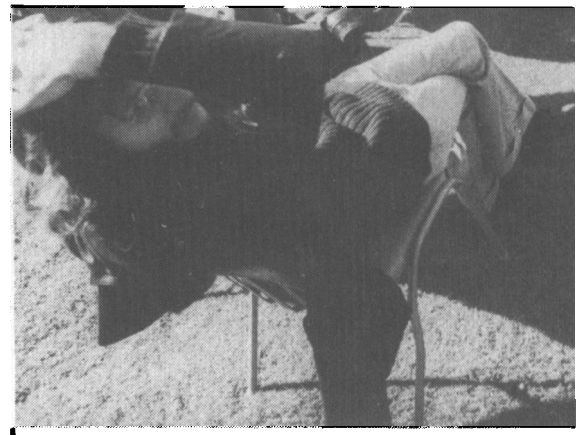
ALL RESPONSIBILITY AND NO CARE

by TERRY CARNEY



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In the comprehensive paper he argues that certain legislative and administrative reforms particularly related to wardship provisions are an urgent priority.

The theme of this Conference is All Care and No Responsibility while the title assigned to this paper is All Responsibility and No Care. Consistent with what I understand to be the focus of this title, the paper will examine various aspects of the system of governmental and no governmental care for the child deemed to be in need of some protective care from the state. The paper will concentrate on the present arrangements for admitting a child to wardship and consider possible alternatives to wardship and alternatives to institutional care for wards.

Problems of Definition

This bland description of the subject matter of the paper rather conceals a number of very difficult choices and dilemmas not normally addressed or debated but which, in the author's view, account for the very imprecise terminology and concepts which abound in the literature. Terms such as "care", "responsibility", "accountability" and even "rights" can only be described as "slogans in search of a definition". They mean different things to different people and only continue to exist because they serve the very functional purpose of promoting communication between people who hold very different views on fundamental issues.

For example it can properly be contended that a responsible service should incorporate a means of ensuring that it was "accountable" for its success or failure in meeting its goals and serving its client group. In the child care field in Victoria, however, there is negligible information concerning the size, or the characteristics, of the sub groups of children which existing programmes purport to serve. The existing official date is in the form of "gate statistics"[1a] which measure the magnitude and consequences of the response by the state but provide almost no information on the problem to which that response is directed. Due to the ambiguity implicit in the objective of promoting the welfare of the child, and the equivocal nature of the theoretical and empirical literature bearing on the attainment of this objective, the criteria for evaluating programmes are virtually non existent. Largely spurious exercises are mounted to provide 'in house', subjective internal evaluations of attainment of goals, or often irrelevant (but easily measured) variables are chosen as the criteria of success and the possible countervailing costs of a programme on less easily measured factors ignored.

Success is not adequately or comprehensively defined; trade-offs between areas are glossed over and it is rarely spelled out to whom the programme might be held accountable. Titmuss[2] identified these thorny issues several years ago but to date there has been a marked reluctance to grapple with them.

Problems Generated by the Historical Legacy

To an extent these difficulties might be put down to th. historical legacy of child and family relationships passed down in the English legislative models and patterns for the provision of welfare which Australia inherited from Britain. The family unit has long been placed on a pedestal and protected from interference by the rules of law for the time being. At first the child was accorded few rights even of a derivative kind and, although they have accumulated slowly over the centuries, there has been a marked reluctance on the part of the state to recognize these interests as separate, autonomous entities in their own right, due to a fear that to do so would be incompatible with the preservation, and stability, of the family unit.

British law was slow to recognize the rights of the child, particularly with regard to relationships with its mother. Apart from the Poor Law provisions enacted in Tudor times, which made provision for rather crude systems of substitute care (often including shipment to the colonies such as Virginia, or entry to naval service[3]), apprenticeship schemes[4] and institutional programmes (often of a philanthropic kind or of the 'workhouse' variety) and a nascent scheme of family allowances[5] for large but poverty stricken families, the law initially vested the control and responsibility for the child exclusively with the father (in the case of the legitimate child) or the mother (in the case of the illegitimate child). The Poor Law obligations, of course, were confined to the poverty stricken sector of the community; other than these obligations the only constraint on the custodian's actions flowed from his possible liability for manslaughter should a child be allowed to starve or die from a lack of medical attention.

Not until 1772 did the Chancery courts, in exercise of their equitable jurisdiction, begin to intervene between parent and child[6] and then only in cases where the child had property interests and pursuant to a "welfare" test which was construed in a fashion which rendered it to be substantially identical to the paternal rights asserted by the father.[7] Only in 1814 did it become a criminal offence to steal a child,[8] previously the

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only offence related to the clothes the child might be wearing; not until 1839 did a mother who had separated from her husband gain the opportunity to apply for custody of the child and even then it was conditional on her remaining faithful to her husband.[9]

Poor Law

Australia did not, with the exception of South Australia, adopt the Poor Law principles as a solution to the problems of poverty or child neglect. Initially reliance was placed on voluntary orphanages and similar institutions established by charitable organizations.[10] Throughout there was a strong concern on the part of governments to avoid the possible emergence of a "pauper class" but eventually it became necessary for the state to make provision for neglected children who could not be maintained by their families.[11] For example, Victoria introduced legislation in 1864[12] defining institutions for neglected children[13] — industrial schools — (and reformatory schools for offenders, to which they might be committed **in addition** to the penalties otherwise available[14]) for which state subsidies on a 2:1 basis would be provided to voluntary agencies.[15] The subsidies were not taken up and after an unsuccessful state construction programme, the boarding out scheme, pioneered in South Australia, was adoped in Victoria in 1871-2 and copied in New South Wales in 1881. This pattern persisted, dispite its inadequacies, until the second world war when it was replaced by the combination of state and non government institutional services which are familiar today.

The historical legacy for Victoria consists of a timidity on the part of the legislature at the prospect of openly or substantially improving the bargaining position or autonomy of action of the child or of bodies which claim to represent his interests; for fear, apparently of undermining the position of the family. In addition, there has been a long tradition in favour of casting the primary responsibility for the care of children on the family unit without much regard — child endowment aside — for its capacity to discharge that responsibility unaided; and for minimizing the cost to the state of programmes of substitute care. The peculiarities of the N.S.W. boarding out scheme, whereby wards were boarded back to their mothers with the financial assistance which this device carried with it; the toleration in both states of the poor standards of care in these foster arrangements, and the accumulation in Victoria of numbers of inappropriately located buildings (constituting for many charitable organizations a significant, but often unrealizable capital asset which severely confines the type of services which they are able to offer) are a sufficient testimony to the costs imposed by that legacy.

This paper would argue for two developments at the policy level. First, the adoption of legislative provisions and administrative policies which recognize and protect the interests of the child in its own right. Second, the adoption of more rational principles for the funding of capital and on costs associated with the implementation of better integrated and more sensitive programmes, both at a governmental and non governmental level, while at the same time repaying the economic losses (which will be inucrred by both sectors) in taking the hard decisions to dispose of overcapitalized or largely redundant buildings.

A Problem of Conflicting Goals and Objectives.

The historical legacy of redundant physical facilities and an undervaluation of the independent interests of the child cannot bear all the blame for our present problems. Reference has previously been made to the dilemmas created when two desirable social objectives must be traded off against each other. Perhaps the classic example — and certainly one of the most difficult to resolve — is that provided by the inclusion of cohabitation rules in income support legislation for single mothers or widows. In both Australia and Britain the absence of a relationship akin to a bona fide domestic arrangement is a precondition to entitlement for benefit,[16] and a ground for termination of benefits otherwise payable to a single mother or widow.[17] As the British Finer Committee on One-Parent Families put it, this legislation policy is grounded on the proposition that:

"it cannot be right to treat unmarried women who have the support of a partner both as if they had no such support and better than if they were married."[18]

Nevertheless the Finer Committee asserted that they had "the strong disposition to recommend the abolition of the rule (and) . . . spent much time in this endeavour, but failed."[19] The reasons for their concern were summed up by a paragraph on the same topic penned a year earlier by the Fisher Committee[20] that:

> "(s)ome of our witnesses have expressed disapproval in principle of the intrusion into the private lives of women . . . (t)hey point out that many of the women concerned are in difficult personal and economic circumstances, that (enforcement of the rule) may make it more difficult for them to establish relations with men which might offer a solution . . . by leading on to marriage or to a stable relationship, and that subterfuges provoked by the rule . . . may have damaging effects on children."[21]

Fisher Committee

Despite these considerations the Fisher Committee, the Finer Committee and the Sackville Report on Law and Poverty came out in favour of retention of the basic policy behind the rule and opted for reforms which limit the degree of intrusion posed by the investigations to police it,[22] clearer definition of what constitutes cohabitation;[23] and the provision of adequate appeal procedures and emergency contending the outcome of an appeal.[24]

With all respect to the weighty arguments advanced by these three reports, one may question the pursuit of the goals of equity as between claimants and the general community, and the prely on the basis of a rather crude (because the claimant has no legal right to maintenance from her cohabitee)[25] assessment of needs. In the light of increasing support for the proposition that attachments to a stable father figure may be of importancto the child's later development,[26] and the rather doubtful nature of the claim that the rule produces a net economic saving for the welfare budget of the community if a longer time frame is adoparently avoid many of these less tangible costs by transforming the rule into a low key aspect of normal social work services,[27] the present rule should be kept under close review. Ideally experimental pilot schemes should be introduced to evaluate the cost of the Swedish scheme, or the income tested scheme rejected by the Fisher Committee.[28]

Certainly the above discussion has identified one of the fundamental problems of the present system and that is the degree of fragmentation (and often incompatibility of) various welfare policies, arising from a failure to achieve a consensus around a set of ordered goals and priorities. Until these goals are debated and set there will continue to be tension between sectors of the criminal justice, social security, health and welfare systems. Without wishing to elaborate on it further at this point, it should be noted that the relationship between the policing and welfare agencies at the point where the police make an initial contact with a neglected or delinquent child poses another potential conflict between divergent objectives.

The Problem of Discretion

There is yet another dilemma which must be addressed and that is the difficulty of marrying discretionary processes with the degree of precision, certainty and accuracy reflected in a commitment to the rule of law. Perhaps Kadish put it most succinctly when he wrote:

> "(a) primary issue to be faced in resolving the dilemma of making discretionary judgments . . . compatible with the values of the rule of law is to determine specifically the areas of choice in which primary reliance may acceptably (or must) be vested in the descretionary judgments of public officials, and in which it need (and must) not . . ."[29]

Kadish went on to identify a second issue viz.:

> ". . . the development of structures and arrangements which tend to maximize in particular areas of choice, the guidance and control of law without self defeating rigidity and, at the same time, the wisdom and flexibility of individualized judgment without oppression or folly . . . (this) is, of course, only an aspect of the larger challenge to a democratic community of making accountable those who exercise power in the name of the state."[30]

It is clear that the first enquiry must be to establish the boundaries around the areas where discretionary powers may be justified by the interests at stake. So far as the delinquency jurisdiction of the Children's Court is concerned, a case can be made out in favour of simultaneously raising both the age of criminal responsibility to fourteen[31] and the tolerance level of the courts to petty summary offences. The latter objective might be pursued either by removing certain offences from the register of juvenile crimes — bearing in mind, however, the difficulties encountered by the Australian Law Reform Commission in attempting a similar exercise to delimit the powers of arrest against adults[32] — or by regulating the way in which the discretion to prosecute is exercised.[33]

Given that areas of discretionary powers will remain and that there is a danger that "bureaucratic discretion (will) *replace familial discretion*"[33] *the techniques available to* regulate and control discretions must be examined.

Legislation

Presumptions tend to be unhelpful in child welfare legislation because they ossify what ought to be a flexible and responsive system; partly misrepresent discretionary processes as non discretionary and finally because the theoretical or empirical rationale for the presumption may be doubtful and subject to modifications which cannot easily be reflected in changes in the legislative provisions. The shifts in emphasis in the Bowlby thesis of maternal deprivation over the last thirty years[35] point up the last concern. Subject to the considerations below *the legislature would be well advised to hesitate before* going further than specifying the goals of theparticular discretionary area.

As Kadish implied in the extract above, one of the traditional standbys of the law in these cases is the introduction of procedural regulations to govern the form in which decisions are to be taken. The provision of notice to parties, access to information, representation, fair hearing requirements and so forth are all examples of this technique.[36] It is argued below that the introduction (or the upgrading) of these protections is overdue at most levels of operation of the Victorian child welfare system. Police contacts, negotiated entries to wardship, placement and review of wards are but four examples where this reform is desirable. By the same token, these reforms ought not to be regarded as a simple panacea. For, as Rosett and others[37] have pointed out there is a risk that the institution of procedural constraints at one point in the process will simply result in the emergence of an unregulated — and often unauthorized — discretionary power elsewhere.

Alternative

One of the more interesting alternative (or supplementary) strategies which have been suggested is the approach which seeks to improve the quality of discretionary decisions by selecting and training people to exercise discretionary powers responsibly[38] or by devolving the powers to representative bodies closely identified with the interests of those who will be affected by those decisions. The first approach can take various forms, ranging from the preparation and revision of policy directives and manuals[39] through to elaborate psychological screenings of prospective counter clerks and determining officers. Similarly the second technique may range from the more formal, structured bodies such as are created by the Scottish, New Zealand or South Australian juvenile aid panels,[40] through the more loosely structured "community panels" (or "forums") operating in California and New York[41] down to the community courts and the arbitration and mediation systems[42] advocated for — or operating in — various American states.

Even-handed

Despite the limitations of some of these suggestions, — particularly the difficulties of preserving due process and the civil rights of parties appearing;[43] the incursion into the principle of even handed adminstration[44] (but in return for a recognition of diversity of values and cultures); and a nagging concern about the possibility of dominance by unrepresentative elites within the local communities who paradoxically may be less in tune with (or sensitive to) the needs of the client groups, — these strategies ought to be carefully evaluated, and if suitable to Victorian conditions, implemented. The balance of this paper, however, will be devoted to a discussion of reforms which could be introduced without such a fundamental restructuring of the present decision making bodies.

It was argued above[45] that legislative and administrative *policies be introduced to promote and protect the independent* interests which a child may have in any wardship, adoption, or other matter where the state is seeking to intervene in the relationships which that child may have formed. Presently, Victorian law is particularly inadequate in this regard. For example the Children's Court Act permits (but unlike N.S.W. does not provide for)[46] a **parent** to be represented on "the child's behalf"[47] and, in providing for the case where this representation is not available (but there is a probation officer

A moment of Concentration

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present,) enables that officer to "represent **the interests of the child**" and then only with the consent of the parent (if present).[48] This position should be changed both by providing for representation on a universal basis and, more importantly, by upgrading the degree of control that the child has over the way in which that representative argues his case.[49]

Under present Victorian and Australian law the courts are required to take account of the child's views on custody, access, or guardianship matters once the child reaches fourteen,[50] and, in Victoria, recognize the child's right to elect to have an indictable offence heard by the Children's Court or go for trial by jury, once he turns fifteen.[51] Prior to these age thresholds, there is no entitlement for the child to influence these decisions. This position has largely been remedied by the amendments introduced in Britain by the Children Act 1975.[52] It should be copied in Australia.

Provisions which provide a child with a right of access to social work and 'pre-disposition' reports (usually subject to a discretionary power to suppress disturbing information) as in New Zealand,[53] and since 1973, also in Victorian Children's Courts,[54] ought to be extended to other important decisions which placement meetings and, if established, review boards might take with respect to the child. Similar rights should be considered in relation to welfare agencies and voluntary agencies operating in the child care field.

Requirements such as those contained in the recent New Zealand legislation, casting a duty on courts to explain proceedings to the child (and other parties) in plain and comprehensible terms[55] should be written into Victorian legislation to govern both proceedings in general and, as a precondition to, for example, the acceptance by the court of a delinquent's plea.[56]

Rights

Finally, and once again in line with the basic principle that the child's rights be recognized as an entity on their own, which may be compromised by the representations and actions (well intentioned or self interested) of parents and others, the legislation should be reviewed to ensure that the courts have the power to substitute the appropriate orders whether or not they have been applied for. Perhaps the best example of the breach of this principle is the potential for adoption orders to be sought by, and granted to, a divorced parent and the child's step parent in order to gratify their interests in concealing the fact of divorce, or as a way of "punishing" the former partner. Hambly[57] has recently advanced a compelling case in favour of adoption of the provisions of the British Children Act on this point which enables the court to make 'custodianship' orders[58] in these cases rather than grant adoption applications. That reform also ought to be enacted in Australia.

Last Recommendation

This last recommendation should be complemented by reforms designed to increase the flexibility and range of orders available to, for example, the Children's Court. The present legislation is rather deficient in the area of temporary and emergency powers, and in the availability of orders short of wardship for children requiring more assistance than probation or adjournments can provide.[59] To take one specific matter it is not at all clear why the supervision order has been confined to the care and protection cases in Victoria[60] unlike New Zealand where it is equally available to offenders.[61] Not that the availability of powers will necessarily mean that they will be utilized. Figures for the Melbourne Children's Court suggest that in the period 1974-1975 supervision orders were made in 6.7§ of all applications or for 3.2§ of all children appearing during that period:[62]

The Welfare Structures

It is argued in this paper that the neglect jurisdiction as a legal foundation for admission to wardship is in need of reform and supplementation. In the first place, it should be narrowed[63] to cover only specific situations by removing the notorious "status" categories such as exposure to moral danger and vagrancy situations.[64] The New South Wales courts have already begun to move along these lines[65] but the archaic language of the empowering provisions imposes limits on the potential for judicial reform. More importantly, however, there should be a shift in emphasis by the substitution of welfare agencies for the courts as the point of the first official contact with the neglected child. Welfare agencies should have a wide charter in this regard;[66] should be under a statutory duty to provide services[67] and should have at their disposal outreach strategies such as the homemakers now authorized by the Ontario Child Welfare legislation[68] or the special social work units recommended by Vinson.[69]

None of this should, however, be taken as an endorsement of the proposition that welfare bodies should assume the mantle of the courts by acquiring, or creating the impression of possessing, coercive powers over the children or their families. This danger can best be illustrated by examining the powers presently possessed by the Social Welfare Department to arrange "negotiated" or contractual entry to wardship,[70] and which have been increasingly utilized in recent years.[71] Concern is created by the absence of criteria in the legislation to guide the Director General in the exercise of this power and by the potential for a proportion of these cases to involve situations where — often through no fault on the part of the Departmental officers involved — there is an inequality of bargaining power or uncertainty on the part of the parent as to the consequences of this procedure. To avoid these problems there should be a standard form setting out basic information on the options available to (and the consequences of) parents. This should be required to be signed by the parent as a necessary pre-requisite to a valid exercise of this power.[72]

Ontario

Further, the Ontario provisions which require that a formal contract be drawn up and signed by the parties[73] (subject to a statutory right for either party to terminate it on 15 days notice)[74] should be adopted in order to maximize the degree of freedom and equality between the state and the parents.[74a]

The arguments in favour of substituting non-coercive welfare agencies for courts as the primary strategy for dealing with neglect cases requires further clarification and refinement. Firstly, it must be made clear that this paper would categorically reject any proposal to interpose a quasi-judicial power or body[75] between the welfare contact and, where required, the ultimate adjudication of neglect by a properly regulated formal hearing in a juvenile court (or equivalent environment). That is, welfare should be the policy of first resort and court adjudication the policy of last resort without anyway halfway house between. The lynchpin of this argument is Tappan's classic statement that

> "It is the supreme duty of children's courts (and we might interpose 'any body exercising coercive powers') to adjudicate accurately and justly on the basis of evidentiary facts. Its purpose to protect the community and child is accomplished as fully when it frees the non-delinquent as when it adjudicates and treats the offender."[76]

This must be coupled with the oft expressed concern that benevolent interposition of agencies with powers to "divert" children away from the courts into quasi coercive therapeutic programmes will, as the Canadian Law Reform Commission suggests,

"have the opposite effect to that which is intended: they will result in greater, not less, exposure to the criminal justice system"

There is one further matter. The plurality of the Australian society provides an overwhelming argument in favour of organizing welfare services in a fashion which maximizes the range of choice for the client between the type of services offered and the values of those administering them. A systematic adoption of the principle of contract for service between the state and non government agencies, allied with provision for seeding grants when required would enable this objective to be achieved more easily than is the case with the present methods of funding.[78] Administration of governmental and non governmental services should be decentralized, preferably to a new, but broadly based, structure at the local government level, subject to regional and state monitoring.[79] These bodies should be responsible for integrating income support, preventive health, housing (including emergency housing and day care) and social work services. Finally, the services should contain a mixture of passive and outreach services to avoid discrimination against children located in families who are more apathetic and fatalistic in their response to needs which present

The Adjudicative Structures

The previous discussion has focused on the welfare and preventive services which it is asserted ought to be established to minimize the risk of children requiring wardship or variations of this procedure. A crucial issue to be faced in this context is that of the scarcity of resources. Since one of the most significant ways of improving the quality of adjudications of need for wardship is the provision of legal advice and representation, the question arises as to the stage of the process from first contact through to court adjudication at which that assistance ought to be provided. In line with recommendations of the Australian Law Reform Commission[80] this paper would argue that priority should be given to the initial contact between the child and the police or authorized person with the second priority going to the adjudication stage.[81]

Recognising that discretion must continue to play a large part in determining in which cases of apparent neglect it is appropriate to institute proceedings leading to a formal adjudication, several strategies are recommended with a view to further improving the quality of those decisions. The first strategy aims to foster closer contact between, and ultimately more uniformity of judgment by, personnel responsible for front-line contacts and the welfare and other personnel who might be involved at a later stage or in lieu of a decision to take court proceedings. The New Zealand and British provisions[82] requiring a consultation between police and welfare agencies prior to a decision to take formal action achieves this purpose and should be written into Victorian legislation. Alternatively the "screening body" proposed to be established by the Canadian draft Young Persons in Conflict with the Law Bill might be adopted,[83] or the power to caution juveniles reformed.[84]

Once the child reaches the court door the following procedures should apply. Legal representation should be provided for the child in its own right or other non-legal representation provided. Further, no statement by the child ought to be admitted unless it was taken in the presence of an independent third party or after legal advice.[85] If the legislature concludes that the cost of providing legal advice in all cases would be prohibitive[8] and presently Victoria it seems that only 5% of children are represented in the Children's Court[86] — then a provision
along the lines of section 32A of the British Children Act which requires the court to consider appointing independent counsel in cases where "there is or may be a conflict, on any matter relevant to the proceedings, between the interests of the child . . . and his parent or guardian".[87]

In similar vein consideration might be given to incorporating a provision along the lines of the new English adoption requirement to the effect that the views of the child be ascertained and "given due consideration . . . having regard to his age and understanding."[88] Lest that proposal be rejected as extreme it is as well to note that the Scottish adoption law has accepted Rodham's proposal that the child's "presumption of incompetence be reversed"[89] by requiring the child's consent "except where the court is satisfied that the minor is incapable of giving his consent."[90]

As to the standard of proof, this paper would agree with Muir that it ought to be twofold; any and all factual material ought to be proved beyond reasonable doubt, while the value judgment as to whether or not the child is neglected ought to be proved on the balance of probability.[91] This should be supplemented by a provision precluding the admission of hearsay evidence, prior to the point where the court had adjudicated that the child is neglected;[92] and by a duty on the part of the court to ensure that the child or the child's representative is provided, as a matter of course, with an opportunity to peruse any social report in full.[93] Provision might be made for the court to order that certain parts of that report not be disclosed to the child where such disclosure might cause emotional reactions. But in such cases the court should be obliged to record reasons in full for that decision.

The whole process of adjudication, subject to the more specific grounds as recommended previously, should be governed by the overriding influence of the goal of selecting the "least restrictive alternative" including the enactment of provision requiring the present environment to be weighed against the alternatives.

Rodham argues that the much vaunted "best interests standard" [8] and, one might interpose, also the "welfare" test originally propounded by the courts of Chancery in Britain, and subsequently written into legislation:

". . . is not properly a standard. Instead it is a rationalization by decision makers justifying their judgements about a child's future, like an empty vessel into which adult perceptions and prejudices are poured."[94]

Least Detrimental Alternative

Turning to the "least detrimental alternative" originally developed by American decisions and commentators and given popular currency by Goldstein in articles which laid the foundations of **Beyond the Best Interests of the Child,**[95] Rodham concludes that, although it may be an improvement, this test also fails to specify the standards which are to govern intervention into the parent child relationship. While there might be good grounds for advocating that the least detrimental alternative principle be written into legislation, there are no grounds for regarding this as an optimal solution.

Once the court has adjudicated a child to be in need of care in accordance with the above procedures and admitted him to wardship, the Director General presently acquires wide and flexible powers of placement.[96] Those strategies are required to improve the quality of decisions at this level. There should be an injection of procedural regularity; representation for the child's views; and an upgrading in the quality of information made available to the body. Second, there should be a system of checks and balances, either in the form of power sharing arising from a division of responsibilities between the placement body and a formally constituted body charged with the duty to conduct regular and systematic reviews of all placements,[97] or by the encouragement of all parties to a placement decision (including the body itself) to

reopen the case and to readjust the original placement decision."[98] South Australia adopts the first of these options, while the draft Canadian legislation, and this paper, would argue that **both** options be instituted."[99]

Two final matters. The Australian and American tradition has decreed that the juvenile court should be entirely closed both to the public and the press[1] and subject to a sanction for any unlawful publication.[2] Legislation in eleven of the American jurisdictions and the recent British and New Zealand legislation all permit the press to be admitted subject to a prohibition on the publication of information which directly or indirectly identifies the parties.[3] The Sackville report took the view that:

". . . the existing law goes too far in protecting the privacy of children and their families at the expense of the principle of open justice."[4]

The report went on to recommend the adoption of the British provisions allowing entry for the press. Following discussion of Bentham's aphorism that "publicity is the very soul of justice . . . where there is no publicity there is no justice"[5] during debate on the Family Law Amendment Bill 1976 it would appear that there is bi-partisan support[6] for modifying the Family Law Act in this fashion. This paper would support this move and advocate an appropriate amendment to the Children's Court Act, but would extend the right so that the press might also be admitted to observe the bodies making, or reviewing, placements of wards.

It is beyond the scope of this paper to canvass all the improvements which might be made to the lot of the ward who is institutionalized (including to a lesser degree, the child placed in a family group, home or foster care). Clearly the two most important improvements have already been covered by recommending that the existing environment be balanced against that offered by the state before wardship orders are made[7] and by the establishment of regular review procedures to keep wardship status and present placements under scutiny.[8] There are, however, a number of very important questions apart from these. In line with recent Australian and overseas trends, this paper would support the introduction of fixed term orders in place of indeterminate wardship;[9] favour the introduction of legislation clearly defining the position of the child with regard to:[10] discipline, dress, uncensored mail, religion, normal co-educational schooling, rights to remedial educational and counselling services (and the converse rights to refuse those services), confidentiality of records, and protection from arbitrary transfers or changes in the type of placement made. Some of these matters are of a sensitive or controversial nature [8] particularly those which have implications for the "normal" parent child relationship [8] but that is not a defensible reason for failing to address the issues in the pious hope that fate, or staff selection, will take the care of the problems.

Conclusion

This paper has argued that sensitive and responsible child care programmes for the children presently regarded as candidates for wardship requires that reforms to the legislative and administrative arrangements be introduced in seven basic areas.

First, the introduction of guidelines to promote the conservation of existing relationships and to minimize the degree of intrusion by the state on the privacy and interests of the child. Shortly stated that principles of homeostasis and the least detrimental alternative.[1]

Secondly, the introduction of reforms designed to provide the child with more independence of action in his dealings with the police, welfare and court structures.[2] In short, recognition of the child's rights as an individual, as distinct from those of his parents.

Third, measures designed to achieve a more equitable distribution of welfare resources and a greater degree of equality of access by the child to legal advice and to information bearing on his situation. In short, promotion of the goal of equality.

Fourth, the introduction of more certainty and precision as to the grounds for intervention[4] and more uniformity and sensitivity with regard to the way the decision to intervene or not to intervene is taken.[5] In short, reforms to bring the system closer to the ideal of the role of law.

Fifthly, the introduction of procedural and evidentiary controls at all levels of the juvenile process from initial contact through adjudication, placement and review.[6] Briefly, the pursuit of a better resolution of the conflict between discretionary processes and the rule of law.

Sixth, the introduction of more flexibility to the system both at a particular point in the child's contact with it by expanding the options available, but also flexibility to the process as a whole by the introduction of review and feedback systems which enable the state intervention to be continually monitored and modified.[8] Simply stated the introduction of genuine individualization of treatment.

Finally, the paper makes a plea for child welfare policy to be placed on a more rational footing by the collection of more adequate data,[9] by the resolution of conflicts between short term economic and longer range social goals,[10] and by a recognition on the part of the community that the accumulated legacy of previous policy cannot be removed unless hard, and often costly, decisions are taken.[11]

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BIBLIOGRAPHY

1. Rodham, H., "Children Under the Law" (1973) 43, iv, **Harvard Educational Review**, 487, 487.
1a. Wilkins, L.T. **Social Deviance** (1964) Tavistock 143, 148.
2. Titmuss, R., **Social Policy: an Introduction** (1974) Allen & Unwin 52-4; Titmuss, R., **Commitment to Welfare** (1968) Allen & Unwin, 64-7.
3. These were particularly in evidence in the period 1703-1717: Pinchbeck, I. Hewitt, M., **Children in English Society Vols. I & II**, (1973) Routledge & Kegan, Paul, Vol. I, 105.
5. Pinchbeck **et al., I Children in English Society op. cit.**, 95. (these programmes were instituted in the early C16).
5. **Op. cit.**, 140-141.
6. **Eyre** v. **Shaftsbury** (1772) 24 E.R. 659.
7. **In re Fynn** (1848) 64 E.R. 205, 212. "Before the jurisdiction can be called into action (it must be shown) that the father has so conducted himself . . . as to render it not merely better for the children, but essential to their safety or to their welfare, in some very serious and important respect . . . If the word 'essential' is too strong . . . it is not much too strong": **ibid.**
8. The predecessor of s. 63 Crimes Act 1958 Vic.
9. Infants Custody Act 1839 (U.K.); Pinchbeck **et al. op. cit.** Vol. I, 369 ff.
10. Kewley, T., **Social Security in Australia** (2 ed 1973) Syd. U. Press, 14 Victoria, **Survey of Child Care in Victoria** (1964) Gov. Printer, 71-2.
11. This was still reflected in the 1901 Victorian Aged Pensions legislation: Old Aged Pensions Act 1901 (Vic.) ss.8(1) (m) (n), 16(3), 32.
12. Neglected and Criminal Childrens Act 1864 (Vic.).
13. **Ibid.**, s.13.
14. **Ibid.**, s. 16; this was finally removed in 1887 by section 19 of the Juvenile Offenders Law Am. Act, permitting a reformatory term (for children over 12) or committal to the Department of Neglected Children (for children under 12) in lieu of a normal sentence.
15. Neglected and Criminal Childrens Act 1864 (Vic.) s.10; (repealed in 1881 by act No. 693).
16. Social Services Act 1947-1976 (Aust.) ss.59(1) (3) definition of "widow" (including a dependent female) (as am. by s.7 Act No. 110, 1975) 83 A A G (i) (b) (supporting mother).
17. **Ibid.**, s.83 A A G (b) (requiring a beneficiary to notify the Director General within 14 days of commencing to live with a man on a bona fide domestic basis.
18. U.K., **Report of the Committee on One-Parent Families** (1974) Cmnd. 5629, H.M.S.O., (The Finer Committee Report), Volume 1, para. 5.269.
19. **Loc. cit.**
20. U.K., **Report of the Committee on Abuse of Social Security Benefits** (1973) Cmnd. 5228, H.M.S.O. (The Fisher Committee).
21. **Ibid.**, para. 324.
22. Fisher Committee Report **op. cit.**, paras. 335, 336, 338 (a)-(c).
23. Fisher Committee Report **op. cit.**, para. 330(b).
24. Fisher Committee Report **op. cit.**, para. 343ff; Finer Committee Report **op. cit.**, paras. 5.274, 5.276.
25. Except in Tasmania, but then only after a one year qualifying period: Maintenance Act 1967 (Tas.) s.16(1).
26. Rutter, M., **Maternal Deprivation Reassessed** (1972) Penguin, 48, 64, 125; Finer Committee Report **op. cit.**, Vol. II, 386.
27. **Finer Committee Report op. cit.** Volume II 46-7 (Apparently the male is required to pay his own way and make a contribution to the rent in the normal case.)
28. **Fisher Committee Report op. cit.**, para. 328. The scheme was rejected because of administrative difficulties which the bureaucracy claimed would arise and for the policy reason that the scheme would eliminate a major incentive for the man to support the mother (to avoid her falling into poverty): **Ibid.** para. 328.

29. Kadish, S.H., "Legal Norm and Discretion in the Police and Sentencing Processes" (1962) 75 **Harvard Law Review** 904, 929.
30. **Loc cit.**
31. Such as is provided by, the as yet unproclaimed, section of the British legislation: Children & Young Persons Act 1969 (U.K.) ss.4, 34;
32. Australian Law Reform Commission, **Criminal Investigation** (1975) A.G.P.S. paras. 30-34.
33. Preferably by requiring a joint decision by the police and welfare agencies (infra). See also Treger, H., **et al** "A Police-Social Work Term Model . . ." (1974) 20 **Crime & Delinquency** 281.
34. Rodham, H., "Children Under the Law" **op. cit.,** 490.
35. Rutter, M., **Maternal Deprivation Reassessed** (1972) Penguin **passim.**
36. These requirements are more fully elaborated in Rose, R. J., "Symposium on Juvenile Justice in Arizona: IV Adjudication" (1974) 16 **Arizona Law Review** 325, **passim.**
37. Rossett, A., "Discretion, Severity and Legality in Criminal Justice" (1972) 46 **Southern Californian Law Review** 12, 19.
38. Wexler, S., Discretion — the Unacknowledged Side of Law" (1975) 25 **University Toronto Law Journal** 120.
39. See for example Colliver, S., "The Recognition of Clients' Rights in the Implementation of Welfare Policy" in Carney, T., & Epstein, J., **Welfare & Law** (1975) Monash, 10; Hufford, H.M., "Symposium on Juvenile Justice in Arizona: Part I Intake" (1974) 16 **Arizona Law Review** 239, 245.
40. Social Work (Scotland) Act 1968 (U.K.) Part III ss.30-58; Children & Young Persons Act 1974 (N.Z.) ss.13-19; Juvenile Courts Act 1971 (S.A.) ss.12-16. The statistics on the operations of the South Australian Juvenile Aid Panels indicate that in 1972-3 1.615 (79.5%) of the 2032 appearances resulted in a warning or counselling and 371 (18%) in some form of contractual agreement: **S.A., Report of the Director General of Community Welfare for year ended 30 June 1973** (1974) Government Printer, 16.
41. Fisher, E.A., "Community Courts: an Alternitve to Conventional Criminal Adjudication" (1974-5) 24 **American University Law Review** 1253.
42. **Loc cit.**
43. Appearance before informal bodies may be equally, or more, stigmatizing than appearances before formal bodies: Schur, **Labelling Deviant Behaviour** (1971) Harper & Row, 87.
44. Departure from the simple dictum that like cases should be treated alike can foster a sense of grievance.
45. **Supra,** p.4.
46. **Infra** p.
47. Children's Court Act 1973 (Vic.) s.23(2) (a).
48. **Ibid.,** s.12(2).
49. Compare the provisions of the British law on this point: Children and Young Persons Act 1969-1975 (U.K.) ss.32A, 32B; See also Family Law Act (1975) (Aust.) s.65.
50. Family Law Act 1975 (Aust.) s.64(1) (b) (requiring the child's consent unless there are "exceptional circumstances".)
51. Children's Court Act 1973 (Vic.) s.15(1)
52. Children and Young Persons Act 1969 (U.K.) ss.32A, 32B (inserted by Children Act (1975) (U.K.) s.64).
53. Children & Young Persons Act 1974 (N.Z.) s.42(1).
54. Children's Court Act 1973 (Vic.) s.25(2).
55. Children & Young Persons Act 1974 (N.Z.)s.40.
56. See the discussion of the present law regarding the capacity of a child to make a decision on this matter by Thompson, D., "An Aspect that Needs Reform?" (1976) A.C.L.D. 142. Compare the solution advocated by the draft Canadian legislation for legal or other advice to be provided prior to acceptance of a plea: Young Persons in Conflict with the Law, cl. 11(2).
57. Hambly, D., "Balancing the Interests of the Child, Parents and Adopters: a Review of Australian Adoption Law" (Feb. 1976) mimeo. (paper delivered to First Australian Conference on Adoption) 22-28.
58. Children Act 1975 (U.K.) ss (10)3, (11)4, (33)3, 37.
C.F. Children's Court Act 1973 (Vic.) S.26(1) (g) C.f.s.27 (a)
59. These deficiencies are elaborated more fully in Leaper, P., **Children in Need of Care and Protection** (1974) **op. cit.,** exp. 92, 222, 226-233.
60. Children's Court Act 1973 (Vic.) ss.27(c) (confining the jurisdiction) 41 (specifying the nature of the order).
61. Children and Young Persons Act 1974 (N.Z.) ss.36(i) (ii), 46.
62. Victoria, Parliamentary Debates, Legislative Assembly, 26 November 1975, 9490-92. Taking the figures for **children** (rather than applications) 66% were admitted to care; 18% dismissed; and 6½% of cases placed on probation, with a similar percentage adjourned: **Ibid.**

64. Vic.: S.W.A. s.31(k), (a) & (d) respectively. In addition, s.31(1) (truancy) and (j) (likely to lapse); (b) (found wandering) should be repealed. This proposition was very cogently argued by Paul Tappan over thirty years ago and cannot be improved upon despite the passage of time: see Tappan, P., **Juvenile Delinquency** (1949) McGraw Hill, 310.
65. **Cratchley** v. **Power** (1976) A.C.L.D. 94. The decision takes account of the child's economic background in interpreting the "sufficiency" of his means within section 72 (b) Child Welfare Act.
66. The broad charters conferred by the N.Z. and U.K. legislation provide a model: Children & Young Persons Act 1969 (U.K.) s.l; Children & Young Persons Act 1974 (N.Z.) s.27(3).

67. The New Zealand legislation goes much further in this regard than the rather pious provisions of the Victorian legislation: Children & Young Persons Act 1974 (N.Z.) ss.5, 6; cf. Social Welfare Act 1970 Vic. SS.5., 13.
68. Child Welfare Am. Act 1975 (Ontario) s.22a.
69. Vinson, T., **et al** "A Community Study: Newcastle" in **Community Services: Tour Studies** (1976) A.G.P.S. (Poverty Enquiry Research Paper) 16;17.

70. Vic.: S.W.A. s.35; The avenue was originally confined to the child of a family so poverty stricken that it was beyond their capacity to care for the child; to ensure that families were pushed to the limits of self reliance provision was made for a magisterial enquiry: see for example Child Welfare Act 1954 (Vic.) s.20.

71. In 1971-2, 57 children were admitted while in 1973-4, 117 were admitted: Victoria: **Annual Reports Social Welfare Department,** June 30 1973, 59; June 30 1974, 66.

63. Leaper advocates a narrower set of amendments, while the Ontario Law Reform Commission opted to support the status quo subject to placing on record their concern at the scope of these provisions: Leaper, P., **Children in Need of Care & Protection** (1974) Crim. Dep. Melb. Uni., esp. 209-210, 221; Ontario Law Reform Commission, **Report on Family Law,** Part III Children (1973) Info. Canada 67-9.

72. Comment, "Montana's Child Neglect Law — a Need for Revision" (1970) 31 **Montana Law Review** 201, 209 and draft clause 6 at page 215.
73. Child Welfare Am. Act 1975 (Ontario) ss. 23a(3), (4), (imposing a twelve month limit on the wardship).
74. S.23a(b).

74a. See also Hafford, H., "Symposium on Juvenile Justice in Arizona: I Intake" (1974) 16 **Arizona Law Review** 239, 250; U.S. President's Commission on Law Enforcement and Administration of Justice, Task Force Report **Juvenile** Delinquency and Youth Crime (1967) Govt. Printer, 21.

75. The hearing panel is rejected because of the derogation from essential procedural protections and the stigma which is largely unavoidable in such a setting; the Family Court is rejected because it is likely to be identified not as a welfare body nor a court but something more akin to the adult perceptions of the Conciliation and Arbitration process.

76. Tapp n, P., **Juvenile Delinquency, op. cit.,** 191.

77. Canada, Law Reform Commission **Working Paper on Diversion** (1975) Info. Canada, 24. It is worth noting that the Research Studies Commission, as part of this project, found that 43% of the contacts between police and juveniles involved conduct which was not an offence: Canada, Law Reform Commission, **Studies on Diversion** (1975) Info. Canada, 15.

78. Present arrangements for funding capital works and staffing homes in Victoria tend, with respect to capital works, to favour localities able to attract charitable donations (or with exisiting links with an established agency) and, with respect to staffing, to foster progression towards, but also regression back to, a lowest common denomination in terms of staff ratios.

79. The Co-operation Act structure might be modified to incorporate the best elements of the A.A.P., Councils of Social Service and Community Health Centre Committees.

80. Australia, Law Reform Commission, Criminal Investigation (1975) A.G.P.S. para. 266, 267.
81. This is the point at which the recent N.S.W. scheme slots in legal assistance from private solicitors rostered for each court (in metropolitan areas) or duty counsel (in country areas). The scheme, which is available for both offenders and neglect cases without any means test or contribution, came into operation on 26 May 1975: see (1975) 49 A.L.J. 602; Legal Practitioners (Legal Aid) Act 1970-1975 (N.S.W.) s.3A (1) (2) (a) (b) (inserted Act No. 15, 1975); Legal Aid Regulations 135 S.R. 1975 rr.2, 8(1), 8(2) (a) (b).
82. Children & Young Persons Act 1969 (U.K.) s.5; Children & Young Persons Act 1974 (N.Z.) s. 26; Muir, A., Report to Minister for Youth and Community Services on Certain Parts of the Child Welfare Act (1975) 35.
83. Young Persons in Conflict with the Law Bill (1975) (Canada) cl.9(3) (4) (5) (6).
84. The practice is governed by order 311 and 654(4A) Police Standing Orders and was foreshadowed in 1940, and introduced for children under 12, in 1946. Since then it has slowly expanded and by 1972, 2,251 children (or 22% of the cases on notice to the police) were cautioned: Harmen, W., **Juvenile Delinquents and the Role of the Police in Victoria** (1975) (LL.B. Honours thesis Monash) 49, 56. The Canadian study (**supra** n.77) found that 10% of police juvenile contacts were of a cursory nature, while 45% took the form of a caution or similar section but it must be borne in mind that the Victorian figures relate only to **formal** cautions. **Ibid.,** 15.
86. Figures calculated from information tabled in answer to a question on notice for the Melbourne Children's Court June 1974 – June 1975: Victoria **Parliamentary Debates, Legislative Assembly** 26 November 1975 9490-92.

95. Goldstein, **et al Beyond the Best Interests of the Child** (19) **passim.**
96. Social Welfare Act 1970 s.40, (subject to the best interest test: s.41 Social Welfare Act 1970.)
97. Such as is provided in South Australia by section 47(2) Community Welfare Act 1973 (S.A.).
98. **Children in Conflict with the Law,** draft clauses 36(1) (2).
99. **Ibid.,** clauses 30-34, 36.

87. New sections 32A, 32B Children Act 1948-1975 (inserted by s.64 Children Act 1975 (UK).
88. Children Act 1975 (UK) s.3; Children Act 1948-1975 new s.12(1), (1A).
89. Rodham, H., "Children Under the Law" (1973) 43, iv. **Harvard Educational Review,** 487, 507.
90. Children Act 1975 (UK) s.8(6).
92. Muir Report **op. cit.** iv, recommendation 15; p.44-5; **Contra** Ontario Law Reform Commission, **Report on Family Law Part III** (1973) Info. Canada 74*
92. Vic. (C.C.A.) s.20(1) (2) contains a model of what is required. The recent ruling in the South Australian case (allowing a welfare report in from the outset, subject to access to the child, his parent or legal representative and to cross-examination of the author of the report), is less satisfactory: **Porter** v. **Sinnott** (1975) unreported decision Walters J., Supreme Court S.A. (noted (1975) A.C.L.D. 259). See also Y.P.C.L. (Canada) Cl. 17(7).
93. N.Z. s.42 provides a good model of what is required.
94. Rodham, H., "Children Under the Law" (1973) 43 iv, Harvard Educational Review, 487, 513.

* (favouring the civil standard).

1. See Children's Court Act 1973 (Vic.) s.18.
2. **Ibid.,** s.48. See also Family Law Act 1975 (Aust.) s.121.
3. Children and Young Persons Act 1933 (UK) s.49 (as am. by C.Y.P.A. 1969 s.10). Children and Young Persons Act 1974 (NZ) s.23(9), 24(2), See also (1975) 9, i, **Family Law Quarterly, passim** for the American provisions.
4. Sackville, R., **Law and Poverty** (1976) A.G.P.S. 305.
5. Quoted by Lord Shaw in **Scott** v. **Scott** (1913) A.C. 417, 476-7.
6. Australia, Parliamentary Debates, House of Representatives, 2 June 1976, 2858 (Bowen shadow A.G.) 2861 (Ellicott A.G.). It was suggested that section 121 (supra n.2) provides adequate protection.
7. **Supra** p.
8. **Supra** p.
9. See for example the Muir Report **op. cit.** Canadian Young Persons in Conflict with the Law (draft) clause 31(1); Child Welfare Act 1965-1975 (Ontario) s.23a(4).
10. These issues are well canvassed in: Silbert, J.D., Sussman, A., "Rights of Juveniles Confined in Training Schools" (1974) 20 **Crime and Delinquency,** 373 **passim.**
1. **Supra** p. 14, 16
2. **Supra** p. 8-9
3. **Supra** p. 14
4. **Supra** p. 11.
5. **Supra** p. 6
6. **Supra** p. 14
7. **Supra** p. 9-10
8. **Supra** p. 16
9. **Supra** p. 1
10. **Supra** p. 4-5
11. **Supra** p. 13