CHILDREN'S RIGHTS

Whose children anyway?

Phillip Swain follows up on the article in the last issue about the implicati ns of raids on the Children of God.

The carefully orchestrated 'dawn raids' against the Children of God families in both Victoria and New South Wales raised immediate community reaction. From mid-May for some weeks the media in both States had a field day, as article followed letter and feature story, much of it critical of the practice adopted by the relevant State welfare departments in their intervention. But are we yet aware of the real details of the concerns which led to the intervention, the alternatives which were or could have been canvassed, or the quality of the assessment which determined that the procedures adopted were the best in the circumstances? What we have is a presentation of that part of the story which the parties have to date chosen to reveal — whether the whole is revealed remains to be seen, and may well depend on the negotiations for tactical advantage which inevitably are part of any fully fought court dispute. There is, of course, every possibility that some of the applications begun in the Children's Courts may be withdrawn, in which case the community may well be left to draw its own conclusions as to the appropriateness or otherwise of the actions taken.

Connellan writes of the applicability of the United Nations Convention on the Rights of the Child to both the Victorian legislation (the *Children and Young Persons Act* 1989 *(CYPA)*) and the action actually taken in both States against the Children of God families.[1] He rightly suggests that several Articles of the Convention — notably Article 3 (the 'best interests of the child' criterion), Article 9 (the right to not be separated from parents unless 'in the best interests' and then only with the opportunity for participation in the decision), and Article 16 (the right to not be subjected to arbitrary interference with family privacy or home) — may have been breached by the actions taken on the morning of 15 May 1992. But it also must be remembered that the Convention imposes obligations on the state to both protect the child from physical, emotional and sexual abuse (Article 19), and from sexual or other forms of exploitation and abuse (Articles 34 and 36). As a signatory to the Convention, Australia and its States and territories have agreed to take 'all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the . . . Convention' (Article 4). This obligation, reinforced by the legislative requirements to respond to notifications of suspected abuse (*CYPA*, ss.64, 66) supports the arguments by the Community Services Department in Victoria[2] that investigation of the concerns was not a matter of choice, but a legal obligation. The real issue was not whether to respond to the notifications of suspected abuse or neglect, but how and when.

Dilemmas of child protection assessment

That child protection assessment and intervention requires considerable tact and skills, including an understanding of the legislative mandate, theories and explanations of child abuse, and of the personal and organisational contexts of assessment, has been acknowledged frequently.[3] The task is never easy, and the catch-cry 'damned if you do, and damned if you don't' aptly summarises the reality of protective intervention. Every intervention raises practice and ethical concerns — what is abuse or neglect? When is intervention justified? What behaviours are rightly the concern of the family alone, and which of the community at large? When is care so seriously compromised that separation of child and family is warranted? And, once intervention occurs, how are relative rights and needs of parent and child to be balanced against the possibility that intervention may itself damage the child and family? Child protection workers are acutely aware that it is '. . incumbent on the state to ensure that the child is better off as a result of any intervention',[4] but are also aware that at times the care option offered by the state leaves much to be desired. The community rightly expects child protection intervention to be timely, professional and caring, but is quick to respond with criticism whenever the 'system' is seen to have failed.

But given this, the difficulty in examining the Children of God intervention is that what occurred in response to it seems so predictable. From the very nature of the concerns and the group against whom they were to be raised, it was hardly surprising that the Children of God responded with considerable acumen in use of the media and speedy recourse to the full resources of the legal system. A single family may lack the knowledge or financial resources to be able to challenge interventions in such other jurisdictions as the Supreme Court — though, of course, financial resources and capacity to bring one's case before the public eye ought to make no difference to administration of justice. Given that over 100 children in two States were apprehended, however, the response of the Children of God parents publicly and legally was very predictable. As such, and as notwithstanding the apprehensions the children were all returned to parental care within a matter of days, why the notice provisions of the legislation (*CYPA*, s.68) were not used remains unclear, as Connellan mentions.

Issues for child protection services for the 1990s

The intervention into the Children of God drew attention because of the numbers of children involved and the processes used by the respective departments, but the core issues are

similar to those facing the protective service system as a whole in every intervention.

Mandatory reporting?

Victoria has retained a system of voluntary notifications of suspected abuse or neglect, despite the adoption of mandatory reporting laws in most other Australian and comparable overseas jurisdictions.[5] Despite its strong support for voluntary reporting throughout the 1980s, the Labor Government announced in 1992 that mandatory reporting would be introduced in 1993. This was very quickly followed by the Liberal Party response that it no longer supported such a step, notwithstanding its long held policy to the contrary. While this smacks of political opportunism, it suggests that the mandatory reporting debate is far from over. And, given the obligations of the Convention, some at least would argue that mandatory reporting laws are a necessary requirement if compliance is to be achieved.[6]

A welfare-based child protection system?

Following the 1988 Fogarty review of child protection services, the Victorian Government announced in March 1992 the end of the 'dual track' system under which reports of child protection concerns could be made to either the police or the Community Services Department, in favour of a 'single track' in which the latter were to be the sole authorised recipients of notifications. While the 'dual track' system had attracted criticism, the Children of God intervention highlights that actual separation of child protection assessment from criminal and other protection responsibilities — correctly the province of police — is sometimes easier in theory than in practice. Current department policy in Victoria requires that the police must be notified of serious physical or sexual abuse, where criminal prosecutions may be a possibility. What effect does the involvement of two separate arms of the state have on family interrelationships, particularly given the legislative imperatives to support the family and ensure that separation of parents and children is a step of last resort (*CYPA*, s.87)? How can families and children be supported through the possible involvement of two different court jurisdictions (Children's and County Courts, for example), each with different evidentiary processes, standards of proof, and dispositions available? Can child protection workers assist families and (especially) children to perceive that they are not 'on trial' in Children's Court proceedings, when that is how it feels? What changes to the assessment and adjudication of child protection matters will be necessary to meet not only the demands of justice and equity, but the obligations imposed on Australian jurisdictions by the Convention on the Rights of the Child?

What of resources?

It is too easy (and too frequent a response to questions of service adequacy) to look toward greater provision of resources as a stock reply. Nevertheless, the Children of God intervention has by its very dimensions already placed strain on the protective and support services of two States. Mowbray has argued that if admitted to state guardianship the 128 children apprehended in May 1992 would represent 10% of the annual national admissions for care and protection, and would cost between $2 and $4 million annually.[7] Whether the substitute care and family support systems would be able to cater for the Children of God — even assuming that cases can be proven and dispositions agreed on — is a moot point, given economic rationalism and its implications for leaner services across the government and non-government sectors alike. Despite the obvious planning that the interventions must have entailed, the legal system has shown itself unable to deal promptly with the children apprehended — delays of several months or even longer are occurring — and the adage 'justice delayed is justice denied' seems apt given the seriousness of the actions for parents and children alike.

Greater responsibility — even greater accountability

As suggested, the task of assessment and intervention in child protection matters requires tact, skill and common sense. It carries great responsibility — the capacity to remove a child from parental care, albeit under legislative restrictionsAand rightly bears the onus of concomitant accountability for how that authority is used.

The Children of God cases present an opportunity to test several parameters of child protection systems in Australia: the adequacy and compatibility of definitions of child abuse and neglect across State borders; the boundaries of what are and what are not in present Australian society acceptable behaviours by parents towards children; the timeliness of intervention; and the capacities of our legal, protective and police systems to really protect children. It is also an opportunity to develop a greater appreciation of what attitudes, practices and behaviours ought to be of community concern, so that not only may families be free of interventions which may prove to be unwarranted or unjustifiable, but also those charged with assessment of risk to children may be assisted in undertaking with confidence a task for which few accolades are given and which many critics would themselves be reluctant to perform.

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References

1. This article follows one by Greg Connellan, 'State vs Parents: Whither the Children?' *Alt.L.J.* 17(4), August 1992, 166, to which the reader is referred.
2. Dr John Patterson, CSV Director-General, quoted in the *Age*, 20.5.92, p.6.
3. See, for example, Batten, R., 'Family Assessment Practice in Child Maltreatment', Chapter 20, in Batten, R., Weeks W. and Wilson, J., *Issues Facing Australian Families*, Longman Cheshire, Melbourne, 1991.
4. Le Sueur, E., 'Children's Rights and the State in Loco Parentis', *Children Australia*, 15(2), July 1990, p.27.
5. Refer *Children and Young Persons Act* 1989 (Vic.), s.64. The arguments for and against mandatory reporting are cogently summarised in Carter, J., and others *Mandatory Reporting*, Brotherhood of St. Laurence, Melbourne, 1988.
6. See, Turner, J. Neville, 'The Rights of the Child Under the UN Convention', *Law Institute Journal*, January-February 1992, 38 at p.44.
7. Mowbray, M., 'Not a Care in the World', *Modern Times*, September 1992, p.3.