

ARTICLES

Rebecca J Bailey*

A CHANGE IN IDEOLOGY IN THE TREATMENT OF YOUNG OFFENDERS IN SOUTH AUSTRALIA: THE CHILDREN'S PROTECTION AND YOUNG OFFENDERS ACT 1979-1982

(1) INTRODUCTION: POLICY CONSIDERATIONS

"The expansion of the child care service in the twentieth century and the development of preventive social work both served further to consolidate children in trouble into a single conceptual category: the deprived and the depraved one and the same. Couched in the language of 'welfare', and supported by an army of professionals, attention was continually diverted from what children do to what children are . . . Consequently, children became ensnared in a series of discretionary processes within which the safeguarding of the rights of individual children was subordinated to what were seen as wider social problems. This trend culminated in the *Children and Young Persons Act 1969* (U.K.)." ¹

These criticisms of the system of juvenile justice in England were echoed in South Australia in the late 1970s. Separate juvenile courts had first been established in this State in 1895.² From the beginning of this century until the 1970s, the system of criminal justice for young offenders in most common law jurisdictions was dominated by positivist ideology.³ According to the positivist school, the fact of offending is seen as a symptom of wider problems experienced by the offending individual whether internal or external in origin. The school of "biological determinists" such as Lombroso and Eysenck⁴ suffered disfavour, but the views of the "cultural" or "social" determinists enjoyed a high degree of popularity. If offending is viewed as a symptom of social or cultural problems, and its occurrence is determined by them, then the appropriate response of society's institutions is treatment of the offender, rather than punishment. This is especially so in the case of children, who because of youth and inexperience must be held less responsible than adults for criminal actions, and have the greatest potential for rehabilitation. The application of positivist ideology may lead to a blurring of the distinction between the criminal and "welfare" or "protective" jurisdictions of children's courts. Moreover, similar blurring occurs of the respective roles of the judiciary and the executive. Courts may be seen as acting as agents for welfare intervention, the child's future after a court appearance being largely in the discretion of the appropriate welfare authority.

* BA, BCL (Oxon), Senior Lecturer in Law, University of Adelaide.

¹ Morris, Giller, Szwed and Geach, *Justice for Children* (1980) 7.

² For an historical analysis of the development of children's courts in various jurisdictions see Parker, "The Juvenile Court Movement" (1976) 26 U Tor LJ 140-172.

³ For a succinct account of the positivist school of criminology see Vold, *Theoretical Criminology* (2nd edn 1979) ch3.

⁴ Eg Lombroso, *L'uomo delinquente* (4th edn 1889); Eysenck, *Crime and Personality* (1964).

The Juvenile Courts Act 1971-1974 (SA), hailed as highly progressive at its enactment, represented the positivist approach. Its provisions will be discussed later in detail when specific comparisons with subsequent legislation are made. For the moment, several striking features of the 1971 Act deserve mention. Offenders under sixteen were not charged before the Juvenile Court with the commission of an offence, but instead a complaint was laid that the child was in need of care and control, the alleged offence being evidence of this.⁵ In such proceedings, no conviction was recorded, but the Court could place the child under the care and control of the Minister of Community Welfare.⁶ If the case was an appropriate one for detention, the Juvenile Court itself could make only a twenty-one day holding order. Since the making of the care and control order transferred legal guardianship to the Minister, the long-term detention of the child was a matter for administrative discretion. Offenders between sixteen and eighteen years of age were charged with the commission of the offence, and could be convicted. Nevertheless they too could be the subjects of the same types of orders as their younger counterparts,⁷ with the additional possibility of a fine. If the Juvenile Court found a child to be neglected or uncontrolled, an order was made identical in form to one of the alternatives in the criminal jurisdiction: the child could be placed under the care and control of the Minister of Community Welfare until the age of eighteen.⁸ Moreover, proceedings in relation to neglected or uncontrolled children were in fact "quasi-criminal", in that the child was charged with being neglected or uncontrolled.

A reassessment of positivist ideology in the area of young offenders was assisted by the landmark decision of the Supreme Court of the United States in *Re Gault*.⁹ The decision highlighted the dangers inherent in a "welfare" or "treatment" approach to offending. Gerald Gault, aged fifteen years, was taken into custody following a complaint that he had made indecent telephone calls to a neighbour. After hearings before a judge of the Juvenile Court of Gila County, Arizona, Gerald was committed to the State Industrial School as a juvenile delinquent until he should reach majority (twenty-one). This particular offence entailed for adults a fine of \$5-\$50, or imprisonment in jail for not more than two months. Gerald's parents challenged the Juvenile Court's order, arguing that the Arizona Juvenile Code was unconstitutional and that the procedure used in Gerald's case constituted a denial of various rights of due process. Their challenge failed in the State Supreme Court, but succeeded in the Supreme Court of the United States. Whilst much of the decision turned on the particular American legislation, the opinion of the US Supreme Court contains valuable and important discussion of general principle. Justice Fortas delivered the majority opinion of the Court.¹⁰ He highlighted the potential for deprivation of rights and liberty of the individual child in the adoption of a "clinical" or "protective" approach to young offenders. He stressed that young offenders should

5 Juvenile Courts Act 1971-1974 (SA) s42.

6 Other alternatives were to discharge the child unconditionally, or discharge the child on a bond with various conditions: *ibid*.

7 Juvenile Courts Act 1971-1974 (SA) s43.

8 *Ibid* s56.

9 387 US 1 (1966).

10 *Ibid* 12-31.

not, under the guise of the "welfare" approach, be denied the fundamental protection of due process of law afforded to adults. To quote some extracts from his opinion:

"From the inception of the juvenile court system, wide differences have been tolerated — indeed insisted upon — between the procedural rights accorded to adults and those of juveniles. In practically all jurisdictions, there are rights granted to adults which are withheld from juveniles. In addition to the specific problems involved in the present case, for example, it has been held that the juvenile is not entitled to bail, to indictment by grand jury, to a public trial or to trial by jury. It is frequent practice that rules governing the arrest and interrogation of adults by the police are not observed in the case of juveniles . . .

The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals. They were profoundly convinced that society's duty to the child could not be confined by the concept of justice alone. They believed that society's role was not to ascertain whether the child was 'guilty' or 'innocent', but 'What is he, how has he become what he is, and what had best be done in his interest and in the interest of the State to save him from a downward career'. The child — essentially good, as they saw it — was to be made 'to feel that he is the object of (the State's) care and solicitude', not that he was under arrest or on trial. The rules of criminal procedure were therefore altogether inapplicable. The apparent rigidities, technicalities, and harshness which they observed in both substantive and procedural criminal law were therefore to be discarded. The idea of crime and punishment was to be abandoned. The child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalisation, were to be 'clinical' rather than punitive . . .

Accordingly, the highest motives and most enlightened impulses led to a peculiar system for juveniles, unknown to our law in any comparable context. The constitutional and theoretical basis for this peculiar system is — to say the least — debatable . . .

Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy. Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the State may exercise."¹¹

In 1977, Mohr J in South Australia said that the decision in *Re Gault*

"points the way for the future by re-asserting the need for the protection of a child's legal rights, but also poses the dilemma of how this protection is to be achieved whilst still providing a distinctive system of criminal justice for children."¹²

¹¹ Ibid.

¹² SA, Royal Commission into the Administration of the Juvenile Courts Act and other Associated Matters, *Report Part II* (1977) 17 (hereinafter the "Mohr Report").

It was never alleged in South Australia that the substance or procedure of the Juvenile Courts Act were strictly comparable to those in Arizona which gave rise to the decision in *Re Gault*. However, in 1976 a Royal Commission was established to enquire into and report inter alia on the administration of the Act, and whether any changes by legislation or otherwise were necessary or desirable for the proper implementation of the policy of the Government enacted in s3 of the Act. Mohr J was appointed Commissioner, and his Report appeared in 1977. The Report contained a fundamental reconsideration of principles for the system of juvenile justice. Many of the recommendations were implemented in the Children's Protection and Young Offenders Act 1979, which came into operation on 1 July that year.

The Report at the outset posed the essential dilemma: how to provide a special system of juvenile justice without eroding fundamental rights. Mohr J's delineation of the problem deserves quotation at length:

"I took as a starting point the basic fact that I was dealing with a system of criminal justice, albeit a specialised one in the sense that after the guilt of an accused person had been established a different system of sentencing or disposal would follow from that operating in the adult world. However, I was determined that in providing this special system of Juvenile Justice for young people there was to be no erosion of the fundamental rights of accused persons nor indeed of convicted persons under the guise of 'helping the child' or putting the interests of the child 'as of paramount importance'. It is fundamental in what follows in this report that no child shall be found guilty of a crime by means which would not and do not apply in the adult world, and that having been found guilty, no child should be subjected to processes which are non-judicial (in the widest sense) which do not apply in the adult world.

It is fashionable in some quarters to see juvenile crime as, in effect, an illness with the sick person to be treated in one way or another to cure the sickness. That is to place the emphasis on remedial work in the child's environment and on his personality without much regard to the nature of his offence. There is much to be said for this approach, and I do not deny it, but to use as the selective process for diagnosing the illness a system of criminal justice seems to me to be a perversion of what is normally thought to be a foundation of such a system. That there are children in the community who need help, encouragement and guidance is undoubted and programmes designed to provide this sort of assistance are properly the province of a department such as Community Welfare. However, to use a system of criminal justice, modified at the disposal stage, and disregard the seriousness of the offence and prefer the social circumstances of the offender in deciding what course to follow after conviction is not to give the child more rights than an adult, it is to deny them. A child because of youth and immaturity needs more protection from the processes of the criminal law rather than less than that offered to an adult. A child needs to be protected at all stages from unfair and arbitrary treatment, whether it be at the level of police investigation or in the decision as to what is to follow conviction and how that decision is to be implemented. The guarantee afforded to an adult that he receive such treatment if

involved in the processes of the criminal law comes from his access to courts of law and the availability of independent legal advice. The foregoing sentences set out a concept of justice which I take to be axiomatic.”¹³

The Commissioner began with a consideration of s3 of the Juvenile Courts Act (the “policy” section):

“3. In any proceedings under this Act, a juvenile court or a juvenile aid panel shall treat the interests of the child in respect of whom the proceedings are brought as the paramount consideration and, with the object of protecting or promoting those interests, shall in exercising the powers conferred by this Act adopt a course calculated to:

(a) secure for the child such care, guidance and correction as will conduce to the welfare of the child and the public interest;

and

(b) conserve or promote, as far as may be possible a satisfactory relationship between the child and other members of, or persons within, his family or domestic environment,

and the child shall not be removed from the care of his parents or guardians except where his own welfare, or the public interest, cannot, in the opinion of a court, be adequately safeguarded otherwise than by such removal.”

The Commissioner addressed a number of issues arising from the interpretation of this section. In the first place,

“The question arises as to what are the ‘interests of the child’ which are to be ‘the paramount consideration’.”¹⁴

Mohr J considered that one such interest must be to ensure that no child is found to have committed a crime otherwise than by due process of law (allowing for modifications appropriate to the child’s status as a child). If guilt is not established, then the organs of criminal justice (whether Court or Panel) have no further function to perform,

“notwithstanding the social circumstances of the child which in some . . . cases may call out for intervention of . . . a ‘Community Welfare’ kind.”¹⁵

The Commissioner then considered how, once the guilt of an accused child had been established, the organs of criminal justice could fulfil the obligations cast upon them by s3 of the Juvenile Courts Act 1971-1974. The options open to the Court under the Act in respect of children under sixteen years of age were (i) to discharge the child, (ii) to discharge the child on a bond with or without conditions, or (iii) place the child under the care and control of the Minister of Community Welfare.¹⁶ The Court was also empowered to make an ancillary order

¹³ Ibid 7-8.

¹⁴ Ibid 20.

¹⁵ Ibid 21.

¹⁶ Juvenile Courts Act 1971-1974 (SA) s42(1) and (2).

that the child be committed to a home for a maximum period of twenty-one days.¹⁷ In relation to offenders aged between sixteen and eighteen years of age, the Court could, as an additional alternative, fine the child (up to \$100).

Mohr J envisaged the principal difficulty facing the Juvenile Court in fulfilling its duties under s3 as follows. Once the Court had imposed its "ultimate penalty" and placed the child under the care and control of the Minister of Community Welfare, how could the Court discharge the statutory obligation of securing for the child

"such care, guidance and correction as will conduce to the welfare of the child . . . and conserve . . . a satisfactory relationship between the child and other members . . . within [the] family . . . environment".¹⁸

When the Court consigned the child to the care and control of the Minister,

"what happened to the child would be subject to *administrative* decision as opposed to an order of the *Court*".¹⁹

Mohr J pointed out the falsity of any supposed dichotomy between the "interests of the child" and the "public interest". The two interests are in fact identical: that the organs of criminal justice should adopt a course, following a finding of guilt, calculated to ensure that the child commits no further offences in the future,

"and a desired but not essential by-product of that course . . . that the child can take a decent and useful place in society".²⁰

The Commissioner therefore recommended that s3 of the Juvenile Courts Act be replaced by the following preamble, modelled very closely on a publication of the Solicitor-General of Canada:²¹

- "(i) children who commit offences should bear responsibility for their contraventions and while children should not in all instances be held accountable in the same manner or suffer the same consequences for their behaviour as adults, society must nonetheless be afforded the necessary protection from such illegal behaviour;
- (ii) in affording society protection from illegal behaviour, it is to be recognized that children require supervision, discipline and control, but also, because of their state of dependency and level of development and maturity, children have special needs and require guidance and assistance;
- (iii) where not inconsistent with the protection of society consideration should be given to using alternative social and legal measures for dealing with children who have committed offences;
- (iv) in determining the responsibility of children under this Act, it is to be recognized that children have rights and freedoms

17 Ibid s42(4).

18 Ibid s3(a) and (b).

19 Mohr Report, 24. Emphasis supplied.

20 Ibid 29.

21 Canada, Solicitor-General, *Highlights of the Proposed New Legislation for Young Offenders* (March 1977). See Mohr Report, 27-29.

equal to those of adults; and, in particular, a right to be heard in the course of, and to participate in, the processes that lead to decisions that affect them as well as special guarantees of these rights;

- (v) in the application of this Act, the rights and freedoms of children include a right to the least interference with freedom, having regard to the protection of society, the needs of children, and the interests of their families;
- (vi) children have the right, in every instance where they have rights or freedoms which may be affected by this Act, to be informed as to what those rights and freedoms are;
- (vii) it is recognized that parents have responsibility for the care and supervision of their children, therefore, children should be removed from parental supervision either partly or entirely only when all other measures that provide for continuing parental supervision are inappropriate . . .”

Mohr J's recommendation was that the existing legislation be replaced by a new Act, entitled “The Children and Young Offenders Act”, and that the Court be renamed “The Children's Court”.

(2) THE NEW LEGISLATION

Most of the recommendations of the Mohr Report found legislative expression in the new Act which in fact bore the title “The Children's Protection and Young Offenders Act 1979”. The minimum age of criminal responsibility is ten years,²² and the age of majority is eighteen years. The relevant date is that of the commission of the alleged offence, not that of the hearing or the sentence.²³ The detailed provisions of the Act, and the changes effected by it, will now be considered.

(i) The New Policy Section

Section 3 of the Juvenile Courts Act was not in fact replaced by the exact formulation recommended by Mohr J. The new section (Children's Protection and Young Offenders Act 1979 s7) is as follows:

“7. In any proceedings under this Act, any court, panel or other body or person, in the exercise of its or his powers in relation to the child the subject of the proceedings, shall seek to secure for the child such care, correction, control or guidance as will best lead to the proper development of his personality and to his development into a responsible and useful member of the community and, in so doing, shall consider the following factors:—

- (a) the need to preserve and strengthen the relationship between the child and his parents and other members of his family;
- (b) the desirability of leaving the child within his own home;
- (c) the desirability of allowing the education or employment of the child to continue without interruption;

22 Children's Protection and Young Offenders Act 1979-1982 (SA) s66. Up to the age of 14, the “doli incapax” presumption applies, ie, a child can be convicted of a crime only if it can be proved that he had the capacity to know right from wrong. In practice, the presumption is fairly easily rebutted

23 Ibid s4; *R v Sander* (1979) 22 SASR 361.

- (d) where appropriate, the need to ensure that the child is aware that he must bear responsibility for any action of his against the law;
- and
- (e) where appropriate, the need to protect the community, or any person, from the violent or other wrongful acts of the child."

Several points call for comment. The express reference to the paramountcy of the interests of the child, found in the equivalent section of the repealed Act, no longer appears. However, it must be remembered that Mohr J considered that the interests of the child and the public interests are one and the same, namely that the organs of the criminal justice system seek to achieve the objects stated in the first paragraph of s7. Thus in reality the emphasis of the new section remains on the child's interests. Factors (a) and (b) echo the repealed section. It has been suggested, somewhat superficially, by some that the express inclusion of factors (d) and (e) somehow represent a "tougher stand". In fact, it must not be forgotten that the intention of Commissioner Mohr was to give children rights which they did not have under the previous legislation. The reference to "responsibility for . . . action . . . against the law" appears to be an expression of neo-classical philosophy. According to the neo-classical school,²⁴ criminal action is the result of an exercise of free will, with the proviso that an individual's characteristics (eg youth) may affect the exercise of will and therefore require consideration at the dispositional stage. Factor (d) contains the important qualification contained in the words "where appropriate". For instance, the factor may be given weight only in the case of older "young" offenders of whom a full sense of responsibility can be expected. Section 3 of the repealed Act referred to safeguarding the public interest, but obviously factor (e) of the new s7 is expressed more strongly.

The Children's Court is bound by the policy stated in s7 when it determines what is the appropriate penalty to impose upon a child found guilty of an offence. The interpretation of the section in sentencing will be discussed *infra*.

(ii) Diversionary Procedures

"Diversion" describes those procedures whereby young offenders are directed away from an appearance in court and instead are dealt with less formally. The rationale is that it is neither necessary nor desirable for all cases to go to court. A policy of diversion adopts a number of arguments in its jurisdiction. The first is based on "labelling theory":²⁵ a court appearance stigmatises the child in their own and others' eyes and causes them to act in the future in accordance with that perception. The second argument is an economic one: diversionary procedures keep out of court trivial matters which do not require the time and money involved in a full judicial hearing. Thirdly, the informal nature of diversionary procedures is conducive to crime prevention, in that a more constructive approach can be taken to the young offender in the form of counselling, advising and warning. Nevertheless, all juvenile justice

²⁴ See Vold, *supra* n 3 at 26-28.

²⁵ Eg Matza, *Delinquency and Drift* (1964).

systems accept that some cases must go to court, for example, serious offences and repeated offenders.

South Australia has had a sophisticated statutory system of diversionary procedure since 1972. However, one must not overlook the very important role played by the police force as a "first level filter" at the point of entry into the criminal justice system. It is the police who exercise a high degree of control over the number of cases proceeded with (and consequently over crime statistics). There are a number of ways in which a young offender may be dealt with by the police. A child may be warned on the spot, with no record made. Or a report may be made, and the child given an official warning by a senior officer at the station. There may be some form of subsequent counselling. In none of these instances will a complaint be laid, and so the child does not formally enter the criminal justice system.

It is for its system of Panels that the South Australian system of juvenile justice is particularly noted. Panels keep non-serious matters and first offenders out of the Children's Court. "Juvenile Aid Panels" existed under the Juvenile Courts Act 1971-1974. The Children's Protection and Young Offenders Act 1979 further refined the system by creating "Screening Panels" which determine whether a case is to be dealt with by diversionary procedures or by the Court. Screening Panels are statutory bodies.²⁶ They can consider all complaints laid against those under eighteen years of age, except homicide and certain traffic offences allegedly committed by those under sixteen years of age.²⁷ A Screening Panel is composed of a police officer and an officer of the South Australian Department for Community Welfare. The Panel considers the case and any existing reports on the child held by the Police or the Department for Community Welfare, and makes a decision. Three options are open. The Screening Panel may certify that a child need not be dealt with at all for the alleged offence, and in doing so it may recommend that the child be cautioned by a police officer (this is the result of a 1982 amendment to the Act²⁸); that the matter be heard by a Children's Aid Panel, in which case no complaint is laid; or that the matter be referred to the Children's Court, in which case a complaint must be laid.²⁹ Thus Screening Panels play a crucial role in determining what matters go where in the South Australian juvenile justice system. How do Screening Panels make their decisions? They are bound by the principles in s7 of the Act (*supra*). Also, guidelines have been produced by both the Police Department and the Department for Community Welfare. Factors to be considered include the seriousness of the alleged offence, whether the child is already under a court order, and the child's past history. More than two previous appearances before a Children's Aid Panel may mean that the child should be referred to the Court. A Screening Panel is in no way a judicial body, and there is no right of appearance nor of appeal.³⁰

26 Children's Protection and Young Offenders Act 1979-1982 ss25-30. See Seymour *Juvenile Justice in South Australia* (1983) ch3.

27 Illegal use of motor vehicles and procuring their use by fraud (Road Traffic Act 1961-1982 (SA)) are prescribed offences under reg8 of the Children's Protection and Young Offenders Regulations 1979-1980 and so can be dealt with by a Children's Aid Panel or the Children's Court.

28 Children's Protection and Young Offenders Act 1979-1982 (SA) s28(2a).

29 *Ibid* s30.

30 *Ibid* s28(2) and (4).

A Screening Panel may decide that a case should go to a Children's Aid Panel ³¹ (called "Juvenile Aid Panels" under the repealed legislation). The scope of Aid Panels' work was increased by the 1979 legislation. Under the Juvenile Courts Act 1971-1974, Juvenile Aid Panels could only deal with alleged offenders up to sixteen years of age. Under the Children's Protection and Young Offenders Act 1979, those up to eighteen years of age can be dealt with by Children's Aid Panels. A Children's Aid Panel may deal with all types of offences except homicide and some traffic offences.³² An Aid Panel is composed in the same way as a Screening Panel. The hearing is informal; the child and a parent or guardian attend, and the proceedings last approximately three quarters of an hour. They usually take place in a Department for Community Welfare office. It is a condition precedent of a case being dealt with by a Children's Aid Panel that the child admit the allegation;³³ if the allegation is not admitted, the case must go to court. Moreover a child has the right to request that the case go to court.

A Children's Aid Panel is not a court; it does not convict or sentence a child. Its powers are contained in s35(2) of the 1979 Act:

- " (a) the panel may warn or counsel the child and his guardians;
- (b) the panel may request the child to undertake, in writing, to comply with such directions as may be given by the panel, including directions as to any training or rehabilitative programme to be undergone by the child;
- (c) the panel may request a guardian of the child to undertake, in writing, to comply with such directions as may be given by the panel to assist or supervise the child in any training or rehabilitative programme to be undergone by the child;
- (d) the panel may vary the terms of any undertaking on the application of the child or a guardian of the child, but not so as to extend the period of the undertaking;

and

- (e) the panel may, at any time within the period of an undertaking, request the child to give a fresh undertaking in substitution for that existing undertaking, but not so as to extend the period of that undertaking."

By far the most common of these in practice is the Panel warning and counselling the child (this is the result of over 80% of Panel appearances). If a child fails to appear before a Children's Aid Panel, or if they refuse to give an undertaking, or if an undertaking is breached, the matter may be referred to the Court.³⁴

What evaluation can be made of Children's Aid Panels in South Australia? In practice there are more appearances before Panels than before the Court. In the four year period from 1 July 1979 to 30 June 1983, there were 21,147 appearances before Children's Aid Panels in South Australia, and 14,276 appearances before the Children's Court.³⁵

31 Ibid ss31-41. See Seymour, *supra* n 26 ch4.

32 Ibid s26.

33 Ibid s35(1)(b).

34 Ibid s36.

35 All statistics cited were obtained from records held by the South Australian Department for Community Welfare.

One aim of Children's Aid Panels is to reduce youth offending, by offering constructive advice to the child and family and ensuring that the child is aware of the consequences of future offending. An undertaking is intended to determine future conduct. Panels are also intended to avoid the stigma of a court appearance. Moreover from the community's point of view they provide a relatively cheap and quick means of dealing with such cases as do not need to go to court. Nevertheless criticisms of the Panel system have been voiced.³⁶ The requirement that a child admit the allegation before being dealt with by a Panel is seen by some as a form of disguised coercion: do children admit offences which they have not in fact committed in order to avoid a court appearance? No legal representation is permitted before a Children's Aid Panel. It is submitted that this is not an abuse of the rights of due process which Mohr J, drawing on the decision in *Re Gault*,³⁷ considered so important in the juvenile system. The Aid Panel is not a judicial body, and makes no determination of guilt or innocence. Submissions from the child, the parents, or others advising or counselling the child may be heard at the Panel's discretion.

(iii) The Children's Court: Criminal Jurisdiction

Cases which are too serious to be dealt with by a Children's Aid Panel (but not serious enough to go to an adult court) come before the Children's Court of South Australia.³⁸

The Children's Protection and Young Offenders Act 1979 effected an important change in the nature of proceedings in that Court. Under the repealed legislation, those under sixteen years of age were not charged with the commission of an offence, but rather a complaint was laid that the child was in need of care and control, of which the alleged offence was evidence. Only those over sixteen years of age could be charged with an offence.³⁹ This represented positivist ideology, a criminal act being seen as a symptom of more general problems. Under the new Act, all those up to eighteen years of age are actually charged with the offence before the Children's Court: this is the logical consequence of Mohr J's view that the commission of a criminal offence should be treated as such, and not be used as a "peg" on which to hang "welfare-type" intervention.

In the vast majority of appearances before the Children's Court, a guilty plea is entered. In the period 1 July 1979 to 30 June 1983, there were 13,780 appearances on criminal matters in the Children's Court, and in 98.2% of these a guilty plea was entered. Thus in very many cases, the important thing is not the determination of guilt or innocence (the "adjudicative stage"), but rather the penalty to be imposed (the "dispositional stage"). The 1979 Act has brought about a change in emphasis in relation to the power to convict a young offender. Under the Juvenile Courts Act 1971-1974, no conviction could be recorded

36 For differing views on the panel system see eg Sarri and Bradley, "Juvenile Aid Panels: An Alternative to Juvenile Court Processing in South Australia" (1980) 26 Crime and Del 42; Gamble, "Children's Hearing Panels for New South Wales" (1976) 50 ALJ 68-76.

37 Supra n 9.

38 For the constitution of the Children's Court, see Children's Protection and Young Offenders Act 1979-1982 s8. For cases that go to adult courts, see the discussion infra.

39 Juvenile Courts Act 1971-1974 (SA) ss42 and 43.

against those under sixteen years of age. Those between sixteen and eighteen could be convicted.⁴⁰ Under the Children's Protection and Young Offenders Act 1979-1982, the Children's Court has the option whether or not to convict any offender under eighteen years of age, but s51(2) provides that where a Group I or Group II offence⁴¹ is found proven, a conviction must be recorded unless there are special reasons for not doing so. Thus the new presumption is in favour of conviction for more serious offences; this is consistent with the duty placed on the Court by s7(d):

"where appropriate, the need to ensure that the child is aware that he must bear responsibility for any action of his against the law."

Where the Children's Court finds an offence charge proven, its powers are contained in s51 of the 1979 Act. A wide range of options is available to the Court:

"51.(1) Subject to this Act, where the Children's Court finds a charge . . . proved against a child, the Court may, by order—

- (a) upon convicting the child, sentence him to a period of detention of not less than two months nor more than two years in a training centre, but no period of detention may be ordered unless the Court has first obtained a report on the child and his circumstances from an assessment panel;
- (b) upon convicting the child, or without convicting the child, discharge the child upon his entering into a recognizance with or without sureties, upon condition that he will be of good behaviour and will appear before the Court for sentence if he fails during the term of the recognizance to observe any of its conditions, and upon any one or more of the following conditions that the Court may think fit to include in the recognizance—
 - (i) that he will be under the supervision of an officer of the Department or other person nominated by the Director-General and will obey the directions of that officer or person;
 - (ii) that he will attend a youth project centre at such times as may be stipulated in the recognizance or required of him by the Director-General and will obey any directions that may be given to him by or on behalf of the person in charge of that centre;
 - (iii) that he will participate in such project or programme as the Director-General may require;
 - (iv) that he will reside with such persons, or in such place, as may be stipulated in the recognizance;
 - (v) that he will attend before the Court at such times as may be specified in the recognizance for the purpose of reviewing his progress or circumstances;

and

40 Ibid.

41 Classified under the Local and District Criminal Courts Act 1926-1983 s54.

- (vi) any other condition that the Court may think necessary or desirable;
- (c) upon convicting the child, or without convicting the child, impose a fine not exceeding—
 - (i) the maximum fine prescribed under the relevant Act or law for the offence;
 - or
 - (ii) five hundred dollars,
 whichever is the lesser;
- or
- (d) without convicting the child, discharge the child without penalty.”

Section 51 represents a fundamental change to the previous law — a change which lies at the heart of Mohr J's conception of the proper role of the system of criminal justice for young offenders. Under the Juvenile Courts Act 1971-1974, a common result of criminal proceedings was that the Court made an order placing the child under the care and control of the Minister of Community Welfare, with consequent transfer of guardianship rights to the Minister. Mohr J's criticisms of this process, with its apparent confusion of the roles of the Court and of the administration, and of the criminal and “welfare” jurisdictions of the Court, have already been discussed.⁴²

Section 51(1)(a) gives the Children's Court the power to fix the period of a detention sentence. Thus the child now knows when leaving the Court precisely how long they can expect to be in detention. The determination is now properly one for the judicial body, and is no longer left a matter for executive discretion. The prerequisite of a report from an Assessment Panel⁴³ gives the child the safeguard, not existing under the repealed Act, that detention will not be ordered except after careful consideration by a body independent of the Court. Important too is the fact that a detention sentence under s51(1)(a) effects no transfer of guardianship rights to the Minister of Community Welfare, as did the old care and control order. The philosophy of the new legislation, consistent with Mohr J's recommendations, is that the commission of a criminal act is to be treated for what it is, and is not to be used as an opportunity for “welfare” intervention. Under the new legislation, if it is felt by the Department for Community Welfare that a young offender is in need of care and that a guardianship order is desirable, then separate “civil” proceedings must be instituted in the “Civil Division” of the Children's Court: Children's Protection and Young Offenders Act 1979-1982, Part III. Hence it is no longer possible for a “welfare result” to follow from criminal proceedings; the confusion apparent under the old Act has been removed.

Section 51(1)(b) continues the Court's power to place the child on a bond, with the new additional option of conviction. The power to fine

42 Mohr Report, 7. For a comprehensive descriptive account of the powers contained in s51, see Seymour, *supra* n 26 ch6.

43 An Assessment Panel is a body constituted under the Community Welfare Act 1972-1983 (SA). It consists of professionals from various disciplines including officers of the Department for Community Welfare.

was exercisable under the repealed Act only in relation to offenders aged sixteen years or more; now it is general. Until 1980, a child who had been ordered to pay a fine under s51(1)(c) and who failed to pay was then detained in a secure centre.⁴⁴ The Children's Protection and Young Offenders Act Amendment Act 1980 introduced an alternative: the child in default may now elect to serve a period of community service in lieu of detention.⁴⁵ The Court is empowered to order a bond plus a fine for the same offence.⁴⁶ When a child is found guilty of a number of offences in one hearing, the Court makes only one order, ie imposes only a single penalty. An order is made in respect of one offence, and discharge orders for the others. However, in determining the one order which is appropriate, the other offences are taken into account: s51(13).

In practice, the orders most commonly made by the Children's Court are, in order of frequency: fine, bond (with various conditions), discharge.⁴⁷ Detention orders (unsuspended) amount only to approximately one tenth of discharges. Upon what principles does the Court determine what order is appropriate in a given case? In sentencing, the Court is bound by the principles of s7 of the Children's Protection and Young Offenders Act 1979-1982. The meaning of the section, together with the continuing distinction under the new legislation between the adult and juvenile systems of criminal justice, received judicial consideration in *Hallam v O'Dea*.⁴⁸ In this case, Crowe J in the Children's Court sentenced a young offender who pleaded guilty to armed robbery to twenty-three months' detention. Since he had served one month in custody prior to sentence, the sentence was in practice the maximum that could be imposed. On appeal,

"Counsel for the appellant argued that . . . the maximum period of detention should be reserved for persistent offenders or the worst types of cases. This argument is an attempt to equate the period of detention authorized to be imposed by the *Children's Protection and Young Offenders Act* with a maximum sentence of imprisonment authorised to be imposed on adult offenders."⁴⁹

The Full Court of the Supreme Court (King CJ, Wells and Legoe JJ) dismissed the appeal. It was held that the distinction between the adult system and the juvenile system persists under the new legislation.

"There is no valid comparison between a sentence of imprisonment on an adult and the measures prescribed by the juvenile justice legislation. The Act prescribes methods of dealing with juvenile offenders which differ radically in nature and object from the methods used in relation to adult offenders."⁵⁰

The Full Court drew attention to the duty imposed on the Court by s7 to

"seek to secure for the child such care, correction and control or

44 Children's Protection and Young Offenders Act 1979-1982 ss98 and 99.

45 Ibid ss12-14.

46 Ibid s51(4).

47 In the period 1 July 1979 to 30 June 1983, the following orders were made: 4,526 fines; 4,480 bonds with various conditions; 3,560 discharges; 336 detention orders (unsuspended).

48 (1979) 22 SASR 133.

49 Ibid 134f, per King CJ.

50 Ibid 136.

guidance as will best lead to the proper development of his personality and to his development into a responsible and useful member of the community . . .”

The proper approach for the Children's Court is to consider what penalty will best achieve these objects. In other words, the considerations are prospective in nature; there is no “tariff system” of the punishment simply fitting the crime.

“In the case of an adult offender, the starting point will generally be the observance of a proper proportion between the gravity of the crime and the severity of the punishment. This fundamental principle of adult sentencing obviously has no place in fixing the period of detention under the *Children's Protection and Young Offenders Act* . . .”⁵¹

This decision makes it clear that the object of the new legislation is still rehabilitation of the offender, and not punishment per se. The system of juvenile justice in South Australia thus remains treatment orientated; it would be incorrect to view the new Act as punitive in its objective. The consequence is that, as occurred in *Hallam*, a particular child may be subject to a more severe penalty in the name of rehabilitation than would be the case if a “tariff system” applied. (In *Hallam*, the appellant had a record of offending dating back to the age of thirteen years and had had three separate bonds.) The punishment continues to be tailored to the individual offender. Hence it would be incorrect to view the 1979 Act as total abandonment of positivist ideology. The Children's Court in determining the appropriate penalty receives guidance from a social background report prepared by an officer of the Department for Community Welfare. Those reports are only presented after a child has pleaded or been found guilty. Such reports normally contain a recommendation as to the appropriate penalty. Moreover, no sentence of detention can be imposed without a report from an Assessment Panel. Thus the Department for Community Welfare retains an input into sentencing.

Nevertheless, a judge of the Children's Court is not bound to follow the Department's recommendations as to penalty. In *Barry v Marriott*⁵² Barry, aged seventeen years, pleaded guilty to assault occasioning bodily harm. He had knifed another youth, necessitating six stitches. The report of an Assessment Panel recommended a bond with supervision, as did that of a psychologist. Crowe J in the Children's Court sentenced Barry to six months' detention. Barry appealed to the Full Court of the Supreme Court, on the ground inter alia that the sentence was excessive, that the judge had discounted the reports, and had failed to give sufficient weight to the objects stated in s7 of the Act. Crowe J had said:

“This is another of those disturbing cases of violence, where a defendant aged 17 blames over-indulgence in liquor and where he then asks the Court to look at his circumstances and give little weight to the interests of the victim and of the community . . . I regard it as serious and as requiring a strict order to bring home to you the seriousness of this conduct.”⁵³

51 Ibid.

52 (1981) 93 LSJS 472.

53 Ibid 475.

The Full Court dismissed the appeal, stating the important point of principle that whilst the sentencing judge is obliged to consider all the factors (a) - (e) listed in s7, entitlement to give more weight to one factor than to another in the circumstances of the particular case is present. In this case, Crowe J had thought it proper to give greater weight to factors (d) and (e) (the protection of the public and the offender's responsibility for criminal conduct) than to the other factors focussing on the offender's personal circumstances. This decision highlights the discretionary nature of the judge's role in sentencing.

(iv) The Role of Adult Courts in the Trial and Sentencing of Young Offenders

"In many jurisdictions dealing with children both in Australia and overseas the problem is seen of children who are alleged to have committed crimes of such a serious nature or whose records show them to be so incorrigible or a combination of both that it is felt that it is not appropriate that they be dealt with by the 'kindlier' or more 'benevolent' juvenile justice systems but that they should face the rigors of the adult courts. Accepting that the position is a valid one — and it seems difficult to find a persuasive argument against it the question arises as to how the result desired is to be brought about." ⁵⁴

Just as it is considered in the South Australian system that some cases are too serious to be dealt with by the diversionary procedures of Children's Aid Panels, it is also considered that some cases cannot appropriately be dealt with by the Children's Court but must go to courts of the "adult" system ie the Supreme Court or the District Criminal Court. How are such cases to be identified? One approach is to make certain offences triable only in an adult Court. This approach was adopted by the Juvenile Courts Act 1971-1974, and is adopted by the Children's Protection Act 1979-1982, in relation to homicide.⁵⁵ Few would depart from the classification of homicide as the most serious of all offences. But apart from homicide, Mohr J drew attention to the inherent fallacy of the "designated crimes" approach, since

"the appropriate label does not necessarily truly connote the seriousness of the crime . . . (and) its very inflexibility militates against its acceptance." ⁵⁶

A more flexible system is required, permitting consideration of the offender's circumstances and history and of the circumstances of the commission of the offence, as well as the nature of the offence itself.

Under the Juvenile Courts Act 1971-1974, the transfer of very serious cases (other than homicide) to an adult court was a matter for the discretion of the Juvenile Court. The Juvenile Court could transfer a case involving an indictable offence to the Supreme Court or the District Criminal Court for trial, if it was "desirable, in the interests of the administration of justice", so to do.⁵⁷ In exercising discretion, the Juvenile Court was bound to

⁵⁴ Mohr Report, 66. For an account of the jurisdiction exercised by adult courts over young offenders, see Seymour, *supra* n 26 ch8.

⁵⁵ Juvenile Courts Protection and Young Offenders Act 1979-1982 s45.

⁵⁶ Mohr Report, 66-67.

⁵⁷ Juvenile Courts Act 1971-1974 (SA) s36(3).

"have regard to the nature of the charge, the age of the child, the circumstances of the case . . ." ⁵⁸

The Juvenile Court had also a discretion, exercisable on the same grounds, to transfer a child found guilty of an indictable offence to the Supreme Court for sentencing.⁵⁹

The Children's Protection and Young Offenders Act 1979 effected important changes in relation to the trial of very serious cases (other than those involving homicide). The matter is no longer one for the discretion of the Children's Court. Section 46 gives a child charged with an indictable offence the right to request trial by jury in an adult court. This is a new right given to young offenders, and is consistent with the notions of "due process" that children are not to be deprived of rights afforded to adults. Applications under s46 have in practice been rare. In the period 1 July 1979 to 30 June 1983, only six children are known to have been tried by an adult court pursuant to a s46 application.⁶⁰ Section 47 introduces a procedure of which there is no equivalent in states other than South Australia.

"47.(1) Where the Attorney-General is of the opinion that a child charged with an indictable offence (other than a minor indictable offence) should, by reason of the gravity of the circumstances of the offence, or the fact that the child has previously been found guilty of more than one serious offence, be tried in the appropriate adult court, the Attorney-General may apply to a Judge of the Supreme Court for an order that the child be so tried."

Mohr J saw this procedure as having the advantage that the decision is made on a high judicial level: under the old system it was a matter for the Juvenile Court. The s47 procedure in fact begins with the police member of a Screening Panel, passes through the Police Department and then to consideration by the Attorney-General's Department and the Crown Law office. The Supreme Court judge hears the application in chambers, and must hear any submissions made by the child and the child's guardian⁶¹ who appear at the hearing. The s47 procedure appeared to some to be one of the new Act's more sinister innovations. But as was to be expected, the power has been exercised sparingly. In the period 1 July 1979 to 30 June 1983, only eighteen successful applications are recorded, and one unsuccessful. Of the successful recorded applications, in ten the child was sentenced as an adult and in eight the child was sentenced as a child. In addition to being used for serious offences, s47 may be invoked when an offender has almost reached the age of majority at the time of the commission of the alleged offence, and in cases of joint offenders when some are over eighteen and some under. In the latter situation

"an order that all accused be tried together in an adult court and on conviction be sentenced on the same basis would be highly desirable". ⁶²

58 Ibid s36(2).

59 Ibid s39.

60 Figures recorded by the Department for Community Welfare contain some unknown values for ss46 and 47.

61 Children's Protection and Young Offenders Act 1979-1982 (SA) s47(b).

62 Mohr Report, 68.

What are the powers of an adult court with regard to sentencing a young offender? In the case of a child convicted of murder, the Supreme Court has no option but to sentence the child to be detained at the Governor's pleasure. It is then for the Governor to specify the place and conditions of detention.⁶³ The child can be detained either in an adult prison or in a training centre. If a child is convicted of homicide other than murder, then s56 of the Children's Protection and Young Offenders Act 1979-1982 provides that the Supreme Court may either (i) deal with the child as if they were an adult, or (ii) make an order that the Children's Court could have made, or (iii) remand the child to the Children's Court for sentencing. These same three options are open to an adult court (Supreme Court or District Criminal Court) which has convicted a child pursuant to a s47 application by the Attorney-General. The power to sentence a child as an adult includes the power to order that the child serve a term of imprisonment in an adult prison, although the Court may direct that time be served in a training centre.⁶⁴ By contrast, the powers of an adult court to sentence a child following a request by the child for trial by jury are more limited. Section 57 provides that in these circumstances the adult court may either make an order that the Children's Court could have made, or remand the child to the Children's Court for sentencing. In other words, an adult court exercising jurisdiction pursuant to a request by the child for trial by jury cannot, in sentencing, do more than the Children's Court could have done. The most severe penalty that can be imposed is two years' detention in a training centre. Is it then possible for a young offender, anticipating that their personal history and circumstances, or the nature and circumstances of the offence alleged are such that an application by the Attorney-General under s47 is likely, to avoid the possibility of being sentenced as an adult by requesting trial by jury under s46? The answer is no, as the statute expressly provides that a s47 application overrides a s46 request.⁶⁵

Section 47 applies without age restriction, and so it is theoretically possible for a ten year old offender to be sentenced as an adult to serve a term of imprisonment in an adult prison. But far-fetched fears are unjustified. The exercise of proper responsibility by the Police, Attorney-General's and Crown Law Departments, together with the application's outcome being placed in the hands of a Supreme Court judge, will probably limit the section's operation to its proper scope.

(v) Special Provisions Relating to Children Detained in Training Centres

A young offender may be sentenced by the Children's Court (or by an adult court) to serve a period of detention in a training centre. A training centre is an institution run by the Department of Community Welfare providing secure care. There are at present two in South Australia: the SA Youth Training Centre, for boys fifteen to eighteen years of age, and SA Youth Remand and Assessment Centre, for girls and younger boys. The Children's Protection and Young Offenders Act 1979 created the Training Centre Review Board, introducing for the first time in South Australia an equivalent for young offenders of the Parole

63 Children's Protection and Young Offenders Act 1979-1982 (SA) s55.

64 Ibid s58.

65 Ibid s46(2).

Board system for adults. Once again, the intention of the legislation is that young offenders should not be denied the rights given to adults. The Review Board is under a duty to review the progress and circumstances of a child sentenced to detention in a training centre, at least every three months.⁶⁶ The Board has the power to authorise the Director-General of Community Welfare to grant a child periods of unsupervised leave from a training centre, and furthermore may order the release, subject to conditions, of a child.⁶⁷ A child who has thus been conditionally released may then apply to the Children's Court for an absolute discharge.⁶⁸

Mohr J expressed the view that a young offender's period of detention should not be a matter purely of administrative discretion. Consistent with the Commissioner's philosophy, the Training Centre Review Board is an independent body, and not an organ of the Department for Community Welfare. It consists of the judges of the Children's Court, two appropriate persons appointed on the recommendation of the Attorney-General, and two on that of the Minister of Community Welfare.

Section 100 of the Children's Protection Act 1979-1982 provides that the Director-General of Community Welfare may apply to the Children's Court for the transfer of a young offender over sixteen years old from a training centre to an adult prison for the remainder of their sentence, if the young offender cannot properly be controlled in the training centre or if they have incited others to cause a disturbance. This section effects little change in the previous law; s82 (now repealed) of the Community Welfare Act 1972 was very similar. The Court must be satisfied on the balance of probabilities (civil standard) that the grounds are made out, and the child may appeal to the Supreme Court.⁶⁹

(3) CONCLUSION

"Far from this being a 'tougher line' I see it as guaranteeing to a child legal rights which it does not now have."⁷⁰

This was Mohr J's own evaluation of the system for dealing with young offenders proposed in his *Report* of 1977. It is submitted that the Commissioner's evaluation was correct. The previous commitment to a highly "welfare orientated" or "treatment" approach to the system of criminal justice for young offenders was ripe for the thorough reconsideration it received in 1977. The Mohr Report is notable for its conceptual rigour, in particular, in its discussion of the severability of the criminal justice system from the system of welfare intervention. The consequent separation under the 1979 legislation of the criminal and civil jurisdictions of the Children's Court, and the new distinction between the types of orders made in those two jurisdictions, cannot but be applauded by those who see the dangers inherent in systems which use the commission of an offence as the occasion for welfare intervention. Consistent with the philosophy expressed in the decision in *Re Gault*,⁷¹ it has been demonstrated that the 1979 legislation in South Australia

⁶⁶ Ibid s63.

⁶⁷ Ibid s64.

⁶⁸ Ibid s65.

⁶⁹ *Robinson v Cox* (1979) 21 SASR 536.

⁷⁰ Mohr Report, 17.

⁷¹ Supra n 9.

confers on young offenders rights both procedural and substantive which did not exist under the previous law.

It would be simplistic and indeed false to regard the move from the Juvenile Courts Act 1971-1974 to the Children's Protection Act 1979-1982 as a straight move from positivist ideology to pure classicism or neo-classicism. The duty imposed on all those who apply and administer the new Act is, as stated in s7, to seek to secure the future rehabilitation of the child. Reported decisions⁷² on the interpretation of the Act have correctly pointed out the continuing distinction between the adult and juvenile systems of criminal justice. This is not to deny the very great change of direction in the system of criminal justice for young offenders represented by the 1979 legislation. It remains whether a similar change in ideology will be adopted in other jurisdictions.

72 Supra nn 49 and 53.