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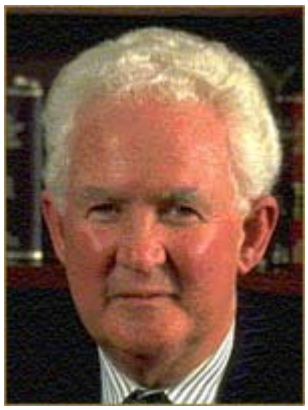
Australian Children's Rights News

Newsletter of the Australian Section of Defence for Children International
Issue Number 36, December 2003
ISSN 1320-7091

Strength in Unity – 21st Century Court Reform for Children

The Chief Justice of the Family Court of Australia, The Honourable Alastair Nicholson, argues for a unified model to deal with legal family matters including juvenile justice in a holistic way. This speech was delivered as the 2003 John Barry Memorial Lecture to commemorate the life of one of Australia's outstanding jurists.[1]



INTRODUCTION

> *"It makes little sense to deal with fragmented families in a legal system that is similarly fragmented."* [2]

Whatever else may be meritorious about the Australian Constitution, it tends to fragment the law relating to children and young persons; in particular between the Federal Government in relation to issues arising out of marriage, divorce and the custody of children and the State governments in relation to the areas of care and protection and juvenile crime. Depending on the nature of the matter, the same child can be the subject of proceedings in many courts at the same time.

Yet the problems that arise in families are typically interlocked. The young offender of today was often yesterday's victim of family breakdown, intra-familial abuse and multiple other problems,[3] and frequently, but of course not necessarily, then becomes tomorrow's adult criminal offender.

The purpose of this article is to outline a more holistic approach to the law relating to Australian families and children and particularly young people alleged or found to have broken the criminal law. Underlying this theme is my view that our courts and our law have become far too compartmentalised and could better serve the aim of doing justice.

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A UNIFIED COURT

The concept that I espouse is what the Americans call a "Unified Family Court". In Australia we are not used to the concept that family courts might exercise criminal jurisdiction. That is because we have ascribed a too limited role to what a family court is or should be.[4] However in my view it is less important what the court is called than what it does:

> "Defined most simply, a family court is a single forum with which to adjudicate the full range of family law issues, based on the notion that court effectiveness and efficiency increase when the court resolves a family's legal problems in as few appearances as possible".[5]

So far as the types of cases is concerned, the American Bar Association has long endorsed jurisdiction for unified family courts on matters such as: [6]

- Juvenile law violations;
- Cases of abuse and neglect;
- Cases involving the need for emergency medical treatment;
- Voluntary and involuntary termination of parental rights proceedings;
- Appointment of legal guardians for juveniles;
- Intra-family criminal offences [including all forms of domestic violence];
- Proceedings in regard to divorce, separation, annulment, alimony, custody and support of juveniles; and
- Proceedings to enforce paternity and to enforce child support.

Under the unified court model all of these proceedings would be dealt with in one court and preferably by one judge. In "Family Justice: Specialized Procedures Trends in 2002: Family-Friendly Courts", Carol Flango of the U.S. National Center for State Courts comments:[7]

> "A single judicial officer can become familiar with the details of each family's crisis and better address the family's needs and foresee difficulties. Families might more readily obey court orders if they know they would have to appear before the same judicial officer. On the other hand, concern has arisen that a judicial officer's familiarity with a family and its issues will lead to prejudgment and that one judicial officer may not have the expertise to deal with all the issues. In Ben, Oregon the general jurisdiction circuit court judges carry a general caseload but are also responsible for coordinating a limited number of family law cases. One judicial officer is assigned to a family and hears all matters, civil and criminal, and children's welfare. Because of their general experience, these judges have proved able to handle the diverse caseload. Motions to recues judges based on over-familiarity and possible prejudice have been rare."

Such a court would be equipped with professional staff such as mediators, social workers and psychologists, and have or have ready access to a range of medical, psychiatric and other expert resources. It would thus have some of the features of the Family Court of Australia and some State Children's Courts but rationalised under one roof. Judge Michael Town, who has served as Presiding Judge of the family court in Honolulu, one of the oldest unified family courts in the U.S. has aptly observed:[8]

> "The very existence of a unified court will encourage such services, as families with very similar problems and needs will appear on the different calendars being heard by the judges. The very same services are often needed regardless of the kind of case before the court. For example a divorcing family in serious distress with acting out children may require the same services as one with a child who commits a serious offense."

In this vein, my colleague Justice Linda Dessau has expressed the following view with which I agree:

> "… a unified family court must also include juvenile crime. Otherwise, those children charged with offences would be dealt with as the junior part of an adult criminal justice system. To follow that course would be to marginalise those children, who in reality are mostly indistinguishable from the children who are in need of care and protection or suffering family breakdown, family violence or other family problems." [9]

Research reported in 1992 by the U.S. National Center

for State Courts has shown that at least 64% of abuse and neglect cases, 48% of delinquency cases and 16% of divorcing families who had children previously went to court for another family related matter during the prior 5 years.[10]

In a just-published study by Gloria H. Danziger, a senior fellow of the Center for Families, Children and the Courts at the University of Baltimore, the author analysed six operating United States' unified family courts in Maryland, Hawaii, Rhode Island, New Jersey and Indiana. A major theme of her findings was the need for such courts to have jurisdiction in relation to juvenile crime, which the Unified Family Court in Maryland does not have.[11] Importantly, her study also makes the very clear point that in those States where unified family courts exercise the young offender jurisdiction, the juvenile arrest rate for violent crime and drug abuse is almost half of those States where there is no such unified approach. Similarly she found that in most States there is also a lowering of the arrest rate for property crimes.[12]

A DIFFERENT ROLE

A key feature of unified courts is that they take a less adversarial approach to the problems raised. As contrasted with an inquisitorial approach, an adversarial system theoretically has core traditional features such as the following:

- The disputed issues and the proceedings concerning them are principally controlled by the parties;
- Facts are found through the testing of evidence in open court governed by the parties' strategies and the conventional rules of evidence with no independent evidence gathering by the court itself;
- There is a reliance upon legal representation and oral evidence;
- There is a strong adherence to rules of evidence and procedure governing pre-trial and trial process; and
- The judge/judicial officer is a passive disinterested and unbiased umpire regulating the parties' compliance with procedural and evidentiary rules.

Danziger describes the advantages of a break with tradition and a change in role, saying:[13]

> "In order to resolve family problems in a comprehensive and coordinated way, the unified family court considers all of the parties related to the family's legal proceedings, as well as all the agencies, institutions, or organisations that need to be consulted or brought into the case. In addition, the unified family court reviews the delivery of social services to ensure that agreements between families and agencies are implemented; if they are not, the court has the authority to enforce such agreements, monitor them for compliance, and/or order agencies to deliver services. This is a radical departure from the traditional responsibilities of the court: instead of simply adjudicating legal disputes, the court must now oversee services, assessments, evaluations, counselling, outreach, probation, diversion, attention and community services. This is not the *modus operandi* of a neutral and independent forum. It is a way of conducting business that renders the court inextricably linked to agencies – and the day to day actions of those agencies. The court is responsible for ensuring that services are appropriate and productive. While the court is independent of the agencies, it acts in concert with them." (my emphasis)

This construction of the role and responsibilities of a court and its judges/judicial officers carries risks such as the actual or perceived loss of judicial independence. In addition, skills, resources and knowledge that are not conventionally expected of them become critical. Challenges of this kind arose with the establishment of the Family Court of Australia and, in my view can be managed.[14]

I would hasten, however, to make two matters clear.

First, my concern to see a unified system is not a bid for the Family Court of Australia to be the court venue. My concern is to see a careful examination of the feasibility of a unified model in an Australian setting with our particular constitutional context, and one that is informed by the strengths and also the drawbacks that have been found through evaluation of the various attempts that have been made elsewhere. [15]

I would also add that my support for blending criminal justice and civil matters in a single court does not mean I am advocating any retraction of the rights of a young person to due process, procedural justice, satisfaction of the standard of proof, or dispositional outcomes which are proportionate to the offence. Safeguards such as these are required by international

standards such as Articles 37 and 40 of the Convention on the Rights of the Child ['CROC'], and the Rules and Guidelines that have been developed to facilitate domestic implementation and practice.[16] In my view, adherence to these instruments and evaluation of the extent to which the rights therein are actually realised must be incorporated into the design of unified courts as with any juvenile justice initiative.[17] In doing so, it must be remembered that the implementation of CROC: [18]

> "… should be grounded in a welfare approach, its three core principles having significant implications for youth justice. First, children's status requires discrete recognition and different responses from adult status, while taking account of individual experiences and capacities. Second, children's welfare should be prioritized. This implies treatment support and guidance based on individual needs rather than punishment retribution and deterrence. Third, children should participate fully in decisions affecting their lives, having had opportunities to gain confidence, explore issues of importance to them, learn the skills required to actively participate, and take action on their own behalf."

Professor Terry Carney's warning about the limitations of a rights framework needs also to be heeded:[19]

> "On the one hand it offers the uplifting hope of aspiring standards but, on the other, it also may serve as a distraction from the main debate about political values and resourcing. 'Rights talk … is more effective in protecting individuals from denial of entitlements (such as presumptions of innocence or access to legal advice) than in mobilising resources by groups (such as adequate housing). Civil rights are a political (structural) issue, not merely a precept to be legislated into existence."

A legal shift began in juvenile justice in the mid-1970s from a welfare model to a rights-oriented justice model. Among the rationales for this was a desire to clearly distinguish between state intervention based on the needs versus deeds of young people brought before the court and, in a related vein, to tailor distinct forms of orders which, in the criminal justice domain, were in better conformity with the principle of proportionality.[20]

While the disentanglement of needs and deeds based state intervention may have been an appropriate response to the intrusive legacies of the welfare model, particularly for young women,[21] it is time to consider how a unified forum can retain the best of criminal justice rights protections within a more holistic court context. We have not even begun to move in the U.S. direction in this country however there is at least sign of limited promise. The Standing Committee of Attorneys-General has recently agreed to establish a working group to look at better ways to co-ordinate the Commonwealth family law system with the child protection systems of the States and Territories.[22] Unfortunately, it does not seem that consideration is being given to including juvenile justice issues.

The rethinking that I suggest should be informed by matters such as: the relatively low age of criminal responsibility within Australian jurisdictions; the infrequency with which alleged young offenders contest the charges laid against them; our knowledge of the prevalence of abuse and neglect histories; and the ever-present risk of net-widening. Non-traditional justice system initiatives such as "group-conferencing" – a label which subsumes a variety of structures and aims[23] – drug courts, and unified courts models must be subjected to rigorous, credible and independent evaluations that have a keen eye not just to outcomes but also the protection of young people's rights during the process.[24] Interventions have to be demonstrably effective not only attractive in theory. They must certainly not be counterproductive, no matter how well-intended they are portrayed to be – and I am thinking here, for example, of the so-called "scared straight" programs[25] and the imposition of curfews on young people.[26]

CONCLUSION

This article has advanced a radical and what some would no doubt describe as a pie in the sky proposal in relation to the improvement of the delivery of court services to families in Australia. I have done so advisedly. I do not think much attention has been paid to reform in recent years in this area. It is obvious that the United States has adopted what might be described as a vibrant response to fragmentation from which we can learn. The Australian approach on the other hand appears to be somnolent and disinterested.

In a speech delivered last year in Sydney, the Lord Chief Justice of England and Wales, Lord Woolf of Barnes quoted the person he described as the father of criminology, Sir Leon Radzinovicz. Sir Leon said:

> "No meaningful advance in penal matters can be achieved in contemporary democratic society so long as it remains a topic of political controversy instead of a matter of national concern." [27]

I strongly endorse Lord Woolf's approach. Over the last 15 years in Australia we have seen a steady erosion of principles in relation to the sentencing of both adult and juvenile offenders that has done much to undo many of the advances of the past. We now have more and more people in jail sentenced to increasingly longer terms of imprisonment for reasons that have nothing to do with a scientific approach to the question of criminal punishment. We have had aberrations such as mandatory sentencing laws in relation to juveniles in the Northern Territory and in Western Australia.[28]

Politicians on all sides seem to see votes in appearing to be harsher and harsher upon all forms of criminal offenders regardless of whether there is any evidentiary basis supporting the taking of such action. We see wholesale amendments of legislation to increase penalties without any substance to them beyond popular clamour eagerly led on by radio shock jocks and irresponsible media coverage.

In propounding these severe penalties for criminal behaviour we appear to have learned nothing from history. In a sense the crippling penalties that we now impose for criminal offences will I believe eventually become to be seen as cruel and barbarous as the tortures that our forbears inflicted upon persons as part of the criminal law process.

Instead of following enlightened and sensible initiatives from the United States such as those to which I have referred tonight, we seem hell bent upon imitating the worst excesses of the American criminal justice system. We spend huge amounts of what are supposed to be limited public funds on building more and more prisons and setting up more and more law enforcement agencies while at the same time we starve our universities and research centres of funds, apparently uncaring that it is from these organisations that real advances can be expected.

I think that it behoves all of us to insist to the community that there are other and better ways of achieving a more just society than those we are currently adopting. To my mind, an important element of such a way forward is the unified court approach coupled with the safeguarding of human rights protections.

Endnotes

1. This is an edited text of the of the 2003 John Barry Memorial Lecture delivered on 14 October 2003 at The University of Melbourne Department of Criminology to commemorate the life of one of Australia's outstanding jurists.

2. Shepherd, R.E. (2000) "The Juvenile Court in the 21st Century" 12 CYC- ONLINE available at http://www.cyc-net.org/cyc-online/cycol-0100-juvenile.html.

3. New South Wales Community Services Commission (1996) The Drift of Children in Care into the Juvenile Justice System: Turning Victims into Criminals, Sydney, Australia; Fogarty, J. (1999) Foreword in Cook, S. & Hancock, L (Eds.) Privatising Youth Detention, Centre for Public Policy, University of Melbourne; Elstein, S. G. (1999) "Understanding the Relationship Between Maltreatment and Delinquency" 18(9) Child Law Practice 136 reviews empirical findings on the link and identifies the limitations of such research. Keogh, T. (2002) "Juvenile Recidivism: New and surprising possibilities for mental health promotion and prevention" in Rowling, L. etal (Eds) Mental Health Promotion: Concepts and Practice – Young People, McGraw-Hill, Roseville, Australia.

4. Nicholson, A. and Harrison, M. "Specialist But Not Unified: The Family Court of Australia" Family Law Quarterly, forthcoming.

5. Babb, B. (1998) "Where we stand: An Analysis of America's Family Law Adjudicatory Systems and the mandate to establish unified Family Courts" 32 Family Law Quarterly 31 at 35.

6. Institute of Judicial Administration/American Bar Association (1980) Juvenile Justice Standards relating to Court Organization, Standard 1.1 part 1, 5. See also (1998) "American Bar Association Policy on Unified Family Courts Adopted August 1994" 32 Family Law Quarterly 1.

7. Available at http://www.ncsconline.org/WC/Publications/KIS_FamJus_Trends02_FamFriendPub.pdf . Other research published by the Center found that 14 of 27 family courts without criminal jurisdiction (n=27) and 10 of 19 family courts with criminal jurisdiction (n=19) adopted a "One Judge/One Family Assignment": Uekert, B. with Keith A. and Rubin, T (2002) Integrating Criminal and Civil Matters in Family Courts : Performance Areas and Recommendations, National Center for State Courts at 51 available at http://www.ncsconline.org/WC/Publications/Res_SctFam_FamCtFamVioFinalReportPub.pdf

8. "The Unified Family Court: Preventative, Therapeutic and Restorative Justice for America's Families", essay for the National Centre for Preventive Law, California Western School of Law (Spring 2001) available at http://www.preventivelawyer.org/main/default.asp?pid=essays/town.htm.

9. "Children and the Court System", A paper delivered to The Australian Institute of Criminology conference, Brisbane, 17 June 1999, available at http://www.familycourt.gov.au/papers/html/dessau.html

10. Rubin, H. T. and Flango, V. E (1992) Court Co-Ordination of Family Cases National Center for State Courts, Williamsburg Virginia at 5.

11. (2003) A Strong Presence in the Life of a Child: A Report on Unified Family Courts and Juvenile Delinquency Matters, Center for Families, Children and Courts, University of Baltimore School of Law, 1420 North Charles Street, Baltimore, Maryland 21201.

12. Ibid 15 – 19. In "The Unified Family Court: Preventative, Therapeutic and Restorative Justice for America 's Families", essay for the National Centre for Preventive Law, California Western School of Law (Spring

2001) available at http://www.preventivelawyer.org/main/default.asp?pid=essays/town.htm Judge Michael Town, who has served as Presiding Judge of the family court in Honolulu, one of the oldest unified family courts in the U.S. suggests:

"Such a court must promote and model fairness and effectiveness together with an ethic of care and a restoration of relationships where possible. As a result, future legal and social problems are more likely to be prevented. Public trust and confidence in the judiciary will grow, as will economic and political support."

13. At 4-5.

14. The advantage of judicial involvement in the coordination of services has been graphically demonstrated in the Family Court's Magellan project relating to the management of cases involving serious allegations of child sexual abuse or physical abuse: see Brown, T. with Sheehan, R., Frederico, M. and Hewitt, L. (2002) Resolving Family Violence to Children, the evaluation of Project Magellan, a pilot program for managing Family Court residence and contact disputes when allegations of child abuse have been made available at http://ww.familycourt.gov.au/papers/html/magellan.html. The Family Court of Australia is also aiming to experiment with a less adversarial approach generally to cases involving children.

15. For a wide-ranging assessment of the potential drawbacks of a unified court in the U.S. context with particular reference to juvenile justice issues see Geraghty, A and Mlyniec, W. (2002) "Unified Family Courts: Tempering Enthusiasm with Caution" 40(4) Family Court Review, 435. In respect of domestic violence matters see Dunford- Jackson, B. L., Frederick, L., Hunt, B. and Hoffard, M. (1998) "Unified Family Courts: How Will They Serve Victims of Domestic Violence? 32(1) Family Law Quarterly, 131.

16. The obligations in CROC are elaborated upon by several United Nations rules and guidelines, namely:

- UN Standard Minimum Rules for the Administration of Juvenile Justice 1985 (Beijing Rules) available on-line at http://www.unhchr.ch/html/menu3/b/h_comp48.htm;
- UN Standard Minimum Rules for Non-Custodial Measures 1990 (Tokyo Rules) – available on-line at http://www.unhchr.ch/html/menu3/b/h_comp46.htm;
- UN Guidelines for the Prevention of Juvenile Delinquency 1990 (Riyadh Guidelines) – available on-line at http://www.unhchr.ch/html/menu3/b/h_comp47.htm; and
- UN Rules for the Protection of Juveniles Deprived of Their Liberty 1990 – available on-line at http://www1.umn.edu/humanrts/instree/j1unrjdl.htm

17. See Nicholson, A. and Sandor, D. (2003) "Trying to Better See Both Sides of the Coin", A paper presented at the Children Law UK Conference on Welfare and Justice, London, 23 May 2003, available at http://www.familycourt.gov.au/papers/html/london.html; Naffine, N. (1992) "Children in the Children's Court: Can there be rights without a Remedy?" in Alston P. et al (Eds) Children, Rights and the Law, Oxford University Press. Carney, T. (1997) "Children's Rights and Juvenile Justice: An Agenda" in Borowski, A. and O'Connor, I. (Eds) Juvenile Crime, Justice and Corrections, Longman, Australia.

18. Scraton, P and Haydon, D, (2002) "Challenging the criminalization of children and young people: Securing a rights-based agenda" in Muncie, J. etal (Eds) Youth Justice – Critical Readings, Sage, London at 323.

19. Carney, T. (1997) "Children 's Rights and Juvenile Justice: An Agenda" in Borowski, A. and O'Connor, I. (Eds) Juvenile Crime, Justice and Corrections, Longman, Australia at 465-466.

20. See further Naffine, N. (1992) "Children in the Children's Court: Can there be rights without a Remedy?" in Alston P. et al (Eds) Children, Rights and the Law, Oxford University Press. Carney, T. (1997) "Children's Rights and Juvenile Justice: An Agenda" in Borowski, A. and O'Connor, I. (Eds) Juvenile Crime, Justice and Corrections, Longman, Australia; An international perpective is provided by Gatti, U. (1998) "Types of Judicial Response to Juvenile Delinquency" in Deutsche Vereinigung fur Jugendgerichte und Jugendgerichtshilfen e. V. and The International Association of Juvenile and Family Court Magistrates (Eds) Young Offenders and their Families – The Human Rights Issue: Proceedings of the 14th International Congress in Bremen Germany from August 28 to September 2 1994, Monchengladbach : Forum-Verl, Godenberg Germany.

21. See for example Alder, C. and Baines, M. (Eds) (1996) …and when she was bad? Working with young women in juvenile justice & related areas, National Clearinghouse for Youth Studies, Hobart, Australia. The problem was not confined to Australia: Hudson, A. "'Troublesome girls': towards alternative definitions and policies" in Cain, M. (Ed.) Growing Up Good, Sage, London, 197.

22. Attorney-General of the Commonwealth of Australia, News Release, 8 August 2003. See also, Family Law Council (2002) Family Law and Child Protection Final Report, AGPS, Canberra.

23. Alder, C. and Wundersitz, J. (Eds) (1994) Family Conferencing and Juvenile Justice : The Way "Forward or Misplaced Optimism, Australian Institute of Criminology, Canberra; Carney, T. (1997) "Children's Rights and Juvenile Justice: An Agenda" in Borowski, A. and O'Connor, I. (Eds) Juvenile Crime, Justice and Corrections, Longman, Australia at 476-477.

24. (1995) "Conferences: set up to fail? 3(4) rights now! newsletter of the children's and youth law centre, 1; McMahon, R. (March 2002) "The NSW Youth Drug Court First Implementation Review" rights now! newsletter of the children's and youth law centre, 9.

25. McCord, J. (2002) "Counterproductive Juvenile Justice" 35(2) Australian and New Zealand Journal of Criminology 238.

26. Deslandes, A. (March 2002) "Time Will Tell" rights now! newsletter of the children's and youth law centre, 7.

27. (2003) "A new approach to sentencing" 15(3) Judicial Officers Bulletin 1 at 1.

28. See for example The National Children's and Youth Law Centre and The Australian Section – Defence for Children International (2000) Submission to the Human Rights Committee Concerning Australia's Third and Fourth Periodic Reports under the International Covenant on Civil and Political Rights available at http://www.dci-au.org/html/iccpr.html.

Chief Justice Nicholson retires from office in mid-2004 after more than 22 years as a Judge. DCI - Australia takes this opportunity to thank him for his championing of children's rights through his judgments, his leadership of the Court, and by the public positions he has taken.