

# PROTECTING CHILDREN — WHEN AND FROM WHAT?

By

Frank Bates\*

On 18 April 1990, the case of *Iowa v Siemer*<sup>1</sup> was decided by the Supreme Court of Iowa in the United States. This case raises many of the issues which this paper seeks to address. Siemer and his *de facto* spouse were charged with the kidnapping<sup>2</sup> of the wife's seven year old son Tracey. In the State of Iowa, the crime of kidnapping, as it applied in the instant case, involved three elements: first, confinement of the victim; second, that such confinement be without authority and consent and, third, that it be with the intent to inflict serious injury or secretly to confine. The charge arose out of events which had occurred between December 1987 and April 1988, when the child was rescued by police and child welfare workers. In the words of Neuman J.:

Siemer had Tracey's sister handcuff Tracey to his bed in the basement of his mother's home every day after school and release him every morning to attend school. Tracey spent the weekends handcuffed to his bed. Siemer also beat Tracey, cut him with a knife, and poured scalding hot water over him, causing him permanent injuries. At no time did Tracey's mother intervene on his behalf. Tracey's sister was sworn to secrecy on pain of her own punishment to keep Siemer's secret. Eventually one of the sister's playmates saw Tracey in the basement and told her parents who alerted the authorities.<sup>3</sup>

The major argument advanced by the defendant was that the legislature had included an exception based on the ground of *authority* which, in effect, granted an immunity to parents (or a person acting on a parent's authority or *in loco parentis*) in respect of the crime of kidnapping. The Iowa Supreme Court rejected that contention and Neuman J. stated that the court was:

...persuaded that parents may not hide behind the guise of authority to escape punishment that is prescribed for all others by the kidnapping statute... While a parent has the authority to confine or remove a child under reasonable circumstances, we can conceive of no circumstance under which a parent could lawfully exercise such authority while harbouring the intent to sexually abuse or subject the child to serious injury.<sup>4</sup>

The remarks of Neuman J. would seem to be totally unexceptionable, but it is the fact that they had to be made at all which causes disquiet. Indeed, *Siemer* is not the only case which dealt with that specific issue decided by courts in the United States in 1990. On 30 January, the Supreme Court of Arizona decided *Arizona v Viramontes*,<sup>5</sup> where the facts were every bit as shocking as those in *Siemer*. In *Viramontes*, the defendant had initiated sexual relations with his thirteen year old stepdaughter in 1981 and, in consequence, she gave birth to a child

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\* Professor and Head of Department of Law, The University of Newcastle (N.S.W.)

1. *Iowa v. Siemer* (1990) 16 Fam L R. 1306.

2. See Iowa Code Paras 710.1, 710.2 (1989).

3. *Supra* n.1 at 1306.

4. *Ibid* at 1307.

5. *Arizona v. Viramontes* (1990) 16 Fam L R 1172.

in April 1983. To avoid his wife's discovery of the baby and the exposure of his relationship with his stepdaughter, the defendant placed the newly born child in a cardboard box, drove to a McDonald's restaurant and abandoned the child in a parking lot. He then anonymously contacted the police regarding the location of the child. The Arizona Supreme Court held that the defendant had properly been convicted of kidnapping. In reaching that conclusion, Corcoran J. stated that:

Parents have authority to reasonably and appropriately discipline their children. However, parents do not have legal authority to subject their children to felonious acts. Although legal authority has not been defined by the legislature, under no imaginable circumstances could the legislature have intended that the defendant's intent in taking the child to abandon it be legally authorized. The defendant's abandonment of a newborn child in a busy parking lot, protected only by a cardboard box, is not sanctioned by Arizona law.<sup>6</sup>

This, indeed, is as it should be, but it should be borne in mind that the Court of Appeals had held that the kidnapping charge could not stand as the defendant was the lawful custodian of the child. That decision was clearly incorrect as the Arizona kidnapping statute referred to an intent to: "Inflict death, physical injury or a sexual offence on the victim or to otherwise aid in the commission of a felony."<sup>7</sup> Child abuse, of which an abandonment of the kind which occurred in *Viramontes* would clearly be included, is a felony under Arizona law.<sup>8</sup> One other difficulty which the courts in both *Siemer* and *Viramontes* faced was an earlier decision of the Arizona Supreme Court in *State v Lawrence*,<sup>9</sup> on which the Court of Appeals had relied. In *Lawrence*, the court had rejected a reasonableness standard as a limit on parental authority on the grounds that: "...the determination of what is or is not a reasonable restraint would be left to jury determination in each case without any standard by which to be guided."<sup>10</sup> Factually, *Lawrence*, where it was held that the mother had acted with lawful authority in locking her four year old daughter in a storage locker every night, was clearly distinguishable from the later cases, as it appeared that the storage locker in question was the mother and daughter's place of residence and, hence, the mother was providing shelter for the child. That was not the case in *Viramontes*.

The collectively disquieting matter which arises out of the *Siemer* and *Viramontes* cases is that a claim based on legitimate parental authority was made in an attempt to justify actions on the part of a parent (or a person *in loco parentis*) against a child which are objectively unreasonable or unjustifiable. It is hard not to take the view that the defendants in both cases did not regard the children for whom they had tangible responsibility as human at all. Indeed, it is not without significance that there have been two articles in recent journals which have from different standpoints (jurisprudential<sup>11</sup> and socio-historical<sup>12</sup>) taken up the theme of children as property.

Of course children should be protected from physical abuse and abandonment; but that statement is only a part of a continuum and identifying that continuum is itself far from easy. Thus, for instance, Loney, writing of the general situation in the United Kingdom, states that the focus on child abuse is very one sided:

6. *Ibid* at 1173.

7. A.R.S. para. 13-1304(a)(a).

8. A.R.S. para. 13-3623(A).

9. *State v. Lawrence* (1983) 663 P. 2d 561.

10. *Ibid* at 563.

11. J. Montgomery "Children as Property" (1988) 51 MLR 323.

12. F. Bates "Children as Property: Hindsight and Foresight" (1988) 13(2) *Australian Child and Family Welfare* 3.

It encourages the mobilization of public concern and the launching of major inquiries when children are killed by parents or other members of the household, but it excludes from public scrutiny those children who die of poor diet, damp housing, in the nether world of bed and breakfast and the tenement. It excludes from the debate strong evidence that there is a massive difference in infant mortality rates between rich and poor and disregards the higher incidence of disease amongst poor children, their lower educational attainment and their greater risk of incarceration and so forth.<sup>13</sup>

Although the examples which have been selected are from the United States and the United Kingdom, it would be struthious indeed were we to pretend that instances and comments of the kind noted are not readily applicable to Australia. Thus, for example, the *Child Support (Assessment) Act 1989 (Cth)*<sup>14</sup> is quite clearly drawn from a United States template<sup>15</sup>.

In establishing a continuum, perceptions of childhood are likewise important. Hence, from one point of view, the social construction theorist Hoyles writes that the argument of that school of thought is:

...both that childhood changes historically, which could be seen merely as a passive event, and that it is changed by people's actions. In other words it is a political issue and one which, though it seems strange to need to mention it, involves children's actions as well as those of adults.<sup>16</sup>

In like vein, Stainton Rogers comments:

That we no longer hang children, burn them as witches or brand them as vagrants is not the victory of a few social reformers, it is the victory of a whole society which has overcome the constructions that made such actions possible.<sup>17</sup>

Thus, the same kind of process could see the fact situations represented by *Siemer* and *Viramontes* consigned to the same historical dustbin as the practices to which he refers.

But, inevitably, the process is not as simple as is that: in some areas, particular attitudes either die hard or are continually resuscitated. One such is the methods used for disciplining children and the English legal commentator Freeman notes that:

Disciplining procedures are...divergent, ranging from physical chastisement to emotional sanctions engendering guilt and shame and the use of reasoning and negotiation. In all cases communities differ in what is considered 'reasonable' and how far is 'too much'.<sup>18</sup>

Freeman's immediate concern is that, given the preponderance of white, middle-class people in both the legal and caring professions, there are dangers of their values and standards being imposed on parents from other social or ethnic groups. But, as Freeman himself, in the same passage, points out there are different directions and values in parenting, as some parents may emphasise reasoning qualities and initiative, whilst others emphasise conventional discipline.

13. M. Loney "Child Abuse in a Social Context" in *Child Abuse and Neglect: Facing the Challenge* W. Stainton Rogers, D. Hervey and E. Ash, (eds.) (1989), 88 at 90.

14. For comment, see Nygh J. "Child Support" (1989) 3 *Australian Journal Family Law* 197.

15. National Center for State Courts *Developments of Guidelines for Child Support Orders: Advisory Panel Recommendations and Final Report* (1987).

16. M. Hoyles *Changing Childhood* (1979) at 1.

17. W. Stainton Rogers "The Social Construction of Childhood" in *Child Abuse and Neglect: Facing the Challenge*, *supra* n.13, 23 at 29.

18. M.D.A. Freeman "Principles and Processes of Law in the Protection of Children" in *Child Abuse and Neglect: Facing the Challenge*, *ibid*, 129 at 131.

All of that notwithstanding, in another of his writings on the topic, Freeman has remarked that much abuse of children is the result of corporal punishment gone wrong as either the consequence of deliberate action causing more harm than was intended or the product of loss of self-control.<sup>19</sup> Freeman continues by urging that government should take a lead by abolishing corporal punishment in schools, community homes and other institutions for which it has responsibility. In fact, in the State of New South Wales the process represented by the writings of commentators such as Freeman and others<sup>20</sup> has been, to a degree, revoked by administrative directive in the shape of the so-called Fair Discipline Code.<sup>21</sup>

Again, much depends on the initial standpoint of the commentator: a useful starting point is provided by a discussion by two United States writers on law, Coons and Mnookin.<sup>22</sup> Their views, although initially stated twelve years ago, are as germane to discussion of the United Nations *Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally* 1986 and the *Children Act* 1989 (U.K.),<sup>23</sup> for example. Broadly, Coons and Mnookin are unsympathetic to the manner in which the issue of children's rights has been canvassed and are critical<sup>24</sup> of advocates of Bills of Rights for children (such as Foster and Freed<sup>25</sup>) and, by implication, those who seek protection of children through increased government intervention. This school of thought is designated as the "child savers", the arguments and inspirations of which are flawed in that they lack reality and practicality. The other broad school is referred to as "child liberators"<sup>26</sup> and includes the well known educator and writer Holt.<sup>27</sup> These writers urge that children, generally, ought to have the right to do what any adult may legally do and they seek to equate the position of children with that of women and underprivileged minorities. The answer to this, say Coons and Mnookin, is that the argument conflicts with biological and economic reality.

Coons and Mnookin, it will have been noted, base their criticisms of the perceived lack of reality and practicality of the schools of thought which they seek to refute. But as *Siemer* and *Viramontes* have helped to show, there are often realities to be confronted. In those cases — assisted, admittedly, by statute — the courts have gone behind traditional notions of parental authority (and, implicitly, right). But it is also clear that more specific policy determination is needed and three noted American writers Goldstein, Freud and Solnit<sup>28</sup> have attempted such a formulation. At the outset, it should be said that these writers are frankly sceptical of the value and utility of much state intervention and base their criteria for state intervention on the standards of: "...least intrusive disposition."<sup>29</sup> Seeking to perceive the issue from the

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19. M.D.A. Freeman *Violence in the Home: A Socio-Legal Study* (1980) at 119.
  20. See also P.T. Wallington "Corporal Punishment in Schools" (1982) *J.R.* 124; F. Bates "Corporal Punishment in Legal Historical and Social Context" (1983) 12 *Manitoba LJ* 337. For a wider ranging discussion see I. Gibson *The English Vice: Beating Sex and Shame in Victorian England and After* (1978).
  21. See New South Wales Department of Education *Fair Discipline Code* (1989) at 16; also F.G. Sharpe *Memorandum to Principals* March 29th 1989. There still, of course, exists the school of thought which insists on the therapeutic value of corporal punishment; see, for example, a letter in the *Sydney Morning Herald* April 20th 1989 from one C. Harle.
  22. J.E. Coons and R.H. Mnookin "Towards a Theory of Children's Rights" in *The Child and the Law*, I.G.F. Baxter and M. Eberts (eds) (1978), 391.
  23. For a detailed comment on this legislation, see below, text at n.73 ff.
  24. *Supra* n.22 at 392.
  25. H.H. Foster and D.J. Freed "A Bill of Rights for Children" (1972) 6 *Fam L Q* 343.
  26. *Supra* n.22 at 392.
  27. J. Holt *Escape from Childhood* (1974).
  28. J. Goldstein, A. Freud and A.J. Solnit *Before the Best Interests of the Child* (1979).
  29. *Ibid* at 137. For comment on the details of the formulation's application, see F. Bates "The Role of the Law in the resolution of Family Problems" (1984) 58 *ALJ* 448.

standpoint of the child as a member of the family, they have attempted always, in their *ipsissima verba* "...to restrict coercive intervention to actual and threatened harm as to which there is a consensus and about which there is a reasonable expectation that intrusion will be more beneficial than injurious." That broad statement, of necessity, raises general issues which have already been touched upon but will be addressed with more particularity later.<sup>30</sup>

On the specific matters which Goldstein, Freud and Solnit regard as justifying government intervention (and it should be said that their formulation is by far the most detailed thus far attempted) they posit seven such grounds. These are as follows: first, a request by a separating parent for the court to determine custody should be a ground for intervention.<sup>31</sup> Second, the request by other or both parents for the court to terminate their rights should be regarded as grounds.<sup>32</sup> Third, a request by a child's long term caretakers to become the child's parents or a refusal by long term caretakers to relinquish the child to parents or to a state agency should be considered as grounds for intervention.<sup>33</sup> Fourth, the death or disappearance of both parents, the only parent or the custodial parent, when coupled with their failure to make provision for the child's custody or care, should be deemed grounds.<sup>34</sup> Fifth, the state should intervene where parents have been convicted, or acquitted by reason of insanity, of a sexual offence against their child.<sup>35</sup> Sixth, serious bodily injury inflicted by parents upon their child, an attempt to inflict such injury or the repeated failure of parents to prevent such injury ought to provide grounds.<sup>36</sup> Finally, Goldstein, Freud and Solnit consider that the refusal by parents to authorise medical care should be grounds when medical experts agree that the relevant treatment is both non-experimental and appropriate for the child and that the denial of the treatment would result in death and, further, that the anticipated result of the treatment represents a chance for normal healthy growth or life worth living.<sup>37</sup>

But time has overtaken Goldstein, Freud and Solnit. Even in 1979, when *Before the Best Interests of the Child* was written, there would have been many commentators who would have considered their formulation to have been too narrowly drawn.<sup>38</sup> In England, the Cleveland scandal<sup>39</sup> and its aftermath, the Butler-Sloss inquiry<sup>40</sup> and, in Australia, the two decisions of the High Court, *In the Marriage of B*<sup>41</sup> and *In the Marriage of M*<sup>42</sup> have drawn the reality of child sexual abuse to public attention. The implications of the Cleveland affair are enormous and touch upon almost every aspect of the relationship of parent and child.

30. Below, text at n.67 ff.

31. *Supra*, n.28 at 31.

32. *Ibid* at 32.

33. *Ibid* at 39.

34. *Ibid* at 59.

35. *Ibid* at 62.

36. *Ibid* at 72.

37. *Ibid* at 91.

38. See, for example, R. Dingwall, J.M. Eekelaar and T. Murray *The Protection of Children: State Intervention and Family Life* (1983), in particular Ch. 11. These writers, at 264, comment that Goldstein, Freud and Solnit's argument is flawed paradoxically when they claim that, "...the right to optimum development encompasses 'the privacy of family life under the guardianship of parents who are autonomous!' When they concede, however, that parents may fail and family privacy becomes a threat to the child, the authors desert this argument of principle in favour of one of contingency, founded on an empirical claim that the state lacks the means to respond adequately to children's needs, and a political commitment in favour of limiting state action."

39. For comment, see S. Bell *When Salem Came to the Boro* (1988) cf B. Campbell *Unofficial Secrets: Child Sexual Abuse — The Cleveland Case* (1988).

40. Department of Health and Social Security *Report of the Inquiry into Child Abuse in Cleveland* (1988).

41. (1988) FLC 91-978.

42. (1988) FLC 91-979.

However, one matter which does clearly emerge is the need to find an effective balance between competing aims and objectives: in Loney's words:

...whilst society has a clear duty to protect children from physical or sexual abuse, it has an equally clear duty to ensure that no child is separated from his or her parents without good reason and that great care is taken to ensure that parents are not wrongly separated from their children. It certainly requires no great feat of imagination to understand the anguish that arises when parents are not only wrongfully accused of abuse but subsequently have their children removed from them.<sup>43</sup>

Yet, sensible though Loney's view appears to be at first glance, it effectively begs the question; the more so as he has referred to an organisation entitled *Parents Against Injustice* (PAIN) as having played an important part in focusing concern on the issue of separating children from parents where the standard of proof was inadequate. This is not a good example, as one parent who was active in the group and had appeared on its platforms was subsequently found to have sexually abused his six year old mentally retarded son and his children were consequently made wards of court. That was not the only instance of the development of parents' rights rhetoric arising from the Cleveland case.<sup>44</sup> Much has been achieved by the courts in relation to clarifying realistically the appropriate relationship of parent and (particularly, older) child — notably in the landmark decision of the House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority*.<sup>45</sup> Much of that good work could well, as the present writer has elsewhere pointed out,<sup>46</sup> be undone if procedures are not seen to be adequate and to be followed.<sup>47</sup>

From the High Court of Australia's decisions, it appears that these problems were appreciated, even though their ultimate solution cannot be said to be beyond criticism. The High Court decisions, it must be said, were concerned with proceedings under the *Family Law Act* and hence all issues, whether related to child sexual abuse or not, were subservient to s. 60D of that Act which requires that the welfare of the child be regarded as the paramount consideration. Hence, the test which was ultimately to be enunciated in *In the Marriage of M* would not directly be applicable to criminal or care and protection proceedings.<sup>48</sup> In *M*, after a detailed analysis of prior formulations,<sup>49</sup> the High Court<sup>50</sup> concluded<sup>51</sup> that:

In devising these tests the courts have endeavoured, in their efforts to protect the child's paramount interests, to achieve a balance between the risk of detriment to the child from sexual abuse and the possibility of benefit to the child from parental access. To achieve a proper balance, the test is best expressed by saying that a court will not

43. *Supra* n.13 at 95.

44. See B. Campbell, *supra*, n.39 at 153 ff.

45. [1986] AC 112. For comment, see J.M. Eekelaar "The Emergence of Children's Rights" (1986) 6 *Oxford J. Legal S.* 161; S.P. de Cruz "Parents, Doctors and Children: The Gillick Case and Beyond" [1987] JAWL 93.

46. F. Bates "Child Sexual Abuse and the Courts: The Message from Custody and Access Cases. An Old Light on a New Problem" (1989) 9 U Tas LR 87 at 116.

47. For an English example of where procedures were neither adequate nor followed, see *C v C (Child Abuse: Evidence)* [1987] 1 Fam LR 331.

48. For an example of a proceeding in the latter instance, see the decision of the Full Court of the Supreme Court of Queensland in *R v. Lyndon* [1987] 31 A Crim R 111.

49. See, *A v. A* [1976] VR 298; *In the Marriage of M* (1987) FLC 91-830; *In the Marriage of B (Access)* (1986) FLC 91-758; *In re G (A Minor)* [1987] 1 WLR 1461.

50. Mason C.J., Brennan, Dawson, Toohy and Gaudron JJ.

51. (1988) FLC 91-979 at 77, 081. For comment on this case, see R. Chisholm "Child Sexual Abuse: The High Court Rules on Onus of Proof" (1989) 3 Aust J Fam L 184; F. Bates "Evidence, Child Sexual Abuse and the High Court of Australia" (1990) 39 ICLQ 413.

grant custody or access to a parent if that custody or access would expose the child *to an unacceptable risk of sexual abuse*.<sup>52</sup>

It is submitted that this test cannot properly be supported on the basal level that it is far from clear as to whom the risk is to be acceptable. As I have elsewhere written:

. . . it might be that any risk of child sexual abuse occurring could legitimately be described as unacceptable, given the high level of community abhorrence. On the other hand, it could well be argued that there might be some generally acceptable level of risk a view which would be unlikely to find favour with other groups.<sup>53</sup>

There are, inevitably, other ways in which courts can seek to deal with the issue. In the recent decision of Hardinge L.J.S.C. of the British Columbia Supreme Court in *Migliore (Zeisek) v Migliore*<sup>54</sup> the children of the marriage, who were aged eight and ten years, had remained with their mother following her separation from the children's father. The mother had deliberately interfered with the father's access by moving house several times without warning and without informing the father of her new address. The father was granted custody three years later by consent. However, the children were subsequently returned to the mother in consequence of her allegations of child abuse. Although investigations of prior allegations did not substantiate such complaints, a social worker and a psychologist interviewed the children and concluded that the children had been abused despite the absence of any physical evidence. The judge found that the mother was not a wholly credible witness<sup>55</sup> and, conversely, there were aspects of the conduct of the interview which were not wholly satisfactory.<sup>56</sup> Nonetheless, Hardinge L.J.S.C. concluded that:

In the absence of compelling reasons, it would be very dangerous for me to reject, as unreliable, the evidence of [the social worker] and such a highly qualified and respected a psychologist. . . It is always possible to speculate that the opinions of experts such as those might not have been the same if their interviews had been conducted somewhat differently or if they had more information available to them. However, when the safety and well being of young children is at stake it is not so much a question of whether the court is absolutely sure there has been no abuse as it is, so far as is possible, their safety.<sup>57</sup>

Although effectively handing over disposition to experts might be an easy way out, it is unlikely to find much favour in Australian law where, in a leading case, Street C.J. in the New South Wales Court of Appeal, stated that: "...our system of jurisprudence does not, generally speaking, remit the determination of disputes to experts,"<sup>58</sup> and where the Family Court of Australia seems to be becoming ever closer to traditional adversarial procedures and attitudes.<sup>59</sup>

52. Author's italics.

53. F. Bates, *supra* n.51 at 417.

54. (1990) 23 RFL (3d) 131.

55. *Ibid* at 136.

56. First, *ibid* at 137, the quality of the audio reproduction of the video recording of the interview was very poor, although the judge had been furnished with a transcript which, it had been agreed, was substantially accurate. Second, *ibid* at 138, the social worker's admitted lack of experience in the area resulted in his failure properly to put the children at ease and Hardinge L.J.S.C. expressed the view that he would have preferred him to have taken a more indirect approach. Third, the judge, *ibid* at 138, doubted whether, had the psychologist had the advantage of seeing the additional background information, he would have reached the same conclusion.

57. *Ibid* at 138.

58. *Epperson v. Dampney* (1976) 10 ALR 227 at 228.

59. For comment, see J.N. Turner "The Family Court of Australia: A Triumph or Disaster?" (1988) 13(4) *Aust. Child and Family Welfare*.

Another manner of curial intervention is by changing applicable standards: in all texts on the law of tort it is stated,<sup>60</sup> in various forms, that a parent has a right or a privilege (probably the latter is more accurate)<sup>61</sup> to inflict reasonable chastisement. In the recent Scots case of *Peebles v McPhail*,<sup>62</sup> the High Court of Justiciary<sup>63</sup> upheld a conviction against a mother for assault on her child with Emslie L.J-G commenting that: "It is perhaps sufficient to notice that to slap a child of two years old on the face knocking him over, is an act as remote from reasonable chastisement as one could imagine."<sup>64</sup> It is quite clear from *Peebles v McPhail* and another recent Scots decision, *B. v Harris*,<sup>65</sup> that it was the nature of the assault, rather than any state of mind of the offender, which constituted the assault.<sup>66</sup> *Peebles v McPhail* perhaps represents a rather surprising development from a jurisdiction where corporal punishment seemed to be endemic.<sup>67</sup>

However graphic, and however occasionally surprising, such developments might be they are not, and cannot be, systematic. But, from the jurisdiction which spawned Cleveland, to say nothing of the Maria Colwell,<sup>68</sup> Karen Spencer,<sup>69</sup> Alia Aziz,<sup>70</sup> Jasmine Beckford<sup>71</sup> and Kimberley Carlile<sup>72</sup> affairs, (all of which were well publicised cases involving instances of fatal, or near fatal, child abuse), a systematic attempt has been made. The *Children Act 1989* (U.K.) — described in the House of Lords debates by the Lord Chancellor, Lord Mackay, as "The most comprehensive and far reaching reform of child law which has come before Parliament in living memory",<sup>73</sup> — brings together both the public and private<sup>74</sup> law relating to children. Although a detailed analysis of this Act is beyond the scope of this paper,<sup>75</sup> attention will be drawn to aspects<sup>76</sup> of the Act which are most relevant to its major thrust.

First of all, s. 1 of the *Children Act* lays down principles for courts which deal with the welfare of children: thus, it is provided that the child's welfare shall be the court's paramount consideration.<sup>77</sup> In addition, the Act novelly<sup>78</sup> warns courts that delay in determining

60. See, for example, F. Trindade and P. Cane *The Law of Torts in Australia* (1985) at 209; R.F.V. Heuston and R.A. Buckley *Salmond and Heuston on the Law of Torts* (19th Ed. 1987) at 149; W.V.H. Rogers *Winfield and Jolowicz on Tort* (13th Ed. 1989) at 680.

61. See P. Wellington, *supra* n.20 at 143.

62. *Peebles v. McPhail* 1990 SLT 245 at 245.

63. Emslie L.J-G and Lords Cowie and Clyde.

64. *Supra* n.62 at 245.

65. *B v. Harris* 1990 SLT 208.

66. Thus, in *Peebles v. McPhail* 1990 S.L.T. 245 at 246, Emslie J.J-G had said "...it appears merely that the mother was bent on punishing the child reasonably and the mere fact that she was angry at the time did not by itself permit the inference of evil intent to be drawn, converting chastisement into assault."

67. See, for example, *Gray v. Hawthorn* [1964] JC 69; *Muckarsie v. Dixon* 1948 11 D.4; *McShane v. Paton* [1922] JC 26; *Brown v. Hilson* [1924] JC 1.

68. See J.G. Howells *Remember Maria* (1974) — O.M. Stone, "Hard Cases and New Law for Children in England and Wales" (1974) 8 Family LQ 351.

69. See J.D. McClean "The Battered Baby and the Limits of the Law" (1978) 5 Monash ULR 1.

70. See M. Jay and S. Doganis *Battered: The Abuse of Children* (1987).

71. See London Borough of Brent (L. Blom-Cooper) *A Child in Trust. The Report of the Panel of Inquiry into the Circumstances Surrounding the Death of Jasmine Beckford* (1987); R. Dingwall "The Jasmine Beckford Affair" (1986) 49 MLR 489.

72. See London Borough of Greenwich (L. Blom-Cooper) *A Child in Mind* (1987).

73. *Hansard* H.L. Vol.502, col.488.

74. The reforms to the private law relating to children are those recommended by the Law Commission in their report, *Review of Child Law: Guardianship and Custody* (Law Com No 172).

75. The Act consists of 108 sections and fifteen schedules.

76. Though the Lord Chancellor, above n.73, had continually stated that the Act should be read as a whole.

77. *Children Act 1989* (U.K.) s. 1(1).

78. *Ibid* s. 1(2).



questions of upbringing<sup>79</sup> or administration of property is likely to prejudice the welfare of the child. A major innovation is contained in s. 2 of the Act which throughout refers to *parental responsibility*. This, it is suggested, is an inherently worthwhile development in that the emphasis is shifted, as it ought to be, away from notions of parental *right* to *responsibility*. Unfortunately, in s. 3(1), parental responsibility is described as meaning, "...all the rights, duties, powers, responsibilities and authorities which by law a parent of a child has in relation to a child and his property." Unfortunately, again, those various aspects are nowhere spelt out in the Act, so that recourse has to be made to the existing and untidy state of the common law.<sup>80</sup> It appeared that the Law Commission had dismissed as impracticable any detailed enumeration of parental rights and duties.<sup>81</sup> Nevertheless, the fact that the legislation refers to *responsibility* throughout is, it is suggested, a significant step forward in recognising what appropriate parenthood ought to entail.

In addition, the Act ceases to use the traditionally emotive terms *custody* and *access* and replaces them with a *residence order* which is defined as being, "...an order setting the arrangements to be made as to the person with whom a child is to live..."<sup>82</sup> and a *contact order* which "...means an order requiring the person with whom the child lives, or is to live, to allow the child to visit or stay with the person named in the order, or for that person and the child otherwise to have contact with each other..."<sup>83</sup>

Although it could be argued, as indeed it was in the House of Lords debates,<sup>84</sup> that these provisions amount to no more than "...cosmetic renaming...", it is suggested that the manner in which the contact order provision is couched strongly reinforces the notion of *responsibility* to be found earlier in the Act.<sup>85</sup> On the specific issue of protection, the same section<sup>86</sup> refers to a *prohibited steps order* and to a *specific issue order*. The former refers to an order "...that no step which could be taken by a parent in meeting his parental responsibility for a child, and which is of a kind specified in the order, shall be taken by any person without the consent of the court..."

This order, derived from wardship jurisdiction, specifically relates to actions within the power of a parent, rather than the child. Hence, it could include matters involving education or religious practice.<sup>87</sup> The latter means, "...an order giving directions for the purpose of determining a specific question which has arisen, or may arise, in connection with any aspect of parental responsibility for a child..." The effect of this order is profoundly interventionist: its effect is not to give one person the right to take decisions, but to enable the court to give directions. The court may either take a particular decision itself, or direct that the decision be made by some other party or agency. Local authorities<sup>88</sup> may apply for such an order requiring, for example, that a parent obtain medical treatment for a child.

Part IV of the *Children Act* deals specifically with the protection of children. This part makes reference to *child assessment orders*<sup>89</sup> and *emergency protection orders*.<sup>90</sup> The former,

79. "Upbringing", the Lord Chancellor said, *supra* n.73 at col. 1168, is a word of general scope which, "... includes education and social life while being reared..."

80. See, in particular, J.M. Eckelaar "What are Parental Rights?" (1973) 89 LQR 210.

81. See J.M. Masson "Annotations to the *Children Act 1989*" [1989] (4) *Current Law Statutes* 41-14.

82. *Children Act 1989* (U.K.) s. 8(1).

83. *Ibid.*

84. *Hansard* H.L. Vol.502 Col.503 Lord Meston.

85. Above, text at n.77.

86. *Children Act 1989* (U.K.) s. 8(1).

87. Below, text at n.117.

88. The role of Local Authorities in relation to children is covered in detail in Part III of the Act.

89. *Children Act 1989* (U.K.) s. 43.

90. *Ibid* ss. 44, 45.

which was the subject of substantial controversy during parliamentary debate,<sup>91</sup> is of considerable importance for the purposes of the present discussion. Under the Act, a local authority<sup>92</sup> or the National Society for the Prevention of Cruelty to Children<sup>93</sup> or similarly authorised body may apply for a child assessment order which the court may only grant if, first, the applicant has reasonable cause to believe that the child is suffering, or is likely to suffer, significant harm.<sup>94</sup> Second, that an assessment is required to so determine<sup>95</sup> and, third, that it is unlikely that there would be an assessment without a court order.<sup>96</sup> Fourth, the grounds for an emergency protection order are not satisfied or it would not be appropriate to make that kind of order.<sup>97</sup> The purpose of these orders is quite clear: the more rigorous requirements for an emergency protection order<sup>98</sup> might result in such an order not being granted where there was fear for a child's safety, but no hard evidence and the existence of the child assessment order means that a child may be protected in circumstances which are serious but do not amount to an emergency. It should, though, be borne in mind that the parents retain parental responsibility and the applicant will only be able to take such steps as are permitted by the court without parental consent. Those seeking the order must explain to the court the types of assessment which are required and how they should be carried out.<sup>99</sup>

Emergency protection orders replace the previous "place of safety order"<sup>100</sup> which caused so much of the trauma during the Cleveland affair,<sup>101</sup> although it does appear that it is easier to fulfil the grounds available under the *Children Act* than those under previous legislation. There are, essentially, three grounds for the making of the orders: first, if the court is satisfied that there is reasonable cause to believe that the child will suffer significant harm if not removed to accommodation provided by or on behalf of the applicant,<sup>102</sup> who may be "any person".<sup>103</sup> Second, if there is reasonable cause to believe that the child is likely to suffer significant harm if he does not remain in the place in which he is then being accommodated.<sup>104</sup> Third, in the case of an application by a local authority or the National Society for the Prevention of Cruelty to Children or similarly authorised body,<sup>105</sup> an order may be made if they have reasonable cause to suspect that a child is suffering, or likely to suffer significant harm, or they are making inquiries<sup>106</sup> and those inquiries are being unreasonably frustrated by access to the child being unreasonably refused and the applicant has reasonable cause to believe that such access is required as a matter of urgency.<sup>107</sup>

91. *Supra*, n.81 at 41-93.

92. *Children Act* 1989 (U.K.) s. 43(1).

93. *Ibid* ss. 43(1), 43(13), 31(9).

94. *Ibid* s. 43(1)(a).

95. *Ibid* s. 43(1)(b).

96. *Ibid* s. 43(1)(b).

97. *Ibid* s. 43(4).

98. Below, text at n.100.

99. Section 43(8) provides that, if a child is of sufficient understanding to make an informed decision, he may refuse to submit to a medical, psychiatric or other form of assessment.

100. *Children and Young Persons Act* 1969 (U.K.) s. 28(1).

101. See M.D.A. Freeman, *supra* n.18 at 131, who writes that, "What Happened in Cleveland (and had been happening elsewhere) was that the place of safety order intended as an emergency measure came to be used as a matter of routine, even in cases where it was not necessary to remove the child before a court hearing."

102. *Children Act* 1989 (U.K.) s. 44(1)(a)(i).

103. *Ibid* s. 44(1).

104. *Ibid* s. 44(1)(a)(ii).

105. *Ibid* s. 31(9).

106. *Ibid* s. 47(1). Below, text at n.108.

107. *Ibid* ss. 44(1)(b) and (c).

Two other matters must be mentioned: first, local authorities are placed under a duty to make inquiries to enable them to decide whether to take any action to safeguard or promote the child's welfare in the cases of children who are the subject of emergency protection orders<sup>108</sup> or are in police protection<sup>109</sup> or the authority has, "...reasonable cause to suspect that a child who lives, or is found in their area is suffering, or is likely to suffer significant harm."<sup>110</sup> This, likewise, represents an entirely desirable development, emphasising as it does duty and responsibility. Along analagous lines is recent legislation in Queensland<sup>111</sup> which, similarly, casts a duty on police to investigate and act on reasonable suspicion of domestic violence. Second, throughout the legislation the phrase "significant harm" is used. "Harm" is defined as: "...ill-treatment or the impairment of health and development...".<sup>112</sup> In turn, all of these terms are defined: thus, "health" refers to "...physical and mental health..."; "development" to, "...physical, intellectual, emotional social and behavioural development..."; and "ill treatment" includes, "...sexual abuse and forms of abuse which are not physical...". Finally, it is further provided that where: "...the question of whether harm suffered by a child is significant ... on the child's health or development, his health or development shall be compared with that which could reasonably be expected of a similar child."<sup>113</sup>

Once more, these broad descriptions are wholly to be welcomed as they take into account forms of abuse which are more than physical and take the broad consequences into account.<sup>114</sup> Emotional damage and failure to thrive are just as relevant as more obvious physical injury.

In the Canadian case of *Migliore*, to which reference has already been made,<sup>115</sup> one of the many causes<sup>116</sup> of disharmony related to the wife's perception of the husband's religious belief. It appeared that a major part of his academic studies was concerned with the Sicilian Evil Eye and Hardinge L.J.S.C. stated that his interest, "...was such that the mother came to the conclusion he turned from his belief in orthodox Christianity to a belief in the Evil Eye. The father denies that his interest in the subject ever went beyond academic interest in a particular example of folklore."<sup>117</sup> Supposing, however, that the mother's conclusion had been in fact correct, would that, without more, make any difference to the custody disposition?

The point is that courts in making custody dispositions are being faced with significantly different subject matters than was once the case. Further, many issues are inextricably intertwined so that, for example, matters relating to daily discipline of children may also interact with educational and religious attitudes. Thus, for example, Susanna Wesley, mother of John Wesley the founder of modern Methodism, wrote in 1872:

108. *Ibids.* 47(1)(a)(i).

109. *Ibid* s. 47(1)(a)(ii).

110. *Ibid* s. 47(1)(b).

111. *Domestic Violence (Family Protection) Act 1989* (Qld) s. 30.

112. *Children Act 1989* (U.K.) s. 31(9).

113. *Ibid* s. 31(10).

114. See, generally, K. Oates *Child Abuse and Neglect: What Happens Eventually?* (1985), particularly at 3-19.

115. *Supra* n. 54.

116. As Hardinge L.J.S.C. put the matter, (1990) 23 R.F.L. (3d) 131 at 132: "Another irritant seems to have been caused by the fact that the father who had received a B.A. from McMaster University prior to his marriage was continuing the studies that led to his receiving an M.A. after which he entered a Ph.D. program which he expects to complete next year. The mother and her parents let it be known that they thought that the father should abandon his academic goals in favour of 'real work'".

117. *Ibid*.

Break their will betimes; begin this great work before they can run alone, before they can speak plain, or perhaps speak at all... conquer their stubbornness; break the will, if you will not damn a child... make him do as he is bid, if you whip him ten times running to effect it... Break his will now and his soul will live, and he will probably bless you to all eternity.<sup>118</sup>

Similarly, vicious physical punishment and associated privations are associated with, especially, education outside the state sector<sup>119</sup> and is justified on the basis, not of spiritual salvation, but as a developer of character.<sup>120</sup> Yet, in this broad context, as Charlesworth, Turner and Foreman, in their recent book, have pointed out, the law is part of any interprofessional operation.<sup>121</sup> In law, motive is very largely irrelevant<sup>122</sup> and, hence, an apparently good motive such as spiritual salvation or building of character ought not to provide exculpation from the consequences of brutal conduct. To put the matter another way, the law, and intervention by its agencies, must begin with the consequences of actions, not with frequently specious justifications.

Likewise, as various attempts so to do seem to have shown, enforcement of *rights* may be difficult, but enforcement of duties and responsibilities may be less so, particularly where there is an obvious breach. Calam and Franchi have set out various essential rights for children which can easily be changed into the forms of duties or responsibilities,<sup>123</sup> which is the way in which legislators are at last moving.<sup>124</sup> Hence, it is urged that parents have a duty, which should be implemented by legal sanction, to ensure that their children are fed, clean, and are safe and secure.<sup>125</sup> It will be apparent from the structure and orientation of the *Children Act* 1989 (U.K.) that the implementation of such duties and responsibilities were in the minds of reformers and legislators.<sup>126</sup> The legal affirmation that parenthood is a matter of *responsibility* and *duty* rather than *right* is long overdue and it is more than a little sad that it has been a series of disastrous instances<sup>127</sup> which resulted in that development. In modern Australian law, any development whether at Federal, State or international level which can help bring that about is to be commended.

There can be no doubt that social, philosophical and legal attitudes are changing towards family structures. Watson's comment,<sup>128</sup> never wholly correct, that family life is one of those areas of human activity where the basic norm is "Law Keeps Out" is being modified in many areas almost daily. If this modification is properly to be achieved for the benefit of all parties, it must not be based on anything other than the realities of family life<sup>129</sup> and one must continually bear in mind the comment of Engels that, "...the more civilization advances, the more it is compelled to cover the ills it necessarily creates with the cloak of love, to embellish

118. Quoted in M. Jobling "Child Abuse: The Historical and Social Context" in *Child Abuse: A Study Text* (1978), Ed. Carver at 24.

119. See W. Stainton Rogers "Childrearing in a Multicultural Society" in *Child Abuse and Neglect: Facing the Challenge*, *supra* n.13 at 102.

120. See, in particular, A. Glyn *The Blood of a Britishman* (1970).

121. S. Charlesworth, J.N. Turnert and L. Foreman *Lawyers, Social Workers and Families* (1990) at 235.

122. *Chandler v. D.P.P.* [1964] AC 763.

123. R. Calam and C. Franchi "Setting Basic Standards" in *Child Abuse and Neglect: Facing the Challenge*, *supra* n.13 at 75.

124. *Ibid*, particularly text at n.111.

125. Calam and Franchi also specify, *ibid*, the rights to play, to be valued and to be allowed to be a child. However, it will be apparent that those rights and corresponding duties are not so susceptible of being reduced to legislative form.

126. *Supra*, text at n.77 ff.

127. *Supra*, text at n.68.

128. A. Watson *The Nature of Law* (1977) at 96-7.

129. *Supra*, text at n.1 ff.

them, or deny their existence...”<sup>130</sup> These realities, when taken together with the definitions in the *Children Act*<sup>131</sup>, tell us when, and from what, children must be protected. *Children must be protected when they are at risk of harm and they must be protected from such harm and from their families.*

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130. F. Engels *The Origin of the Family, Private Property and the State* (4th Ed. 1891) at 174.

131. Above, text at n.112 ff.

