



MONASH University
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Children's Rights and the Victorian Charter

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■ **High Point**



■ **Low Point**



■ **Future Reform**



High Point



A & B v Children's Court of Victoria & Ors [2012] VSC 589 (5 December 2012)

- 2 sisters aged 11 & 9 were the subject of protection applications made by Department of Human Services.
- One girl had been physically assaulted by their mother in the presence of the other child.
- VLA acted for the girls who instructed them that they wanted to continue living with their aunt, and did not want to have any contact with their mother.

A & B v Children's Court



- Children's Court held the girls lacked the maturity to provide instructions to legal representatives.
- As a result, their lawyers would act in accordance with what they considered to be in the best interest of the children, rather than according to the children's express wishes.
- Decision was overturned by the Supreme Court.

A & B v Children's Court

- At issue, was the interpretation of s 524(2) and (4) of *Children, Youth and Families Act 2005* regarding legal representation.
- Court held that the phrase “mature enough to give instructions” should be construed against the background of human rights and freedoms set out in the Charter.

Which Charter Rights?



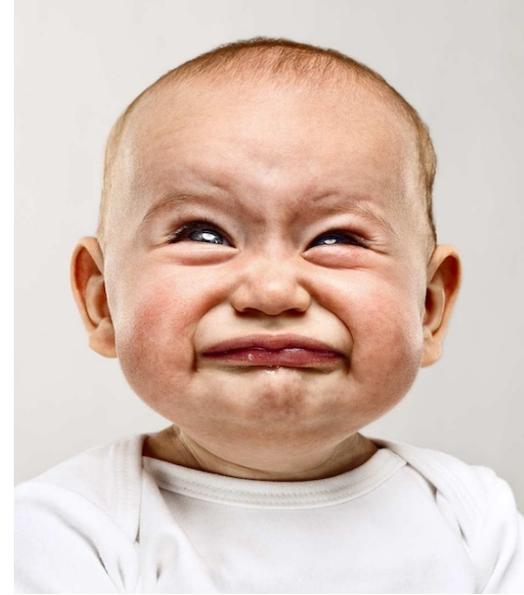
When interpreting the provision relating to legal representation for children, the following *Charter* rights were engaged:

- (a) right to equality before the law (s 8 (3));
- (b) right of a child to such protection as is in his or her best interests (s17(2)); and
- (c) the right to a fair hearing (s 24(1)).

A & B v Children's Court

- Justice Garde found that the sisters had the capacity, insight and language to be able to give instructions to a lawyer on many of the issues in the case, and that the Children's Court erred in assessing their maturity on the basis of their chronological age alone.
- Further, the fact that they may not have been mature enough to give instructions on some matters (relating to allegations of sexual abuse and drug usage) should not impact on their capacity to give instructions on the key issue of whether they wished to have any contact with their mother.

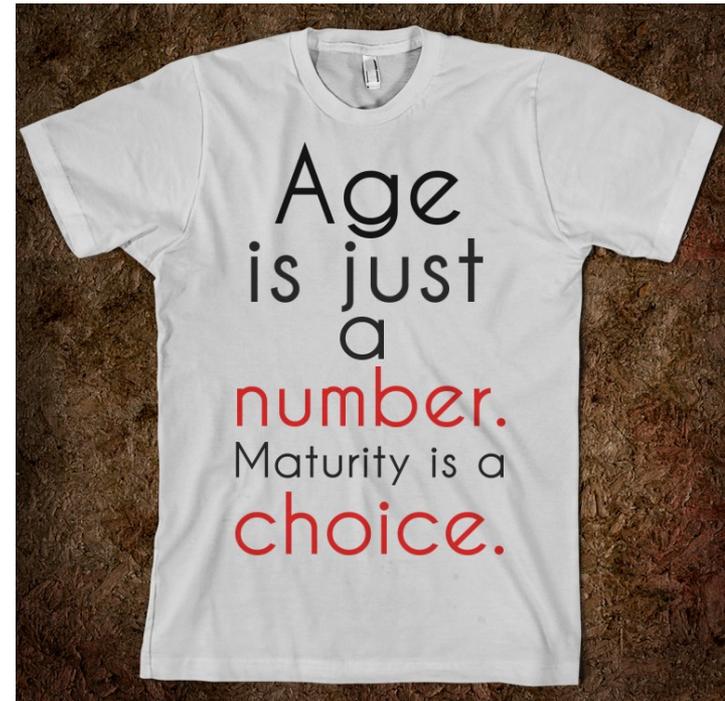
Low Point?



- Justice Legislation Amendment (Cancellation of Parole and Other Matters) Bill 2013.
- The 'other matters' in the Bill's name, refer to an unprecedented restriction on access to legal representation for children under 10.

Low Point cont.

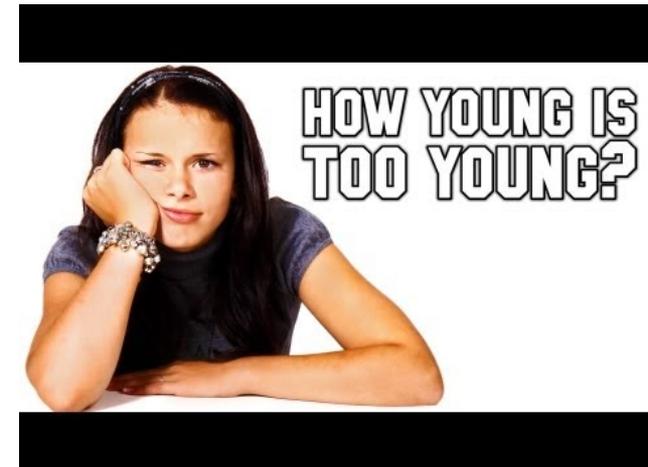
- Prior to this 'reform' all children aged 7 and older were assessed as to their maturity to give instructions in child protection proceedings.
- The age of 7 was just a presumption, and the determination of maturity was made on a case by case basis.



Low Point cont.

Amendment:

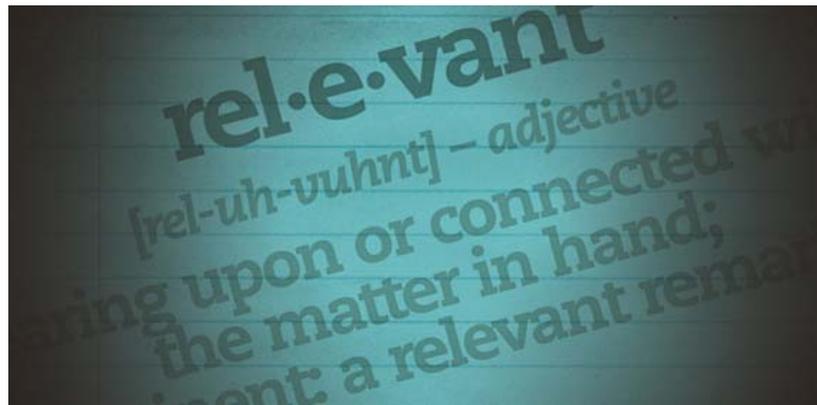
- Imposed an arbitrary age limit of 10.
Only children over 10 have can have a lawyer acting on a direct instructions model.
- Under 10, they have no right to instruct their own lawyer.
- In ‘exceptional circumstances’ child under 10 can have legal representation based on ‘best interests’ not instruction model.



Relevance of the Charter to the Bill?

Restrictions on legal representation for children under 10 engages human rights:

- Section 8 Recognition and equality before the law;
- Section 17(2) (best interests of the child); &
- Section 24 (right to a fair trial).



Statement of Compatibility



- S 28 “*A member of Parliament who proposes to introduce a Bill into a House of Parliament must cause a statement of compatibility to be prepared in respect of that Bill.*”
- SoC must state whether in the member's opinion, Bill is compatible with human rights and, if so, how it is compatible; and if, in member's opinion, any part of Bill is incompatible with human rights, the nature and extent of the incompatibility.

S o C



- Andrew McIntosh, Minister for Corrections, Only mentioned ss 17(2) & 24 (1), NOT equality before the law.
- *“Children who are younger than 10 years of age are less likely to be able to provide direct legal instructions than those aged 10 or over. A distinction for separate representation based on an age of 10 or more is more consistent with the timely and effective protection of children in their best interests than a rule based on contested evaluations of maturity.”*

S o C

Conclusion reached?

“The provisions in the bill therefore do not limit the rights in section 17(2) and section 24(1) of the charter act.”

Seems to be an unfounded S o C.

Removes existing rights of a significant group of children (aged between 7 and 10).

Dialogue Model...

- Decision in *A & B v Children's Court* made by Justice Garde in December 2012.
- Bill passed by Victorian Parliament in February 2013 (3 months later)!
- Bill explicitly states that it “does not affect the rights of the parties in the proceedings known as *A & B v Children's Court of Victoria*”.



Future Reform?

- Article 24(2) of the ICCPR:

“Every child shall be registered immediately after birth and shall have a name.”

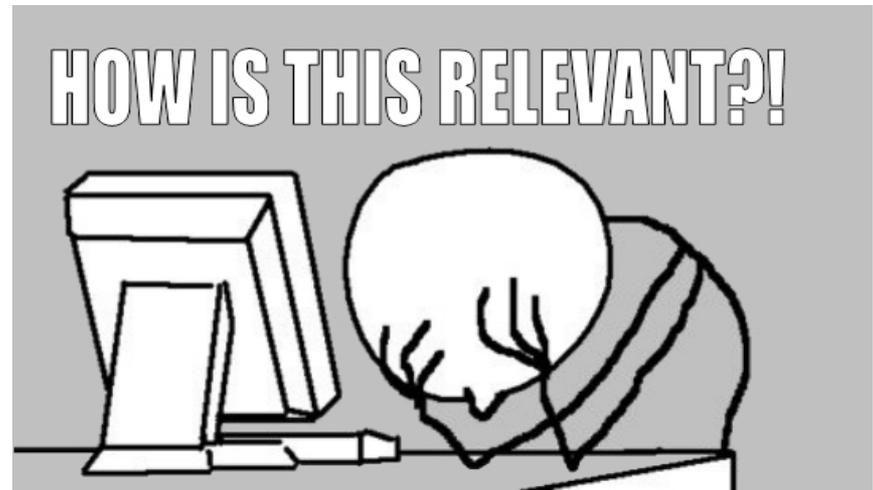
- This right to birth registration has been interpreted as including the right to a birth certificate.
- This right was omitted from the Charter.

VICTORIA AUSTRALIA BIRTH, DEATH AND MARRIAGES REGISTRATION ACT 1964		REGISTRATION NUMBER 6886/2010
BIRTH CERTIFICATE		
1 CHILD	Surname Given Name(s) Sex Date of Birth Place of Birth	CITIZEN Jenny Female 11 February 2010 Carlton Victoria
2 MOTHER	Surname Birth Surname (if different) Given Name(s) Occupation Age Place of Birth	CITIZEN DOE Jane Industrial Chemist 35 years Shepparton Victoria
3 FATHER	Surname Birth Surname (if different) Given Name(s) Occupation Age Place of Birth	CITIZEN John Accountant 39 years Sydney New South Wales
4 MARRIAGE OF PARENTS	Date of Marriage Place of Marriage	24 December 1999 Melbourne Victoria

Right to Birth Registration

- Text of the *Charter* was largely guided by the model bill recommended in the Community Consultation Committee's Report.
- That report said:

“The Committee has not included ... the right to birth registration and to a name. While these rights were more relevant in the post-World War II context in which the ICCPR was drafted, they are less relevant for inclusion in a modern Victorian Charter.”



Right to Birth Registration

- Omission of Article 24 from the Charter reveals a lack of awareness of the birth registration problems experienced by Indigenous Victorians.
- Without a birth certificate, an individual is legally invisible.
- Yet under the Charter, they have no right to such a foundational document.

The unbearable heaviness of being no one

January 23, 2009

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Jewel Topsfield

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After years of running in circles, 31-year-old Bradley Hayes has finally had his identity recognised by Victorian authorities, who gave him a birth certificate this week. *Photo: Wayne Taylor*

AS FAR as the authorities were concerned, Bradley Hayes did not exist.

The 31-year-old fisherman from Lakes Entrance grew up a ward of the state and did not know his real birth date. His birth was never registered.

Mr Hayes never really worried until he was 16 and realised he did not have any ID when he tried to sign up for the dole.

"The best I could come up with was paperwork from the Aboriginal co-operative which stated I was Aboriginal," Mr Hayes said. "I had to get my sister to come in and verify."

He was unable to drink at the pub until his 20s because he could not prove he was 18.

For the past nine years Mr Hayes has been battling to register his birth so he can participate in everyday activities others take for granted.

Without a birth certificate he has been unable to register his fishing boat in his own name, obtain a passport or get a driver's licence so he can take his children to school.

"I wouldn't be able to leave the country or nothing, not because I've done anything wrong, I just didn't have a birth certificate," he said.

Will it happen?

- In 2011, Scrutiny of Acts and Regulations Committee's review of the Charter included following recommendation:

“that consideration be given to whether the rights contained in the ICCPR omitted by the Human Rights Consultation Committee should be re-examined for inclusion in the Charter.”

- Government's Response (March 2012):

“Government agrees with SARC that additional ICCPR rights that are not presently incorporated into the Charter should be considered for inclusion. The Government will seek further specific legal advice to inform its decision about whether to include any of these additional civil and political rights.”