

DEPARTMENT OF YOUTH AND COMMUNITY SERVICES

INTERDISCIPLINARY CONFERENCE ON CHILD NEGLECT AND ABUSE

FRIDAY 26 SEPTEMBER 1980

RIGHTS OF THE CHILD IN THE FAMILY AND

IN ALTERNATIVE PLACEMENTS

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

September 1980

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This conference has already looked at the involvement of various professions in issues affecting children. The diverging professional perspective of social-workers, police, medical practitioners, psychologists, educationalists and the judiciary often produce a conflict in responses to the problems of neglect and abuse of children. There is often no complete solution to such a divergence of approach. However there is rarely the dissent from the view that, even if it provides no entire solution, multi-disciplinary training and experience is indispensable. The role of the family in Australia today is undergoing rapid and extensive change. The family is nuclear, increasingly 'one-parent', often isolated, strongly committed to creating the appearance of 'coping'. Today this theme of the conference is the 'rights of the child in the family and in alternative placement'. In 1959 the General Assembly of the United Nations proclaimed the Declaration of the Rights of the Child. Principle 2 of that declaration states:

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually, and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose the best interest of the child shall be the paramount consideration.

It could not be said that the claimed right of the child to dignity and integrity in Principle has yet been attained in Australian society. But the Principle is increasingly accepted as a worthy ideal. However, had the claim to such a right and its practical implications been posed one or two centuries ago, it would have raised gasps of horror and indignation amongst our forebears.

At common law the father's legal right to the 'custody' of his legitimate child was almost absolute. The courts treated as sacred the right of the father to bring up his own child in his own way. It was only in exceptional cases (where there was a risk of serious physical or moral harm to the child due to the father's cruelty or to gross corruption of the child) that the father's right was liable to be forfeit. The family sphere was permeated by feudal concepts of 'ownership', the father's interest in the 'custody' of his children being essentially so far as the law was concerned akin to a right of property. The wardship jurisdiction of the Court of Chancery, exercised on behalf of the Crown as parens patriae, developed. Attitudes changed very slowly. From the 19th Century legislation strengthened the mother's relative rights, and the rights of the father were simultaneously weakened. Eventually regard for the child's welfare assumed paramount importance over parental rights. In 1925 there was enacted in the United Kingdom legislation containing an express declaration that in the determination of questions of (amongst other things) 'custody or upbringing' the child's welfare was to be regarded as 'the first and paramount' consideration. In Australia the Family Law Act 1975 (Cwlth), s.64 provides that in proceedings with respect to the custody or guardianship of, or access to, a child of a marriage the court shall regard the welfare of the child as being of paramount consideration. In South Australia the Children's Protection and Young Offenders Act 1979 requires a court to seek to secure for the child (whether a young offender or a child in need of care) 'such care, correction, control or guidance as will best lead to the proper development of the child's [personality] and [his] development into a responsible and useful member of the community'. Of the several factors which should be considered by the court, one is the need to preserve and strengthen the relationship between the child and his parents and other members of the family.

There is no doubt that the concept of parental rights is undergoing reappraisal to accompany the rights of the child, be accepted to be a chimera, to be abandoned rather than clung to. It is enough to say that parents have duties and that they must have the necessary authority to perform those duties properly. The State's assumption of a right to interfere with parental authority where the physical integrity and welfare of the child are at risk, challenges the patriarchal conception of the child as the property of the

family. If you consider it intervention is based upon a recognition ultimately of the child's status as a person distinct from his parents. However, the policy of intervention to protect children from likely serious harm is not the sole objective to be considered. Our society has a profound sense of the autonomy and privacy of the family unit. Between those two objectives, rights of child and unity of family, each in itself desirable, there must be achieved a proper balance. Court proceedings as a solution to neglect or abuse, should be a last resort. Every opportunity and assistance should be given to the family to resolve its difficulties itself. Where a case does come to court, the state should not, as I presently think, have a carte blanche to intervene. The circumstances in which a child should be declared a child in need of care should be precisely defined. The extent of the loss of duties and authority on the part of a parent should also be made clear in the legislation. The duties and authority assumed by the home, foster parent or other alternative placement authority should likewise be defined.

The Law Reform Commission is at present nearing completion of its report on the law and practice affecting child welfare in the A.C.T. The Commission has found that there is a need for regular review of a dispositional order made by the Children's Court in care proceedings, in order that the personal circumstances and progress of the child are properly taken into account. Close attention has been given to the incidents of the parent-child relationship, or of guardianship. These are the bundle of duties and authorities including physical control or custody, maintenance care and upbringing, discipline, health, education, religious education, appointment of a testamentary guardian, and property. It is important that when a child is subject to a family supervision order, a residential care order, a committal order, or a wardship order, that there be no uncertainty as to which of those duties and authorities have been removed from the parents, and who now bears the responsibility for them. No doubt these are issues which will be canvassed by the speakers presenting papers today. In that hope I open today's proceedings.