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PROTECTING CHILDREN ON BOTH SIDES OF THE GLOBE

AT opposite ends of the globe two major common law jurisdictions passed far-reaching new legislation on child welfare in 1989. New Zealand passed its *Children, Young Persons and Their Families Act* 1989 (NZ); England its *Children Act* 1989 (UK). The two new pieces of legislation are superficially similar and both are a model for South Australia's *Children's Protection Act* of 1993.[1] This article examines the *Children's Protection Act* in the light of the New Zealand and English models and offers, it is hoped, some constructive criticisms from a children's rights perspective. The year of the English and New Zealand legislation was, of course, also the year of the United Nations Convention on the Rights of the Child.

NEW ZEALAND'S CHILDREN, YOUNG PERSONS AND THEIR FAMILIES ACT

The history of the 1989 Act in New Zealand goes back to the mid-1970s. The focus of the reformers' minds then was on such issues as the mandatory reporting of child abuse[2] and on inter-disciplinary management. But the proposals were seen by critics as "monocultural". Maori and Pacific

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1 No 93 of 1993. References to the Act could only be incorporated at proof stage. The original bill was the subject of considerable debate and amendment in the South Australian Parliament until being finally assented to in November 1993, immediately prior to the defeat of the Labor Government.

2 A good discussion of the 'pros' and 'cons' is contained in Maidment, "Some Legal Problems Arising Out Of the Reporting of Child Abuse" (1978) 31 *Curr Leg Prob* 149.

Island groups in particular took the view that the proposed law failed to recognise the importance these groups attached to the family and family decision-making. The emphasis on professionals and bureaucracies deflected, they believed, attention away from the family. Professionals were likely, it was thought, to think in a Eurocentric way using professional approaches and ideologies. The proposed legislation, not surprisingly, emphasised the paramountcy of the child's welfare. But, said the critics, this failed to place the interests of the child within the context of his or her family and culture. A Working party examined these differences and recommended that problems affecting the child should be resolved within the family.[3] Only if the child's interests could not be taken care of in this way should they be pursued outside the family environment. Though in its turn criticised, the 1989 Act clearly bears the imprint of the Report of the Working party.

The Act tackles child protection and youth justice separately. This article ignores the youth justice measures. It is a huge document and only the more interesting provisions can be considered. The general thrust of the Act is family-oriented: resources are to be directed towards families; the interests of families are to be protected. The child's welfare is situated in the family, with the family group conference as central.

The first of the general principles of the Act is that of participation of the family, *whanau, hapu, iwi,*[4] and of family groups in decisions affecting the child. Consideration must always be given to the welfare of the child; however this is coupled with consideration of the stability of the family. The welfare of the child is to be seen as part and parcel of family integrity and well-being. Other principles are child-centred. The wishes of the child are to be taken into account, though the extent of consultation is dependent on the child's age, maturity and culture. The agreement of the child, as of the parents, is to be sought to any course of action. Decisions are also to take account of the child's "sense of time".[5] The protection of the child is the first-listed principle, but it is "overshadowed" by subsequent provisions that emphasise that there should be minimum intervention into family life and that the child should be removed only if there is a "serious risk of harm"

3 NZ, Department of Social Welfare, *Report of The Working Party Review of Children and Young Persons Bill* (1987).

4 *Whanau* is the extended family, *hapu* the sub-tribe and *iwi* the tribe. There are Samoan equivalents: for example *aiga* is equivalent to *whanau*.

5 Goldstein, Freud & Solnit, *Beyond The Best Interests of The Child* (Free Press, London 1973) pp40-45.

to the child.[6] Of the remaining principles, the most significant relate to the role of the family and the need to reintegrate a child within the family. The "primary role in caring for and protecting a child" is vested in the family, *whanau, hapu, iwi* and family groups rather than parents as such; this approach is radically different from the approach to child law that we have become used to. The model is throughout a Maori one.

Despite the emphasis on family participation and stability, there is a residual place for the welfare of the child to take priority. If any conflict of interests or principles arises, the welfare and interests of the child are to be the "deciding factor".[7] There is conflict in New Zealand as to what it is necessary to prove to establish the existence of "conflict". This was a late addition to the 1989 Act. Opponents agued that, if the welfare of the child was to be paramount, this would undermine the emphasis on the family - the chief focus of the Act. The provision was thus a compromise between those who supported children's rights and those who wished to uphold the rights of the family. On one view it is difficult: it needs to be established on a case-by-case basis. On another view, where there has been abuse, there is *ipso facto* a conflict of interests. It would seem that a purposive interpretation would at the very least support the former view, but a Court of Appeal judge,[8] albeit in a different context, has expressed the view that the relevant section is but "a contemporary re-statement" of the legislative policy, long-entrenched, that the welfare of the child is the first and paramount consideration.[9] The Mason Report of 1992 has recommended that the Act be amended to make it clear that any court or person exercising any power conferred by the Act must treat the interests of the child as the first and paramount consideration.[10] The Report notes that, although the courts have interpreted the section as a restatement of the paramountcy principle,[11] social workers and participants in family group conferences

6 *Children, Young Persons and Their Families Act* s13.

7 Section 6.

8 Richardson J in *Director of Social Welfare* v *L* [1990] NZFLR 125 at 130. See also Judge Inglis QC in *Re B* [1992] NZFLR 726 at 758: "Parental and Family rights are relevant only to the extent that they are exercised for the welfare and interests of the child".

9 *Report of the Ministerial Review Team to the Minister of Social Welfare* (1992) (hereafter referred to as the "Mason Report"): "We are in no doubt that the well-being of the child is paramount"; p16.

10 Mason Report p192. See also Tapp, Geddis & Taylor, "Protecting The Family" in Henaghan & Atkin (eds), *Family Law Policy In New Zealand* (OUP, Auckland 1992) Ch 3.

11 *Director of Social Welfare v L* [1990] NZFLR 125.

have refused "to acknowledge that there has been a conflict of principles or interests in situations where one clearly exists".[12] It believes that conflict is "either overlooked or not understood".[13] And it firmly recommends that it is "necessary in ALL cases to look separately at the interests of both the family and the child and to hold the latter paramount".[14]

But perhaps the most important innovations in the Act are the new processes of decision-making, which are so clearly a model for the South Australian Act.[15] As in the majority of the industrialised world in the twentieth century, decision-making in New Zealand had resided with social workers and other professionals and centred on the courts. Under the 1989 Act the family group conference takes the central place. The family group conference, a wide range of family members with friends and others sometimes added, is given the initial responsibility of coming up with a proposal for dealing with the child's problems. Every effort is made to bring the family together for the purpose of the conference.[16] The proposal of the conference has to be agreed to by the social work department (or whatever other agency was responsible for the initial investigation). This is designed to keep a check on the decision-making process; after all, the thought of the abuser participating in the drawing up of a plan for the child's future is potentially alarming. There is thus a filter, though the impression gained is that very few proposals are not acted upon. There is a clear impression also of "elders" laying down the law to the abusers. The Mason Report notes that, in the year ending 30 June 1991, there were 10,720 conferences of which only 652 had failed to reach agreement. It had been "reliably informed" of some fairly bizarre occurrences at FGC's, one example being "a meeting where everyone present spent the entire time haranguing the young person: the Departmental workers said nothing, and at the end of the Conference everyone got up and walked out, with nothing resolved. But they all felt better".[17] The review committee heard allegations of conference rigging by improper selection, conference hijacking by different branches of the family, DSW scapegoating of various attendees, *whanau/hapu* arguments, and, of particular concern, cases where children were subjected to "intimidation".[18] And yet despite these concerns

12 Mason Report p11.
13 As above.
14 As above.
15 See below p91ff.
16 It is not uncommon for air fares to be paid in order to bring the family together.
17 Mason Report p20.
18 At p26.

the report made no significant recommendations regarding family group conferences and left the principle of family decision-making intact. It was too early, the Report implied, for a radical overhaul. The Review team contended itself with identifying the problems at the level of service delivery.

The role of the court is subsidiary yet it retains a function. But this is only where the the family group conference cannot reach an agreement, or if its proposal is rejected. The Family Court can make a declaration that a child is in need of care and protection, but only as a last resort.[19] On considering whether or not to declare a child in need of care and protection, there is no need to prove culpability on the part of the parents or of anyone else.[20] Before a court makes a declaration it must explore other options to see whether an appropriate solution, short of a court order, can be found.[21] As part of this process, the court can call a mediation conference to try to resolve matters by agreement between the parties.[22]

If a court declares a child to be in need of care and protection, there are a number of possible orders. These range from counselling to custody and guardianship orders. Custody or guardianship may be given not only to the state, but also to foster parents, community organisations and *iwi* authorities. Access orders can be made in favour of the parents. Despite this, the intention is that foster arrangements should be long-term. The Act also preserves the power of the High Court to make a child a ward of court.[23]

Opinion on the New Zealand legislation is divided. It has its staunch supporters, including the Family Rights Group in Britain,[24] and its trenchant critics. The Mason review committee was established within two years of the passage of the Act. Amongst its other recommendations are some directed towards mitigating the problems highlighted. Thus, it proposes a higher level of professionally trained social workers.[25] It recommends that the care and protection resource panels which monitor the

19 *Children, Young Persons and Their Families Act* s14.
20 Section 71.
21 Section 73.
22 Sections 170-177.
23 Section 120(2). It is worth contrasting this with s100(2) of the *Children Act* 1989 (Eng).
24 The Family Rights Group held conferences in London in 1993 with New Zealand invitees to propagate the concept.
25 Mason Report pp198-199.

care and protection provisions in the Act be given more authority. In particular, it recommends that panels be entitled to representation at family group conferences, although the purpose of this will be information-giving and advisory.

Perhaps the most important of its recommendations however, is the one advocating the upgrading of the office of Commissioner for Children. New Zealand is one of the few countries in the world to follow Norway's example[26] and institute an "ombudsman" for children.[27] It is a recognition, sadly lacking in South Australia's new legislation, of the need for children to be independently represented. New Zealand's Commissioner was established as a result of the 1989 Act. The Mason report wishes to separate the Commissioner from the Department of Social Welfare (the proposal is that the Commissioner be made an officer of parliament) and to empower the Commissioner to seek judicial review. Since the Commissioner's remit emphasises the welfare of the child, this recommendation should go some way to giving children a louder voice. Whether this in turn will undermine the family-oriented ideology within the FGC only carefully monitored practice will show.

ENGLAND'S CHILDREN ACT

England's 1989 *Children Act* has an amalgam of sources, including reports of inquiries into a series of abuse scandals in the late 1980s.[28] But of these it is the influence of the Butler-Sloss report into child sexual abuse in Cleveland in 1987 which is most profound.[29] Social workers had been criticised in the earlier reports for not using coercive statutory powers firmly enough, but the Cleveland report criticised them for an over-reliance on compulsory measures and for paying too little attention to parents by adopting a perspective which placed "a strong focus on the needs of the child in isolation from the family".[30] Contemporaneous with the reports came Government enquiries into the child care system,[31] the publication of

26 See Flekkøy, *A Voice for Children* (Jessica Kingsley, London 1991).
27 Newell and Rosenbaum have recommended a "Commissioner" in England. See *Taking Children Seriously* (Gulbenkian, London 1991).
28 See Freeman, *Children, Their Families and The Law* (Macmillan, London 1992) Ch 1. A recent analysis of these reports of inquiries is Reder, Duncan & Gray, *Beyond Blame* (Routledge, London 1993).
29 *Report of the Inquiry Into Child Abuse in Cleveland 1987* (Cm 412, 1988).
30 As above para 4.57.
31 DHSS, *Review of Child Care Law* (1985).

research findings[32] and investigations by the Law Commission into the private law of children.[33]

The Act is the product of a number of value positions:[34] Laissez-faire and patriarchy; state paternalism and child protection; defence of the birth family, parents' rights, children's rights and child liberation. Each of these positions can be detected in provisions in the Act.

The presumption of non-intervention, keeping compulsory intervention to a minimum, both in private and public matters, is the clearest example of laissez-faire. The courts are instructed not to make orders unless doing so is "better" for the child.[35] This is the keynote to an understanding of the whole Act. But the Act not only strengthens the position of parents, by getting the local state off their backs, it also strengthens the powers of local authorities to intervene. For example, the "trigger" for care includes for the first time prognosis by social workers that the child is "likely" to suffer "significant harm".[36] The new child assessment order, allowing removal of a child for up to 7 days for medical and psychiatric investigative purposes, where there is suspicion that something is wrong but no hard evidence, is a further example.[37]

There are also clear instances of the pro-birth family perspective. An official *Guide* to the Act states that the Act "rests on the belief that children are generally best looked after within the family with both parents playing a full part and without resort to legal proceedings".[38] Thus, there is a new emphasis on the provision of services to children and families "in need".[39] "In need" is defined to include both the socially disadvantaged and the disabled or handicapped. Both have special needs. There is a greater emphasis on "contact" between children and their families when circumstances dictate that they are separated.[40] "Parental responsibility",[41]

32 DHSS, *Decisions In Child Care* (1985).
33 Law Commission, *Wards of Court* (1987); *Guardianship and Custody* (1988).
34 See Fox-Harding, "The *Children Act* in Context; Four Perspectives in Child Care Law and Policy" [1991] *JSWFL* 179, 285. And see Freeman, "In The Child's Best Interest?" (1992) 45 *Curr Leg Prob* 173 esp at 176-82.
35 *Children Act* s1(5).
36 Section 31(2). See *Hounslow LBC v A* [1993] 1 FLR 702; *Northamptonshire CC v S* [1993] 1 FLR 554.
37 *Children Act* s43.
38 Lord Chancellor's Dept, 1990, p11.
39 *Children Act* s17. See also Part III of the Act generally.
40 Section 34.
41 Section 2.

a key concept in the Act, is never lost by parents, even when it may seem they have behaved in a manner to suggest lack of responsibility.[42]

The fourth value position, an emphasis on promoting children's rights, is also not overlooked. The *Cleveland* report had insisted that the child should be "a person and not an object of concern".[43] Children may initiate court actions: for example, they may challenge an emergency protection order, seek contact when in care or ask for a care order to be discharged. They may seek the court's leave to obtain an order making a decision as to where they are to live or with whom they are to have contact. It is usually a pre-condition that the child has sufficient understanding to make the application, but this is not always so. There is also greater recognition of the child's wishes and feelings,[44] and more extensive use of separate representation of children by guardians *ad litem*. There is a feeling that the Act has "empowered" the child, but this line is not consistently held, for example in relation to divorce where the child's position is weakened by a loosening of the court's control over residence arrangements.[45]

Overarching the whole Act are a set of principles. First, when a court determines any question with respect to a child's upbringing, the child's welfare is the "paramount consideration".[46] This means that the child's welfare, and it alone, "determines" the decision.[47] Of course, welfare is not value-neutral, and decisions will often emphasise one aspect of welfare over another, and reflect inevitably judicial values which may be far removed from those of the family or community. Not surprisingly, in one recent case judges preferred a disciplinarian father to an easy-going mother.[48] They feel uncomfortable about lesbianism,[49] and have expressed hostility to Rastafarians[50] and Scientologists,[51] as well as other marginal religious groups.[52]

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42 See Eekelaar, "Parental Responsiblity: State of Nature or Nature of the State?" [1991] *JSWFL* 37.

43 *Report of the Inquiry Into Child Abuse in Cleveland 1987* p245.

44 *Children Act* s1(3). And see *Re H* [1993]1 FLR 440.

45 Roche, "The Children Act 1989: Once A Parent Always A Parent?" [1991] *JSWFL* 345.

46 *Children Act* s1(1).

47 *J v C* [1970] AC 668 at 710-711 per Lord MacDermott.

48 *May v May* [1986] 1 FLR 325.

49 *C v C* [1991] 1 FLR 223; *B v B* [1991] 1 FLR 402.

50 *Re JT* [1986] 2 FLR 107.

51 *Re B and G* [1985] 1 FLR 134.

52 Further thought will have to be given to this in the light of *Hoffman v Austria* [1994] 1 FCR 193.

Secondly, the Act contains a novel "checklist".[53] It is set out as Parliament's indication of its perception of the content of a child's welfare and is there to assist the courts, as well as practitioners, to operate the welfare principle. First-mentioned in the list are the "ascertainable wishes and feelings of the child". The word "ascertainable" indicates that, wherever possible, an attempt should be made to ascertain the child's opinions.[54] It has been stressed that to understand a child's communication it needs to be set "in the context of his or her daily living situation, past experiences and racial and cultural background".[55] Another factor on the checklist is the child's age, sex, background and any characteristic the court considers relevant. "Background" is significant. It includes religion, racial origin and cultural and linguistic background. These four factors must also be considered by local authorities when making decisions about children they are looking after.[56] Race is, and is likely to remain, a contentious issue. The courts have said they will not prioritise it over other aspects of a child's welfare.[57] They believe that some local authorities are "politically dogmatic"[58] on race issues, that they easily become "prisoners" of their own over-rigid policies.[59] But there is evidence that black children reared in white families experience confusion about their identity, and in one contentious case this was used to justify moving a child of mixed race from a white foster mother, with whom he had lived for 18 months from birth, to a black family.[60]

There is a major issue of policy involved. To what extent should the dominant culture take account of the cultural practices of minority groups? How far is tolerance to go? If the majority considers the practice abhorrent should it be allowed? The protection of children from "harmful" cultural practices is thought by some to undermine children's rights.[61] There are

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53 *Children Act* s1(3).

54 The Act emphasises the importance of welfare reports (s7) and, in the public law area, the guardian *ad litem*.

55 Thurgood "Active Listening - A Social Services' Perspective" in Bannister, Barrett & Shearer (eds), *Listening to Children* (Longman, Harlow 1990) p52. See also Bray, *Sexual Abuse; The Child's Voice* (Canongate, Edinburgh 1991).

56 *Children Act* s22(5).

57 *Re A* [1987] 2 FLR 429.

58 *Re N* [1990] 1 FLR 58.

59 *Re JK* [1991] 2 FLR 340.

60 *Re P* [1990] 1 FLR 96.

61 The issue of male circumcision is now being raised by Alice Miller and Peter Newell, the latter in *The UN Convention and Children's Rights in the UK* (National Children's Bureau, London 1991) pp96-97. But to call a practice

African peoples who practise female genital mutilation and areas of London where this practice has continued amongst a particular cultural group. The United Kingdom has outlawed this practice.[62] But it continues and social work authorities have to confront the continuing challenge it offers. The courts have decided that a child's culture is to be discounted where the care being offered is unacceptably poor. But, in the case in question, which concerned the parenting of a mother from Vietnam,[63] the court was convinced that the mother's disciplinary measures were unacceptable also in the rural Chinese culture from which she came. But, what if they had been the norm there? English courts have struggled previously to tackle the issue of what is thought to be excessive corporal chastisement within Afro-Caribbean cultures.[64]

A third principle is the presumption of non-intervention. It is a presumption against court action and will influence the work of lawyers and social workers. Lawyers will have to wean clients away from their beliefs that courts exist to make orders. Social workers will have to have clear long-term plans for the child for whom they propose a care order. The Act recognises that care is no panacea. Courts will need to be convinced that a care order is beneficial to a child's well-being before they make one.[65] The number of post-divorce orders about children will decline considerably. The work of counsellors and conciliators will increase as those denied court resolutions seek the informal justice of agreements and settlements. There is some fear that the withdrawal of courts may deleteriously affect the lives of children.[66]

A fourth principle in the Act is a new emphasis on parental responsibility.[67] There is a shift away from parental rights, with its suggestion of children as property, to the new concept which sees parents as trustees for their

"abuse" which is also a pre-requisite to religious identity is, and is likely to remain, contentious.

62 *Prohibition of Female Circumcision Act* 1985 (UK). But it still continues; see Livingston, "Female Circumcision: A Continuing Problem in Britain" (1991) 302(6774) *British Medical Journal* 477.

63 *Re H* [1987] 2 FLR 12.

64 *R v Derrivière* (1969) 53 Cr App R 637. On tentativeness about intervening in black families where there are concerns about child care see Stubbs in Wattam, Blagg & Hughes, *Child Sexual Abuse* (Longman, Harlow 1989).

65 On this see *Re Humberside CC* [1993] 1 FLR 257

66 A concern I voiced in a lecture delivered in London as the Act was coming into operation. See Freeman, "In the Child's Best Interests?" (1992) 45 *Curr Leg Prob* 173.

67 *Children Act* s2.

children. Parental responsibility itself contains three distinct messages. First, that responsibility is more important than rights. Secondly, that it is parents, and not children who are the decision-makers. The *Gillick* decision in 1985 limited the power of parents to make decisions for their mature children.[68] The new Act, though child-centred, has arguably overturned this principle. It was therefore not surprising that shortly before the Act came into operation, the Court of Appeal decided that, if a "Gillick-competent" child declines to consent to medication, "consent can be given by someone else who has parental rights or responsibilities".[69] Thirdly, the emphasis on parental responsibility conveys the all-important message that it is parents, not the state, that have responsibility for children. Parents, it is stipulated, have responsibility in a normative sense even when in fact they act with complete disregard for that responsibility. So wedded is the Act to this ideology that, short of adoption, there is no way that a parent with parental responsibility can divest himself or herself of it. Even when the child is in the care of a local authority under a care order, the parents retain parental responsibility. In a strange compromise it is also vested in the local authority and this can control the way in which parents exercise their responsibility. The result is that parental responsibility becomes, after a care order, little more than a piece of symbolism, but highly significant nevertheless.[70]

The fifth principle is not mentioned in the Act as such and yet is a *leitmotif* recurring throughout it. The Act adopts the view of Fisher et al that the "philosophy of partnership with clients, in which the primary caring role of the family is reasserted, but effectively *supplemented* by public services".[71] The philosophy rests on a view of the "good society" which sees those in need of child care services as fellow citizens rather than as "inadequate" parents or children. The Governmental *Guidance*[72] argues that

> measures which antagonise alienate, undermine or marginalise parents are counter-productive. For example, taking compulsory measures over children can all too easily have this effect even though such action may be necessary to provide protection.

68 *Gillick v West Norfolk AHA* [1986] AC 112.

69 *Re R* [1991] 4 All ER 177. See also Masson, "Adolescent Crisis and Parental Power" (1991) 21 *Fam Law* 528, and Freeman, "Removing Rights from Adolescents" (1993) 17(1) *Adop & Fost* 14.

70 See *Children Act* ss33(3), (4).

71 Fisher, Marsh & Phillips *In And Out of Care* (Batsford, London 1986) p125.

72 DH, *Principles and Practice* (1990) p8.

It advocates that if young people cannot remain at home, placement with relatives or friends should be explored before other forms of placement are considered. It wants parents to be more actively involved in the decision-making process about their children even when they, for one reason or another, cannot be involved in day-to-day care. The Act envisages "shared care" as a long-term option, with "supplementary" rather than substitute parents. The Act puts a greater emphasis on contact, which it sees as the right of the child.[73]

SOME COMPARISONS AND CONTRASTS

There are a number of similarities between these two models of child welfare legislation. Both emphasise the importance of the family to the child. In both, the welfare of the child is situated within the well-being of the family. Both are sensitive to cultural pluralism: in the case of New Zealand this constitutes part of a re-awakening of understanding of native culture; in England it is a response to the needs largely of those of Afro-Caribbean descent and from the Indian sub-continent whose families immigrated to England in the 1950s and 1960s. Both Acts recognise the limitations of professional competence, and appreciate that clients can be seen as experts. In both Acts coercive state intervention is seen as a last resort. The emphasis in both is on minimal intervention. There is an ideology embedded in both Acts that the family is a basic building block of a free society. There is a recognition also that the state is no substitute for "flesh and blood" families and cannot replace them.[74] The result is that not only is there a presumption of non-intervention in both Acts, but also a recognition that intervention does not necessarily lead to the undermining of parental authority or to the child being removed to foster care. Both Acts speak also of the priority of the child's interests, though the treatment of these is less equivocal in the English legislation. Both Acts stress the importance of ascertaining the child's wishes, both recognise the variable of age and understanding. The New Zealand legislation, in addition, relates this to the child's culture. The significance of time in a child's life is also stressed. The English Act matches the New Zealand's emphasis on a child's sense of time by enacting a presumption that delay is likely to be prejudicial to a child's welfare.[75]

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73 See Freeman, "Is Access A Child's Right or a Parent's"; paper presented at the 1st World Congress on Family Law and Children's Rights, Sydney, July 1993.

74 See Goldstein, Freud & Solnit, *Beyond The Best Interests of The Child* (Free Press, New York 1973).

75 *Children Act* s1(2).

There are thus a large number of similarities. There are differences too. In England the courts are still central. Indeed, the new Act gives them a new pro-active role, the ability, for example, to set timetables for action by social workers and others.[76] True, fewer cases should reach courts but, for those which do, there is no doubt who is in control. There is a new "open-door" to the courts policy in the English Act, though still no Family Court.[77]

The Family Group Conference, the most innovative characteristic of the New Zealand legislation, is not replicated in England. Indeed, the participation of parents in professional inter-disciplinary child protection conferences only became official policy in 1991.[78] Parental decision-making as such is not institutionalised in England. In England, parental participation in child welfare decisions remains on the margins; whereas in New Zealand the family is, subject to far from overpowering controls, the decision-maker. Even so, in New Zealand, the legislation recognises the protection of the child before any other of the listed principles. By contrast, this is not recognised as a principle as such by the new English *Children Act* 1989, though it permeates the provisions of the Act including the checklist of factors of which account is taken when a child's welfare is assessed. The race question is not as dominant in England as it is in New Zealand. In New Zealand, the decision-making processes best suited to the Maori peoples (*whanau, hapu, iwi*) are imposed on the European population too. Although the English Act makes reference to the importance of race, culture, religion, background and the *Guidance* issued by the relevant Government department constantly advised on the operationalisation of race issues, the race question remains subsidiary.

THE SOUTH AUSTRALIAN CHILDREN'S PROTECTION ACT

To an outside observer, the South Australian legislation has distinct similarities with models just discussed. The Family Care Meeting concept is clearly adopted from New Zealand's Family Group Conference. The

76 Sections 11, 32.

77 An institution the tenth anniversary of which New Zealand celebrated with a major conference in Auckland (29 September- 10 October 1991).

78 See DH, *Working Together* (1991), and compare the court's approach in *R v London Borough of Harrow ex parte* D [1990] Fam LR 133. The practice does not appear to have changed much. See PAIN, *Child Abuse Investigations*, 1992. A useful discussion is Blyth & Milner, "The Process of Inter-Agency Work" in The Violence Against Children Study Group, *Taking Child Abuse Seriously* (Unwin Hyman, London 1990) p194.

situating of the administration of the Act "on the principles that the primary responsibility for child's care and protection lies with the child's family"[79] has its parallels in both 1989 models. The prioritisation of sustenance and support of families uses language similar to both models. The South Australian Act emphasises "partnership" and it stresses prevention, both goals of the English legislation and implicit in that from New Zealand. The Act is sensitive to the race, culture and community problem. But it adopts mandatory reporting,[80] which the English rejected[81] and the New Zealand machinery will only embrace if the Mason Report is adopted.[82] Many of the provisions in the Act are superficially similar to the English legislation, though there are often important differences. For example, the limit of time (12 months) placed on a care and protection order[83] has no parallel in an English care order;[84] and the voluntary custody agreement[85] resembles the "accommodation" concept,[86] but the requirement in the original Bill to give seven days notice to terminate such an agreement was in sharp contrast. Given the need for careful planning, the omission of a period of notice from the final Act is regrettable.

There are within the proposed legislation many flaws, a number of inconsistencies and several nagging doubts. I will focus on some of the questions most significant to an outside observer.

The Family Care Meeting concept is, it is submitted, essentially flawed. It is a transplant from New Zealand, where it was introduced with Maori cultural structures in mind. The *whanau* has no counterpart in South Australia. We are told that the purpose of the Meeting is to "make informed decisions as to the arrangements for best securing the care and protection of the child"[87] and that, if possible, it should act by "consensus of the child and the child's guardians and other family members".[88] But family care

79 *Children's Protection Act* 1993 (SA) s3(2).
80 Section 11.
81 See DHSS, *Review of Child Care Law* (1985) pp80-81. It was seen as "counter-productive" and likely to increase the risks to children by weakening the individual professional's sense of responsibility, and by raising barriers between professionals and between clients and their professional advisers.
82 Mason Report p17.
83 *Children's Protection Act* s38.
84 *Children Act* 1989 (Eng) s33.
85 *Children's Protection Act* s9.
86 *Children Act* 1989 s20.
87 *Children's Protection Act* s28(a).
88 Section 32(5).

meetings are to be convened for children "at risk". In effect, this means that where a child has, for example, been sexually abused, the family (whatever this means and it is not satisfactorily defined) will be expected to agree on a protective course of action. This fails to understand family dynamics, particularly gender power differentials. It shows little appreciation, for example, of what is commonly found in sexual abuse cases where the mother is often also abused or cowed into submission or dependency.[89] The Act looks to "consensus", but how real will this be? And how will it be arrived at? It ignores the competing interests to be found in many cases where a child's protection is not at issue. By situating the welfare of children under the umbrella of their families the Act risks relegating that welfare to the shadow of family unity. Given the problems already identified in the operation of the New Zealand system,[90] how do South Australia's legislators think that the problems already identified in the operation of the New Zealand system will be overcome? It is difficult to believe that they will. There must be a concern that the central mechanism in an Act to protect children has the potentiality to expose some of the most vulnerable of children to more abuse.

If child abuse is to be tackled more successfully, there must be a new vision of childhood. A conception of childhood must be developed which acknowledges the personality and integrity of children.[91] The question that must be asked is whether committing a child's future to a family forum is likely to enhance this value or to undermine it. To protect children one must also protect their rights. A mechanism for tackling child abuse which identifies children as a social problem, rather than as a participant in a social process, reduces children to little more than property in dispute. The Family Care Meeting could so easily disintegrate into a squabble about rights over a child. Children must be seen as individuals, not merely as "assets" or even subsumed within a family and its interests. How many children will have the competence, the initiative or the courage to stand up to parents and other adult family members who are negotiating about their future?

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89 See Hooper, *Mothers Surviving Child Sexual Abuse* (Routledge, London 1992). See also Herman's description of abusing fathers as "perfect patriarchs" in *Father-Daughter Incest* (Harvard University Press, Cambridge 1981) p71.

90 See the Mason Report.

91 See Freeman, *The Rights and Wrongs of Children* (Frances Pinter, London 1983). And see Anne McGillivray's comment that "child abuse is the hard case for children's rights....the horns of the dilemma of what children are as human and legal beings" in Freeman & Veerman (eds), *The Ideologies of Children's Rights* (Nijhoff, Dordrecht 1992) pp213-214.

Perhaps it is not surprising that the Act does not appear to recognise the need for children in family care meetings to be independently represented. But, as an English lawyer looking back to the days before Maria Colwell and the *Children Act* 1975, when children were not so represented, it seems like another civilisation.[92] Today, the norm in England in child abuse cases is for the child to have an experienced, independent social worker (a guardian ad litem) and his or her own lawyer. The English, on the other hand, have not yet contemplated devolving decisions upon family groups, though it has to be said that a leading pressure group, the Family Rights Group, is clearly attracted by the New Zealand concept.

The South Australian Act does not say that the child will not have independent representation, but it does exclude legal practitioners from the Family Care Meeting setting. Is it assumed that parents or other members of the wider family will protect and further the interests of the child? If so, this rests on a belief at best naive. It overlooks entirely the potential for, if not the reality in most cases of, a conflict of interests, and it ignores the precarious position of the child. It is also, arguably, in breach of the United Nations Convention on the Rights of the Child.

The fact that the Act is silent as to whether children will be afforded independent advocacy also suggests that, should the concept emerge, it is likely to be underfunded. Advocacy "on the cheap" may amount to little more than well-motivated but inexperienced "volunteers" stepping in to offer assistance to children. It is to be feared that should this happen such persons will all too readily be co-opted into the dynamics of the family decision-making process. The danger is of being lulled into a confidence that children's interests are being adequately and independently taken care of, when this is very far from the truth. Children's representatives (advocates) need to be properly trained. They need a thorough understanding of the problems of child abuse. They must be equipped with skills in interviewing children. They require advocacy skills. They need to appreciate the small group dynamics involved in family decision-making. None of this can just happen: it requires proper organisation and full funding. An Act as vague on the question as this one is cannot give confidence that such will follow.

The family care meeting's processes, as laid out in the Act, have other troublesome features. The Act provides that a family care meeting that makes decisions as to the arrangements for securing the care and protection

92 There was little independent representation of children before the 1975 Act.

of the child "must also make provision for the review of those arrangements".[93] But there is no indication as to how this is to be done. What, if any, is the role of the Care and Protection Co-ordinator to be?[94] It is now clear from the Act (though it was omitted from the Bill) that they are to monitor whether the decisions of the Family Care Meeting have been implemented[95], but that they are only to convene a second meeting for the purposes of review in limited circumstances.[96] Whatever the good intentions of those concerned at the time, there will inevitably be a tendency for less effort to concentrate on the decision with the passing of time. It is also the case that the decision may become less meaningful as changes take place in the family structure and in family interaction. But who is to monitor the progress of the decision? In what circumstances are there to be reviews? If so, by whom, and how often? The Act is clear on none of these issues. These are important questions on both a micro and macro level. Of course, it is important to know whether the decision of the Family Care Meeting is protecting the child who was its remit. But it is equally crucial for social policy makers to know whether the Family Care Meeting as a vehicle for furthering children's welfare is having this effect. Without a proper monitoring and review process it is unlikely that there will be meaningful feedback or any adaptation or change to meet problems that emerge.

If there is a feeling that the child is marginalised by the Family Care Meeting concept, the same impression is conveyed elsewhere in the Act. Thus, in identifying "policies" the Act rightly contains the overriding exhortation that the powers exercisable under the Act are to be exercised "in the best interests of the child".[97] This could be stated more categorically by emphasising the paramountcy of the child's welfare. This is particularly important given the interpretational problems thrown up by the New Zealand legislation.[98]

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93 *Children's Protection Act* s33(1).

94 The "jobs" of the Co-ordinator are gargantuan (see ss28-33) but the role is vague.

95 See s33(2).

96 They are not obliged to do so if requested by a family member not present at the original meeting or by the child. It is odd to find the word "will" rather than "shall" in the provision - "The co-ordinator *will* convene a Family Care Meeting" (emphasis added).

97 Section 4(1)(b).

98 See above p81.

There is a failure to address the personality of the child in other clauses too. Thus, for example, whilst it is right that medical treatment cannot be given to a sixteen-year-old without the adolescent's consent, the drawing of a dividing line at sixteen is too inflexible. There is nothing magical about attaining the age of sixteen and no need for arbitrary distinctions to be made. The Act could have followed the reasoning employed by Lord Scarman in *Gillick*, according to which child acquires the right to make their own decisions when of sufficient understanding and intelligence to be capable of coming to a mature decision.[99] It would be a gross interference with a mature 14 or 15 year-old, to insit on treatment against that person's express wishes. Indeed, it would amount to abuse in itself. The Act also appears to allow for examinations and assessments and tests on adolescents over 16 years without their consent. This cannot be acceptable: an intrusive examination of a seventeen-year-old woman, for example, against her express wishes to ascertain whether she has been sexually abused is an outrageous attack on her integrity and personality. There are not even obligations under the Act to inform a mature child as to the results of an examination, assessment, test or treatment.

A further criticism is the absence of any recognition of the need for complaints structures. There needs to be an institutional structure, to which representations and complaints can be made by children, by their parents, and by other family members. In particular, children need a commissioner or ombudsperson. A number of countries, Norway being the first and Sweden the latest, have instituted such a body. If the Mason report is implemented, New Zealand, the model for much of the Children's Protection Act, will strengthen its Commissioner by giving him greater independence from executive authority.[100] If South Australia is to go over to a protection model drawn from New Zealand, it should adopt its institutional structures as well.

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99 So-called "*Gillick*- competence". See above fn 67. It has to be conceded that *Gillick* competence is proving troublesome to the courts, to the extent that it is being by-passed. See *Re R* [1991] 4 All ER 177; *Re W* [1992] 4 All ER 627; and especially now *South Glamorgan CC v W and B* [1993] 1 FLR 574.

100 Mason Report p182. The Commissioner may be empowered to seek judicial review.

CONCLUSION

It was Goldstein, Freud and Solnit who observed that

> the law does not have the capacity to supervise the fragile, complex interpersonal bonds between child and parent. As *parens patriae* the state is too crude an instrument to become an adequate substitute for flesh and blood parents.[101]

On one level this is incontestable; on another its implications can be dangerous for children. Are legislators on both sides of the globe treading the path towards family privacy and autonomy and are they, in so doing, relegating children's protection rights to the interests of family unity? I believe this is happening, though to a greater extent in New Zealand than in England. South Australia is now set to pursue the "family knows best" model with the distinct danger that it will be children who will lose out. The family's protective umbrella can all too easily cast a shadow on its children's welfare.

101 Goldstein, Freud & Solnit, *Beyond The Best Interests of The Child* pp11-12. See also King & Trowell, *Children's Welfare and The Law: The Limits of Legal Intervention* (Sage, London 1992) and Coady & Coady "'There Ought to be a Law Against It': Reflections on Child Abuse, Morality and the Law" in Alston, Parker & Seymour (eds), *Children, Rights and the Law* (Clarendon Press, Oxford 1992) p127 (note also Bettina Cass's impressive critique at p140).