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children in trouble : report

My mother loved children — she would have given anything if I had been one

Groucho Marx

major report. In November 1981, Senator Chaney tabled in the Australian Parliament the 514-page report of the Australian Law Reform Commission on *Child Welfare* (ALRC 18). The report makes recommendations for change in the law and practice governing children in the Australian Capital Territory. Among subjects examined by the Commission are:

- treatment of young offenders;
- dealing with children in need of care;
- child abuse;
- regulation of child care services;
- employment of children;
- provision of welfare services.

The Commissioner in charge of the ALRC project on child welfare was Dr. John Seymour, a senior criminologist with the Australian Institute of Criminology. That Institute co-operated with the ALRC in the development of the report. Dr. Seymour said that the ALRC had, in its proposals, sought to:

- provide appropriate and effective assistance for children in trouble;
- ensure protection to the community against harmful conduct by children; and safeguard children in need of protection;
- avoid excessive intrusion into the lives of children and their families in the pursuit of these objects;
- maintain the checks and balances necessary in any legal system which permits coercive intervention.

Dr. Seymour said that the ALRC had also emphasised:

- the need to clarify the law on the options open to the courts in dealing with young offenders and children in need of care;
- the desirability of reducing the scope for unreviewed administrative discretion in implementing court orders; and
- the need to define more clearly the grounds upon which coercive intervention in the lives of children would be permitted, where they had not committed an offence (need cases).

young offenders. The ALRC report, following major similar moves in the United States and in other Western countries, rejects the expedient of turning over cases of child crime to welfare agencies. According to figures assembled by Mr. David Biles of the Australian Institute of Criminology, crime by persons under 18 years already amounts to more than 60% of detected crime in Australia. The ALRC report urges that:

- the objectives traditionally pursued by the criminal justice system, including the punishment of offenders and protection of the community, cannot be repudiated in dealing with young offenders;
- young offenders should not, in the name of benevolence, end up with procedures which overlook due process requirements;
- nonetheless, filters should be provided to ensure that children are prosecuted only where this course is clearly justified and where less punitive procedures (e.g. cautions administered by police) will not be effective.

According to the ALRC report:

> The aim must be the creation of a system which reflects a proper balance between, on the one hand, the lawyer's demand for fair procedures and the law enforcement officer's concern with the detection and prevention of crime and, on the other, the welfare worker's desire to respond in a humane and understanding manner to the special needs of the young.

Among the major recommendations for dealing with child offenders, the ALRC report lists:

- the requirement that an order depriving a child of liberty should be employed only where an adult would be liable to imprisonment;
- the requirement that wherever possible a child should be permitted to remain in his own home and to maintain his relationship with his family and continue his education or employment;
- a rejection of a 'panel' system for filtering out cases that need not go to court;
- new emphasis upon improved police procedures, including review by senior police officers of a decision to prosecute and the adequacy of a warning;
- provision of a wider range of options to the children's court for dealing with convicted child offenders, including attendance centre orders and provision of an institution and the detention of at least certain categories of young offenders in the ACT. At present young persons sentenced to detention in the ACT are 'transported' to NSW institutions;
- provision for monitoring of court orders and report back to the court by a new official known as the Youth Advocate concerning compliance with the order.

children in need of care. The ALRC report also deals with procedures to be employed for providing assistance to children in need of care.

It is suggested that a procedure distinctively different from that for dealing with offenders should be introduced. This should abolish 'antiquated procedures' which presently result in children being charged with being 'neglected' or 'uncontrollable'. Instead, the ALRC report envisages:

- a precise definition of the grounds for care proceedings;
- a requirement of actual or potential harm to the child as the basis for coercive action;
- emphasis on the provision of adequate preventive services and residential facilities for children and families;
- use of court proceedings to deal with children in need of care only as a 'last resort';
- provision of every effort to keep a child with his family.

The ALRC report reflects similar thoughts in other jurisdictions of Australia and the United States Juvenile Justice Standards project in limiting well-meaning but coercive intervention in care cases. This is explained as based upon the doubt about the effectiveness and appropriateness of coercive action and the preference normally to be given to informal services offered on a genuinely voluntary basis. Courts are not seen as an 'all-purpose welfare agency'.

child abuse. A typically modern problem that is dealt with in the ALRC report is the handling of cases of child abuse. Child victims of physical and sexual abuse are seen as a 'particularly vulnerable' example of children in need of care. According to the ALRC report, child abuse cases create special problems requiring new procedures. Amongst the new procedures for dealing with child abuse recommended in the report are:

- provision for compulsory reporting to the Youth Advocate of suspected cases of child abuse coming to the notice of doctors, police officers, teachers, welfare workers and others;
- provision of holding orders to permit temporary removal of a child from a home, where he has been abused or is at risk of abuse;
- provision of safeguards against premature prosecution of a parent suspected of abusing a child;
- provision of improved support services designed to tackle the basic causes of child abuse.

other proposals. The ALRC report deals with a wide range of proposals aimed at implementing an entirely new child welfare law for the Capital Territory. A draft Bill for a new child welfare law is annexed to the Commission's report. The summary of the report acknowledges:

> On almost every page there is an analysis of a sensitive and controversial topic. On many of the subjects addressed members of the community will naturally have strong views and sincere people will hold differing opinions.

However, the Commission urges the need for reform, following a clear identification of the problems in current law and practice. Among institutional reforms suggested are:

- the creation of a Youth Advocate, modelled on the Reporters created under the Scottish legislation, with numerous functions relevant to the effective implementation of a bridge between court procedures and welfare services;
- establishment of a specialist children's court to replace the roster system in the general Court of Petty Sessions in Canberra. It is urged that only by the establishment of a specialist court will it be possible to respond expertly to the particular needs of the young and from a perspective which is not solely legal;
- creation of a new Childrens Services Council to bring together the disparate and sometimes competing welfare and voluntary agencies already established to help children;

- upgrading the welfare agency in the Capital Territory to ensure that it can better respond to the needs of children in trouble.

The report also contains detailed provisions on child care services. As a reflection of a society in which an increasing number of mothers go to work, the law must turn more attention to the facilities offered in child care centres, in order to protect the physical, intellectual and emotional wellbeing of children, without creating an intrusive bureacracy. The law governing employment of children is also addressed and recommendations made which would greatly simplify previous law on this topic.

responses. Tabling the report, Senator Chaney (the Minister representing the Acting Federal Attorney-General) recorded the Government's appreciation of the 'comprehensive report' which recommended 'changes in virtually all aspects of child welfare'. In compliance with the Government's undertaking of May 1980 (see [1980] *Reform* 79) Senator Chaney indicated the action that was being taken by the Government to handle consideration of the report:

> Careful study is clearly required in respect of this report on child welfare. My colleagues will be arranging for relevant officers to consider the report in detail. In addition, views will be sought from the ACT Children's Advisory Committee. As child welfare is a State responsibility, relevant State Departments will also be consulted, as will the ACT House of Assembly and organisations concerned with child welfare in the Territory. In due course there may be a need for further discussions to be arranged with the Law Reform Commission. Following those considerations of the report, my colleague the Minister for the Capital Territory expects to present options to the Government for child welfare legislation in the Australian Capital Territory.

So far, so good. The intervention of summer vacation torpor, will probably mean that not much is done until 1982. However, the report came under notice again at the close of 1981 following statements made by the Chief Stipendiary Magistrate in the Capital Territory, Mr. Hermes. Mr. Hermes claimed (*Canberra Times*, 1 December 1981) that certain public secondary schools in Canberra were places where criminal conduct was met by approval and enthusiasm from students and 'a Nelsonian blind eye' from staff. The Chief Magistrate's comments attracted criticism from educational authorities. It was claimed that it unfairly cast a slur on large numbers of innocent students and a dedicated staff. The *Canberra Times* (2 December 1981) reflected on the responsibility (including legal responsibility) that must accompany respect for the individuality of children:

> [S]ociety . . . tends to excuse the behaviour of young people who ought to know very well the worth of what they do. This generation, informed without inhibition as no other has been, becomes mature very early in life. It needs and deserves to be respected, which means that society should expect schoolchildren to be responsible for their behaviour, to know right from wrong, and each be unique. If society accepts too much of the blame for juvenile delinquency, then it lacks not only self-respect, but also respect for the wisdom and worth of young people, implying that they cannot withstand the destructiveness of their elders.

Reflecting the debate on the use of corporal punishment in schools, one of the ALRC recommendations is that, as a step towards the reduction of dependence on corporal punishment, the provision in the Child Welfare Ordinance endorsing the rights of teachers to administer corporal punishment should be repealed. The report points out that corporal punishment in schools is unlawful in all European countries except Britain and Ireland. But it also points out that the common law authorises limited use of corporal punishment in schools. This compromise is urged pending a detailed inquiry into the matter by the proposed Children's Services Council. No doubt such an inquiry would take account of Mr. Hermes' comments:

> I am old fashioned enough to believe that schools still have some responsibility for the control and discipline of their students, especially when those students, as was the case here, spend part of the day breaking into the homes of nearby residents. . . . A growing number of parents . . . have abdicated their responsibilities in pursuit of their own ends. It is a pity that they do not understand that youngsters themselves are crying out for and would welcome some sensitively imposed discipline.

Writing on the controversy in the *Canberra Times* (8 December 1981) Dr. John Seymour pointed out that the case in the children's court called attention to the dilemmas of handling the problems of children in trouble and especially to the need for a wide range of penalties to be available for dealing with young law-breakers.

meanwhile elsewhere. It is pointed out in the report that the whole history of child welfare is a history of reform because 'we are never quite satisfied'. The report lists innovations being tried in numerous jurisdictions of Australia. One important White Paper published by the Home Office in London on *Young Offenders*, (Cmnd. 8045), explores non-custodial punishments including:

- attendance centres;
- residential care orders;
- supervision orders;
- community service orders;
- imposing responsibility on parents.

All of these options are explored in the ALRC report. The Home Office proposal was criticised in the *Times* for proposing an undifferentiated 'generic' sentence of 'Youth Custody Order' (*Times*, 14 January 1981). The emphasis of the ALRC report is distinctly in favour of non-custodial punishment, whilst recognising the need for a wider range of options. Other developments are:

- The Australian Conference on Child Abuse in Brisbane in August was told by Mr. Kerry Dillon of the Legal Aid Office in Brisbane that children's court procedures were themselves 'a form of child abuse'. He urged that the courts should be open and said that they 'struggled in poverty, were largely ignored by lawyers and allowed evidence that would not be admitted in superior courts'. *Australian*, 25 August 1981.
- In South Australia, the Minister of Community Welfare, Mr. Burdett, announced in October that courts in South Australia would be empowered from 1982 to order offenders aged between 12 and 18 to work for voluntary organisations and youth and employment groups, instead of serving time in detention centres. He estimated that, because of the cost-intensive nature of custodial punishments for children, as much as $1.6 million a year could be saved by the introduction of community service, whilst at the same time instilling responsibility in offenders.
- In November 1981 the Minister for Community Services in Victoria, Mr. Walter Jona, criticised the Opposition policy on mandatory reporting of child abuse. Adhering to the line of the Victorian Government in favour of voluntary reporting by doctors and others, Mr. Jona said that a 24-hour central unit reporting service as envisaged by the Opposition would be valueless, without back-up and supporting services in the regions to cope with the cases that are reported.
- In November 1981 came a report of a departmental committee chaired by Mr. John Spender MP, which was said to have recommended switching child care programs funded by the Federal Government from voluntary agencies to private enterprise. The report in the Melbourne *Age*, 2 November 1981, elicited the response from the Community Child Care Association that 'overseas-based franchise operators will establish in Australia, setting up child care chains like supermarkets'. It is understood that the Government is considering financing a pilot scheme. At present child care grants cost about $47 million a year.
- According to the Queensland Police Department's Annual Report, more than 430 Queensland children aged under 10 years came to the notice of police during the last financial year (Brisbane *Telegraph*, 28 October 1981). The ALRC report on Child Welfare recommended that the age of criminal responsibility in the ACT should remain unchanged at 8. Several States have moved to raise the age to 10.

- In New South Wales, a major reforming statute on child welfare law lapsed with the dissolution of Parliament for a State election. It is expected that the new Minister, Mr. Kevin Stewart MP, will reintroduce a revised Community Welfare Services Bill early in the parliamentary session in 1982.

The Year of the Child has passed. But 1982 may be the year of child welfare legislative reform in Australia.

accident compensation : try again

It is not Justice, the servant of men, but accident, hazard, Fortune — the ally of patient Time — that holds an even, scrupulous balance

Joseph Conrad, *Lord Jim,* 1900, 34.

inquiry announced. Readers of these pages will know that one of the major reform controversies in Australia remains the subject of the just compensation of victims of accident. New pressure for reform has been exerted in recent months by verdicts of an unprecedented size for the grossly injured in motor car and industrial accidents. It seems that not a week goes by but another paraplegic recovers a verdict of more than $2 million. These amounts put pressure on the current mixture of workers' compensation, third party and negligence procedures, available in Australia for accident compensation cases. In 1974 the National Committee of Inquiry into Compensation and Rehabilitation in Australia, chaired by Sir Owen Woodhouse, recommended a national, no-fault, comprehensive scheme, similar to that operating in New Zealand. Although the former Prime Minister, Mr. Whitlam, introduced legislation based on the Woodhouse report, when in Opposition in 1977, the Federal Government has indicated that it will not be proceeding with the Woodhouse scheme, because of perceived opposition and funding and constitutional problems.

In mid November 1981, the State Attorney-General for New South Wales, Mr. Frank Walker QC, announced a reference to the New South Wales Law Reform Commission on accident compensation. Mr. Walker said that the NSWLRC would advise the NSW Government of how, in what cases, and to what extent, compensation might be payable for death or personal injury resulting from accidents. In particular, the Commission would be required to examine whether 'no fault' compensation should be payable for all cases of death or injury suffered, in the first case, in road accidents and, in the second case, in other accidents:

> Our existing laws on accident compensation can lead to gross injustices. For example, while one accident victim in a hospital bed could stand to gain more than $2 million, the person in the next bed, also an accident victim, could be liable for not a penny compensation. The first patient, a road accident victim, would be able to claim personal injury damages in court. The second, a housewife injured in a house accident, has no claims for compensation. The schemes the Law Reform Commission will examine would overcome these injustices.

wide reference. Among the issues raised by the reference Mr. Walker has given the NSWLRC are:

- whether no-fault compensation should be payable in respect of death or personal injury;
- if so, what benefits should be provided, the means of financing the scheme, administration of the scheme and the relationship to other forms of assistance or entitlement;
- whether no-fault compensation should be substituted for all or any rights to compensation under existing law, including workers' compensation legislation and common law damages;
- transitional arrangements to implement the scheme.

Commenting on the 'wide-ranging' scope of the proposed inquiry, the NSWLRC says:

> It is open to the Commission to examine whether the common law system of compensation should be modified. It will be remembered, for example, that the Pearson Royal Commission in the United Kingdom (the Royal Commission on Civil Liability and Compensation for Personal Injury) recommended that a threshold should be imposed for