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DEPARTMENT OF COMMUNITY WELFARE SERVICES VICTORIA
VICTORIAN CHILD MALTREATMENT CONFERENCE
CHILD MALTREATMENT AND THE LAW
5 NOVEMBER 1982, COLLEGE OF NURSING, MELBOURNE

CHILD ABUSE: INFANTICIDE AND LAW REFORM

The Hon. Mr. Justice M.D. Kirby
Chairman of the Australian Law Reform Commission

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CHILD WELFARE REPORT

The invitation to address this Conference arises from my involvement in a report on child welfare law for the Australian Capital Territory. In Australia, the criminal law and child welfare law remain, overwhelmingly, the responsibilities of the States and Territories. The Australian Law Reform Commission, a Federal body, must confine its labours to tasks specifically assigned to it by the Commonwealth Attorney-General. Furthermore, those tasks are restricted to the constitutional powers of the Commonwealth. Hence, our entry into child welfare law was in the narrow confines and somewhat special circumstances of the A.C.T. Yet when this door was opened, we found that these existed precisely the same problems of child offenders, children neglected and in need of care, child care activities, child employment, the provision of services for children and child abuse.

I do not need to tell this audience of the inescapably sad facts of child abuse; physical, psychological, sexual. In proof of the classlessness of child abuse, one can turn to the Law Reform Commission's report for cases and statistics on the somewhat privileged community of the A.C.T. It is a sad and seemingly intractable problem. There are, of course, no simple, bandaid solutions.

By the same token, law reformers, police, social workers, medical practitioners, administrators and others cannot just go around wringing their hands, wishing that the evidence of child abuse would go away. When cases come to notice, they must be dealt

with in some fashion. When they do not come to notice, steps must, at least sometimes, be taken to ensure that they do: lest early evidence of abuse heralds something more shocking and final.

Whilst recognising that child abuse was an extreme form of failure to provide adequate care, the Law Reform Commission concluded that it had special features. Children who are the victims of physical or sexual abuse are particularly vulnerable. Every effort should be made to protect them.[1] The Commission proposed that special attention should be paid to endeavouring to ensure that the plight of the victims was brought to official notice. It recommended that emergency procedures should be introduced to permit abused children or children at risk of abuse to be removed from the threatening situation at home. Furthermore, special consideration was recommended for the cases of child abuse which not only involved harm to the child but also raised the possibility of a parent or guardian being charged with a serious offence. As everyone recognises, this is a Catch-22 situation. No one comes out unscathed where the heavy machinery of the criminal law is brought into play. This is specially true in circumstances where the offender and the victim are irrevocably tied together by inerasable bonds of blood, dependence, affection.

I note that you will be examining the most difficult problem of sexual abuse of children. Nowhere is the law less effective than in dealing with the traumas of incest. Dread of incest, the incest taboo makes it difficult for societies such as ours even to discuss this problem. Yet discuss it we must, if we are not like Pilate to wash our hands of the conflicts and dilemmas involved: turning the problem over to the criminal law, despite its notorious inadequacy in dealing with the issue.

This inadequacy has been said to be one of the chief reasons why sexual abuse of children, including incest, is not reported. A recent talk on the BBC explained why:

> 'It's not difficult to see why: both within and outside the family, sexual relations with children carry harsh penalties - and once a case is reported, the law must take its course. No wonder that, as a child, Rachel was even more terrified of her father's blackmailing threats than of his behaviour: she didn't want to bear the responsibility of breaking up the family. Twenty years on, she found she finally had to take recourse to the law when she discovered that her father had in turn abused her young daughter - his granddaughter. The father was gaoled for six months. Now it's all over, Rachel looks on the whole process as ultimately pointless. "It's no good whatsoever. The family has been split up - that's what its done...and everything

that I was threatened as a child, that we would all be split up, well, it happened. I've got nobody now...nobody. There is no family left."[2]

The law intervenes to protect the child. But in reality, by its formal, inexorable process of prosecution in frightening courts according to mysterious rules frequently applied by people in black and frightening robes, it merely reinforces the victim's sense of guilt and feelings of terror. Yet abuse of a child, whether physical or sexual, cannot simply be shrugged off. The law and the civilised community must offer some protective help. Where does the balance lie between helping intervention that is not too officious and punishment which is sensitive to the special traumas of child abuse?

The Australian Law Reform Commission made a number of proposals which are now under consideration by the Federal Government. They include:

* Youth Advocate: The appointment of a new statutory officer with special function - the Youth Advocate: an independent official, with background training in the social sciences as well as law. By co-operative work with police, welfare workers and others, it was hoped that he could modify the inflexible operation of the criminal law, whilst at the same time directing help and not turning a blind eye to cases of child neglect and child abuse. It was proposed that the decision to initiate court proceedings in such cases would be left to him and that he would monitor, on behalf of the court, the implementation of orders.

* Compulsory notification: Provision was also made for compulsory notification by medical practitioners, teachers and other relevant persons of suspected cases of child abuse. The records would be kept confidentially by the Youth Advocate. Special emphasis was to by placed on support services and the improvement of police procedures. Avoidance of compulsory notification to police or to specific welfare agencies was thought to be the best means of encouraging a proper level of effective notification.

* Holding orders: The Commission also recommended that members of the police and authorised welfare and health personnel should be empowered to hold an abused child in hospital for a limited period where they believe urgent action is required to protect the child. In deference to parents' rights and our traditional notions of liberty, it was proposed that a report should be made at once in such cases to the Youth Advocate and within a short interval to the Children's Court.

* Prosecuting parents: The Commission recognised that where a parent has abused a child, criminal prosecution can have a devastating effect on everyone concerned - as the case of Rachel illustrates. It was therefore suggested that prosecutions in these cases should be initiated only after careful deliberation. Provisions were included by which the police should consult representatives of welfare agencies before a decision to prosecute is taken. Further, when a prosecution has been initiated, procedures were introduced to facilitiate the withdrawal of the prosecution, when this is desirable, with the leave of the court.

We were, of course, aware of the controversies that have surrounded the proposals for compulsory reporting of suspected cases of child abuse. Disease reporting laws have been around for a long time. Death reporting by physicians dates from the 12th century in Europe and even earlier in China. Organised public efforts to control physical disease in Europe concentrated on leprosy in the Middle Ages and spread to venereal and other diseases by the 16th century.[3] I will not recount the arguments for and against the notion and effectiveness of compulsory reporting provisions. Suffice it to say, that with eyes wide open as to the limitations of compulsory reporting and conscious of the problems, the Law Reform Commission believed that the social balance of possibly helping the child outweighed the general desirability of preserving trusting, confidential relationships. But I stress that the proposal was made in the context of the creation of a new, independent, skilful officer, the Youth Advocate. The idea of the Youth Advocate was borrowed from the now well-established Scottish reporter.[4] It also comes close to the system in operation in the Netherlands where, for 10 years, they have had a 'Confidential Doctor' with bureaux spread throughout the country.[5]

INFANTICIDE

Just as child abuse is the extreme version of children in need of care, so infanticide is the extreme form for child abuse. In the last week, in the wake of the Darwin jury's conviction of Mrs. Lindy Chamberlain for the murder of her baby daughter Azaria at Ayres Rock, not a little attention has been paid to the legal process involved. Because an appeal may be lodged, in a case that has already attracted too much publicity and not a few pundits, I will confine my observations to a general legal issue which is relevant to the concerns of this Conference.

Careful scientific research in Australia suggests that unlawful killing of young children, excluding traffic fatalities, may rank fourth amongst the causes of traumatic fatalities in the age group under 5 years. Collectively, cases of unlawful killing of small children display features quite different from adult homicide. In practice, relatively few mothers are convicted of murder or manslaughter. Changed attitudes to illegitimacy and

abortion may be expected to diminish the numbers of cases of neonaticides and infanticides. Most such cases now involve charges against young, unmarried mothers often with low intelligence and in the lowest socio-economic groups who may continue to react to pregnancy by attempted concealment. Cases of child euthanasia may be on the increase. Early detection of child abuse offers some hope of successfully reducing the incidence of infanticide.[6]

The first comment I wish to make relates to the law of infanticide. It is not uncommon that a women who has recently given birth kills her child under the influence of emotional disturbance which is attributed to the process of giving birth or to subsequent lactation.[7] Various psychological explanations are offered. For example:

> 'Where murder of an infant by its mother had no apparent motive, it is essentially a crime of passion and can be understood only by appreciating the mother's relationship with that particular child and what it represented to her. For example, a child may remind a mother of unwanted or repudiated parts of herself. This would be possible especially if her own earliest perceptions were of being a bad baby...The sex of the child may be a crucial factor here...The tragedy of infanticide may take place on impulse, as in the crime of passion, when conscious attitudes are temporarily overthrown and the unconscious murderous impulses are permitted expression.'[8]

According to Professor Colin Howard, such cases do not literally fall within our present legal defence of insanity. In any event, they may be inappropriate to that defence. So to deal with the injustice of treating the killing by a mother of her child in this way as murder, several Australian jurisdictions have enacted a specific offence of infanticide. The effect of this offence is to reduce such a killing from murder to manslaughter and consequentially to substitute a wider range of punishment than are typically available in cases of murder.[9]

The Australian States which have adopted infanticide as a special category of voluntary manslaughter are New South Wales[10], Victoria[11] and Tasmania[12]. These States basically followed the English Infanticide Acts of 1922 and 1938 which were in turn the result of a number of cases in which juries had proved themselves unwilling to convict recently delivered mothers on a charge of murdering their babies.[13] To satisfy the charge of infanticide, the child must have been born alive and must be under the age of one year. Many charges fail because of the inability to prove that the infant lived.[14]

Now, it is important in law reform to criticise the law where it goes wrong and constantly to be on the alert for improvements of the law. It is equally important not to blame the law for every problem of society, nor to blame its personnel and procedures for every decision that is regarded as unjust.

There is a certain irony in the fact that South Australia and the Northern Territory (which takes much of its law from South Australia) were the first Australian States to proceed to enact legislation of lawful abortion in certain circumstances.[15] Yet neither has an infanticide offence in its criminal law. It was for this reason that Mrs. Chamberlain could be charged not with infanticide manslaughter but only with murder.

It must also be remembered that the defence case was conducted not on the basis that Mrs. Chamberlain had killed her child while suffering from 'post natal syndrome' but on the contrary, that she had nothing whatsoever to do with the death of the child - a death she ascribed to the attack of a dingo. By inference, the jury did not accept this version. The jury on the contrary accepted that the Crown had proved, beyond reasonable doubt, that Mrs. Chamberlain murdered her daughter.

Leave aside entirely the Chamberlain case. Is there any room for improvement of the law under which she was charged? A number of ideas deserve consideration:

* Infanticide offence: The first would be the introduction in those parts of Australia which do not already have it, of a special offence of infanticide manslaughter. This offence is not available in Queensland, A.C.T., South Australia, Western Australia and the Northern Territory. Quite apart from permitting the imposition of a penalty lower than that required for a conviction of murder, the provision of a special offence might encourage more jury convictions in these sad cases, recognise the effects of an established post natal symptomology and avoid labelling such homicides with the specially stigmatising crime of 'murder'.

* Sentencing discretion: The second approach, possibly in addition and possibly as an alternative, is to attack the problem at the stage of the sentence. In the Chamberlain case, Mr. Justice Muirhead had no alternative under the law but to impose the mandatory life sentence. This is the position in most jurisdictions in Australia. It is no longer the position in the Australian Capital Territory or New South Wales. Following the Crimes (Homicide) Amendment Act 1982, the New South Wales law has been changed recently. Section 19 of the Crimes Act has been amended to allow a judge, on a verdict of murder, to consider whether 'the person's culpability for the crime is significantly diminished by mitigating circumstances,

whether disclosed in evidence at the trial or otherwise'. Such a provision would permit reduction of a life sentence to some other punishment more appropriate to the culpability of the particular crime in question. Plainly such an approach to sentencing would be relevant in the usually tragic cases of child homicide. The Victorian Government has recently asked the Victorian Law Reform Commissioner, Professor Louis Waller, to examine the New South Wales amendment and to consider whether this reform should be adopted in the law of Victoria. It must be remembered that mandatory life sentences were introduced as part of the compromise upon abolition of the death penalty in Australia. They normally mean that the prisoner serves a period of years, usually about 12, varying from State to State. This period is ultimately determined not in open court by a judge but behind closed doors by the Executive Government.[16]

* Diminished responsibility: The third approach to the problem involves reform attention to the defences in the case of homicide. For example, the 'insanity' defence might be broadened beyond the rather narrow and old fashioned category largely defined accordingly to psychological knowledge in the 19th century. Diminished responsibility might be extended to encompass a wider range of actitity than is presently allowed. A verdict of manslaughter on a charge of murder might become a means of modifying the rigour of the law.[17] One recent Australian commentator has suggested:

'A defence of diminished responsibility can now be reserved for a sentencing issue and an accused defend a charge of murder fully with some hope of an acquittal but in any event the availability in reserve, as it were, of mitigating circumstances having effect of reducing the conviction for murder to a conviction for manslaughter so far as sentencing is concerned'.[18]

* Tackle causes: Other commentators are not content with the above reforms which they see as mere 'bandaids' on the legal process. One practising psychiatrist this week reflected on the cost of the Chamberlain trial and the 'enormous cost of keeping a women in gaol for years' and contrasted this to the 'more realistic approach of providing some skilled assistance for her and her baby during the time they are both vulnerable'.[19]

Of course provision of such assistance to every potential child homicide or even to a great number of them would be enormously costly - far more costly than even the expense of the Chamberlain trial and its aftermath. In law reform, one must constantly do one's sums. The cost of welfare assistance cannot be dismissed by reference, anecdotally, to one rather expensive and atypical legal procedure.

This is not to say that welfare assistance should not be provided. It is merely to point out that the equation of costs and benefits must be looked at in a social and not an individual case context.

* End sexist offences: Far the most radical approach is that offered in a recent book on Women and Crime[20], Dr. Jocelynne Scutt challenges the assumption of infanticide provisions and calls for political and social changes necessary to deal with the issue 'at the beginning, not at what is an inevitable result of socio-political neglect'.[21]

'If the patriachal family was eliminated from our society and non-sexist, non-classist living arrangements adopted, there would be no necessity for introducing legislation in the form of infanticide provisions. Infanticide provisions by dealing on the personal psychological level with what is a problem of social structure and political impotence, based on the myth of motherhood, absolves society from the responsibility of having regard to the reality of women's needs. Additionally, the non-prosecution route serves only to reinforce the idea of the women-as-mother - ever coping and supremely happy in her lot. If those women who visibly cannot cope and reveal too clearly their failure to be supremely happy in the wife-mother role are classified "mentally unstable", "psychologically unbalanced", "mentally aberrant", there is no need to look beyond that individual explanation to the roots of a greater malaise'.[22]

Not everyone will accept that there is a 'myth of motherhood'. But the Chamberlain case and the various attempts at reform of the law of infanticide may teach us that there is still plenty of room for law reform in respect of the way our legal system deals with cases of alleged child homicide.

This is a sad subject. The miracle of birth is often presented as a fairy story. Unfortunately, these are fairy stories without happy endings. We cannot turn our back on them. Nor can we shrug them off. Nor should we allow the law insensitively to operate, without regard to the incurable human tragedies involved. Let us hope that out of the enormous national energies that have been concentrated on the publicity surrounding the Azaria case, just a little of the national attention span will be captured for the implications of the case for reform of Australia's criminal laws and procedures. If only a fraction of the news print and air time devoted to the Azaria case were spent on concentrated attention on improvement of the criminal law and associated welfare procedures, perhaps we would have fewer such melancholy cases in the future.

FOOTNOTES

1. Australian Law Reform Commission, Child Welfare, ALRC 18, 1981, xxi.
2. D. Henshaw, 'The Child Abuse That No One Dares To Mention', The Listener, 13 May 1982, 7.
3. W.J. Curran and E. D. Shapiro, 'Law, Medicine and Forensic Science', 3rd edition, 1982, 616.
4. See Social Work (Scotland) Act 1968.
5. Henshaw, 8.
6. I. Wilkey, J. Pearn, G. Petrie and J. Nixon, Neonaticide, Infanticide and Child Homicide, Med Sci Law 1982 Vol 22 No 1, 31.
7. C. Howard, Criminal Law, 3rd edition, 1977, 98.
8. A. Tierney, 'Tragic Causes of Infanticide', The Australian, 3 November 1982, 9.
9. Howard, 98.
10. Crimes Act 1900 (N.S.W.) s 22A.
11. Crimes Act 1958 (Vic), s 6.
12. Criminal Code Act 1924 (Tas) s 165A.
13. V.D. Plueckhahn, Lectures on Forensic Medicine and Pathology, 5th edition, 1982, 251.
14. ibid. See also A. Bartholomew and K.L. Milte, 'Child Murder: Some Problems' (1978) 2 Crim LJ 2 and R v Smith, unreported case in the Supreme Court of the Australian Capital Territory, 1976, there referred to.
15. Criminal Law Consolidation Act 1935-78 (S.A.) ss 81, 82; Criminal Law Consolidation Act and Ordinance (N.T.) s 79A.
16. D. Biles, 'The Meaning of Life', A.I.C., 1981.
17. See e.g. Crimes Act 1900 (N.S.W) s 23 and Crimes (Homicide) Amendment Act 1982 (substituted s 23).
18. Editorial, 'Provocation' (1982) 6 Crim LJ 117.
19. Tierney, ibid.
20. F.K. Mukherjee and J.A. Scutt, 'Women and Crime', 1981.
21. J.A. Scutt, 'Sexist in Criminal Law' in Mukherjee and Scutt, 1, 9.
22. ibid.