AUSTRALIA

The Law Reform Commission

Discussion Paper No. 9

CHILD WELFARE

CHILDREN IN TROUBLE

THIS PAPER IS NOT A COMMISSION REPORT. It contains certain tentative proposals by the Commission on the reform of child welfare laws and procedures in the Australian Capital Territory and identifies certain issues upon which no conclusions at all have yet been reached. **THIS PAPER IS INTENDED TO PROMOTE DISCUSSION AND ELICIT COMMENTS WHICH WILL BE CONSIDERED BY THE COMMISSION IN REACHING ITS CONCLUSIONS AND DRAFTING ITS FINAL REPORT.** As far as possible comments should be related to specific paragraph numbers in the paper. All inquiries and comments should be directed to —

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Care
International Year of the Child 1979

The Commission has been as ed to report on this Reference by 31 October 1979. All submissions hould be received by 1 August 1979.

Commissioner in charge of the Reference: Dr. John Seymour.

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THE REFERENCE IN ITS CONTEXT

Child Welfare Reference

1. ***Need for Reform:*** The Commonwealth Attorney-General has given the Commission a Reference asking it to enquire into child welfare law and practice in the Australian Capital Territory. The Commission is to consider the rights and obligations of children, of parents and other persons with responsibility for children, and of the community. In particular the Commission is to examine:

- the treatment of children in the criminal justice system;
- the position of children at risk of neglect or abuse;
- the roles of welfare, education and health authorities, police, courts and corrective services in relation to children; and
- the regulation of the employment of children.

The Reference also draws attention to the need to review the Australian Capital Territory's *Child Welfare Ordinance* 1957. There is no doubt that the need to review the Ordinance is urgent. It is confused both in concept and language. It is outdated when compared to other like Australian and overseas laws and reflects values and attitudes of times gone by.

2. ***United Nations Congress:*** Apart from the inadequacies of the Ordinance, two events give this Reference special significance. In 1980 the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders will be held in Sydney. One of the five topics to be discussed is "Juvenile Justice: Before and After the Onset of Delinquency". As the Attorney-General's Reference points out, the Congress will direct world attention on Australian laws and practices in this field. It is therefore appropriate that, in advance of the Congress, efforts should be made to examine closely current child welfare laws and practices and, where improvement is necessary, to call the need for reform to the attention of law makers.

3. ***International Year of the Child:*** The second event is the declaration by the United Nations General Assembly of 1979 as the International Year of the Child. This makes an enquiry into child welfare particularly appropriate at this time. 1979 is also the twentieth anniversary of the adoption, by the General Assembly, of the Declaration of the Rights of the Child. When children come into conflict with the legal system or with their parents, difficult questions may arise as to the rights and obligations of all parties. The Commission will explore some of these questions. It will, for example, examine such matters as court procedure, the provision of a legal representative or some other type of advocate to appear for the child, the possibility of involving children more fully in decisions affecting their lives, and access to police and court records. Discussion of "children's rights" also raises for consideration the protection which children under the control of welfare and correctional agencies should be given. The powers of supervising officers and institutional staff may need to be more closely defined.

4. ***Australian Reforms:*** The high level of activity in the field of Children's Court reform also makes the Reference a particularly timely one. Following a

Royal Commission,[1] South Australia has recently enacted a new statute.[2] In New South Wales a Green Paper[3] dealing with proposed changes to the child welfare system was published in 1978. Victoria,[4] Queensland,[5] Tasmania and the Northern Territory are all re-examining different aspects of their procedures for dealing with children in trouble. The Commission has already made contact with the State officers engaged in considering child welfare law reform. Co-operation and assistance have been promised and will be reciprocated. Our Terms of Reference specifically call attention to two relevant considerations. The first is the general obligation of the Commission under s.6(1)(d) of the *Law Reform Commission Act* 1973 (Cth) to consider proposals for uniformity between laws of the Territories and laws of the States. The second is the particular need to consider, in this context, uniformity with child welfare laws and practices in New South Wales. This last mentioned consideration is important for a number of reasons. First, the Australian Capital Territory is small and is entirely surrounded by the State of New South Wales. Unnecessary and unjustified disparities in laws and procedures in such small distances could lead to injustice or perceived injustice. Second, the Territory presently relies upon New South Wales facilities when institutional placement of children is necessary.

5. ***Other ALRC References and Reports:*** Other Law Reform Commission References deal with matters of relevance to the enquiry into child welfare laws. Of particular importance is the Reference on the sentencing and punishment of Commonwealth and Territory offenders which is still proceeding. As will be indicated, the debate between those who favour fixed sentences and those who favour flexibility is especially significant in the field of juvenile justice. In connexion with the Sentencing Reference the Commission is considering the desirability of building a prison in the Australian Capital Territory and the need for alternatives to such an institution. Mention must also be made of the Privacy Reference which will, amongst other things, examine problems relating to police and court records. Also the Commission's report on criminal investigation contains recommendations on police procedures generally and in particular on interrogating juveniles, which recommendations found reflection in the Criminal Investigation Bill 1977.[6] Although that Bill lapsed with the dissolution of Parliament in November 1977 the Attorney-General has announced his hope to reintroduce it, with amendments, in 1979.[7]

Scope of the Reference: Priorities

6. In view of the breadth of the Terms of Reference and the early reporting date (31 October 1979) the Commission has decided that its initial report on this

1. *Report of the Royal Commission into the Administration of the Juvenile Courts Act and Other Associated Matters*, Part 2, 1977 (His Honour Judge R. F. Mohr, Commissioner).
2. *Children's Protection and Young Offenders Act* 1979 (S.A.).
3. *A Report Issued by the Hon. R. F. Jackson, M.P., Minister for Youth and Community Services on Proposed Child and Community Welfare Legislation*, 1978 (Green Paper).
4. See *Committee of Enquiry into Child Care Services in Victoria Report*, 1976 (Norgard Report).
5. See *Report and Recommendations of the Commission of Inquiry into the Nature and Extent of the Problems Confronting Youth in Queensland*, 1975 (Demack Report).
6. The Law Reform Commission, *Criminal Investigation*, Canberra, 1975 (ALRC 2), paras. 265-267.
7. (1978) 3 *Commonwealth Record* 892.

Reference will deal only with certain issues. A distinction can be drawn between the general welfare needs of *all* children in the Australian Capital Territory and the needs of children *in trouble.* It is clear that a survey of the former would be impracticable in the time available. The Commission has therefore concluded that the report to be produced by the end of October 1979 will concentrate on the Australian Capital Territory's system for dealing with young offenders, as well as with neglected and uncontrollable children. This paper is similarly confined to these three categories. By "the system" is meant the Children's Court, the police, child welfare services, educational and health authorities, correctional agencies and voluntary organisations. The aim of the report will be to offer a blueprint for procedures for dealing with children in trouble in the Australian Capital Territory.

7. The foregoing does not mean that the Commission views the Reference as limited to the reform of the Children's Court, important though that topic will be. The Commission will inquire into, and make recommendations upon, the type of services which should be made available to children who come to the notice of governmental and non-governmental agencies. There is room for much more preventive work and a major defect of current child welfare laws is the way they generally operate after the event. It is possible, for example, that the role of the school with regard to troublesome children might be expanded. If more effort could be made to identify those children whose physical or psychiatric problems make it inappropriate to deal with them in the criminal justice system better systems of diversion might be suggested. These are just some of the issues which are raised by the Terms of Reference. The Commission is instructed in the Terms of Reference to "keep in mind the importance of viewing child welfare in the context of general community welfare". The assistance of departmental and private organisations engaged in community welfare is being sought on the implications of this instruction. Comment from the community affected is invited.

8. The Commission proposes to exclude several topics from its initial report. The subject of child abuse will not be dealt with except to the extent that victims of child abuse can be regarded as neglected children who come within the jurisdiction of the Children's Court when protective or coercive intervention is needed. Nor will the report deal with the employment of children, with day-care centres, or with the special needs of mentally ill or handicapped children. Certain of these subjects will be dealt with in a later report.

The Australian Constitution and Children

9. ***Territories Power:*** The Commonwealth Parliament does not have plenary power under the Australian Constitution to enact uniform child welfare legislation throughout Australia.[8] On the other hand, the Commonwealth Parliament has undoubted power to legislate for the reform of the *Child Welfare Ordinance* 1957, and other laws of the Territory relating to the welfare of children. That

8. Relevant powers it does possess include those to make laws with respect to "marriage" (s.51 (xxi)); "divorce and matrimonial causes; and in relation thereto, parental rights and the custody and guardianship of infants" (s.51 (xxii)) and the provision of certain social security benefits (s.51 (xxiii)).

the Parliament has this power was made clear in a decision of the High Court,[9] where the validity of the *Child Welfare Ordinance* 1957, and *Infants' Custody and Settlement Ordinance* 1956 was tested and upheld.

10. ***Marriage, Divorce and Custody:*** Given the wide scope of the Commonwealth's powers, the Terms of Reference and the desirability always of avoiding the duplication and unnecessary creation of supervisory and adjudicating bodies, consideration must be given to the possibility of extending the operation of institutions which already exist in the Australian Capital Territory to deal with the welfare of children. One obvious example is the Family Court of Australia. It has been proposed[10] that jurisdiction at least over matters of child welfare in the Territory which do not involve a criminal offence should be conferred on the Family Court of Australia and removed from the present Children's Court. The Family Court already has technical jurisdiction in matters arising under a law of a Territory concerning adoption, guardianship, custody or maintenance of children and affiliation proceedings.[11] The Commonwealth was able to confer this jurisdiction on the Court by using its territories power, but the necessary Ordinance to give effect to this provision has not yet been made. Arguments advanced in favour of extending the Family Court's jurisdiction include:

- the desirability of removing children as far as possible from the environment of criminal courts and the rigidities of criminal procedure;
- the advantages of procuring judicial officers with special interest in children and their welfare who are not spending most of their professional lives administering the criminal law; and
- the existence of special courtroom and associated facilities and counselling services and the common experience that cases of child neglect, child abuse and uncontrollability frequently (though not always) arise as a result of family problems.

There is an additional practical consideration. A new court building is being erected in Canberra to house the Family Court. As a result of decisions made five years ago this building will also house the Children's Court. This consideration and the absence of the constitutional problems that might stand in the way of expanding the jurisdiction of the Family Court outside the Territory, have encouraged those who assert that an entirely new approach should be taken to the administration of child welfare laws and that this would best be done in the context of the Family Court of Australia.

11. Because the Family Court has jurisdiction in divorce matters it often happens that this Court must make orders as to the custody, guardianship and maintenance of children of a marriage. A Children's Court also has the power to make orders affecting a child's life, the most important for our purposes being an order declaring a child a ward of the state. Sometimes it happens that a child can be the subject of orders by both Courts and thus there is the possibility of conflict.[12] There is a need for clarification of the law concerning these competing jurisdictions.

9. *Minister for the Interior* v. *Neyens* (1965) 113 CLR 411.
10. Family Law Council, *Second Annual Report*, 1978 para. 178.
11. *Family Law Act* 1975 (Cth.) s.31 (1) (c).
12. In *Re Demack; ex parte Plummer* (1977) 137 C.L.R. 40.

A Children's Advisory Body

12. As a first step towards the integration of child welfare programs in the Capital Territory and the co-ordination of government-sponsored and community-based initiatives to help children in trouble and in need the Commission has already formed the tentative view that a co-ordinating body should be established. This body could be an independent statutory commission, a statutory council consisting largely of part-time personnel, or a unit in the Welfare Branch of the Department of the Capital Territory. There are advantages and disadvantages in each proposal and comment is invited. It does seem important that there should be a permanent advisory body with representatives of a number of different interest groups associated with child welfare and related areas to act as a stimulus for on-going reform, a monitor of the effectiveness of current laws and facilities and watchdog of children's rights in legislation and practices affecting them.

Approach and Consultation

13. When approaching the task of re-designing methods for coping with troublesome and needy children, it is undesirable to begin with preconceptions about the components of an ideal model. Models which are appropriate in other countries and even in the States of Australia may be ill-suited to the special needs of the Australian Capital Territory. The Commission is examining the Children's Court system in the Australian Capital Territory so that its operation will be understood and problems and deficiencies identified. Discussions have already begun with magistrates, police officers, welfare officers, and those involved in health, education and voluntary work. In addition the Commission hopes to get the views of parents and children who have been through the system. The Commissioners have also arranged to hold discussions with groups of young people to hear their opinions on society's response to their needs and difficulties. Members of the Commission will visit institutions for children and observe the courts and welfare facilities in action. Public Hearings will be held to allow interested persons to make comments and submissions. A series of seminars will be arranged, some of them with the assistance of the Australian Institute of Criminology, to bring together those who, in the Capital Territory and beyond, work with children in need and in trouble. The Commission is also assisted by a group of consultants drawn from the universities, and the magistracy, the police, welfare and health agencies. The Commission hopes that a properly sampled survey of public opinion can be arranged within the Capital Territory on some of the key issues.

The Legislative Assembly Report

14. The Attorney-General's Reference draws attention to the Report on Child Welfare prepared by the Standing Committee on Housing and Welfare of the Australian Capital Territory Legislative Assembly.[13] This report was completed in 1978 and in the course of their wide-ranging enquiry into the operation of the *Child Welfare Ordinance* 1957 the members of the Committee received and analysed a large number of submissions and put forward a series of recommendations for change. The Committee also organised a public seminar to discuss these

13. Australian Capital Territory Legislative Assembly, Standing Committee on Housing and Welfare, *Child Welfare*, Report No. 8 (Legislative Assembly Report).

recommendations. All the submissions collected during the course of the enquiry and a transcript of the proceedings[14] of the seminar have been made available to the Commission, which gratefully acknowledges the help derived from the work of the Standing Committee. The Commissioners have already taken the opportunity to discuss the Reference with Members of the Assembly.

The Capital Territory: Some Pertinent Statistics

15. ***Population Statistics:*** The Commission in its report on *Alcohol Drugs and Driving*[15] drew attention to the special features of the Capital Territory when compared with other centres of population in Australia:

> The population is predominantly an urban one . . . Overall, the statistics show that the typical Canberra resident is fairly young (1972 figures show that 62 per cent of its population is under 30 years compared with 54 per cent for Australia as a whole). He is well educated and receives a higher income than the national average. Average male weekly earnings during the September quarter of 1975 amounted to $199.40. This was $41.70 (26.4 per cent) higher than the Australian average. The Canberra population is also highly mobile. Taking the same five-year period (1966-1971) the statistics reveal that 60 per cent of the Territory's residents moved home within that period. This is well in advance of the national average and demonstrates peculiar features relevant to law enforcement in the area under study.[16]

The most recently published statistics on the size of the population in the Australian Capital Territory are derived from the 1976 census. These statistics showed that 196,540 people resided in the Australian Capital Territory, of whom 38.5% (75,795) were aged 18 and under, and 21.7% were aged 9 and under. When the statistics are further analysed the special nature of Canberra's development is revealed. Weston Creek, a relatively new district, has 44.5% of its population aged 18 and under, but even more interesting is Tuggeranong, where 29.8% of the total population are aged 9 and under. Details of the statistics are as follows:

Percentage of Total Population of the Australian Capital Territory

	Age Group				
	0-4	5-9	10-14	15-18	0-18
A.C.T.	11.1	10.6	9.6	7.2	38.5
Woden Valley	7.9	12.8	12.4	8.0	41.1
Weston Creek	16.2	13.7	9.3	5.3	44.5
Belconnen	16.2	12.8	8.6	5.1	42.7
Canberra City	5.3	6.6	9.7	10.0	31.6
Tuggeranong	19.3	10.5	6.5	3.0	38.4

16. ***Children's Court:*** No official comprehensive figures are available on the number of children dealt with by the Children's Court of the Australian Capital Territory. Preliminary analysis by the Commission indicates that in 1978 there were 1159 appearances before the court.[17] Of these, 34 related to neglect charges and 61 to uncontrollability. The remainder were offenders, the most common offences being traffic matters (52.2%) and crimes against property

14. Australian Capital Territory Legislative Assembly, Standing Committee on Housing and Welfare, *Child Welfare Seminar*, 9 February 1979, *Transcript of Proceedings.*
15. The Law Reform Commission, *Alcohol, Drugs and Driving*, Canberra, 1976 (ALRC 4).
16. *Id.*, para. 137.
17. The term "appearances" is used because one child may appear in court several times in one year. Each time he or she does so the child is recorded in the total quoted.

(30.6%). Offences involving violence accounted for only 4.7% of all recorded offences by juveniles. It is already obvious to the Commission that there is an urgent need to keep proper and informative statistics of child welfare cases in the Capital Territory. Only by keeping comprehensive statistical information on child offenders and other child welfare cases can reform be correctly addressed and its effectiveness monitored.

History and Description of the Existing System for Dealing with Children in Trouble

17. ***Children and the Chancery Court:*** Historically children were treated as under the protection of the Sovereign, who as *parens patriae* had the charge of persons not capable of looking after themselves. Jurisdiction over them was delegated to the Lord Chancellor and Court of Chancery. Because of the paternal authority of the Crown, the Lord Chancellor through the Court of Chancery was seen as able to supersede the natural guardianship of a parent.[18] Section 11 of the *Australian Courts Act* 1828 (Imp.) provided that the Supreme Court of New South Wales should be a court of equity and able to exercise all such powers for the due execution of its equitable jurisdiction "as the Lord High Chancellor of Great Britain" could use in England. It has been held that part at least of the Lord Chancellor's protective jurisdiction over infants was passed to the Family Law Division of the Supreme Court.[19] The *Australian Capital Territory Supreme Court Act* 1933 (Cth) s.11 provides that the Court in the Territory has the same original jurisdiction as the Supreme Court of New South Wales.

18. ***Child Welfare Laws:*** In the early years of the Australian Capital Territory procedures for dealing with children in trouble were governed by the New South Wales *Neglected Children and Juvenile Offenders Act* 1905, and by other enactments passed in the State before 1911. When the Capital Territory was created these Acts along with other New South Wales laws continued in force for the time being by virtue of the *Seat of Government (Administration) Act* 1910 (Cth), s.4. In the 1940's three Ordinances[20] were made, but when the present Ordinance came into operation in 1958 these were repealed, and the relevant New South Wales statutes ceased to apply. This Ordinance was based on the New South Wales *Child Welfare Act* 1939. The Capital Territory still has no custodial institution for children, but by virtue of the *Child Welfare Agreement Ordinance* 1941, approval was given to an agreement between the Commonwealth and the State of New South Wales whereby children committed to institutions by the courts of the Australian Capital Territory are held in New South Wales institutions.

19. ***The Child Welfare Ordinance 1957:*** The Ordinance covers a wide range of matters including court proceedings involving children,[21] the establishment of certain institutions, the guardianship and care of children, payments in respect of needy children, the licensing of day-care centres, lying-in homes,

18. See *Re O'Hara (an infant)* [1900] 2 I.R. 232, 251.
19. See *Selke* v. *Ray* [1973] 2 N.S.W.L.R. 282.
20. *Juvenile Offenders (Probation) Ordinance* 1940, *Juvenile Offenders Ordinance* 1941, *Neglected Children and Juvenile Offenders Ordinance* 1949.
21. The Ordinance makes a distinction between children and young persons, but for convenience the term "children" is used.

procedures and powers for dealing with neglected and uncontrollable children and young offenders, and the employment of children. Section 5 of the Ordinance contains a series of definitions of situations indicating neglect. It also gives a brief definition of uncontrollability.

20. ***Neglected and Uncontrollable Children:*** Both the Australian Capital Territory Police (through the activities of its Juvenile Aid Bureau),[22] members of the Welfare Branch of the Department of the Capital Territory and staff of the Capital Territory Health Commission undertake a considerable amount of informal work with children who come to notice as neglected or uncontrollable. Thus, for example, a police officer who encounters a runaway child might merely warn the child and take him or her home. When staff of the Welfare Branch learn of a child who is not being properly cared for by parents or guardians they will, if the situation is not too serious and the parents are co-operative, carry out supportive work with the family, assisting with advice, counselling and direction to available social security benefits. When formal intervention is required in respect of either category of child it is the police who take action and a charge is laid.

21. ***Offenders:*** When a child who has committed an offence comes to the notice of the police the matter may be handled by a general duties officer, by a detective, or by a member of the Juvenile Aid Bureau. Very minor offences can result in an on-the-spot warning, usually in the presence of a parent. With more serious matters the child is normally taken back to a station and there are three possible outcomes. The child may be warned, dealt with by way of a summons, or charged. Before any of these courses is taken the usual procedure is for the matter to be referred to a senior officer.

22. ***The Children's Court:*** Under the *Child Welfare Ordinance* 1957, a Children's Court is created. This is a Court of Petty Sessions but with special powers and some special procedures. There is a right of appeal from the Children's Court to the Supreme Court of the Australian Capital Territory. The jurisdiction of the Children's Court may be broadly divided into criminal and civil, although the distinction drawn between the two is by no means sharp. Young offenders fall within the criminal jurisdiction. The non-criminal jurisdiction encompasses neglected and uncontrollable children.

23. When dealing with a neglected or uncontrollable child or with a young offender the Children's Court has certain special measures available to it under the *Child Welfare Ordinance* 1957. In addition to nominal and financial penalties the court may place the child on probation. In such a case he or she is supervised by a field officer of the Welfare Branch. There are many conditions which may be attached to a probation order. One which is sometimes employed when a child is unable or unwilling to remain at home is a direction that the child live where directed. Substantial use is made of church homes and institutions when such a direction is given. For example, the probationer may be required to reside in accommodation provided by the Outreach Organisation or by Dr. Barnardo's,

22. The Juvenile Aid Bureau is a specialised section of the Australian Capital Territory Police. Its officers work with children who come to notice as offenders or as neglected or uncontrollable children.

or in a similar institution in New South Wales. Where probation is inappropriate a child can be committed to the care of the Minister of the Capital Territory to be dealt with as a ward. Such an order allows for various types of placement, ranging from a foster home to an institution. Finally, committal to an institution can be directly ordered by the court. In such a case the child will be accommodated in a facility operated by the New South Wales Department for Youth and Community Services. This Department decides the nature and length of placement.

The Making and Maintenance of Records

24. Contact with the law produces records both in police files and in court files. An important issue in this Reference is the nature of the records to be kept, the length of time they should be maintained and who has access to them. The Commission is aware that some police warnings are recorded. Should the keeping of these records be encouraged? If so, is there a case for their destruction after a specified period or at least for limited access to them? Many commentators believe that the stigma of a court record or police record of an offence committed in childhood should not follow a young person and hinder him or her in such matters as finding employment. The more efficient and comprehensive the record-keeping the more difficult it may be for the child to escape the past. Expunging juvenile records is a possibility which must be explored. Should expunction occur only after a specified period and only in respect of certain offences? Further, if some satisfactory process is devised, should the expunction occur automatically or only when the child or a parent is knowledgeable and energetic enough to make an application to the court? Should records be destroyed or merely sealed so that certain types of person could continue to have access to them? There are some who might argue, for example, that if a person with a Children's Court record subsequently appears in court as an adult, a probation officer who is preparing a pre-sentence report should have access to Children's Court records so that he or she may present a full and fair account of the child's background. The court sentencing a young adult may want to know if the person appearing before it has spent a lengthy period in a welfare or other institution. The interest of researchers in the preservation of records must not be overlooked. From the point of view of the researcher it would be valuable if all warnings could be recorded so that it would be possible to draw an accurate picture of informal police work with juveniles. Some records could be kept in an anonymous form. These and similar questions arise in respect of criminal records generally and are being dealt with by the Commission in its Reference on Privacy protection. The special vulnerability of children may raise a particular need to ensure that they can "live down" past records.

Basic Issues

Background

25. The present system for dealing with children in trouble in the Australian Capital Territory is a confused and piecemeal adaptation of procedures employed for adults. Little consideration has been given to the appropriateness of these procedures for the young and at no stage has a coherent and comprehensive set of principles been developed on the basis of which a special tribunal for children can be built. The initial task facing the Commission is the formulation of certain basic principles, and it is therefore necessary to grapple with a number of issues

the resolution of which will have critically important consequences for the preparation of child welfare laws. The most fundamental of these arise from what may be characterised as the interventionist/non-interventionist debate.[23]

26. ***The Interventionist Approach:*** The arguments of the interventionist school reflect the benevolent, protective, paternalistic approach to juveniles which led to the establishment of the Juvenile or Children's Court. They are based on the premise that the aims and assumptions of the criminal law are in large measure inappropriate in a Children's Court and that such a court should regard the needs of the child and his or her welfare as paramount. Since the purpose of the Children's Court is to serve the needs of children it is not seen as necessary to draw any distinction between the neglected and the delinquent child. The behaviour or condition which brings him or her to notice, it is argued, is far less important than the underlying situation of which the behaviour or condition is merely a symptom or sign. With regard to offenders, proponents of this view would consider pre-occupation with the offence as short-sighted. They would believe it misguided to allow the nature of the offence to determine the measures to be applied. The commission of a relatively minor offence might, for example, indicate a serious situation at home and it is towards the detection and remedying of that situation that the court process should be directed. Coercive intervention in the lives of neglected and delinquent children is seen as being justified on the ground that the subjects are immature and in need of guidance and help which the court should provide both in their interests and in the interests of society. The acceptance of such arguments has implications for the type of expertise of the tribunal which makes the decision, the degree of formality with which proceedings are conducted, and the nature of the measures which the tribunal should have at its disposal.

27. In recent years scepticism has grown as to the appropriateness and effectiveness of coercive intervention for welfare purposes. This scepticism is based on a number of arguments and it is important to attempt to disentangle them. On the one hand doubts are expressed as to whether the state ought to take upon itself to attempt to improve persons whom those in authority believe to be living in an unsatisfactory manner. Obviously there is a danger that subjective criteria will be employed. In particular a paternalistic philosophy can encourage the middle class to endeavour to impose its views on the working class. On the other hand there are doubts based on the fact that the high hopes of those who founded special courts for children have not been realised. There is growing awareness of the limitations of our techniques and resources. We know little about diagnosing personal problems and even less about treating them. Further, not only is it true that our efforts may not do good. It is also possible that they may do harm. Some writers have drawn attention to the stigmatising and alienating

23. This subject is a complex one and the Discussion Paper can do no more than touch on some of the issues. For a fuller treatment see Home Office, *Report of the Committee on Children and Young Persons*, London, H.M.S.O., 1960 (Cmnd. 1191) (Ingleby Committee Report); Scottish Home and Health Department, Scottish Education Department, *Children and Young Persons Scotland*, Edinburgh, H.M.S.O., 1964 (Cmnd. 2306) (Kilbrandon Committee Report); President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Juvenile Delinquency and Youth Crime*, Washington, U.S. Government Printing Office, 1967, chapter 1 (*Task Force Report*); and A. M. Platt, *The Child Savers*, Chicago, University of Chicago Press, 1969.

effects of much state intervention in the lives of those considered deviant.[24] In short, doubts are being expressed both about the rehabilitative ideal itself and our ability to make it a reality.

28. ***The Non-Interventionist Approach:*** If what may be described as the "non-interventionist" view be accepted then it follows that rigorous restraints must be imposed on the state's right to intervene coercively in the lives of troubled and troublesome children. For the lawyer this means that the state must strictly prove the alleged neglect or alleged offence, and that evidential deficiencies must not be ignored on the grounds that benevolence is its own justification. With regard to the offender the arguments outlined have another important corollary. Acceptance of the rehabilitative ideal demands the possibility of extended periods of intervention in children's lives because society's efforts are directed towards identifying and meeting needs rather than to imposing punishment. It also necessitates the use of measures which allow a good deal of flexibility so that those administering the measures can respond to children's changing needs. Lawyers tend to feel doubly uneasy about the use of powers of this kind. However laudable the motives, it is felt to be unfair to extend the period of intervention beyond that which the offence merits. Further, the lawyer sees perils in measures whose nature and duration are not clearly specified in advance. In the absence of such specificity the Executive is free to exercise a substantial amount of discretion.

29. To a large extent the controversy is about society's objectives when it intervenes in the lives of children in trouble. When it is dealing with neglected juveniles the purpose is clear. It is protection of the children, although there is much disagreement as to the best means of achieving this. However, when one examines the action taken in respect of offenders and uncontrollable children society's objectives are far from clear. Is the aim social control or the furtherance of children's welfare? If the answer to this question is "both" then we must ask whether the two can be satisfactorily combined. Another way of posing the question is to ask whether the demands of the lawyer and the social worker can both be met. The lawyer emphasises procedural regularity and the protection of the interests of the child and society. The welfare officer tends to believe that informality and intuition are of more use than ritual.[25]

30. In assessing the foregoing arguments it must not be overlooked that the criticisms mentioned relate to *coercive* intervention. Acceptance of the non-interventionist view does not mean an abandonment of helping services. These can still be provided at the pre-court stage. The fact that benevolent coercion may be unattractive to the child and the measures imposed usually ineffective does not imply that vigorous efforts should not be made to provide services and facilities which will be attractive and hence voluntarily used. Naturally such a proposition has implications with regard to the role of the Children's Court. Should this court be seen as "a primary social agency,"[26] or as a last resort? In

24. For a most useful collection of material on labelling theory see E. Rubington and M. S. Weinberg, *Deviance: The Interactionist Perspective*, New York, Macmillan, 1968.
25. Council of Social Service of New South Wales, *Submission: The Green Paper*, 1979, 5.
26. P. D. Scott, "The Use of Volunteers in Work with Delinquents", *Probation* 15 (3) Nov. 1969, 80-82, 81.

many countries it is the latter role which is being emphasised and efforts are being made to divert as many children as possible from the court.

31. ***A Case Study:*** The presentation of an imaginary case study will bring some of the problems to life.

> Jenny, aged 14, has run away from home. She has some psychiatric problems and is bitterly at odds with her mother. Her father is in prison and her mother has had a series of liaisons with other men and displays little interest in Jenny. While away from home Jenny commits a number of minor thefts.

How do we define the problem which Jenny presents? Do we see it in law enforcement or welfare terms? If the former do we impose a punishment proportionate to Jenny's offences? Or do we simply treat the offences as a starting point—a mere symptom—and direct our intervention towards her needs? If, from the outset, we treat Jenny as a welfare problem, should we focus on her family situation and endeavour to ameliorate it, or should we concentrate on her psychiatric condition? If we choose to do both how can we co-ordinate the necessary services? Whichever tasks we undertake we must also decide whether our objectives are best achieved by taking Jenny to court or by attempting to deal with her behaviour and problems in an informal manner. As has been explained, the Children's Court in the Australian Capital Territory has jurisdiction over young offenders, neglected children and uncontrollable children. Jenny could fall into each of these categories and thus, if it is decided that she should be taken to court, an important procedural choice must be made.

Welfare Services for Children

32. ***Preventive Work: Youth Bureaux:*** Some and perhaps many of the children who are at present taken to court may be more appropriately and effectively helped by being referred to welfare agencies on an informal basis. The Commission understands that many of those operating governmental welfare services consider that the demands imposed on them by the courts (e.g., writing reports and supervising those on probation) make it impossible to undertake much genuinely preventive work. If this is so then more emphasis should be placed on such preventive work. The Commission is investigating whether the existing governmental and non-governmental agencies are equipped to identify the needs of children who come to notice and who do not require referral to court. In particular, is the ability of the Welfare Branch of the Department of the Capital Territory to respond to problems quickly and flexibly reduced by avoidable bureaucratic factors? These are some of the matters which must be faced by those recommending greater emphasis on informal services. There would appear to be merit in the creation of a co-ordinating agency, although a preoccupation with co-ordination must never be allowed to divert attention from the basic need to provide the necessary services and resources. One possible model for an informal youth agency is provided by the Youth Services Bureaux which exist in several States of the United States. These bureaux are designed to develop services "for a group now handled, for the most part, either inappropriately or not at all except in time of crisis".[27] Their role is described as follows:

> A primary function of the youth services bureau . . . would be individually tailored work with troublemaking youths. The work might include group and individual counseling, placement in group and foster homes, work and recreational programs, em-

27. *Task Force Report*, 21. See also J. A. Seymour, "Youth Services Bureaux", *Law and Society Review*, 7 (2), 1972, 247-272.

ployment counseling, and special education (remedial, vocational) . . . The key to the bureau's success would be voluntary participation by the juvenile and his family in working out and following a plan of service or rehabilitation.[28]

33. ***Welfare Agencies:*** Welfare Agencies play an extremely valuable part in providing services for children in trouble. Attention must be paid to their role, to their place in the overall pattern, and to any problems which they encounter. One of the difficulties, however, is the proliferation of both governmental and non-governmental agencies. In the Capital Territory governmental welfare agencies include the Welfare Branch of the Department of the Capital Territory, the Capital Territory Health Commission, the Guidance and Counselling Section of the A.C.T. Schools Authority, the Office of Child Care in the Department of Social Security and the Youth Employment Office of the Department of Employment and Youth Affairs. There are also various charitable grants made by government and semi-governmental bodies such as the Totalisator Agency Board. This proliferation, when added to the proliferation of non-governmental bodies, leads to some confusion on the part of the welfare recipient.

34. ***Child or Family Orientation?:*** The focus and character of governmental welfare services must be examined. Should they be child-centred or family-centred? The organisational implications of this problem have been vigorously debated in England and Scotland. There are arguments for and against a broad Family Service or Social Work Department, just as there are for and against a more specialised agency.

YOUNG OFFENDERS

The Criminal Liability of Children: Competence

35. ***Minimum and Maximum Ages:*** In considering the criminal jurisdiction of the present Children's Court two ages are relevant. There is an age at which a child becomes criminally liable (this is known as the age of criminal responsibility) and the age at which a child passes beyond the jurisdiction of the Children's Court. These two age limits are simply instances of the large number of decisions which the law must make regarding children. For example, the *Age of Majority Ordinance* 1974 s.5 (1) provides that a person attains full age for the purposes of the law of the Territory when he attains 18, and he is not subject to want of legal capacity by reason only of his age. The *Gun Licence Ordinance* 1937 s.6 (1) provides that no one under 16 shall have a licence. The age at which a child may be proceeded against for an offence in the Australian Capital Territory is 8.[29] Elsewhere in Australia it is 7, 8, or 10. There are also variations in the upper limit of the jurisdiction of courts for children. In the Australian Capital Territory this is set at 18, as it is in three States. The remaining States and the Northern Territory have fixed 17 as the age at which a juvenile ceases to be eligible to appear before a Children's Court. The concept of the age of criminal responsibility has its origins in a desire to shield the young from the full rigours of the criminal law. It is not based on any observable facts of child development.

28. *Task Force Report* 20.
29. See s.108, *Child Welfare Ordinance* 1957.

Nor does there seem to be any obvious reason for selecting 17 or 18 as the age when a person should be treated as an adult if he or she violates the criminal law. Can any reasoned conclusion be reached about the age of criminal responsibility and the age at which children should pass out of the jurisdiction of the Children's Court or must it be merely arbitrary?

36. ***"Child" and "Young Person":*** Reference must also be made to the puzzling distinction embodied in the present *Child Welfare Ordinance* 1957 between a "child" (a person under the age of 16) and a "young person" (a person aged 16 and under 18).[30] This distinction can be used to take into account differing stages of maturation: a "young person", though not an adult, can be required to accept a greater degree of responsibility than can a "child". Whether juveniles should be classified in this way is one of the questions which the Commission must consider.

37. ***A Rule as to Knowledge of Wrongness:*** A child aged 8 and under 14 may not be held criminally liable unless it is proved that he or she appreciated the wrongness of the act. This rule has its origins in the common law which has been modified by the raising of the age of criminal responsibility to 8. Should this rule be retained? For the criminal lawyer its retention is necessary for the maintenance of a coherent body of law: if a child lacks the guilty intent (*mens rea*) required to establish criminal liability then logically he or she cannot be found guilty. However, another view is that if a child under 14 really does not appreciate the wrongness of a criminal act this child is likely to be a greater threat to society than one who is aware that the act is wrong. Hence, it is argued, it is socially undesirable to allow the application of the rule to prevent action being taken. A strong case can be made for the abolition of the rule. If it is retained it should be incorporated into the new Ordinance.

38. ***Offences by the Very Young:*** How should society deal with offences by under-age children? This is a question which has recently attracted attention in England. One answer to the problem is to initiate proceedings based on the assumption that the offending child is in need of care and protection. There is something artificial about this solution. It seems unsatisfactory to proclaim that a seven-year-old is immune from criminal prosecution and then to take action against him or her (under the guise of civil proceedings) when he or she commits an offence.

39. ***A New Principle?:*** Underlying any decisions reached on the criminal liability of children is the feeling that society should employ distinctive procedures for dealing with young offenders. Mention has already been made of a desire to shield the young from the criminal process. But does the system rest on no more than an emotional reaction of this kind? Or is it designed to reflect a recognition of children's immaturity, dependency, vulnerability and malleability?

Police Procedures

40. ***Criminal Investigation:*** One basic question is whether special procedures should be employed in dealing with and investigating allegations against children.

30. See the definitions of "child" and "young person" contained in s.5 of the *Child Welfare Ordinance* 1957.

The interrogation of children has already been examined by the Commission in its report *Criminal Investigation* which proposed that, as a general rule, a child who has not attained the age of 16 years should not be questioned except in the presence of a parent, relative, friend, welfare officer or other responsible person. The General Orders and Instructions under which the A.C.T. Police operate lay down certain rules as to the interrogation of children. A number of other topics remain to be explored. The operation of the Juvenile Aid Bureau has been described; the creation of a unit such as this is a clear manifestation of a specialised approach to children's problems. The functions of this Bureau will be examined by the Commission, as will any difficulties which attend its operation. For example, should *all* offences by children be referred to the Bureau before a decision is made as to a warning or a prosecution? And how appropriate is it for members of the Bureau to be involved in continuing follow-up after a child has been warned? There is a potential for conflict of interest and duty if the police undertake informal counselling. Can a police officer combine welfare work with law enforcement functions? Yet some police officers perform this task most effectively.

41. ***Arrest and Summons:*** Research into the use of the power to arrest juveniles is needed. It has been suggested to the Commission that some police officers in the Australian Capital Territory make use of their power of arrest in order to avoid delays which attend bringing the child to court by use of the summons procedure. In its report on *Criminal Investigation* the Commission has already advanced proposals designed to encourage police to proceed by way of summons rather than arrest, wherever possible. It was proposed, for example, that certain offences should be capable of being declared by regulation to be "non-arrestable". It was also proposed that as a criterion for arrest in a particular case the police officer should be required to have a reasonable belief not only that the person had committed an offence but also that proceedings by way of summons would not be effective or appropriate in the circumstances. These recommendations were adopted in the Criminal Investigation Bill 1977, cl.9. There appears to be no reason why they should not apply to children and every reason why they should. The Commission intends to examine the time taken to bring a child to court on summons. Consideration will also be given to the use of bail, pre-trial custody, fingerprinting and photographing. Upon all of these matters recommendations of a general kind were made in the *Criminal Investigation* report. The aim of the re-examination will be the formulation of any special guidelines needed to create distinctive procedures for children at every stage of the process.

42. ***Police Warnings:*** When a child comes to notice because of the alleged commission of an offence one of the options open to the police is to administer a warning. This might be done on-the-spot or after the matter has been further investigated. We have already discussed the important subject of the keeping of records of warnings.[31] Warnings also raise the important subject of police discretion. Informal unexamined decisions can be arbitrary or prejudiced.[32] At present there are no written guidelines indicating when it is appropriate for a police officer to issue a warning in the Australian Capital Territory. This situa-

31. See para. 24.
32. For a general discussion see K. C. Davis, *Discretionary Justice*, 1969, Ch. VII.

tion contrasts with that in Victoria where the Police Standing Orders give guidance on the use of cautions (as they are called in that State). The possibility of introducing similar guidelines in the Australian Capital Territory is to be explored. When examining the subject of police discretion consideration will also be given to the view (perhaps an unfashionable one) that the use of discretion should be energetically discouraged and that the majority of alleged offenders should be taken to court and given the right to be heard and given due process of law. Many urge the establishment of a specialised panel of lawyers who have particular expertise and sympathy in the special problems of children in trouble.

The Screening of Cases

43. ***A.C.T. Present System:*** In the Australian Capital Territory the choice between a warning and a prosecution is, in the main, the responsibility of the police.[33] Examination of the system in operation may reveal that the existing procedure is appropriate to the Territory's needs and that it makes satisfactory distinctions between matters which require court action and those which do not. However, if it is felt that new decision-making procedures could profitably be introduced or that more emphasis should be placed on the diversion of children from the court then there are several models which can be considered.

44. ***New Zealand: Youth Aid Scheme:*** New Zealand has for some time had a procedure whereby non-arrest cases are discussed at regular meetings between members of the Youth Aid Section (a police branch which is the equivalent of the Juvenile Aid Bureau) and members of the Department of Social Welfare. From these meetings a recommendation goes forward to a senior police officer who makes the final decision. This procedure allows for the diversion/prosecution decision to be based on a combination of law enforcement and welfare criteria.

45. ***Scotland: The Reporter's Decision:*** Another method of screening cases is to employ an independent official such as the Scottish reporter. This officer assumes responsibility for deciding whether formal proceedings should be instituted. Under the *Social Work (Scotland) Act* 1968 the system works as follows. With the exception of certain offences which must be referred to the Procurator Fiscal all formally processed offences by children under 16 are reported by the police to the local reporter. The courses open to the reporter are:

- to take no further action;
- to refer the case to the local authority so that arrangements may be made for the provision of informal assistance to the child and his or her family;
- to refer the matter to a Hearing.[34]

As will be explained, the Hearing is a tribunal which decides what measures should be employed once the offence has been admitted or proved. If the child denies the offence the reporter must refer the case to the Sheriff Court for a decision on the factual allegation.

33. Special procedures exist in respect of offences investigated by the Commonwealth police. These require that before proceedings are instituted by Commonwealth police against certain children for offences against the law of the Commonwealth the papers should be considered by the Secretary of the Commonwealth Attorney-General's Department.
34. See s.39 *Social Work (Scotland) Act* 1968.

46. ***England: Statutory Limit on Proceedings:*** A further possibility is the imposition of a statutory curb on prosecutions. For example, court proceedings could be barred unless a dual test is met: first, that an offence is alleged and second, that the situation is such that it can be met only by way of court order.[35]

47. ***South Australia: Panels:*** A quite different solution is that adopted in South Australia and Western Australia. These States have recently created panels to deal informally with the majority of young offenders. This is a course which must be scrutinised particularly carefully as it is one which has also been recommended for New South Wales in the recent Green Paper.[36] Under South Australia's *Children's Protection and Young Offenders Act* 1979 offences by children (i.e., those aged 10 and under 18) may be dealt with by Children's Aid Panels. The two exceptions are children charged with homicide and those charged with certain traffic offences. The reports concerning the child's case are first considered by a Screening Panel, consisting of a policeman and a social worker, who make a decision as to whether the alleged offender should be brought:

- before a Children's Aid Panel; or
- before the Court

The Screening Panel may, however, finalise the matter in some other way, for example:

- by taking no action;
- by arranging a police caution; or
- by arranging a visit by a social worker.

The Children's Aid Panels consist of a policeman and a social worker and are usually held in the Community Welfare Office in the district where the child resides. The child and at least one parent must be present for the panel to proceed and the child must have admitted the allegation if the Panel is to deal with the matter. Children's Aid Panels have the power:

- to warn or counsel the child and his or her guardian;
- to request the child or his or her guardian to sign an undertaking; or
- to refer the matter to Court.

48. ***Western Australia: Panels:*** In Western Australia a Children's Panel may, under that State's *Child Welfare Act* 1947 deal with first offenders whom the police have decided to charge, provided the child is aged 7 and under 16 years. There are restrictions on the type of offence with which a panel may deal —a schedule to the Act lists a number of serious offences in respect of which a panel has no jurisdiction. A panel is made up of a police officer (or a retired police officer) and a Department for Community Welfare Field Worker. As in South Australia, the child must have admitted the offence before the panel may deal with him or her, and the child and parents may elect to have the matter dealt with by a Children's Court. A panel is empowered:

- to dismiss the complaint;
- to ask the parent and child to enter into a voluntary supervision agreement;
- to refer the matter to a Children's Court.

35. *Cf.* s.1 (2) of the English *Children and Young Persons Act* 1969.
36. Green Paper, chapter 12.

49. ***Panels Generally:*** Before considering whether a similar panel or panels should be recommended in the Capital Territory, a number of questions must be answered.[37]

- Would the introduction of a panel overcome any deficiencies in the system in the Australian Capital Territory?
- How would it operate?
- Would it be likely to be more effective in the performance of some of the tasks at present undertaken by police and courts? Why?
- Are the additional costs of alternative machinery warranted by the possible improvement in the administration of child welfare laws, including intangible benefits such as the avoidance of a court hearing?

Before any decision on the need (or otherwise) for panels is made, it is necessary to make a careful examination of the present police practice regarding warnings and their impact. Seemingly simple questions, such as what proportion of young offenders are warned and what proportion are prosecuted, prove surprisingly difficult to answer. A study of the existing system of warnings can provide valuable information on the desirability of introducing more sophisticated procedures for dealing with children at the pre-court stage. Those who favour panels quote apparently impressive "success rates". But might not warnings prove equally successful with comparable groups of children? Until the answer to this question is known a rational decision cannot be made about the need for change. There are critics of the panel system. They point to its cost, the "lack of special expertise" of some panels, the pressure which may exist to admit a charge in order to avoid a court hearing, and the increased formality which panels may introduce where previously a simple warning would have been administered.

A Facility for Treatment or a Criminal Court?

50. ***Scotland: Treatment:*** No matter how effective informal welfare assistance may be and how successful the diversion of children in trouble from the criminal justice system, there will remain some cases which must be dealt with in a court or tribunal. Much debate has focused on the type of court or tribunal which should deal with young offenders. In Scotland, following the recommendations contained in the Kilbrandon Report,[38] a new type of tribunal known as a "Hearing" was introduced. Three lay persons make up a Hearing and it is their task to determine the child's treatment needs, once guilt has been established. If the offence is denied the case is referred to the Sheriff Court, which makes the adjudication decision. When the offence has been admitted or proved and the situation is such that the reporter considers that the matter warrants formal action then the case goes before a Hearing.[39] The Hearing has the power to order a period of supervision. To this may be added a requirement that the child reside in an institution.[40] One very interesting feature of the Scottish system is that the Hearing is responsible for reviewing the child's progress. Orders lapse if they are not reviewed within one year.[41]

37. For a discussion of panels see Legislative Assembly Report, 24f.
38. Scottish Home and Health Department, Scottish Education Department, *Children and Young Persons Scotland*, Edinburgh, H.M.S.O. 1964 (Cmnd. 2306). The recommendations contained in this report were enacted in the *Social Work (Scotland) Act* 1968.
39. The reporter must arrange a hearing if he considers that "the child is in need of compulsory measures of care". *Social Work (Scotland) Act* 1968 s.39 (3).
40. The hearing's powers are set out in s.44 of the *Social Work (Scotland) Act* 1968.
41. *Social Work (Scotland) Act* 1968 s.48 (3).

51. ***United States: Due Process:*** In sharp contrast are the developments in the United States where emphasis is being placed on the Juvenile Court's role as an agency of criminal justice.[42] In the view of many commentators in that country this court is and should be first and foremost a criminal court and not a treatment tribunal. This attitude found its clearest expression in the 1967 decision of the United States Supreme Court in *In re Gault*.[43] Whether the appropriate tribunal for the Australian Capital Territory should be in essence a criminal court or whether it should be a treatment tribunal is, of course, one of the major issues with which the Commission must grapple. However, at the outset it is necessary to sound a warning. The developments in the United States outlined above may well be a product of conditions (including constitutional conditions) peculiar to the United States and we should beware of slavishly adhering to models derived from that country. Nevertheless the question must be faced: do we necessarily and always wish to make a child's trial indistinguishable from an adult's trial or should the aim be to provide selected legal safeguards within the framework of a flexible and informal procedure? Further, is there any evidence that essential legal safeguards are being ignored in the Australian Capital Territory?

52. ***New Organisation and Personnel?:*** If it is decided that the Children's Court should remain essentially a criminal court further questions arise. Some of these relate to the training and expertise of those who preside. Can a case be made out for a specialist Children's Court magistracy? One possibility already raised is assimilation of the Children's Court into a reformed Family Court. Such an expanded court could operate a civil division (dealing with neglected children and children at risk) and a criminal division (dealing with young offenders). One of the many problems which such a proposal raises is the level of court which should deal with children's matters. What place should a court for children occupy in the court hierarchy?

Limits of Criminal Jurisdiction?

53. Decisions will have to be made about the jurisdiction of the court or tribunal in criminal matters. Are we justified in retaining the existing law under which certain serious offences must be dealt with by the Supreme Court? Are the reasons for removing these offences from the Children's Court satisfactory? Consideration must also be given to whether limits should be placed on a Children's Court's right to commit for trial or sentence. And what of a child's right to elect trial by jury? Should a child be in the same position as an adult in this regard? The possibility of a wholly new approach to the serious offender could be explored. Mention has already been made of the Scottish reporter. Perhaps an official of a similar kind could not only make the decision whether a prosecution should be instituted, but could also be given the responsibility of deciding whether an offence is too serious to be dealt with by a Children's Court.

The Child Traffic Offender

54. One category to which special attention should be paid is the traffic offender. Children's Courts are built on the notion that children should be dealt with differently from adults. Should this philosophy apply to children who commit

42. For an excellent statement of the arguments see *Task Force Report*, Ch. 1.
43. 387 US. 1 (1967).

traffic offences? There are many who would argue that the youthful driver is, at least in respect of his driving conduct, part of the adult world. On this view the specialised approach of the Children's Court is inappropriate for those who violate traffic laws. The alternative argument is that special attention should be paid to such offenders and that measures should be developed which will improve their behaviour on the road and their attitude to the specially anti-social character of some traffic offences. Certainly the statistics show that young people are disproportionately involved in serious motoring offences.[44]

Welfare Reports

55. Mention has already been made of court reports, the preparation of which occupies a good deal of welfare officers' time. Could this time be better spent by a more selective use of written reports? Are reports needed for virtually every court case or for only some? If the latter, can we identify those cases in which reports fulfil a useful function? Can reports occasionally be prejudicial in that they lead to additional intervention directed towards the meeting of the child's needs, intervention beyond that which would have been considered appropriate as punishment for the offence which brought the child before the court? Questions also arise as to whether reports should be available to the court before a finding of guilt or innocence, whether the child and his or her parents should have access to them, and whether the report writer should be subject to cross-examination. The value of more elaborate residential assessment procedures will also be scrutinised.

Representation of Children in Trouble

56. An aspect of the police and court system which requires examination is the need for and organisation of legal or other representation for a child in trouble. How best can society protect the interests of such a child? Is representation by a lawyer necessarily the most effective way of achieving this?[45] If the child does have a legal representative in court should this representative approach both the adjudicative and dispositional phases of the hearing as he would in an adversarial trial? With regard to the disposition decision, for example, should counsel see it as his or her role to challenge a recommendation contained in a welfare report, or should counsel collaborate with the report writer in the search for a solution which is in the child's best interest? Many welfare workers are critical of the adversarial role of lawyer. Perhaps there is room for the creation of a specialised panel of lawyers who have particular expertise in, and sympathy with, the special problems of children in trouble.

Judicial or Administrative Control of Sentencing

57. ***Punishment or Needs?:*** A central issue—and one which is also raised by the Reference on Sentencing—is where the real control over sentences should lie. This is no more than an aspect of the debate whether a young offender should be sentenced on the basis of the seriousness of the offence or on the basis of his or her needs. The question of judicial as against administrative controls over sentencing is raised in a particularly acute form by the existence of a Children's Court's power to commit a child to the care of the Minister. Such an

44. A.L.R.C. 4, 61.
45. See *In the Marriage of E* (1977) 31 FLR 171, 178.

order in practice vests a considerable amount of discretion in the Director of Child Welfare.

58. ***Reporting back to the Court:*** Some judicial officers (and others) have criticised what they see as the surrender to welfare officers of control by courts over the punishment of offenders. Further, they complain that judges and magistrates are not informed on a routine or regular basis as to what happens to the child after sentence is passed. The alternative is for the court to specify precisely the nature and term of the sentence. Flexibility is seen by some commentators as an essential quality in custodial dispositions for juveniles. The question to be faced is whether the criticisms of indeterminacy which are at present being voiced about punishment of adult offenders are equally applicable to juveniles. It should be noted that the matter of control over sentences also arises with regard to probation. Is it for the court or the supervising officer to decide the intensity and conditions of probationary supervision? If the court is to make these decisions, it does seem desirable that there should be greater "feedback" to the judge or magistrate concerning compliance or otherwise with the probation order than there is at present.

59. ***Solution? A Mixture:*** The last paragraph presents the problem in terms of choice between court determination of penalties and a structure allowing those who administer these penalties such as welfare, parole and probation officers to exercise considerable discretion. Perhaps the solution lies in a system which permits greater sharing of control. The court could perform its traditional functions of protecting the child and the community by making reasonably specific orders, yet some flexibility could be retained to allow for response to a child's changing needs. This flexibility might be achieved by making provision for regular review of a child's progress, perhaps by the court which made the original order.

Dispositions Available to the Children's Court

60. ***A Detention Institution?:*** A central question is whether the Australian Capital Territory needs a juvenile detention institution of its own. This raises fundamental issues as to the use of institutional measures for children. There are some who oppose the use of institutions and who reject the argument that an institution should be built in the Australian Capital Territory in order to avoid the disadvantages inherent in the distant placement of children in New South Wales facilities. They argue that advantage should be taken of the existing situation to develop alternative measures. The absence of an institution for children makes the Australian Capital Territory unique in the Commonwealth. According to this view it offers an opportunity to devise a genuinely radical and non-custodial approach. In the Commission's Sentencing Reference we are also grappling with these issues, for it raises the counterpart question of whether a prison should be built in the Australian Capital Territory. The Commission will shortly be publishing a Discussion Paper on this issue and many of the arguments canvassed in it will be apt for consideration in relation to the question of a juvenile detention institution in the Capital Territory.

61. ***Alternatives to Custodial Punishment:*** If alternatives to existing measures (particularly to institutional placement) are to be preferred, what form might they take? Consideration could be given to New Zealand's periodic

detention,[46] to South Australia's youth project centres, and to intensive forms of probation such as that available in California under the name of the Community Treatment Project.[47] Other avenues which might be explored are the making of greater use of closely supervised community homes (i.e., ordinary houses accommodating up to six children) and of juvenile refuges for the child whose offending is not particularly serious, but who is unwilling to continue living with his or her parents. Mention can also be made of the possibility of expanding the use of restitution orders and of introducing work orders, although particular difficulties are likely to be encountered in employing the latter measure for young children especially at a time when youth unemployment in the community is high.

NEGLECTED CHILDREN

The Neglected Child in the A.C.T.

62. As mentioned earlier, a neglected child in the A.C.T. is dealt with under the *Child Welfare Ordinance* 1957. Section 5 defines a "neglected child". In Part IX of the Ordinance provision is made for a child to be brought before the Children's Court after his apprehension or the issue of a summons for his appearance. Where the Court finds a child is neglected it has a range of options from admonishing and discharging through to committal to an institution.[48]

Protecting the Neglected Child from Court

63. Earlier in this paper there is a brief discussion of the subject of coercive intervention for welfare purposes. The arguments against such intervention apply with particular force when we are considering the plight of the neglected child. In the case of an offender, objectives such as the vindication of the law and the protection of the community often compel resort to the courts. No such arguments apply to the case of a non-offender. Therefore society's reluctance to institute court proceedings—particularly when they tend to expose a child to the same court-room atmosphere and stigma as the young offender encounters —should be strongly developed. In the view of many the neglected child should be protected against court action. Such a conclusion has two implications. Obviously the avoidance of the court is dependent on the existence of services and facilities which are available on a voluntary, informal basis. The aim should be the creation of a network of services which will maintain and support the family and thus avoid the child's removal from home. When all else fails juvenile refuges can fulfil a valuable role. There might be room for the introduction of procedures to ensure that all potential court cases are scrutinised and efforts made to co-ordinate the work of the helping agencies. Only after these procedures have been employed should court action be undertaken.

46. For a description see New Zealand Justice Department, *Periodic Detention in New Zealand*, 1973.
47. For a description see M. Q. Warren, "The Community Treatment Project", in N. Johnston, L. Savitz and M. E. Wolfgang, *The Sociology of Punishment and Correction* (2nd ed.), London, John Wiley and Sons, 1970, 671-683; and P. Lerman, *Community Treatment and Social Control*, Chicago, University of Chicago Press, 1975.
48. See s.55.

Strict Criteria for Community Intervention?

64. The second implication is one that is peculiar to the Children's Court's non-criminal jurisdiction. Under s.5 of the *Child Welfare Ordinance* 1957, a "neglected child" is defined in very broad terms. Provision is made for a large number of situations on the assumption that the net should be as wide as possible if the community is to be able to offer help to those in need. This philosophy is now being questioned. Also, the criteria which can be used to justify the institution of neglect proceedings against a child can all too often be highly subjective. Hence the first issue which should be considered in an examination of neglect proceedings is whether the grounds on which these proceedings can be based should be restricted. Perhaps the aim should be the formulation of precise and narrow statutory definitions which will put the complainant to the test of proving specific types of serious harm or the risk of such harm. Wald, a United States commentator, has urged the adoption of restrictive guidelines on the grounds that society should respect parental autonomy. In his view, we lack sufficient knowledge and consensus about child development and proper upbringing of children to justify the state's assumption of guardianship in many of the situations in which neglect proceedings are instituted under the existing law. Wald concedes that the narrow guidelines which he proposes are not designed to ensure that every child receives adequate housing, medical care, education or supportive home environment, but adds,

> Many children need more than they now have, but their needs should not be met through neglect proceedings, which even in the best circumstances will be perceived as punitive, rather than helpful, by parents.[49]

Wald would agree with the view that, when dealing with neglected children, society should place emphasis on supportive programs designed to assist families in a non-coercive manner. The major challenge is how to respond to families' needs in a manner which is not both stigmatising and alienating. To some extent the answer lies in facilitating self-referral. However, many people are reluctant to approach any agency. The difficulties which this reluctance poses should not be under-estimated.

Maximum Age of Intervention?

65. The Legislative Assembly's Standing Committee on Housing and Welfare drew attention to another aspect of the definitional problem. It concluded that it was not appropriate for those aged 16 or over to be dealt with as neglected children.[50] Research is necessary to determine whether the exclusion of older children from the court's non-criminal jurisdiction would leave significant categories of juveniles unprotected. It has been suggested that there are certain groups of 16 and 17 year-olds who are particularly troublesome and for whom the present law provides a means of obtaining assistance and needed discipline.

Abolition of the "Offence" of being a Neglected Child

66. Once agreement is reached as to the statutory grounds for intervention in the lives of neglected children, a decision must be made about the procedure to be employed. It seems to be widely accepted that it is ludicrous to charge a

49. M. S. Wald, "State Intervention on Behalf of 'Neglected' Children: A Search for Realistic Standards", in M. K. Rosenheim (Ed.), *Pursuing Justice for the Child*, Chicago, University of Chicago Press, 1976, 246-278, 272.
50. See Legislative Assembly Report, 57.

child with being a neglected child. The Commission is of the view that an alternative type of procedure should be found. When court action is necessary, a complaint should perhaps be laid against the parents that the child is in need of care and protection and the courts given jurisdiction over the child when such a charge is laid. Also to be decided is who should bring these proceedings. If it is desired to make a clear distinction between criminal matters and non-criminal matters, then this might be encouraged by limiting the institution of proceedings when a child is at risk to persons or bodies other than the police. However, this can be criticised as an unduly negative approach. To emphasise the role of the Welfare Branch with regard to children in the non-criminal category, it would be logical to require the Branch to accept responsibility for the ultimate stage of the process—the taking of court action. Welfare officers will have been working with the family and should therefore be in the best position to identify the family's problems and hence to assemble the necessary evidence.

New Tribunal, Personnel and Procedures?

67. At present the Territory's Children's Court deals with offenders and neglected children. Whatever decision is reached about the type of tribunal which should handle the former group, special consideration must be given to the possibility of creating a radically different tribunal to hear cases involving neglected children. Perhaps the emphasis should be on procedures which will foster negotiation and reconciliation. Mention has already been made[51] of the need to consider whether the Children's Court's non-criminal jurisdiction might be transferred to the Family Court. The role of the Family Court counsellor could well be expanded to encompass that performed by a reporter.[52] The counsellor could be empowered to prevent the initiation of neglect proceedings until all other avenues have been explored. In order to fulfil this role this officer would need an extensive knowledge of welfare services. This knowledge would put him in a position to advise the court on the types of assistance available and to negotiate with families and welfare agencies in an endeavour to solve problems without resort to the court process.

Flexibility and Review of Orders

68. Careful attention must be paid to the services and facilities available to the court or tribunal when a case does necessitate formal intervention. Should they be entirely separate from those employed for young offenders? The guiding principle should be that society should do its utmost to avoid undermining parental involvement and support. Hence the use of care orders must be scrutinised. How often is it really necessary to transfer the guardianship of the child from the parents to the state? Consideration should be given to the lead recently provided by South Australia. Under s.14 of the *Children's Protection and Young Offenders Act* 1979, a court contemplating the removal of guardianship from the parents has more than one option open to it. Removal of guardianship need not be total and it is possible for the Director-General of Community Welfare to be responsible for certain aspects of the child's life.

51. See paras. 10 and 52 above.
52. See para. 45 above.

UNCONTROLLABLE CHILDREN

The Uncontrollable Child in the A.C.T.

69. Uncontrollable children in the A.C.T. are also dealt with under Part IX of the *Child Welfare Ordinance* 1957. In section 5 "uncontrollable" is defined as meaning "not controllable, or not in fact controlled for the time being, by a parent or by the person in whose care he is". Children who solicit for immoral purposes or behave indecently are also deemed uncontrollable.[53] The number of such children in the A.C.T. is small.[54] Like neglected children,[55] uncontrollable children can be apprehended with or without a warrant, or be summonsed, and brought before the Court. A child may also be dealt with by the Court on the application of a person responsible for his care.[56] The powers of the Court where the child is found to be uncontrollable are the same as for neglected children.

Defining the Status Offence

70. On this subject the crucial question is whether uncontrollability should continue to be a separate ground for intervention by the Children's Court. In the United States, the so-called "status offence" jurisdiction is under fierce attack.[57] It is argued that the state should have no power to intervene in the lives of children whose misbehaviour does not amount to actual criminal misconduct. This argument is strengthened by evidence which suggests that the intervention of the law and its officers tends to do more harm than good. In considering these arguments, however, we should not fall into the trap of assuming that the uncontrollability jurisdiction should be abolished simply because, in the past, it has not always been invoked justly and with sufficient care in every case. Perhaps in extreme and carefully defined situations there is still room for formal intervention in the lives of some of those who are at present dealt with as uncontrollable? One possibility—suggested by the Standing Committee on Housing and Welfare—is that the uncontrollability jurisdiction should be limited to children under 16.[58] Another more radical approach is to include some of the children at present dealt with as "uncontrollable" within a general but carefully defined category of children in "need of care". This new category would also encompass some of those at present treated as neglected children.

Non-Court Procedures

71. Whatever decision is made about the appropriateness of court intervention, the arguments as to the desirability of placing primary emphasis on the provision of assistance and advice *outside* the court system seem particularly strong when the subject of the uncontrollable child is under review. It is important that the Commission be assisted in its attempts to identify the types of facilities and resources which should be made available if resort to the blunt weapons of the

53. See s.52 of the *Child Welfare Ordinance* 1957.
54. See para. 16 above.
55. See para. 62 above.
56. See s.53 *Child Welfare Ordinance* 1957. Wherever possible the members of the Welfare Branch avoid invoking this section and prefer to arrange the child's voluntary placement in care.
57. *E.g.*, *Task Force Report*, 25-27 and R. C. Sarri, *Status Offenders: Their Fate in the Justice System and an Alternate Proposal*, Ann Arbor, University of Michigan, 1977.
58. See Legislative Assembly Report, 57.

law is to be avoided. What is needed are welfare services able to provide constructive help to troubled and troublesome children, especially those who are unable or unwilling to remain at home.

KEY ISSUES

Children in the Criminal Justice System

1. What is the age below which a child should not be criminally liable at all? (See para. 35) At what age should a child pass beyond the jurisdiction of a special children's tribunal to the ordinary court system? (See para. 35)
2. Should a clear distinction be made between offenders (i.e., children who have breached the criminal law) and non-offenders (i.e., neglected and uncontrollable children)? Should different tribunals, facilities and services be created to deal with each group?
3. If we want a distinctive system for dealing with young offenders why do we want such a system and what characteristics should mark it off from that employed for adult offenders? Should the same penalties apply to a child as to an adult for the same offences?
4. Should greater efforts be made to divert young offenders from the court or tribunal and, if so, how should this be achieved?
   - By Police/Welfare Branch consultation? (See para. 44)
   - By the appointment of a reporter or similar official? (See para. 45)
   - By the introduction of informal panels? (See paras. 47-49)
   - By other means?
5. To what types of services should offenders be diverted?
6. When formal intervention is required what type of tribunal should deal with young offenders? (See paras. 50-52)
   - A modified criminal court?
   - A panel?
   - The Family Court?
   - Other?
7. Should very serious offences by a child (e.g., murder) be dealt with in the adult system rather than in a special children's court or tribunal? (See para. 53)
8. Should the court or tribunal exercise complete control over the nature and duration of the measures employed for young offenders (e.g., detention for a specified time) or should these measures be flexible, allowing those who administer them to exercise discretion (e.g., indefinite detention to be reviewed in the light of circumstances)? (See paras. 57-59)
9. Should new types of measures be available for young offenders? (See para. 61)
   - Periodic detention?
   - Community service?
   - Intensive probation?
   - Intermediate treatment?
   - Other?

10. Should an institution for children who commit offences be built in the Australian Capital Territory to replace the present system of sending such children to New South Wales institutions? (See para. 60)

Neglected and Uncontrollable Children

11. At what age should the state cease to assert the right to intervene coercively in the life of a neglected or uncontrollable child? (See paras. 65 and 70)
12. In what situations should the state intervene to protect children considered to be neglected or uncontrollable and should these situations be narrowly defined or should the legislative net be cast wide? (See paras. 64 and 70)
13. When formal intervention is required what type of tribunal should deal with neglected and uncontrollable children? (See para. 67)
    - A Court of Petty Sessions?
    - The Family Court?
    - A community panel?
    - An expert panel?
    - Other?

The Supporting Services

14. Should greater emphasis be placed on the provision of informal services for children in trouble? If so, what types of services are lacking at present and how can they best be organised and provided? (See paras. 32, 63 and 71)
15. Is fragmentation of services a problem and, if so, how can co-ordination be improved?
16. Should greater use be made of the work of non-governmental agencies? (See para. 33)
17. Are there deficiencies in the welfare and psychiatric services available to the Children's Court? If so, what are these deficiencies and how can they be remedied?

Commissioner in Charge:	Dr. John Seymour
Research:	Susanne Tongue
	Marina Rinaldi

PUBLIC HEARINGS

Child Welfare Reference

A Public Hearing of the Commission will be held in Canberra to permit members of the public to express their views and explain their concerns in this Reference. The hearings will be conducted informally. Persons wishing to do so may explain personal experiences in private. Details are as follows:

PLACE: Conference Room, 4th Floor, National Library of Australia

DATE: Thursday, 10 May, 1979

COMMENCING: 10 a.m.

Public Hearings and Seminars to be conducted elsewhere in Australia will be announced later.

Sentencing Reference

In the associated Reference concerning the reform of the law of sentencing and punishment of Commonwealth and Territory offenders, the Commission has also fixed a Public Hearing in Canberra. Details are as follows:

PLACE: Conference Room, 4th Floor, National Library of Australia

DATE: Friday, 22 June, 1979

COMMENCING: 10 a.m.

Members of the community are invited to attend these open sessions of the Commission to express their views and opinions. Further copies of this Discussion Paper are available free of charge from—

The Secretary,
Australian Law Reform Commission,
99 Elizabeth Street,
SYDNEY 2000 (Telephone: (02) 231 1733)
(G.P.O. Box 3708, Sydney 2001)

Copies of the Discussion Paper on Sentencing will be available mid-May 1979.

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