LA TROBE UNIVERSITY, VICTORIA

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SEMINAR, 9 JUNE 1980

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A STUDY IN INCOMPATIBLE GOALS

The Hon. Mr. Justice M.D. Kirby
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REVIEW OF CHILD WELFARE LAWS IN AUSTRALIA

If the International Year of the Child in Australia did nothing else, it certainly helped to focus the attention of law makers, and those who advise them, on the reform of child welfare laws. The purpose of declaring 1979 as the International Year of the Child was to ensure that new attention was given to the implementation, in practice, of the fine principles of the U.N. Declaration of the Rights of the Child. The Year provided the occasion for the review of the institutional, administrative and legal machinery affecting children in several of the jurisdictions of Australia. In Victoria, the State Government initiated a working party to review the operations of the Children's Court Act. It also established an Interdepartmental Committee on Child Maltreatment. In New South Wales, the Minister for Youth and Community Services commissioned an inquiry into the operation of the child welfare law of that State. A Green Paper has been published which suggests important changes in the law. In Queensland, a report was produced in mid 1979 addressing the problems of improving the law as it affects children. In essence, the paper suggested that new efforts should be made to provide effective family support services. The paper was put forward for public and expert comment and suggestions.

In South Australia, a Royal Commission was undertaken by Judge (now Mr Justice) R.F. Mohr. His inquiry scrutinised the operation of important legislative changes in that State. In the Northern Territory, the administration is considering the special problems of juvenile delinquency and has recently extended its inquiry into welfare services as they affect children.

In the Commonwealth's sphere the Attorney-General gave a reference to the Australian Law Reform Commission to report on the reform of child welfare law in the Australian Capital Territory. Under the Australian Constitution, the Commonwealth does not have plenary power to deal with the improvement in child welfare laws throughout the country. Basically, responsibility for child welfare is a responsibility of the States. Nevertheless, in the Territories the Commonwealth does have constitutional responsibility. The Ordinance of the Australian Capital Territory has been criticised in the courts, on a number of occasions. It has been castigated in the news media and in the professions.

In addition to the general powers of the Commonwealth in the Territories, however, the Federal Parliament has a special power to make laws with respect to 'marriage' (s.51(xxi)) 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 only. Therefore, we must deal with child welfare law reform in this country on a piecemeal basis, jurisdiction by jurisdiction. This is not necessarily a bad thing. It may permit experimentation and advance by example: one jurisdiction pointing the way for another.

THE AUSTRALIAN LAW REFORM COMMISSION'S INQUIRY

The Law Reform Commission's report will be completed within the next few weeks. This seminar is therefore particularly well timed. The fact that State colleagues in the Working Party and Interdepartmental Committee will take part in the seminar is especially welcome. I have no doubt that there should be more consultation between advisory bodies working at a Federal and State level in Australia and in the different State jurisdictions. Our aim should not be the dull blanket of uniformity, whatever the cost. It should, however, be the common identification of problems and the clear minded identification of the policy issues which are at stake.

The reference to the Law Reform Commission by the Federal Attorney-General required us to examine a number of matters in particular:

* the treatment of children in the criminal justice system;
* the position of children at risk of neglect or abuse;
* the role of welfare, educational and health authorities, police, courts and corrective services in relation to children; and
* the regulation of the employment of children.

Quite apart from the reviews of child welfare laws in all of the jurisdictions of Australia, the Commission has had regard to recent reassessments of child welfare laws in England, Scotland, Canada, the United States and elsewhere. Professor Kahn was surely right when he said recently:

> The whole history of child welfare is a history of reform. We are never quite satisfied.

The Australian Law Reform Commission followed its normal course in developing its ideas on child welfare law reform. This was but one of a number of busy references on which the Commissioners are assigned to work. The Commissioner in charge of the Child Welfare reference is Dr John Seymour. He has had many years of specialist study in this area of operations. A number of consultants were appointed by the Commission with the approval of the Attorney-General. One of them is Mr Terry Carney, who has also been active in the Victorian reviews. Two discussion papers have been published and these set out the tentative views of the Commission.

ALRC DP 9 Child Welfare: Children in Trouble, 1979
ALRC DP 12 Child Welfare: Child Abuse and Day Care, 1980.

Public hearings have been held in Canberra and a series of detailed consultations have been conducted, as have seminars, conferences and other meetings. Visits were arranged to A.C.T. schools in order to obtain the opinions of young people. Discussions were held with children in six schools and also with children in homes and the remand centre. A detailed empirical research program has recently been concluded. Long ago, the Law Reform Commission came to the opinion that sound law reform which was likely to last, should be based upon a thorough understanding of the actual operation of the present law. It is often quite unsafe to judge the operation of the law from the cold print of the statute book.

This, then, is the background of our inquiry. We are on the brink of a report. Our report will attach draft legislation for amendments to A.C.T. law. We hope that our proposals will be of help to State colleagues working in the same area. Of course, it would be inappropriate for me to foreshadow final conclusions. In fact, final decisions have still to be made on a large range of issues. A further meeting with Consultants and a meeting of Commissioners is to be held later this week. What I propose to do is, instead, to identify some of the fundamental problems which any group looking at child welfare law reform must face up to. If we can clarify our fundamental problems, much detailed law reform will then fall into place. By reference to two parricular issues, I want to suggest that reform of child welfare law requires the law reformer to face up to a number of incompatible goals. In the case of compulsory reporting of child abuse, there is a fundamental incompatibility between the legitimate demand for confidentiality of

professional relationships and the demand for the effective identification and follow-up of cases of child maltreatment. I will revert to this issue. Before I do so, however, I want to address an even more fundamental problem, namely the issue of whether child welfare law reform should be guided by an 'interventionist' or 'due process' approach. Although the choice is not an absolute one and although all Australian systems seek a marriage of the two, there is at the heart of this debate a very important philosophical quandary.

INTERVENTION VERSUS DUE PROCESS OF LAW

Should child welfare law reform in cases of children accused of criminal conduct take an 'interventionist and welfare' approach or should the approach to be adopted reflect the principle that a child is entitled to 'due process of law' at least to the same extent as an adult accused?

A simple case illustrates the issue before the law. It is a case mentioned in the Law Reform Commission's Discussion Paper No. 9 'Child Welfare: Children in Trouble, 15.

> 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 series of liaisons with other men and displayed little interest in Jenny. While away from home Jenny commits a number of minor thefts.

Legal systems have developed two basically different approaches to Jenny's problems. The choice between them (or the discovery of some compromise) is a matter which is under consideration in the various Australian inquiries on child welfare law reform. Should society treat Jenny as a child in need of care whose home troubles have manifested themselves in the commission of an offence, or should society concern itself solely with the minor offences? The reform of the juvenile court system raises the issue as to whether efforts should be made to emphasise the common features of cases of young offenders and children in need of care, or whether the distinction between the two categories should be sharpened.

The first approach is what might be called the 'interventionist' or 'welfare' approach. Jenny's minor thefts are viewed as a symptom of personal or social problems and society's response is directed towards meeting the child's needs.

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. The paramount guiding principle should, according to this view, be the need of the child.

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

The other approach is what may be called the 'due process of law' approach. According to this view society should concern itself with Jenny's offence. Society's response should be directed towards social control of the child's deeds rather than meeting the child's needs. It is said that the 'child-saving' philosophy of looking beyond the offence to the child's needs carries with it the danger of denying the child the due process of law which adults enjoy. The early juvenile courts which were based upon the 'welfare' approach have been described as 'anti-legal' in orientation and methods. Critics have pointed out that despite benevolent motives, intervention by such a court frequently results in coercive action and substantial interference with the child's liberty. An insistence upon due process or fair procedures should not therefore be dismissed too readily. Although it may appear benevolent and caring to label Jenny's case as 'care proceedings' rather than 'criminal prosecution', we do not as a result want to cheat her of the legal rights she should have.

Supporters of the due process approach also argue that programs for solving the human and social problems which lead to juvenile crime have only limited success. What could be done, for example, to solve the complex personal problems which led Jenny to commit minor thefts? Are there effective techniques for curing Jenny's psychiatric problems, reconciling Jenny to her father's imprisonment and her mother's liaisons with other men, and to forge some bond of affection and caring attention between mother and daughter? It is argued that social welfare workers seeking to help not only Jenny, but the whole family, in solving delicate private differences may become more oppressive even than the criminal law. Society may be requiring Jenny to participate in a therapeutic program with enormous potential for unscrutinised, unregulated intervention in her family's life - on the basis of an allegation which has never been proved by fair procedures which protect legal rights. It is said to be dishonest to seize upon a minor offence as a pretext for the imposition of therapeutic measures which are disproportionate to the seriousness of the offence. If society's aim is the benevolent one of attempting to help Jenny in her needs the aim should be pursued outside the criminal court system and unaccompanied by legal threats.

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 criminal 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).

In dealing with the reform of child welfare law, the Australian Law Reform Commission has attempted to achieve a proper balance between the 'interventionist' approach and the 'due process of law' approach. The Commission has proposed a strict bifurcation of proceedings in relation to offences and proceedings concerning children 'in need of care'. Instead of procedures which mix up in the same Children's Court criminal cases with cases of neglect, uncontrollability and abuse, the two streams should be divided. Criminal proceedings should continue to be heard by the Children's Court. To emphasise the civil nature of care proceedings, it has been proposed that the Family Court of Australia should exercise jurisdiction in a Children's Division of that Court in the Capital Territory.

CRIMINAL PROCEEDINGS

In criminal proceedings it is proposed that a balance between the interventionist approach and the due process approach be achieved in the following manner. Firstly, there should be some procedure for diverting young offenders from the court. There are a number of reasons for this:

* a prosecution is a cumbersome and frightening response to a trivial offence;
* there may be a significant delay before the case comes to court;
* the A.C.T. statistics reveal that in nearly one third of criminal cases involving young offenders, the court takes minimal action;
* the court process can be stigmatising.

It is possible to devise a diversion procedure for screening cases which may be handled informally, rather than by way of prosecution, without a return to the old child-saving philosophy in a new form. The Commission believes that placing a screening procedure between the police and the court creates an unnecessarily cumbersome three-tier system. Instead there should be clear and public guidelines according to which the police should exercise their discretion to deal with a case by way of an informal warning rather than prosecution. The police should give to a child who has received a warning a pamphlet listing the welfare agencies which can help him. It is up to the child to approach the agency. The child should also be informed of the role of the Youth Advocate, an official who is to play a co-ordinating role between the court system and the welfare agencies. The child may approach the Youth Advocate for advice as to what help is most suitable for his needs. The police may alert the Youth Advocate to the existence of a problem which may lead to care proceedings. As an executive officer on the staff of the Children's Court, the Youth Advocate's function in criminal proceedings arises principally at the dispositional stage. He should:

* collect background reports about the child, if the magistrate so orders;
* assist the magistrate in seeking a suitable placement for the child; and
* monitor the implementation of the court's dispositional orders.

USE OF THE FAMILY COURT IN CHILD WELFARE CASES

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 special 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 the court to develop a more sensitive environment for the disposal of family disputes, a natural suggestion that has been made is that proceedings where the child is charged with being neglected or uncontrollable, 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. The Proceedings themselves would be civil: by way of an application for a declaration that a child is a child in need of care. 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 permamently 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, so long as the requirements of Chapter III of the Constitution are observed.

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 Court, 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 presently 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. No noticeable problems have arisen.

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

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, others feel that rescuing a child who is in need of care from the criminal justice system may warrant the greatest possible skill and be deserving of the greater investment in legal talents and counselling than we are presently inclined to make.

In care proceedings the Youth Advocate has a duty to explore alternatives to care proceedings, including, where appropriate, medi ation and reconciliation. The Youth Advocate is responsible for the initiation of care proceedings in the proposed Children's Division of the Family Court. The Youth Advocate should provide an independent focus for co-ordinating the efforts of welfare agencies to help the child without resorting to care proceedings. Assistance and advice in this task should be provided by a consultative committee consisting of representatives of welfare and health authorities.

THE PROBLEM OF CHILD ABUSE

Scope of the Problem. The second illustration of the conflict between irreconciliable legal principles in the context of child welfare law reform, is to be found in the controversy surrounding compulsory reporting of child abuse. I am aware that as recently as 27 May, the Premier of Victoria, Mr Hamer, announced the Victorian Government's decision on this subject. Victoria will not introduce, as other States have, a system of statutory compulsion upon designated professionals to report cases of suspected child abuse. Instead, Victoria has decided to maintain voluntary reporting and to examine the effects of compulsory reporting in the other Australian States. Amongst initiatives announced at the same time were the establishment or expansion of four child protection units during 1980 and the establishment of further units in 1981.

The controversy surrounding compulsory reporting of suspected cases of child maltreatment illustrates the clash between two schools of thought. In a sense, it is an extension of the clash between the 'interventionist' approach and the 'due process' approach. One's views in the earlier debate are almost certainly carried forward into the latter.

It is difficult to estimate the precise measure of child abuse in Australia, certainly on a nationwide basis, because of the shocking state of crime statistics in our country. I have previously had occasion to refer to the languid pace with which we are moving towards uniform, national crime statistics. Part of the difficulty in the area of child abuse is the problem of securing an agreed definition of what is meant by this

expression. In The Netherlands, which is unencumbered by the difficulties of a Federal system, recent research has suggested that serious physical abuse of children occurs annually in some 1 200 cases. Some 120 children die as a result and another 150 sustain permanent physical injuries. In many cases, help for the abused child and the offending parents comes too late or not at all. Despite the increasing attention on child abuse in recent years, the offence is still regarded as a taboo. The population of The Netherlands is comparable to that of Australia and our societies are not significantly different. But national figures in Australia might disclose an even more serious incidence of child abuse than is disclosed in The Netherlands research project. The Inquiry into Non-accidental Physical Injury to Children in South Australia in 1974-75 showed a wide discrepancy between the number of cases officially reported and the number of cases revealed by the survey. On the basis of the figures disclosed, the Australian Royal Commission on Human Relationships estimated in 1977 the incidence of non-accidental physical injury to juveniles under the age of 15 years in Australia could be as high as 13 500 cases a year. This represents 37 juveniles injured every day in this country. Although it is possible that the number of cases of child abuse coming to notice of the Federal Police in Canberra is not as high, proportionately, as it is in the States (physical child abuse having an apparent relationship with poverty), many cases do exist. The police submission to the Law Reform Commission, criticising the current Child Welfare Ordinance 1957 (A.C.T.), called for specific provisions to be included in relation to the reporting of, and procedures to be adopted in relation to, complaints of maltreated children.

Reasons for Non Reporting. Some critics ask why more cases of child abuse are not reported to the police and other agencies. The Victorian Police Surgeon, Dr J.P. Bush put it thus:

> The failure of doctors to recognise child abuse for what it is and to do anything about it is still, I believe, partly due to the fact that as students they are not told sufficient about it. Doctors are unwilling to become involved. It is not sufficiently academic or challenging a situation perhaps - though what could present a greater challenge to one's skills? They refuse to participate in police or court activities. This is, in my opinion, an abrogation of responsibility.

I do not find it difficult to understand the failure of doctors and others to report cases of child abuse. The whole thrust of medical ethics is to preserve the confidentiality that is so vital for an effective relationship between doctor and patient. The doctor's role is to heal. It is natural that he should resist becoming an adjunct of the community's administration of welfare services or of criminal justice. Furthermore, it has to be said that rightly or wrongly most doctors do not regard the police as agents for supporting and helping parents.

and children in the abuse situation. On the contrary, they see the police as the agents of punishment and for that reason, withhold information to the police, except in the most serious cases. Quite apart from scepticism about the utility of reporting to the police, there is a well-developed (and possibly partly justified) scepticism about the utility of legal process in dealing with conflicts such as this. A common feature of all family violence (whether directed at adults or children) is that the relationship between the parties, forged by blood, must normally continue. Police, welfare agencies and the law come and go, but the parties must continue generally to live together or at least in relationship to one another. It is this phenomenon which makes the law's intervention often seem so ill-suited and inadequate to those whose responsibility it is to care for the injured victims of family violence. Some cases are so grave that they must be reported. In other cases, the law may do at least temporary good. But all too frequently, the law's impact is transient and aimed at specific recent conduct rather than the underlying personal or family problems, of which the conduct is but the latest symptom.

Added to these inhibitions are other restraints which are harder to define. The study in The Netherlands to which I have referred suggests that the taboo about inter-family violence and abuse continues because people dislike seeing it occur or disbelieve it when they see it. Akin to the reaction healthy people have to people with handicaps, we respond with an atavistic desire to avoid contemplation of such unacceptable variance from the norm. We prefer not to see or, if we see, to excuse or explain the unacceptable evidence of physical or mental cruelty to a child.

COMPULSORY REPORTING IN AUSTRALIA

This is not the occasion to explore in any depth such solutions as have been tried to cope with the problems of child abuse. In New South Wales, a radical new scheme is being attempted, on an experimental or pilot basis, for the establishment of community justice centres. Modelled after developments in the United States, these centres, often manned by law students, provide the courts and police with an alternative machinery of mediation and reconciliation to which they can refer appropriate cases, including at least some cases of family violence. Instead of seeking to deal with such a sensitive and usually intractable problem through court processes directed at a particular historical incident, the community justice centres will seek by more informal procedures of discussion, counselling and conciliation, to help parties to find solutions rather than to have a solution imposed upon them.

More orthodox approaches to the problems of child abuse include the provision of new police facilities, child protection units, the assurance of 24-hour counselling and assistance agencies (for most cases of child abuse do not conveniently occur in office hours), the provision of a 'child watchdog' or youth representative (Youth Advocate), and so on.

Perhaps the most persistent debate in this area relates to whether compulsory reporting of cases of child abuse should be required by law of medical practitioners and others. In all of the 50 States of the United States, as well as in Washington D.C., Puerto Rico and the Virgin Islands, legislation of varying scope and impact requires that physical abuse of children be reported to some form of State agency. The consequence of this legislation has been at the very least, a better appreciation of the size and difficulties of the problem and the proliferation in the United States of a number of novel experiments in designing and providing child abuse facilities.

In Australia, no such universal picture emerges from a study of State and Territory legislation. In four States (New South Wales, South Australia, Queensland and Tasmania) legislation specifically provides that medical practitioners have a duty to report where evidence of maltreatment comes to their notice in the course of their professional duties. The group required to report extends beyond medical practitioners in New South Wales, South Australia and Tasmania. In other States, a different approach has been adopted. In Western Australia, although there is no legislation for compulsory reporting, there does exist a Child Life Protection Unit which is part of the State Department of Community Welfare. It began operating a Parent Health Centre in January 1976. That Centre offers 24-hour crisis counselling and adopts a comprehensive approach to the whole range of support services needed in cases of child abuse. In Victoria, the Community Welfare Services Act was amended in 1978 so that people who report suspected child abuse cases are generally immune from legal suit for having done so. The suggestion by Dr Bush that Victoria should move towards compulsory reporting of child abuse cases has been rejected by the Government. The Government's decision is supported by representatives of the medical profession. Medical practitioners questioned whether compulsory reporting had done any good where it existed. Opposition does not come only from within the medical profession. Privacy bodies and others have questioned the utility of compulsory reporting. In respect of the Australian Capital Territory, the issue is now before the Law Reform Commission.

ARGUMENTS ABOUT COMPULSORY REPORTING OF CHILD ABUSE

Arguments against Compulsory Reporting. The arguments against a system of mandatory reporting of child abuse cases may be rehearsed. First, it is said that parents may be discouraged from seeking help, especially necessary medical attention, for injured children, for fear that seeking help may lead to police prosecution. Secondly, it is pointed out that if compulsory reporting leads on to prosecution, it may exacerbate rather than help solve the inter-family causes of violence. A parent may blame the child for the report and subsequent encounter with authority. Physical abuse or at least prolonged emotional maltreatment may be precipitated by the report of the case.

Thirdly, it is frequently said that compulsory reporting procedures are virtually unenforceable. A doctor who failed to report would rarely be prosecuted and almost never be convicted by a jury, if he acted in good faith. Furthermore, the difficulty of establishing a case against the doctor on the uncorroborated evidence of the child would make prosecution extremely difficult. Fourthly, it is said that compulsory reporting of itself treats and cures not a single case of child abuse. It does not guarantee the provision of effective services and deflects the debate from providing those services to an obsessive and bureaucratic concern with collecting information rather than helping victims. Fifthly, it is pointed out that it is extremely difficult to define child abuse and to distinguish cases of abuse from cases of neglect, failure to thrive and simple selfish parental indifference. Critics fear that out of this vagueness about the target may emerge a community of spies and reporters who inform on their fellow citizens, ostensibly for their own good but often to satisfy an interfering disposition. Sixthly, it is proposed that a voluntary regime is preferable under which medical practitioners have a discretion but are under no obligation to do so. It is said that if a doctor is adequately protected against civil action by his patient, he should remain the judge of the best way to handle the situation and should not be submitted to an absolute obligation to report, whatever the consequences for the individuals involved.

Arguments for Compulsory Reporting. On the other hand proponents of compulsory reporting suggest that the time has come to stop talking in generalities about the rights of children and to act effectively and resolutely to uphold them. In the clash between the integrity of the child and the right of the family to freedom from State interference, the community it is said should give preference to protecting the child. This is not least because of the fact that usually the child is unable to complain for himself and should therefore be able to look to others and ultimately the community to protect him, even as against his family.

Secondly, unless a system of compulsory reporting is introduced, supporters contend that the practical result will be relatively little reporting, especially by medical practitioners brought up in the traditions of patient/doctor confidentiality. Without a system of statutory obligation, reporting will be uneven, depending on the personal predispositions of particular medical practitioners, and relying too much on neighbours and other non-expert observers.

Thirdly, supporters contend that the obligation to report provides a useful means by which the treating doctor can sustain his relationship of trust with the child and his family. The statutory compulsion explains and justifies the doctor's notification which is otherwise hard for a patient to understand and accept. Fourthly, although compulsory reporting will do little more, of itself, than improve the lamentable state of knowledge

of the extent of child abuse, it is suggested that the very collection of information of this kind will impose proper pressure upon lawmakers to assure the provision of supporting services. At the level of the individual doctor, it will ensure that he has available to him multi-disciplinary assistance that can sustain his endeavours to cope with the difficulties of a child abuse case.

Fifthly, it is contended that a compulsory reporting system represents a public commitment to protecting abused children. It enables the community to become involved and has an educative effect and possibly even a sanctioning effect. Sixthly, opponents of compulsory reporting will not be deflected by the suggestion that it is enough to provide immunity from civil liability and to encourage voluntary reporting by doctors and others. If there exist only provisions for reporting together with immunity from civil liability, extraneous social considerations still operate to impede reporting of child abuse cases. These considerations include fear of, or actual imputations of, malicious interference by the reporter. Not only may this be unjust to the well-meaning reporter. It may also be likely to impede the fair assessment as to whether the case requires reporting.

CONCLUSIONS

The Law Reform Commission's conclusion on this issue is stated in its Discussion Paper on this topic. The claim that compulsory reporting legislation deters parents from seeking medical help has never been established by statistical information. Physical abuse tends to be triggered by crises which, once passed, frequently lead to parental remorse and the seeking of treatment for the child. In the twelve months from July 1978 to July 1979, notification in New South Wales by a potential or abusing parent or by other parents or relatives constituted 13.3% of all notifications received. It is more likely that there will be self-reporting if supportive services are clearly identified and provide accessible, practical and expert assistance. The aim of these services should be to provide help, not to ascribe blame. There is no doubt that compulsory reporting is no panacea for the problems of child abuse. But no problem of this kind can be tackled if its variety, incidence and frequency are all but unknown. A procedure for compulsory reporting of child abuse cases in the Capital Territory is at this stage proposed by the Law Reform Commission as part of a comprehensive effort to improve the child welfare laws and procedures of that Australian jurisdiction.

Everyone agrees that there should be proper legal protection to those who, for good cause and in good faith report suspected cases of child abuse. Everyone agrees that facilities should be available to deal with established cases of child maltreatment. The special problem that the parties must usually continue to live together should be sensitively recognised by the criminal justice system.

But whether compulsory reporting by those who enjoy a relationship of confidentiality and trust would help or hinder the community's response to the problem of child abuse is a matter upon which there is the most acute difference of view. I welcome the opportunity of this seminar to expose and debate the differences of opinion. Above all, it is important to recognise that there is little point in providing coercive legislation for compulsory reporting if it is not observed, not enforced and if obeyed, is not followed up by the provision of supportive services. Too often the law tackles the symptoms rather than the underlying disease behind a social problem. A telephone call to report a suspected case of child abuse may help identify the symptoms of breakdown. Tackling the underlying problem is much more difficult.

The Commission has proposed that the Youth Advocate should be the central recipient of notifications of child abuse cases. Ideally notifications should be received by a 24 hour crisis centre but the extimated number of cases of child abuse in the A.C.T. is too small to warrant the establishment of such a centre. The Youth Advocate bears the formal responsibility for delaying rash actions by one agency or remedying a dangerous delay in action by every agency. In a child abuse case the Youth Advocate should convene the consultative committee to discuss the case and advise him. He should explore every welfare alternative before initiating care proceedings.

The clash between the 'interventionist' approach and the 'due process' approach arises not only with respect to the abused child but also with respect to the parent who has maltreated him. The pressures which lead to child abuse are part of a social problem which calls for some form of community treatment. On the other hand, child abuse involves serious injury to a child, even the death of a child, to which society's response is usually criminal proceedings and severe sanctions. Criminal proceedings may have a devastating effect on parent and child. The Law Reform Commission has sought to achieve a proper balance in this matter. Procedures (including consultation with the consultative committee) should be introduced to facilitate reconsideration of a police decision to prosecute a parent. Where, in view of the interests of the child it is desirable to do so, it should be possible to have such proceedings withdrawn with the leave of the court.

The tension between the 'interventionist' approach and the 'due process' approach will never be perfectly reconciled. It is to be hoped that the final report of the Commission does represent an honest recognition of the inconsistency of these goals and a closer solution to the search for a proper balance.