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FOREWORD

This seminar was organised to focus on the changing status of children in society and the implications that this may have for the traditional approach to children and their rights, especially in the legal and criminal justice spheres.

During 'The International Year of the Child' the questions of children's rights and justice for juveniles were frequently raised as peripheral issues; it was one of the purposes of this seminar to focus squarely on them.

The Institute was, in addition, able to collaborate once again with the Australian Law Reform Commission in this seminar. The then preliminary views of the Commission in its Reference on Child Welfare in the Australian Capital Territory were discussed with the participants by Dr John Seymour and the changes planned were thus given a valuable airing.

The special problems of children who become involved in the legal system were raised and discussed from a variety of perspectives. The resolutions reflect the wide range of concerns and interests of participants.

Publication of those papers presented which have not previously been published elsewhere, is in accord with the Institute's charter and responsibility to make available nationally the results of its activities. It is hoped that the material reproduced in these proceedings will be of assistance to those working in the field with an interest in the rights of children.

CHILDREN'S RIGHTS AND JUSTICE FOR JUVENILES

W. Clifford

This Seminar is taking place just after the conclusion of the United Nations Year of the Child. Whatever the serious problems of malnutrition, cruelty or neglect which still remain, there can be little doubt that when the history of this last century is written, it will be possible to designate it as the century of the child. When it is remembered that this is the first period in history in which education has been made not only available but compulsory for children, that this is the period in which children were brought out of the factories, that the funerals of infants, common when I was young, have become rare indeed, that the reduction of infant mortality across the world has been a major reason for the world population explosion, that child care and welfare services have mushroomed, the lot of the child certainly appears to have improved immeasurably.

On the other hand, the change in the nature of the family during that same period, the way in which the number of children without family care has increased, the rise in the number of drop-outs, the unemployment problems between the wars and after 1972, the modern dangers of drugs and violence, as well as the psychological and social pressures of an age of unprecedented sexual permissiveness largely insulated against the responsibilities of conception, all give us reasons to argue that the child has suffered. Whatever has been done for the child seems to have been neutralised by the changes in society itself. The physical and legal protection of children against abuse and exploitation has not been matched by the personality and character ingredients available to children born before this last century.

The originator of the idea for the UN Year of the Child was a Belgian Catholic priest, Canon Moermann, who is the executive director of an international Catholic organisation for children with headquarters in Geneva. But until 1966 or 1967 Canon Moermann was the Catholic Secretary for Education in the Belgian Congo, responsible for the hundreds of mission schools in the country now known as Zaire. In that capacity I knew and worked with him in both Zambia and Zaire when I was responsible for the broader issues of social development in those countries. In 1970, when I was the Executive Secretary for the Fourth United Nations Congress on the Prevention of Crime and he had already moved to Geneva, he approached me to introduce resolutions on prisoners' children. He already had the idea for a UN Year of the Child.

This background is important to understand the conceptualisation of the needs of children. It means that when the UN took over the idea these needs were not thought of as limited to human rights or the formal legal claims for recognition. However necessary these basic rights may be, they are no substitute for the love which is at least a prime need - and some would say a total need. That is to say that the justice we seek may not be simply obtainable from courts of justice. The device of the *guardian ad litem* in English law to represent a child in court was never conceived as a substitute for the human affection which underlies growth and personality fulfilment. If a child depends only on his legal claims, to his rights in law he or she will be in a parlous state indeed.

Rousseau began his monumental work with the now famous words 'man is born free but he is everywhere in chains'. But is man born free? Looking at a newly born child literally dependent on others for his next breath and most certainly unable to move, eat or see without outside aid is hardly a picture of a free person. All his human rights are dependent not merely on the letter of the law but on the humanity and care which exceeds any bill of rights which cannot enforce a cuddle.

This is why there is probably a difference likely to emerge in this seminar between those who would approach the needs of the child from a purely legal point of view stressing the individual rights which are not always recognised in the case of the child - and those who would, whilst not opposing legal recognition, feel that attention could more productively be concentrated on the family environment, without which the love necessary to growth cannot be ensured.

I purposely mentioned the Christian initiation of the Year of the Child because this goes to the roots of the division I have mentioned. The Reverend Canon Sydney Hall-Evans, an English divine in his book on Human Rights says:

> 'A Christian will inevitably, therefore, experience some feelings of unease when the talk is of human rights. Talk of rights is lawyers language ... Theologians talk of love and of love as a duty.'

When, therefore, we are thinking of children's rights, we have to be as much concerned with the way we can ensure that other people can be brought not only to do their duty but to provide the necessary affection and care. Moreover, real affection includes firm guidance and even discipline when this is necessary - an area of judgment which is full of diversity and emotionalism in these days of value conflict in our plural society. This could be undermined by working entirely by the book, strictly to the letter of the law or without consideration of children's own obligation to match their rights by duties.

In the United States it has been held that the police, searching without warrant a pram containing, not only a few weeks old child, but also a packet of drugs, were infringing the constitutional rights of that child. On the other hand, it was in the United States that Mr Justice Fortas warned us that the child in the interplay of law and welfare often gets the worst of both worlds. He perhaps initiated world concern with the situation when he declared that the child often gets neither the legal protection available to adults nor the care and treatment required by children.(1) This followed in the next few years by the Gault and Winship cases which demonstrated convincingly how children could be deprived of their liberty and denied procedural safeguards in the name of doing good.(2)

There is little virtue in embracing the purely legal or welfare, the retributive or rehabilitation or treatment models for the disposal of children's cases with the self-righteousness and emotion that is sometimes demonstrated. Anyone with experience in this field knows that there has been injustice done on both sides. There are children as delinquent and even vicious as any child brought before the courts who have escaped criminal labelling. There are children labelled who have been the victims of an over enthusiastic application of law. Legally conscious boys have charged each other in juvenile courts after an ordinary fight in the school quadrangle. Over concern for the family has deprived battered children of necessary legal protection.

Juvenile needs, no more than juvenile behaviour cannot be stretched on the Procrustean bed of statute: but nor can it be exposed to the excesses of over enthusiastic welfare specialists. There has to be a balance between the individual child and family interests, so that the rights and duties of both are kept in clear perspective.

That balance is not easy to achieve with vested interests on both sides and with established and diametrically opposed positions on the future of the family tending to confuse the issue. It is worth mention that since our basic objectives and fundamental values in society are not only unclear but sometimes in direct conflict, related issues like this of children's rights and justice suffer from the fierce pushes and wild pulls of modern social action. Should the child be socialised for basic conformity or trained for the challenge of change? This is not an academic question but a daily issue for parents and teachers. Any balance which can be achieved will depend upon the child's own psychological, sociological and perhaps even spiritual needs being kept in the forefront of our concern with legal and social questions.

FOOTNOTES

(1) Mr Justice Fortas in *Kent* v *United States* 383 U.S. 541 (1966)

(2) *Gault* v *U.S.* 387 U.S. 1 (1967); *In re Winship* 397 U.S. 358 (1970)

OPENING ADDRESS

W.K. Nicholl

On the subject of Rights and Justice for Juveniles, I have no hesitation in saying that the Children's Rights and Justice for Juveniles which we have at the moment is not adequate. Our administration of justice falls short of 'justice', we get justice according to law of course, but we have much to achieve. What changes should be made will no doubt be the subject of argument here.

Dr J. Seymour will tell you something about the submissions and thoughts that he and the members of the Law Reform Commission have had on Child Welfare for the Australian Capital Territory and to some degree what happens here is a mirror of what is going on in other parts of Australia. The problems are really the same but the people are different and in some areas the problems are greater perhaps than here. The Australian Capital Territory population is differently constructed to those in the States, we have a much larger middle class than I think exists in the States and that does make some difference to the way the problems present themselves here.

On the legal system there are clearly enough questions of whether welfare cases ought to be associated with criminal law cases or whether it should be the same Court with the same rules applying or otherwise.

The Courts have inadequate options in criminal matters and also in welfare matters. In the Australian Capital Territory there is far too big a gap between sending a child to an Institution in the State of New South Wales, we have no Institution of our own, and leaving a child in the community. I am not going to talk about this aspect because I am sure that Dr John Seymour will give you an appreciation of the submissions that he has received not only from welfare workers and police and magistrates and judges but from right across the board.

Just in passing, one area that does concern me in the strictly legal area, is the difficulty of coping with the confession improperly obtained. The Court on its own cannot deal with that situation, you cannot expect the Court to ask questions in every case designed to enquire into whether confessions have been properly obtained. It is a matter of regret that whilst by and large the police officers who work in the area of the juvenile are dedicated and fine people occasionally you have somebody who on a particular occasion falls short of the desirable standard.

The question of availability of legal advice and legal representation is important for children in the strictly criminal area and of course it is also important in the welfare area that they have access to legal advice.

It has to be realised that the administration of justice cannot be expected to solve the problems of the community. The circumstances which give rise to children and young people coming before the Court are not the responsibility of the Courts and cannot be cured by the Courts. Any of you familiar with the first 'State of Judiciary' message that was given by the Chief Justice of the United States in about 1970 will be aware of the emphasis that the Chief Justice placed upon putting things in perspective by appreciating that community problems need to be solved by the community by the politicians, by us. We cannot expect police and courts to solve community problems if there are factors that exist in our way of life or if there are problems in the way correctional systems function that are directly undermining the ambition of us all, namely that we are able to live in harmony with each other in a crime-free community. There are some community problems for which we may never have an answer. Certainly we all face frustration where the problems which confront us really do not have a constructive answer. We have an answer within the framework of what society will permit us to do but the laws are a long way behind the needs of the community.

The Director referred to a need for love and in many of the cases that come before me I cannot help but feel that if only the child or young person had the benefit of a loving relationship with one human person hopefully with more than one, that child or young person would not be before the Court. I am sure that you all have had the experience where a child comes into your care and you discover that the child has nobody with whom he or she has a loving relationship or can have a loving relationship. How apprehensive a child or young person in that situation is, how defensive are they, how reluctant are they to put themselves in a situation where they may be hurt.

When for some reason or another parents are not available to care for a child and some arrangements have to be made for that child hopefully we can provide a situation in which that child will be able to develop a loving relationship with somebody because it does seem to me that each one of us has an inherent need to be able to love and be loved without it we are stifled, the growth of us as individuals is stifled.

You will only be too well aware that for many people in our community there is an absence of love in their lives. Some members of our community live in virtual isolation and there seems to be evident a tendency for many members of the community to be very selfish. There are of course many people including young people very concerned for their fellow man almost selfless in their efforts to help some of those who are isolated in our community. Whilst ever we have significant numbers of our community living without love there will be problems which we cannot solve, which the community cannot expect the courts, police and welfare officers to solve for them.

I would like to speak a little about the non-criminal area where the courts are hampered by the lack of options, the lack of power to make suitable orders. Before you can decide what powers courts should be given in the Welfare area, you need to ask how far is it appropriate for the State or a State instrumentality such as the court to intervene in the affairs of or the life of a child, or the life of a family for when we are considering the rights of a child or a young person we ought not to consider those rights in isolation. This point I think was made by the Director that somehow or other we have to strike a balance between the rights of parents, their right to bring up children according to their beliefs and the rights of children and rights of the community. The emphasis on the rights of children which has appeared in the press in recent years seems to follow on what has often been referred to as the women's liberation movement.

Children have always had rights and rights beyond the right to be seen and not heard. The concern here is with the quality of those rights and whether the ones that exist at the moment are adequate. I am sure that we would agree that we have not the right balance yet and I suppose utopia is not capable of being achieved, all we can hope to do is try our best as a community to achieve a balance which has the support of the majority of us. Our pluralist society creates a lot of problems for us in reaching a consensus which were not apparent in earlier years.

You cannot really begin to understand our own times without appreciating, in a way that we probably cannot identify for the most part, the impact rapid change has had on our society. Some of us are old enough to remember before the Second World War and those of us who read will be able to know that even at the beginning of this century doctors like Earl Page went to some of their calls on horseback. Now we are living in an age where some years ago our technology enabled some men to land on the moon and to relay what they were doing by colour television back to earth. These changes have come about more rapidly, so far as I can tell from my reading, than at any time in history. Although we are conscious of the change by and large it is bewildering for all of us. There is not one of us able to put himself or herself above the world sufficiently to see it in perspective. We try by bringing together different disciplines to get from that mixture of disciplines a wider appreciation of what is happening and I do not think even the computor can be programmed to bring us to an awareness as to what is happening. All we have is, I think, a consciousness that change is having a tremendous impact on all of our lives but not one that we can measure totally. We can see some of the things that are happening and for many of us it creates a real problem because our worlds are being challenged and in some cases, shattered.

To come back to the welfare area, questions arise as to whether where a young person is in the need of care or uncontrollable or neglected in terms of the current legislation (which I hope will not be with us for a great deal longer) what do the terms mean and how far do you go. We have to resist the temptation to be God. I think that there is a terrible risk of an unholy alliance between a court and a welfare branch or probation officers and that this has to be recognised by the

court and welfare and probation officers. When is it appropriate for the State through its various instrumentalities to intervene in the lives of people and the young people. In those cases where you have physical violence there is generally not much difficulty about the need to intervene. What is a court to do when a child, a victim of violence by one or both parents, has been brought before it? Sometimes it is appropriate for nothing to happen immediately other than to see that the child is not in the same household as the parents and thereafter to strive to bring about a reconciliation between the child and the parents. Sometimes it is possible to educate parents and to overcome the fear that has developed in the child's mind in his or her relationship with parents. Sometimes parents disqualify themselves virtually indefinitely from having any right to a say in their children's lives.

What do we do with a child who cannot for one reason or another be cared for by his parents. Ideally a foster home where hopefully the foster-parents could give the child the love and affection that I think is necessary for the proper growth of any person would be found. However we all have been aware of how hurt some young people are and not just in the physical sense, not just the marks on them but the marks on their emotional system upon their minds and we are all conscious that for many of the young people who are brought before courts no foster parent as a general proposition will have the training to be able to cope with the child's problems.

In general terms we do not have the means in our community to provide adequate help for young people who are disturbed whether by reason of physical violence or otherwise and we finish up falling short of making adequate provision for the needs of the child often falling back upon committal to an Institution not because we think that that is the answer, but because of all the choices that we have it is the one most likely to provide a constructive response to the needs of the child. I like most people who have anything to do with Institutions see them as a last resort and frequently as a most inadequate last resort.

There is a suggestion in Richard Chisholm's writings and he may say something about this today, that although the extreme cases warrant intervention there is something to be said for, and I think the expression he uses is 'judicious non-intervention'. I appreciate that there is a need to look at ways in which some of the so-called problem children do not come into the court system. It can be argued that the extent of the problem may not justify intervention, that the cure may be worse than the problem which brings the child or young person before the court, I do not know whether by doing nothing we help. It is said by some that what we do is useless and in some cases, harmful. I am prepared to concede that what we do may sometimes prove to be harmful and that with hindsight what we do and I am now speaking about all of us that are involved in the process may prove to be of no help. However how do we know in advance that intervention is going to be useless or possibly harmful. We are not blessed with the capacity to have solutions for all the problems which confront us. I suppose that is partly because medical science and any other branch of science that

may be involved have not produced answers for all the various aspects of human behaviour. We have not been able to solve all the mental problems and probably never will be able to in a way which is acceptable to people in a democracy.

We have to attempt to balance the rights and responsibilities of parents and children in a community which is pluralist. We should not look at rights without looking at responsibilities and you certainly cannot look at the rights of children without considering the rights of parents. Are we going to permit a girl of thirteen or fourteen who decides that she wants to live with her boyfriend to do that? Is that the way we should proceed in this pluralist society of ours? Are we going to allow a girl of thirteen or fourteen to embark upon a life of prostitution? It is true that at a certain age we do not really stop it, but is eighteen the age to which the law should concern itself with the welfare of young people or should the age be brought back. We are all conscious of many young people at sixteen being maturer than many adults and many at eighteen falling far short of the maturity that they are going to need in life. Nevertheless the law says that at eighteen a citizen can fight for his country, enter contracts, vote, etc.; is eighteen the right age? What age do we say you can live with your boyfriend if you want to, or be a prostitute or an alcoholic, or a drug addict? Apart from the laws which punish people when they are caught soliciting or using some drugs or in some cases imbibing too much, adults are free to make a mess of their lives. Should we permit our young people to make a mess of their lives or do we have a duty to intervene.

Of course we are not talking about the vast majority of young people in our community, we are talking about a small percentage of them and seeking to determine in what circumstances the law should permit intervention and to what extent. We know that the quality of life varies considerably from home to home within our community and we are not going to permit intervention in the case of a child in poor circumstances simply because from a material point of view the child could be better provided for in another household. What standards are we going to attempt to impose upon the community as minimum standards. It is very difficult to get agreement upon what the law should say. There are some who are reluctant to make the law in general terms and leave it to the judges and magistrates to give it definition, allowing for appeals, or to allow police and welfare officers to act where the law is not defined in specific terms but is in more general terms. I can understand the basis for their concern. However we generally choose well educated and well trained persons to be appointed to the Bench whether as judges or magistrates and we seek to train and educate our welfare officers and probation and police officers so that they have not only the specialist knowledge they need for their avocations but also a wide appreciation of the community in which they live and work. In our Child Welfare Ordinance the circumstances in which intervention is permitted are largely specified in the definition of neglected children and to some degree in the definition of neglected children and to some degree in the definition of uncontrollable children. You will readily appreciate the problems that would arise

if the law were amended to permit intervention in the case of a young person who is in need of care if that law did not provide criteria for determining when a court could determine a young person was in need of care.

These are matters which are going to exercise your minds over the next few days. It is a real challenge. I trust that you, that each of you, will make a very real contribution and I know there are all points of view within the group and you do have a challenge which very much involves a conflict of values. It is not for us to impose our own values upon other people somehow or other we have to strike a balance which is a consensus.

In welfare cases the notion of a consensus in another sense is I think important. In New Zealand they have a diversionary programme which seeks to establish consensus with parents and children and welfare officers and which functions outside the court system. In our court system here some of us in these welfare cases certainly raise right at the beginning the question of whether the case is one in which a consensus response may be obtained. If it is, the matter is adjourned for discussion between the parents and police and welfare officers and the child so that agreement may be reached. I am pleased to say that there are a significant number of cases where we have achieved agreement and in which three or four months later or a little longer sometimes, with a few appearances in the meantime, there is no evidence offered and the problem that had given rise to the young person being brought before the court has been solved to the satisfaction of those involved.

No doubt that will be part of what you will be talking about here, but if you are going to grasp the nettle you somehow have to find a way of giving expression to this conflict of values by finding a consensus for our community and then turning it into law. It is no easy task. Candidly I do not know how it can be done. I do know that we have to do better than we are doing at the moment and that it is this sort of seminar that brings to the notice of governments from time to time ideas which sometimes in the years to come find their way into the Statute Book.

In practical politics we can wait ten years for a desirable piece of law reform to be implemented. From our individual points of view that seems to be an inordinate time and we tend to condemn it. But when an idea is put forward which gets support what happens is that it gets into a system that can only rarely act quickly. We only have to look at the number of reports that have been made by the Law Reform Commission and the number that have been implemented to have some appreciation of delays of the system in which we work. We would all like to see it work more efficiently but that in some cases involves more manpower and other cases of course involve persuading the Government of the day that the existing law should be changed. We all know that there is a tremendous reluctance to change our law and to some degree rightly so, but we do have to be prepared to change when the case is made out for change.

I do hope that I have given you some thoughts upon which you may meditate during the course of this seminar. I have great pleasure in declaring this seminar open.

OVERVIEW - CHILDREN'S RIGHTS

R. Chisholm

Very few of us could have lived through 1979 without attending at least one conference on Children's Rights, or reading some of the relevant literature that has come out this year and of course throughout the seventies. I think you will share with me a feeling of being overwhelmed by the variety and scope of issues of children's rights. I needn't go through them all because many of them have already been raised in the earlier speeches; they include the age at which children can leave home; the extent to which the State should intervene in their lives when they have committed offences or they are in some sort of trouble; corporal punishment; and so on. Then there is the international dimension. To the well known vision of the starving third world child we now have to add that of the refugee third world child. I saw recently that of all babies now alive, 15.5 million would not survive to their fifth year, and 15 million of those are in developing countries. To put it another way, of the 100 children being born every minute, 20 will be dead before a year.

The relation between our concerns with corporal punishment and schools and the spectre of wide-spread starvation in less wealthy countries always makes me feel trivial and peripheral in talking about children's rights. I do not know what to do about it, except record it. But the relationship between our own laws and some of these third world countries gives rise to one of the most acutely difficult problems in children's rights, and that is the question of adoption of children from these countries. It is now common for children in deprived circumstances in third world countries to be adopted by couples from rich countries like ours. Some see this as a step towards children's rights, promoting the rights of the children who are adopted. Others see it as the cruelist and most bizzare form of exploitation.

That example vividly illustrates just how difficult it is to think clearly about children's rights. I was asked to give an 'overview' of children's rights - a daunting prospect. In trying to work out what I should say, I resolved not to sell you any particular 'line' on children's rights, not to persuade you to take particular positions. Instead, I wanted to try and say something which might help raise the real issues in the discussion and make cliches less acceptable. If this talk has any useful effect on the seminar it will be to make it more difficult to rely on cliches and simplistic solutions.

There are two striking features of nearly all discussions of 'children's rights'. Firstly, the phrase seems to mean different things to different people. I unfortunately have to give you two small examples of this by noting my disagreement both with one thing that Mr Clifford said and another that Mr Nicholl said. I am bothered by Mr Clifford's remark that it seems absurd or preposterous for two children to be bringing assault claims against each other arising out of a fight in a school-yard. Perhaps it is, but it seems to me no more preposterous or absurd than two adults bringing charges of assault arising out of a fight in a pub. The point on which I would like to record my disagreement with Mr Nicholl is in his remarks about liberation of women and our children. As I understood him, he was saying that in a few years to balance the picture we will have to be liberating men. Now that doesn't accord with my conception of the feminist movement. For example, it seems to me that the best feminist thinking and writing is in a direction that liberates men as well as women. To advocate more economic opportunities for women, for example, opens up new possibilities for closer relationships between men and children. So I do not see children's rights in the kind of oppositional way that I understood Mr Nicholl to be suggesting. It seems to me that if we liberate women and liberate children we will find that the men have become liberated too.

I want to give a few examples of the way that people differ on children's rights. The first arises from education. As you know there is a well known debate between the liberal educators and the conservative educators, the liberal educators speaking of children's needs for freedom, self development and so on, the conservative 'Black Paper' educational theorists talking about the need to master the three R's, the importance of discipline, and so on. All I want to say about that debate is that both sides claim to be representing children, to be advancing children's rights.

A second example is in relation to financial support of children. A lot of children's advocates point to children in poverty, even in rich countries like Australia, and use that as an argument for greater financial support by the State. They point out the effect of poverty on children which is very damaging. They conclude that children's rights demand that the State by way of financial support stops any child falling below a certain poverty line. My reaction to that is a highly sympathetic one. But it is a politically loaded proposition, because it can be argued on the other side - and this is what I suppose Milton Freedman and the conservatives argue - that if the State gets into that level of financial support of people it destroys incentive, people won't work anymore, they will go overseas to avoid paying their taxes etc.

What follows from this is that you can't make propositions about children describe them as 'children's rights', and thereby avoid political dilemmas.

The last example that I would give is of a children's rights organisation run by an American singer called Anita Bryant, who successfully persuaded the aging population of Florida to vote against measures designed to protect the rights of homosexuals. Her view was that it was the Christian thing to do to continue to stigmatise homosexuals, and she called her organisation 'Save Our Children'. So, she also saw herself as an advocate of children's rights.

Once you get down to specifics, consensus about 'children's rights' disappears. This is entirely predictable and proper, rather than surprising, because children are members of society, and whatever views we have about how society should be organised will naturally divide us when we come to talk about children. Most arguments about children's rights can be translated into the form: 'Children have a right to grow up in a world, where .....' Then you fill in all your own political beliefs and values. *Agreed* statements of children's rights tend to be at such a level of generality that they are trivial. I have a little story about the United Nations Declaration of the Rights of the Child which is so good that I will tell it to you, even though I am not sure if it is true: I only have it secondhand.

The story is, that when the Declaration was being drawn up there was a great argument about abortion. One view was that the most elementary right of a child is to be born alive. Of course this view, if stated clearly in the Declaration, would have caused great embarrassment among countries whose laws permitted abortion, if only in particular circumstances. This fight about what to say about abortion in the Declaration threatened to undermine the whole thing. After (in the United Nations way) endless discussions in impenetrable language, the problem was resolved. The phrase that emerged from this, and the phrase which enable all the countries to affirm the declaration was: 'the child by reason of his physical and mental maturity needs special safe-guards and care, including appropriate legal protection before as well as after birth.' Armed with that endlessly ambiguous phrase each delegate no doubt could go home and assure his country that its attitudes to abortion had been embodied in the Declaration of the rights of the Child.

My first and major proposition, then, is that you can't have a notion of children's rights that amounts to anything, without embodying in that all your values about how society ought to work and how it should be organised. In other words, children's rights is, and ought to be, as politically divisive, and interesting as any other issue.

The second feature of children's rights discussions is the presence of a Mr Bloggs, who always says in a loud voice: 'Well, children do not have any rights. What rights have they got? You show me a list of children's rights!' and he always adds - 'I have to tell you this - that children have no rights in this bloody country'. The vulgar Mr Bloggs has a point. I think his point is that children, in law and to a large extent I think in social organisations, are in a state of dependency. Think of such reforms and improvements as, say, the setting

up of a children's hospital or a child abuse unit, or having compulsory vaccinations. What Mr Bloggs would say about all those things is that even though they may be good for children, they do not affect children's *power* in the world, they do not give the children any more say in their lives.

Mr Bloggs, if he could summon up the patience to do so, would draw a distinction between *welfare* for children and *rights* for children. He would say that we can only talk properly about children's rights if we are changing our laws and social institutions in a way that gives children more voice in their own lives. I have not got time to develop this argument - as I say I am not trying to sell you lines - but my second major point is that in law what characterises children is legal *powerlessness;* they can not drink, they can not vote, they can not make contracts and so on. In compensation for this other people, their parents or their guardians, can in certain circumstances act on their behalf. They can also do things to them by way of punishment and confining them, which if done to an adult would amount to the tort of false imprisonment or the crime of assault and so on. So what characterises children in law, is a state of powerlessness and the powers that they lack you can by and large find in other people; either their guardians and parents or the schools or the police or various other people and organisations. What Mr Bloggs is saying is that as long as that remains the case you can't properly talk of children's rights.

Let me give you a couple of quick illustrations of the distinction that I am trying to make. In the Family Law Act there is the provision that in deciding custody cases the court must regard the child's welfare as the paramount consideration; it overrides anything else. Now it seems to me that that is a welfare type provision. Mr Bloggs would not regard it as relating to children's rights as it does not give them any *say*. However, there is another provision in the Act which says that where a child of 14 or more expresses a wish about custody or access, unless circumstances are very special the court must follow those wishes. Now it seems to me that that is of a very different order, because that provision does give the child a voice, a say in his own affairs. We have to be very careful when we are talking about children, to distinguish whether we are saying things that will make the world a better place for them or provide services for them on the one hand,or whether we are doing things which give them a more effective say in their own lives.

I have to mention two books, because I have not got time to expand this argument. They are John Holt's *Escape from Childhood*, (Penguin, 1974) and Richard Farson's *Birthrights*,also published in 1974. Those two books put essentially a very simple argument. They say that what 'children's rights' really means is that we should give children of *any* age *all* the rights possessed by adults, and they mount a persuasive and well argued case saying just that. It is a case which most people find preposterous but some of the arguments that they raise, even if you do not accept them at the end, are very valuable. Take voting for example. They say that all children should have the vote from age nought. Silly? Just a minute. First of all Holt and Farson say you might object to their suggestion on the basis of *competence;* you might say children

particularly young children, do not have the competence to vote well, they do not understand the issues and so on. But the authors point out that voting in our society is not reserved to people who are competent to make intelligent decisions. We allow psychopaths, horrible people and Young Liberals to vote and we do not have any qualifying criteria of competence or reliability or being a good solid citizen. Indeed it is part of the democratic point, that the right to vote should not be dependent upon some judgment formed about criteria like that. A lot of what we regard as our political development involved getting away from limiting voting by reference to one's sex or ownership of land and other things. These authors argue that a logical extension of that is to extend the vote to children. They also question what would happen if children did have the vote; would they all vote for any politician who offered them the big rock-candy mountain? Well, they argue, if they did they would not thereby distinguish themselves very much from adult voters. Also, the likelihood is that children voting would not make very much difference on the total voting pattern, because if you look at surveys you find that on the whole most children's views on political and related matters mirror those of their parents. In terms of numbers it would not be a very big deal. But, they argue, it might give politicians a new incentive to take children's interests into account when planning transport and all kinds of other facilities. I offer that comment about voting as merely an illustration of the very important argument (even if you do not accept it entirely) that the only serious method of promoting children's rights is to give them, without discrimination, all the rights that adults have. Whatever you think of this, the argument is not going to be accepted in the immediate future, and it would be pure self-indulgence to spend all our time talking about that. What I want to do is to try and say something which might help in understanding the role of the law in defining children's rights and the kind of law that we have. Basically the view that I am presenting to you is that what the law does, among other things, is to allocate power over children's lives. It allocates power in a very complicated way between parents, schools, district officers of the Department of Youth and Community Services, police, doctors, courts, education authorities and so on. What I think you have to ask when you are looking at an issue of children's rights is: where is the power and how is it allocated by law? When people are proposing changes in the law, I think you have to ask: how will the proposed change reshuffle power over children's lives? Now, I want to illustrate what a complex question this is.

Take children born outside marriage. In these liberated times everyone thinks that children born outside marriage shouldn't be blamed for that and shouldn't be discriminated against. In all States there is legislation (passed in the seventies) designed to get rid of the distinction between legitimate and illegitimate children. This changes the relationship between the child and the child's father. What used to characterise the legal position of children born outside marriage was that their fathers had no rights to them. All they had was an obligation to maintain them; they were not entitled to their custody or their guardianship. The legislation which seeks to get rid of illegitimacy has to face the

question whether it is going to make the relationship between unmarried fathers and their children the same as married fathers and their children. And if it does it means that, for example, adoption is going to be a very much more complicated affair. You are going to have to get the consent of the unmarried father to adoption. The unmarried father's consent may be hard to obtain because the father is hard to locate or is unknown, but the situation ranges from cases where the father has only a fleeting relationship with the mother, to a long standing defacto relationship. In the latter case you would want to say that the father's consent ought to be required for adoption. There is great agonising going on among people who are interested in the law of adoption, to try and work out the extent to which the father's consent is required where an unmarried woman has a child and wants it adopted. Can the father stop the adoption? Is he entitled to custody? This question has arisen out of the desire of people to get rid of discrimination between children born inside and outside marriage, an apparently simple exercise in giving children rights.

Another problem involving the distribution of power lies in long term foster care, where the choice is between the power of the long term foster parents and the biological parents. It is open to the law to say, that if biological parents place their children in foster care then no matter how much time goes by, no matter how close the bonds between the child and the foster parents become, as a matter of law the natural parents remain the child's guardians, and broadly speaking if the natural parents then want the child back then they are entitled to the child. That is one extreme. The other extreme, advocated by an increasing number of people, is that once the child has been in foster care for sufficient time to build up real links and bonds with the foster parents it should be regarded as part of that family and it should be adopted by them, or the law should in some other way give the child the right to a new family (at the expense of the biological parents). This is a very difficult issue. It involves 'children's rights' in the sense that we had better get it right if we want the world to be better for children, but, it does not involve children asserting any power over the world. It is a problem of allocating responsibility and power between biological natural parents and foster parents.

The two examples that I have given involve distributing power between individuals who being parents, or otherwise associated with the child, want to exercise power and responsibility over the child. But the law also distributes power between institutions or government agencies and individuals. A particularly vivid and startling case happened in the Australian Capital Territory in 1962. A man called William Neyens went to the Child Welfare Department and asked them for help in looking after his nine-months son. The mother, an unmarried woman, who had lived with Mr Neyens for a year, had just left - leaving him, a farm-worker on a low income, literally holding the baby. He only wanted temporary assistance, as he thought that in a month or two his legal wife would return to him and he would then be able to bring up the

child with his wife. So he asked the Department for help on a temporary basis with this child. The Departmental officer thought that that would be possible, and arranged for Mr Neyens and the child to go before a Children's Court and he agreed to this. The child was found to be 'destitute' and the Children's Court made an order that he be made a State ward. He was then transferred to the New South Wales Department and placed in a baby's home. In fact one month later Mr Neyens was reunited with his wife and she was happy to look after the child. So he applied for his child back. The A.C.T. people said that the child was now in the hands of the New South Wales authorities and he had to apply to them. So he did. The Under Secretary of the New South Wales Department wrote him this letter:

> 'Dear Mr Neyens.....Your letter indicates that you do not understand your legal position in this matter. As you well know you and Margaret Steel were not married, and therefore the child born of your association is illegitimate. Under the laws of this country the natural father of an illegitimate child has no rights whatever regarding the custody or guardianship of the child. However, he has a responsibility of paying maintenance for the child. My main concern is for the welfare of the child who is the only innocent person involved in the relationship between you and Margaret Steel. Any decisions regarding William's future will be made in what is the best for him. You have not and never had any legal right of custody or guardianship and I can therefore hold no hope to you that he will be given into your care'.

Mr Neyens went to the A.C.T. Supreme Court and that court had no difficulty in finding that the welfare of the child required that he be returned to his father. Let me stress to you that at that time, the child had not been placed with foster parents but he was in a baby's home, so there was no question of forming bonds with a new family. The Department in the Supreme Court didn't even argue the merits of the welfare of the child. They appealed to the High Court, which upheld their contention that the Supreme Court's jurisdicition had been excluded by the legislation, with the result that the Department's decision about the child was absolute and unchallengable in any court in the land.

It seems to me that that represents a grotesque over-reaction to a genuine need for State power. There is a need for the State to have some kind of power relating to children who are without parents or in real trouble. There is no doubt that Mr Neyens at that time could not look after the baby and it was right and proper that the State should have stepped in. But the law was vastly over-reacting because the *amount* of power it gave to the State Department was utterly beyond what was required in the circumstances. One of the problems in child welfare law is to solve the problem posed in this case. Various methods have been adopted to tackle it. Under recent Victorian

legislation Mr Neyens would have been entitled to have the child back, unless the Department had been able to convince a court that the child would thereby be at risk. In other words, the law is shifting power in a complex way between an individual like Mr Neyens and the Department, and also between the Department and the courts.

I am not attempting to take sides on whether Mr Neyens should have got his child back, although I suppose my values may have come through. The point that I am making is that what the law in this area is doing, among other things, is not so much a question of where the child's interest lies, but *who gets to make the decision.* The answer in the Neyens case was the department and no one else. The answer under recent reforms is the department if it can convince a court. Whatever you think of the various alternatives, the law here is shifting power between individuals, departments and the court in a complex and intricate way.

One question which has been given a lot of prominence in American law, is the question of the rights of children at school. The only cases which have arisen in Australia (with one or two unimportant exceptions) relate to corporal punishment. But there is a host of potential problems where children are expelled from school, or dismissed from school, or things are written in their reports which are not true and which are damaging. There are a lot of ways in which children may be, and undoubtedly are, harmed by injustices that happen to them at school. We do not yet know the extent to which those injustices are going to be perceived as legal ones. there is one case which came before Mr Justice Blackburn some years ago in 1976 where a child was expelled from a private school and argued that this was in breach of natural justice. 'Natural justice' in this context is a technical term under which university students have been held entitled to some kind of *fairness* in the way that they are being dealt with by the university. If you are expelled from a trade union, for example, you can take proceedings if you have not been given a fair hearing; it is that kind of notion. What the judge held was that it was *inappropriate* to apply natural justice to relations between pupils and school authorities.

This represents a very clear example of the importance of *characterising* a problem. If we characterise things like that as *educational* matter (which would probably be the conventional view) then we are saying that the power over this aspect of the children's lives should reside with the educational authorities. If we characterise it as relating to rights then we are saying that the courts ought to resolve these disputes, and it is right and proper for a child to make some kind of application to a court and claim unjust treatment. As I say there is little case law as yet; it is a chapter of the law which might develop, or might not. A policy choice has not yet been made. This involves a complex decision about whether power over children's lives should reside exclusively with the educational authorities when they are at school or whether power should be shared by the educational authorities and the courts by means of some provision in which the courts can overrule unfair decisions by shcools.

The last aspect is that the framework and the shape of the law itself can substantially affect power. For example, in custody disputes in the Family Court the actual rule of law has not changed, it is still that the child's welfare is the paramount consideration. But, the procedural framework has changed a lot. We now have counsellors attached to the court and they do a lot of work before the case gets to court by talking to the people and trying to get them to resolve the matter themselves. There is a case for similar sorts of pre-trial conciliation methods in children's courts, and it seems to me that that case is at its strongest in cases like truancy. I think there ought to be some mechanism in the children's court area whereby truancy and many cases of run-away children can be perceived as a problem in the *relationship* between children and the parents, or children at school. The legal process ought to have some sort of preliminary framework of conciliation seeking to avoid the necessity for a court order, as counsellors try to help the parties to resolve the matter themselves in custody cases.

It seems to me therefore, that the processes of the law and the structure of legal rules is very important and it is very much neglected. Most discussions of children's rights are in terms of what the substantative rules of law should be; should a child be able to do this or not able to do that. But it's often of more importance to know what kind of structure the law sets up and how the rules are framed. For example, we could have rules which specifically defined the circumstances in which children could be taken to court for non-offences (the children 'in need of care'). Suppose we had a rule that said that if a girl becomes a prostitute at 16 she should go to court. That rule would be easy to understand and enforce. The policy about girls going into prostitution would have been taken at a legislative level. Now if we have a very general phrase like 'exposed to moral danger', or 'in need of care and protection', the result of that is that the decision about whether we take 16 year old prostitutes to court isn't made in the Parliament. It is made at the level of district officers of the department, or maybe at a higher level than the department. So the shape of the legal rules, the extent to which they are particular or general, means that the policy decisions are made in different places. Specific rules in the legislation require Parliament to make up its mind about these difficult issues, whereas very general wishy-washy rules, the kind you find in the United Nations Declaration, mean that all the important decisions are made at a much lower level, and, at a much *less visible* level; in the discretion of police or welfare officers as to which kind of cases are taken to court.

I have really only made one point, and that is that the law allocates power over children's lives. I have suggested that it is very important to see how far children themselves have power over their lives and I have tried to give some examples to illustrate that the way the law allocates power is a terribly complex and ellusive thing.

I would like to end, rather self-indulgently, with four 'presumptions' for children's rights. The first one is that -

> . a proposal which gives children more power to make decisions about their own lives is likely to be good.

The second one is -

> . a proposal that gives more power to the person putting it forward is likely to be bad.

The third one is -

> . we should locate most power over children in the hands of those who are looking after them and living with them, reserving the power of governments and professionals to cases where the risk to children is clear and serious, and limiting the intrusion of authorities to the extent necessary to avoid the risk.

The fourth one is -

> . when choosing people to exercise power over children that they do not know personally - and I include magistrates, children's hospital staff, lawyers acting for the children and so on - we should try to choose people who have shown in their personal lives that they like children and get on well with them.

My last flurry of self-indulgence is about inter-personal relations. It seems to me that reading about child development often gives you the impression that children are weird creatures from another planet utterly unlike ourselves. That is wrong and dangerous. Whenever I read a list, of which there are many, of children's needs, and most talk about the need for nourishment, love, a sense of self-worth and so on, my reaction is 'that is what I want too.'' Professor Goodnow at a recent conference said that some of our best insights into children may come from looking inside ourselves; where children differ from adults may lie not in what they need but in the resources that they can bring to bear in having their needs met. One thing they need, I think, is to be taken seriously. Margaret Mead has a nice line about child care; she says that children ought to be looked after by someone who can remember what they said yesterday. My point is really that in deciding the difficult question of allocating power we must be very careful of being too parentialist; we must as far as possible give power to children to regulate their own lives; and especially we should try and frame the laws in a way which gives them power to be consulted,

to have information, and to participate in those decisions which they are capable of making. Opinions may differ about what decisions they can make and what they can not, but it seems to me that we should always be suspicious of laws which deprive them of decisions in their own lives. Especially, we should be suspicious of laws which deny to them things which we regard as basic rights for adults.

PROPOSALS FOR THE A.C.T. CHILD WELFARE ORDINANCE

Dr J. Seymour

What I want to do, first of all is to emphasise that at this stage all I can put forward to you are some rather tentative proposals. The Commission is still in the process of making up its mind on a number of matters in relation to its reference on the A.C.T. Child Welfare Law and indeed, if our thinking were further advanced, it really would not be proper for me to indicate to you what we had in mind because, as you probably know, our statutory duty is to report to the Commonwealth Attorney-General, Senator Durack. I will have to be rather tentative as some of our ideas are firming up and some of them are at a very tentative stage. This means, of course, that I will be able to get a lot of benefit from your comments and views. I would like your criticisms. I would like any doubts you have about the proposals and possibilities I put forward to you to be expressed so that they can be built into our final report. You, as experienced practitioners, will be able to guide me and will be able to point out things that we, perhaps, have not considered.

As you know, we were originally supposed to report by last October but that did not prove possible The Attorney-General has given us an extension until the end of June this year, and we will produce a report by that date. That report will consist of four parts. First we will look at young people in trouble; second, we will look at child care centres - there are some distinctive problems in the A.C.T. in that area; third, we will look at the law governing the employment of young people; and fourth we will look in a general way at the arrangement of welfare services in the A.C.T.

It is the first part, children in trouble, that I want to discuss with you today. First, because the reference is so vast that I can not cover the whole field in an hour, and second, because our thinking is furtherest advanced in this area.

Looking at this topic of children in trouble, I believe that it is vital to make a clear and complete distinction between offenders and non-offenders. I think that if we do not try to disentangle these two groups, the objectives which we pursue with regard to each will be ambiguous and we are likely to satisfy neither the lawyer nor the welfare worker.

You will know better than I just how much has been written on the objectives pursued in the juvenile justice system and children's court systems; an enormous amount has been written on these topics this century and I do not want to get involved in a lengthy theoretical analysis because we do not have time for that. But, I do want to make one or two points because they are key principles in our report. They

are principles on the basis of which we will approach our task of putting forward reforms regarding children in trouble.

The first principle is that, in the Commission's view, when an offence by a juvenile is alleged, that offence should form the focus of society's concern. I think that it should be explicitly recognised as the reason for intervention. We should not, in other words, treat the offence as a wholly unimportant symptom of personal and social needs which our intervention is designed to meet. In other words we are coming down in the needs/deeds debate. There are a number of reasons for adopting this position, and I will outline some of the more important ones to you.

First, I believe that to regard a criminal prosecution as a vehicle for meeting a juvenile's needs is to misconceive the purposes which criminal proceedings can effectively and appropriately perform. I do not believe we should institute such proceedings simply to meet juveniles' needs. Such proceedings, I think are the wrong setting in which to pursue benevolent purposes. Our help is tainted by legal threats, our aims are ambiguous.

Second, the assumption of pathology (as Nigel Walker has called it) the assumption that an offence is necessarily indicative of personal problems, must be questioned. I think that there is too much doubt now about the notion that offenders are different, and that this difference explains their delinquency. And further, even when some form of social or personal problem, some sort of pathology is manifest, then our ability to do anything about it is very limited. Many studies, have cast doubt on the efficacy of treatment programmes. Also, the personal and social problems encountered in our courts are dauntingly complex. I think it is more realistic and more honest to face up to our limitations and not to impose on the criminal process a burden in the form of commitment to theraputic programmes which it simply cannot bear. So this argument relates to realism, honesty; let us ask ourselves what we can achieve.

The third point is that there are real dangers in using the criminal process as a vehicle for the pursuit of child-saving policies. I do not need to remind you of the lessons to be learnt from the juvenile courts in the United States, although I do think a warning is in order here. We ought to be extremely cautious about applying those lessons to Australia. It is very easy unthinkingly to take American literature, American developments and apply them to Australia. Our Children's Court's history and development are very different from the American experience. Nevertheless, I think there is some truth in the argument that the United States experience does indicate that we should be cautious about pursuing benevolent purposes within the framework of the criminal process.

What are the implications of all this with regard to dealing with offenders in the Australian Capital Territory? The first and most

obvious implication of opting for a deeds approach is that the system should use procedures designed to test evidence and designed to prevent intervention unless the offence is carefully proved. In other words the offence does matter and the State must be put to its proof before being permitted to intervene.

The second point is that it is unrealistic to reject as inappropriate the traditional concerns of criminal justice when we are dealing with the young offender. We cannot simply reject as irrelevant words like retribution and deterrence, however much we dislike them. We have to face up to them even when we are dealing with a juvenile. The juvenile justice process is to some extent in the same business as the adult criminal process. In dealing with a juvenile offender we must attempt to protect, reassure and satisfy the community of which the juvenile justice system is a part.

The third and last point which emerges is that I think we should adhere to tariff principles. We should adhere to a system based on 'just deserts'. These principles should set the upper limit for intervention in the life of a juvenile. We should not claim extended powers over a juvenile for benevolent purposes. This has all sorts of implications and, one outcome I feel sure the Commission will reject is the possibility of making an offender a ward. I think this is a measure which should no longer be available to the courts in respect of offenders. This is one obvious and practical implication of the application of tariff principles.

Before developing other proposals with regard to the offender, let me return briefly to the non-offender and give you some matching principles on which the Commission hopes to build its recommendations. These can be very briefly stated. As far as possible, the non-offender, the neglected the uncontrollable child, should be completely separated from the offender and should not be subjected to criminal procedures, or procedures which look criminal. The second principle is that the system should be designed in such a way as to force the exploration of informal alternatives and so to force the avoidance of the court wherever possible. I have already expressed doubts about benevolence in a coercive context. I think this reservation is particularly important with the neglected and the uncontrollable - court proceedings should be employed only as a last resort.

With regard to offenders the Commission is putting forward the view that we must recognise what can be described as the criminal justice aspects of the system. But this does not mean that we should not retain a special court for young lawbreakers, and that the juvenile should be dealt with in a system indistinguishable from the adult system. The Commission does not believe that this is a necessary implication of the emphasis on criminal justice principles. The Commission does believe that a distinctive court should be retained for the young offender, I do not believe that it is necessary to make a simple choice between the punitive approach and the therapeutic approach; I think both must be accommodated. There will always be

a tension between the two. On the one hand, we must accommodate the lawyer's demand for fair procedures and the law enforcement officer's concern with the prevention of crime; on the other we must respect the welfare worker's desire to respond in a humane understanding manner to the very special needs of the young.

What I am saying is that what must be sought is a balance, a balance between two often conflicting requirements. And this balance, this search for balance, is the Commission's guiding principle in putting forward a blue-print in regard to offenders in the A.C.T. In the A.C.T. the Commission is of the view that this balance can probably best be achieved within the framework of the Court of Petty Sessions, but we are considering changes to this court. The major change to the court is the possibility that a specialist magistrate should preside over a court for children. I would very much welcome your comments.

There are two very distinct schools of thought on this. On the one hand is the view that by appointing a specialist it will be possible to lay the foundations for a genuinely distinctive court and to emphasise its importance. A specialist magistrate could give the lead in developing this court. He or she would not only preside in court, he or she would be expected to maintain regular contact with welfare agencies, to visit A.C.T. and N.S.W. institutions, to attend and convene seminars, to assume responsibility for the preparation of statistics in the children's court, and to keep up with the more important developments in the relevant literature. In other words, we are envisaging a very broad role for this specialist magistrate; someone interested in developing the court as an important specialist jurisdiction. What is envisaged is a much more demanding role than the magistrates at present are able to play in the A.C.T.

The other view, which has been very strongly urged to us, is that it is thoroughly undesirable to have a specialist in the children's court. The argument is that the work in the children's court does not provide the variety and stimulation which a competent magistrate will require. The further objection is that work in the children's court, like that in the Family Court, is emotionally draining and it is not desirable to ask one person to cope with it full-time. We also have a special problem in the A.C.T.. The number of cases is small. We are dealing with something like a thousand offender cases a year. The best estimate seems to be that this would involve a magistrate in three full-time sitting days per week. So we have the question of what we do with him or her on the other two days. Partly the answer may lie in the extended role that I have sketched, but this is a practical problem.

We suggest, and I think we are quite clear on this, that the aim should be to retain and develop a distinctive court for young offenders, one which will balance legal and welfare considerations. We still have a problem to be faced; how do we bring to the court a special understanding of the needs of the young. You will remember that I spoke of balancing the needs of the lawyer with the demands of the welfare worker. You might say, 'Well, you have kept your lawyer on the bench, but you are doing nothing to bring this special understanding of the needs of the young to the court'. In part this might be met by the

appointment of a specialist magistrate, but we are also considering the appointment of a new type of official and I think this possibility is one of the most interesting ideas which the Law Reform Commission is advancing. It is one on which I would like your criticism and comments. We are thinking of creating a new type of official to be called a Court Counsellor. The idea is to make available to the court non-legal expertise when the time comes to make the disposition decision. The counsellor will not be a lawyer. The Counsellor will have social work or behavioural science qualifications. Obviously this counsellor is going to have something in common with the Family Court Counsellor. The Counsellor will have functions both with regard to offenders and non-offenders, but at this stage let us look at the role of the counsellor with regard to an offender.

There are a number of functions which this person will perform. First of all the counsellor will have a special responsibility for the collection of background information. Imagine that we are at the stage in proceedings where the offence is admitted or proved. Then, as you know, the magistrate must consider whether further background information, or indeed any background information is needed. If the court decides that background information is needed it will be the Court Counsellor's function to make the necessary arrangements to see that reports are prepared for the next hearing. I emphasise that it is for the court to say that it wants a report. The Counsellor is not going to have the right to enter homes and ask for information; that would be an intrusion into people's privacy. I think the court should make the order that a report is needed. The court, normally speaking, will either direct the Welfare Branch or the Capital Territory Health Commission to provide background reports and I do not want to change that. But the Court Counsellor's job will be to see that this happens, to make sure that the reports are prepared. He or she will not write them himself or herself, but bring them to court and make sure that they are available. Equally, the Court Counsellor will be able to go out, and with the consent of the parents and child, make available other information to the court. Imagine, for example, that the Court Counsellor knows that the family is a religious one and that their clergyman might be able to contribute something. He might bring the clergyman along to the court with the parent's and child's consent. Equally if the child has been remanded to Quamby - which is the remand home in the Australian Capital Territory - the Counsellor might conclude that it would be a good idea if a house parent from Quamby came along to assist the court. What the Counsellor would be doing is making available additional information to the court. That is one role. The second role is assistance at the dispositional stage. The magistrate - be he specialist or otherwise - might not want a report or if he gets a report he might be quite happy with the recommendation which it contains. In such a situation the Court Counsellor will have no further role to play. However, the magistrate might be dissatisfied with the report. The magistrate might feel that the report writer has not done his or her homework properly. For example, the report might recommend committal and the magistrate might prefer to avoid that. So he might suggest to the Counsellor that the Counsellor make enquiries

as to a suitable alternative placement. The counsellor, because of his social work skill and his behavioural science skills, will be able to 'dig around' and one of his major tasks will be to be familiar with all the services in the Australian Capital Territory, to be able to point out avenues, and possibilities to the magistrate. The magistrate might not have completely made up his mind about the order which he is going to make, or he might ask for the Counsellor's comments.

Another function which I envisage is that the Counsellor might negotiate the details of an order. A magistrate might decide that a child has to leave home, but not know where to put the child. The Counsellor could go out and arrange suitable placement. I think the Counsellor should then bring the matter back to court so that the court can authorise and sanction that placement. The Counsellor is going to be the executive arm of the court, a person able to go out and make enquiries, do the homework for the magistrate, and make available to the magistrate independent expertise which he has not in the past had open to him. I can envisage situations where it could be best for the conditions of a probation order to be negotiated in private, where it might be a good idea to get the parents and child involved in some sort of contract. The magistrate might therefore say to the Counsellor, 'Go away for an hour and negotiate a probation order and then bring it back to me and I will sanction it'.

I see the performance of these sorts of tasks as strengthening the welfare component of the court by bringing to it special social welfare expertise which has not necessarily been available to it before. But I think the Counsellor will also have a part to play in strengthening the court's legal role. A characteristic of the orders presently employed in children's courts, both in the Australian Capital Territory and elsewhere, is their flexibility. Flexibility means that those administering the orders are given an enormous amount of discretion and all of us have heard of magistrates complaining about wards who have been returned home the day after the hearing, or complaining about people being put on probation and not being supervised. The magistrate when he or she makes an order has a clear conception of what the order involves, but there is no one to ensure that this conception becomes a reality, that the order does take the form that the magistrate envisages. The fate of those who are placed on probation, the fate of of those who are made wards is very much in the hands of the welfare worker. There is no feedback to the court, and there is no system of making those who administer the order accountable. The nature and level of probation supervision and the type of placement are in the hands of the administrator.

The Law Reform Commission does not want to put an end to the sort of flexibility which this type of order permits, but it does believe that, if the balance to which I have referred is to be obtained, we should have some regard to the lawyer's demand for accountability and court control.

The Counsellor, I suggest, offers a way of achieving this. The Commission has in mind that a third role, and perhaps the most important role for the Counsellor, be that of monitoring the progress of the child who has been placed under one of the general orders such as a supervision order, a placement order or an institutional order. In monitoring the order the Court Counsellor will protect both the juvenile's interests and the wider community interests reflected in the court's order. Let us look at the juvenile first. If an order is made on the assumption that the child is going to benefit, that the child is going to receive a specific sort of assistance and support, it will be the Counsellor's job to see that that service is delivered and to bring the case back to court if it is not. Equally, if a magistrate envisages a certain level of control being imposed on the child, it will be the Counsellor's job to see that that level of control is sustained. So he is looking both at the community's interest and the child's interests.

I will give you one practical example of the sort of thing that comes to mind. I came across one case where the magistrate made a 'live where directed' order which is a measure often used in the Australian Capital Territory to overcome the lack of institutional facilities. The magistrate placed the child on probation saying 'you will live where directed by the Welfare Branch' in the belief that the child's home was quite impossible and that the child should be removed from it. When the Welfare Branch to whom the power had been given examined the case they decided to persevere with the fragile family; they decided to try and hold the family together. I am not saying that the Welfare Branch should not have done this, but certainly what they did was quite contrary to the magistrate's expectation. What I am suggesting is that in this situation the Counsellor will form a bridge between the court and the welfare worker. The Counsellor might say, 'That is fine, let us go ahead and see if we can prop the family up'. But, if he thinks that this is too much at variance with what the magistrate intended, I think the Counsellor should be able to bring the matter back to court, so that there is some monitoring, some accountability. Here we have the public figure, the magistrate, making an order thinking it has one effect, and in fact it has quite a different effect.

Many examples of monitoring suggest themselves. There may be a failure of probation either because the child is never visited or because the child is totally unco-operative. Possibly the Counsellor could have a look at the situation and decide to bring the matter back to the court. Possibly where an institutional placement is not working, the Counsellor's job would be to go out to the institution and talk to the child. If the placement is unsatisfactory the matter could be brought back to the court. So there would be added some element of court control, some element of accountability, someone caring what happens to the child when the child walks out of the courtroom door.

I talked about maintaining a distinctive system for offenders and we do not believe that this should be swept away. In the Commission's view, one of the features which should distinguish a system for young offenders from that for adult offenders is a greater willingness to divert the young from the court; a greater willingness to avoid the cumbersome blunt instrument of a prosecution. We want as a matter of policy to recognise and emphasise the diversion of young offenders from the court. If we have this as an aim, it seems to me that there are four possible models which we have to look at to achieve this. First of all we can retain the existing system in the Australian Capital Territory. For those of you who do not know the Australian Capital Territory system, basically our offenders are divided into two groups. There is the warned or cautioned group which is selected solely at the discretion of the police, and the group which goes to court. We could build on and try to tidy up the warning system, using the existing foundations.

A second possibility is the introduction of some more sophisticated screening device, some sort of screening panel. The most common form of this screening panel with which I am familiar is the one in South Australia and New Zealand, which consists of a police officer and a welfare worker. These two people get together and decide whether a case should proceed to court. The third model is the most intellectually attractive - and that is the Scottish reporter. Basically the Scottish reporter is an independent local official to whom the police must report virtually all juvenile offence matters, and it is the reporter who must decide whether the matter goes on to court or is dealt with informally. The fourth sort of screening device is the sort of panel which is at present operating in South Australia and Western Australia, and there is also a similar model in New Zealand.

Having decided that we want to divert, what model do we use? As I have emphasised our views are still tentative, but our tentative opinion is that the course best suited to the Australian Capital Territory is the continuation of the existing warning system. I am surprised that I have reached this conclusion, because I did not expect to reach it. The most important single element in this recommendation, if it is made, is that impressionistic evidence suggests that the Australian Capital Territory Police are already diverting a substantial number of young offenders from the court.

Our present thinking is that, unless there is clear evidence to suggest that the police in the Australian Capital Territory are taking too many young people to court, (and that therefore the power of prosecution should be taken away from them) the existing system should be retained. This is a very practical decision which we have been forced to reach . In the Australian Capital Territory there simply is not any evidence to suggest that the police are taking too many people to court.

With regard to Western Australia and South Australian panels,I think a similar sort of comment can be made. The question is one of practicality, of realism. Our present feeling about panels is that

unless it is obvious that the introduction of a South Australian or Western Australian panel would meet a specific and clearly identified deficiency in the existing system, the case for panels is not proven. The questions which need to be asked about panels of the South Australian and Western Australian type, are; What role will they perform? Why do we want them? What will they do that the existing system is not doing? In other words, one has to identify a specific deficiency and see and explain why the panel is the right remedy. The panel is expensive, is bureaucratic, and would introduce another layer and whatever you do with young offenders you are not going to abolish police warnings. If you have a panel there will still be some juveniles who are warned. It seems to the Commission that it is rather too complex to introduce into a small Territory like the Australian Capital Territory a warning group, a panel group, and a court group when it is not apparent what deficiency the introduction of a panel would meet.

Our present view is that the existing warning system should be retained. However, there are no clear-cut criteria, and no clear procedures. The system needs tightening up. Law Reform Agencies are generally worried about unexamined discretion and police warnings are a classic example, so we would like to see a clear statement of policy with regard to police warnings and a clear commitment to diversion spelt out, with explict reasons and objectives. We would also like to see clear and publicly available criteria with regard to warnings, so that the public know the criteria on the basis of which the police are making their warning or prosecution decisions. We do not however, want to expand the warning system in such a way as to impose welfare assistance on the diverted child. We do not want the price of a guilty plea to be 'agreement' to co-operate in some informal programme. We think offenders should be treated as offenders and that the police should decide whether to prosecute or not to prosecute. If,having made the decision not to prosecute, we decide that the child has a problem, certainly we ought to devise ways of informing the family of the services available to meet that problem. We fear intrusive welfare and reject any combination of welfare and police criteria.

Finally, let me turn to the non-offender. You will remember that with regard to the non-offender I advanced two very simple propositions. First of all, that the non-offender should be separated from the offender. The second proposition is that wherever possible informal alternatives to court action should be used.

The first and most obvious way to go about our decriminalisation task is a procedural one. The Australian Capital Territory is still procedurally in the dark ages with regard to non-offenders. Children in this Territory are charged with being neglected. If for example a child is assaulted by the father, the child ends up in court charged with being a neglected child. This is an absurd mechanism, which must be abolished.

The new procedure which the Law Reform Commission is considering is an application for a declaration that the child is in need of care.

We do not claim that this is original; this is the sort of procedure which the Australian Capital Territory should have had many years ago. But we are also considering the possibility that these care proceedings should be initiated *only* by the Court Counsellor. This raises all sorts of problems, but let me first of all explain what the Commission has in mind. I have described the Counsellor's skills and expertise. The Counsellor will be a person with social work or behavioural science training; the Counsellor will be a person whose job it is to know all about the welfare services in the Australian Capital Territory and our argument is that this will ideally equip the person to explore informal alternatives. We want the Counsellor to be a human barrier to the court process. We want to make it impossible for the police to take a child in need of care to court. We want to make it impossible for the Welfare Branch to take a child in need of care to court. We want this decision to be made solely by the Counsellor.

Another important point and one that I have not emphasised enough is that the Counsellor will be quite independent of the Welfare Branch and of all existing welfare agencies. The Counsellor will be in a position to say 'no' to Welfare Branch, if the Branch brings a case along to the Counsellor for court proceedings. Or, equally, the Counsellor might conclude that a welfare agency is hanging on too long, and is not doing that which is in the child's best interests. He then will be able to take the case over.

What we have in mind is that the Counsellor will, with regard to the non-offender, be a screening device. The Counsellor will represent a preliminary conciliation process. There are links between the Children's Court Counsellor and the Family Court Counsellor. The Family Court Counsellor is statutorily empowered to perform a similar role: look for alternatives, have an informal chat, explore possibilities, try to avoid the heavy weapon of the court. That is exactly what the Court Counsellor will do.

In addition to the human screening device there will be a further legislative screening device. Having decided that there is just no alternative to taking a child to court, the Counsellor will have to establish before a court that the child comes within one of the definitions of a child in need of care, *and*, that the case is one which can be met only by way of court order. I would expect the magistrate to adopt the same sort of scepticism as the Counsellor as he would be statutorily obliged to be sceptical. When the case comes before the magistrate, I would expect the magistrate to ask, 'Why this is a matter which requires the court? What have you been trying to do? What alternatives have you explored? Why is this something which can be solved only by way of a court order?'

This device, is advanced as a way of solving the problem of defining the situations in respect of which coercive intervention, is justified. If any of you have taken the trouble to look at the Australian Capital Territory Ordinance you will see an abysmal list of broad loose definitions of neglected children. We are in the process of working on much more specific definitions but we are going to leave our

definitions wide enough so that in extreme circumstances, intervention will still be possible. I am troubled by the very rigourous statutory approach which is being advocated by Michael Wald in the United States. I would rather keep a little openness in our definition, but have this procedural bar in the form of a counsellor, and the additional legislative bar in the form of a need to establish not only that the child comes within a particular category, but also that the situation is such as can be met only by way of a court order.

This leaves the final problem which I wanted to discuss with you, which is the question of the type of court to which these cases should be referred. You will remember,our basic desire is to separate care proceedings from offenders and to remove the child from the taint of a criminal jurisdiction. Obviously this leads the Law Reform Commission to look at the possibility of transferring care cases to the Family Court in the Australian Capital Territory. In theory this court offers the ideal solution. What we are considering at the moment is that a magistrate should be placed in the Family Court to exercise jurisdiction in respect of care proceedings.

Some people feel that the way that the Family Court has developed makes it an unlikely venue in which to seek new and imaginative solutions to the sort of problems which these cases will present. Also, we have a practical problem in the Australian Capital Territory in that we are faced with the difficulty of creating a special jurisdiction in the Family Court for a very small number of cases. My best guess is that we are dealing with about 60 neglect and uncontrollability matters a year. These difficulties would be solved if another proposal being looked at in another committee comes to fruition, that is, that a magistrate be placed in the Family Court to deal with a wide range of family matters. Thus there is already in the air a proposal that a magistrate be placed in the Family Court to assume jurisdiction over a range of matters. If that happens, of course, the Law Reform Commission's problem is solved, because we simply add care proceedings to this magistrate's jurisdiction.

There is another problem, that of placing what some would see as a 'second-class citizen' in the Family Court. Magistrates have made the point to us that a magistrate in the Family Court would be in an invidious position as there would be two judicial levels. Another objection, from the point of view of the child, is that this downgrades the care jurisdiction.

The alternative to the use of the Family Court is, of course, to leave care cases, in the jurisdiction of the Children's Court. The most important argument in favour of this solution is that the significant characteristic which offenders and non-offenders have in common is that they are children and that therefore we ought to have a person who specialises in children and knows the services available for children. However,you will be well aware of the contrary argument, which is that we will not achieve a real separation if one magistrate presides in the two jurisdictions.

I shall conclude with some comments on the problem of disposition. As you know, the key issue in the Australian Capital Territory is whether there is a need for an institution as at present we rely on New South Wales facilities. There is the argument that once we have an institution it will be filled. Also you are all aware that criticisms of all institutions, particularly institutions for juveniles, are mounting, and I think there are strong arguments for not swimming against the tide and opening a brand new institution at a time when many people are criticising institutions, and indeed one State in the United States (Massachusetts) has endeavoured to close them. It can be argued that if we want to do interesting and imaginative things in the Australian Capital Territory we should take advantage of the unique absence of an institution and that we should create new facilities.

A practical consideration which may well prove decisive, is that about 40 juveniles a year are sent to New South Wales facilities. This number includes a wide range of cases, from children who are babies right through to those who are seventeen and it is unrealistic to think that any institution which we would build in the Australian Capital Territory could hope to cope with such a large range of cases. What I am saying therefore, is that even if we did build an institution, it would not be the end of the Australian Capital Territory's dependence on New South Wales facilities. The practical problem we face is this: unless we can identify a sufficiently large and reasonably uniform group of juveniles from among this 40, then the idea of an institution for the Australian Capital Territory is simply not practical. Institutions as you well know, are expensive,and one for a small number of juveniles might be prohibitively expensive.

Personally I do not favour the use of an institution for short-term detention. Some magistrates and others have suggested that there ought to be an institution in which a juvenile can be locked up for say four weeks or six weeks. I do not favour this. I think England's experience with the detention centre has indicated that it is not a good idea and if we need a deterrent sentence, personally I favour something along the lines of New Zealand's periodic detention centres. If we build any sort of facility, what I would envisage would be some sort of correctional centre which might combine a hostel and a base for a weekend periodic detention centre.

These, then, are some of the problems with which we are wrestling and some of the tentative solutions which we are considering. I put them up for your consideration and I would very much appreciate your criticisms and comments.

A CHILD'S EYE VIEW OF THE FAMILY LAW ACT

W.G.A. Prendergast

The text of this paper is not included in this volume. It has been previously published under the title 'Childrens Rights and the Family Law Act' in 'Oracle 79'; the journal of the Monash Law Students' Society.

CHILDREN'S RIGHTS AND JUSTICE FOR JUVENILES

Julia Young

THE YOUTH FORUM

The Youth Forum was held on September 12th, 13th and 14th at Sydney Teachers College.

The Forum was funded by the Law Foundation of N.S.W. and the I.Y.C. Secretariat with the co-operation of the N.S.W. Department of Education, who paid for relief teachers in schools to enable teachers to accompany their students, the N.S.W. Teachers Federation who gave Aboriginal students, the Sydney Teachers College in providing their facilities and staff at a nominal charge, the C.B.C. Bank which supplied us with $1,000 worth of folders for the conference and the Trades and Labour Council of N.S.W. who staged a concert for the country kids - an extraordinary alliance of funding bodies.

The aims of the Forum were:

(1) To provide an opportunity for young people in N.S.W. to carefully address an issue of importance to them and publicly express their views to policy and decision makers in the State.

(2) To look at changes in legislation that affect young people.

(3) To enable the I.Y.C. Secretariat and the Law Foundation to assess public interest in the establishment of a permanent body to examine, defend, promote and publish the needs of young people.

(4) To provide a powerful catalyst to stimulate activity amongst young people in the future.

It was May - we had $34,000, Sydney Teachers College and four months to get it together. We contacted about 240 groups of young people wherever they were gathered together - schools, both government and independent,youth groups, CYSS schemes, youth refuges, handicapped kids, aboriginal kids, kids-in-care, and kids who were institutionalised. Most of these contacts were to individuals, interested teachers, social

workers, lawyers etc. This worked well, a 'switched on' adult is a better contact with kids than a mailing list.

We asked them to focus on a major issue of importance to them, to discuss it with their peers and present a 'Theme and Outline' to us by July 1979. We stressed the fact that we were looking for coherent statements that presented:

(a) the problem
(b) a careful analysis of that problem
(c) possible solutions.

The groups were able to use slides, video, film, stage etc to present their point of view, and were asked to remember that because our budget was limited a selection process would operate. The 60 best presentations would be selected by the Youth Forum Advisory Committee and a Youth Committee. The number of groups participating was eventually extended to 75 because of the high standard of work with which we were presented. The overwhelming response came from country areas where kids, isolated from the mainstream, felt for the first time they had a chance to express their views at a public forum. They came from all over the State, from Barham in the far South West of New South Wales to Narrabri in the Central North West and from many varied backgrounds. About 70 percent came from state or private high schools, but we also had a group of deaf and blind kids, kids from Daruk and Mt Penange Training Schools, three groups of aboriginal kids, kids who are 'in care' in New South Wales and youth groups from Tamworth, Leichhardt and Annandale.

The forum was opened by the Premier Mr Wran on Wednesday morning. Commenting on the programme, Mr Wran said - 'it looks like an agenda for a Liberal or Labor party conference - but I am sure the standard of debate will be higher'. He was right!

The standard of debate and the quality of the presentations was indeed very high. The groups had worked within their communities for up to three months: -

Coonamble High School's presentation on 'Old Age' had stemmed from a project to build flats for the elderly in Coonamble. The kids were accompanied not only by a teacher but by an elderly man who was to live in one of these flats, an ex-photographer, who had done all their filming and processing.

MacIntyne High School, Inverell, had managed to get their local radio stations to hold a phone-in programme to canvass the thoughts of their community on advantages and disadvantages of 'Living in a Country Town'.

> Orara High School (Coffs Harbour) were so keen to be involved they worked on two presentations and when we were unable to finance both groups they got the necessary money from Service Clubs in their area.

Each group was made up of four to six kids and one teacher/social worker or interested adult - the group from Dubbo had a father of one of the kids with them - a small businessman in Dubbo - he had closed his shop for three days to come to Sydney.

There were about 450 young people participating during the three days - all the country kids (about 100 of them) stayed in a hotel in Sydney and were bussed to and from the Teachers College each day.

They had one and a half hours at the Forum to put across their point of view and three days to talk to, listen to and exchange ideas with kids from all over New South Wales, with different backgrounds, from different school systems. This exchange was one of the most valuable parts of the Forum.

We sent about 500 invitations to adults in the community, to the Department of Sport and Recreation, Public Works, Education Department, Probation and Parole Services, Ethnic Affairs etc, asking them to come and listen to what the kids had to say. This, in fact, was the most disappointing part of the Forum. At no time during the three days was there any great number of adults present to listen. Maybe we should ask ourselves why during the International Year of the Child adults such as ourselves were unwilling to take some time to listen to enthusiatic, optimistic, and intelligent young people.

Any genuine attempt to come to terms with the aims of this conference must look at ways in which young people can be properly consulted as to their legal 'needs'. Many groups, for example those 'in care', those receiving the dole, those receiving corporal punishment have very specific things to say about the law and how the practise of that law affects their lives. The abiding impression left with the organisers and many of those adults who did attend, was that if carefully nurtured and sympathically listened to young people are very capable of researching topic areas and forumulating coherent policy suggestions.

The topics they wanted to discuss were many and varied but fell into the main themes of:-

Education	Law/Politics
Ethnic Minorities	Handicapped Youth
Family and Society	Unemployment
Isolated Communities	Media
Aboriginals	

Representatives from all groups concerned with each topic area met to discuss their ideas and present recommendations at an 'Action Workshop'. These recommendations were published in the 'Legal Eagle' - a newspaper published by the Law Foundation of New South Wales as part of the High School Education Law Project. Copies of the Legal Eagle have gone into three-quarters of the schools in New South Wales and a large number have been distributed to interested bodies throughout New South Wales and indeed throughout Australia.

The recommendation which will probably be of most interest to those of you here today will be those on Law/Politics and Family and Society and I have copies of these recommendations if you would like them.

The end of the Forum was a unique experience for both the adults and the kids. We had loosely planned a plenary session involving all the kids and a panel of adults to whom they could direct questions - but as the three days progressed it became obvious that the kids were not only eager to, but more than capable of organising their own plenary session. We left it to them.

They organised themselves into geographic regional groups and elected two representatives from each group to form an ongoing Youth Forum Committee. As Louise Dwyer who was elected as co-representative from Western Region, said 'Youth Forum should go on and continue, - and keep the youth of Australia involved in what is happening and the policies that are made, - we think that would be really good'.

The Minister for Youth and Community Services, Mr Rex Jackson closed the Forum on Friday afternoon and as he was leaving was asked by one of the participants why the government had not been more widely represented during the Forum. His answer to this created a flow of correspondence in the Sydney Morning Herald over the next few days.

This Youth Forum Committee met again in December and were still enthusiastic about their continued involvement and have in fact continued the work of the Forum in their areas since.

The boys at Daruk Training School at the Forum put forward their ideas for changes in the way the institution was structured and the affects they felt this had on their lives. This was the first time the boys had worked together to articulate their position. Their ideas are now being seriously considered at Daruk.

The Young High School group has since the Forum presented their ideas on 'A Kids Life in the Country' to five different service clubs in Young. They have gained financial and moral support from these clubs and are setting up a Junior Council in Young.

The work of the Portguese Children at the Forum has been published in English and Portugese and distributed by the Ethnic Communities Council in New South Wales.

Kathy Saul - a member of the Youth Forum Committee has been appointed to the Advisory Committee of Senior Citizen's Week in New South Wales.

Louise Dwyer, also on the Youth Forum Committee has been invited to sit on the 'Carnivale' Advisory Committee in New South Wales.

Here we have a group of young people keen to continue to develop Youth participation projects in their local areas, to exchange ideas with one another and to present their ideas to policy makers at a public Forum. They have contact with 450 other young people throughout the State, they are eager, willing and articulate - so lets not sell them short, the problems and concerns of young people are the problems and concerns of the community as a whole. Let us make sure that in looking at the area of 'Children's Rights' we consult with those whom these rights, or lack of them, most directly concern.

The International Year of the Child Secretariat and the Law Foundation are seeking State Government support to carry on the work of the Forum - and have recently put a submission to Mr Jackson to this end - but at this time the outcome of this submission is still indefinite.

Now I would like to take this opportunity to introduce to you a member of the Youth Forum Committee - Jenny Rigg - St George area co-representative. Jenny attends Wiley Park Girls High School in Sydney and is in year 12.

The group that Jenny was part of at the Forum gave a presentation on the 'Punishment of Delinquents'.

THE NEW SOUTH WALES YOUTH FORUM

Jenny Rigg

After doing some considerable research into today's youth, or rather, today's criminal youth and their 'deserved' punishment for their committed offence, we were horrified by the injustice and lack of rights that these juveniles have with the police and in the courts and that existing measures to prevent and remedy juvenile crime have no effect whatsoever, because of archaic beliefs on how to handle troublesome children, the employment of a large majority of people, who are completely inadequate for positions as district officers, and officers and workers in institutions such as Mt Penang, and the corruptness of the system as it lay with the 'big-time' policemen, and temperamental judges - thus, the result is the exploitation of juveniles.

This was one of the most important points to emerge at the Youth Forum - the fact that children, due to their age, are not regarded as individuals with rights and are thrown and pushed around to where it suits society's adults. This was emphasised by the Homeless Adolescent of Annandale Youth Refuge; the Homeless Speak Out Kids, Bob Bellears's presentation on 'Young Aboriginal People and the Law'; Sydney Girls' High School's 'Discrimination Against Children'; Mt Penang and Daruk Training School's Presentations, and 'Juvenile Injustice' from Waverley College.

Justice is defined as fairness, yet juvenile justice does not incorporate at all this definition. Their obscure rights in court are subsequently shown in the justice that is supposedly being brought to them.

Through our visits to Minda Remand Centre, Tullimba at Camden, and Mt Penang Training Centre, we found that most crimes committed by juveniles were acts resulting from pressures of family breakdowns, through death or separation, or peer groups with the thought that 'I won't get caught'. When justice is being brought to these kids, these social and family pressures are not investigated, so that their justice is not relative. Instead, the child is thrown into a Remand Centre, for example Minda, until their case appears in court and from there mostly committed to an institution such as Mt Penang, without any consideration being given as to why the crime was committed.

Their defending lawyer speaks to the child for about five minutes before the hearing, so as can be imagined they are really getting to the depths of that child's problems.

Also, whether they are cautioned, fined or committed, depends on what sort of day or night before the judge just had. One officer at Mt Penang told us that one particular judge at the Albion Street Children's Court was well known for his moodiness and that, if he was

particularly cheery one day, a juvenile that committed assault and breaking and entering would receive a fine, yet if he had just had a quarrel with the wife, a child on his first offence of car stealing would receive a general sentence in an institution. There was one specific case of a boy at Mt Penang that I spoke to who, on his first offence attempted to forge a bankcard. He was arrested and this particular judge committed him to Mt Penang on a general sentence, yet more severe offences on other occasions were given cautions or fines.

We also discovered that kids in country towns were disadvantaged from the beginning. The police and magistrate in that small town considered themselves in the 'big-league' and so exerted their power to have their 'criminal youths' run out of town, so to speak, so as not to upset the smooth running of their community. So the child is taken to a city court and because of the stigma attached to country kids, they are almost always committed - their rights are non-existent.

This situation in the country is even worse for Aboriginal kids, as was well expressed by Bob Bellear at the Youth Forum. An Aboriginal youth can be walking down the street looking a little intoxicated and thrown into gaol for the night by police, whilst a white youth doing the same thing would be ignored. The rights of the Aboriginal parents are completely neglected, whilst the police and the courts continually exploit the youth, having him charged and committed for the most trivial offences. The corruption that goes on with the police and magistrate in country towns regarding juveniles, especially Aboriginals, is incredible and very disillusioning in the eyes of those who see the need for reform. We are all aware, no doubt, that this does occur, yet it continues to happen - so where are a child's rights, and how can their justice be fair in such a system?

This then leads us to the effectiveness of traditional institutions, for example Mt Penang and Daruk, the recidivist rate for Mt Penang and other similar establishments is 80 per cent. Therefore it can immediately be seen that obviously current methods of deterring juvenile crime are rather ineffective. Their principles are based on traditional beliefs - the young should be taught discipline (as in the army) in terms of having to march everywhere, making a perfect bed and if not, return after the day to find it all torn apart, and heaped up on the middle of the bed for him to make again and again until perfection is achieved; they are also disciplined in being made to break up rocks all day long. We can all agree in that these and other similar actions will appropriately rehabilitate the child, teaching them to have concern for other community members so as not to steal cars, break into houses, etc., whilst at the same time delving into the roots of the problem as to why that child committed the crime/s - what problems are at home or at school? - No !!! Present methods in these institutions to remedy juvenile crime are of little value whatsoever, as is shown in its 75 per cent recidivist rate. The emphasis here is in treating the symptoms, rather than the causes of the crime, whereas the causes must be treated in order to bring proper justice to the juvenile.

With this is mind, an experimental centre was established at Camden, called Tullimba. It is a large home, which houses about 20 kids - the ratio of worker to child is much larger, thus there is more individual attention. There the kids learn to work in with one another and with the youth workers and at the same time an attempt is made to treat the cause of the crime by involving the family in the reform project. One of the conditions of the child being allowed to attend this centre is that the family involves itself too.

At places such as Mt Penang, the child is taken out of society and isolated, being told what to do and when to do it constantly; at Tullimba, they are treated with the family and the principle of community involvement, allowing them to make their own decisions so that when they return to society, assimilation is relatively easy. At Mt Penang etc., kids are taken out of society, isolated, supposedly treated, then when their term is up they are thrown back into the same mess and confusion that got them into trouble at the beginning. Tullimba attempts to sort out the confusion and as a result it's recidivist rate is a mere 20 per cent.

Another difference at Tullimba is that the workers involved are more suited to the job in personality, with more dedication, compassion, and time for the kids. At the more traditional institutions, the majority of officers and workers are academics and people that see it as just a job with a wage, therefore, the time and attention that the kids need is not given.

As a result, we see that in order for relative justice to be brought to these kids, emphasis should be placed on rehabilitation, not incarceration, where there are no bars, marching, breaking rocks, etc., but group therapy and a relaxed atmosphere where there is gradual assimilation back into society and it's laws. However, places such as Tullimba are very rare, with only one in New South Wales and one in South Australia. We can see by the difference in recidivist rates that Tullimba is more effective, yet why are there no more?? People are obviously satisfied with in-carcerating institutions and are ignorant (unaware) of Tullimba's achievements. We realise that a much larger budget is required for Tullimba, but at the moment all they are doing is pouring bad money after bad money into places such as Mt Penang, as success is small, whereas they could channel these resources into the principles of Tullimba!

At the Youth Forum we made the following recommendations:

1. Drop-in Centres, for example Stanmore and St Marys, should be established where the youth can discuss their problems and pressures with other people. These places are cheap and far more co-extensive with society.

2. More social awareness with children being taught from an early age about crime and it's consequences; and place more emphasis on the extended rather than nuclear family, so that kids suffering from family breakdowns have other family members to turn to rather than crime.

3. To aid in deterring crime, we should undertake on a much larger scale, a programme currently in the United States, called 'Jailhouse Shock'. Parramatta Gaol has a smaller similar programme, where youths enter the prison and learn about life there - however, the Government has defeated it's purpose by preventing kids under 18 years of age from entering the prison and partaking in the scheme. The American programme's emphasis is placed on shocking the child out of committing a crime - the Australian programme is much more subtle (U.S. recidivist rate through programme is 2 per cent).

4. More time and consideration should go into the selection of officers and youth workers for any of the centres or training schools so that this is reflected onto the child.

   Most importantly, more emphasis should be placed on the community, so that individual rights as well as a child's rights are recognised and upheld in such a way that criminal acts become minute, as the community gives responsibility and individual attention - it's relevance being reflected on a society's criminal rate.

Thus, through society's lack of community feeling (especially the Western World), and in turn fostering the lack of children's rights, we are continually being tossed about in the system to the extent of total injustice! The blatant corruption by our beaurocratic heads has reached an uncomprehendable peak and has lead to the disillusionment of many Australian youths. Until a child's rights are recognised, and there is a complete enquiry into police and magistrate's manipulation of youth, and existing measure to remedy juvenile crime is modified, in addition to the employment of more suitable youth workers, then justice of the juvenile will continue to be exploited!!

LEGAL AID AND REPRESENTATION OF CHILDREN

Peter J. Sharkey

I would preface my ensuing remarks by stating that this paper contains my own opinion only and does not contain the opinion of any members of the Legal Aid Commission (A.C.T.) or of the Commission itself.

The Legal Aid Commission in the Australian Capital Territory is charged pursuant to its Ordinance with the responsibility of providing legal aid in the Australian Capital Territory. Of course, children are amongst those entitled to assistance from the Office and in fact, pursuant to Section 10 (1)(j) of the Legal Aid Ordinance (A.C.T.) children have been determined by the Commission to be a class of persons to whom priority will be given in the granting of legal assistance.

As well as formal legal assistance, in litigation or in substantive matters, the Commission assists children in the course of its advice service and by children of course I also mean 'young persons' juveniles etc. In addition, a duty solicitor service is provided at the Children's Court on a daily basis. Thus, children in the Australian Capital Territory may be assisted by way of advice, by way of duty solicitor and in substantial matters. The most common sort of matters in which children are assisted are of course criminal matters (for want of a better name), personal injury matters and a number of other matters. You will thus see, that by referring to legal aid, I refer to legal aid in the formal sense, that is the assistance which is given by lawyers in relation to matters of advice, other sorts of matters, or in litigation of a civil or criminal nature.

Representation by the Legal Aid Practitioners - Criminal and Quasi Criminal Matters

Of course, the object of representation is for the advocate to say on behalf of a party before the court, what the party himself ought to be able to say had he the expertise to do so. Some people of course, have and others have not. One difficulty arises in what I might call neglect/care proceedings where it is imperative that the child should be represented. In particular ought he to be represented if parents are formally made parties to these proceedings by an alteration to the law, in the Australian Capital Territory, in any event. In almost all criminal proceedings, also, a child should be represented. The importance of this representation is that without a counsel to stand for the child the child can be subject to psychological intimidation (albeit unintentional) by officials. Indeed, a child may simply not be intelligent enough or articulate enough to conduct a transaction

before a Magistrate or a Judge and other adults in a court or indeed with adults, generally.

Further, legal representation is the cornerstone of the formalisation which is the main way in which the child's interests can be adequately protected and represented. It should be borne in mind that in this situation, that is in a criminal matter or neglect matter, the individual child is opposed to the State. The matter should be decided on the basis of evidence which has been thoroughly examined before the Court according to proper process.

Historically, one is left with the impression that protection of individual rights has been too often regarded in Children's Court circles as an obstacle to the rehabilative mission of the Court. This is a role, which it is submitted, is not the primary role of the Court. This historical notion, if I am right, openly supports the rule of men with ideas 'we know what is best for you'; thus the rule of law or the principle of legality which is supposed to be sacrosanct is eroded or even bulldozed. In a society where genuine recognition of individual status and integrity before the law is meant to be a cornerstone, the historical notion is quite unconscionable. Even more importantly, there should not be a less fair method of trial for children than for adults. There must be clearly stated offences or allegations, protection of individual rights, restraint of governmental activity, personal accountability before punishment or other sanctions or even 'treatment' are imposed by the Government. In other words the rule of men must not displace the rule of law. More importantly, and I do not in any way derogate from the heavy responsibility to look after the welfare of the child and to rehabilitate and put him in a proper care situation, the question of determining what is best for him in that context should not in any way be intermingled with the trial of issues. This latter involves the consideration of whether an allegation which takes the form of a charge has been proven or not.

The Role of the Lawyer

There is great necessity in my opinion for children to be represented by solicitors who are used to representing them. Ideally, they ought to be trained in certain skills to assist children. Certainly, in the case of a very young child, much difficulty is experienced and it is a matter of judgment for that solicitor as to how he should best represent his client. I was interested to read in one report that a weak and apologetic plea for leniency and a second chance after a promise of reformation was criticised. In the given case, it may not have been possible to say more. Legal practitioners, experienced in the legal aid field, and in the representation of children are constantly aware of the potential conflict of interests between parent and child in many matters. They should have better access to information on alternatives to sentencing, and disposition of the child through a court welfare information service.

Separate Representation

In this context, I am strongly of the view that an official guardian or legal representative for children should be appointed just as a guardian ad litem is appointed to give instructions in civil matters. Therefore, whenever care or neglect proceedings or indeed, proceedings of a penal nature are taken against children the guardian should be served with a copy of the complaint or application involved and take over the effective representation of the child in the non-legal sense. He will also be in a position to conduct all investigations and arrange through the appropriate legal aid body for representation on his instructions to appear on behalf of the child. His role also meshes in with my view that the rules of evidence should not be relaxed to allow reports, statements etc. to be tendered merely because they exist.

The Position of the Child

In most litigation in other jurisdictions application to a court in the interests of a child is preceded by an application to appoint somebody to represent the child's interests, a guardian ad litem etc., before the application is brought. This may of course not be necessary in the Children's Court if a person of the type of the English official solicitor is appointed whose job it is to represent children. It may be that a child ought to have the right to apply to the Court to be separately represented on his own behalf. It may likewise be in many cases that the child is adequately represented upon the instructions given by his parents.

A function of a person acting for a child in these situations is firstly to assist the child in assessing its own broad interests; and, of these broad interests, of course, the wishes of the child is only one aspect although it is very often an important factor in assessing those interests, just as it is in custody proceedings in the Family Court. Separate representation of children might often bring forward additional evidence of factual matters known to all the parties concerned in the litigation which for some reason or another was not brought to the notice of the Court. Clearly, the legal practitioner who acts for the child in care proceedings for example ought not to be in the position of an ordinary representative of a party, of being bound by instructions. In Family Court matters for example, there is no reason why a Court should not appoint a representative for a six month old child, as Asche S.J. said in *Dimitri* v *Dimitri* (1976) FLC. The concept of counsel or a solicitor abandoning important considerations to the wishes of a child of say 4 or 5 need only be stated to establish absurdity. It may not be necessary to have a guardian ad litem if the lawyer appointed to represent children is not obliged to act upon instructions from anyone, as is envisaged in the Family Law Regulations. It is an almost unique role for any lawyer to find himself conducting a case on behalf of one of the interested parties being entirely unfettered by such instructions as in aid or receiving from the interest that he is supposed to be representing. He can (as Fogarty J. said in *Harris* v *Harris*) occupy the position of an advocate appearing for a particular party in the litigation although it

is a role of advocacy having about it certain unusual features including:-

1. He is not appointed by the party whom he represents.
2. That he may not be removed by that person.
3. That he does not necessarily advance what 'the client' wants but what in his view is in the best interests of that client and to that extent exercises an independent judgment quite out of character with the position ordinarily occupied by an advocate.

His functions would be inclusive of the following:-

(a) to cross-examine the parties and their witnesses;

(b) to present direct evidence to the Court about the child and matters relevant to its welfare; and

(c) to present in appropriate cases evidence of the child's wishes.

However, I do not see him as being in the position of submitting a separate welfare report of his to the Court. He may collect evidence or material for cross-examination and employ his own expert witnesses. However, he himself should not be a witness (see comments in relation to Separate Representation of Children in Family Court matters in *E* v *E* (No.2) 1979 (FLC) 90-645). However, in straight matters of decision of guilt or innocence which are not care or neglect proceedings it would be appropriate for the representative of the child to act in the normal manner of counsel.

One problem which does arise is whether representation should occur in a separate manner where the normal parental responsibility for looking after the child and instructing a solicitor on the child's behalf should occur, and when the special children's representative should act.

In fact, it would seem that care and neglect cases are best incorporated within the jurisdiction of the Family Court and I understand that moves in this direction, if not the whole way, have occurred in Western Australia. There is much to be said for care proceedings being civil in nature and involving the parents as parties with the child separately represented before a Family Court Judge since the matter very often involves the whole structure of the family and how the best interests of the child are served within that structure, or outside it.

Sentencing

There is much to be said for children being sentenced by a Commission.

Legal Services Outside Court

Further, it is a matter of concern to me that more attention has not been given to attempting to solve matters outside the area of the courtroom.

It is clear indeed that courts including the Children's Court have been asked to intervene in matters which would formerly have been dealt with by the family or by the wider community itself at large. For example, in the tribal context it would have been dealt with by the elders; in a country area, it may well have been dealt with by an older citizen etc. Thus the courts by default have been asked to fill the space vacated by the departure of these traditional methods of resolving disputes. It was to substitute for these that the Neighbourhood Law Centres were set up in the United States to deal with neighbourhood problems and indeed petty criminal matters. One sanction which existed was that if persons were not responsive to the conciliation or arbitration procedures of these bodies then the more formal sanction of the law applied.

The Juvenile Panel of course can fill a similar role and the danger of having children plead guilty before the Juvenile Panel where pressure is brought on them to do so, can be avoided by the presence of the official guardian to whom notice of intention to bring the child before such a panel should be given.

Alternatively, in concert with the official guardian there ought to be a power in police officers to formally caution children.

These are just one or two suggestions for widening the scope of legal services to children.

Conclusion

Finally, I regret that these conclusions are somewhat fragmented. I have attempted to canvass a number of areas concerning children and which are encounted by lawyers in practice in the legal aid field.

THE RIGHTS OF CHILDREN IN CUSTODY DISPUTES

S. Moncrieff

The following paper relates to the rights of children in custody disputes. To adopt a totally cynical view and address you on that basis I would present you with the shortest paper at this seminar, consisting of one word, namely, none. I do qualify that statement in that children do have some rights in custody disputes but that generally these rights are far more apparent than real.

The most startling feature of the rights children do have is that there are two different sets of 'rights' existing for the two classes of children involved in custody disputes.

I use the word 'discrimination' to describe the differences between these two classes, which can be defined as first 'children of the marriage' and secondly those children that are not 'children of the marriage,' as defined by the Family Law Act.

The children in the first category have different rights from those in the second. The distinction was broadened considerably by the decision in *Russell* v *Russell* and the subsequent amendment to Section 5 of the Family Law Act. The extent of the discrimination can be seen when one looks at the classes of children now excluded from the provisions of the Family Law Act. In *Russell* 'In relation to custody proceedings, the Full High Court upheld the jurisdiction under the Family Law Act to deal with custody disputes before any divorce or annullment proceedings or proceedings for a declaration of the validity have arisen, but held that there was no constitution of jurisdiction to deal with disputes other than between the husband and the wife about custody or to deal with children other than the natural or adopted children of the husband and the wife.' Originally the Family Court had jurisdiction conferred pursuant to Section 5(1) to deal with matters relating to:

(a) A child adopted since the marriage by the husband and the wife or by either of them with the consent of the other.

(b) A child of the husband and wife born before the marriage and

(c) a child of either the husband or the wife (including an ex-nuptial child of either of them and a child adopted by either of them) if, at the relevant time, the child was ordinarily a member of the household of the husband and the wife.

These classes of children were deemed to be children of the marriage for the purposes of the application of the Act. Now only natural or adopted children of the husband *and* the wife have the benefit of having their rights and custodial status determined by the Family Court.

The class that is now excluded includes illegitimate children of the marriage, children adopted by one party to the marriage and legitimate children of one party.

Children not falling within the class of 'children of the marriage' being excluded from the application for Family Law Act, are now the subject of proceedings brought pursuant to the various State legislation such as the Guardianship of Infants Act.

The only common right that these two classes of children have is that a Court is bound in very similar terms under both State and Federal Legislation to regard the welfare of the child as the 'paramount' consideration. The use of the expression 'paramount' of course presumes the existence of other considerations thereby diminishing this right. I shall deal with this consideration later.

From this point the statutory rights of the two classes of children diverge; for non children of the marriage they cease. The child of the marriage has a second statutory right pursuant to Section 65 of the Family Law Act which is the right to be represented separately from the parties to the proceedings. (The child over 14 years also has a further right to be heard as to its wishes).

Before a separate representative can be appointed it is conditional that proceedings for custody, access, guardianship or maintenance be pending or proceedings be on foot pursuant to Section 61 (4) of the Family Law Act, that is, following the death of a party to the marriage in whose favour a custody order had been previously made.

It may be argued that at common law a child (not the child of the marriage) has a right to be represented separately in other proceedings but this right has not been widely accepted by state jurisdicitions and may be treated as being essentially non-existent.

The most severe restriction on the right to be represented is the condition of current proceedings. Regulation 67 (1) also confers a right for a person over the age of 18 years to institute or commence proceedings. But I doubt that a child can issue proceedings to determine its own custody by applying to have a separate representative appointed and commence such an application. It is my view, that regulation 67 (1) was drafted to contemplate the infant principal party and not an infant vis-a-vis the principal parties. Section 65 of course does provide that a child may make an application pursuant to Section 65 and regulation 67 (1) enables the child to do so.

As the Act is presently drafted, and this is the view expressed by Judges of the Court, I think it is correct in law to say that Section 65 determines the extent of proceeding that an infant may commence relating to its own custody.

I would also suggest that for a separate representative to be appointed not only must proceedings be current but also relevant, that is, the representative can only act in a relevant capacity and not raised issues on his or her motion.

It appears also that a separate representative can not be appointed in proceedings for principal relief for the purposes of appearing and speaking to the declaration pursuant to Section 63. Where no other application has been made, and of course no party can intervene in proceedings with principal relief in the Section 63 declaration, for example foster parents, it would appear that the child is without the right of representation other than insofar as the parents can best represent the interests of the child, and yet the declaration is directed solely to the welfare of the child.

An amendment to the Act in this regard may de facto, cure some of the difficulties produced by the split jurisdiction but at the same time would create monumental difficulties. In any event, parties determined to fight over the custody of children would seldom be satisfied with a de facto solution to a dispute. An example, is an Adelaide Registry matter where a Section 63 declaration was made on the basis that the husband had a continuing arrangement where a child of a previous marriage was fostered. A declaration was made after the Court had received a Welfare Officer's report and presumably on the basis that the fostering arrangement continued. After the declaration was made the husband proceeded againt the foster parents in the Supreme Court and was successful. If the father had given an under-taking to the Court to continuing the fostering arrangement, no power exists in the family Court to deal with any breach of such an undertaking unless of course it may be suggested that the decree absolute for dissolution of marriage could be recinded, but I would add that by this time the father had remarried in any event. I would also add that the first wife, the natural mother of the child, had died without orders being made determining the child's custody.

As can be seen, an intervention either by child's representative or by third party in such a declaration, would result in a wholly unsatisfactory situation and the court would of course be totally without jurisdiction to determine on-going custody care and control and the like of such a child. Yet the court is directed to satisfy itself as to the childs welfare. Of course this dichotomy was strengthened by the decision in *Russell* and the subsequent amendment to the Act. From the child's view-point Section 63 creats a right without remedy and therefore no right at all.

Assuming now that properly founded proceedings are in existence, again the rights of the two classes of children diverge.

The child of the marriage again has a general advantage by virtue of having its custody determined by the Family Court of Australia rather than a State Court.

This divergence results in my view from two principal factors. First, by the essential conservatism of State Superior Courts and the overly formal acceptance of precedent in essentially factual matters with a consequntial resistance to change. The State Superior Courts tend to suffer in these proceedings from lack of exposure to appropriate expert evidence and may generally tend to be less aware of developments in the area of child welfare. Secondly, and really by way of explanation for the former reason, is the fact that generally the matrimonial bar is considered a junior or inferior bar with a low output of judicial officers to the State Superior jurisdictions. This divergence is likely to become more extreme as the Matrimonial Causes Act fades further into the past and again exposure by States Superior Courts to this area of the law becomes less and less. With all respect to their learned Honours, this is already apparent, particularly with the appointments to these courts since the commencement of operation of the Family Law Act.

The Family Court has demonstrated a greater flexibility and has tended to more easily adapt to more modern concepts relating to child welfare such as psychological parents, joint custody, even the concept of care and control as opposed to custody, which seem to have struck horror into the hearts of their Honours sitting elsewhere.

A resistance to accept decisions made by the Family Court and its lines of precedent is also noticeable. Decisions of the Family Court are generally not seen as 'covering the field' in relation to the principals of child welfare. A remarkable situation considering that both courts are directed to the same end. By way of aside, in proceedings before the Supreme Court of South Australia recently, counsel had to lend the learned trial Judge his set of Family Law Cases as the library did not possess a copy.

Whether statutorily relevant or not, it is ridiculous to ignore doctrines being established by a court dealing with by far the majority of custody cases. Child of the marriage concepts are not irrelevant in determining questions of custody of the children from the other class.

I referred briefly to the concept of the psychological parent. This must be one of the most relevant products of the greater learning in areas of psychology that is presently available. This is even more so in situations involving the non child of the marriage cases where very frequently foster parents are the psychological parents and the contest is psychological parents versus bilogical parents. This contest is common in States Superior Court proceedings and this is the jurisdiction that should make itself particuarly aware of the relevant concepts. Of course, this contest is by no means unknown in the Family Court and many cases can be cited involving this dispute and in particular I would refer you to the marathon case of *E* v *E* (no.2) and particular the Judgment of Asche S. J. where this concept was squarely faced and recognised.

It is in the area of the biological parent and psychological parent dispute that the definition of the word 'paramount' is thrown into very sharp relief. The use of the expression 'paramount' allows other considerations to be entertained, in particular, 'the traditional view is still followed in the Courts that prima facie it is for the welfare of a child that it should enjoy the affection and care of biological parents and be brought up with their guidance and influence. Where, because of the separation of the parents or for other reasons, the child is deprived of the advantage of the combined parental responsibility, the courts do not find in that fact the reason for preferring a stranger' I quote directly from the judgment of Dixon J. (as he then was) in *Storie* reported at 80 CLR 597 at 612. At page 611 he had prefaced his remarks by dealing with the definition of 'Paramount', 'it makes the welfare of the child the first and paramount consideration. The word 'first' as well as the word 'Paramount' shows that other considerations are not entirely excluded and are only subordinated', the interest of the child usually being subordinated to what is considered the right or presumed advantage for the child if the biological parents are also the custodial parents.

As recently as December 1979 the judgment of Latham C.J.in that particular case was approved and followed. The learned trial judge considering Latham's statement at page 603 as being the present leading authority, when he said 'prima facie the welfare of a young child demands that a parent who is in a position, not only to exercise parental rights, but also to perform parental duties, should have the custody of the child as against any stranger. The fact that a stranger can also provide a good (or even, I should say a better) home is in such circumstances an element of only slight, if any weight'.

I am not suggesting this view is the failing only of States Superior Courts or that only the Family Court has seen beyond such statements, only that there is a lesser resistance to change in the Family Court than exists in the States Superior Courts. I would be pleased to furnish you with a list of offending judgements in the Family Court and non offending judgments in the Supreme Courts.

Do not think for one moment that I am suggesting the destruction of the relationship between the bilogical parent and the child, only that the welfare of the child should and must be the *only* consideration and no party must be allowed rights against the interests of the child no matter how subordinant. To hold a contrary view is to take the view that a custody action is one in possession. Custody and access are the *rights of children* and must be viewed exclusively as such.

Having now assassinated the good character of our judicial officers and the respective approaches of jurisdictions, I would ask you to consider the full implication of custody as the right of a child. If custody is the right of a child and the child *must* have a remedy to enforce and determine that right. The child must have the status to bring proceedings to determine its own custody.

I would suggest that an immediate reaction to this suggestion may well be surprise and images of child litigants pacing the halls of the courts. However, the major part of the machinery to effect this proposition is already in existence and is to a large extent presently responsible for the appointment of most child representatives. As you may be aware a child representative does not act on instructions and my proposal does not include alteration of this status.

Taking a fact situation that may occur on any day and be heard in Chambers in the Family Court where an urgent ex parte application is brought by a wife seeking custody and an injunction based on allegations that the husband beats the wife and the children of the marriage. A temporary order is made. It is at this time child representation should become an issue to be considered, either by way of judicial order appointing a child representative or by referral to the appropriate counselling section of the Court for investigation and report. This would defeat the possibility of the children's welfare being lost with a possible reconciliation or consent order. Certainly, the children's welfare is the consideration behind the original order being made on the application but generally no investigation is undertaken independently at this time. I certainly accept that a very great burden would be placed upon the counsellors at the court and the relevant departments of State Community Welfare and of course the resources of the Legal Aid Services.

Let me add, I do not advocate the appointment of a child's representative in every situation where a custody application exists. Common sense and bureaucratic realities work against this. Rather, a child representative should be appointed in cases where a real risk that the parents may be unable to best represent the interests of the child is apparent or where other factors suggesting that a child may be at risk of either physical or emotional injury are evident.

Certainly I would forsee a larger nunber of appointments being made. I think the present Court Counselling Services or the relevant Departments of Community Welfare could appropriately act as a screen and make recommendations to the court which of course has the power to make an appointment on the basis of such a recommendation.

Once appointed the child's representative should then have the power to issue applications on the childs behalf seeking determination of the question of the childs custody. Possibly directed more to a general application as well as one seeking specific orders, if necessary.

In addition to the situation where proceedings have been commenced I feel the relevant counsellors should also have the power of recommendation of appointment, and be able to seek orders of appointment, based on counselling sessions. I appreciate the difficulties arising with questions of confidentiality and the 1984 concepts of 'Big Brother' but surely it is a question of priorities, and childrens' welfare must have priority over such considerations.

I do not propose to canvass here the legislative details and constitutional issues involved, other than to say that it is a matter of utmost priority to incorporate all actions involving childrens' custody, access guardianship and care generally into the one court system applying uniform legislation in a consistent manner. Without doubt this must be the first recommendation arising from any consideration of childrens' welfare.

I turn now to a consideration of separate representation itself and what is the function of the representative.

The initial question must be, who is to act as the representative of the child? The representative must be independent and trained to obtain and synthesise information and yet not be personally involved other than as the child's advocate.

As a legal practitioner I expect cries of 'naked self interest' to be heard against my proposition which of course fits that of legal practitioner. As protection against your cries, and support for my view, I would refer you to the text of Goldstein Freud and Solnit 'Beyond the best interests of the Child'. I quote from page 66 'nor should it be presumed, as it is, that the State represents the interests of the child. Its policy or practices may conflict with those of the child. Nor should it be presumed, as it is, that a child is represented by each and all of any of the adult participants in a dispute between adopting, foster, or biological parents, or when such 'parents' are in dispute with the child care agency. Even child care agencies which are delegated responsibility for safe-guarding the welfare of children often have conflicts of interests between their need to safe-guard agency policy and the needs of the specific child to be placed. In none of these proceedings does anyone have a conflict free interest in representing the child'. No doubt you are all familiar with the particular and indeed excellent text.

In short, a legal practitioner familiar with the concepts applicable to children and experienced in the area of child conflict is my choice as the presently best available child advocate.

At present child representatives are appointed by the various Legal Aid Offices and Commissions and the cost of child representation is quite staggering. To off set the cost and enable greater use of the facility I see no reason why an agency, either of the Legal Aid Services or the court itself that maintains total doctrinal independence can not be established to this end.

As to the role of the separate representative, in general terms this has been adequately defined by Asche S.J. in *Demetriou's* case as being 'appointed for the children to assist the court, and consequently the children, in assessing the interests of the child.'

It is clear that the separate representative of children is not bound by, or must act upon, instructions, presumably the expressed wishes of children.

Generally statements as to the role of the separate representative have tended to be somewhat negative, the exception being those judgments adopting the view of Wood J. in *Lyons* and *Bosely*, for example *Sampson* v *Sampson*, and *E* v *E* (no.2). This is not to say that I disagree with the general statements however, particularly those rejecting concepts such as the submission of reports by a separate representative or with those rejecting the idea that a separate representative should be heard as to his opinion. These practices are quite properly disapproved of and have no place in child advocacy.

The separate representative has largely a co-operative role, particularly with the Court Counsellor and expert witnesses. It is not the function of the separate representative to investigate alone the circumstances relevant to the matters before the Court, but rather to investigate co-operatively with qualified persons and present their evidence to the court. A separate representative can not play the role of advocate and at the same time the role of witness.

In undertaking a matter as a separate representative I see 10 areas for immediate consideration.

1. The relationship to the Court, and the child.

2. Co-operation and liaison with the Court Counsellor.

3. Co-operation and liaison with other expert witnesses.

4. General collection of evidence in an admissible form.

5. Contact with the other parties to the action.

6. Contact with the child.

7. The role to be taken in settlement negotiations.

8. The role to be taken in cross examination of the parties and their witnesses.

9. Presentation of a case for the child.

10. The role in summing up and balancing the objective and subjective factors apparent in the evidence before the Court.

I of course hasten to add that the interpretation of the role of a separate representative is very much determined by the personal preferences and objectives that the representative sees as being applicable, however, I think the 10 points I have outlined are worthy of some consideration.

As to the first point, I think I have adequately dealt with the relationship between the separate representatives, the court and the child although I am disappointed to see some practitioners acting in the role of separate representatives very much as they were welfare officers or private investigators. In my view this is not within the contemplation of the relationship between the representative and the child.

As to the questions of liaison with the Court Counsellors and professional witnesses I feel this is probably one of the most fundamental features of separate representations. Separate representatives who are not prepared to liaise are not in my view doing themselves a favour nor are they achieving the objectives of their own appointment. As I have stated the role of the separate representative is to collate the evidence available, request further evidence to be obtained and then to present this to the court. I have considered in my points a separate heading of general collection of evidence because I feel there is a tendency by child representatives to be restricted to experts, psychiatric or social, rather than looking at the old party line objectives of 'what the neighbour saw'. There is no reason why the area from which the separate representative can call evidence should be in any way restricted, in fact, it is my view that the separate representative's duty is to put before the court as much evidence as is available and therefore to ferret such evidence out.

Personally I feel that contact with the parties themselves is essential. I quote from Fogarty in *Sampsons* case where he said 'it appears to me clearly within the power and discretion of the separate representative of the child and the proper conduct of his brief to request either or both parties to attend upon him for the purpose of being interviewed by him in relation to issues in the case. It may be appropriate for that invitation to include the presence of the parties legal representatives, but whether that should occur or not it is in my view a matter for the separate representative to determine in the particular case. Similarly, the nature of the information which he seeks to elicit from the parties again falls within the wide discretion which must be "reposed" in a person occupying that important and delicate position.' I would take the view further and suggest that it is in fact essential in every case that the separate representative meet with the principal parties in an attempt to assess for himself the family dynamics. I have always found this of great assistance in placing the evidence offered by other witnesses, particularly expert witnesses, into perspective.

'Contact with the Child', has been the subject of much debate amongst separate representatives. I do not believe that it is essential that the child be 'interviewed', and I will return to a definition of that expression, but I do believe that it is essential that the child be

seen and be communicated with. It is not the role under any circumstances of the separate representative to interrogate and attempt to elicit instructions from a child. It is, however, essential that there be, as much as possible, a bond of trust between the child and the child's representative if only to the point of the child being aware that he or she has an ally in the proceedings to whom the child has no competing loyalties. If such bond of trust can be established the separate representative will usually find that he or she can perceive the wishes, feelings and needs of the child through observation and understanding of the varied statements and actions of the child. It is for this reason that I do not initiate contact with the child until some knowledge is to hand of the dynamics of the situation in which the child finds itself. It is definitely not a function of the child representative to interview the child on a 'solicitor-client' basis or direct questions to the child solely for the purpose of receiving an instruction as to the child's wishes. To do so it is only to further add to the conflict that must surely already be existing within the child.

As to the question of the role of the child's representative in settlement negotiations, again I do not feel this can be under stressed. It is the duty of the representative to protect and further the welfare of the child. This duty is no means diminished purely and simply by virtue of the fact that the parties to the action may wish to discuss the settlement. Unless the separate representative is totally satisfied that he has discharged his duty and is satisfied on the basis of the evidence that he has to hand, it is the clear duty of the separate representative not to allow settlement on the terms proposed by the parties.

As to points 8,9, and 10 I would refer you to the statement of Treyvaud J. in *Waghorne* v *Dempster* where his Honour said 'the role of the separate representative at the hearing is to cross examine witnesses, to call evidence touching upon the child's welfare, where necessary to ensure that the child's wishes are known to the court, to finally address and make submissions to the court based upon the evidence adduced,and the law which he feels may be of assistance to the court in dealing with the questions raised for its determination'. You may remember I referred to a subjective element in making submissions to the court. There is at times, necessarily a subjective element present in the role of the separate representative and the way in which he or she places his or her submissions before the court. However, a fine but very distinct line must be drawn between directing court as to what is relevant to the welfare of the child on the evidence which has been put before the court and leading evidence from the bar table. If the separate representative has to resort to leading evidence or opinion from the bar table then he or she has not fulfilled the task undertaken. At times this line is very indistinct and too frequently I feel that the line has been crossed by separate representatives. By way of example I have heard a separate representative say in open court 'I have interviewed the child and the child has told me so and so and I feel that the appropriate order is such.' What should have been stated and supported is that the child's representative was satisfied on the evidence available that such an order was appropriate. This is

particularly so at the pre-trial stage of proceedings and the representative must be in a position to back that satisfaction with evidence on which it is based.

The title of this paper was 'The Rights of Children in Custody Disputes'. Perhaps I have extended beyond the scope of that topic somewhat in presentation, but, only to demonstrate that the rights of children in custody disputes are far from real and what toehold the children do have to ensure that their interests and welfare are protected must be substantially reinforced and properly exercised. The most significant feature of any rights that a child may have in such a dispute or may be able subsequently to obtain in any dispute, cannot be exercised by the child alone and therefore require the greatest degree of expertise in their enforcement.

The terms of recommendations therefore must be twofold; firstly to extend and clarify the rights of the children in such disputes and secondly to ensure that such rights are properly advanced in actions where the same may be at risk.

ABORIGINAL JUVENILES AND JUSTICE

M.C. Morriss

I will begin by drawing attention to what is seen by many Aborigines as a major injustice in the way our legal system affects their society. This is the fact that a disproportionate number of their young people are placed in adoption or fostered with non-Aboriginal families, or into corrective institutions.

To substantiate this I will quote a number of generalisations about the disproportionate impact of the legal system on young Aboriginals, drawn from a report of a National Symposium on the care and treatment of Aboriginal Juveniles in State Corrective Institutions.(1)

1. The percentage of Aboriginal juveniles in corrective institutions, relative to the Aboriginal population, is significantly higher than the comparative figures for whites in all States and Territories.

   In New South Wales Aboriginals comprise 6.6 percent of the toal number of juveniles in shelters and training schools, while representing only 0.5 percent of the population.

2. Recidivism rates for Aboriginal juveniles are very high. In Victoria the Malmsbury Youth Training Centre claims some 60 percent success rate with non-Aboriginal youth, compared with a 10 percent success rate for Aboriginal youth.

3. Aboriginal Juveniles are more likely to end up in court and to be remanded to an institution than are non-Aboriginals. In Western Australia 26 percent of those appearing in court are Aboriginals, 52 percent of those committed are Aboriginals and 70 percent (estimated) of those in institutions are Aboriginals.

4. A substantial number of Aboriginal juveniles do not have homes to go to after release and are transferred to institutions or foster care as wards of the State.

Those people involved in Aboriginal affairs would know that all these problems stem largely from the long story of dispossession, oppression and neglect experienced by Aboriginals. Today far too many Aboriginal families are still locked in what has been called the 'poverty cycle'. It is clearly impossible for people locked in such a life style to mount and present the sort of alternatives our legal system demands when deciding the question of proper care of a young person. Note that the decisions are made by a non Aboriginal system, based on argument and assessment by non Aboriginals.

What It Means To Have An Aboriginal Background

To expose the question of why young Aboriginals have such a disproportionately high rate of commitment to corrective institutions is necessary to examine the nature of Aboriginal life style and culture. This is also necessary to considering better approaches to the problems.

The life experiences of Aboriginal youth across Australia vary greatly. Some in remote areas of the northern and central regions live in small communities, which have been able to retain substantial elements of their traditional culture. Others lead relatively institutionalised lives on larger settlements, or are fringe dwellers on the outskirts of country towns. In the more populated parts of the continent Aboriginal society has been subject to a greater degree of cultural and physical disruption. They have survived on the reserves and fringe camps, mainly in the rural areas, and in recent years considerable numbers have moved to the metropolitan areas, where they maintain much of their cultural identity.

Despite this diversity of life styles there are strong common elements in the experiences of Aboriginal youths which go a long way to explain their high level of conflict with the judicial system and the harsh treatment they receive from it.

These common elements are:-

1. Adverse social conditions - The National Population Inquiry (2) noted that Aboriginal people probably have the highest growth rate, the highest death rate, particularly amongst the very young, the worst health and housing, the lowest educational, occupational, economic, social and legal status of any identifiable sector of the overall population in Australia.

2. Aboriginals typically live in culture conflict situations and experience a high degree of stress. This arises from the demands which white society makes for Aboriginals to conform to values which are alien to their culture and life style.

3. Aboriginals face problems of prejudice and discrimination. Numerous studies have demonstrated that whites hold unfavourable attitudes towards Aboriginals. Prejudice affects many aspects of their lives such as employment, housing and their treatment by the bureaucracy and the law.

These factors, for many young Aboriginals, add up to a life experience dominated by poverty, poor health, excessive drinking, unstable families, a lack of personal pride and despondency about the prospects of ever achieving anything better. This is the poverty cycle mentioned earlier. The negative self image of many is reinforced by experiences of prejudice which convince them the Aboriginals are not respected by the dominant white society, and will never be given a fair go.

Juvenile delinquency is certainly an understandable response to such intense feelings of alienation and powerlessness. The forms of delinquency largely appear to be acts of hopeless rebellion, such as thefts of petrol for the purpose of sniffing and vandalism of buildings.

Several years ago this delinquency was said to be at crisis level in many remote communities in Northern Australia, but because of their isolation it remains largely a problem only for the communities themselves.

There are however many positive aspects of Aboriginal community life which must be appreciated. Despite poverty and disruption, Aboriginals are typically brought up in an extended family, which provides secure and loving kinship bonds and a strong sense of belonging to a community. In traditional communities this kinship system is part of a deep and complex spiritual system, based on affiliation with particular areas of land. There is in addition, a growing belief among Aboriginals across Australia, that they all share their culture and that collective action will help to preserve and foster it. An important expression of this cultural revival is an assertion that Aboriginal juveniles should not be taken out of Aboriginal communities and families and placed in adoption or fostered with non-aboriginals, or in institutions. There is plenty of evidence to support the view that these practices are futile and damaging, both to the individuals concerned and to their families and communities.

New Approaches to the Care and Treatment of Aboriginal Juveniles at Risk

My intention in the foregoing section was to establish that Aboriginal juveniles are a special case in their relations with the judicial system which requires a radically different approach. I now turn to some of the principles which should underly a new approach to the problem and outline some new developments.

Central to a constructive approach to this question is an acceptance of the separate cultural identity of Aboriginals, and genuine respect for it by the wider society. It follows from this that Aboriginals should be permitted and encouraged to negotiate major adaptations to the judicial and administrative systems, so that it can recognise and serve their requirements.

This process is already active with the development of Aboriginal Legal Services and bodies such as the Aboriginal Child Care Agencies and a growing awareness on the part of government agencies of the need for more effective liaison with Aboriginal people. There is however a long way to go before major inroads are likely to be made on the problems of Aboriginal juveniles at risk.

If we examine the Aboriginal Child Care Agencies for example, we find that an agency is established and working in effective co-operation with Government authorities only in Victoria. Progress is being made however in other States.

The basic objective of these Agencies is to maintain Aboriginal children within their family, or community environment, by placing children at risk with secure and stable Aboriginal families. Work of great importance to Aboriginals is carried out in the tracing of family connections, often disrupted by periods in foster care or corrective institutions. They also perform preventive work which help to keep children from coming before the courts. For example the Victorian Agency does considerable counselling work with white families who have adopted Aboriginal children.

Where Aboriginal juveniles are apprehended by the police or go before the courts, they are often in a particularly disadvantaged situation. This is because of the cultural gulf between them and the system which is seeking to deal with their perceived problems. The Department of Aboriginal Affairs is seeking to promote uniform and adequate protections in this area with provision for:-

- notification to the juvenile's parents or guardian, to a Government agency or the Aboriginal Legal Service, when an Aboriginal juvenile is being interviewed or has been arrested by the police;

- presence of a parent, lawyer, field officer or an Aboriginal Legal Service or officer of a government department or agency during a police interview;

- notification to a parent guardian, Aboriginal Legal service or government agency where proceedings in court or welfare action are being taken in respect of an Aboriginal juvenile;

- preparation and presentation to the courts of social welfare reports on Aboriginal juveniles coming before courts;

- systems designed to direct Aboriginal juveniles from the court process, for example by police caution, juvenile panel or referral to an Aboriginal Agency.

Current practice on these matters carries greatly between States. In the N.T. a 'prisoner's friend' is required to be present for an admission by an Aboriginal at a police interview to be accepted in court. There is no such requirement in Queensland, but case law is suggesting that evidence obtained from an Aboriginal juvenile in the absence of a sympathetic adult may be declared inadmissible. In Victoria police standing orders require the presence of parents or next of kin during police interview, court proceeding or welfare action with regard to an Aboriginal juvenile.

On the question of diversion from the court process, in the N.T. and other remote areas, with close liaison between the police and some communities greater reliance is being placed on tribal authority to deal with juvenile offenders.

In Victoria the Aboriginal Youth Support Unit within the Department of Social Welfare employs Aboriginal youth workers who liaise with young Aboriginal offenders, their family and the legal service, preparing court reports and assisting with rehabilitation.

While the major objective should be to keep Aboriginal juveniles within their own communities, it is an unfortunate fact that many continue to be sent to State institutions. It is therefore necessary to consider the special needs of Aboriginals in these institutions and their need for after care.

The essential problem is the intense alienation Aboriginals suffer because of the great differences between their cultural background and the alien 'culture of the institutions'. Other aggravating factors are the generally poorer health of Aboriginals, their lack of education and the difficulties of maintaining contacts with their families, many of whom would not usually know their rights in this regard. Additional problems are encountered on release, due to the lack of employable skills, inadequacy of support services and their frequently disrupted families.

I will summarise here some recommendations on this question of the symposium on Aboriginal Juveniles in Custody, referred to earlier.

1. Youth Development Committees and Aboriginal Counsellors should be appointed and required to devise programmes which will support a positive Aboriginal identity;

2. there should be a screening programme to identify illness and this should be followed up by treatment;

3. education and training programmes should be initiated with major Aboriginal inputs;

4. accommodation should be provided for families to facilitate visits;

5. on release there should be continuity of care through a system of Aboriginal liaison officers. (The Aboriginal Youth Support Unit in Victoria was put forward as an example of a very good innovative approach).

CONCLUSION

My dictionary defines 'Justice' as 'the exercise of authority in the maintainance of right'. From an Aboriginal point of view our judicial system does not appear to be filling this role, particularly in its treatment of their juveniles. The decision on what is right would, for most aboriginals, be very different from that arrived at by our judicial system, and certainly their right to pursue their own life style and ability is not enhanced by this conflict.

The main points which I have endeavoured to establish are that:-

- Aboriginal juveniles have special and very difficult problems in their relationships with our system of justice;

- the Aboriginal community is deeply concerned about the impact our judicial system on their young people and on their society and culture;

- there ought to be modifications to the judicial system to meet the speical needs of Aboriginals;

- the Aboriginal community should have the leading role in determining the necessary modifications and in implementing them.

FOOTNOTES

1. Elizabeth Sommerland. Aboriginal Juveniles in Custody. Department of Aboriginal Affairs June 1977.

2. W.D. Borrie, Population and Australia, First Report of the National Population Inquiry, Canberra Australian Government Publishing Service 1975.

RESOLUTIONS

The seminar resolved that:

- The form of care proceedings should be altered so that there is as little similarity with criminal proceedings as possible.

- Magistrates concerned with children should be specially qualified and trained in the needs of children and the best means of assisting children.

- Magistrates should at all times when dealing with children before them have available counsellors and welfare officers of experience.

- The use of detention in an institution and all wardship proceedings should be used only as a last resort.

- At all stages of any court process concerning children it should be considered of major importance that the child and his or her parents or guardian should understand that process.

- The seminar supports police cautioning systems and procedures. But that in relation to police cautioning systems, statements of policy, particularly in relation to criteria used with regard to warnings and procedures used, should be publicised by police departments.

. The State should give to the Commonwealth power over all children who are members of the family for the purposes of s.63 of the *Family Law Act* 1975 to enable the Family Law Court to make orders in respect of custody, access and maintenance for the benefit of such children.

. The Family Law Act should be amended to grant power to children to institute proceedings in matrimonial matters involving their own welfare and that the right to be legally represented should be extended to cover all proceedings before the Court.

. Counselling facilities of the Family Court should be made available to children as of right.

. The seminar in general terms endorses the principles which should govern the delivery of legal services to children embodied in the submission to the Child Welfare Committee of the Legal Services Commission of N.S.W. by the 'Ad Hoc Working Group on Children's Legal Services'.

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