*Christopher Darby**

THE *YOUNG OFFENDERS ACT* 1993 (SA) AND THE RIGHTS OF THE CHILD

A NEW DIRECTION IS PROCLAIMED

SOUTH Australia has been seen to be at the forefront of juvenile justice reform in Australia for many years.[1] However, within this process the rights of the juvenile offender have often been subsumed in the pursuit of other objectives.[2] Now a new direction has been enunciated in the *Young Offenders Act* 1993 (SA). This Act is a reflection of many competing interests and it is unclear how the rights of the child will fare.

The emphasis in the *Young Offenders Act* is on "justice". It is a justice defined by retribution termed deterrence and accountability.[3] However,

---

* BA (Adel), LLB (Student).

1 Naffine, "Children in the Children's Court: Can There be Rights without a Remedy?" in Alston, Parker & Seymour (et al)(eds), *Children, Rights and the Law* (Clarendon Press, Oxford 1992); Naffine, Wundersitz & Gale, "Reforming the Law: Idealism versus Pragmatism" (1991) 13 *Adel LR* 1; O'Connor & Sweetapple, *Children in Justice* (Longman Cheshire, Melbourne 1988); Seymour, *Juvenile Justice in South Australia* (Law Book Co in association with the Australian Institute of Criminology, Sydney 1983).

2 Gale, Bailey-Harris & Wundersitz, *Aboriginal Youth and the Criminal Justice System: The Injustice of Justice?* (Cambridge University Press, Melbourne 1990); SA, Royal Commission into the Administration of the Juvenile Courts Act and Other Associated Matters (Part 2; Mohr, Commissioner) *Report* (1977) (hereinafter "Mohr Report"); Naffine, "Children in the Children's Court: Can There be Rights without a Remedy?" in Alston, Parker & Seymour (et al)(eds), *Children, Rights and the Law*.

3 Section 3(2) of the *Young Offenders Act* 1993 (SA) provides that the statutory policies of the Act are:

(a) a youth should be made aware of his or her obligations under the law and of the consequences of breach of the law;

(b) the sanctions imposed against illegal conduct must be sufficiently severe to provide an appropriate level of deterrence; and

perhaps conversely, the *Young Offenders Act* seems to contain a reflection of those international instruments ratified by Australia in this arena. The Select Committee Report - the precursor to the *Young Offenders Act* - and the Act itself pay heed to aspects of the United Nations Convention of the Rights of the Child (1989) ("the Convention") and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985) ("Beijing Rules"). However, the question whether this commitment goes beyond mere lip-service must be asked. Does this new direction provide sufficient protection for the rights of the child, or does it constitute a new and significant incursion?

In exploring the extent of South Australia's compliance with international standards on children's rights it is essential to establish the conceptual foundations of the instruments in question. What is the ideological vision of children's rights, and of children, which is being enunciated by the international community? The answer to this ultimately involves the recognition that these international provisions are structured in very broad terms. The boundaries of what constitutes acceptable state and societal practice are ill-defined and open to divergent interpretation. Consequently, given the breadth of the international provisions, a further question arises as to the value and validity of these international mechanisms for asserting the rights of the child. Can we, and should we, simply accept them as a conclusive exposition of the rights of the child?

To answer this last question, and to explore the validity of South Australia's new provisions in this context, it becomes essential to look to the theoretical constructions of children's rights. In so doing it becomes possible to identify and elucidate the ideological formulations which underlie the *Young Offenders Act* as a basis for critique.

THE PROTECTION OF THE CHILD: IDEOLOGY

Existing Paradigms

Can children be the subjects of the method of empowerment constituted in the assertion of rights? The answers traditionally given to this question have provided a serious barrier to asserting the rights of the child. It has been a consistent theme in constructing the role of the child to identify their unique dependency as an inability to act independently, or more precisely as

an absence of entitlement to an independent system of rights.[4] This construction reflects two strands of thought which deny the child access to the potent symbol and instrument of rights. The first is relatively simple to identify, being the transformation of children's disempowerment into an immutable state only to be remedied upon reaching adulthood.[5] Rather than being regarded as a citizen the child is regarded as requiring protection from society. The need for guardianship of children is indisputable. However does the particular vulnerability of the child of necessity carry the concomitant denial of fundamental rights to the child? The answer to this would be no from almost any perspective. However, this denial is the consequence of the new direction in juvenile justice in South Australia.

How then are the rights of the child compromised if the need to guarantee their protection necessitates the granting and pursuit of their rights? The answer to this constitutes the second strand and lies in the particular conception of rights which is employed. All too often the child has been conceived as the subject of rights as opposed to the recipient of rights.[6] The distinction lies in the identification of the child's position with respect to their rights. Conceiving of the child as a subject of rights denies agency to the child. That is, the child's citizenship is denied. This conception of rights is premised upon a perceived dichotomy between the status of a dependent and that of a rights-holder.[7] This involves a specific interpretation of the nature of rights and the rights-holder. To this end the rights holder is seen to be the autonomous, self-interested, rational actor envisioned by liberal theorists: an individual capable of pursuing their rights in competition with other such individuals. This isolated individual is seen as the ultimate claimant to a given set of rights.[8]

(c) the community, and individual members of it, must be adequately protected against violent or wrongful acts.

4 Eekelaar, "The Importance of Thinking that Children Have Rights" (1992) 6 *IIntJLaw & Fam* 221; O'Neil, "Children's Rights and Children's Lives"(1992) 6 *IIntJLaw & Fam* 24.

5 Bailey, *Human Rights: Australia in an International Context* (Butterworths, Sydney 1990).

6 At p343; Naffine, "Children in the Children's Court: Can There be Rights without a Remedy?" in Alston, Parker & Seymour (et al)(eds), *Children, Rights and the Law* p77.

7 Campbell, "The Rights of the Minor: As Person, As Child, As Juvenile, As Future Adult" (1992) 6 *IIntJLaw & Fam* 1.

8 Naffine, "Children in the Children's Court: Can There be Rights without a Remedy?" in Alston, Parker & Seymour (et al)(eds), *Children, Rights and the Law* pp82-83; Eekelaar, "The Importance of Thinking that Children Have Rights" (1992) 6 *IIntJLaw & Fam* 221.

Given such agency it is then argued that the notion of obligations in a scheme of rights only exists to the extent of requiring that one not infringe the free exercise of will of other autonomous actors. This is a strictly limited vision of the nature of rights and corresponding societal obligations.[9] Such a conception fundamentally alienates those who cannot pursue their rights from any claim to rights. They are restricted to the position of recipients of the largesse of those who can claim their rights.[10] In the case of children this has not been seen as a denial of rights, for rights have the inherent aspect of interests and the child's interests are met by the parent, or by the state in loco parentis. The disempowering nature of this conception is seen as unproblematic in the case of the child for the child is ultimately the subject of parental will.[11]

The denial of rights to the child on the basis of their dependent and vulnerable status may also be seen in the case of interest-based theories of rights.[12] To this end rights are determined by identifying relevant interests requiring defined responses from other members of the community.[13] Under such a construction, coercion of the individual may potentially be justified "by an appeal to their rights on the basis that paternalistic interventions can protect the vital [or best] interests of those who are thereby constrained".[14] Thus the identification of the interest to be protected remains problematic.

What seems clear from both these theories is the belief that it is possible for there to be a transition to a fully empowered adult rights-holder without heed being paid to the fundamental requirements for the effective function of the progenitor of such actors, the child.[15] In such a construction the unique transitional position of the child is employed to subvert and deny the veracity of attempts to create an independent framework of children's rights.

---

9 Campbell, "The Rights of the Minor: As Person, As Child, As Juvenile, As Future Adult" (1992) 6 *IIntJLaw & Fam* 1 at 3; Eekelaar, "The Importance of Thinking that Children Have Rights" (1992) 6 *IIntJLaw & Fam* 221 at 226; Naffine, "Children in the Children's Court: Can There be Rights without a Remedy?" in Alston, Parker & Seymour (et al)(eds), *Children, Rights and the Law* p95; O'Neil, "Children's Rights and Children's Lives" (1992) 6 *IIntJLaw & Fam* 24.

10 Bailey, *Human Rights: Australia in an International Context* p343.

11 At p342.

12 Campbell, "The Rights of the Minor: As Person, As Child, As Juvenile, As Future Adult" (1992) 6 *IIntJLaw & Fam* 1.

13 At 5.

14 At 6.

15 O'Neil, "Children's Rights and Children's Lives" (1992) 6 *IIntJLaw & Fam* 24 at 40.

It is a view which may be seen, in a conflation of these divergent theoretical strands, to be a basic premise of the juvenile justice system in South Australia unto the current day.[16]

Historical Context

The veracity which the conception of the child as dependent has been accorded, and the manner in which it may result in denial of rights to the child, may be seen in the South Australian juvenile justice system. At least prior to the Mohr Report in 1977 the juvenile justice system in South Australia was predicated on what has been termed the "welfare" model.[17] Under this regime juvenile offenders were treated as any other child who came to the State's attention under its broader welfare function. Juvenile offenders were termed to be "in need of care". With this approach came the view that child offenders required a cure tailored to the particular child's deviancy as opposed to punishment.[18] The child's rights were enunciated in terms of their best interests. In so doing this construction of the juvenile offender involved the fundamental denial of the child's agency, and of their claim to a basic set of rights.[19]

The Mohr report recognised the shortcomings of this best interest model and found that the discretion afforded to the courts and to the police was, at times, associated with a highly punitive approach.[20] In response to this Mohr advocated a return to justice. This catch-cry concept has remained and has gained an increased following in the calls for reform to the juvenile justice system. As Naffine identifies, prominent in such debates are the "notions of criminal agency and criminal responsibility with the associated notion of proportionate punishment".[21] Thus, rather than constituting a transformation, a fundamental ideological flaw remained. Best interests were superseded by the conception of the free rational actor as the bearer of

16 *The Children's Protection and Young Offenders Act* 1979 (SA).

17 Mohr Report; Naffine, "Children in the Children's Court: Can There be Rights without a Remedy?" in Alston, Parker & Seymour (et al)(eds), *Children, Rights and the Law*; Seymour, *Dealing with Young Offenders* (Law Book Co, Sydney, 1988); Aust, Select Committee on the Juvenile Justice System, *Interim Report* (1992).

18 Mohr Report; Naffine, "Children in the Children's Court: Can There be Rights without a Remedy?" in Alston, Parker & Seymour (et al)(eds), *Children, Rights and the Law* p77.

19 As above p2.

20 Naffine, "Children in the Children's Court: Can There be Rights without a Remedy?" in Alston, Parker & Seymour (et al)(eds), *Children, Rights and the Law* p79.

21 At p83.

rights. Assumptions of agency and volition became a basic premise of the juvenile justice system and remain so in the current transformation.[22]

What then is the alternative to this "will theory" of rights? How else are rights to be pursued other than by the individual actor given the potential for justifying coercion under an interest theory of rights? To resolve this issue it is necessary to explore the theme of obligations in further detail. The concept of obligations is one which has proved to be a central and highly contentious issue in the debates regarding children's rights, and particularly so with respect to the juvenile offender.

The *Young Offenders Act*

In the arena of children's rights the concept of obligations has come to reflect a particular construction of the child's dependent status, a construction which reflects the premise of the liberal individual rights-holder. However, the dependency of children on those who control their lives, whether they be parents or the state, has not involved a concomitant recognition of the consequences of this control in the absence of fundamental guarantees of their rights. More precisely, the control of the subordinate individual in such a system of power imbalance has been accepted as an inevitable and immutable aspect of the position of the child.[23]

This vision of the status of the child as the subject of the will of others is premised, in part, on the belief that to confer rights upon the child necessitates a corresponding denial of rights to some other group.[24] In the case of children, and in particular the child accused of a crime, the interests seen to be in competition with those of the child are those of the parents (or parent), and the community (or State).[25] This is a fallacious dichotomy clearly premised upon the strictly limited vision of rights as mutually

---

22 Naffine, "Children in the Children's Court: Can There be Rights without a Remedy?" in Alston, Parker & Seymour (et al)(eds), *Children, Rights and the Law* p82.

23 Bailey, *Human Rights: Australia in an International Context* p342.

24 At p343; Campbell, "The Rights of the Minor: As Person, As Child, As Juvenile, As Future Adult" (1992) 6 *IIntJLaw & Fam* 1 at 2-3; Otlowski & Tsamenyi, "Parental Authority and the United Nations Convention on the Rights of the Child: Are the Fears Justified?" (1991) 6 *AJFL* 137; *Young Offenders Act* 1993 (SA) ss3(2)(a)-3(2)(c).

25 Bailey, *Human Rights: Australia in an International Context* p343.

exclusive competing sets of interests. It is however a disturbingly prevalent view.[26]

The veracity accorded to this conception of the child is illustrated by the juvenile justice system in South Australia. The concept of irreconcilable competing interests, or rights, constitutes a fundamental premise of the debate over the "welfare" and "justice" models of juvenile justice, and of the new direction pursued under the current transformation.[27] It has been increasingly perceived that the attribution of rights to the juvenile offender constitutes a fundamental infringement of community freedom and has evoked demands for "justice" for the victims of juvenile crime.[28] The rights of a child accused of an offence and those of the community have come to be seen almost as mutually exclusive.[29]

This call for justice is one which demands that the acts of the juvenile offender be invested with a strong sense of moral culpability and that retribution be exacted.[30] Such demands in and of themselves may be seen as unproblematic for is it not essentially a matter of policy for the state and society to determine what actions cross the bounds of acceptable behaviour? It is one thing, however, to seek to define such bounds but another to employ mechanisms which remove the legitimacy of the law, and in particular the criminal law, as a means of social control. It is this divide that the recent calls for justice have crossed.

---

26 *Crime (Serious and Repeat Offenders) Sentencing Act* 1992 (WA); Aust, Joint Committee on Foreign Affairs, Defence and Trade, *A Review of Australia's Efforts to Promote and Protect Human Rights* (1992); Wilkie, "*Crime (Serious and Repeat Offenders) Sentencing Act* 1992: A Human Rights Perspective" (1992) 22 *WALR* 187.

27 Naffine, "Children in the Children's Court: Can There be Rights without a Remedy?" in Alston, Parker & Seymour (et al)(eds), *Children, Rights and the Law* pp77-80.

28 See in particular the recent WA legislation: *Crime (Serious and Repeat Offenders) Sentencing Act* 1992 (WA); Wilkie, "*Crime (Serious and Repeat Offenders) Sentencing Act* 1992: A Human Rights Perspective" (1992) 22 *WALR* 187; Naffine, "Children in the Children's Court: Can There be Rights without a Remedy?" in Alston, Parker & Seymour (et al)(eds), *Children, Rights and the Law* pp80-83.

29 Naffine, "Children in the Children's Court: Can There be Rights without a Remedy?" in Alston, Parker & Seymour (et al)(eds), *Children, Rights and the Law* pp80-83.

30 *Young Offenders Act* 1993 (SA) ss3(2)(a)-3(2)(c), and Div 3; Freiberg, Fox & Hogan, "Procedural Justice in Sentencing Australian Juveniles" (1989) 15 *Mon LR* 279 at 300. Naffine, "Children in the Children's Court: Can There be Rights without a Remedy?" in Alston, Parker & Seymour (et al)(eds), *Children, Rights and the Law* p81.

This transformation is the direct result of the failure to protect the rights of the child in our justice system. The principles upon which the new mechanisms of juvenile justice are founded are fundamentally compromised by the failure to balance their capability for retribution and alienation of the child with a respect for the rights of the child. Justice cannot be exacted on the grounds of accountability, retribution, and ultimately reintegration if the safeguards to ensure that such exactions are proportionate to the child's offence do not exist, or are procedurally circumvented.[31]

The Select Committee Report into the Juvenile Justice System reflects the basic conceptual flaw of this false dichotomy. The rights of the accused child are, despite the rhetoric, being subsumed to other goals and other demands. The changes recommended by the report indicate a belief that the existing system is too lenient and does not serve the needs of the community. However, in proceeding to identify the failings of the current model, minimal consideration has been given to according primacy to the rights of the child. There is no thought given to the possibility that any failings in the current formulation may stem directly from the failure to accord and ensure the protection of the rights of the alleged child offender.

The Select Committee Report makes two substantive recommendations. The first is that the system of Screening panels be abolished and the second is that Aid panels be abolished. With respect to the former it was concluded that the screening process contravened due process, led to over-processing, and denied Aboriginal access to diversionary mechanisms.[32] These conclusions are entirely valid and conform with independent research in the area.[33] However the alternatives which are recommended by the committee and instituted under the *Young Offenders Act* are such that in every likelihood these flaws will continue to exist and the inequities be compounded. These flaws will impact most particularly, once again, on Aboriginal children.

With respect to Aid panels, the report claims that this mechanism has widened the net of social control, is culturally inappropriate for Aboriginal children, is coercive in the requirement of a plea of guilty, has contravened the notion of due process, has not allowed for victim participation, and has

---

31 Beijing Rules Rule 5.1.

32 Aust, Select Committee on the Juvenile Justice System, *Interim Report* (1992) pp169-171.

33 Gale, Bailey-Harris & Wundersitz, *Aboriginal Youth and the Criminal Justice System; The Injustice of Justice.*

lacked effective sanctions.[34] The alternative proposed, however, does not appear to address the problems which are the motivating force for the abolition of the existing mechanism.

From this basis has arisen the *Young Offenders Act*. The *Young Offenders Act* gives voice to the theoretically and factually unsound premises which are evinced in the report. In so doing it fails to give due weight to the accused child's particular vulnerability in the face of legal authority. The child is ultimately denied the rights envisioned either by the Convention or the Beijing Rules.

INTERNATIONAL STANDARDS & THE *YOUNG OFFENDERS ACT*

International Provisions

In order to fully explore the human rights implications of the specific provisions of the *Young Offenders Act* it is valuable to consider the basic requirements with respect to the rights of the child enunciated in the Convention and the Beijing Rules. Upon such an investigation it becomes evident that there exists a clear divergence between the rhetoric of rights in the *Young Offenders Act*, as far as that goes, and the reality of its foreseeable consequences in terms of the rights of the child accused of an offence. The *Young Offenders Act* reflects an ongoing failure to achieve a coherent balance between the interests of society and the rights of the child. It is a failure founded upon the fact that the rights of the child are once again being fatally compromised. This is particularly true at the level of the provisions with respect to police cautioning and sanctions but it is also seen at the innovative core of the *Young Offenders Act*, the family conference.

The Convention and the Beijing Rules state explicitly that they provide only the bare minimum accepted standard for the recognition of the rights of the child.[35] Moreover it is clear that the provisions therein do not provide an overly rigorous schema of rights. What then is the exact nature of the provisions, particularly those with respect to the child accused of a criminal offence? What are the boundaries and principles which are seen to constitute acceptable responses to juvenile deviancy?

---

34 Aust, Select Committee on the Juvenile Justice System, *Interim Report* (1992) p142.

35 Article 41 of the Convention; General Assembly Resolution 40/33 respectively.

The Convention has as its basic premise that "the best interests of the child shall be a primary consideration".[36] What this concept encompasses exactly is left unclear.[37] It may be argued, as by Veerman, that this basic premise encompasses the possibility of a shift in the notion of childrens' rights away from one of basic needs and toward the concept of "effective functioning".[38] The shift is away from a system in which the so-called "needs" of the child are employed to subvert any concept of the child being vested with rights to one which recognises basic guaranteed obligations to the child as a recognition of the child's participation in society.[39] This concept lies within the sphere of the interest theory of rights.[40] Equally, however, it is open to other interpretations. This is both the value and the fundamental weakness of this instrument. It is adaptable but in so being it allows for the corruption of its principles and objectives. With the recognition of this fact it becomes essential to develop the principles enunciated in the Convention. It is with such development that the Convention may have its greatest impact.

The Convention contains a number of specific provisions with respect to the juvenile offender. These provisions are contained in Articles 37 and 40. Under Article 37(b) the Convention provides in part that: "The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time." Article 37(c) goes on to state that, during such deprivation of liberty, "every child ... shall be treated ... in a manner which takes into account the needs of persons of his or her age."

From these provisions one may see that a great deal of leeway is left to the state in the permissive terms "appropriate" and "needs". The extent to which the latter is open to interpretation is illustrated clearly by the South

---

36 Article 3.1 of the Convention.

37 There has been some debate as to the limitations implicit in the term "a" in Art 3 of the Convention as it implies that the rights of the child are not to be "the" priority: see Eekelaar, "The Importance of Thinking that Children Have Rights" (1992) 6 *IIntJLaw & Fam* 221 at 231-233. This debate is fallacious to the extent that the recognition of other priorities does not necessarily require that the rights of the child be subsumed. To assert such an outcome would be to employ the notion of mutual exclusivity of competing rights which alienates the child from the system of rights as an inescapable conclusion.

38 Veerman, *The Rights of the Child and the Changing Image of Childhood* (Martinus Nijhoff, Dordrecht 1992) pp57-72.

39 See infra this text.

40 Campbell, "The Rights of the Minor: As Person, As Child, As Juvenile, As Future Adult" (1992) 6 *IIntJLaw & Fam* 1.

Australian juvenile justice system between 1971 and 1977 with its problematic definition of the child accused as "in need of care".[41]

Informal Interviews and Police Cautioning

The corruption of the principles under the Convention, however, cannot be relegated to the position of an historical anomaly. Upon initial scrutiny the provisions of the *Young Offenders Act* relating to police questioning of the child suspect appear unproblematic. Section 7 provides that the police are required to inform the child of the nature of the offence and of the circumstances out of which that offence is alleged to have arisen, and that the child is entitled to both obtain legal advice, and require that the matter be dealt with by the court.[42] Moreover ss7 and 8 provide, respectively, that an independent witness be present for the signing of the admission, and that a parent or guardian is required to be present during formal police cautioning.[43] These provisions would appear on their face to accord the child the right to remain silent (Beijing Rule 7) and the right under Article 12 of the Convention to express their "views freely in all matters affecting" them. However these ostensible safeguards in the *Young Offenders Act* are revealed as not only strictly limited but as a positive denial of the rights of the child suspect upon closer investigation.

First, under s6, the *Young Offenders Act* extends a discretion to the police officer to caution the child informally if the child admits the commission of an offence. The provision was formulated as a recognition of the process which police routinely undertake in the exercise of their duty. It was stated as giving explicit authority for police to engage in such decision-making.[44] The potential impact of this provision is far greater.

T v Waye[45] involved the questioning, and subsequent confession, of a fourteen year old boy in the early hours of the morning in the absence of any independent witness. The police argued that the child was not under arrest and that as a result there was no requirement that they ensure the presence of a parent or independent adult witness. It was found that,

---

41 Mohr Report; Naffine, "Children in the Children's Court: Can There be Rights without a Remedy?" in Alston, Parker & Seymour (et al)(eds), *Children, Rights and the Law* p77.

42 *Young Offenders Act* 1993 (SA) s7(3).

43 *Young Offenders Act* 1993 (SA) ss7(2), 7(3), 8(2)(b).

44 Aust, Select Committee on the Juvenile Justice System, *Interim Report* (1992) pp130-133.

45 (1983) 35 SASR 247.

without independent advice:[46] "it is hardly to be thought that [the child] was in a position to exercise his legal right to silence and he may even have found it difficult to maintain his initial denials in the face of police authority."[47]

Thus it was held that the court could exercise the *Bunning v Cross*[48] discretion to exclude the confession on the grounds of public policy.

The rejection of this practice of "informal questioning" which is accorded the police under s6, however, has by no means been a consistent theme in the judgement of the courts. In fact the approach of the courts would seem to tacitly endorse the distinction between initial questioning and formal questioning with the latter requiring formal cautioning and the presence of an adult.[49] However in spite of judicial intransigence in fully enunciating the right of the child to the free exercise of the decision to speak or be silent, in accord with Article 12 of the Convention, the possibility of retrospective control of police questioning did exist. Even this (limited) protection is circumvented under the *Young Offenders Act.*

This breach of Article 12 of the Convention and of Beijing Rule 7 is evident under s6 of the *Young Offenders Act* as that section makes no provision for the presence of an independent witness or for cautioning of the child suspect. This in itself would be unproblematic if the admission of the commission of an offence was to inevitably lead to an informal caution upon which no further action may be taken in accord with s6(2). However this is by no means the case. Section 6 involves the exercise of a discretion upon the admission of an offence. Clearly upon s7 this discretion could equally be exercised to pursue the options of formal cautioning under Division 2, or referral for family conferencing, or the laying of a formal charge.[50] There is no guarantee that, upon the admission of a minor offence ostensibly under s6, the child will not be dealt with under s7.

Furthermore, it would seem that s7 provides for this process of informal interviewing of the child suspect prior to cautioning. The ostensible protection enunciated under s7 seems only to come into play once the decision to process a child has been made upon the admission of a minor

---

46 *T v Waye* at 254.
47 At 249 per King CJ.
48 *Bunning v Cross* (1978) 141 CLR 54.
49 Seymour, *Dealing with Young Offenders* p207; *R v Pratt* (1965) 83 WB (Pt 1) (NSW) 358; *R v C* (an infant) [1976] Qd R 341.
50 *Young Offenders Act* 1993 (SA) s7(1).

offence. Presence of an independent witness is only required upon the formal process of signing a confession.[51] Section 7(2)(a)(ii) provides that "the officer should explain to the youth - that the youth is entitled to obtain legal advice". Such provision is entirely valid except in so far as it lacks mandatory force, and is only proffered subsequent to a process of informal questioning. This constitutes a breach of the procedural safeguards set out in Rules 1 and 7 of the Beijing Rules and Article 37 of the Convention.

If one looks to Article 37 of the Convention (and its counterpart in Rule 7 of the Beijing Rules) it is provided that "every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance." Minimal regard is paid to this requirement, or its counterpart, in ss7 and 8 of the *Young Offenders Act.* Undoubtedly the child is not actively denied such rights. The child is entitled to seek a lawyer or insist upon an independent witness. However such an entitlement is premised upon the volition of the individual to pursue such a right for their own benefit. The applicability of such a construction in the case of the child is to be seriously questioned. The dependent and vulnerable status of the child mitigates their ability to assert such a right.[52] The *Young Offenders Act* clearly envisages the autonomous rational independent actor. This implicitly fails to recognise the potential consequences of the child's disempowerment during police questioning.[53]

In contrast the recognition of the particular vulnerability of the child in the face of police questioning is evident both in judicial decisions and independent studies.[54] It has been found that children expect rough

---

51 *Young Offenders Act* 1993 (SA) s7(3).

52 Naffine, "Children in the Children's Court: Can There be Rights without a Remedy?" in Alston, Parker & Seymour (et al)(eds), *Children, Rights and the Law* p95; Gale, Bailey-Harris & Wundersitz, *Aboriginal Youth and the Criminal Justice System; the Injustice of Justice?*

53 *Collins v R* (1980) 31 ALR 257; *Dixon v McCarthy* (1975) 1 NSWLR 617; *Frijaf v R* [1982] WAR 128; *Pascoe v Little* (1978) 24 ACTR 21; *R v M* [1976] Qd R 344; *R v Peters* (1986) 23 ACR 451; *R v Tietie* (1988) 34 ACR 438; *Walker v Markley* (1976) 14 SASR 463; NSW, Juvenile Justice Advisory Council, *Green Paper: Future Directions for Juvenile Justice in NSW* (1993); NSW, Law Reform Commission, *Report on Criminal Procedure: Police Powers of Detention and Interrogation after Arrest* (1990).

54 *Collins v R* (1980) 31 ALR 257; *Dixon v McCarthy* (1975) 1 NSWLR 617; *Frijaf v R* [1982] WAR 128; *Pascoe v Little* (1978) 24 ACTR 21; *R v M* [1976] Qd R 344; *R v Peters* (1986) 23 ACR 451; *R v Tietie* (1988) 34 ACR 438; *Walker v Markley* (1976) 14 SASR 463; New South Wales, Juvenile Justice Advisory Council of NSW, *Green Paper: Future Directions for Juvenile Justice in NSW* (1993); New South Wales, Law Reform Commission, *Report*

treatment by police during the investigative process.[55] This expectation is a manifestation of the fundamental disempowerment the child suspect experiences upon dealing with the police.[56] The differential power relations which characterise the child's interaction with police are reaffirmed by police responses to child criminality. Such responses are apparently informed by the desire to restore the perceived breach of existing power relations consequent upon the offending behaviour. To this end the substantive discretion exercised by the police as to the manner in which to respond to offending behaviour is informed by the relative co-operation of the child suspect.[57] It was found by James and Polk that the nature of the child's response during apprehension largely determined the nature of the disposition exercised by police.[58] The greater the level of perceived "co-operation" the greater the likelihood that the child would be diverted from the formal justice system.[59]

Such "co-operation" is often characterised by the child's willingness to surrender their rights and thereby surrender their decision making power.[60] Moreover if submission is not immediately forthcoming the processing of the child seeks to ensure such "co-operation". To this end the child is rendered the passive subject of "justice" through their being labelled as deviant, a criminal to be dealt with, a result inherent in the process of arrest and fingerprinting.[61] Such a process serves the function of defining the framework in which interaction between the police and child suspect are to

---

on Criminal Procedure: Police Powers of Detention and Interrogation after Arrest (1990).

55 Alder, O'Connor, Warner, & White, *Perceptions of the Treatment of Juveniles in the Legal System: Report to the National Youth Affairs Research Scheme* (National Youth Affairs Research Scheme, Hobart 1992); Cunneen, *A Study of Aboriginal Juveniles and Police Violence* (Report Commissioned by the National Inquiry into Racial Violence, Human Rights Australia, Australian Institute of Criminology, Sydney 1990); O'Connor & Sweetapple, *Children in Justice*.

56 James & Polk, "Policing Youths: Themes and Directions", in Chappell & Wilson (eds), *Australian Policing: Contemporary Issues* (Butterworths, Sydney 1989) p54; O'Connor & Sweetapple, *Children in Justice* pp17, 123; White, *No Space of Their Own: Young People and Social Control in Australia* (Cambridge University Press, Australia 1990) p29.

57 James & Polk, "Policing Youths: Themes and Directions" in Chappell & Wilson (eds), *Australian Policing Contemporary Issues* p48; O'Connor & Sweetapple, *Children in Justice*.

58 James & Polk, "Policing Youths: Themes and Directions" in Chappell & Wilson (eds), *Australian Policing: Contemporary Issues* p48.

59 O'Connor & Sweetapple, *Children in Justice* p21.

60 As above.

61 As above p29.

occur. The child is to be the subject of police will. O'Connor and Sweetapple posit that, as a consequence, "consent and submission flows naturally from most children and there is no need to exercise physical force".[62] Once a child reaches the stage of questioning, the nature of the power imbalance between child and police has been affirmed and made explicit. This process is compounded under s8 with police being granted the ability to impose sanctions.

In this context of fundamental power imbalance the courts have to some extent recognised that the evidence given by a child at interview is likely to reflect the assumptions of submission and acquiescence which characterise this relationship.[63] As a consequence it has been held that to avoid unfairness and ensure that the will of the child is not overborne a witness should be present during the interviewing of the a child.[64] Upon a failure by the police to arrange for the presence of a witness the court is able to exercise the discretion provided in *Bunning v Cross* to exclude any confession made by the child on the grounds of public policy.[65] The relevance of this judicial discretion, however, has been circumvented with the provision under the *Young Offenders Act* for informal interviewing of the child.

This is not to say that the provisions made by the courts are by any means ideal or even adequate. Rather the extent of the incursions made upon the rights of the child by the *Young Offenders Act* is evident. Both the courts and earlier legislative provisions have been extensively criticised for their imprecision and lack of clarity regarding the requirement that a witness be present during the interrogation of a child.[66] The courts and the legislature have left unclear the exact role of a witness and thus who constitutes a witness capable of fulfilling such a role. Now, however, even these

---

62 As above.

63 *Collins v R* (1980) 31 ALR 257; *Dixon v McCarthy* (1975) 1 NSWLR 617; *R v Pratt* (1965) 83 WB (Pt 1) (NSW) 358; *T v Waye* (1983) 35 SASR 247.

64 As above; Cashmore, "Problems and Solutions in Lawyer-Child Communication" (1991) 15 *Crim LJ* 193; Finlayson, "Youth Advocacy", in Vernon & McKillop (eds), *Preventing Juvenile Crime: Proceedings of a Conference held 17-19 July 1989* (AIC, Canberra 1990).

65 Seymour, *Dealing with Young Offenders* p194; *T v Waye* at 249.

66 Alder, O'Connor, Warner, & White, *Perceptions of the Treatment of Juveniles in the Legal System: Report to the National Youth Affairs Research Scheme* p8; Seymour, *Dealing with Young Offenders* p222; Warner, "Legislative and Policy Overview" in Alder, O'Connor, Warner & White, *Perceptions of the Treatment of Juveniles in the Legal System: Report to the National Youth Affairs Research Scheme* p7.

notably limited presence requirements are circumvented in clear breach of the Convention and the Beijing Rules.

Moreover the National Youth Affairs Research Scheme found that there should be a statutory right to a solicitor and, further, that this should be given substantive effect through the provision of "publicly funded duty solicitors to ensure availability of legal advice".[67] This too is identified in Rules 1 and 7 of the Beijing Rules and Article 37 of the Convention. Under these provisions the right of the child to such representation has been identified as essential to "*all* stages of proceedings"[68] in order to "effectively, fairly and humanely (deal) with the juvenile in conflict with the law".[69]

The child suspect under the *Young Offenders Act* is not explicitly denied this right. The child is indeed entitled to be informed of their right to seek the services of a lawyer once they have admitted commission of the offence under s7. However not only does this not take account of the potential coercion involved in informal interviews but it is premised upon the volition of the individual to pursue such a right for their own benefit. The applicability of such a construction in the case of the child is to be seriously questioned. The dependent and vulnerable status of the child mitigates against their asserting such a right.[70] It has been found that the child suspect is unlikely to be aware of, let alone exercise, their common law right to the presence of an independent adult let alone a right to legal advice.[71] The *Young Offenders Act* makes no provision for assuring the latter right while subverting existing common law protection for the child suspect. The *Young Offenders Act* clearly envisages the autonomous rational independent actor which fails to recognise the consequences of the child's disempowerment in a system of justice.

This failure to provide for legal guidance and the conception of the child which the *Young Offenders Act* thereby incorporates constitutes a fundamental flaw in this new direction. This is particularly true once it is noted that provision of legal representation is one of limited involvement, if

---

67 Alder, O'Connor, Warner & White, *Perceptions of the Treatment of Juveniles in the Legal System: Report to the National Youth Affairs Research Scheme* p8.

68 Beijing Rules, Rule 7.1 (emphasis added).

69 Beijing Rules, Rule 1.3.

70 Naffine, "Children in the Children's Court: Can There be Rights without a Remedy?" in Alston, Parker & Seymour (et al)(eds), *Children, Rights and the Law* p95; Gale, Bailey-Harris & Wundersitz, *Aboriginal Youth and the Criminal Justice System: The Injustice of Justice?*

71 O'Connor & Sweetapple, *Children in Justice* p122.

at all, at the further stage of both police sanctions under s8 and the family conference. The implications of this for the validity of the *Young Offenders Act* lie in the fact that the law is fundamentally a mechanism for social control and definition. The law, and particularly the criminal law with its attendant stigma, is a means to delineate societal boundaries by characterising which behaviour may be seen to fall beyond the bounds of acceptable practice.[72] Given this definitive role with respect to social status and societal mores, serious implications must flow from the denial of fundamental rights to the child which governs their entrance to this system. Guaranteed procedural rights as a bare minimum provide the essential accountability of the law and are the basis upon which the legitimacy of its sanctions are founded. Thus the imposition of sanctions, in such an environment, by non-judicial bodies must also be seriously questioned.

Given that the child does not fit the purposive model of the autonomous individual and thus has no rights under such a construction it is fallacious to seek to define the boundaries of acceptable behaviour for such non-actors. To legitimately control a person's actions that person must be acknowledged to be an actor in society vested with fundamental rights and concomitant obligations. In the absence of such status any claim to control their behaviour on the grounds of boundary definition and subsequent reintegration is logically unsound and open to fundamental challenge.[73] From this it would seem that the *Young Offenders Act* faces a crisis of legitimacy which goes to its very heart.

Reconciliation and the Family Conference.

What then of the second level of change signified in the *Young Offenders Act*? What are the consequences of the abolition of the Aid Panels and the implementation of family conferences in their stead? In considering these provisions it is relevant to consider Article 40 as a basis for critique. In so doing it is also possible to explore whether, given the leeway evident in Article 37, Article 40 provides any surer safeguards for the rights of the child. Are the rights it identifies expressed in a sufficiently proscriptive manner to require compliance?

Article 40 provides that "every child alleged as, accused of, or recognised as having infringed the penal law" has the right:

---

72 Erikson, *Wayward Puritans: A Study in the Sociology of Deviance* (New York, Wiley 1966).

73 As above; Braithwaite & Mugford, "Conditions of Successful Reintegration Ceremonies: Dealing with Juvenile Offenders" (1994) 34 *BJ Crim* at 139.

> to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

The priorities identified in this Article are such that they may be seen to accord with the concept of effective functioning as a fundamental principle of children's rights.[74]

On their face the provisions under Division 3 of the *Young Offenders Act* would seem to accord with the principles enunciated in Article 40. However the validity of these provisions must be called into doubt if one gives consideration to the reasons given for the abolition of Aid Panels. These reasons once again must be assumed to be basic problems sought to be rectified by the new direction. The first problem identified by the Committee was that the Aid Panels resulted in a widening of the net of social control.[75] This claim, however, is empirically unsound and factually incorrect. It has been established that the system of Aid and Screening Panels, while initially producing some net widening effect in South Australia, after the initial transition phase was accompanied by a flattening of the rate of increase in juvenile contact with the criminal justice system.[76]

Secondly the Aid Panels were charged with having been coercive in the requirement of a guilty plea to access such diversion and with contravening the notion of due process.[77] However, the structure of the family conferences does not address this violation of the accused child's rights. Access to such conferences through police referral as the basic screening mechanism is still premised upon a plea of guilty.[78] This requirement is

---

74 Article 40 of the Convention; Veerman, *The Rights of the Child and the Changing Image of Childhood* pp57-72.

75 Aust, Select Committee on the Juvenile Justice System, *Interim Report* (1992) p142.

76 Wundersitz, "The Net-Widening Effect of Aid Panels and Screening Panels in the South Australian Juvenile Justice System" (1992) 25 *ANZJ Crim* 115; Morgan & Gardner, *Juvenile Justice 1*, Office of Crime Statistics - Attorney-General's Department (SA), Series B, No 6 (1992).

77 Aust, Select Committee on the Juvenile Justice System, *Interim Report* (1992).

78 Alder, O'Connor, Warner, & White, *Perceptions of the Treatment of Juveniles in the Legal System: Report to the National Youth Affairs Research Scheme* pp4-6; Naffine, "Children in the Children's Court: Can There be Rights without a Remedy?" in Alston, Parker & Seymour (et al)(eds), *Children, Rights and the Law* pp84-96; Seymour, *Dealing with Young Offenders* p193.

particularly significant given that the family conference constitutes the primary mechanism for diversion under the *Young Offenders Act*. Thus it is argued that the requirement of a guilty plea mitigates any ostensible compliance which may be seen with respect to the principles in Article 40 or Rule 11.

This breach is by no means rectified by the provision that the child may engage the formal justice system at any stage. Such an option is premised upon the volition of the child. Moreover it would seem a hollow safeguard in itself given the child's over-riding preference for informal mechanisms identified and criticised by the Select Committee with respect to Aid Panels. The coercive impact of the guilty plea requirement is compounded when it is noted that access to the family conference is to be primarily through police referral at which stage the child has limited access to legal advice and is particularly vulnerable.[79]

Consequently the family conference constitutes another fundamental incursion into the arena of children's rights. Although the child is formally accorded a voice in these proceedings the basic right to defend yourself against a criminal charge in an environment which must allow your participation is delimited by the fact that the child is presumed to be guilty and by the strictly limited role accorded the lawyer.[80] The introduction of family conferences encompasses a juvenile justice strategy which may be attacked at a number of levels for its infringement of children's rights.

Restorative Justice

Thus it would seem that the *Young Offenders Act* manifestly breaches the trust vested in the state. Given such breach the effectiveness of the Convention and the Beijing Rules to proscribe the acts of states must be in doubt. The Select Committee specifically stated with respect to the principles enunciated in the Convention and the Beijing Rules that "it stresses that they are legally enforceable only in so far as Parliament has specifically amended legislation to incorporate them."[81] What then is the value of the Convention, or indeed of the more elaborate Beijing Rules, for the child accused of committing a crime? The answer to this must come

79 *Young Offenders Act* 1993 (SA) s7(2)(a)(ii), s8(2)(b), s10(1)(a)-(d).

80 This is somewhat mitigated by Youth Court Rules, Rule 16.01(g). Nonetheless the fundamental incursion remains a fact as seen by Rule 16.01(f): Naffine, "Children in the Children's Court: Can There be Rights without a Remedy?" in Alston, Parker & Seymour (et al)(eds), *Children, Rights and the Law* p84.

81 Aust, Select Committee on the Juvenile Justice System, *Interim Report* (1992) p106.

from the recognition that these international instruments are not intended as the final word in children's rights. The extent of the discretion which they permit may be equally used to extend the notion of children's rights. They provide a basis for pursuing the rights of the child and are not the final answer.

This positive role for these international provisions can in fact be seen within the Select Committee's discussion of the assumptions underlying the family conference. The conceptual foundation of the family conference is the notion of "restorative justice".[82] There are two convergent principles which underlie the concept of restorative justice. The first is the recognition that crime is an offence against the victim and not against the State.[83] This is incorporated in the family conference model with victim participation in the decisions made at this level. The second strand is that the basic premise of such a process is not retribution or prevention. The objective is the restoration of community peace.[84] These sentiments would seem to be in line with Article 40 of the Convention. However they are corrupted upon application in the *Young Offenders Act.*

Under the *Young Offenders Act* the principle of restorative justice is interpreted as requiring that "responsibility" for the "confessed" deeds of the child be placed upon the child.[85] The decision as to the method of reparation whether it be financial or otherwise is made by the family conference under the aegis of a Youth Justice Co-ordinator.[86] The Youth Justice Coordinator supervises and mediates input from the various participants - police, alleged offender, family and victim - and has the power to make various orders.[87] The outcomes of such proceedings are recorded and any breach of an agreement reached is able to be used in subsequent action against the youth.[88]

---

82 Aust, Select Committee on the Juvenile Justice System, *Interim Report* (1992) pp103-104.

83 Ness, "Restorative Justice" in Galway & Hudson, *Criminal Justice, Restitution and Reconciliation* (New York Criminal Justice Press, Mansey 1990) p9.

84 Aust, Select Committee on the Juvenile Justice System, *Interim Report* (1992) p104; Ness, "Restorative Justice" in Galway & Hudson, *Criminal Justice, Restitution and Reconciliation* p9.

85 *Young Offenders Act* 1993 (SA) s12(1)(b).

86 Section 11.

87 Section 12(1)(c).

88 Section 8(2)(a): "the caution may, if the youth is subsequently dealt with for an offence, be treated as *evidence of commission of the offence* in respect of which the caution is administered" (emphasis added).

Therefore the premises underlying the family conference may be seen to comply with the conception of children's rights contained in Article 40 of the Convention insofar as the notion of reconciliation is accorded prominence. The positive philosophical conception of the juvenile offender in the theoretical basis of the family conference is clear. However this recognition merely reiterates the necessity of assuring children's rights given the problematic nature of access to this mechanism for reintegration and reconciliation. The fact, for example, that the process of mediation specifically presumes the child's legal culpability upon a process which fails to recognise the child's vulnerability compromises its conceptual foundations. Without guarantees of fundamental rights at the screening level it is difficult to see how such community based justice can be incorporated into the "current paradigm of state-centred justice", or lead to the reincorporation of the child in accord with Article 40.[89]

Further criticism may be levelled at the family conference with respect to its culturally specific origins as a Maori initiative for reintegration.[90] It is questionable whether a process which employs methods of community reconciliation developed within a particular cultural context may be successfully and indeed validly transferred to other cultures.

In a recent study Braithwaite and Mugford posited that the family conference as employed in New Zealand and in Wagga Wagga (Australia) provides a readily transferable reintegration ceremony.[91] They argued that the conceptions in forming the family group conference in New Zealand are not so culturally specific as to mitigate against their application in other societies given the satisfaction of fourteen essential conditions.[92] Upon this construction it would indeed seem that the family conference may constitute a valid process of reintegrative shaming.[93] This is a process the fundamental tenets of which reflect the provision for community reconciliation in the Convention.

Nonetheless the potential validity of this process of reintegrative shaming may be seen as compromised in its application under the *Young Offenders*

---

89 Ness, "Restorative Justice" in Galway & Hudson, *Criminal Justice, Restitution and Reconciliation* p8; Aust, Select Committee on the Juvenile Justice System, *Interim Report* (1992) pp103-104.

90 Braithwaite, and Mugford, "Conditions of Successful Reintegration Ceremonies: Dealing with Juvenile Offenders" (1994) 34 *BJ Crim* at 139.

91 Braithwaite & Mugford, "Conditions of Successful Reintegration Ceremonies: Dealing with Juvenile Offenders" (1994) 34 *BJ Crim* 139.

92 At 142.

93 At 140.

Act. One essential factor identified by Braithwaite and Mugford is that "the perpetrator must be so defined by all the participants [such] that he is located as a supporter of both the supra personal values enshrined in the law and the private interests of victims".[94] Such a fundamental principle is absented under the *Young Offenders Act* with the significant potential for alienation and disempowerment of the child during the stages of police questioning.

It is difficult to see how a child in this situation can be expected to uphold the values of society without being accorded the basic rights to which a member of that society is entitled. The alienation and subordination of the will of the child at the police screening level is not consistent with ensuring that the child identifies with the values of the society into which they are to reintegrate. Such a denial of rights does not accord with the process of disapproval - nondegradation - inclusion fundamental to the object of reintegrative shaming underpinning the family conference.[95]

Consequently the family conference has the potential not to heal but rather to be fundamentally scarring and alienating. This is particularly true given the alleged offender's confrontation of the victim and the subsequent imposition of sanctions in the absence of direct judicial control. It is not simply that as Braithwaite and Mugford identify, "the imbalance of power in society ... must spill over into, and hence structure in negative ways, the reintegration process".[96] The issue for the *Young Offenders Act* is more fundamental. Such an imbalance of power and its assertion as a fundamental reality of the child's position in society informs the screening process. Given this fact, and the conception of the autonomous individual actor which is thereby envisaged, the communitarian reintegrative features of the family conference are fundamentally subverted.[97]

CONCLUSION: JUSTICE OR THE CREATION OF CHILD CRIMINALITY?

Given these likely outcomes and procedural weaknesses in the new scheme it would appear that the *Young Offenders Act* will be in breach of numerous international provisions. The proposed system of police interviews and cautioning alone will be in breach of Articles 2, 12, 37 and 40 of the

---

94 Braithwaite & Mugford, "Conditions of Successful Reintegration Ceremonies: Dealing with Juvenile Offenders" (1994) 34 *BJ Crim* 139 at 150-152.

95 At 152.

96 At 156.

97 Braithwaite, and Mugford, "Conditions of Successful Reintegration Ceremonies: Dealing with Juvenile Offenders" (1994) 34 *BJ Crim* 139 at 156.

Convention and Rules 5, 7, 11, 14 and 15 of the Beijing Rules. This failure may be attributed to the fact that the *Young Offenders Act* is premised on a conception of the individual which alienates the child. Moreover the conclusions drawn vis-à-vis the earlier system are not backed by evidence and the assumptions regarding the new directions proposed are conceptually and factually flawed.

The denial of even basic procedural rights to the child which this process of alienation involves compromises the legitimacy of the juvenile justice system. There can be no claim to legitimate control without a concomitant regard for the integrity and value of the person to be subjected to such sanctions. Undoubtedly it is possible to enforce control. The dependency of the child makes this a foregone conclusion. The question however is not one of power but one of legitimacy. The recognition of this distinction is a vital as it is basic. It is a principle denied in the *Young Offenders Act.*

The *Young Offenders Act* will not achieve the reconciliation and reintegration of the accused child into society. The denial of rights to the child makes this inevitable. Without guarantees of rights the *Young Offenders Act* constitutes a bare exercise of power and such an exercise poses no solution to the manifold problems faced in the South Australian juvenile justice system. The solution must lie in a truly new approach: an approach requiring a transformation of the ideological premises which alienate the child. Fundamentally this involves the recognition that not only *can* children be the recipients of rights but that it is absolutely vital that they be guaranteed such rights.[98]

This answer is by no means simplistic. Of necessity it includes a diversity of responses. However the basic principles have already been enunciated by the Convention and the Beijing Rules. What is now required is the recognition of the veracity of these principles not only for the child but for our future society generally.

This is not to construct the international principles enunciated in the Convention and the Beijing Rules as the ultimate answer. They are but the beginning and require elucidation through a coherent theoretical account of the conceptual foundations for such rights. However in failing to even acknowledge these basic presumptions it is clear that the objectives of the *Young Offenders Act* with respect to community reconciliation will be unavoidably compromised and will remain elusive visions.

---

98 Eekelaar, "The Importance of Thinking that Children Have Rights" (1992) 6 *IIntJLaw & Fam* 221.