UNICEF COMMITTEE OF AUSTRALIA

ANNUAL MEETING, BRISBANE, SUNDAY 12 AUGUST 1979

REFORMING CHILD WELFARE LAW IN AUSTRALIA

The Hon. Mr. Justice M.D. Kirby
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I am delighted to be invited to take part in this Annual Meeting. The adoption by the General Assembly of the United Nations of the Declaration of the Rights of the Child in 1959 marked an important development of international law. However, it is vital that we should translate general principles about children's rights into the living law of our country. The Declaration of 1979 as the International Year of the Child puts the focus on laws and policies relating to children in Australia and other countries. The Federal Law Reform Commission has been given an important task by the Commonwealth Government to examine one aspect of those laws, but an important aspect for it is one that affects the liberty of children, something usually taken seriously in societies such as ours.

The Law Reform Commission was established in 1975. It has twelve Commissioners, five of them full-time. The Commission is set up in Sydney with a staff of 19, in addition to the Commissioners. It is busily at work upon a number of references, some of which affect children and children's rights incidentally, one directly.

The Commission works upon references given to it by the Commonwealth Attorney-General. Once it has the reference it consults widely throughout the community before it delivers its report to the Attorney and the Parliament. In the process of consultation, discussion papers are generally produced. These are widely-distributed and considered in the media, in public hearings and public seminars held in all parts of the country and in meetings of informed and concerned citizens, such as this Annual Meeting of the UNICEF Committee of Australia is.

The ultimate product of the Commission's labours is a report. Normally we attach to the report draft legislation which can, if accepted, be translated into the law of the land. Most of the reports of the Commission have either led to legislation or are currently under active consideration, with a view to the adoption of new and improved laws. The Commission is thus not simply an academic or scholarly institution. It is part of the law-making process of our country. It helps Parliament and the government with considered and reasoned reports in complicated, sensitive areas of the law. The duty of the Commission is to review, modernise and improve our federal legal system.

There are law reform commissions in all of the States of Australia, including a distinguished commission in Queensland which is headed by the Honourable Mr. Justice Andrews, a Judge of the Supreme Court.

The task given to the Law Reform Commission which brings me before you today is one which we were assigned by Senator Durack, the Commonwealth Attorney-General. It relates to the reform of child welfare laws in the Australian Capital Territory.

RATIONALE FOR THE REFERENCE ON CHILD WELFARE

In our country, child welfare is not one of those matters which was assigned, at federation, to the Commonwealth Parliament. Basically, therefore, it is a State responsibility under the Australian Constitution. There are three good reasons why the Commonwealth Attorney-General should choose this subject as one appropriate for review by the Federal Law Reform Commission in Australia.

The first is that in 1980 the Sixth United Nations Congress on the Prevention of Crime and Treatment of Offenders will take place. Originally it was intended that the Congress would take place in Sydney. For a number of reasons, the Congress will now proceed overseas and the original expectation that a world spotlight of attention would be on Australia's criminal justice system will not now be borne out.

Nevertheless, these recurring United Nations Congresses do provide an opportunity to consider the progress being made in the criminal justice system. One sub-topic of the Sixth Congress will be "Juvenile Justice : Before and After the Onset of Delinquency". Although Australia will no longer be the host of the Congress, it is appropriate that we should make every effort to present to the Congress, when it is held, the active attempts that are being made in Australia to improve the criminal justice system as it affects children in this country.

The second reason is the International Year of the Child itself. The purpose of declaring 1979 as the I.Y.C. is to ensure that new attention is given to the implementation of the fine principles of the Declaration of the Rights of the Child. It also provides the occasion to review the institutional, administrative and legal machinery affecting children.

The third reason is a domestic one. In all parts of Australia child welfare law is under review. In New South Wales a Green Paper has been published by the Minister responsible for Youth and Community Services (Mr. Jackson). This Green Paper suggests important changes in child welfare law in that State. In Queensland a report was produced in recent weeks which is also addressed to improving the law as it affects children. In essence this paper suggests new efforts to provide family support services and to prevent problems affecting children from arising in the first place. The Paper has been put forward for public and expert comment and suggestion.

In South Australia, a Royal Commission has been held by Judge R.F. Mohr. As a result of the report of this Royal Commission important new legislation was introduced in 1979.

In the Northern Territory the Administration is considering the special problems of juvenile delinquency. In other States of Australia ongoing review of child welfare law is proceeding.

The Australian Law Reform Commission is in touch with all of the State inquiries. As one would expect, there is good co-operation between Commonwealth and State officers working on the improvement of the same area of the law.

THE LIMITS OF COMMONWEALTH POWER

I have said that the Commonwealth does not have plenary power to deal with improvement in child welfare laws throughout the country. This is basically a State responsibility under our Constitution. Nevertheless, the Commonwealth does have responsibility in the Territories. The Ordinance of the Australian Capital Territory has been criticised in the courts on a number of occasions. It has also come under criticism in the news media and elsewhere.

In addition to the general powers in the Territories, the Commonwealth has a special power to make laws with respect to "marriage" (s.51(xxi) of the Constitution) and "divorce and matrimonial causes : and in relation thereto, parental rights and the custody and guardianship of infants" (s.51(xxii)). It is pursuant to these powers that the Commonwealth has established the Family Court of Australia. However, the power with respect to child custody and guardianship is not at large. It is limited to a power to make orders ancillary to divorce and matrimonial causes.

USE OF THE FAMILY COURT IN CHILD WELFARE

One of the recurring complaints voiced to the Law Reform Commission about the present child welfare laws of Australia is that they are insensitive and fall heavily upon the frightened child who gets caught up in the criminal justice system. It is said that what we have done is merely to apply the adult criminal justice system to young people. The complaint is that this is not appropriate and that efforts should have been made to mould a court system more appropriate to the special needs of children in trouble.

Because of the establishment of the new Family Court of Australia and because of the special arrangements made in that court to develop a more sensitive environment for the disposal of family disputes, a natural suggestion that has been made is that child welfare matters, or some of them, should be transferred out of the Children's Courts, which are merely another form of the Magistrates' criminal jurisdiction, and into the new Family Court environment. What are the arguments for and against this proposition?

In favour is the fact that the Family Court of Australia exists. It is already in being and there are two judges of the Family Court permanently stationed in the Australian Capital Territory. The Family Law Council, a body set up to review the operations of the Family Law Act, has already suggested an expansion of the jurisdiction

of the Family Court to cover at least matters of child welfare in the Territory which do not involve a criminal offence. Whatever may be the difficulties of extending the legal jurisdiction of the Family Court to cover child welfare matters in the States, no such difficulty arises in the Australian Capital Territory. There, the Commonwealth has plenary powers under the Constitution and such a jurisdiction might be conferred on the Family Court as readily as it might be conferred on the Magistrates' Courts.

It is said that the Family Court is a "caring court" and that the special atmosphere of the Family Court of Australia is needed to avoid the punitive atmosphere of the Police Courts. The judges are said to be people who have specialised in family law matters and who are more likely to be sensitive to the family environment in which the child's welfare problem has arisen than magistrates who do cases involving children, in between cases involving the police and adult offenders.

Additionally, there is some overlap between the work presently being done by the Family Court and the work of the Children's Courts, at least in relation to wardship. The Family Courts have counsellors who could give advice, assistance and guidance to a child. No such counsellors are available in the Magistrates' Children's Court. Finally, in Canberra, there is the fact that a special new court building is being constructed. By reason of decisions made more than five years ago, the building will house both the Family Court and the Children's Court. It is said that this physical combination makes it appropriate to seek out and establish a legal combination as well, and to pioneer a new court system which in truth deals with all family matters and matters affecting young persons.

What are the arguments on the other side? In the first place critics say that we should not bifurcate the jurisdiction of the Family Court, extending jurisdiction to child welfare matters (or some of them) in one part of Australia but not in others. This argument has always seemed to me to be a weak one. In Western Australia, where there is a State Family Court, the Family Court has special additional jurisdiction which has not yet been conferred on the Federal Family Court.

Secondly, it is objected that it would not be appropriate to have young delinquents and policemen in the vestibules of the Family Court. One of the purposes of establishing a separate Family Court was to get away from the atmosphere of the normal courts and to establish a more equable environment for the resolution of family crises. These crises are already serious enough without adding to them the burdens of the normal courts.

Thirdly, it is said by some judges that the work of child welfare cases is not worthy of the judges of a superior court, such as the Family Court of Australia is. It is work that has been traditionally done by magistrates and the community cannot afford to pay highly experienced judges to do such tasks. On the other hand, some people feel that rescuing a child from the criminal justice system may warrant the greatest possible skill and be deserving of a greater investment in legal talents and counselling than we are presently inclined to make.

INTERVENTION V. DUE PROCESS OF LAW

Leaving this controversy to one side, there is another major contribution which faces all those who seek to reform child welfare laws in Australia. It is whether, put generally, an interventionist and welfare approach should be taken to child welfare laws or whether the approach to be adopted should reflect the principle that a child is entitled to the due process of law, at least to the same extent as an adult accused.

A simple case illustrates the issue before the law.

> "Jenny, aged 14, has run away from home. She has some psychiatric problems and is bitterly at odds with her mother. Her father is in prison and her mother has had a serious of liaisons with other men and displayed little interest in Jenny. While away from home Jenny commits a number of minor thefts".
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> The Law Reform Commission, DP9, "Child Welfare : Children in Trouble", 1979, 15.

Legal systems have developed two basically different approaches to Jenny's problem. The choice between them (or the discovery of some compromise) is a matter under consideration in the various Australian inquiries on reformed child welfare laws.

The first approach is what might be called the "interventionist" or "welfare" approach. This is in part a reflection of the 20th Century's assumption that the government, on behalf of the whole people, has a special welfare responsibility for people in need of help. It is said that Jenny's problem should be looked upon as a fundamental social welfare condition and that her minor thefts are no more than symptoms of this welfare need. The paramount guiding principle should, according to this view, be the needs of the child. We should be not too troubled about the letter of the criminal law and the fact that Jenny has committed what the books declare to be a crime. It is better to use any legal process, including in court, as an opportunity to diagnose her basic problem and to help to restore her to good society. It is said that it is typical of lawyers to deal with the superficial criminality of Jenny's conduct whilst ignoring the underlying cause for such criminality which will not go away, simply by the imposition of some criminal punishment : caution, fine or custodial detention.

In short, it is said that we should turn Jenny, and possibly her family, over to social welfare workers who should endeavour to get to the bottom of the problem and provide social assistance that will rescue Jenny from the family and personal predicament that has led her to commit crimes.

The other approach is what may be called the "due process of law" approach. According to this view, there are limits upon the extent to which society should countenance an endeavour to improve Jenny and her family: Cases are instanced of too great an interference in personal conduct, appearance and morality, in an endeavour to stamp on an individual the dull blanket of ordinariness. It is said that however well motivated, social welfare workers have not been notably successful in curing the "underlying disease". What should be done in Jenny's case, for example? Should the law forbid her mother from having liaisons? Can the law command Jenny's mother to love Jenny? Are there enough funds to provide Jenny with divertisements that will take her mind off her mother's indifference? How can the law force Jenny's parents, who are utterly innocent of any actual criminality, to attend to Jenny? Would such a law be successful anyway? Does society have the right, in the case of such minor crimes, to so grossly interfere in the family situation as to remove Jenny from the care of her parents? Is there any guarantee that doing this will lead to a better result in the long run?

Supporters of the due process school assert that social welfare workers, seeking to help Jenny and her family, become more oppressive even than the criminal law. They use the courts as a first port of call, yet courts are not, according to most lawyers, the best places in which to achieve reform and improvement. They are places of fear and intimidation for most citizens, especially for young people. According to this view, there should be more not less control over the impact of the criminal

law on young people. The protections for them and the assurances of due process of law should be strengthened not weakened. However well intentioned, it is said, the effort at a social welfare approach to child criminality and wrongdoing becomes more oppressive even than the criminal justice system and at no assurance of success for the price paid.

These are not theoretical debates. They are reflected in the approaches taken to child welfare laws in a number of countries with a society similar to our own. The interventionist approach, for example, is reflected in the Scottish law. There a "hearing" takes the place of a formal court proceeding. If a child pleads guilty he or she does not have to go to court but comes before three laymen sitting in the "hearing". They have more limited powers than a court but they can order a period of supervision and even that a child reside in an institution for a time.

I have been told in England of cases before such "hearings". What begins with an inquiry into why a child took this or that article from a store ends up a detailed investigation of the child's social and moral conduct. Complaints are made by parents that the child uses lipstick, stays out late, sees boyfriends and so on. The hearings become something of an inquisition into the "whole child". Supporters say that is as it ought to be. Opponents say that such a response to relatively minor offences would be regarded as outrageous in the case of adults and should not be tolerated in the case of children.

In the United States, the "due process" principle is strictly observed, chiefly for constitutional reasons. Dealing with a child on a criminal matter, it is required that the child should be given every protection of the criminal law. The efforts to establish a Children's Court that combines a more deliberately beneficient approach with relaxation of procedural safeguards was declared

unacceptable by the Supreme Court of the United States in an important decision. Re Gault, 387 U.S. 1 (1967).

OTHER ISSUES

Children and Police. In addition to the design of the appropriate machinery for deciding cases where children have come into contact with the criminal law, a number of other important issues are under study. Amongst these perhaps the most important is the relationship between the police and young people suspected of offences. In the case of interrogations, the Australian Law Reform Commission in its report on Criminal Investigation (ARLC2), 1975, put forward requirements that parents or other responsible and independent people should be present during an interrogation by Commonwealth Police officers of a young person. Furthermore, certain formalities were prescribed and these have generally been followed in the past and are reflected in the Federal Government's Criminal Investigation Bill 1977, and in the New South Wales Child Welfare (Amendment) Act 1977 (No. 20) and Child Welfare (Further Amendment) Act 1977 (No. 100).

But many cases do not get to court or even to interrogation. Sometimes police administer warnings to young people. In favour of this system is the informality of the procedure, the speed with which it is administered and the lack of stigma that attaches to this form of punishment. Against police warnings is the element of discretion that is involved, which discretion may be entirely unreviewed by the independent judicial arm of government. It is said that there is discrimination in the administration of warnings and that children in wealthy areas are more likely to be cautioned than the children of the poor. It is also pointed out that nowadays, with computerisation, the keeping of a list of children warned has begun, yet such children may never have been found guilty by a court of law.

This debate is a difficult one and different police policies exist in Australia towards the administration of warnings. Generally speaking in the Capital Territory relatively few warnings are administered, certainly of a formal kind. Most cases are submitted to court. In Victoria the Chief Commissioner has issued instructions which encourage the giving of a warning, particularly in the case of first offenders and minor crimes. A choice must be made here between competing philosophies.

Screening Procedures. Another controversy surrounds whether screening devices should be adopted to keep cases out of court. Various mechanisms have been tried :

(a) In New Zealand a small committee comprising police and welfare workers makes a recommendation in most cases to a senior police officer as to whether a case warrants proceeding to court. The final decision is with the police but a welfare point of view is guaranteed by the procedures of consultation.

(b) In Scotland a "reporter", an independent official, examines the case and decides whether no action should be taken, whether the matter really requires social welfare assistance or should be referred to a "hearing" instead of the ordinary courts.

(c) In South Australia and Western Australia a system of panels has been introduced, generally comprising police and citizens, as an alternative to the Children's Court, which can deal with a matter and administer relatively minor punishments, without the necessary of the matter proceeding to trial

(d) In Commonwealth offences (e.g. damaging a telephone booth) a procedural device has been implemented administratively by which no action is taken against a child or young person without the approval of the Secretary of the Federal Attorney-General's Department.

These mechanisms are all aimed at diverting as many cases as possible away from the atmosphere of the criminal courts. The greatest Australian controversy now surrounds the success of panels. In favour is the fact that these procedures involve the family of the child, provide an occasion for considering welfare help, avoid criminal courts and have been shown to have good results in rehabilitation and the avoidance of repeat offending.

On the other hand, critics say that panels of this kind put undue pressure upon a child to plead guilty and to forfeit his right to have the matter determined according to law. Only if the child pleads guilty can he or she avoid the criminal court. In a small community involvement of many citizens in panels of this kind can diminish the privacy that otherwise attaches to proceedings against children. It is said that panels comprising policemen or even former policemen, are hardly unbiased in their attitude to the conduct complained of. It is suggested that the cost of this form of diversion is not worth the result. If there are few re-offenders, it is probably that a more informal procedure of police warnings would have had the same outcome. This, then, is the debate about panels. It is another good idea but the reformer must always ask whether the net result is better than the situation sought to be reformed or whether consequences of a proposed reform would not be more unpallatible than even the present situation is.

Other Issues. There are many other issues that are being considered by the Law Reform Commission in its review of child welfare laws. Amongst these are :

(a) Whether a child and/or his parents should be given access to welfare reports upon which decisions may be made affecting his liberty.

(b) Whether as a matter of routine, representation by lawyers or other persons should be afforded to every child who comes before a criminal court, children's court or child panel.

(c) Whether the offence of being a "neglected child" should be redefined so that the child commits no offence.

(d) Whether the offence of being "uncontrollable" and other similar status offences should be spelt out with greater specificity so that vague complaints of unorthodox conduct do not become lumped into an ill-defined and oppressive criminal regime.

CONCLUSION

The issues set out in this talk represent hard, practical questions that must be faced in any review of child welfare laws. Any attempt to improve the way in which the law deals with delinquency and misconduct in children will have to consider the questions I have outlined, and many others. The United Nations and its agencies does well to focus attention upon the child and upon helping children and improving laws and policies that impinge on children's lives.

It is important that our help to children should not be left at the level of generalised resolutions or sentimental statements. It is also important that our concern about children should not be confined to our own country but should extend to children throughout the world and should be reflected in practical programmes of assistance and material aid. But it is also vital that in Australia we should not fall victim to complacency and self-satisfaction. On the contrary, we must be vigilant to ensure that the

laws and practices of our own country are as modern, fair and simple as we can make them. This is a practical way of translating the good intentions of the United Nations and of the International Year of the Child into reality and into application to individual Australian children who get into trouble.

The Australian Law Reform Commission operates in a thoroughly public way, inviting expert and public comment on the issues that have been committed to it by the government. My purpose in coming here was to inform you of the work of the Commission in an area relevant to children and to invite the support of those of you who are interested in the improvement of this area of the law.

Copy of the Law Reform Commission's discussion paper, "Child Welfare : Children in Trouble" (DP #9, 1979) is available free of charge to those who are prepared to comment on it. It contains tentative suggestions and proposals on child welfare law reform. The address for the discussion paper and for inquiries about the Australian Law Reform Commission is 99 Elizabeth Street, Sydney, N.S.W, 2000 (G.P.O. 3708) (Telephone 231-1733)