The Full Court of the Family Court of Australia made reference to the status of UNCROC in *B and B* saying at par 10.20:

> *"... we adhere to the view expressed by Nicholson CJ and Fogarty J in Murray's case and supported by the view expressed by Einfield J in Magno's case, that the fact that [UNCROC] is expressed as a schedule to the Human Rights and Equal Opportunity Commission Act may give it a special significance in Australian law."*

256. Importantly, their Honours then went on in that paragraph to record that the Attorney- General *"did not necessarily disagree with this"*.

257. The nature of the *"special significance"* to UNCROC arising from the s.47 declaration has not been determined.

258. In *Minister for Foreign Affairs v Magno* (1992) 112 ALR 529 at 535, Gummow J, sitting then as a member of the Full Court of the Federal Court of Australia, said of an international instrument not incorporated into domestic law where the domestic law is ambiguous:

"... upon the proper construction of the municipal law, regard may be had by the decision-maker exercising a discretion under the law to the international agreement or obligation."

259. The High Court in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 gave some attention to the issue. Toohey J commented at [300-301] that:

"In the Marriage of Murray and Tam; Director, Family Services (ACT) Nicholson CJ and Fogarty J referred to Gummow J's analysis. The Family Court of Australia was concerned with an appeal from orders made pursuant to the Family Law (Child Abduction Convention) Regulations which in turn derived from the Hague Convention which Australia had ratified. Their Honours noted what Nicholson CJ had said in his dissenting judgment in Re Marion in relation to the Declaration of the Rights of Mentally Retarded persons incorporated as Sch 4 to the HREOC Act, namely that:

> *it [is] strongly arguable that the existence of the human rights set out in the relevant instrument ... have been recognised by the parliament as a source of domestic law by reasons of this legislation."*

260. His Honour considered at [301] that "*Whether this is so is a matter which does not arise in the present case."*

261. The issue was also adverted to by Mason CJ and Deane J who said at [287]:

"In this case, it is common ground that the provisions of the Convention have not been incorporated in this way. It is not suggested that the declaration made pursuant to s.47(1) of the Human Rights and Equal Opportunity Commission Act has this effect."

~~Dra~~

262. McHugh J in *Teoh* was the dissentient as to outcome. His Honour said at [318]:

> *"I find it hard to accept that parliament intended that there should be remedies in the ordinary courts for breaches of an instrument declared for the purpose of the HREOC Act when such remedies are not provided for by the Act."*

263. The relevance of UNCROC being a declared instrument annexed to the HREOC legislation thus appears to be an open question.

264. *Teoh* has recently been the subject of significant judicial comment. Subsequent to the hearing of this appeal, further observations were made by the High Court in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 195 ALR 502 (delivered 12 February 2003).

265. The applicant in *Lam's* case alleged a breach of procedural fairness with respect to the cancellation of his visa. All five members of the Court held on the facts that there was no want of procedural fairness. Of relevance to present issues, the reasons for judgment of McHugh and Gummow JJ gave specific consideration to both UNCROC and the *Industrial Relations Case*. They said [98]:

> *"... The case [Teoh] involved ratification by the Executive of a treaty which had not been followed by any relevant exercise of legislative power to make laws with respect to external affairs. It was remarked in the Industrial Relations Case that there may be some treaties with a subject-matter identified in terms of aspiration which cannot enliven the power conferred by s 51(xxix) of the Constitution. ..."* (footnote omitted)

~~Dra~~

266. Significantly, in the following paragraph at [99], their Honours commented:

" In any event it was not suggested that Teoh concerned a treaty of this limited nature. ..."

267. This is clearly a reference to UNCROC which runs counter to the view expressed by Dawe J that UNCROC is largely aspirational. It is supportive of the submission on behalf of the children, which we accept, that the decision in *Teoh* at par [2.9] indicates that UNCROC is not "merely aspirational" and that:

"[UNCROC] plainly had sufficient specificity (particularly as at Article 3) for the Court in Teoh to discuss (eg at 292) the application of "the principle enshrined in Article 3.1", so that the behaviour of decision-makers would have to reflect that principle."

268. The submissions on behalf of the Minister contend that even if UNCROC is found to have the necessary specificity, a specific intention to implement UNCROC is a pre-requisite for finding that Part VII of the Act implements the Convention. In support of this proposition, reliance is placed on the following statement by the majority in the *Industrial Relations Case* at [487]:

"Where a treaty relating to a domestic subject matter is relied on to enliven the legislative power conferred by s.51(xxix) the validity of the law depends on <u>whether its purpose or object is to implement the treaty</u>." (emphasis in the submission)

269. It is further submitted on behalf of the Minister that we should find that Parliament did not intend to implement UNCROC when

amending Part VII of the Act at [par 44]. In support of this contention, reference is made to the following matters in the terms of Part VII and the parliamentary record.

270. It is said that there is no suggestion of resort to the external affairs power in the 1995 re-enactment of Sub-Division F of Division 12 of Part VII and no indication that the amendments provided for an enhanced welfare jurisdiction. It is also put that there is no mention of UNCROC in the Act, and that reference to UNCROC in the Explanatory Memorandum associated with the amendments speaks in terms of consistency with UNCROC and recognition of the rights contained in UNCROC, but that such that are there do not indicate that Parliament intended to implement UNCROC by enhancing the welfare jurisdiction. Finally, it is said that none of the provisions of UNCROC requires the rights it establishes to be protected or promoted by the conferral of jurisdiction on the Family Court.

271. Implicit in these arguments is the assumption that the welfare jurisdiction of the Court was not "enhanced" by the 1995 amendments. However, it is clear from the Explanatory Memorandum that s.67ZC placed the jurisdiction explained in *Marion's case* upon an express statutory footing.

272. As to the relationship between UNCROC and the 1995 Act, this was the subject of previous judicial consideration in *B and B* especially at [3.3 – 3.8, 3.28 – 3.32, 10.7 – 10.24]. There, the Court was required to determine whether the *Family Law Act* was or was not a code and whether regard could be had to UNCROC in

the interpretation of Part VII as amended by the 1995 Act. It was not asked to answer the question that is posed here.

273. The Court did however give considerable attention to the relationship between UNCROC and the 1995 Act.

- UNCROC is described as a *"source"* to the origins of the new Part VII [3.3].
- Parliamentary records were found to show specific reference to UNCROC in prior versions of relevant Bill, Explanatory Memoranda and second reading speeches.[3.4-3.6]
- Section 60B(2)(a) and (b) were found to *"reflect"* articles from UNCROC [3.28]
- The Full Court said: *"The influence of terms used in UNCROC is apparent ..."* with the following articles described as "directly relevant": Articles 2.1, 3.1, 3.2, 7.1, 9.3, and 18.1.[3.30]
- It also observed: *"The Reform Act exceeds the standard referred to in article 3.1 that the best interests of a child shall be "**a** primary consideration"."* [3.31]
- In respect of the use of the term "best interests" it was said: *"The major reasons for the change appears to be the more general use of the term "best interests" in Australia and overseas and the use of that term in UNCROC, and also because of the confusion which surrounded the term "welfare" because of its various meanings in Australia. The use of that term was the subject of debate in the drafting of UNCROC. The term "best interests" was chosen in*

preference to "welfare" as it was considered to represent a more child-centred and less paternalistic concept - see Alston and Gilmour-Walsh "The Best Interests of the Child - Towards a Synthesis of Children's Rights and Cultural Values" Proceedings of the UNICEF Salamanca Symposium on The Convention on the Rights of the Child (1 to 4 May, 1996).” [9.34]

- The Full Court considered that: *“There are a number of other articles which appear to have had an impact on the Family Law Act or are in any event reflected in the wording of that Act”* with specific mention made of articles 5, 9, and 12. [3.32]
- It was further said that: *“The position of UNCROC in the area of family law may gain further strength from s.43(c) of the Family Law Act which provides, in what we highlight is a mandatory direction, that:-*

  "The Family Court shall, in the exercise of its jurisdiction under this Act, and any other court exercising jurisdiction under this Act shall, in the exercise of that jurisdiction, have regard to- ... (c) ***the need to protect the rights of children and to promote their welfare****; (Emphasis added)”*[10.7]

- It was also said that: *“... it is apparent that in particular s.60B and also other sections as introduced by the Reform Bills relied upon UNCROC as a source”* and that there is a *“close relationship between a number of sections, particularly s.60B, and various articles of UNCROC”* with *“second reading speeches and explanatory memoranda which made it clear that that Convention provided a basis for some of the reforms contained in that proposed legislation.”* [10.21]

274. While it is true that the enactment of s.43 of the *Family Law Act* predates Australia's ratification of UNCROC by many years, it has, at least in sub-par (c) a clear focus on the rights of children. In our view, it is highly likely that this sub section incorporates the provisions of a predecessor of UNCROC, the United Nations Declaration on the Rights of the Child proclaimed by General Assembly resolution 1386(XIV) on 20 November 1959.

275. References such as these are strongly supportive of the proposition that the 1995 amendments to Part VII did intentionally incorporate certain articles of UNCROC into municipal law such as to meet the criterion laid down in the *Industrial Relations Case*.

276. In the second reading speech introducing the *Family Law Reform Bill* 1994 [No. 2] The Honourable Mr Duncan, Parliamentary Secretary to the Attorney-General said:

> *"In December 1990 Australia ratified the UN Convention on the Rights of the Child. That convention contains a number of basic rights in the raising and development of children towards adulthood. The objects clause to the new part VII of this bill gives recognition to such rights by specifying a number of such rights that should be observed in any agreements or decisions concerning children."* (Hansard, House of Representatives, 8 November 1994, page 2759.)

277. The Full Court observed that explicit reference to UNCROC was deleted *"in the passage of the legislation through the two Houses of the Parliament between November 1994 and November 1995... But specific references were made to the Convention in Senate*

debates on 25 October, 1995 (Hansard pp.2427-8) and on 14 November, 1995 (Hansard p.2841). The Bill, as finally passed, did not contain any reference to the Convention." [3.8] Of this, the Full Court in *B and B* said at [10.24]:

"During argument in this appeal attention was drawn to the fact that the express references to the Convention in the early draft of what became s.60B was not in the final enactment. While express reference may elevate the relevance of the Convention, it is another matter to rely upon the fact that the express reference was deleted in order to draw support for the proposition that the Convention is not relevant to a statute which, it is asserted by the Commonwealth, stands alone but which obviously draws upon articles of the Convention."

278. We agree.

279. There is another issue which requires comment.

280. The Full Court in *B and B* noted at [10.12] that par 6 of Australia's First Report Under the Convention on the Rights of the Child (December 1995) had stated:

"6. Australia does not propose to implement the Convention on the Rights of the Child 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."*** *(p.2, emphasis added)."*

281. This statement of executive intention seems inconsistent with other parts of the First Report. We note that in that report at [par 5] it was claimed that the Government had implemented the Convention in the area of (*inter alia)* family law. That could only be a

reference to the *Family Law Reform Act* 1995, which was the only significant Act passed by the Parliament in the area of reform of family law following Australia's ratification of UNCROC. The Family Law Act otherwise long pre-dated UNCROC.

282. Further, we would observe that while *"the general approach"* identified in par 6 of the First Report may have been the attitude of the Executive at the time of the First Report, there are clear instances of implementation such as: *Sex Discrimination Act* 1984 (Cth) implementing the Convention on the Elimination of Discrimination Against Women; *Race Discrimination Act* 1975 implementing the Convention on the Elimination of All Forms of Racial Discrimination.

283. We draw particular attention to UNCROC in relation to s.60B. As the Solicitor General pointed out, this is the objects section that governs the interpretation of Part VII of the Act relating to children. It was introduced in the Act of 1995. We have indicated that we would give it a wider operation than that for which he contended and, in particular, that we consider that it must also be construed in light of s.43(c) of the Act. However, for present purposes we agree that this section does play a significant role in the interpretation of Part VII and in this regard it is important to note its close relationship with UNCROC. If, as seems clear, the objects section of the Part is drawn largely from UNCROC, then we consider that this gives considerable strength to the argument that s.67ZC gains support from UNCROC and the external affairs power contained in the Constitution. This is because following the enactment of s.60B, and the simultaneous insertion of s.67ZC, the

latter section must be interpreted in the light of the former and is not simply a re-enactment of the original welfare jurisdiction.

284. Further, we have noted that s.67ZC was inserted for the first time as a separate jurisdiction of the Family Court and that it is expressed in absolute terms in relation to children and not qualified in its application to children of a marriage.

285. Article 3(2) of UNCROC is in the following terms :

"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."

286. Article 19 provides :

"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.***" (our emphasis)

287. We think it strongly arguable that at least part of the intent of the introduction of s.67ZC in 1995 was to extend its protection to all children, as required by the above articles and not just children of a marriage. To conclude otherwise would be to adopt an interpretation that the Parliament, in enacting the section, intended to ignore its obligations under these articles.

288. In conclusion on this point, we think that the Parliament in passing s.67ZC, has implemented the relevant parts of UNCROC so far as this case is concerned and that therefore, s.67ZC, in so far as it requires a further source of constitutional power to support it, is supported by the external affairs power.

THE ALLEGED IMPACT OF DETENTION ON THE CHILDREN AND THE MOTHER

289. There is untested evidence before us that the continued detention of these children in these circumstances is causing them significant and permanent psychological damage.

290. On the first day of the hearing, Mr McQuade for the father, sought leave to add an eighth ground of appeal in the following terms:

> "That the learned judge at first instance erred at law in failing to take into account or adequately take into account the assessment report of Karen Fitzgerald."

291. No objection was raised by the other parties to the addition of the ground nor to the receipt of the report.

~~Dra~~

292. It is a report dated 18 September 2002. The report was prepared by the Director and Senior Clinical Psychologist of the Child Protection Service, Flinders Medical Centre in response to the referral of the brothers by the South Australian Department for Family and Youth Services. The assessment also covered the three younger children and the mother.

293. It was filed for the proceedings at first instance in this Court. However, due to the course adopted by the trial Judge, the contents of the report were not considered by her. We cannot and need not accept the contents as proved facts. The contents do, however, demonstrate in our view a *prima facie* basis upon which the welfare jurisdiction for the protection of the children could be attracted.

294. Ms Fitzgerald concluded (at page 15 of the report):

> *"The impact of the experience to which* [these] *children have been subjected within the Woomera Detention Centre have been superimposed on previous trauma. Within a child protection framework these experiences can be described as psychological maltreatment defined by Hart, Brassard and Karlson as behaviours that "convey to the child that (she/he) is worthless, flawed, unloved, endangered or only valuable in meeting someone else's need". Psychological maltreatment alone, that is without the components of sexual or physical abuse can be the most powerful influence and best predictor of the development outcomes of other forms of child abuse and neglect. Against the six major forms of psychological maltreatment* [the children] *demonstrate the effects of such abuse and neglect in terms of undermined attachment relationships with their parents, disrupted peer relationships, unhappiness and depression and an undermining of their ability to achieve their developmental milestones to mention but a few."*

~~Dra~~

295. Ms Fitzgerald recommended that the children be released into the community where they would require *"watchful, respectful, restorative and specialised parenting care"* and *"access to therapeutic/mental health and educational services already available to other adolescents and children who have been subjected to child abuse and neglect"* (at page 16 of the report). As to the mother, Ms Fitzgerald said:

> *"*[she] *too will require expert and specialised intervention over a significant period of time to restore and re-establish her parenting roles. In short, the only way of beginning to restore [the mother's] self-esteem and self-worth and ultimately her parenting capacity is to end her time in detention and provide her with significant and long-term specialist therapeutic intervention."* (at page 16 of the report).

STATE CHILD PROTECTION SYSTEMS

296. Ms Fitzgerald's report was characterised by her (at page 13 of the report) as having been prepared within a *"child protection framework"*. At the request of the Court, subsequent to the hearing of the appeal, the solicitors for the Minister provided a "Memorandum of Understanding" between the Department of Immigration and Multicultural and Indigenous Affairs and the South Australian Department of Human Services relating to Child Protection Notifications dated 6 December 2001.

297. The South Australian department ("DHS") performs statutory functions under the *Children's Protection Act 1993* (SA) and the *Family and Community Services Act* 1972 (SA). Those functions concern the investigation of child protection notifications and the

taking of appropriate action in response to the assessment. Such action includes removal of the child from "dangerous situations" (s 16 *Children's Protection Act 1993* (SA)) or "guardians" (s17 *Children's Protection Act 1993* (SA)) "using such force (including breaking into premises) as is reasonably necessary for the purpose". The objects and principles of the *Children's Protection Act 1993* (SA) are set out in s.3 and include the provision "for the care and protection of children and to do so in a manner that maximises a child's opportunity to grow up in a safe and stable environment and to reach his or her full potential."

298. Section 4 sets out the principles to be observed in the protection of children.

299. If the relevant Minister is of the opinion that children are at risk an application may be made to the Youth Court of South Australia for a care and protection order and the Court is clothed with appropriate powers to deal with the matter.

300. As noted in Schedule 1 of the Memorandum, the *Children's Protection Act* 1993 contains the following definitions:

"Abuse or neglect in relation to a child means:

(a) sexual abuse of the child; or
(b) physical or emotional abuse of the child, or neglect of the child, to the extent that:
(i) the child has suffered, or is likely to suffer, physical or psychological injury detrimental to the child's well being;
(ii) the child's physical or psychological development is in jeopardy;"

301. We note that satisfaction of the criteria in these definitions is unrelated to the source of the abuse or neglect of the child; that is, the criteria may be met irrespective of whether the abuse or neglect is due to a family member, a stranger to the family or the environment itself. In respect of children in the present case, it will be recalled that Ms Fitzgerald formed the view (at page 15 of the report) that *"*[a]*gainst the six major forms of psychological maltreatment* [the children] *demonstrate the effects of such abuse and neglect…"* and she recommended that the children be released into the community.

302. For present purposes, the Memorandum is relevant to the issue of the Court's supervisory jurisdiction in two ways.

303. First, as is noted in the Federal Court decision of *VLAH v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1554 (13 December 2002), which is discussed subsequently, counsel for the Minister acknowledged the Minister's duty of care to detained non-citizens generally.

304. Paragraph 4.1. of the Memorandum under the heading "**Roles and Responsibilities**", underlines that responsibility. Paragraph 4.1 reads as follows:

> *"DIMIA maintains the ultimate duty of care for all immigration detainees. That is, ultimate responsibility for the welfare of unlawful non-citizens remains with DIMIA The day to day operations of detention services have been contracted out by DIMIA to a private detention services provider."*

305. Secondly, the Memorandum purports to limit the capacity of DHS to determine the appropriate protective action that should be taken in response to its investigation of a notification. Paragraph 4.2 of the Memorandum states:

> *"DHS has a legal responsibility to investigate child protection concerns for children in detention in South Australia. However, any interventions undertaken to secure the care and protection of detainees must be actioned by DIMIA. DIMIA will consider carefully DHS recommendations to ensure that the best interests of the child are protected."*

306. The term "interventions" is not defined in the interpretation section of the Memorandum.

307. It is unnecessary for us to consider the legal effectiveness of an interdepartmental agreement such as the Memorandum that purports to modify the capacity of DHS to intervene in a particular case in conformity with s.4 of the *Children's Protection Act* 1993 (SA).

308. For present purposes it is sufficient to observe that the role of the State Welfare Authority responsible for child protection under the Memorandum is only an advisory one and that the Memorandum would appear to purport to prevent the State Minister from the intervention by making application to the Youth Court of South Australia to protect a child in detention, without the approval of DIMIA.

309. When comparison is made with the factual context in *Johnson* (supra), it seems to us that there is an even stronger basis for the

Court asserting its protective jurisdiction in the present case. In *Johnson*, the situation of the child in question had been the subject of judicial intervention by the State Children's Court and under the care of the State Welfare Authority pursuant to such intervention. Nonetheless, the supervisory jurisdiction of the State Supreme Court was held to still operate. In the present case, the State Welfare Authority and State Youth Court may only address the children's situation if the Department of Immigration and Multicultural and Indigenous Affairs "actions" such a course. This is at least unfortunate given that Ms Fitzgerald's report identifies the immigration detention centre environment to be, *prima facie*, the source of the children's abuse and neglect.

310. In such circumstances, we consider these children have an even greater entitlement to the protection of this Court's supervisory welfare jurisdiction. Were it otherwise, they and other children covered by the Memorandum would be excluded from the right to the protection of their best interests by the courts. Compared with children who are not covered by the Memorandum they are, to recall the words of La Forrest J in *Re Eve* (supra) distinctly unable to protect themselves, nor we would add, able to rely upon the State statutory systems for child protection that otherwise apply.

DOES THE *MIGRATION ACT* CURTAIL THE COURT'S JURISDICTION?

311. Hitherto we have been considering issues relating to the construction of the *Family Law Act*, the welfare jurisdiction of the

Court and its constitutional background, and the limits of the welfare jurisdiction in the light of the *parens patriae* jurisdiction.

312. We have broadly concluded first, that the trial Judge was wrong in determining that the Court had no welfare jurisdiction in the State of South Australia and, secondly, that the trial Judge was wrong in determining that the exercise of the welfare jurisdiction was beyond the limits prescribed by the Constitution. We have determined that the welfare jurisdiction may legitimately be exercised not only by reason of a combination of the marriage, divorce and incidental powers contained in the Constitution but insofar as it is necessary to do so, by reason of the fact that the *Family Law Act*, when it was amended in 1995, was amended at least in part to implement the provisions of UNCROC and is therefore also supported by the external affairs power contained in the Constitution.

313. In the course of these discussions we have not yet considered the issue as to whether and to what extent the *Migration Act* limits the exercise of the welfare jurisdiction of the Court. We have however, concluded that apart from the specific provisions of the *Migration Act* the Court does have general welfare jurisdiction over all children of a marriage in Australia whether in immigration detention or not. We have also determined that apart from any limitation that might be imposed by the *Migration Act*, there is no reason why orders made in the Court's welfare jurisdiction in relation to children of a marriage at least, should not be directed at the Minister, his servants and agents.

~~Dra~~

314. We now turn to consider the *Migration Act* itself with a view to determining whether it prevents the Court from exercising jurisdiction.

315. In this regard we think that three questions arise.

316. The first is as to whether there is anything in the *Migration Act* that prevents the Court from ordering the release of children who are in immigration detention.

317. The second is whether if the Court has no power to order the release of such children, there is still room for the operation of the welfare jurisdiction for the purpose of supervising the Minister in his treatment of children in immigration detention, including determination of where such detention should occur and the methods used to detain the children.

318. This involves the third question which is whether these decisions by the Minister as to the treatment of children in immigration detention are decisions affected by s.474 of the *Migration Act*, which purports to prevent any applicant from seeking any court from granting any relief with respect to any application for review of the decision of an administrative character (save for some minor exceptions) under the *Migration Act*.

319. We turn now to the first question which is whether the Court has the power to order the release of children from immigration detention.

~~Dra~~

320. Her Honour found that the provisions of ss.189 and 196 operated to prevent the making of such an order.

321. First it can be said that it is clear that the children are unlawful non-citizens within the meaning of the *Migration Act*. Pursuant to s.189, an officer knowing or reasonably suspecting that a person in the migration zone is an unlawful non-citizen, is required by sub-section 1 to detain that person.

322. Section 196(1) provides:

"An unlawful non citizen detained under section189 must be kept in immigration detention until he or she is:
(a) removed from Australia under s198 or s199; or
(b) deported under s200; or
(c) *granted a visa."*

323. Sub-section 3 upon which the Minister relies is in the following terms:

"To avoid doubt, sub-section (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than for removal or deportation) unless the non-citizen has been granted a visa".

234. The Minister submits and her Honour agreed that this section, in the clearest possible terms, deprives any court of the jurisdiction to release an unlawful non-citizen.

325. At first sight, this submission appears to have some substance. However, as the Federal Court have pointed out as discussed hereafter, the real issue is as to whether the retention of the

children is lawful. The way that s.196(3) has been treated by the courts makes it clear that its current meaning has been interpreted as being subject to limitations. The meaning of this section was most recently considered by the Full Court of the Federal Court in *Minister for Immigration and Multicultural Affairs v VFAD* [2002] FCAFC 390 and subsequent to the hearing of the present appeal in *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 197 ALR 241.

326. The judgment of the Court in both cases was delivered by Black CJ, Sundberg and Weinberg JJ on 9 December 2002 and 15 April 2003 respectively.

327. The judgment in *VFAD* points out that s.23 of the *Federal Court Act* provides:

> "*The Court has power, in relation to matters in which it has jurisdiction, to make orders of such kinds, including interlocutory orders, and to issue, or direct the issue of, writs of such kind as the Court thinks appropriate."*

328. While the *Family Law Act* does not contain a corresponding section to s.23 we have found that it does confer a broad welfare jurisdiction on the Court coupled with a jurisdiction to grant injunctions for the protection of children. In this sense therefore, the situation of this Court and the Federal Court might be thought to be analogous for the purpose of this Court's powers to order the release of children who are unlawfully in detention or where the lawfullness of their detention is an issue.

~~Dra~~

329. The judgment in *VFAD* points out that there are two sections of the *Migration Act* that are closely linked to s.196. The first is s.189(1), to which we have referred, and the second is s.198, which provides for the removal from Australia as soon as reasonably practicable, (our emphasis) of unlawful non-citizens. Section 198 specifies a range of circumstances in which this must occur including the expiration of avenues to change their unlawful status.

330. As the Full Court noted in *VFAD*, although the word "detention" is not defined in the *Migration Act*. Section 5 defines the word "detain" as meaning:

> *"(a) to take into immigration detention; or*
>
> *(b) keep or cause to be kept in immigration detention; and includes taking such action and using such force as are reasonably necessary to do so."*

331. Section 5 provides an elaborate definition of immigration detention which, whilst it includes the detention of persons in a detention centre, makes it possible for them to be detained in much less restrictive circumstances.

332. The issue before the Federal Court in *VFAD* related to an applicant who had been refused a visa and was held in immigration detention. He lodged an application with the Refugee Review Tribunal to review the decision to refuse a visa. The Tribunal affirmed the decision that his application should be refused.

333. He then instituted proceedings in the Federal Court pursuant to s.39B(1A)(c) of the *Judiciary Act* 1903 (Cth). In that proceeding

he sought a declaration that he had been granted a protection visa and that as from that date he was a lawful non-citizen. If successful, this application would entitle him to remain in Australia. He sought by way of interlocutory relief an order that pending the hearing and determination of his application he be released from immigration detention.

334. The primary judge granted an interlocutory order directing the Minister to release him despite the terms of s.196(3). The primary judge in considering the question of whether s.196(3) should be construed as either expressly or impliedly denying the Court's powers under s.23 of the *Federal Court Act* noted a line of authority in the Federal Court which held that the general power conferred by the section could be exercised to order the release on an interlocutory basis of persons in immigration detention. The authorities include the decision of the Full Court of the Federal Court in *Minister for Immigration, Local Government and Ethnic Affairs v Msilinga* (1992) 34 FCR 169.

335. Before the Full Court in *VFAD* it was argued the primary judge had erred in relying upon the reasoning of the Full Court in *Msilinga* because that case and the other authorities to which his Honour referred were said to relate to different provisions of the *Migration Act* and therefore said to be of limited utility when considering the operation of s.196(3). It appears that the Minister argued before the Full Court that the primary judge erred in failing to follow the approach of Hely J in *NAMU of 2002 v Minister for Immigration and Multicultural & Indigenous Affairs* [2002] FCA 999 who said at [30]:

"... s 196(3) is a legislative command to the Courts not to order the release of persons in the position of the applicants..."

336. The Minister also submitted that the historical context within which s.196(3) had been enacted was important. He submitted that the section had been introduced to overcome the difficulties created by the decision of the High Court in *Lim* (supra). That case had held that s.54R, a legislative pre-cursor to s.196 was constitutionally invalid. The Minister submitted in *VFAD* that the re-enactment of the section in its modified form was intended to make it clear to the Court that it could not under any circumstances order the release of persons who were unlawful non-citizens. It appears that following the decision in *Lim's* case the Parliament enacted s.54ZD which was the immediate pre-cursor to s.196(3). The judgment in *VFAD* records the explanatory memorandum to the *Migration Reform Act* 1992 introducing that section which said:

"This section provides that a non-citizen detained under section 54W must be kept in immigration detention until he or she is removed, deported or granted a visa (in which case he or she ceases to be an unlawful non-citizen). Where an application for a visa has been made, release cannot be effected unless and until the visa has been granted. The section also makes it clear that a Court may not order the release of an unlawful non-citizen unless the non-citizen has made a valid application for a visa and the criteria for a visa has been satisfied by the non-citizen. The section makes it clear that the detention and non release provision apply only in respect of a non-citizen who is an unlawful non-citizen"

337. The Court in *VFAD* held that there was no reason why an interlocutory injunction could not be granted to restrain what was said to be an unlawful detention. It further held that s.196(3) did not prevent the Court from granting interlocutory relief in

circumstances where a person in detention claims not to be an unlawful non-citizen.

338. In discussing the proper interpretation of s.196(3) their Honours referred to *Trobridge v Hardie* (1955) 94 CLR 147 at 152 and to the remarks of Mason and Brennan JJ in *Williams v The Queen* (1986) 161 CLR 278 where their Honours said [at 292]:

> *"Personal liberty was held by Blackstone to be an absolute right vested in the individual by the immutable laws of nature and have never been abridged by the laws of England 'without sufficient cause'...*
>
> *The right to personal liberty cannot be impaired or taken away without lawful authority and then only to the extent and for the time which the law prescribes."*

339. They said that s.196(3) should be construed consistently with the principles discussed in *Coco v The Queen* (1994) 179 CLR 427 by Mason CJ, Brennan, Gaudron and McHugh JJ, at 437–438:

> *"The insistence on express authorisation of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities, but has also determined upon abrogation or curtailment of them. The Courts should not input to the legislature an intention to interfere with fundamental rights.* ***Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.*** *(Chu Kheng Kim V Minister For Immigration, Local Government And Ethnic Affairs (1992) 176 CLR 1, at p12, per Mason CJ.)*

…

"Curial insistence on a ***clear expression of an unmistakable and unambiguous intention to abrogate or curtail a fundamental freedom*** *would enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights (emphasis added)."*

340. In addition they referred to the remarks of Brennan J in *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 523 where he said:

"The law of this country is very jealous of any infringement of personal liberty (Cox v Hakes (1890) 15 App Cas 506, at p 527) and a statute or statutory instrument which purports to infer a right to personal liberty is interpreted, if possible, so as to respect that right: R v Cannon Rowe Police Station (Inspector) (1922) 91 LJKB 98 FP106… The Constitution of the Australian Commonwealth does not contain broad declarations of individual rights and freedoms which deny legislative power to the Parliament, but the courts nevertheless endeavour so to construe the enactments of the Parliament as to maintain the fundamental freedoms which are part of our constitutional framework. It is presumed that that is the intention of Parliament, though the Courts acknowledge that the balance between the public interest and individual freedom is struck not by the courts but by the representatives of the people in Parliament. Unless the Parliament makes ***unmistakably clear its intention to abrogate or suspend a fundamental freedom, the Courts will not construe a statute as having that operation****." (emphasis added)"*

341. Their Honours said at [114]:

"We are fortified in our conclusion by reference to the principle that s196 should, so far as the language permits, be interpreted and applied in a manner consistent with established rules and international law and which accords with this country's treaty obligations: Polites v The Commonwealth (1945) 70 CLR 60 per Latham CJ at 68-69, Dixon J at 77, and Williams J at 80-81; Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273 per Mason CJ and Deane J at 287 and Kartinyeri v The Commonwealth (1998) 195 CLR 337 per Gummow and Hayne JJ

at [97]. In this case arts 2(3), 9(1) and 9(4) of the International Covenant for Civil and Political Rights are pertinent."

342. They rejected the proposition on behalf of the Minister that the *Migration Act* contained an exhaustive code of the remedies available to persons in immigration detention. This finding is of course relevant to the present proceedings.

343. In its final conclusion, the Full Court in *VFAD* said at [159]:

"There is nothing in the language of s196(3) which, expressly or impliedly, prevents this Court from ordering the release, on an interlocutory basis, of a person who establishes that there is a serious question to be tried regarding the lawfulness of that person's detention. Regrettably, although perhaps inevitably, the task of finally resolving that question may involve a lengthy process. The right to be free from arbitrary and unlawful detention is as fundamental a freedom as our system of values recognises. It is of such paramount importance that it would be remarkable if this Court, in which is vested the judicial power of the Commonwealth, could not, in an appropriate case, order the release of the person from detention at least on an interlocutory basis. It would require language of much greater clarity that any contained in s196(3) to deprive the Court of the general power to grant interlocutory relief which is conferred by s23".

344. The present case is of course not a case where interlocutory relief is sought. On the contrary, what the applicants seek is the release of these children on an unconditional basis. However, the principles stated by the Full Court of the Federal Court are clearly relevant to the present case.

345. The decision of the Full Court of the Federal Court dismissing an appeal against the decision of Merkel J in *Al Masri v The Minister*

for Immigration & Multicultural and Indigenous Affairs (2002) 192 ALR 609 is of even greater significance. It is a case where the trial judge made a final order for the release of a person who was on any view an unlawful non-citizen and who was in immigration detention. The person had made a request pursuant to s.198(1) for repatriation to the Gaza Strip. The trial judge found that it had been established that there was no way in which the applicant could be returned to his country of origin at the time of the proceedings before him.

346. In arriving at this conclusion Merkel J referred at [54] to the following remarks of Beaumont J in *NAMU of 2002 v Secretary, Department of Immigration, Indigenous and Multicultural Affairs* [2002] FCA 907 at [15]:

> *"…it is clear on the face of subs(3) [of s196] that it is not intended to direct or control the manner of exercise of any judicial power; rather, it makes clear that there is no jurisdiction in a court to direct the release of a person lawfully detained. But this is not to say that the question whether or not a person is an 'unlawful non-citizen' is not justiciable or not examinable by a court; it would be open to a court to order, for example, that a person judged not to be an unlawful non-citizen, be released; that is to say, the ability of the courts to determine the lawfulness of any detention remains unaffected by the provisions of Division 7"*

347. Merkel J continued at [55]:

> *"If contrary to my view s196(1)(a) and (3) was construed as preventing the courts from granting relief in respect of unlawful detention, they would be invalid as transgressing the constitutional protections of the judicial power in Chapter III discussed in Lim".*

~~Dra~~

348. His Honour pointed out at [58] that Brennan, Deane and Dawson JJ had observed in *Lim's* case (at 19):

> *"Under the common law of Australia … an alien who is within this country, whether lawfully or unlawfully,* ***is not an outlaw****. Neither public official nor private person can lawfully detain him or her or deal with his or her property except under and in accordance with some positive authority conferred by the law."* (Our emphasis).

349. On appeal, the Full Court in *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri* (2003) 197 ALR 241 noted, after discussing the statutory scheme in the *Migration Act*, at [31-32]:

> *"31 The effect of ss 189 and 196 is that no decision under the Act is required as a precondition to the power and duty to detain an unlawful non-citizen. Detention depends upon the status of the person, and in that sense the detention regime is clearly administrative, mandatory, indefinite and, if the Solicitor-General's submissions are accepted, possibly even permanent.*
>
> *32 The obligation to detain unlawful non-citizens is an obligation to do so pending the determination of a visa application with removal "as soon as reasonably practicable" thereafter, or pending deportation under s 200. This is made clear by s 196 and the various provisions of s 198 which, it should be noted, create powers and duties of removal in situations other than where there has been a request under s 198(1). Each is qualified by the expression "must remove as soon as reasonably practicable".*

350. They pointed to the initial presumption that Parliament does not intend its laws "to pass beyond constitutional bounds."

351. Their Honours said at [50]:

Dra

" It is well settled that the parliament has power to legislate for the detention of aliens for the purpose of their expulsion. This was confirmed by the High Court in Lim where the Court considered a challenge to the validity of the scheme of mandatory detention introduced by the Migration Amendment Act 1992 (Cth) ("the Migration Amendment Act (No 1)"). The challenge to the principal elements of the scheme failed but the case is nevertheless of critical relevance to the present appeal because of the clear preponderance of opinion in the judgments that Ch III of the Constitution may operate to impose limits upon the power to detain by reason of its insistence that the judicial power of the Commonwealth is vested exclusively in the courts that Ch III designates. The possibility of invalidity for Ch III reasons was necessarily and directly addressed, and the reasoning as to why the provisions of the earlier scheme were not offensive to the exclusive vesting of the judicial power of the Commonwealth in the courts is, in our view, directly and authoritatively in point here."

352. Their Honours at [53] referred to the remarks of Brennan, Dawson, Deane and Gaudron JJ in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 and in particular to the following passage at (30-32):

"...it has been consistently recognized that the power of the Parliament to make laws with respect to aliens includes not only the power to make laws providing for the expulsion or deportation of aliens by the Executive but extends to authorizing the Executive to restrain an alien in custody ***to the extent necessary to make the deportation effective****. ... It can therefore be said that the legislative power conferred by s. 51(xix) of the Constitution encompasses the conferral upon the Executive of the authority to detain (or to direct the detention of) an alien in custody* ***for the purposes of expulsion or deportation****. Such authority to detain an alien in custody, when conferred upon the Executive in the context and for the purposes of an executive power of deportation or expulsion, constitutes an incident of that executive power."* (our emphasis)

353. They then referred to their Honours' conclusion [at 34]:

> *"In the light of what has been said above, the two sections will be valid laws if the detention which they require and authorize is* ***limited*** *to what is* ***reasonably capable of being seen as necessary*** *for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered. On the other hand, if the detention which those sections require and authorize is not so limited, the authority which they purportedly confer upon the Executive cannot properly be seen as an incident of the executive powers to exclude, admit and deport an alien.* ***In that event, they will be of a punitive nature and contravene Ch. III's insistence that judicial power of the Commonwealth be vested exclusively in the courts which it designates****."* (our emphasis.)

354. The judgment of the Full Court of the Federal Court continued on this point from [57]:

> *"57 Their Honours considered that s 54P(1) saved the scheme in Lim from Ch III invalidity because it always lay within the power of a designated person to bring his detention in custody to an end by requesting to be removed from Australia. Once such a request had been made, further detention in custody was authorised "only for the limited period involved, in the circumstances of a particular case, in complying with the statutory requirement of removal `as soon as practicable'" (at 34).*
>
> *58 Their Honours then concluded (at 34):*
>
> *'In the context of that power of a designated person to bring his or her detention in custody under Div. 4B to an end at any time, the time limitations imposed by other provisions of the Division suffice, in our view, to preclude a conclusion that the powers of detention which are conferred upon the Executive exceed what is reasonably capable of being seen as necessary for the purposes of deportation or for the making and consideration of an entry application.'*

59 It therefore followed that the powers of detention in custody conferred by ss 54L and 54N were an incident of the executive powers of exclusion, admission and deportation of aliens and were not, of their nature, part of the judicial power of the Commonwealth."

355. In applying these principles to Mr Al Masri, their Honours said at [60-63]:

"60 In applying the reasoning in the joint judgment to the present scheme, it will be immediately apparent that one of the "significant restraints" in the earlier scheme - the time limit upon detention in custody after the making of an application for an entry permit - is not present. The importance of the time limit in the reasoning of the joint judgment is apparent from the reference to the limit in the passages referred to at 33 and in the explicit reference to the time limit in the passage just cited, in which their Honours expressed their conclusion. (Our emphasis)

61 The aspect of the legislation in the present case which, considered in the light of the joint judgment in Lim, gives rise to a question of possible invalidity is not just the absence of a time limit, ***important (perhaps critically important) though that might be****. A serious question about the validity of the present scheme, interpreted without at least the second of the suggested limitations, arises because of the way in which s 54P(1) was seen by Brennan, Deane and Dawson JJ in Lim as having a practical operation to bring detention to an end. Its importance to validity lay not in the foundation it gave for an alien in custody to apply for mandamus to enforce performance of the duty the provision imposed; its importance lay in its presumed practical effect. The language used in the joint judgment is the language of practical reality:*

"It follows that, under Div. 4B, it always lies within the power of a designated person to bring his or her detention in custody to an end..."

"In the context of that power of a designated person to bring his or her detention in custody ... to an end at any time..." (both at 34).

> *62 To speak of the "power" of a person to bring detention to an end is to speak of something that has real effect. If further support were needed for this understanding of the sense in which the language was used, it is surely to be found in the context. That context included statutory time limits upon the period of detention which, with other elements, were considered not to have gone far enough to save the impugned sections from invalidity in the absence of s 54P(1).*
>
> *63 On this understanding of the joint judgment in Lim the scales were tilted in favour of validity by s 54P(1) on the footing that the section would operate, as a practical matter, to enable detention to be brought to an end." (Our emphasis)*

356. We lay particular emphasis upon this conclusion for reasons discussed subsequently relating to the particular position of children in detention and their ability to alter their situation. We also note the present absence of any time limit on detention.

357. We adopt and agree with the views expressed by the Full Court of the Federal Court as to the presumption against construing a statute to have the effect of curtailing fundamental freedoms at [82-84] of the judgment and similarly we agree with the views expressed by their Honours as to liberty and the common law in [86-95] of their judgment. This gains even greater strength in relation to the detention of children.

358. We also note their Honours' reliance upon the decision of Woolf J (as he then was) in *R v Governor of Durham Prison; ex parte Hardial Singh* [1984] 1 WLR 704 where his Lordship said (at 706)

> *"...Although the power which is given to the Secretary of State in paragraph 2 to detain individuals is not subject to any*

> *express limitation of time, I am quite satisfied that it is subject to limitations. First of all, it can only authorise detention if the individual is being detained in one case pending the making of a deportation order and, in the other case, pending his removal. It cannot be used for any other purpose. Secondly, as the power is given in order to enable the machinery of deportation to be carried out,* ***I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend upon the circumstances of the particular case****. What is more, if there is a situation where it is apparent to the Secretary of State that he is not going to be able to operate the machinery provided in the Act for removing persons who are intended to be deported within a reasonable period, it seems to me that it would be wrong for the Secretary of State to seek to exercise his power of detention.*
>
> *In addition****, I would regard it as implicit that the Secretary of State should exercise all reasonable expedition to ensure that the steps are taken which will be necessary to ensure the removal of the individual within a reasonable time.****"* (our emphasis)

359. As their Honours noted, his Lordship gave the respondent three days to respond. They also noted that the decision has since been followed in a number of cases and has been approved by the Privy Council in *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97 and by the House of Lords in *R v Secretary of State for the Home Department; ex parte Saadi* [2002] 4 All ER 785 at 793.

360. It is to be noted that as in Australia, the relevant legislation in the *Hardial Singh* case contained no time limit on detention beyond the phrase "pending his removal".

~~Dra~~

361. As the Full Court note in *Al Masri*, the decision has also been followed by the Hong Kong Court of Final Appeal, of which Sir Anthony Mason was a member of the majority, in *Thang Thieu Quyen & ors v Director of Immigration & anor* (1997-98) 1 HKCFAR 167.

362. The Full Court concluded as to s.196 at [120] that its language, either taken alone or in the context of the scheme as a whole *"does not suggest that Parliament did turn its attention to the curtailment of the right to liberty, in circumstances where detention may be for a period of possibly unlimited duration and possibly even permanent."* Again we stress that this comment applies with even greater force to the detention of children.

363. We also adopt the views of the Full Court as to construction in accordance with Australia's international obligations that are set out at [138-145] of the judgment. We note in particular paragraph 154 as to the possible effect of UNCROC. This was not argued before the Federal Court but is highly relevant to the matter before us. It seems inconceivable to us that the Federal Parliament in enacting the Migration Act would have contemplated the lengthy detention of children.

364. While the primary issue in *Al Masri* related to the situation of a person who has made a request under s.198, the principles expressed by the Full Court are obviously of general application.

365. In the present case it is clear that the trial Judge should have directed a much closer inquiry as to whether the children were

being lawfully detained and as to the validity of s.196 in its application to them than she did. She was referred to the decision of Merkel J in *Al Masri* at first instance but dismissed it as having no relevance. In this we think that she was plainly wrong.

366. This may have been because before Dawe J and before us to some extent, the argument proceeded upon the basis that the matter for determination was as to whether one Commonwealth Act should be interpreted as superseding the other. In particular it canvassed whether an Act such as the *Migration Act* which related to a particular class of persons should be able to override the more general jurisdiction conferred upon this Court under the *Family Law Act*. The other view that was put was that the *Family Law Reform Act* 1995, which was passed subsequent to the *Migration Act* should therefore supersede it. In our view her Honour rightly rejected the argument that the later passage of the *Family Law Reform Act* gave it primacy, but the above decisions make it clear that the issue is far more complex than that.

367. We think that the proper analysis is to determine the limits of s.196(3) before determining the issue as to whether the Court has jurisdiction to make orders in its welfare jurisdiction to order the release of the children. In this regard, we note that Drummond J's decision in *Molisi* is distinguishable. His Honour there said at [20]:

"I hold that, even if I have jurisdiction to issue an injunction under s 68B (or s 114(3) for that matter) of the Family Law Act in a proper case, (a point I leave open), those provisions, properly construed, do not empower me to restrain the Minister and his

officers from performing mandatory duties cast on them by the provisions of s 189 and 198(5) the Migration Act, though performance of those duties will have a serious detrimental impact on the welfare of two Australian citizen children of Mr and Mrs Molisi's marriage."

368. Although his Honour addressed the injunctive contained in the *Family Law Act*, he did not consider the issue of the Court's welfare jurisdiction. We therefore consider that this decision is irrelevant to the issues before us.

369. Drummond's decision in *Molisi* was also given prior to the decision of the Full Court of the Federal Court in *Al Masri*, which emphasises the issue of the ability of unlawful non-citizens to take steps to bring their detention to an end under s.198(1).

370. The subject children in this case are aged 14, 12, 11, 9 and 6. It seems to us to be unlikely that any of these children would have the capacity to make a request to the Minister under s.198(1). It should be noted from the outset that the 'capacity' of a child will vary according to a number of factors, including age. While the word 'capacity' has not been judicially considered, questions of an age at which children can exercise rights or participate in legal processes have been the subject of case law and academic opinion.

371. Most categories of law have special rules to deal with children and young people. For example: the evidence of a child was historically subject to special tests; children cannot be held to an otherwise binding contract; and young people are not entitled to participate in democratic processes. Furthermore, there are long-

standing principles of common law related to the capacity of a child to form criminal intent, make a decision about medical treatment or be held responsible for a tortious act.

372. While the underlying basis of this method might be found in the common law principle of *doli incapax*, it is more recently known as '*Gillick* competence' from *Gillick v West Norfolk & Wisbech Area Health Authority* [1985] 3 All ER 402. It is not always called *Gillick* competence, but it is clear that increasingly, across disciplines, a child's individual maturity and a range of other circumstances are being considered when determining their capacity to make decisions or exercise legal rights.

373. *Gillick* competence was incorporated into Australian common law by the High Court in *Marion's case (supra)*. Deane J, whose words echoed the concept affirmed by the majority, said (at FLC 79,203):

> *"The effect of the foregoing is that the extent of the legal capacity of a young person to make decisions for herself or himself is not susceptible of precise abstract definition. Pending the attainment of full adulthood, legal capacity varies according to the gravity of the particular matter and the maturity and understanding of the particular young person."*

374. The Australian Law Reform Commission (ALRC) and the Human Rights and Equal Opportunity Commission (HREOC) in 1997 conducted a thorough examination of the concerns of children and young people accessing the law. (Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for children in the legal process*, Commonwealth of Australia, Canberra, 1997). They

noted [at 91] the "formidable barriers [which] prevent or limit children's participation in legal processes."

375. The significance of these points in this case is that given this research found that ordinary Australian children and young people face significant barriers to exercising their legal rights, these barriers are amplified when disadvantage is overlayed by being held in a detention centre in a country with limited language skills.

376. From the examination of the various disciplines of law alongside credible research on the issue of the experience of children and young people before the law, two conclusions are clear:

1. A child's capacity in law depends upon that child's individual circumstances; and
2. In spite of increasing capacity, commensurate with age and other factors, major barriers still exist in children exercising their legal rights.

377. While the common law and legislation (where it exists) increasingly reflect a tendency towards children having rights, responsibilities and capacity commensurate with their maturity and particular circumstances, any analysis must take into account factors which will inhibit the exercise of those rights, responsibilities and capacities. For example, a child who has experienced trauma or has spent time separated from one or both parents may have a different level of competence to one who has grown up in a 'stable' household. A child whose first language is not English in Australia may have a different level of competence to a child whose first language is English. A child whose

schooling has been sporadic or interrupted may have a different level of competence to a child who has progressed through school without incident. In any given case, a child's capacity can only be properly assessed by examining a range of factors and influences on that child.

378. This brief survey of some key areas indicate that *Gillick*-like tests exist in many spheres of law. The law has developed to avoid strict tests or the application of set criteria to test a child's capacity. It is clear that tests of capacity should be based on a range of factors, where age is but one of many. A child's criminal or tort liability will be determined first by reference to their level of maturity, which can only be assessed by examining a range of other factors. Similarly, a child's ability to be held to an otherwise lawful contract will depend on their understanding of the contract.

379. These *Gillick*-like tests appear to be the most appropriate way of determining a child's capacity. They allow for an assessment of a child's age alongside other important factors. Factors such as, for example, isolation, English language skills, schooling, access to resources and the administrative barriers to exercising legal rights must also be considered, as they too will impact upon a child's capacity.

380. Any assessment of the capacity of the children in this case to bring their detention to an end would have to take into account these kinds of factors, and other factors specific to each of the children as individuals. While this would ultimately be a matter for the trial judge, on the face of it, it seems unrealistic to think that any of

them could bring their detention to an end under s.198(1) of the *Migration Act*. To do so would involve them taking a decision exposing themselves to an uncertain future in a country with which they have little or no familiarity without the protection of their parents. Indeed for the Minister to accede to such a request in the case of a child would leave him open to strong criticism and would also probably be in breach of Australia's obligations under UNCROC.

381. In the present case, consistent with the decision of the Full Court of the Federal Court in *Al Masri*, we consider that if the children or any of them are unable to bring their detention to an end, therefore, like Mr Al Masri, their continued detention is unlawful.

382. Further, it seems to us that because, these children are unlikely to have the capacity to make a request under s.198(1) of the *Migration Act*, they are therefore not in a position to bring their detention to an end of their own accord. It is true that their parents could do so, but to regard this as a determining factor seems to us to effectively involve treating the children as the chattels of their parents.

383. It is quite apparent that under our law children are entitled to be treated as individuals and not as the property of or appendages of their parents. They are entitled to the same rights and protections at common law and under the Constitution as adults subject to Australian law. It thus seems inconceivable that their continued detention should depend upon whether or not their parents have made a request for repatriation under s.198(1). Regardless of the

issue of the incorporation of the principles of UNCROC into Australian law, it is clearly appropriate to have regard to it in construing legislation of this sort. In this regard we look to Article 2(2) of UNCROC which provides as follows:

> *"2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment* ***on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians or family members****."* (our emphasis)

384. In the present case the continued detention of these children appears to be, so far as they are concerned, an indefinite detention. If the Minister is correct, this can only be brought to an end by the actions of their parents or the children attaining a sufficient capacity to make a request for repatriation themselves. Such an interpretation of the legislation raises the very real possibility of these children spending their entire childhood in detention. It seems to us that the *Migration Act* cannot be interpreted to produce this effect. If it does then we consider that s.196(3) is unconstitutional insofar as it purports to do so.

385. Like the Full Court of the Federal Court in *Al Masri* we can find nothing in the scheme under the *Migration Act* or s.196 that suggests that Parliament contemplated such a departure from fundamental freedoms and individual liberty that would produce such a result.

386. We have already referred to the discussion in the Full Court's judgment in *Al Masri* of the impact of international instruments in

this area. In this regard, in addition to the matters there discussed, we refer to Articles 2(2) above, 9, 22(1), and 24.

387. In particular we also refer to Article 37 of UNCROC and in particular paras (b), (c) and (d). Article 37 states:

"States Parties shall ensure that:

a. No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below 18 years of age;

b. No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

c. Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

d. Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action."

388. The indefinite detention of these children is, in our view, incompatible with this Article and constitutes a serious breach of Australia's obligations under the Convention. These conclusions are strengthened and exacerbated if the psychological report

concerning these children to which we have referred is found to have substance. More importantly for present purposes we consider that if they lack competence to make a request under s.198(1) then their continued detention is unlawful.

389. In such circumstances, s.196(3) or the *Migration Act* does not operate as a bar to the exercise of the Court's welfare jurisdiction nor does it prevent a court from ordering the release of the children from detention. It was pointed out by the Federal Court in *Al Masri* that such a conclusion does not mean that the children cease to be unlawful non-citizens, nor does it mean that they are not subject to deportation. That issue does not arise in this case.

390. Such a conclusion is not without its practical difficulties, because although the children's detention may be unlawful, this is not to say that that of their parents can be similarly regarded. That issue is not before us. There are however alternatives that could no doubt be canvassed before the trial judge, who can make appropriate orders for the welfare of the children. It is we think, inappropriate for us to embark upon this exercise, because the full facts are not before us by reason of the course taken at trial. Further, consistent with the decision of the Full Court of the Federal Court in *Minister of Immigration & Multicultural & Indigenous Affairs v VFAD of 2002* (supra) interim orders could be made for the release of the children pending the determination of their capacity to make a request for repatriation. We note in this regard an affidavit sworn on 15 December 2002 by Mr Dale West, the Director of an organisation known as Centacare Catholic Family Services in South Australia. The affidavit was filed on behalf of the children and admitted into the appeal record. In it, Mr

West swore that Centacare "can and will take responsibility for providing accommodation and support" to the five children if the Court were to release the children into Centacare's care and control.

391. If we are wrong in our view as to the probable unlawful nature of the children's detention, we turn to the second question as to whether there is room for the operation of the welfare jurisdiction while the children remain in immigration detention.

392. In this regard we have noted the decision of Ryan J in *VLAH v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1554 (13 December 2002). In that case, the applicant had been granted a bridging visa which was granted in relation to a pending appeal to the Full Court of the Federal Court. However, he withdrew his appeal and as a result was obliged, in accordance with an undertaking given to the Department to depart Australia, to present himself to the Department for removal by the day of the hearing, 10 December 2002. Apparently a bridging visa had been granted because the applicant's physical and mental health had deteriorated significantly while in the Curtin Immigration Detention Centre in 2001.

393. There was evidence before Ryan J, that the applicant was severely depressed. He argued that upon surrendering himself to the Department he could not lawfully be returned to an immigration detention centre, contending that the modes of detention which were lawfully and constitutionally available should be confined

when the circumstances attending the non-citizen in question was as extreme as those affecting the applicant.

394. In the context of judicial review, Ryan J at [9] took the view that the selection of a particular mode of detention was invalid only if it went outside the definition of immigration detention in s.5 of the Act or if it was made for some ulterior purpose like punishment of the non-citizen. His Honour concluded:

> *"... the only arguable contentions open to the applicant are, in my view, founded on the provisions of the Act on its proper construction, requires by implication that the mode of detention not be unreasonable in the circumstances of an individual applicant, and that the selection of a particular mode of detention not be actuated by an ulterior purpose. For the reasons I have already outlined above, I am not persuaded that the definition of "detain" supports an implication that the selection of a mode of detention will be invalid if it is not reasonable in light of the circumstances of the non-citizen concerned. Mr Manetta contended, as is undoubtedly correct, that the effect of the definitions in s5 "immigration detention" and "officer" is that the Minister may in writing authorise detention in a wide range of places other than Detention Centres established under the Act and may authorise in writing any person to act as a Detention Officer in such a setting. For example it might well be possible to have the applicant confined to immigration detention in the Uniting Church facility where he presently resides, and have him "held by, or on behalf" the manager of that facility, authorised to be an "officer" as contemplated by paragraph (f) of the definition of officer quoted above. However, the flexibility in the selection of a mode and place of detention which the various statutory definitions afford does not, by implication, restrict the Minister's choice in a particular case, or impose any statutory duty to consider alternative modes of detention."*

395. His Honour also rejected an argument based upon the proposition that the impact of detention on the mental or physical health of an

individual unlawful non-citizen could result in its selection being characterised as punitive.

396. In this regard we also refer to *NAMU of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 401 where the Full Court of the Federal Court rejected a similar argument.

397. In an important passage which has relevance to the present case, Ryan J said at [14]:

> *"In substance, this is an application contending that any decision (not yet taken) to return the applicant to an immigration detention centre would, having regarding to the consequences for the applicant, be so unreasonable that no reasonable decision-maker could make it. Such an argument could only succeed if the decision were one which this Court has jurisdiction to review. The decision in this case would not be made under an enactment so as to be amenable to judicial review as it is not a decision expressly provided for in the Act. It would be merely a decision giving administrative effect to a mandatory requirement to detain a non-citizen. That is not say that decisions as to where, or under what conditions, non-citizens are housed will always be entirely free from judicial scrutiny. Mr Gunst QC conceded that the Minister owes persons in immigration detention a duty of care. Accordingly, if an actual or apprehended breach of that duty could be demonstrated, interlocutory relief might well be available in this or some other court. However, this is not such a case."*

398. We agree with Ryan J as to the nature of the decision in question and the fact that it would not be subject to judicial review in the Federal Court. However, we are of the view that it clearly would be subject to review by a court exercising welfare jurisdiction as this Court does in relation to children. This is precisely the type of

supervisory jurisdiction that the High Court envisaged that the Court exercising *parens patriae* jurisdiction would engage in relation to child welfare authorities in *Johnson's* case. (supra). We therefore consider that her Honour was wrong in her conclusions as to the exclusory nature of the provisions of the *Migration Act* in relation to proceedings in the welfare jurisdiction.

399. We also think that Ryan J's characterisation of the nature of the decision making process in relation to the place of detention negates any effect of s.474 which we think would have no application to this Court's review of this type of decision of the Minister.

400. We consider that if it was to be determined that the continued detention of the children was not unlawful, the Court could not order their release, but could nevertheless give directions in relation to their welfare, including directions as to the nature and type of detention to which they are to be subject, as to medical and other treatment to be made available to them and as to the provision of appropriate education. There may well be other matters relating to their welfare that could be the subject of Court Orders.

Conclusions

401. For the reasons we have set out above, our conclusions in this appeal are that:

1. The first four grounds of Appeal of the children are established.

2. The first seven grounds of appeal of the appellant intervener father are established.
3. The welfare jurisdiction conferred upon the Court by s.67ZC and the injunction powers conferred upon the Court by 68B of the *Family Law Act* enable the Court to make orders for the welfare of and in the best interests for the children the subject of these proceedings.
4. Such powers extend to the making of orders directed to the Minister.
5. If a trial judge finds that the continued detention of the children is unlawful, then the Court has the power to order the Minister to release the children.

402. In these circumstances the remaining grounds of appeal do not arise for consideration.

403. It is necessary to touch briefly upon the procedural situation. Apart from the issue of costs, which remains to be considered, the children have been successful in obtaining the orders sought by them.

404. The father, at the time of formulating the orders sought by him, was not in detention. Accordingly, the first order sought by him was that the children should reside with him. We assume that he would not now wish the Court to make such an order, as he is also detained.

405. The remaining orders sought by him presuppose that the children will remain in immigration detention. It is apparent from our reasons for judgment that this is not necessarily the case. In the

circumstances we grant leave to him and the children to reformulate the orders sought by them.

406. **ELLIS J**: This is an appeal by five children, by their next friend, their mother, and an appeal by the father of those children against the order made by Dawe J. on 9 October 2002, namely:-

> "1. That the hearing date of the 18 November 2002 is hereby vacated.
>
> 2. That the Form 3 Application of the applicants filed on the 31 July 2002 is hereby dismissed.
>
> 3. That the Form 8 Application filed on the 18 September 2002 and the Form 3 Application filed on the 19 September 2002 of the father are hereby dismissed.
>
> 4. That the question of costs sought by the Minister be adjourned to 18 November 2002 at 9.30 am for mention only before the Honourable Justice Dawe.
>
> AND IT IS NOTED that the Minister's solicitor to advise solicitors for the applicants and the intervener if costs are being sought against each of them before that date."

407. The history of the proceedings and relevant background has been set out by Nicholson CJ. and O'Ryan J. in their joint judgment (which I have had an opportunity to read in draft form), as have the reasons of the trial Judge for dismissing the applications. It is thus not necessary for me to reiterate that material. Their Honours also set out the grounds of appeal relied upon in the Notices of Appeal filed on behalf of the children and by the father. They record that

the appeals do not raise any disputed issue of fact, as the factual background to the applications was not considered by Dawe J. Thus, if the appeals are allowed, it would be necessary to remit the applications for rehearing by a single Judge of the Court.

408. It was common ground before us that the five children are the children of the marriage of the next friend, their mother, and the appellant/intervener, their father. It was also common ground before us that the children are unlawful non-citizens within the meaning of s.14 of the *Migration Act* 1958 (Cth). Further, it was common ground that, by their application, the children sought orders the effect of which would require the Minister to release them from the Woomera Immigration Reception and Processing Centre, and restrain him from detaining them at that Centre or another Centre in the future, but not release them from immigration detention.

409. By his application, the father seeks an order which would have a similar effect to those sought by the children and, in the alternative, the order set out in paragraph 88 of judgment of the Chief Justice and O'Ryan J.

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The Application of the Welfare Jurisdiction and Injunctive Powers of the Family Court of Australia

410. I agree with the conclusion of the Chief Justice and O'Ryan J. that the welfare jurisdiction of the Court in relation to a child of a marriage encompasses the substance of the parens patriae jurisdiction, freed from the preliminary requirements of a wardship order. That jurisdiction extends to the making of orders which are appropriate to avert a risk to the well being of a child of a marriage. I further agree with the conclusions reached by their Honours in paragraph 175 of their joint judgment, and with their reasons for concluding that s.67ZC confers an additional jurisdiction upon the Court. There are, however, limits to the scope of the welfare jurisdiction: see *Secretary, Department of Health and Community Services v JWB and SMB (Marion's case)* (supra) where at 261 Mason CJ, Dawson, Toohey and Gaudron JJ. said [footnotes omitted]:-

> "Ultimately, however, any limitation on the jurisdiction of the Family Court conferred, or apparently conferred, by the *Family Law Act* must be constitutional. The Act is limited in its operation by reference to the constitutional powers under which it is enacted: "Marriage" (s. 51(xxi)); "Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants" (s. 51(xxii)); and, so far as the Northern Territory is concerned, the territories power (s. 122). In the present case the emphasis was naturally on the marriage power and, as well, the territories power.

In *Fountain v Alexander* Gibbs C.J. said:-

> "The power of the Parliament to make laws with respect to marriage does not extend to laws for the protection or welfare of the children of a marriage except in so far as the occasion for their protection or welfare arises out of, or is sufficiently connected with, the marriage relationship."

Clearly there are limits on the scope of the welfare jurisdiction, as with the custody and maintenance jurisdictions, though the scope of the jurisdiction will nevertheless be very wide. So long as an order of the Family Court is constitutional, there can be no limitation on the Court's powers emanating from the need to preserve the scope of State legislative powers. To hold otherwise would be, as counsel for the Commonwealth said, to take the law back beyond the *Engineers' Case*.

It is clear enough that a question of sterilization of a child of a marriage arises out of the marriage relationship and that the sterilization of a child arises from the custody or guardianship of a child. Therefore, jurisdiction to authorize a sterilization is within the reach of power of the Commonwealth, quite apart from the operation of s. 122 of the Constitution."

411. After referring to *Marion's case* and *P v P*, the Chief Justice and O'Ryan J. concluded:-

> "234. These cases make it clear that the Court's welfare jurisdiction is akin to the *parens patriae* jurisdiction and they also make it clear that this is a valid exercise of constitutional power depending on the subject matter of the order therefore, it is necessary for a court exercising such jurisdiction to satisfy itself that the subject matter of the order is connected with the appropriate heads of constitutional power."

412. I respectfully agree with those conclusions.

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Exercise of Constitutional Power

413. In the instant case, it is submitted that the appropriate heads of constitutional power are to be found in s.51 of the Constitution, paragraphs (xxi) (Marriage), (xxii) (Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants) and (xxix) (External affairs).

414. I agree with the conclusion of Nicholson CJ. and O'Ryan J, and generally with their reasons that the jurisdiction conferred by ss.67ZC and 68B extends to enable the Court to make a particular order in relation to a child of a marriage against a third party where an appropriate connection between the subject matter of the order and an appropriate head of constitutional power exists.

415. It was submitted on behalf of the Minister that the parents of the children retain full parental authority notwithstanding their detention. In my view, the parents retain parental responsibility although it is clear that, as a result of their collective detention, some of the parental duties, responsibilities and authorities normally exercised by parents are limited or suspended for the duration of their detention.

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416. I accept, for the reasons advanced on behalf of the Minister, that he is not the legal guardian of the children. I also accept that, in other proceedings, the Minister has conceded that he owes a duty of care to persons in detention: see paragraphs 237 and 397 of the joint judgment of the Chief Justice and O'Ryan J. Notwithstanding his powers under the *Migration Act*, the Minister, does not, in my view, stand in loco parentis to children of a marriage who are in immigration detention nor, by reason of such detention, is he exercising a type of de facto parental authority as Nicholson CJ. and O'Ryan J. concluded at paragraph 238 of their joint judgment (as to the meaning of a person in loco parentis, see *Bennet v Bennet* [1879] 10 Ch.D. 474 at 477). He is exercising powers and discretions vested in him whilst the children remain in immigration detention.

417. The children and the father submitted that the subject matter of the order sought by each is sufficiently connected with appropriate heads of constitutional power, whereas the Minister submitted to the contrary.

418. The Chief Justice and O'Ryan J. concluded that the circumstances of the present case, namely that the children, being the children of the marriage of their parents, are detained in circumstances

contrary to their welfare as a result of being brought to this country by their parents, are sufficiently related to the marriage of their parents to activate the constitutional power of the Commonwealth to protect them.

419. In *P v P* (supra), Mason CJ, Deane, Toohey and Gaudron JJ. at 600 said [footnotes omitted]:-

> "The grants of legislative power contained in pars (xxi) and (xxii) of s. 51 of the Constitution are cumulative. Each must be given its full scope and effect. Neither is to be read down by reference to the other. Paragraph (xxi)'s grant of legislative power with respect to "Marriage" encompasses laws dealing with the protection or welfare of children of a marriage in so far as the occasion for such protection or welfare arises out of, or is sufficiently connected with, the marriage relationship. To a significant extent, that operation of par. (xxi) overlaps par. (xxii)'s express conferral of legislative power with respect to "parental rights, and the custody and guardianship of infants" in relation to "Divorce and matrimonial causes"."

420. The orders sought are orders for the release of the children, not from immigration detention, but from detention at a particular location - continued detention at which is said to be contrary to their welfare or release from a particular form of detention, namely at a centre such as the Woomera Immigration Reception and Processing Centre. In my view, the subject matter of that order is not sufficiently connected with the constitutional powers referred to in ss.51(xxi) and (xxii) of the Constitution. Thus, in my opinion,

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the Court does not have the power to make the order sought by the children.

421. However, the provision of adequate, proper and prompt medical treatment for the children and of ensuring they are not exposed to violence and trauma are matters directly related to their protection and welfare. Such matters arise out of and are aspects of the relevant marriage relationship.

422. After referring to relevant authorities and submissions of the parties, the Chief Justice and O'Ryan J. concluded that in passing s.67ZC, the Parliament implemented the relevant parts of UNCROC, and that therefore s.67ZC is supported by the external affairs power.

423. The Full Court in *B and B: Family Law Reform Act 1995* (supra) referred extensively to the background to the passage of the Family Law Reform Act 1995. The Full Court acknowledged (at paragraph 3.3) the various origins of Part VII, including the Children Act 1989 of the United Kingdom and noted that UNCROC appeared to be another source. However, as Mason CJ. and Deane J. observed in *Minister for Immigration and Ethnic Affairs v Teoh* (1994-1995) 183 CLR 273 at 286-287:-

> "It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute."

The Reform Act does not by clear language incorporate the Convention, nor is the Convention mentioned therein, or attached to it as a Schedule.

424. In my view, the Parliament did not, in enacting the Reform Act, implement UNCROC or the relevant parts thereof, and thus the provisions of Part VII of the Act in particular s.67ZC, are not laws with respect to external affairs under s.51(xxix) of the Constitution. See also *Richardson v Forestry Commission* (1987-1988) 164 CLR 261 per Deane J. at 311. Accordingly, the Court does not have the power to make the orders sought by reference to s.51(xxix).

Migration Act

425. I agree with the analysis of the Chief Justice and O'Ryan J. as to the limits of s.196(3) of the *Migration Act*, namely that a statutory provision in such terms must be interpreted within the context of the authorities they referred to, such that administrative detention extends for a period only for as long as is necessary to give effect to the provisions of s.196(1). I also agree with the observations of the Full Court of the Federal Court in *Minister for Immigration and*

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Multicultural and Indigenous Affairs v Al Masri (supra) at 276, namely:-

> "155. We are therefore fortified in our conclusion that s 196(1)(a) should be read subject to an implied limitation by reference to the principle that, as far as its language permits, a statute should be read in conformity with Australia's treaty obligations. To read s 196 conformably with Australia's obligations under Art 9(1) of the ICCPR, it would be necessary to read it as subject, at the very least, to an implied limitation that the period of mandatory detention does not extend to a time when there is no real likelihood or prospect in the reasonably foreseeable future of a detained person being removed and thus released from detention. It follows from our earlier discussion that we consider the language of the statute in question does permit the implication of such a limitation."

426. However, I do not agree with the conclusion reached by the Chief Justice and O'Ryan J. that, in the instant case, the continued detention of the children is unlawful. In my view, in the instant case, it cannot be said that there is no real likelihood or prospect in the reasonably foreseeable future of the children being removed and thus released from detention.

Conclusion

427. For the reasons given, I am of the view that the Court does not have the power to make the orders sought by the children. Accordingly, I would dismiss the appeal of the children.

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428. However, in exercising its welfare jurisdiction, the Court does have the power to make orders covering the subject matter referred to in paragraph 421 hereof. To that extent, I would allow the appeal of the father and remit that part of his application for rehearing by a single Judge of the Court.

ORDER OF THE COURT

429. The order of the Court will therefore be:

1. That the appeal of the appellant infants and of the appellant intervener be allowed.

2. That paragraphs 1, 2 and 3 of the order made on 9 October 2002 be set aside and in lieu thereof it be ordered that the application of the appellant infants filed on 31 July 2002 and the applications of the appellant intervener filed on 18 September 2002 and on 19 September 2002 be remitted for rehearing as a matter of urgency before a Judge other than the Honourable Justice Dawe.

I certify that the preceding 429 paragraphs are a true copy of the reasons for judgment of this Honourable Full Court.

Associate