Notes on the Lecture given by Mr Mort Stamm at the Australian Crime Prevention Council (Victorian Branch) meeting on Children's Court held 1st May, 1978 — prepared and submitted by Mr Grant Johnson, associate member and senior social worker with Correctional Services Division of the Victorian Social Welfare Department.

The Children's Court: the formalisation of the process

The Politics of Formalisation

Formalisation refers to a fair and equitable arrangement which puts a child on equal footing with the Government. Children must have more than just a technical right to legal assistance, and this should be either at the expense of the parents or the State.

Reference: Legal Resources Book, Chapter 6.

6% of children appearing before the Children's Court at present have legal representation. There are injustices being brought in the process of pushing rights.

What good is the right to counsel if a child cannot afford it. What good is the right to silence if the Police force an alleged offender to talk. Legal assistance is therefore essential for the child to be given his fair protection. There is an old American saying, "he who has himself for a client is a fool." There can be no fairness when the child faces court alone. Legal representation is the corner stone formalisation.

The State must ensure that the child's alleged needs are proved before a court rather than assumed. Children also need legal help before a Court appearance. The State has a duty and an interest to ensure that the child did in fact do the alleged act. The court should decide this matter on the basis of evidence put before it.

"Due process or fairness is the beginning of rehabilitation."

There are two theories of criminological thinking which have lead to our current modes of operation.

(a) **the positivist criminological tradition** — dominates the thinking of the court today — e.g. offences are vaguely worded, the powers of the Director General of Social Welfare in Sections 31 to 36 of the Social Welfare Act are too broad, or the uncertainty of the treatment orientation of the disposition powers of the courts. Therefore, there are

(i) vague offences
(ii) broad powers to intervene
(iii) stress on State intervention.

This amounts to a parental attitude on the part of the State. This theory supports the rule of men over the rule of law, and yet the latter is supposed to be sacrosanct. This appears to be anti-democratic. It appears to be ingrained in the functions of the Children's Court which has grown up with it, as has the community.

We need more than just recognition of Children's rights — we need action.

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(b) **the classical school of criminological stresses** —

(i) clearly stated offences
(ii) protection of individual rights
(iii) personal accountability before Government action
(iv) the guilty should go free rather than the innocent being punished
(v) the rule of law over the rule of men
(vi) more in line with democracy

Therefore, the classical school differs significantly from the positivist school.

The United States and Australia are formally classical in orientation, but in respect of the Children's Court, they are caught up in the political contradictions of the positivist school. It is interesting to note that the positivist school and the Children's Court developed at the same time. (South Australia had the first Children's Court in the world).

Police and the prosecution seem to have a very strong influence in the Court.

In the Children's Court, there is a conflict between two schools of thought — law and social work — one is legalistic and the other paternalistic. We appear to be trying to accommodate both philosophies in our courts, and the outcome is not particularly satisfactory. The positivist influence must be reduced to that of a dispositional alternative.

The child must be on equal footing with the State in defending himself.

In Kentucky, until 1978, Children's Court's Magistrates did not have to be lawyers, rather, they were elected. In many States, power lay in family members, and there were situations where families controlled everything in the State, including the Police Force.

A 1966 United States Supreme Court decision, lead to the requirement of fairness and due process in Children's Courts. This lead to the introduction of lawyers into the courts, and there was recognition of the right of the child to treatment rehabilitation, to prevent his constitutional rights being violated.

Reference: Juvenile Justice Standards published by the Institute of Judicial Administration.

The emphasis therefore is on reconciling the two schools of criminology in favour of classical and away from positiveness — not emphasing rehabilitation. It emphasises the child having a say in what happens to him — therefore there is formalisation of the process. This change meant formalisation of a process which had formerly operated on sheer caprice.

In 1971, in the United States, there were too many children being found guilty of delinquency, and being given criminal records. It was therefore decided to attempt to institute the requirements of due process in such a way that the court could not dispose of the case unless there was due process and unless the Judge certified that the constitutional rights of the child were upheld.

There were also too many children going to State Institutions mainly as a result of inadequate agency procedures and poor court jurisdiction. Decisions that were made were not always properly followed up. Under due process, no child could go to an institution unless the Government agreed, and then only as a last resort. Social Workers agreed with this in theory in the past, but they failed to take action because children had still been going to institutions.

The aim of the Children's Court activists was therefore:

(i) legislative action
(ii) to control the administrative arrangements in agencies.

There were specific procedures laid down from the time of the first police contact with the child. There was an almost immediate decision by the Judge on:

(i) if the offence was actually committed by the child
(ii) if the child should be detained.

If not, the child was freed and there was no further action.

In the United States, the Judge can decide if a case should go before the court — this is not the case in Victoria.

In the United States, citizen initiative can amend a position out of court if the Judge agrees, by the use of citizen panels. The courts could then delegate responsibility to judicially approve citizens. This also enabled many children not to appear before the court at all, and helped to decriminalise some areas such as truancy which had repercussions in freeing the over-crowded courts.

The constitutional formalities and rights of the child, however, were regarded as paramount. Otherwise the court's decision was not valid. This meant that lawyers became involved in the Children's Court, rather than Social Workers, and it overcame a conflict if a Social Worker prosecuted and then offered help. Furthermore, there was recognition of:

(i) the right to a speedy trial
(ii) the right to counsel through the whole process
(iii) the right to immediate appeal
(iv) behaviour offences and criminals were not mixed

This lead to:
(a) a decrease in the number appearing before the court
(b) a decrease in the numbers being held in institutions

The community was therefore better served by keeping so many children out of the system. The reduction in the court case-load enabled Social Workers to do better planning for the more difficult cases which contributed to the closing of some institutions, more money for fewer children, and better programmes. The court could therefore deal more creatively with children.

Overall then there could be no official intervention in a child's life without due process, and even then there could only be intervention which was beneficial for the child.

To do this, Judges needed alternatives. Judicial iformality needed to blend with due process. If the court needed to act authoritatively, the child must warrant it. If the child could be helped in the Children's Court, if there was hope for him, he was not to go to a criminal court.

In the United States, the implementation of counsel for children was helped by the public defender scheme, which was being introduced for the use of the general public. The availability, funding and integrity of counsel are essential in the formalisation of the process — this demands fairness. It is recognised that not all legal personnel are competent to work in the Children's Court which is a specialist area. The Judge must also be a lawyer to ensure that he understands the legal Counsel's arguments.

There was administrative stress on the understanding that children before the court are basically incompetent. Therefore, the social workers were involved in what was happening with families and in institutions. The Police were not happy with social work involvement and with the understanding that perhaps a family is responsible for the behaviour of children. As a result of this, Police often could not prove their cases and they resented lawyers and the due process system itself.

However, a working relationship had to be developed and it was noted that the numbers coming into the system decreased, there were less charges, there were less children in institutions. Therefore, there was less official intervention.

With the advent of lawyers, social work agencies started more indepth studies before placing children in institutions. They started to use community resources more, even for "heavy" offenders. There were more diversionary programmes to keep children in the community. Community panels were established which, instead of institutionalising children, required them to apologise to the people they had offended, and this meant a loss of prestige for children. Whilst there was much pressure against such programmes, the States supported them and as they controlled most community resources, due process had some hope. After some months, State agencies and institutions noticed the decline in numbers and this lead them to question about the future of staff employment. In 1973, there were some institutions with full staff complements but no children. This eventually led to welfare between social workers in the institutions and the community. Eventually administrative policies were changed to fill beds leading to a lowering of the morale of community staff, and return to the pre 1971 system.

The question to be asked is why do the State act that way?
(a) to protect the interests of children; or
(b) to protect its own needs to fill institutions and keep jobs for staff

The court is only one part of the criminal system, we need to look at the whole process from top to bottom. The State has an obligation to ensure that when it intervenes, there is a reason for the intervention. The Police are basically against the openness of courts because they can see their authority being undermined. The social work profession has an inadequately developed philosophy and a weak imperical basis for supporting one programme over another. Formalisation of the due process in the Children's Court can only have positive effects for children in a democratic society.

Notes on speech in reply to The Hon. Hadden Storey, Attorney General Of Victoria.

Children's Court Judges have independence from the legislature. In 1973, there was a new Children's Court Act, in which there was no major review of philosophy, but there was consolidation.

The Children's Court hears: indictable offences (excluding homicide) care and protection applications uncontrollable chldren cases.

The Children's Court requires proof for criminal offences, based on relevant and admissible evidence. Guilt must be beyond reasonable doubt, but:
(1) this is not spelt out in the Act
(2) this is not always given effect to
(3) children do not necessarily have counsel.

In Dennis Challinger's book "Young Offenders", he states that "the number of children appearing before the court is increasing.
1960 — 4300 appeared before the court)
1975 — 9000 appeared before the court)
Increase of 115%. The police warning system has increased by 915% in the same time.

The 1976 Norgard Report stated that institutionalisation is the last resort. The Norgard Report had two major recommendations —
(a) the formal Children's Court proceedings should be used only when guilt/innocence is in dispute, or when the offence is serious or when more than a mere warning is needed.
(b) legal aid is necessary if the children's legal status is to be changed. The recognition of the need for counsel is seen by the Duty Solicitor scheme in Children's Courts which is increasingly being used in suburban courts.

There is a need for legal representation at two stages:—
(a) the determination of guilt/innocence
(b) the disposition of the child if he is found guilty.

The Children's Court has wide powers under Section 26, and can impose sanctions affecting the child's legal status. Formalisation of the court process is also necessary in care and protection applications or if a child is uncontrollable — these are currently vague and subjective areas. Norgard criticized this, especially the language in the Social Welfare Act, e.g. alms, begging etc. He said that more justifiable criteria were required.

With respect to uncontrollable children, the Community Welfare Services Bill amends Section 34 of the Social Welfare Act 1970. The tenor of the Community Welfare Services Bill is to provide for positive family support — it takes an overview to prevent the situation where a child may come before the court.

The Norgard Report has basically been accepted by the Government, and there are two Committees now operating, which can effectively consider the questions raised in the paper delivered by Mr. Stamm:
(a) the Central Implementation Committee to look at the whole report and consider how the recommendations can be implemented.
(b) Inter-Departmental Committee.

Professor Sackville in the poverty report takes account of the positivist and classifical schools. He advocates appropriate institutions to deal with different types of offenders. He questions if the Children's Court should have different dispositional powers to the Adult Court. The Children's Court Act enables a child to be committed to the care of the Director General of Social Welfare for an indeterminate period, the Adult Court cannot. This presumes a child should be brought before a court in the first place.

In Victoria, we do not have community panels but use a police warning system for first offenders. In 1960, this accounted for 13% of juvenile/police contacts. In 1975, this figure rose to 48%. Norgard advocated the formalisation of this system and its further evaluation.

An alternative is the South Australian Panel system. 90% of children who appear before this Panel do not come in contact with the police or the courts again. This compares to 80% of those dealt with in the police warning system.

However, diversionary programmes must be optional, according to the needs of the child (positivist school).

With care and protection applications, Sackville suggests the Family Law Court would be a better venue as they are more equipped for this purpose. However, the court should only be used after all community welfare facilities have been exhausted. If Sackville's proposal was to be adopted, family courts would need to become State rather than Commonwealth responsibilities, but this would probably not be difficult.

The rights of the child however are still paramount and the child should be represented. It is noted that although there is an increase in the number of cases represented in offence hearings, it is not often the child is represented in care and protection cases.