ARTICLES

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REFORMING THE LAW: IDEALISM VERSUS PRAGMATISM

In recent years, most Australian states have sought to improve and refine their approach to juvenile justice by enacting new laws.[1] In each instance, legislative change has been the outcome of an inquiry and a report. One can point, for example, to the Carney Report in Victoria, the Edwards Report in Western Australia and the Mohr Report in South Australia.[2] The road to legal change in this area has rarely been smooth. In some cases, the period between the inquiry and the enactment of new legislation has been extensive. For example, in Western Australia the Edwards Report was submitted to the Government in 1982, but the new legislation was not proclaimed until 1989. In other cases, political expediency, changing public attitudes and bureaucratic manoeuvering have

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1 See discussion in J Seymour, *Dealing with Young Offenders*, (Law Book Co, Sydney 1988).

2 Carney Report, *Child Welfare Practice and Legislation Review Committee, Report*, Vic Govt, 1984; Edwards Report, *The Treatment of Juvenile Offenders; a Study of the Treatment of Juvenile Offenders in Western Australia as Part of an Overall Review of the Child Welfare Act*, WA Govt, 1982; Mohr Report, *Report of the Royal Commission into the Administration of the Juvenile Courts Act and Other Associated Matters Part 2*, SA Govt, 1977.

meant that the final legislation has failed to incorporate the recommendations of the original inquiry and has demonstrated little kinship with the ideas of the original reformers. One obvious example is that of New South Wales, where the current legislation represents the outcome of a long and tortuous process of negotiation and politicking.[3]

One Australian state, however, has encountered fewer obstacles to legal change. South Australia has always regarded itself as a leader in the field of social reform - an attitude which can be traced in part to its origins as a colony based, not on convict settlement, but on the "ideas of systematic colonisation" expressed by Edward Gibbon Wakefield.[4] From the first, South Australia saw itself as an enlightened and humanitarian colony where the opportunities for the development of a liberal and free society were strongly promoted. During its early years of development, it went so far as officially to acknowledge Aboriginal ownership of the land and make an effort (albeit a futile one) to ensure that only those areas voluntarily ceded by "the natives" could be offered for sale to the colonists.

South Australia's treatment of juveniles has demonstrated a similarly enlightened quality. This State was one of the first places in the world "to establish a juvenile court and to provide special legislation for that purpose".[5] Under the terms of the *Minor Offences Bill* (SA) 1869, children were accorded summary hearings before special magistrates or justices, instead of appearing before the Supreme Court. The separation of children's cases from adult cases was strengthened in 1892 when the Government instructed police that all female offenders aged under 18 and males under 16 years of age were to be taken, not to the police lock-up or court house, but to the premises of the State Children's Department, where they were to be tried in a room set apart for that purpose. The separation of juvenile cases from police courts received statutory endorsement five years later with the passage of the *State Children's Act* 1895 (SA).[6]

For much of this century, South Australia, in keeping with its image as a "social laboratory", has remained a trend setter. In the juvenile justice sphere, it has consistently reassessed the law and implemented innovatory changes. It was one of the first states to embrace a strong welfare approach to the treatment of juvenile offenders and it was also the first in Australia to

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3 See Freiberg, Fox and Hogan, *Sentencing Young Offenders* (AGPS, Canberra 1988); Luke *Back to Justice; an Evaluation*, paper presented at a National Workshop on the Theory and Practice of Juvenile Justice (Canberra, May 1990).

4 Gale, *Urban Aborigines* (ANU Press, Canberra 1972) p38.

5 Social Welfare Advisory Council, *Report on the Legislation Concerning Juvenile Offenders* Adelaide, 1970.

6 Newman, *Juvenile Justice in South Australia*, Paper presented to the American Society of Criminology, Annual Meeting (Cincinnati, Ohio Nov 7-11 1984) pp4-5.

recognise and emulate the retreat from the welfare model towards a greater emphasis on justice which, by the 1970s, was becoming evident in the United States.[7]

Two quite recent legislative reforms illustrate the nature and commitment to change in South Australia. In the late 1960s, the Government-appointed Social Welfare Advisory Council was given the task of assessing the existing juvenile justice system. Its final report was submitted in May 1970,[8] the new legislation arising from it was introduced into Parliament on 1 September 1971 and came into force on 1 July 1972. The next major set of changes was precipitated by the Mohr Royal Commission into Juvenile Justice. This inquiry was established in October 1976, its final report submitted to Cabinet in July 1977, and the resulting legislation came into effect on 1 July 1979.

Yet, even in a state such as South Australia, where the socio-political *milieu* is highly supportive of speedy law reform, we find the resulting legislative changes beset with contradictions, anomalies and inconsistencies.

When evaluating the effectiveness of law reform and, in particular, when assessing the "degree of fit" between its intentions and its results, there is a tendency to seek explanations for any mismatch by focusing on the practice rather than on the theory. The tendency is to argue that those in charge of decision-making and the day-to-day functioning of the system are not implementing the theory correctly. Various explanations are put forward for this. It has been suggested for example, that decision-makers drawn from different organisations have their own professional loyalties and consequently seek to implement the ethos of their own organisations, rather than to abide by the philosophical intentions of the legislation.[9]

Another reason for what appears to be a gap between legal theory and practice is the nature of the law reform process itself. In any such process, incongruities may stem from two sources. In the first instance, there may be inconsistencies in the theory expounded within the document itself, which lead to contradictory recommendations. Further inconsistencies may be generated by the selective implementation of only some, rather than all, of the recommendations made.

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7 Seymour, *Dealing with Young Offenders*; and Freiberg et al, *Sentencing Young Offenders*.

8 Social Welfare Advisory Council, *Report on the Legislation Concerning Juvenile Offenders*.

9 Pratt, *Welfare and Justice: Incompatible Philosophies*, Paper presented at National Workshop on the Theory and Practice of Juvenile Justice (Canberra May 1990).

In this paper, these two sources of incongruity will be examined by analysing critically the *Report of the Royal Commission into the Administration of the Juvenile Courts Act*, usually referred to as the Mohr Report. Our aims are twofold. First, we consider the internal consistency of the document - that is, the extent to which the reasoning employed throughout remains faithful to the stated philosophical goals of the Report and whether the final recommendations of the document accord with these goals. We then discuss the extent to which the recommendations of the Mohr Report were incorporated within the ensuing *Children's Protection and Young Offenders' Act* 1979 (SA).

By considering which of Mohr's recommendations were subsequently included within the new Act and which were omitted, we intend to highlight those points at which the selective implementation of recommendations resulted in deviations from the Report's stated philosophy. With the benefit of hindsight, we are also now in a position to assess some of the practical effects of Mohr's plan. Indeed we intend to raise fundamental questions about the extent to which the current system of juvenile justice in South Australia departs from due process - by reason of design and by reason of pragmatism. This analysis has clear implications for other states which have more recently set out to reform their mechanisms for dealing with young offenders and which continue to turn to South Australia as a source of ideas.[10]

Law reform in this area can still be characterised by its failure to benefit sufficiently from past experiences. What is needed is a far more reflective and self-conscious approach. If South Australia is to provide a role model for other states, it is vital that we look beneath the rhetoric of its reforms and examine more critically the intellectual coherence both of its ideas and its practices.

THE PRE-MOHR SYSTEM: THE RISE OF THE WELFARE MODEL

The approach which dominated juvenile justice in South Australia during the first seven decades of this century is usually referred to as the welfare model. In simple terms, this model was premised on the belief that the welfare of the child was the principal reason for legal intervention. Delinquency was interpreted as a symptom of pathology in the child which required the benign intervention and treatment of the court. The limits of punishment were therefore established not by the seriousness of the crime but by the needs of rehabilitation. This welfare approach reached its apotheosis in South Australia with the passage of the *Juvenile Courts Act* 1971 (SA).

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10 Seymour, *Dealing with Young Offenders.*

This piece of legislation was chiefly notable for its introduction of Juvenile Aid Panels, which were intended to function primarily as early-warning mechanisms, providing counselling for those first or minor offenders who did not require formal Court processing. By identifying any illegal behaviour as early as possible, it was argued that the State could intervene quickly, nip in the bud any delinquent tendencies and so avoid any future involvement in crime. The emphasis then, was on diagnosing and treating incipient offending rather than on identifying and punishing illegal actions in the manner of a criminal court.

Certain rules governed the appearance of a child before an Aid Panel. Only children aged 15 years and under who had been reported by police could be dealt with by a Panel. Those aged 16 and over automatically went to Court as did all youths who had been apprehended by means of an arrest. Within this framework of regulations, it was the Aid Panel itself which decided whether it should deal with a case or refer the matter on to Court. Thus the Panels also filled a screening function, deciding the procedural future of a case.

Another precondition of an appearance before an Aid Panel was an admission of guilt from the young accused. This gave the Panel the necessary power to proceed with the offender in a more benign, non-judicial and informal manner. Because it was not required to adjudicate, it was not obliged to offer the benefits of due process associated with the contested hearing. The admission of guilt also signalled that the offender was sufficiently remorseful to be receptive to the warning and counselling offered by the Panel. If a child refused to admit responsibility for the offence then they were sent to Court. In deciding whether to admit guilt, the child was not, however, afforded access to a lawyer for advice about whether the alleged actions satisfied all the ingredients of the charge.

Under the 1971 legislation, a strong welfare philosophy was also evident in the functioning of the Children's Court. Here the concept of criminality was obscured by the fact that children under the age of 16 who appeared before the Juvenile Court for offending behaviour were not charged with the criminal offence in the manner of adult defendants. Rather, all were charged with being "in need of care", a charge that also applied to neglected children who were the victims of inadequate parenting. Thus criminal and welfare cases were treated as a single category of behaviour.[11] Both were thought to demand the intervention of the State and so there was little recognition that children accused of an offence required the legal rights of the criminal defendant.

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11 Bailey, "A Change in Ideology in the Treatment of Young Offenders in South Australia: *The Children's Protection and Young Offenders Act* 1979-1982" (1984) 9 *Adel LR* 325.

In line with this philosophy, the Children's Court had no power to impose a fixed period of detention. Its only option was to place offending youths under the control of the Minister for Community Welfare. It then became the responsibility of that Minister, rather than the Juvenile Court, to decide if and for how long the youth should spend in detention. Not surprisingly, this often led to an extreme imbalance between the child's behaviour and the State's reaction.[12] Even for a very minor crime, a child could be defined as "in need of care" and then be made a ward of the State until they reached the age of majority.

Thus the *Juvenile Courts Act* 1971 (SA), which Mohr was asked to report on, paid little heed to notions of criminal procedure and due process. From the outset, it was this feature of children's justice which Mohr set out to change. In doing so, he was strongly influenced by international trends and debates.

BACK TO JUSTICE: THE FRAMEWORK FOR MOHR'S INQUIRY

By the late 1960s, at a time when the Social Welfare Advisory Council was advocating an even stronger welfare commitment in South Australia, a new set of concerns began to dominate the international debate about children's justice. Although the specific catalyst for this change is often said to be a series of decisions of the American Supreme Court handed down at this time,[13] others suggest that the shift in thinking was part of a larger social process which encompassed the civil rights and feminist movements.[14]

Viewed in the context of these new concerns, the welfare principle was judged a failure. It had not achieved its over-riding purpose of "curing" or reforming young offenders, as evidenced by a steady increase in the numbers of juveniles being apprehended. It had failed to satisfy the basic liberal-democratic requirements of fairness and due process. And it had failed the community which demanded punishment and retribution, not "soft" treatment. Critics from the Left and the Right thus converged in their

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12 Bailey-Harris and Naffine "Gender, Justice and Welfare in South Australia: A Study of the Female Status Offender" (1988) 2 *International Journal of Law and the Family* 214.

13 Notably, the decision in *Re Gault* 387 US 1 (1967) which highlighted the manner in which children's justice infringed the civil liberties of young offenders.

14 Debele "The Due Process Revolution and the Juvenile Court: The Matter of Race in the Historical Evolution of a Doctrine" (1987) 5 *Law and Inequality* 54.

objections to the model[15] and a "back-to-justice" school came to dominate juvenile justice reform.[16]

JUSTICE ENDORSED

From the outset, Mohr declared his commitment to the justice model. He believed that children brought before the Children's Court should have all the rights of adults, at least until the point of sentencing when the need for individualised justice would take precedence. Mohr stated his commitment to formal justice in the strongest of terms. He began his inquiry, he noted,[17]

> with one over-riding determination. I took as a starting point the basic fact that I was dealing with a system of criminal justice, albeit a specialised one...I was determined that...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".

Thus he took it to be fundamental "that no child shall be found guilty of a crime by means which would not, and do not apply, in the adult world".[18] "A child", he said, "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".[19]

Mohr expressed his concern about the disregard of due process implicit in the welfare model. He also objected to what he saw as the disjunction between the child's behaviour and the State's response. Children, he maintained, should have as many rights as adult defendants and certainly should not be punished more severely. Also implicit in his "justice approach" was the idea that children found guilty of criminal behaviour should be held responsible for their actions. In particular, he felt that serious or "incorrigible" young offenders should not be treated like needy children but as real threats to the community.

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15 Hudson, *Justice Through Punishment: A Critique of the "Justice" Model of Corrections* (St Martin's Press, New York 1987).

16 Cohen *Visions of Social Control: Crime, Punishment and Classification* (Polity Press, Cambridge 1985).

17 Mohr Report, *Report of the Royal Commission into the Administration of the Juvenile Courts Act and Other Associated Matters Part 2.*

18 As above, fn17.

19 As above, fn17.

Mohr set the whole of his report within the intellectual framework of a traditional theory of due process and adversarial justice. It is therefore pertinent to ask, how closely did his recommendations agree with this stated view?

MOHR'S RECOMMENDATIONS FOR REFORM

The Courts

The most significant reforms sought by Mohr were directed at the Children's Court. Here, most of his recommendations were consistent with his stated philosophy. He insisted on a clear separation of welfare from criminal matters and the consequent elimination of the vague "in need of care" charge which had formerly been applied to criminal offenders. He recommended that all youths, regardless of age, who appeared before the Children's Court on criminal matters, should be charged with the offence and, upon being found guilty or admitting guilt, should be liable for the standard range of penalties applying to adults, including dismissal, fines, good behaviour bonds and detention. Most importantly, he stipulated that there should be no transfer of guardianship rights to the Minister for Community Welfare.

In keeping with his objections to the concept of indeterminate sentencing (which, under the *Juvenile Courts Act* 1971 (SA), had operated under the guise of "care and control" orders), Mohr recommended that the Children's Court be given the power to impose a fixed period of detention up to a maximum of two years. He also favoured a compulsory periodic review by the Court itself to ensure that the judiciary, rather than some administrative branch of Government, had responsibility for supervising the progress of children held in detention. Here Mohr was particularly concerned that the welfare ideal should not be used to impose excessive punishments on children. If, at the end of the period of detention imposed by the Court, the child had not been rehabilitated, Mohr argued that the child should still be allowed to go free as they should not be detained for a longer period than the crime warranted. In his own words,[20]

> Detention for a determinate period has been proposed so that a child who does not for one reason or another avail itself of the opportunities for rehabilitation which will be afforded it whilst in detention will know exactly where it stands in relation to its release date.

Also consistent with Mohr's commitment to due process were his recommendations relating to the hierarchy of judicial officials operating

20 At pp54-55.

within the Children's Court. He advocated a more formal structure for this Court in which justices of the peace would exercise a very limited jurisdiction, magistrates would exercise an intermediate jurisdiction, while only judges could hear the most serious matters. The Commissioner was also firmly of the view that judicial officers should be just that. They should be exclusively concerned with "the hearing and weighing of evidence as to the course to be adopted with a particular child".[21] Such officers, he affirmed, should not consider themselves as social or behavioural scientists and indeed, they should "resist the temptation to substitute [their] expertise" for those of social workers.[22]

A further perceived drawback of the summary justice offered by the *Juvenile Courts Act* 1971 (SA) was the absence of a right to trial by jury. Mohr noted that this was "an absolute right which an adult has and is regarded as a fundamental right under the law in a free society".[23] While recognising the value of summary justice for children - such as its informality, efficiency and less intimidatory nature - the Commissioner recommended that the child defendant be given "the right to have its trial before a jury if it so chooses".[24]

Mohr also favoured a formal system of appeals. The *Juvenile Courts Act* 1971 (SA) under review made provision for appeals to the Supreme Court but it also allowed reviews of decisions, referred to as "reconsiderations", to be heard at the same judicial level. That is, a Judge of the Children's Court could reconsider an order or adjudication of another Judge of the same court. Mohr regarded this right of judicial officers to judge their peers as "repugnant". He also objected to the fact that the child had no right to appeal to the Supreme Court against the outcome of a reconsideration hearing. He therefore recommended that reconsiderations be abandoned and that a system of appeals along adult lines be introduced. Children should be able to appeal against any decision of the Children's Court and that appeal should always be heard by a Court at a higher level. Mohr proposed that appeals from the decisions of a Children's Court justice or magistrate be heard by a single judge in the Supreme Court and appeals from a judge of the Children's Court be dealt with by a Court of Criminal Appeals.

Another important difference between children's and adult's justice observed by Mohr was the committal hearing. With the exception of homicide (which went to the Supreme Court), the Children's Court had the power to deal summarily with all indictable offences. By contrast, in the adult court, an individual charged with an indictable offence underwent a preliminary hearing in the magistrate's court at which the prosecution was obliged to

21 At p59.
22 At p59.
23 At p50.
24 At p51.

establish a *prima facie* case before the plea was received. This gave the defence the opportunity to hear the case against it and to argue that there was "no case to answer" before the indication of a plea. Consistent with his commitment to due process, Mohr argued for the introduction of committal hearings in the juvenile sphere.

It would appear, though, that Mohr's reasons for favouring the committal hearing had little to do with safeguarding the rights of children. And it is here that the first inconsistency in his approach becomes evident. Rather than viewing the committal hearing in terms of its formal function (to determine whether there is a case against the accused), Mohr treated it as a means of supplying the sentencing judge with sufficient knowledge of the crime to enable him or her to decide the appropriate sentence. He maintained that "a Judge deciding on disposal of a particular case, will need all the information it (sic) can get and for this reason I recommend that in the case of an indictable offence a preliminary hearing be had in the usual manner".[25] Mohr therefore tended to bypass the question of the accused's right to hear the case against him or her in order to have the evidence of the prosecution tested in open court before a judicial officer.

A final set of recommendations concerning the Children's Court stemmed from Mohr's recognition that, if children were to be given the same legal rights and protections as accused adults, then they should also be held accountable for their crimes. It is this notion of accountability, implicit in the justice model, which represents its more punitive side. Mohr showed his commitment to the "justice" notion of criminal accountability in his discussion of "persistent recidivists" and "very serious offenders". Such children, he suggested, were not amenable to the treatments offered by "the "kindlier" or more "benevolent" juvenile justice system" and should therefore "face the rigors of the adult courts".[26] Under the *Juvenile Courts Act* 1971 (SA), the Juvenile Court itself had the discretion to transfer very serious cases to an adult court. Mohr considered it more appropriate that such decisions be made at a higher judicial level. He therefore recommended that, when the circumstances warranted it, the Attorney General should have the right to apply to a judge of the Supreme Court for a child charged with an indictable offence to be dealt with by an adult court.

Also consistent with the "justice" notion that children should be held accountable for their actions was Mohr's argument that, while the public at large should continue to be excluded from the Children's Court, some element of public scrutiny would be achieved by allowing the print and electronic media access to the Court. Under the 1971 Act, only the results of proceedings could be published, while details of the case itself and any

25 At p50.
26 At p66.

information which could identify the individual offender were suppressed. The media apparently regarded this as "slim pickings" and so rarely bothered to report on children's matters. The consequence, in Mohr's view, was that the Juvenile Court had been able to sit in secret and this secrecy had "given rise to considerable public disquiet".[27] The Commissioner's solution was to allow the media to report proceedings, but with the proviso that any information which would identify the individual could be published only with the court's approval. By this means, he argued a balance would be struck between the need for young people to face public scrutiny, in the manner of adults, and the need to prevent unnecessary exposure which may interfere with the rehabilitation of the young person.

Welfare Retained: Children's Aid Panels

Apart from his rather unconventional approach to the committal hearing, Mohr's recommendations for the Children's Court were consistent with his commitment to formal, adversarial justice and his expressed disapproval of welfare intervention in the lives of young offenders. This commitment however, seemed to waiver when he came to consider the other major component of the South Australian juvenile justice system, the Aid Panels. He not only endorsed this informal and highly interventionist system, which departs in most respects from the principles of due process, but he actually recommended that it be extended. More specifically, he argued that the previous restrictions which had limited Panel appearances to reported youths aged 15 years and under should be abolished so that henceforth, all youths should be eligible for informal processing, irrespective of age or the method of apprehension.

Having committed himself to a justice model, Mohr set about justifying the incongruity of Aid Panels by distinguishing them as much as possible from courts. He noted that they were informal, that a child only appeared before them if they chose to do so, and that Panels could not determine guilt or innocence or impose any punishment. He maintained, therefore, that they were not part of the coercive justice system and so did not pose a serious threat to the child. Yet Mohr was also aware that Panels brought into question children's legal rights in that they required an admission of guilt as a precondition of a Panel appearance. He sought to diminish this tension by recommending that children who wished to be dealt with by a Panel should sign a form admitting guilt in the presence of a lawyer and that this should be done prior to their attendance at the Panel hearing. The clear implication was that the lawyer would advise the child at this stage of the proceedings as to whether his or her behaviour satisfied all the ingredients of the charge.

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27 At p79.

From this it would appear that Mohr was philosophically committed to formal justice but yet was unwilling to jettison those welfare elements of the system that were perceived to be working. He recommended the retention of Panels for pragmatic reasons, but also endeavoured to resolve the ensuing philosophical tension by injecting a lawyer into the process before the child appeared at a Panel. The contradiction, however, is never entirely resolved because, in all other respects, Panels do not adhere to due process. In particular, they do not allow a lawyer to be present once the hearing commences to represent the interests of the child. In fact, Mohr explicitly rejected a submission by the Law Society of South Australia that legal representation be allowed at Panel hearings. He argued that this would carry the risk of Panels "becoming mini-courts".[28] He also rejected the proposal that the Panel should be chaired by a special magistrate or legal practitioner. Paradoxically, Mohr found himself safeguarding "by all proper means"[29] the informality of the Panel system against those who wanted to introduce some element of due process.

Screening Panels

The retention and extension of the Aid Panel system represented a clear departure from the philosophical stance stipulated by Mohr. So too, did his recommendation that a formal screening body be created.

Having advocated the abolition of the mandatory age and arrest requirements which had previously controlled access to the Aid Panel system, Mohr had to find another way of deciding which cases should go to a Panel and which to Court. He opted for the establishment of an independent screening authority quite separate from the warning and counselling Aid Panel.

In view of his commitment to due process and his desire to curtail the discretion of justice personnel, it is surprising that Mohr recommended a Screening Panel comprising a police officer - who organisationally represents the interests of the community and, in particular, the desire to punish the defendant - and a social worker - who, in Mohr's reading, was associated with State intervention and control of the child. What is missing from this model is a lawyer's perspective - that is, someone who represents the legal rights of the child and who is therefore concerned to limit State intervention.

The Commissioner devoted only four pages of his Report to Screening Panels even though they were completely new to the South Australian system and were (and still are) unique in Australia. Moreover, experience

28 At p46.
29 At p46.

has now shown that their decisions are critical. A Court appearance virtually guarantees that the child leaves the system with a criminal record, which will carry over into adult life, whereas an Aid Panel hearing has no such consequence. However, Mohr did not seem to comprehend fully the critical nature of the referral mechanism which he was suggesting and so did not take heed of the justice implications of the composition of these Screening Panels. He envisaged that they would perform only a minor administrative role in the system and therefore did not call for formal due process. But by combining the two sectional interests of police and welfare, he effectively prevented them from functioning as administrative and non-adversarial bodies. The resultant lack of neutrality inevitably raises questions of due process.

The only safeguard which Mohr built into the Screening Panel structure was the option that, in the event that the police officer and the social worker should fail to agree on a case, the matter could be referred to a judge or magistrate of the Children's Court for adjudication. This, he thought, provided "the necessary checks and balances to ensure that a proper referral is made".[30] To guarantee that Screening Panels were not, in any way, equated with Aid panels, he also recommended that "the members of such a screening panel were not to be involved in Children's Aid Panel work".[31]

Mohr's failure to appreciate the critical role that Screening Panels would play in the juvenile justice system also meant that he devoted little time to their operation. He refused, for example, to establish any guidelines for decision-making, merely expressing his hope that "with the passage of time...experience will lay down informal and non-arbitrary guide-lines".[32] He declined to concern himself with such issues as whether the child should be notified of the hearing and have the right of appeal from the decision. By failing to pay attention to these important aspects of Screening Panels, Mohr left the way open for the implementation of procedures which departed substantially from the concept of due process and the protection of the legal rights of the child.

IMPLEMENTING THE MOHR REPORT

Within two weeks of the submission of the Royal Commissioner's Report to Cabinet, the then Premier, the Honourable Donald Dunstan, announced in Parliament that the State Government had accepted the Report in principle and had established a three person working party consisting of the Senior Judge of the Children's Court, the Deputy Director General of the

30 At p40.
31 At pp39-40.
32 At p41.

Department for Community Welfare and a research officer from the Attorney General's Office.[33] The responsibility of this Working Party was to consider the recommendations put forward by the Mohr Royal Commission and to prepare instructions for Parliamentary Counsel for the drafting of new legislation which would implement those recommendations.

The first report of the Working Party[34] identified which of Mohr's recommendations it supported and which it rejected, providing reasons to substantiate its position. It also made new recommendations which either built on or replaced those of Mohr. These new proposals were themselves subjected to a further review process as the Working Party progressively refined its ideas in the light of feedback from Cabinet, the Attorney General and other government departments. The opinions of non-government "experts" in the field of juvenile justice were also sought. It seems, however, that Mohr himself had little to do with this process. Having lodged his report with Cabinet, the task of implementing his visions for the reform of juvenile justice in South Australia passed entirely into the hands of other people, whose own preferences were, in turn, mediated by the government of the day. If some of Mohr's own deviations from due process were prompted by pragmatism (such as his decision to retain Aid Panels on the ground that they worked) so too, were the suggestions of the Working Party (and by extension, of the government).

The Children's Court

Three important changes to the operation of the Children's Court proposed by Mohr gained the support of the Working Party and were incorporated within the new legislation. One was the clear separation of the criminal and civil jurisdictions and a second was the elimination of the vague charge of being "in need of care" for young offenders. In combination, these changes meant that henceforth all children, regardless of age, who appeared before the "criminal" branch of the Children's Court were actually charged with the offence for which they were apprehended, rather than with the all-encompassing charge of being "in need of care and control". If the Department for Community Welfare considered that an offending child was the victim of parental neglect, then a separate "care" application had to be lodged by the Department within the "civil" branch of the Court. Welfare and offending matters thus were kept separate.

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33 SA, Parl, *Debates* Third Session (1977) at 185.

34 *Report of the Working Party Appointed to Consider the Implementation of the Recommendations of the Royal Commission into the Administration of the Juvenile Courts Act and other Associated Matters* SA Govt, 1977.

Determinate sentencing was also introduced. The Children's Court was invested with the power to impose a period of detention, ranging from two months to two years, on a proven offender. Children found guilty of a criminal offence could no longer be detained at the pleasure of the Minister for Community Welfare until they reached adulthood.

Other recommendations made by Mohr were jettisoned. One relates to the introduction of an hierarchical structure for judicial officers in the Children's Court. While accepting that the jurisdiction of justices of the peace should be limited as outlined by Mohr, the Working Party advocated that special magistrates should have the same jurisdiction as judges. To justify this view, it pointed to problems of distance, judicial manpower and expenditure which would arise if certain cases could only be dealt with by a judge based at the central Children's Court in Adelaide.

The recommendation concerning committal hearings was also rejected. Notwithstanding Mohr's idiosyncratic interpretation of the committal hearing - as a source of evidence for the sentencing judge rather than as a procedural protection for the accused - the implementation of his recommendation that committals become a feature of children's justice would have allowed young people charged with indictable offences to hear the case against them. The new laws would thus have accorded more closely with Mohr's overall commitment to formal, adversarial justice along adult lines.

The reasons given by the Working Party for rejecting committal hearings were, once again, entirely pragmatic - one might even say, realistic. Since the majority of young offenders coming before the Children's Court were charged with indictable offences (principally offences against property) most would require a committal hearing. The Children's Court would then grind to a halt under the increased workload. Committal hearings were therefore judged impractical.

The Working Party also opposed Mohr's idea of a system of appeal to a higher court. Indeed, it could find no good reason to abolish the existing method of reconsiderations. Consequently, under the current system, judicial officers still have the right to judge their peers. Mohr's recommendation that the Court conduct a periodic review of the progress of each child sentenced to detention was also rejected. Mohr had envisaged that children in detention would be brought to the Court at periodic intervals to have their progress assessed by the sentencing judge or magistrate. But when an estimate was made of the transport, vehicle and staff costs which would be involved, the proposal was quickly rejected. The Working Party advocated, instead, that three-person Training Centre Review Boards be established, each of which would include a judge of the Children's Court, and that these Boards would visit the detention centres on a regular basis to assess individual cases.

Finally, Mohr's recommendations on the accountability of children and children's justice were only partially implemented. His suggestion that the Attorney General have the right to apply for serious offenders to appear before adult courts found favour with both the Working Party and the Government. His proposal that the print and electronic media should be able to report the proceedings of the Children's Court also gained the initial support of the Working Party, even though it expressed some reservations about the concept. This support was not, it seems, shared by the Government, and so the concept of an "open court" failed to be incorporated into the new legislation, despite some heated parliamentary debate on the issue.[35]

Screening Panels

The innovatory concept of an independent screening authority, comprising a senior police officer and a senior social worker, was fully accepted and incorporated within the new legislation. Yet Mohr's stipulation that police and welfare workers who dealt with screenings should not sit on Aid Panels was rejected. Again, the reason given by the Working Party was purely pragmatic. It believed that restrictions of this sort would create staffing difficulties, especially in rural areas, where the number of senior personnel eligible to undertake these tasks would be small. The Working Party's rejection of Mohr's recommendation, however, was conditional upon the acceptance of one of its own proposals: that records of Aid Panel hearings should be kept only for statistical and research purposes and should not be disclosed in proceedings before the Children's Court unless the child had broken a Panel undertaking and was before the Court for the original offence. The Working Party apparently assumed that if Panel records were inadmissible at the Children's Court level, and if the Panel hearing itself were non-judicial in nature, there would be no real costs for the client. The Working Party was therefore able to dismiss Mohr's philosophical objections to the same person performing at both the Screening Panel and the Aid Panel level.

What ensued therefore makes little sense. Screening and Aid Panel personnel became interchangeable (against the wishes of Mohr) and Aid Panel records became admissible in the Children's Court (against the wishes of the Working Party). Thus the endeavours of both Mohr and the Working Party to protect children's rights were undermined.

35 See, for example, SA, Parl, *Debates* (1978) Vol 1 at 883ff and 934-937

Aid Panels

Mohr's recommendation that age and method of apprehension should no longer determine eligibility for an Aid Panel hearing was adopted. However, Mohr's recommendation that a child's written admission of guilt be witnessed by a lawyer did not gain favour. The reason given by the Working Party for rejecting the latter proposal was that, given the cost of consulting a legal practitioner (this was before the wide-spread availability of legal aid), such a requirement would seriously disadvantage offenders whose families were relatively poor. It was argued that, if this recommendation was implemented, children from lower socio-economic groups would opt for a Court appearance rather than incur the legal costs involved in going to a Panel.

Because only one (not both) of Mohr's recommendations was implemented, the incongruity of "welfare" panels in a system increasingly committed to due process was even more pronounced than anticipated. The informal welfare system of Panels was extended without the commensurate extension of legal safeguards for the accused - in particular, without ensuring the protection of a lawyer to oversee the admission of guilt at the Panel stage.

THE LEGACY OF THE MOHR REPORT

The culmination of the efforts of Judge Mohr and the Working Party was the *Children's Protection and Young Offenders Bill* which was introduced into Parliament on 22 August 1978, less than one year after the completion of the Royal Commission. Although the Legislative Council insisted that it go to a Select Committee (partly on the grounds that it failed to incorporate all of Mohr's recommendations[36]) - it was eventually assented to with only minor amendment on 15 March, 1979.

The achievements of Judge Mohr have gained widespread recognition[37] and should not be underestimated. The Mohr Report stands as a landmark in the development of Australian juvenile justice. It represents a critical moment when a clear philosophical commitment was expressed towards due process for children and was relatively quickly translated into legislation. In many other jurisdictions the processes of legal discussion and statutory change have been more protracted.

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36 See, for example, the arguments of the Honourable JC Burdett and the Honourable KT Griffin in SA, Parl, *Debates* (1978) at 1193ff and 1246ff.

37 Bailey, "A Change in Ideology in the Treatment of Young Offenders in South Australia: The Children's Protection and Young Offenders Act 1979-1982" (1984) 9 *Adel LR* 325.

A number of reforms which Mohr proposed and which were subsequently implemented were fully consistent with his commitment to formal and predictable justice for children, governed by due process. But in certain respects, the Mohr Report seemed equivocal about its stated wish to bring formal procedures and adult legal rights into the children's sphere of justice. Other conflicting agendas appear in this report - notably, those of simple pragmatism and administrative efficiency. As a result, in a few key areas, the recommendations put forward by Mohr strayed from his strong philosophical commitment to due process and, in some instances, stood in clear opposition to that approach. The current system's failure to provide full due process for children may well be at least partly a product of the law reformer's occasional failure to remain true to his own philosophical position.

The process of law reform, however, does not end with the submission of a report to the government. No matter how philosophically consistent a reform document may be, the task of translating that document into legislative reality becomes the responsibility of people who, themselves, are influenced by practical considerations and by what the government of the day finds politically acceptable and achievable. In this case-study of law reform, the Working Party established to advise on the implementation of the Report of the Royal Commission rejected certain recommendations, not on the grounds that they were philosophically inconsistent, but because they were impractical and too costly to implement in terms of time, money and personnel. Similarly, other recommendations which clearly did not gel with Mohr's formal commitment to due process were accepted because they were relatively inexpensive and workable.

The Working Party's selective rejection of certain reforms and acceptance of others meant that the gap between the rhetoric of due process (as expounded by Mohr) and the reality of the system of juvenile justice (which came into being as a result of the Royal Commission) was even more pronounced than would have been the case had his recommendations been implemented in toto. The final product of this process of law reform, the *Children's Protection and Young Offenders Act* 1979 (SA), thus represents an exercise in compromise - compromise by Mohr, by the Working Party and by the Government. It is therefore pertinent to consider, albeit briefly at this point, the legacy of just some of these compromises.

In certain areas, the failure to implement recommendations which were consistent with the concept of due process appears to have had few discernible effects. For example, the rejection of the idea that Children's Court judges and magistrates should exercise different jurisdictions appears to have generated no significant problems for the delivery of justice to young people. Similarly, the failure to abolish the system of reconsiderations has not resulted in any major infringement of children's rights. Reconsiderations

now co-exist with a system of appeal to a higher court. But experience has shown that, when confronted with this choice, children recognise that it is in their best interests to have their cases reheard by a judge of the Children's Court rather than risk an appeal to a judge of a higher "adult" court who is less attuned to the rehabilitative philosophy of children's justice. In other words, the retention of the reconsideration system, while straying from conventional notions of due process, has apparently worked to the benefit of young offenders.

One reason for this positive outcome, from the point of view of child defendants, is that the system of reconsiderations centralises control in the Senior Judge of the Children's Court, who is strongly committed to a rehabilitative/welfare philosophy. The attendant risk of this centralisation of power is that a great deal depends on the personal philosophy of the individual who wields that power. If the current Senior Judge were to be replaced by one who favoured a more punitive approach, appeals to a higher court might then become more attractive.

In other areas, the failure to act on the recommendations of the Royal Commission initially produced unwanted consequences, both for young offenders and for the efficient functioning of the system. This is true of the decision not to introduce committal hearings into the children's jurisdiction. A major role of the committal hearing is to provide a mechanism for the elimination of weak cases. The absence of such a system in the juvenile jurisdiction meant that, during the initial days of the *Children's Protection and Young Offenders Act* 1979 (SA) a large number of trials collapsed at the last minute because the evidence had not been tested beforehand. Soon after the passage of the new Act, the Senior Judge of the Children's Court sought to overcome this problem by way of a practice direction that pre-trial negotiations must take place between the prosecution and defence counsel before the Court would grant a trial date. Such negotiations give the defence the chance to examine the prosecution case, determine common ground and challenge points of difference. In other words, it is possible that they do largely the same job as the committal.

The problem with this informal alternative to the preliminary hearing is that such officially-sanctioned pre-trial negotiations are not open to judicial scrutiny. Nor do they give the accused the right of confrontation. Moreover, this informal testing of the case requires accused persons to signal a plea of not guilty rather than withholding their plea until they have had the opportunity to evaluate the sufficiency of the Crown case, whereupon they may well submit that there is no case to answer. Children who intend to plead guilty to indictable offences in the Children's Court therefore do not have the advantage of having the Crown case examined as in the adult jurisdiction. Instead, the case proceeds from plea to the prosecution's "facts"

which are generally uncontested.[38] These disadvantages, however, must be set against the costs of committals themselves, particularly the additional time required for a full committal hearing. According to Feeley,[39] such delays often impose a greater punishment on the offender than the final sentence. It is possible that here, pragmatism, rather than strict adherence to due process, may be in the child's best interests.

Mohr proposed that the media be permitted to report Children's Court proceedings but the Government rejected this idea. The result has been some public disquiet about the apparent secrecy of children's justice in this State. Especially in recent years, the legal constraints which prevent media coverage of Children's Court proceedings have been viewed by certain sections of the community as a means of concealing the leniency of sentences meted out to young offenders at a time of escalating juvenile crime. In response to these concerns, an amendment was passed in 1990 which finally gave the media the access which Mohr had proposed over a decade earlier. Print and electronic media now have the right to report details of Children's Court hearings, but are not permitted to disclose any information which would identify the young offender. This new amendment reflects a clear shift towards a "law and order" agenda and is fully in keeping with Mohr's original concern that young people be held accountable for their offending.

While rejecting certain proposals which accorded with due process, the Government proceeded to implement other of Mohr's recommendations which departed from this principle, with interesting results. The most significant of these moves was the retention and extension of the Aid Panel system. The effect was immediate: the proportion of apprehended youths referred to Panels increased from 42.6%, in the year preceding the change of Act, to 57.4% during the first year of the new legislation. Undoubtedly, the opportunity to be dealt with by a Panel and to avoid the stigma of a Court record produces significant benefits for a child and clearly justifies Mohr's stance. However, the Government's refusal to inject a lawyer into this informal process has made the system more coercive than it might otherwise have been. The very existence of Aid Panels means that children are already subjected to a powerful inducement to admit guilt (the inducement being that Panels are not empowered to punish the child, in the manner of a court, but can only warn or counsel). The absence of legal advice strengthens this inducement. Without a lawyer, children are not in a position to judge whether the actions alleged by police satisfy all the ingredients of the charge. Thus they often assume that they are guilty when, in fact, they are not.

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38 See Naffine, Wundersitz and Gale "Back to Justice for Juveniles: the Rhetoric and Reality of Law Reform" (1990) 23 *ANZJ Crim* 192; and Wundersitz and Naffine "Pre-Trial Negotiations in the Children's Court" (1990) 26 *ANZJ of Sociology* 329.

39 Feeley, *The Process is the Punishment* (Russell Sage, NY 1977).

Nor does the young person usually appreciate the consequences of such an admission. The decision to allow Children's Aid Panel records to be submitted as evidence of prior offending at any subsequent Children's Court hearing (notwithstanding the Working Party's recommendation to the contrary) means that an Aid Panel hearing entails unforeseen consequences for those youth who, at a later time, find themselves back in the system. When such persons first come before the Children's Court, they are viewed as recidivists and so are treated more seriously by the Court.

The acceptance of Mohr's recommendation on the composition of Screening Panels has also generated problems. Originally these referral panels were regarded as essentially administrative bodies. Any bias against defendants on the part of police would be counter-balanced by the more sympathetic approach of the welfare worker, and so a lawyer was not required. But this did not work in practice. Because social workers have no legal training, they are not equipped to challenge the police on points of law. Their position is therefore bound to be weak when it entails discussion of the offence itself. For the same reason, social workers are likely to fare poorly when additional pressure is brought to bear on the police members of the screening panel by operational police who want to ensure that young offenders (especially those who have been arrested) are dealt with as seriously as possible. It is not surprising then, that, especially during the initial years of operation of Screening Panels, police assumed a dominant role in the decision-making process.[40] Nor is it surprising that Screening Panels have been referred to as "kangaroo courts" by members of the legal profession.

The decision to have a police officer on the Screening Panel also ensured that the Police Department was represented at every decision-making level of the juvenile justice system in South Australia. In practice, police are now responsible for initiating the prosecution as well as deciding how the case should be processed. It is therefore not unusual, particularly in country areas, for the same police officer to lay the original charge, to screen it and then to hear it at the Aid Panel. This, of course, goes against the requirement of natural justice: *nemo judex in causa sua.* That is, a person should not be judge in his or her own cause.

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40 Gale and Wundersitz "The Operation of Hidden Prejudice in Pre-court Screening Procedures: The Case of Australian Aboriginal Youth" (1987) 22 *ANZJ of Crim* 1.

CONCLUSION

The compromises made by Mohr, by the Working Party and by the Government did not produce wholly undesirable consequences from the point of view of young defendants. As we have endeavoured to show, some compromises were beneficial to the accused while others were not. The apparent tensions in the process of law reform between theoretical purity and pragmatism reflect the difficulty of implementing any single model of justice in an unadulterated fashion. Inevitably, adjustments and modifications are necessary. And it may well be judicious to retain components of a system which appear to be positively beneficial, even though they mar ideological purity. In the juvenile sphere of justice, with its countervailing ethic of welfare (which may well be on the wane but is far from moribund), it is indeed possible to justify philosophical inconsistencies, such as those we have identified here, on the basis that the system has a number of complex and often competing goals.

The point of this exercise, however, has not been to argue the costs and benefits of philosophical consistency, but to establish how the law reform process itself can produce inconsistencies between theory and practice. We have also highlighted a number of philosophical tensions which continue to inhere in South Australian juvenile justice. Other states, which are currently undergoing similar reforms, could well learn from the South Australian experience.

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