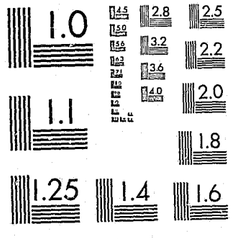
If you have issues viewing or accessing this file contact us at NCJRS.gov.

National Criminal Justice Reference Service

ncjrs

This microfiche was produced from documents received for inclusion in the NCJRS data base. Since NCJRS cannot exercise control over the physical condition of the documents submitted, the individual frame quality will vary. The resolution chart on this frame may be used to evaluate the document quality.



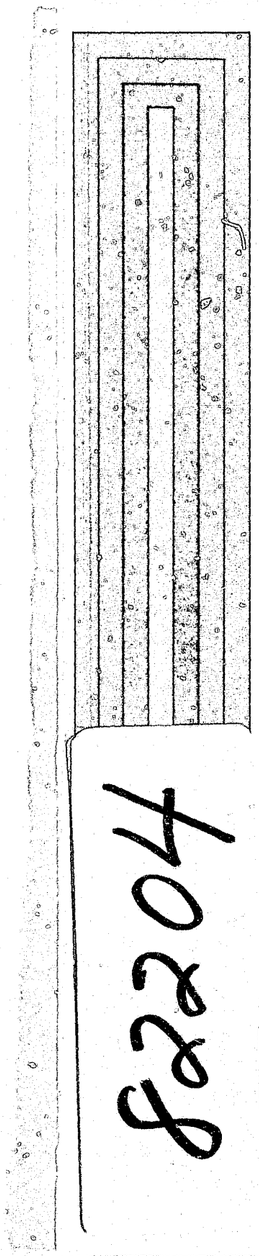
MICROCOPY RESOLUTION TEST CHART
NATIONAL BUREAU OF STANDARDS-1963-A

Microfilming procedures used to create this fiche comply with the standards set forth in 41CFR 101-11.504.

Points of view or opinions stated in this document are those of the author(s) and do not represent the official position or policies of the U. S. Department of Justice.

National Institute of Justice
United States Department of Justice
Washington, D.C. 20531

6-17-83



82204

CR sent 6-21-82

The Law Reform Commission

Report No. 18

CHILD WELFARE

82204

U.S. Department of Justice
National Institute of Justice

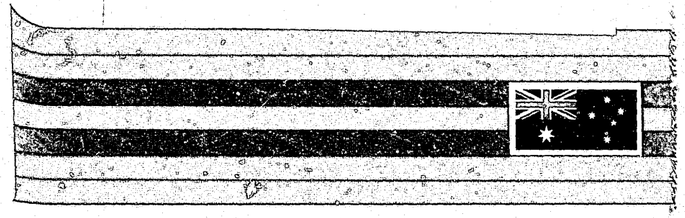
This document has been reproduced exactly as received from the person or organization originating it. Points of view or opinions stated in this document are those of the authors and do not necessarily represent the official position or policies of the National Institute of Justice.

Permission to reproduce this copyrighted material has been granted by

Australian Government Publishing Service

to the National Criminal Justice Reference Service (NCJRS).

Further reproduction outside of the NCJRS system requires permission of the copyright owner.



Publications of the Law Reform Commission

Reports
ALRC 1 Complaints Against Police, 1975
ALRC 2 Criminal Investigation, 1975
ALRC 3 Annual Report 1975
ALRC 4 Alcohol, Drugs and Driving, 1976
ALRC 5 Annual Report 1976
ALRC 6 Insolvency: The Regular Payment of Debts, 1977
ALRC 7 Human Tissue Transplants, 1977
ALRC 8 Annual Report 1977
ALRC 9 Complaints Against Police (Supplementary Report), 1978
ALRC 10 Annual Report 1978
ALRC 11 Unfair Publication: Defamation and Privacy, 1979
ALRC 12 Privacy and the Census, 1979
ALRC 13 Annual Report 1979
ALRC 14 Lands Acquisition and Compensation, 1980
ALRC 15 Sentencing of Federal Offenders, 1980
ALRC 16 Insurance Agents and Brokers, 1980
ALRC 17 Annual Report 1980

Working Papers
WP 1 Complaints Against Police, 1975
WP 2 Alcohol, Drugs and Driving, 1976
WP 3 Consumers in Debt, 1976
WP 4 Defamation, 1976
WP 5 Human Tissue Transplants 1977
WP 6 Complaints Against Police (Supplementary Report), 1977
WP 7 Access to Courts — I Standing: Public Interest Suits, 1977
WP 8 Lands Acquisition Law: Reform Proposals, 1977

Issues Papers
IP 1 Statutory Brain Death, 1977
IP 2 Insurance Contracts, 1977
IP 3 Evidence, 1980

Discussion Papers
DP 1 Defamation — Options for Reform, 1977
DP 2 Privacy and Publication — Proposals for Protection, 1977
DP 3 Defamation and Publication Privacy — a Draft Uniform Bill, 1977
DP 4 Access to the Courts — I Standing: Public Interest Suits, 1978
DP 5 Lands Acquisition Law: Reform Proposals, 1978
DP 6 Debt Recovery and Insolvency, 1978
DP 7 Insurance Contracts, 1978
DP 8 Privacy and the Census, 1979
DP 9 Child Welfare — Children in Trouble, 1979
DP 10 Sentencing: Reform Options, 1979
DP 11 Access to the Courts — II Class Actions, 1979
DP 12 Child Welfare: Child Abuse and Day Care, 1980
DP 13 Privacy and Intrusions, 1980
DP 14 Privacy and Personal Information, 1980
DP 15 Sentencing of Federal Offenders, 1980
DP 16 Reform of Evidence Law, 1980
DP 17 Aboriginal Customary Law — Recognition, 1980

Periodicals
Interim Law Reform Digest and Supplements
Reform (Quarterly)

The Law Reform Commission

Report No. 18

CHILD WELFARE

NCJRS
FEB 9 1982
ACQUISITIONS

Australian Government Publishing Service
Canberra 1981

© *Commonwealth of Australia 1981*

ISBN 0 642 06078 9

Commission Reference: ALRC 18

The Law Reform Commission is established by section 5 of the Law Reform Commission Act 1973 for the purpose of promoting the review, modernisation and simplification of the law. The Chairman and first Members were appointed in 1975. The offices of the Commission are at 99 Elizabeth Street, Sydney, N.S.W., Australia (Tel. 02 231 1733).

Printed by Watson Ferguson and Co., Brisbane

Contents

APPENDIXES

Terms of Reference

I, PETER DREW DURACK, Attorney-General of the Commonwealth of Australia, HAVING REGARD TO THE FOLLOWING:

(a) the need to review the Child Welfare Ordinance 1957 of the Australian Capital Territory and other laws of the Territory relating to the welfare of children;

(b) the intention of the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders to be held in Sydney in 1980 to discuss as Agenda Item 2 – 'Juvenile Justice: Before and After the Onset of Delinquency' and so focus world attention on Australian laws and practices in this field; and

(c) the declaration by the United Nations General Assembly 1979 as the International Year of the Child with the aims of encouraging programs for the promotion of the wellbeing of children and of heightening awareness of the needs of children,

HEREBY REFER to the Law Reform Commission

FOR INQUIRY AND REPORT as provided by the Law Reform Commission Act 1973 the law and practice relating to child welfare in the Australian Capital Territory including a consideration of the rights and obligations of children, of parents and other persons who have or assume rights or obligations in respect of children and of the community, and in particular

(a) the treatment of children in the criminal justice system;

(b) the position of children at risk of neglect or abuse by their parents or caretakers;

(c) the roles of welfare, education and health authorities, police, courts and corrective services in relation to children;

(d) the regulation of the employment of children;

(e) any other related matter.

IN ITS INQUIRY AND REPORT the Commission will

(a) keep in mind the importance of viewing child welfare in the context of general community welfare;

(b) keep in mind its obligation under paragraph 6(1)(d) of the Law Reform Commission Act 1973 to consider proposals for uniformity between laws of the Australian Capital Territory and laws of the States (in particular, in this context, New South Wales); and

(c) note that the Standing Committee on Housing and Welfare of the A.C.T. Legislative Assembly has prepared a Report on Child Welfare in the Territory.

THE COMMISSION IS REQUIRED to report not later than 31 October 1979.

DATED this eighteenth day of February, 1979.

Peter Durack
Attorney-General

Participants

The Commission

For the purposes of the Reference, the Chairman in accordance with section 27(1) of the Law Reform Commission Act 1973 created a Division comprising members of the Commission.

Chairman

The Hon. Mr Justice M.D. Kirby, B.A., LL.M., B.Ec. (Syd.)

Commissioner in Charge

Dr J.A. Seymour, B.A., LL.B. (Auckland) Ph.D. (Auckland), Dip.Crim. (Cambridge) Barrister and Solicitor of the Supreme Court of New Zealand, Australian Institute of Criminology *

Commissioners

Professor A.C. Castles, LL.B.(Melb.), J.D. (Chicago), Professor of Law, The University of Adelaide. Retired from Division on 27 July 1979

Professor Duncan Chappell, B.A., LL.B. (Tas.), Ph.D. (Cambridge) Appointment expired on 31 December 1979

Associate Professor G.J. Hawkins, B.A.(Wales) Deputy Director of the Institute of Criminology, Faculty of Law, University of Sydney

Associate Professor Robert Hayes, LL.B. (Melb.), Ph.D. (Monash) Barrister of the Supreme Court of New South Wales, Associate Professor of Law, University of New South Wales

Mr Howard Schreiber, B.A., LL.B. (Syd.) LL.M. (Harvard) Solicitor of the Supreme Court of New South Wales. Retired 6 June 1980

Officers of the Commission

Secretary and Director of Research

Mr G.E.P. Brouwer, B.A., LL.B.(Melb.), LL.M.(A.N.U.)

Assistant Legislative Draftsman

Mr Stephen Mason, B.A., LL.B., M.T.C.P. (Syd.)

Research Staff

Ms S. Tongue, B.A., LL.B. (A.N.U.) Senior Law Reform Officer. Resigned 24 August 1979
Mrs M. Rinaldi, B.A. (A.N.U.) Research Officer
Ms M. Allars, B.A., LL.B. (Syd.) Associate to the Chairman, to September 1980
Mr J.W. Barnes, B. Juris, LL.B. (N.S.W.) Associate to the Chairman

Executive Officer

Mr B.A. Hunt, B.A. (Syd.)

Secretarial

Mrs S. Ferry

* See para.1.

Legislative Draftsman

Mr J.Q. Ewens, C.M.G., C.B.E., LL.B. (Adel.), formerly First Parliamentary Counsel, and formerly Member of the Law Reform Commission

Consultants to the Commission *

Chief Superintendent A.H. Bird, A.A.I.M., Australian Federal Police
Mr R.J. Cahill, S.M., B.A., LL.B. (Melb.), Court of Petty Sessions, A.C.T.
Dr T. Carney, LL.B., Dip. Crim. (Melb.), Ph.D. (Monash) Monash University
Mr R. Chisholm, B.A., LL.B., (Syd.), B.C.L. (Oxon.) University of New South Wales
Ms E. Cox, B.A., (N.S.W.), Council of Social Service
Mr J.Q. Ewens, C.M.G., C.B.E., LL.B. (Adel.), formerly First Parliamentary Counsel
Ms H. Gamble, LL.M., (A.N.U.) Australian National University
Mr J.M. Hemer, A.U.A., Dip. Soc. Stud., Department of Social Security, Canberra
Dr M. Maloney, M.B., B.S., M.R.C., Psych. (U.K.) Capital Territory Health Commission
Ms H. Nicholls, Dep. Tech. Soc. Wk. (S.A.I.T.) Department of Community Welfare, South Aust
Mr B.W. Prior, B.A., Dip. Ed. (Monash), M. Soc. Sc., Dip. Ind. Rel. (Inst. of Soc. Studies The Royal Melbourne Institute of Technology
Mr J. Wall Dip. Soc. Stud. (Melb.) Department of Capital Territory, Canberra

Special Assistance

Ms J. Bonsey, B.A., M. Mus., (Melb.), LL.B. (A.N.U.), Department of Capital Territory
Mr D. Nairn, LL.B. (W.A.), Committee Office, House of Representatives
Mrs R. Nairn, B.A., Dip. Soc. Stud. (Melb.), Australian Social Welfare Union

* The recommendations in the report and statements of opinion and conclusion are necessarily those of the Members of the Law Reform Commission alone. They may not be shared by the consultants nor by the Courts, Institutions or Departments with which the consultants are associated.

Summary

The Report

This report deals with the reform of child welfare laws. The Commission's terms of reference required it to examine child welfare law and practice in the A.C.T., but many of the issues which are addressed are the same as those being considered in Australia and overseas. The subject of child welfare law reform is a topical and controversial one. Numerous inquiries, both in Australia and overseas, have considered the matter at length. Coinciding with the publication of this report are proposals for major reforms in child and community welfare laws in N.S.W.

The report is based on a careful study of current child welfare laws and practices in the A.C.T. It has been prepared with the assistance of consultants from relevant disciplines and in consultation with persons and agencies involved in the field. Research projects were initiated to monitor the operation of the present system. These included an examination of police practices, a study of the powers and procedures of the Childrens Court, an analysis of methods of dealing with neglected and abused children and an intensive examination of the delivery of welfare services in the A.C.T.

Among the subjects dealt with are:

- young offenders and methods of dealing with them;
- children in need of care;
- abused children;
- child care services;
- children in employment; and
- welfare services.

There are many other matters dealt with in this report. On almost every page there is an analysis of a sensitive and controversial topic. On many of the subjects addressed members of the community will naturally have strong views and sincere people will hold differing opinions. What is needed is:

- a clear analysis of current laws and practices;
- identification of the defects and deficiencies in the existing system;
- articulation of the principles which should underlie the solution of the problems identified;
- presentation of reform options; and
- a series of recommendations for necessary reforms.

This report seeks to achieve these aims. The Commission's analysis of the present law has clearly shown that the existing Child Welfare Ordinance 1957 (A.C.T.) is an outmoded and inadequate piece of legislation. Hence there is appended to the report a draft Bill for a new Child Welfare Ordinance for the A.C.T. Following this summary there is a list of the recommendations made in this report. What follows is a statement of the major problems in the present system and a brief explanation of the more important proposals.

Basic Problems

A number of problems have emerged from the Commission's study of current

child welfare laws and practices in the A.C.T. Among the most acute of these were the following:

- absence of clear laws and guidelines relating to police procedures for dealing with young offenders;
- the absence of a clearly articulated and controlled policy designed to divert young offenders from the Childrens Court;
- the failure of the A.C.T. Childrens Court to develop the specialised approach which is already well established in a number of Australian jurisdictions;
- lack of an adequate range of measures available to the Childrens Court for dealing with children who have been found guilty of offences;
- the need for the A.C.T. to rely on N.S.W. institutional facilities;
- lack of clarity in the law relating to dispositional measures;
- absence of procedures to ensure that the Childrens Court receives information about the implementation of its orders;
- the antiquated procedures for dealing with children in need of care, particularly the need to 'charge' them with being 'neglected' or 'uncontrollable';
- the absence of legislative provisions designed to encourage and facilitate the exploration of informal alternatives to court proceedings in respect of children in need of care;
- unsatisfactory and imprecise definitions of the categories of children in need of care whose situation merits coercive intervention, and the law's failure to distinguish between such children and young offenders;
- deficiencies, particularly with regard to residential accommodation, in the services available for children in need of care;
- the absence of an agency or individual clearly responsible for making the decision about the initiation of care proceedings;
- the failure of the law to provide adequate machinery to deal with the newly identified and growing problem of child abuse;
- the absence of clear and workable laws to regulate child care services;
- the confusion and inappropriateness of a number of the laws governing the employment of children;
- lack of comprehensive child welfare statistics;
- the lack of co-ordination of the numerous agencies engaged in the provision of welfare and health services in the A.C.T.; and
- the lack of clear policies with regard to the delivery of welfare services in the Territory, especially the lack of policies which would aid the development of an integrated health and welfare system in which the roles of individual agencies are clearly defined.

Principles and Proposals

Young Offenders Existing procedures in the A.C.T. fail to distinguish adequately between offenders and non-offenders. Society should clearly identify the objectives which it wishes to pursue with regard to offenders and those which it wishes to pursue with regard to non-offenders. A pre-requisite to this task is the creation of a system which clearly differentiates between the two groups. Treating a young offender simply as a child in need results in procedures marred by ambiguity and confusion of purposes. If an attempt is made simultaneously to identify and meet a

child's needs and to respond appropriately to the alleged commission of an offence, it is highly likely that neither task will be performed satisfactorily. When dealing with a young offender it is unrealistic and undesirable to repudiate the objectives traditionally pursued by the criminal justice system. When charged with a crime a child is entitled to all the protections afforded to an adult in a similar situation. In some respects the safeguards provided should be greater when a child is involved. Further, notwithstanding society's desire to display a positive and understanding approach to children who break the law, it is unrealistic to deny that the system which deals with them must attempt to protect, reassure, and satisfy the community. Yet recognition of the legitimate concerns of the criminal law does not mean that distinctive procedures for dealing with the young should be rejected. The special needs of children should be taken into account. The aim must be the creation of a system which reflects a proper balance between, on the one hand, the lawyer's demand for fair procedures and the law enforcement officer's concern with the detection and prevention of crime and, on the other, the welfare worker's desire to respond in a humane and understanding manner to the special needs of the young.

A desire to achieve a balance between fair and effective procedures and procedures which take the special needs of the young into account is central to the Commission's recommendations relating to methods of dealing with young offenders. The more important implications of the Commission's approach are as follows:

- ***Police procedures*** The design of procedures which are fair and which give special protection to the young requires the formulation of clear legislative restrictions in such areas as the use of the power to arrest a child without warrant, the interviewing of children and the taking of their fingerprints and photographs. There is also a need for the formalisation of the police warning system.
- ***Diversion*** One of the most important ways in which recognition can be given to children's immaturity is by the explicit adoption of a policy of diverting young offenders from the court whenever possible. Although proper attention must be paid to upholding the law and protecting the public, the available evidence does not suggest that reliance on simple, speedy alternatives to a prosecution results in higher rates of re-offending than reliance on more formal methods. A policy of diversion must, however, be pursued in a consistent and principled manner.
- ***Court procedures*** When a child is prosecuted he should be given all the protections which an adult facing a similar charge would receive. But the court which deals with him should combine a concern for due process with a special understanding of children's problems and of the services available to alleviate these problems. The court should also be alert to the need to adapt its procedures to children's understanding.
- ***Dispositional orders*** The dispositional orders employed by the court when a child has been found guilty of an offence should not only be fair and reflect the need to protect the public, they should also be flexible and adapted to the special needs of the young. A penalty imposed by the Childrens Court should be specific and should not exceed that warranted by the gravity of the offence. But a concern for specificity and the principle of 'just deserts' must be reflected in a varied range of measures capable of accommodating the changing needs of the children who are subject to them. The necessary flexibility can be achieved by way of orders which, though reasonably specific, may be reviewed by the court. Further, there is a need for an increased range of measures available to the court for dealing with children found guilty of offences.

Children in Need of Care

Two principles should be adopted with regard to children in need of care. First, court action should be avoided wherever possible and every effort should be made to find informal solutions to the problems faced by these children. Secondly, when court action is necessary, the procedures employed should be distinctively different from those used in respect of young offenders. The application of these principles requires the following reforms:

- ***Non-criminal procedures*** Existing antiquated procedures, which result in children being 'charged' with being 'neglected' or 'uncontrollable,' should be replaced by care proceedings. The definitions of the grounds for care proceedings should be as narrow and precise as possible. In general it is actual or potential harm to the child which should provide the basis for coercive intervention.
- ***Preference for informal solutions*** The new form of procedure should be such as to encourage the use of informal solutions. Use of court proceedings in order to assist children in need of care should normally be a last resort. If reliance on the court process is to be minimised, emphasis must be placed on the provision of adequate preventive services and residential facilities for children and families.
- ***Dispositional orders*** When court action is initiated, and coercive intervention is found to be necessary, every effort should be made to keep the child with his family. Any order made in respect of a child found to be in need of care should be continually reviewed. Society should be compelled regularly to re-examine the justification for the continuance of intervention in the child's life. The utmost flexibility should be permitted so that any order made by the court should not remain in force if changes in the circumstances of the child or his family have rendered it inappropriate.

Abused Children

Although child abuse is an extreme form of failure to provide adequate care, it is a problem which has certain special features. Children who are the victims of physical or sexual abuse are particularly vulnerable, and every effort should be made to protect them. Special attention should be paid to endeavouring to ensure that the plight of these children is brought to official notice. Emergency procedures are necessary to permit abused children or those at risk of abuse to be removed from home. Further, special consideration should be given to the fact that a case of child abuse not only involves harm to the child, but also raises the possibility of the parent or guardian being charged with a serious offence. New procedures for dealing with child abuse should therefore embody the following features:

- ***Compulsory reporting provisions*** If abused children are to receive the protection and assistance which the law offers, their cases must be brought to official notice. Therefore certain categories of persons involved in work with children should be obliged to report cases of abuse which come to their notice. Further, the voluntary reporting of such cases should also be encouraged.
- ***Holding orders*** Holding orders should be available to permit the removal from home of a child who has been abused or who is at risk of abuse. Provisions relating to these orders should, however, reflect a concern for legal safeguards.
- ***Prosecuting parents*** When a parent has abused his child the prosecution of the parent can have devastating effects on parent and child and on their relationships. Prosecutions should therefore be initiated only after careful deliberation. The police should be encouraged to consult representatives of welfare agencies before a decision to prosecute is taken. Further, when a prosecution has been initiated, procedures should be introduced which will facilitate the withdrawal of the proceedings when this is desirable.

Child Care Services

The existing law relating to the licensing of child care facilities in the A.C.T. is unsatisfactory. It is unclear and does not cater adequately for the varied range of child care services which have developed in the Territory. The new law should aim to protect children who are placed in child care and yet avoid the creation of an unnecessarily bureaucratic and intrusive system. The new licensing requirements should be clear and workable, and should reflect a recognition that certain small-scale, informal child care arrangements are not the law's business.

Children in Employment

Children are particularly liable to exploitation in employment. There is a need for laws to protect them. However, as with laws regulating child care services, it is important to avoid the creation of intrusive, bureaucratic procedures which unduly interfere with children's freedom to work. The need to avoid unnecessary controls is particularly important in times of high unemployment among the young. The basic principle should be that a child's employment opportunities should not be interfered with unless he has suffered, or is likely to suffer, harm. The Commission's major reform proposals are as follows:

- ***General minimum age*** The age of 15 should be specified as the general minimum age of employment. Exceptions should be made with regard to light work and employment in the family business.
- ***Employers' duty*** A duty should be imposed on employers to ensure the health and safety of children in their employ.
- ***Director's powers*** A general power should be vested in the Director of Welfare to prohibit or restrict the employment of any child if it is causing, or is likely to cause, harm to the child.

Welfare Services

Welfare services in the A.C.T. are fragmented and unco-ordinated. Because of the way these services have developed, and because of the nature of government in the

A.C.T., there is no agency in a position to assume responsibility for the rationalisation and integration of health and welfare services. Too many agencies and individuals operate without reference to each other. Added to this are jealousies and rivalries and bureaucratic impediments. In particular, difficulties are caused by the fact that the work of two major government agencies, the Welfare Branch of the Department of the Capital Territory and the Capital Territory Health Commission, is unco-ordinated. The Health Commission's welfare role has expanded without consideration being given to an overall welfare policy in the Territory. Further, the Welfare Branch has experienced particular difficulties. It lacks appropriate status, identity and autonomy. A general examination of the planning and delivery of welfare services raises difficult and complex questions beyond the scope of this report. Consideration of these questions must await a comprehensive inquiry into welfare and health services in the A.C.T. Such an inquiry should be undertaken as soon as possible.

Institutional Reforms

The Commission has given careful consideration to the costs of the proposed reforms and to the need to ensure that these are kept to a minimum. The institutional innovations necessitated by the Commission's proposals are as follows:

- ***The Youth Advocate*** Because of the diversity of the A.C.T.'s welfare agencies and the way in which they have developed, no one person or agency is clearly responsible for taking resolute action in respect of children in need of care. At present, cases can remain poised uncertainly between a number of agencies, the concern of all but the responsibility of none. The Commission therefore proposes the appointment of a new official, to be known as the Youth Advocate, who should be independent of the health and welfare agencies. One of this official's functions will be the initiation of care proceedings when these are necessary. The independence of the Youth Advocate will be a most important characteristic. An independent official would be in the best position to challenge and question those working with a child in need of care. The decision to initiate court proceedings can best be made by a person who stands apart from those whose responsibility it is to provide welfare services. It is also in the interests of those who provide these services to be relieved of the responsibility for taking court action. Further, a system in which an independent official makes the decision about the initiation of care proceedings would introduce desirable checks and balances into the welfare system. Adoption of the Commission's proposals regarding the Youth Advocate would result in an appropriate division of power between the new official and the major governmental welfare agencies in the A.C.T. It would avoid an unacceptable concentration of power in one agency. With regard to care proceedings, the Youth Advocate will fulfil a role very similar to that performed by the Scottish reporters under the Social Work (Scotland) Act 1968. In addition, the Youth Advocate will perform a number of other functions, the most important of which will be the monitoring, on the court's behalf, of the implementation of dispositional orders. This task is also central to the Commission's proposals. At present the orders made by the Childrens Court

confer wide discretionary powers on health and welfare agencies. There are no procedures by which the court can learn whether its expectations and objectives have been realised. The Youth Advocate will be responsible for introducing such procedures. He will make possible the creation of a system in which Childrens Court orders can be reviewed and in which children can be brought back before the court if orders prove unsatisfactory or inappropriate. The Youth Advocate will also be able to provide the court with advice on dispositional orders.

- ***Specialist Childrens Court*** The constitution of the Childrens Court should reflect the need for procedures marked by a balance between the requirements of a criminal justice system and a system designed to take the special needs of children into account. In the A.C.T. this balance can most appropriately be achieved by retaining the Court of Petty Sessions, presided over by a magistrate with legal qualifications, but by requiring this magistrate to be a specialist. The Childrens Court should be a distinctive one, able to respond expertly to the needs of the young. The appointment of a specialist magistrate offers the best chance of achieving this aim. The expertise of the court should be further enhanced by the contribution of the Youth Advocate, whose special knowledge of the Territory's welfare services will complement that of the magistrate.
- ***Childrens Services Council*** The purpose of the Childrens Services Council, a part-time body consisting of representatives of government and non-government welfare and health agencies, is to examine and co-ordinate the work of the many organisations concerned with children's welfare in the A.C.T. The Council will be concerned with the further development of an integrated welfare system in the Territory. In particular, it should consider the relationships between, and the roles of, the various health and welfare agencies. In the course of this report reference is made to a number of areas which the Council should keep under review. The Council will play a key role in the further reform of child welfare services in the A.C.T. The Council will be concerned with broad issues of policy. It is not designed to co-ordinate the provision of services in individual cases when these are causing concern. When the handling of a particular case is causing difficulty, a Standing Committee of the Council should assess the situation and endeavour to co-ordinate the services provided for the child and his family. As the Committee will be made up of representatives of the more important health and welfare agencies, it will offer a mechanism for solving day-to-day child welfare problems in consultation with the Youth Advocate.
- ***A new Welfare Division*** Pending the setting up of a comprehensive inquiry into welfare and health services in the A.C.T., the Welfare Branch of the Department of the Capital Territory should be upgraded to the Welfare Division of that Department. The position of the head of the Division should also be enhanced by giving it legislative recognition. The new Child Welfare Ordinance should make provision for the appointment of a Director of Welfare.

Summing Up

The aim of this report, and of the legislation appended to it, has been to design a

child welfare system which will:

- provide appropriate and effective assistance to children in trouble;
- recognise the community's right to be protected against harmful conduct by children; and
- safeguard children in need of protection.

Yet these objectives must be pursued in a way which avoids intrusive intervention in the lives of children and their families. Attention must also be paid to the need for legal safeguards and for those checks and balances so necessary in a system which permits coercive intervention in citizens' lives.

Summary of Recommendations

Major Reforms

1. ***New Ordinance*** There is a need for a new Child Welfare Ordinance for the Australian Capital Territory (A.C.T.). The new Ordinance should provide a clearer and more appropriate framework for the child welfare system in the A.C.T. In particular it should:
   - Establish new institutions for the better delivery of services concerned with children in trouble and children in need of care. (Chapters 5, 8, 13).
   - Make provision for the appointment of a Director of Welfare (Chapter 13).
   - Provide new, clearer and publicly available rules governing the conduct of police in relation to children (Chapter 5).
   - Provide clear guidelines for the diversion of young offenders from the Court (Chapter 5).
   - Create new procedures and institutions for dealing in an appropriate way with children found guilty of criminal offences, including facilities for community service, reparation to victims and an attendance centre (Chapter 6).
   - Make provision for the Childrens Court to review the implementation of dispositional orders (Chapter 6).
   - Encourage the exploration of informal alternatives to the use of Court proceedings in respect of children in need of care (Chapter 8).
   - Abolish the procedure by which children may be charged with being neglected or uncontrollable and substitute for vague general provisions of this kind a closely defined provision for dealing with children in need of care (Chapter 8).
   - Create distinctive measures for dealing with children found to be in need of care (Chapter 9).
   - Provide for the regular review of orders made in respect of children found to be in need of care (Chapter 9).
   - Provide new procedures and obligations to deal with the problem of child abuse (Chapter 10).
   - Provide new provisions to govern the conduct of child care facilities (Chapter 11).
   - Establish new and simplified provisions governing the employment of children (Chapter 12).
2. ***Legislation Governing Shelters*** There is a need for legislative provisions governing the operation of Quamby Children's Shelter.
   (para.173)
3. ***New Institutions*** For the purpose of dealing with the problems identified in this report new institutions should be established or old institutions revised as follows:

   - The Childrens Court should be retained but constituted by a specialist Childrens Magistrate.
     (para.161)
   - ***Youth Advocate*** A new official, to be known as the Youth Advocate, should be appointed. His responsibilities should include the following:
     - to assist the court at the dispositional stage in proceedings involving child offenders;
     - to monitor compliance by a child offender with conditions and orders imposed by the court;
     - to initiate proceedings in respect of a child in need of care and act as applicant in those proceedings;
     - to monitor the implementation of orders made in care proceedings;
     - to be the recipient of notifications of suspected child abuse and to act upon such notifications;
     - to participate in the Childrens Services Council; to chair the Standing Committee of the Childrens Services Council; and
     - to compile reports, statistics and otherwise to provide assistance to the Childrens Services Council.

     The Youth Advocate should be a statutory officer, appointed by the Governor-General. He should desirably have social work or behavioural science qualifications, but, ideally, he should combine these with a qualification in law. He should have a staff of two, and his staff requirements should be kept under review.
     (para.163, 242-250, 282-284, 313-320, 362-368, 397)
   - The Welfare Branch of the Department of the Capital Territory should be upgraded to a Division.
     (para.512)
   - The post of Director of Welfare should be created.
     (para.512)
   - A Childrens Services Council should be created with responsibilities for co-ordinating and developing policy on child welfare laws and practices.
     (para.516)
   - A Standing Committee of the Childrens Services Council should be established with responsibility for considering action in particular cases of children in need of care, including children the victim of child abuse.
     (para.284)

Children: The Criterion of Age

4. ***Upper Limit*** The age of 18 should be retained as the upper limit of the jurisdiction of the Childrens Court. With regard to young offenders, the relevant time should be the age at the time of the alleged commission of the offence. However, to avoid difficulties which could arise if an adult is charged with an offence committed long before in his youth, no person should make an initial appearance before a Childrens Court after he has attained the age of 18 years and six months.
   (para.63, 87)

5. ***Children and Young Persons*** No practical benefit results from the maintenance of the existing distinction between 'children' and 'young persons'. The distinction in the present Ordinance should be abolished.

(para.64)

6. ***Age of Criminal Responsibility*** The age of criminal responsibility in the A.C.T. should remain unchanged at 8.

(para.65)

7. ***Special presumption*** For the time being the *doli incapax* rule should be retained in the A.C.T. It does embody a recognition of children's immaturity and of the need to give them special protections in their dealings with the criminal justice system.

(para.68)

New Police Procedures

8. ***Panels Rejected*** The desirability of introducing either a screening or a hearing panel to deal with certain categories of young offender in the A.C.T. has not been convincingly demonstrated. It is not recommended that a panel of either type be established in the A.C.T.

(para.128, 131)

9. ***Police Prosecution Decision*** When an offence is alleged by the police, the power to decide between a prosecution and the informal handling of a case should remain with the police and not be transferred to a panel or other body or person.

(para.132)

10. ***Offences Against Commonwealth Law*** Members of the Commonwealth Attorney-General's Department should confer with representatives of the Australian Federal Police on the desirability of retaining special procedures for dealing with Commonwealth offences allegedly committed in the A.C.T.

(para.147)

11. ***Diversion*** Provided proper attention is paid to the protection of the public, children should be prosecuted only when this course is clearly justified. A policy of diversion should be explicitly adopted in the A.C.T.

(para.123)

12. ***Procedure and Criteria*** If a policy of diversion is to be pursued in a consistent and principled manner, clear procedures should be laid down for the police to follow when making the prosecution decision. The decision should be made on the basis of clear and publicly available criteria.

(para.138)

13. ***Senior Officers to Authorise Prosecutions*** No child should be prosecuted without the approval of an authorised officer of the Australian Federal Police. This officer should not authorise the prosecution of a child unless he decides that a formal warning is not appropriate. The factors which he should take into account are as follows:
    - the evidence available concerning the commission of the offence;
    - the seriousness or circumstances of the alleged offence;
    - the prevalence of offences of the kind alleged;
    - the child's previous record of offending;
    - the age, maturity or mental capacity of the child;
    - the ability and willingness of the child's parents to discipline and control the child; and
    - the need to protect the public from offences of the kind alleged.

(para.138)

14. Every effort should be made to provide, for children diverted from the court, welfare services which the children and their families are genuinely free to accept or reject.

(para.145)

15. ***Development and Formalisation of Police Warnings*** The administration, by the police, of a warning should be the major alternative to the prosecution of a child. The existing warning system should be formalised.

(para.133)

16. ***Citing Police Warnings in Court*** If a properly administered system of formal police warnings is introduced, the police should be entitled to bring a warning to the notice of the Childrens Court, but the fact that a warning was administered should not be evidence that the offence was committed.

(para.171)

17. ***The Power of Arrest*** The use of the power to arrest children without warrant should be reduced. The circumstances in which the power should be used should be indicated in the new Ordinance.

(para.135–137)

18. ***Summons Procedures*** The police should be required by law to proceed by way of summons rather than by way of a charge unless satisfied that proceedings by summons would not be effective. There is a need for simplified summons procedures which will be sufficiently attractive to the police to encourage their use in preference to arrest and charging procedures.

(para.139–140)

19. ***Reduce Delay*** Every child accused of a crime should either be warned or make his first court appearance within 28 days of being apprehended by the police.

(para.140)

20. ***Investigative Procedures*** There is a need for the clear legislative regulation of the police use of their power to interview a child, to take his finger prints or photograph, and to hold him in custody prior to his first court appearance.

(para.141–144)

21. ***Enforcement*** Provisions regulating police practices should be enforced by complaints machinery and by empowering the court to exclude evidence wrongfully obtained in breach of the legislative requirements.

(para.142)

22. ***Monitoring New Police Procedures*** New procedures should be introduced

which will allow for a simple recording of cases informally handled. These procedures should also allow the monitoring of police practices with regard to young offenders. In particular, attention should be focused on the operation of screening and diversionary mechanisms. If these are not operating satisfactorily consideration could be given to the introduction of a screening panel which would assume responsibility for making the prosecution decision.

(para.146)

23. ***Police Juvenile Aid Bureau*** The Juvenile Aid Bureau should be retained. The Bureau has an important role to play in the development of special procedures for dealing with children. It is recommended that its role be clarified and strengthened. The Bureau's community relations role should be explicitly recognised and its functions should include:
    - providing advice and assistance following the administration of a police warning;
    - primary responsibility for police work with children in need of care;
    - establishing closer liaison between the police and welfare and health agencies; and
    - providing a resource on which other members of the police may call.

    (para.154–157)

The Childrens Court

24. ***Family Court Rejected*** At this stage it would not be appropriate to transfer to the Family Court of Australia, a court primarily concerned with matrimonial matters, jurisdiction over proceedings under the new Child Welfare Ordinance.

    (para.160, 307–311)

25. ***Formal Panel Rejected*** The existing Childrens Court should not be replaced by a multi-disciplinary panel.

    (para.159)

26. ***A Specialist Childrens Court*** Both adjudication and dispositional decisions should continue to be made by a Childrens Court consisting of a single judicial officer. The Childrens Court should be presided over by a specially designated magistrate. He should be a member of the Court of Petty Sessions but specifically appointed to hold office as magistrate in the Childrens Court. Initially he should hold office for five years. At the end of this period he should be eligible for re-appointment. If not re-appointed to the Childrens Court he will take his place on the bench of the Court of Petty Sessions and a new specialist magistrate should be appointed to the Childrens Court. The new legislation should contain a provision (similar to s.22(2)(b) of the Family Law Act 1975 (Cwlth)) which gives a general indication of the relevant qualities which the specialist Childrens Magistrate should have. All other magistrates of the A.C.T. Court of Petty Sessions should be empowered to sit in the Childrens Court when the Childrens Magistrate is not available.

    (para.160, 161)

27. ***Comprehensible Procedures*** An effort must be made to introduce much greater participation by children and their parents in Childrens Court proceedings. In order to make the proceedings as comprehensible as possible, the Childrens Magistrate should be under a duty to explain, in simple language, the nature of the proceedings and the effect of any order made by the court.

    (para.160,164,322,323)

28. ***Legal Representation*** The new Ordinance should empower the Childrens Court to appoint a legal representative when it considers that the child's need for representation is manifest. Provision should also be made for the court to appoint a 'next friend' to assist the child and the child's representative.

    (para.190, 191, 330, 331)

29. ***Reports to Assist the Court*** The law relating to social inquiry and psychiatric reports should be clarified. In particular, the child, his parents and their legal representatives should normally be entitled to a copy of any social inquiry, psychiatric or like report tendered. The court should, however, be able to make an order that a child appearing before it is not to receive a copy of a report and that its contents must not be disclosed to him.

    (para.169, 170, 328, 329)

30. ***An Open or Closed Court*** The Childrens Court should not be opened to the public. Only those persons directly interested in the proceedings should be permitted to be present.

    (para.166)

31. ***Presence of the Media*** Representatives of the media should be entitled to be present in the Childrens Court and to report the proceedings, provided no details which could identify the child or his family are disclosed. However, the court should have a general power to limit the number of persons present if it considers that it is in the child's interests or the interests of justice to do so.

    (para.167)

32. ***Remands and Adjournments*** The remand powers of the Childrens Court with regard to children the subject of criminal or care proceedings should be clarified. When it is necessary to adjourn a case, an adjournment should, other than in exceptional circumstances, be for no longer than 21 days.

    (para.172, 327)

33. ***Appeal to Supreme Court*** The law relating to appeals from findings and orders of the Childrens Court is confused. It should be clarified. It should be made clear that the Supreme Court may hear appeals from findings and orders of the Childrens Court and that appeals may be by way of re-hearing or by way of order to review. Broad appeal rights should be available both in criminal matters and in care proceedings.

    (para.182, 312)

34. ***Monitoring Court Orders*** The Youth Advocate, on behalf of the Childrens Court, should gather information about the progress of children who are the subject of a Childrens Court order. He should ascertain how orders are being implemented and the extent to which they are being obeyed. He should be

empowered to bring cases back before the court if its orders are not complied with or if they have proved unsatisfactory or inappropriate.

(para.242–244,250,362–368)

Dealing with Young Offenders

35. ***Legislative Statement of Principles*** The new Child Welfare Ordinance and the practice of the Childrens Court should embody the following principles to be observed in dealing with young offenders found to have committed breaches of the criminal law:
    - although the court must have regard to the welfare of the young offender, this objective must be pursued within the framework of orders whose upper limits are determined by the seriousness of the offence of which the child has been found guilty;
    - an order depriving a child of his liberty should be employed only in respect of an offence for which an adult would be liable to imprisonment;
    - wherever possible a child should be permitted to remain in his own home and to maintain his relationship with his family and continue his education and/or employment; and
    - intervention should be limited to the minimum necessary to achieve community protection.

    (para.201)

36. Subject to the Childrens Court's power to decline jurisdiction, and the child's right to elect trial by jury, the Childrens Court should exercise jurisdiction in respect of all offences allegedly committed by children, other than offences punishable by life imprisonment. The Childrens Court should exercise jurisdiction in respect of traffic offences allegedly committed by children.

    (para.174,179)

37. ***Right to Elect Trial by Jury*** The new Child Welfare Ordinance should explicitly confer on the child a right to elect trial by jury in the Supreme Court in those circumstances where an adult may exercise that right.

    (para.180)

38. ***Committal to Supreme Court*** When dealing with an indictable offence in respect of which the Childrens Court may exercise jurisdiction, it should be open to the Childrens Court to decline jurisdiction and to commit the child to the Supreme Court for trial or sentence.

    (para.179)

39. If a matter is committed to the Supreme Court and a finding of guilt made, it should be open to the presiding Judge to employ any of the special Childrens Court measures rather than imposing an adult penalty.

    (para.181)

40. ***Children Jointly Charged with Adults*** When a child is jointly charged with an adult, the proceedings should normally be heard separately, and the child should be dealt with in the Childrens Court. However, provision should be made for joint committal proceedings to be heard in the Court of Petty Sessions. This would avoid the duplication of lengthy committal proceedings.

    (para.176)

41. ***Closing the Supreme Court*** When matters involving children would otherwise be heard in open court (for example, when a child and an adult are the subject of joint committal proceedings or when a child is tried before, or appeals to, the Supreme Court) the court should be empowered to close the court and to forbid the publication of details likely to identify the child.

    (para.168, 176)

42. ***Measures Abolished*** All forms of release on recognizance should be abolished. Apart from a new and very limited form of conditional discharge and an adjournment (the duration of which should be brief) all forms of disposition which keep open the possibility of recalling a child to court for sentence for the original offence should be abolished. This recommendation applies both to orders which take the form of a deferred sentence and to those which represent a conditional discharge. General committals should also be abolished and it should no longer be possible for the Childrens Court to commit a young offender as a ward. Nor should it be possible for the Childrens Court to imprison a child.

    (para.203, 214, 241)

43. ***Measures Available*** The following measures should be available in respect of young offenders:
    - dismissal;
    - reprimand;
    - conditional discharge;
    - monetary penalties (i.e. restitution or a fine);
    - probation;
    - attendance centre order;
    - residential order placing a child in an open home or hostel;
    - custodial order placing the child in an A.C.T. institution for a maximum of six months; committal to a N.S.W. institution for a specific period not exceeding two years; and
    - other penalties available to the court in its capacity as a Court of Petty Sessions.

    (para.202)

44. ***Orders without Recording Conviction*** Provision should be made for orders not involving a deprivation of liberty to be made without the entry of a conviction against the child.

    (para.240)

45. ***Monetary Penalties: Fine and Restitution*** The amount of any fine or restitution order should be directly related to the child's ability to pay.

    (para.206, 207)

46. ***Failure to Pay*** Where a child has failed to pay a fine or monetary restitution ordered by the court, he should be brought before the court to explain his default. A measure depriving the child of his liberty should be imposed only after it has been established that the default was wilful and without reasonable excuse. The court should not, however, be limited to the imposition of a custodial penalty when a wilful default has been established. As an alterna-

tive it should be open to the court to make an attendance centre order.
(para.208)

47. Where the failure to pay a fine or a sum ordered by way of restitution is not wilful and without reasonable excuse, it should be open to the court to order:
- that the fine be reduced or remitted;
- that the child be given further time to pay;
- that the sum be paid in instalments, where the order directed a lump sum payment; or
- the imposition, in lieu of the fine, of any other measure open to the Childrens Court in respect of the original offence (other than an order depriving the child of his liberty).

(para.208)

48. ***Conditional Discharge*** Provision should be made for the conditional discharge of a child who has been found guilty of an offence. The maximum period for such a discharge should be six months. The conditions incorporated into a conditional discharge should be clear and specific. No further penalties should be imposed in respect of the offence if the child complies with the conditions.
(para.215, 244, 247-248)

49. ***Probation*** The probation order should be retained and further developed as a distinctive measure for dealing with young offenders. It should not be made unless the nature and circumstances of the offence and the offender's background indicate the need for continuing control and support. The conditions attached to a probation order should be specific and enforceable. The normal maximum for a probation order should be one year. In exceptional circumstances it should be open to the court to order a two year term of probation.
(para.216–220)

50. ***Attendance Centre Order*** An attendance centre should be established in the A.C.T. and an attendance centre order should be introduced. This will offer a framework for the development of new and imaginative programs mid-way between probation and complete removal of a child offender from home.
(para.224)

51. ***Community Service*** Where it is felt that a child should undertake some form of community service, this objective should be pursued within the framework of an attendance centre order.
(para.206, 224)

52. ***Residential Orders*** When the court decides that a child must be removed from home, but need not be committed to a N.S.W. institution, it should have a choice between two orders:
- an order placing the child in an approved home or in the care of a suitable person; or
- an order that the child live where directed by the Director of Welfare.

The court should specify the period for which the order should remain in force. The maximum term should be two years. As under the present law,

the making of a residential order should in no circumstances involve the transfer of the guardianship of the child to the Director of Welfare.
(para.225)

53. ***Community Based Alternatives*** Within the framework of the residential order, vigorous efforts should be made to develop small, open facilities as alternatives to closed institutions.
(para.226–227)

54. At least until a review and rationalisation of existing services is undertaken, open homes and hostels should continue to be operated by voluntary organisations. The possibility that the Welfare Division might, at some future time, operate one or more such facilities should be kept open.
(para.227)

55. ***Breach of Probation, Attendance Centre or Residential Orders*** Failure to obey a probation, attendance centre or residential order should be a distinct offence and the child should be dealt with for that failure and not for the original offence. A new procedure should be created which explicitly focuses on the breach of the terms of the court order. To be punishable the breach should be wilful and without reasonable excuse. When a child who is subject to a probation, attendance centre or residential order commits a further offence, he should be dealt with for that offence.
(para.244–249)

56. ***Procedure on Breach*** When an alleged breach of a probation, attendance centre or residential order comes to notice, a police officer or a person who, under the order, is responsible for the supervision or care of the child, should be able to lay an information, although the primary responsibility should be with the Youth Advocate.
(para.244–247)

57. ***Special Powers of Review*** On occasions, although no specific breach of a court order has occurred, it will be desirable for the court to be given the opportunity of considering whether an order should reman in force. Situations may arise in which the continuance of the order seems inappropriate. Provision should therefore be made for the Youth Advocate or any other person affected by the order to ask the court to consider the desirability of permitting a probation, attendance centre, residential, custodial or committal order to continue. A court hearing such an application should be empowered to vary or revoke the order or to substitute another order of the kind available in respect of the original offence.
(para.222, 250)

58. ***An A.C.T. Institution for Young Offenders*** It is in principle desirable to establish an A.C.T. institution for young persons convicted of serious offences warranting institutional punishments. With a view to establishing such an institution, the Welfare Division, in conjunction with the Childrens Services Council, should develop proposals relating to the design of an institution and to the programs which it should offer. An institution should be constructed in

the A.C.T. only if it is clearly established that it would be able to offer programs at least as varied and as stimulating as those already available in N.S.W. facilities. A new institution might, with advantage, be built on the same site as the existing Quamby Children's shelter. However, if it were built on this site it is important to recognise that the two institutions should be designed and run as separate facilities.

(para.234, 235)

59. ***Custodial Order*** If an institution is established in the A.C.T., children should be detained there pursuant to a new form of order (a 'custodial order'). The maximum term for such an order should be six months. Provision should be made for the administrative grant of remission of up to one third of the sentence. Provision should also be made for day release to allow an offender to go out to work or to participate in an attendance centre or other day-time program.

(para.237)

60. ***Committal to a N.S.W. Institution*** If the Childrens Court concludes that a child's offence merits a custodial sentence of more than six months, or if the child is unsuited to detention in the A.C.T. institution, the court should be permitted to commit the child to an institution run by the N.S.W. Department of Youth and Community Services. Certain aspects of the committal process should be changed, after due consultation and negotiation with N.S.W. authorities. The general directions of change envisaged by the Commission are as follows:
    - all committals should be for a specific period fixed by the court;
    - a committal order should not involve the removal of guardianship from the child's parents; and
    - more formal procedures should be created to permit a child released from a N.S.W. institution to receive supervision and support when he returns to the A.C.T.

(para.238)

61. ***Combined Orders*** The Childrens Court should be empowered where appropriate to make a probation order in combination with a residential, custodial or committal order.

(para.225, 237–238)

62. ***Imprisonment of Children*** Imprisonment should continue to be available as a penalty for very serious offences by those under 18. However, it is the Supreme Court, and not the Childrens Court, which should exercise the power to imprison in such cases. The Childrens Court should not be empowered to order the imprisonment of a child. When a custodial sentence is required, the Childrens Court should employ an order which results in a child's detention in an institution specifically adapted to the incarceration of the young. If a child's offence is so serious that a measure of this kind is inappropriate, the Childrens Court should employ its power to commit the child to the Supreme Court for trial or sentence.

(para.203, 239)

63. ***Control of Adjournments*** The power of adjournment should not be employed to fashion a type of sentence for which the legislation makes no provision. Although courts must retain a general power to adjourn a matter, the Childrens Court should be obliged to make a dispositional order within six months of a finding that an offence has been proved.

(para.203)

Children in Need of Care

64. ***A Clear Distinction*** A clear distinction should be made between procedures for dealing with young offenders and procedures for dealing with children in need of care.

(para,118, 280, 299)

65. ***A New Procedure*** A new form of procedure, to be known as care proceedings, should replace the present practice of charging children as neglected or uncontrollable. Coercive measures should be employed only following a declaration, by the court, that a child is in need of care.

(para.292–294)

66. ***Care Proceedings*** Special attention should be paid to defining the legislative grounds for coercive intervention in the lives of children who have not committed an offence. These grounds for care proceedings should be narrow and precise, so that intervention will be minimised and confined to those situations in which it is necessary to protect the child against clearly defined forms of harm. Further, in order to erect a barrier to premature or unnecessary court proceedings, the law should require that, before a child is declared to be in need of care, the court must be satisfied that the child falls within one of the definitions of a child in need of care *and* that the child's situation is such as can be met only by way of a court order.

(para.293–294)

67. ***Specific Definition of Need of Care*** A specific definition of the circumstances justifying a declaration that a child is in need of care should replace expressions such as 'living in conditions that indicate that the child or young person is lapsing or likely to lapse into a life of vice or crime', or 'exposed to moral danger'. Under the present Ordinance situations of this kind can form the basis for the initiation of neglect proceedings. The new legislative definitions should focus attention on the discernable impact on the child and so indicate that the purpose of intervention is to protect the child from harm. The definition of a child in need of care should cover such cases as:
    - non accidental physical injury;
    - sexual abuse;
    - impairment of health;
    - psychological and emotional damage;
    - behaviour harmful to the child;
    - abandonment or lack of support;
    - incompatibility between child and parents; and
    - persistent truancy harmful to a child.

(para.293–304)

68. ***Initiating Care Proceedings*** The primary responsibility for the initiation of care proceedings should be with the Youth Advocate. The Youth Advocate's role in these proceedings is designed to ensure that:
    - they are normally initiated only by a person who is fully aware of the objections to unnecessary and premature court action and who appreciates the limitations of the court process; and
    - all informal alternatives have been first explored.

    (para.313–314)

69. Any person may notify the Youth Advocate of a case involving a child in respect of whom care proceedings might be appropriate.

    (para.313)

70. ***Access to Court by Other Persons*** If the Youth Advocate refuses to make an application for a declaration that a child is in need of care it should be possible for a person dissatisfied with his decision to approach the court to seek leave to have the matter brought before the court.

    (para.317)

71. As a further means of ensuring that careful consideration is given to the initiation of care proceedings, the Youth Advocate should be required to consult with the Standing Committee of the Childrens Services Council before the proceedings are commenced.

    (para.282)

72. ***Alternative Services and Procedures*** If a policy of relying as much as possible on alternatives to court proceedings is to be pursued, adequate preventive services and informal procedures should be available. The following are required:
    - *Welfare services.* There is a need for varied forms of residential accommodation for children in trouble and for a more imaginative approach to the provision of counselling services and information about existing health and welfare agencies.

      (para.288–290)
    - *Statutory obligation.* A statutory obligation should be placed on the Director of Welfare to provide preventive services.

      (para.287)
    - *Child Care Agreements.* Administrative admission to wardship should be abolished. Legislative provision should be made for written child care agreements. Under a child care agreement, a parent or guardian should be able voluntarily to surrender the custody of a child to the Director of Welfare and the Director should be authorised to provide financial support to allow the child to be placed with foster parents or in a home. The agreement between the Director of Welfare and the parents should be terminable by either party. No agreement should normally be entered into without the consent of a child who has attained the age of 15.

      (para.285–286)

    - *Child Care Conferences.* Even when care proceedings have been initiated, there may be occasions when the court, feeling that it should still be possible to find a solution without a court order, would prefer not to make a declaration that a child is in need of care. In such cases the court should order a child care conference. This conference should be chaired by the Youth Advocate and attended by the child (if he is old enough), his parents or guardians, and such of those persons working with the family as the court orders. The object of the conference would be to attempt to reach an agreement as to the care and assistance which should be provided for the benefit of the child.

      (para.291)

73. ***Cases Requiring Immediate Action*** The proposals for care proceedings relate to the initiation of proceedings *in court.* Special provision should be made to enable emergency action to be taken to protect a child from harm. A police officer should have the power to take a child in need of care into custody and to place him temporarily in a hospital or a home. A member of the proposed Welfare Division should have similar powers, as should authorised hospital personnel. The power to place a child in custody in such a situation must be strictly defined by legislation. Both the pre-conditions for taking a child into custody and the duration of custody should be carefully prescribed.

    (para.305)

74. ***Procedure in Emergency Cases*** Having placed a child believed to be in need of care in custody, a police officer or authorised person should be required to notify the Youth Advocate as soon as possible and in every case within 48 hours. This will normally be done by telephone. The Youth Advocate should be empowered to direct the child's immediate release. If he considers that the child should remain in custody, an application for an interim order to this effect should be made to the court as soon as possible and in any case within 48 hours of the commencement of the child's detention. The court should be empowered to release the child or to make an interim holding order, authorising his continued detention in custody for up to 72 hours. Before the expiration of the 72 hours, the Youth Advocate should be empowered to approach the court for an extension of the holding order. In no case should this be longer than seven days. During this period the Youth Advocate should make preliminary inquiries to determine whether to file an application for a declaration that the child is in need of care. If he does not do so the child should be released to his parents or guardians.

    (para.305, 401)

75. ***Importance of Informality*** In care proceedings the court should place special emphasis on informality, on making the proceedings comprehensible to the child and his parents, and on giving the child an opportunity to participate and to express his views. It should be left to the court's discretion to decide whether a child is too young to be consulted and what weight should be attached to the views of a young child. Children's participation could also be encouraged by making it possible to exclude the parents or guardians from the hearing, where this is considered appropriate by the court.

    (para.322–323)

76. ***Standard of Proof*** As care proceedings are to be civil in nature, the standard of proof adopted should be proof on the balance of probabilities.

(para.324)

77. ***Modification of Rules of Evidence*** When hearing an application for a declaration that a child is in need of care, the Childrens Court:

- should not be bound by the rules of evidence;
- should be entitled to inform itself on any matter relating to the proceedings in such manner as it thinks fit;
- should not be bound to act in a formal manner; and
- should be entitled to act upon any statement or document whether or not that statement or document would be admissible in evidence.

However, the proposed provision should not derogate from the parties' right to be informed of the evidence placed before the court and to test or contradict it.

(para.325)

78. ***Admission Not to Be Made*** The new Ordinance should make it clear that it is not open to the child or his parents to admit that the child is in need of care.

(para.326)

79. ***Interim Orders*** When adjourning care proceedings the court should be empowered to order that the child:

- continue to live at home;
- be placed in the care of a suitable person;
- be placed in an approved home;
- be placed in a shelter; or
- be placed in a hospital.

(para.327)

80. ***Lapsing of Proceedings*** If no order is made within six months of the filing of an application that a child is in need of care, the proceedings should lapse.

(para.327)

81. ***New Offences*** In addition to retaining the existing offence of neglecting or ill-treating a child, the new Ordinance should create a new offence of leaving a child unattended in a dangerous situation.

(para.306)

82. ***Children in Custody*** A special effort should be made to establish alternative forms of remand accommodation to avoid the need to place children in need of care in the Quamby Children's Shelter.

(para.173)

83. ***Legislative Guidelines*** The new Ordinance should embody guidelines designed to assist the court when making an order with respect to a child declared to be in need of care. In every case in which intervention is required, the court should employ the least intrusive measure necessary to protect the child or to promote his welfare. The separation of parent and child or the removal of guardianship from the parents should be a last resort.

(para.333)

84. ***Proposed Measures in Care Cases*** Once a child has been declared to be in need of care, the following measures should be available to the Childrens Court:

- supervision order;
- residential order;
- order making the child a ward of the Director of Welfare; and
- order committing the child to an institution run by the N.S.W. Department of Youth and Community Services.

(para.334)

85. ***Supervision Order*** A supervision order would permit the child to remain in his parents' custody. The conditions of the order should be clear and precise. The court should be empowered to place the child under the supervision of the Director of Welfare or under the supervision of any other suitable person. Where appropriate the order should apply to the child's parents as well as to the child, and the law should make it clear that, when a child has been declared to be in need of care, the Childrens Court has the authority to impose obligations on the parents.

(para.335)

86. ***Residential Order*** There should be a wide range of choices for the placement, under a residential order, of children declared to be in need of care. The facilities provided by the A.C.T. private agencies should continue to be utilised. In special cases, as at present, placements should be made in homes run by voluntary organisations in N.S.W. Particular emphasis should be placed on the use of foster homes.

(para.337)

87. When a child has been the subject of a residential order, every effort should be made to see that he and his family receive assistance and support when he returns home.

(para.338)

88. When placing a child under a residential order it should be open to the court also to make a supervision order. In each case separate decisions should be made about the need for a residential placement and the need for any additional support such as can be provided by way of a supervision order.

(para.336, 338)

89. ***Wardship*** When it is necessary to deprive a parent of the guardianship of a child, the child should be made a ward of the Director of Welfare.

(para.339)

90. ***Committal to N.S.W. Institutions*** Although the power to commit a child found to be in need of care to a N.S.W. institution should continue to be available to the Childrens Court, the use of this power should be exercised only in special circumstances. A policy of relying on open homes and hostels for the accommodation of children found to be in need of care should be vigorously pursued in the A.C.T. The Childrens Services Council should be expressly required to examine the committal of non-offenders to N.S.W. facilities and to explore the possibility of developing further homes and hostels in the A.C.T. to meet their needs.

(para.343)

91. ***Monitoring Orders*** When a supervision order has been made, or a child placed in a home or institution pursuant to a residential or committal order, or when a child is made a ward of the Director of Welfare, the Youth Advocate should, on the court's behalf, monitor the child's progress.

(para.363)

92. ***Annual Review*** Any order made following a declaration that a child is in need of care should be automatically reviewed by the Childrens Court at intervals of no more than 12 months. Two months before the court's annual review is to be undertaken, the Youth Advocate should prepare a report on the personal circumstances and progress of the child. At that time the Youth Advocate should give written notice of the review to the child, to the Director of Welfare, to the child's natural parents or previous guardian (whichever is appropriate), and to the foster parents, home or other person or agency having the supervision or care of the child at the time.

(para.362, 363)

93. ***Application for Revocation or Variation*** Persons directly affected by an order made in care proceedings and any other person should at any time be permitted to apply to the Childrens Court for the variation or revocation of a supervision, residential, wardship or committal order.

(para.364–366)

Wardship of Children

94. ***Need for Court Order*** Administrative admission to wardship should be abolished. Only a court should normally be empowered to deal with the transfer of legal guardianship of a child.

(para.285)

95. ***Parental Rights*** A parent should not be deprived of guardianship rights unless no other measure is appropriate to the needs of the child. Before making a wardship order, the court should be satisfied that, in order to safeguard the child's welfare, it is necessary to invest the Director of Welfare with the wide-ranging powers and duties which the measure entails.

(para.340)

96. ***Clarification of Law*** The law should be clarified to indicate the powers and duties assumed by the Director of Welfare when a child is made a ward of the Director. This task should be undertaken in the context of a broad study of family law. In the meantime, the new Ordinance should contain a general provision indicating that, in respect of a ward, the Director of Welfare may exercise all the powers of the child's parents. In addition, certain specific matters should be dealt with in the Ordinance:

- general responsibility for the custody and care of the ward;
- power of placement;
- responsibilities regarding a ward's religious education; and
- power to apply to the Childrens Court for an order regarding the administration of a ward's property.

(para.344, 349, 350, 354, 355)

97. The Director of Welfare's guardianship need not automatically exclude the parent or other guardian from all decision-making powers. When making a child a ward, it should be open to the Childrens Court to order that any one or more of the incidents of guardianship be exercisable only after consulting the child's parent or other guardian.

(para.355)

98. ***Access to Wards*** The Childrens Court should have express power, in any care proceedings in which the child is made a ward of the Director of Welfare, to make such order as it considers proper regarding the right of access to the child by any person, or by either parent of the child, having regard to:

- the welfare of the child;
- the wishes of the child;
- the conduct of the person or parent; and
- the wishes of the parent.

(para.357)

99. ***Absconding Wards*** When a ward runs away and the child cannot be persuaded to return voluntarily, provision should be made for the court to order that the child be apprehended for the purpose of returning him to the custody of the Director of Welfare.

(para.360)

100. ***Termination of Wardship*** Wardship should terminate automatically when the child attains the age of 18 or if he marries prior to attaining that age.

(para.341)

101. ***Extended Financial Assistance*** The Director of Welfare should be authorised to provide financial assistance for ex-wards.

(para.361)

102. ***Interstate Movement of Wards*** The new Ordinance should permit the Director of Welfare to assume responsibiiity for the care of children who have been made wards in other States and who then move to the A.C.T.

(para.359)

103. ***Wardship Powers of the Supreme Court*** The new Ordinance should displace the A.C.T. Supreme Court's inherent wardship jurisdiction.

(para.356)

Children in Residential Care

104. ***Medical Procedures*** The Director of Welfare should be empowered to consent to surgical and dental treatment, routine medical examinations, and internal examinations performed on the following categories of children:

- children held in a shelter or remand centre following committal to a N.S.W. institution;
- children who have been made wards; and
- children who have been placed in an A.C.T. institution pursuant to a custodial order.

Consent should only be given to a surgical or other operation in the interests of the child's health. Internal examinations should only be performed by a medical practitioner and for a good cause.

(para.351–353)

105. ***Disputes*** When making a residential order the Childrens Court should be empowered to give directions indicating who may exercise various responsibilities relating to the child. Similarly, persons affected by the order should later be able to apply for such directions if unforeseen difficulties arise.

(para.368)

Child Abuse

106. ***Compulsory Notification*** Child abuse is more common that most people believe. It is imperative that the children involved should not be condemned to neglect and indifference. New legislative initiatives are needed to deal more effectively with this special class of children in need of care. As a means to ensure the provision of care and protection to children the subject of child abuse, legislative provision should be made for compulsory reporting of suspected cases of child abuse in the A.C.T. The following classes of persons should be under a duty to notify a case of child abuse:
    - medical practitioners;
    - dentists;
    - nurses;
    - police officers;
    - teachers and persons employed to counsel children in a school;
    - persons employed in the Department of the Capital Territory or by the Capital Territory Health Commission whose duties include matters relating to children's welfare; and
    - persons for the time being in charge of licensed child-minding centres.

(para.391, 396)

107. ***Definition for Reporting Purposes*** An obligation to report should not be imposed in respect of cases of potential abuse. The obligation should arise only with regard to cases of abuse which have already occurred. Persons in the prescribed categories should be obliged to report cases of children who have been physically injured (otherwise than by accident) or children who have been sexually abused.

(para.393)

108. ***Voluntary Notification*** In addition to compulsory notification by certain defined professionals, provision should be made for voluntary notification of cases of suspected child abuse.

(para.395)

109. ***Protections for Notifiers*** Legal immunity against criminal or civil liability or for breach of professional ethics should be extended to every person who makes a notification in good faith, whether the notification be made pursuant to the voluntary or compulsory notification provision.

(para.395)

110. ***Recipient of Notifications*** There should be one recipient of notifications of child abuse cases. At present there is confusion about the proper recipient of notifications. The Youth Advocate should be identified as the official to whom notifications should be made.

(para.397)

111. ***Records*** The office of the Youth Advocate should assume responsibility for the collection and secure control of confidential records relating to child abuse in the A.C.T. and should compile statistics of child abuse.

(para.399)

112. ***Holding Order*** Members of the police and authorised welfare and health personnel should be empowered to detain an abused child in hospital for a limited period where they believe urgent action is required to protect the child. When this power has been exercised a report should at once be made to the Youth Advocate and within a short interval to the Childrens Court.

(para.305, 401)

113. ***Support Services*** Special emphasis should be placed on services designed to prevent child abuse. The following objectives should be pursued:
    - *Research.* A national body should be established to develop and co-ordinate programs dealing with child abuse.
    - *Publicity.* The range of available services should be publicised.
    - *Prevention.* New services, aimed at prevention of the circumstances which give rise to child abuse, should be developed.
    - *Administration.* There should be a rationalisation of the overlapping roles of the Welfare Branch and the Capital Territory Health Commission.
    - *Self help.* Self help groups designed to assist parents should be encouraged.

(para.408)

114. ***Police Procedures*** Because of the risk that criminal proceedings may aggravate the relationship between parent and child, the police should prosecute a parent suspected of abusing his child only after careful deliberation. Procedures should be devised for:
    - Police consultation with the Standing Committee before a decision to prosecute a parent is made.
    - Withdrawal of a prosecution against a parent when this is desirable. The laying of a charge should not constitute an irrevocable step which cannot be retracted when it emerges that a prosecution will cause disproportionate harm to the child and the relationship between the parties. Even after a charge has been laid and the matter taken to court, the police should consider the desirability of proceeding with the prosecution.

(para.403)

115. ***Corporal Punishment in Schools and Institutions*** Section 124 of the present Ordinance which sanctions the use of corporal punishment, should not be re-enacted. The right to inflict corporal punishment will then exist, if at all, in the limited cases covered by the common law. The desirability of retaining the common law rules should be the subject of inquiry by the proposed Childrens Services Council.

(para.407)

Children in Employment

116. ***Appropriate Balance*** The child labour legislation in the A.C.T. should provide a framework which reflects an appropriate balance between the need to secure the protection of children from exploitation, and the desirability of preserving the right of children in appropriate circumstances to engage in employment.

(para.454)

117. ***Principles*** Intervention should be limited to that necessary to prevent specific harm. A child should be prohibited from engaging in employment only where the employment is, or is likely to be, prejudicial to:

- the health or safety of the child;
- his personal or social development; or
- his education or training.

(para.454)

118. ***Minimum Age*** There is a need for a comprehensive and general prescription of the minimum age for admission to employment in the A.C.T. The age of 15 should be the general minimum age as it coincides with the school leaving age.

(para.461)

119. ***Employment under the Minimum Age*** The types of employment which should be allowed below the age of 15 are those that fall within the categories of light work or of employment in the family business.

(para.461)

120. ***School Employment*** In addition, the minimum age of 15 years should not apply to employment in or in connection with a school, provided that the employment complies with conditions prescribed by a law of the A.C.T., an industrial award or an agreement regulating the relevant industry.

(para.461)

121. ***'Light Work' Defined*** This is work that, *prima facie,* should not harm the child concerned. The types of employment which constitute light work should be made clear in the new Ordinance. It should include only the following:

- selling, delivering or distributing newspapers or advertising matter;
- employment in the entertainment industry;
- baby-sitting;
- going on errands;
- casual work in or around a private home;
- golf-caddying;
- clerical work;
- gardening; or
- any other prescribed work.

(para.467)

122. ***Basis of Regulation*** Light work should be specifically regulated on the following basis:

- *No minimum age.* There should be no minimum age for admission to employment in light work.
- *Minimum intervention* Existing procedures should be abolished and replaced by a system of notification embodying the following features:
  - It should be the duty of the child's employer to notify the Director of Welfare of the proposed employment.
  - The system should apply only in respect of children who are less than 15 years of age.
  - The duty to notify should be limited to cases of employment where it is proposed to employ a child for more than 10 hours in any one week. Employment of a child for a lesser period does not raise expectations of harm to the child and should not be the subject of needless but expensive administrative procedures.
  - Upon being notified, the Director should be empowered to prohibit or restrict the proposed employment.
  - Where the Director of Welfare does not prohibit the proposed employment, he should record the child's name, relevant details of the employment and any conditions imposed by him with respect to the employment. The Director should also be required to notify the Secretary of the Department of Education of the relevant details.
  - It should be an offence for an employer to fail to notify the Director of Welfare in a proper case, or to employ a child in breach of any prohibition or conditions imposed by the Director.

(para.468)

123. ***Employment in the Family Business*** It should be possible for a child under 15 to be employed in a business owned by a parent of the child concerned. Employment of a child in a family business should be defined as 'employment in a business, trade, occupation or calling carried on by a parent of the child or by a company of which a parent of the child is a director'.

(para.469)

124. ***Hazardous Occupations*** Existing restrictions upon the employment of children in hazardous occupations ought not to be removed without rigorous inquiry and serious deliberation. Laws restricting the employment of children in occupations which are hazardous or dangerous to them should be simple, precise and regularly reviewed to avoid the risk that employers will adopt a general policy of not employing young people for fear of violating the law unintentionally.

(para.473)

125. ***Comprehensive Legislation*** The occupational health and safety of children in the A.C.T. should be provided for by comprehensive legislation.

(para.475)

126. ***Special Protections*** There should be provision for certain special protections of children employed in industry, construction or building work, in connection with certain machinery, or on premises where such work is carried on. The new Child Welfare Ordinance should impose upon every employer a duty to:

- do all such things as are reasonably necessary to ensure the health and safety of a child employed by him; and
- without limiting the effect of this requirement, comply with the provisions of any relevant law or of any relevant industrial award, order, determination or agreement.

A child who is so employed should also be under a duty not to render less effective anything done by his employer for the purpose of ensuring the child's health and safety.

(para.476)

127. ***Regulations*** The Minister for the Capital Territory should be empowered to make regulations for the purpose of securing the health, safety and welfare of child employees in work places.

(para.477)

128. ***Dangerous Employment*** An employer of a child under the age of 15 years should not, without the consent of the Director of Welfare, employ the child where the employment involves the child engaging in activity dangerous to the child. The Director should be empowered to refuse his consent, or to give his consent subject to certain conditions, if he has reasonable cause to believe that the employment is likely to be prejudicial to the health or safety of the child.

(para.481)

129. ***General Protective Powers*** In addition to the specific provisions outlined, there is a need for the Director of Welfare to exercise general supervisory powers in relation to the employment of children. He should be empowered to prohibit the employment of any child or to impose conditions on the employment. He should be able to exercise these powers only if he has reasonable cause to believe that the employment is or is likely to be prejudicial to the health, safety or personal or social development of the child or the ability of the child to benefit from his education or training.

(para.482)

130. ***Review.*** Jurisdiction should be conferred upon the Administrative Appeals Tribunal to review the decisions of the Director of Welfare in relation to the employment of children.

(para.483)

Child Care

131. ***Licensing of Child Care.*** A system of licensing should be retained as a method of regulating child care in the A.C.T. The system should be administered by the Welfare Division. The licensing authority should be the Director of Welfare.

(para.422, 443)

132. ***Recommended Definition.*** The new Ordinance's definition of the child care services which are required to be licensed should embody the following elements:

- the care is provided on a business or community service basis;

- the care is provided for more than four children under the age of six or more than eight children under the age of 12;
- in calculating the numbers of children for whom care may be provided without a licence, regard should be had to the minder's own children under the age of 12;
- foster care, residential care, care provided in premises run by the Department of the Capital Territory, and care provided in schools, pre-schools and hospitals should not be included; and
- care provided in an emergency or in unexpected circumstances should not be taken into account until the child has remained on the premises for 10 consecutive days.

(para.435)

133. ***Exemptions from Licensing*** A general provision should exist empowering the Director of Welfare to exempt particular child care facilities from the proposed licensing requirements. It should be possible to exempt from the licensing requirements:

- a particular child care facility; or
- a class of child care facilities.

When an individual facility or a specified class of facilities is exempted, this should be done in writing under the hand of the Director of Welfare. The exemption should be notified in the Gazette.

(para.436)

134. ***Family Day Care Schemes*** Family day care schemes should not at this stage be brought within a system of licensing or certification. However, the need for some form of legislative regulation should be re-assessed from time to time. The Children's Services Council should regularly review the operation of family day care schemes with a view to determining the desirability of introducing licensing or certification requirements.

(para.439, 442)

135. ***One Licence*** When a child care licence is granted, it should be granted to a particular person, but a condition of the licence should be that the licensee provides child care at a specified address.

(para.445)

136. ***Special Conditions*** The Director of Welfare should be empowered to impose conditions adapted to every type of licensed child care facility. Conditions should be specific so that the licensee's obligations are precisely defined. The types of matter to which the Director should give consideration when formulating the conditions of a licence include:

- the number and qualifications of staff;
- the facilities available and the condition of the premises;
- health and safety requirements;
- equipment; and
- management and type of program.

(para.446)

137. ***Director's Powers*** The Director of Welfare or the person nominated by him should have the power to enter premises to check their suitability before a licence is granted. He should also have the power to enter licensed premises to check that the conditions of the licence are being observed. In addition:
- The Director should be given the power, in cases of emergency, to cancel a licence quickly.
- Where the licensee is not complying with his obligations under the licence the Director should be able to take relatively rapid steps to cancel or suspend the licence. He should also have the power to impose new conditions, if changed circumstances warrant this.
- The Director of Welfare or the person nominated by him should be empowered to apply to a magistrate for a warrant to enter premises on which it is reasonably suspected that child care is being provided in contravention of the licensing provisions.
- The Director of Welfare should be empowered to remove children found on unlicensed child care premises, or children found on premises in respect of which the licence has been cancelled. He should also be permitted to restore the children to their parent or guardian, or to a relative. If no parent, guardian or relative can be located, the Youth Advocate should be informed so that consideration can be given to the initiation of care proceedings.

(para.447, 450)

138. ***Provisional Licences*** To cater for newly formed centres and organisations which will take time to develop, allowance should be made for the issue of provisional licences. Such a licence would be granted for a limited period (say six months) and could be issued on condition that, if certain requirements were not met within that period, the centre would not be allowed to continue to operate.

(para.448)

139. ***Guidelines*** Rather than the making of regulations, reliance should continue to be placed on guidelines to state the general standards to be met in licensed premises. New guidelines for child care in the A.C.T. should be drawn up by the Child Care Unit of the Welfare Division in consultation with providers and users of child care services. The proposed Childrens Services Council would provide an organisation within which this process could be undertaken. It might prove appropriate for the Council to establish a subcommittee to deal with the formulation of guidelines and other matters relevant to child care in the A.C.T.

(para.449)

140. ***Review by the Administrative Appeals Tribunal*** The Director's exercise of his powers with regard to the licensing of child care should be subject to review. Provision should be made for the Administrative Appeals Tribunal to review a decision of the Director.

(para.451)

Welfare Services

141. ***Need for Further Review*** A public inquiry into A.C.T. welfare services should be set up. The terms of reference of this inquiry should include:
- a comprehensive review of welfare services in the A.C.T. with a view to putting forward proposals for an integrated community welfare system in the A.C.T.;
- in particular, an examination of the roles of the Capital Territory Health Commission and the Welfare Branch with a view to formulating proposals as to the structure and functions of an integrated health–welfare authority with responsibility for policy-making, delivery of welfare and health services and co-ordination of the work of other welfare agencies (both government and non-government) in the Territory; and
- a thorough review of the operation of the Welfare Branch.

(para.510)

142. ***Membership of the Childrens Services Council*** The Council should be made up of the following *ex officio* members:
- the Childrens Magistrate;
- the Youth Advocate;
- the Director of Welfare;
- a representative of the Capital Territory Health Commission;
- a representative of the Australian Federal Police;
- a court counsellor attached to the Family Court of Australia in the A.C.T.;
- a representative of the A.C.T. Schools Authority;
- a representative of the Office of Child Care of the Commonwealth Department of Social Security; and
- a member of the House of Assembly.

In addition, the Minister for the Capital Territory should be empowered to appoint representatives of voluntary organisations, including those responsible for the care of mentally ill and handicapped children and children of migrants, and those who provide residential and child care facilities and general welfare and counselling services.

(para.518)

143. ***Functions of the Council*** The functions of the Childrens Services Council should include:
- the review of existing services and the identification of overlaps and deficiencies;
- the making of recommendations for the improvement of current practices and for the provision of new services;
- the better co-ordination of existing services;
- the investigation of matters referred to it by a member of the Council or by the Minister for the Capital Territory;
- the formulation of welfare policies and objectives;
- the monitoring of current welfare policies and programs and the commissioning of research into the causes, extent and treatment of youth problems in the A.C.T.;

- examination of the funding of voluntary organisations;
- the initiation and organisation of meetings or seminars, and the issuing of information or discussion papers.

(para.517)

144. ***Annual Report and Statistics*** The Childrens Services Council should assume responsibility for the preparation of an annual report on the child welfare system in the A.C.T. This report should include comprehensive statistics on police, court, welfare and health matters relevant to children.

(para.16, 517)

145. ***Funding*** The Department of the Capital Territory should, in consultation with the relevant voluntary agencies, formulate proposals relating to the funding of welfare services in the A.C.T. The aim should be a flexible system which will permit the Welfare Division to enter into a variety of arrangements with voluntary agencies. The Childrens Services Council should give specific consideration to the subject of funding welfare services in the A.C.T.

(para.515)

146. ***Parental Contributions*** Provisions should be formulated to allow the Childrens Court to order that a person responsible for a child should contribute to his upkeep while he is a residential placement.

(para.515)

1. Preparing the Report

The Report and its Background

1. ***The Reference*** This report arises out of a reference given to the Commission by the Attorney-General on 18 February 1979. Under the terms of reference the Commission was to inquire into child welfare law and practice in the Australian Capital Territory (A.C.T.). The Commission was asked 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 was asked to examine:

- the treatment of children in the criminal justice system;
- the position of children at risk of neglect or abuse by their parents or caretakers;
- 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 Child Welfare Ordinance 1957 (A.C.T.) and other laws of the Territory relating to the welfare of children, to the need to keep in mind the importance of viewing child welfare in the context of general community welfare, and to the Commission's obligation to consider proposals for uniformity between laws of the A.C.T. and the laws of other States (in particular, in this context, New South Wales (N.S.W.)).[1] It must be emphasised that the Commission has not undertaken a national inquiry into child welfare law and practice. This report deals only with the A.C.T., although, as will appear, many of the issues which must be addressed in the Territory are the same as those being considered elsewhere in Australia and overseas. The Commission was originally required to report by 31 October 1979. This deadline was subsequently extended, but it did not prove possible to meet the extended deadline. The issues raised by the reference were numerous and complex, and the Commission engaged in extensive consultation with relevant members of the local community. Difficulties were also caused by reductions in the Commission's resources during the inquiry and the expiry, on 30 June 1980, of Dr Seymour's appointment some time before the report was completed. Dr Seymour continued his association with the Commission to bring this report to a conclusion.

2. ***Interest and Activity in Child Welfare Reform*** The area of child welfare is one which has attracted a substantial amount of attention, both in Australia and overseas. In all of Australia's States and Territories child welfare laws are, or recently have been, under review, and a umber of reports have been produced analysing theories and practices and presenting proposals for reform. In Australia the following are the more important of the recent reports:

New South Wales:

Department of Youth and Community Services, Child Welfare Legislation Review,
Report of the Community Services Project Team, 1974.[2]
Recommendations of the Protection of Children Project Team, 1974.[3]
Recommendations of the Children in Care Project Team, 1974.[4]
Report of Juvenile Offenders Project Team, 1974.[5]
Review of the Child Welfare Act, 1939 — Childrens Courts and Associated Procedures, 1974.[6]

---

1 Under s.6(1)(d) of the Law Reform Commission Act 1973 (Cwlth) the Commission has an obligation to consider proposals for uniformity between the laws of the Territories and the laws of the States. Since the A.C.T. is completely surrounded by N.S.W., there is a particular need to ensure as much similarity as possible between A.C.T. and N.S.W. laws. Further, as is explained in Chapter 2, the A.C.T. makes use of certain N.S.W. child welfare facilities. This provides an additional reason for avoiding unnecessary differences between the laws in the two jurisdictions.

2 Hereafter referred to in this report as the Keir Report.

3 Giddings Report.

4 Doyle Report.

5 Payne Report.

6 Holt Report.

Report to the Minister for Youth and Community Services on Certain Parts of the Child Welfare Act and Related Matters, 1975.[7]
Report of the Child Welfare Legislation Review Committee, 1975.[8]
Report by the Minister for Youth and Community Services on Proposed Child and Community Welfare Legislation, 1978.[9]

Victoria:

Committee of Enquiry into Child Care Services in Victoria, *Report,* 1976.[10]

Queensland:

Report of the Committee on Child Welfare Legislation, 1963.[11]
Report and Recommendations of the Commission of Inquiry into the Nature and Extent of the Problems Confronting Youth in Queensland, 1975.[12]
Minister for Welfare, *Proposed Family Welfare Legislation: Discussion Paper,* 1979.
Minister for Welfare Services, *Paper on Family Welfare Legislation,* 1981.

South Australia:

Report of the Royal Commission into the Administration of the Juvenile Courts Act and Other Associated Matters, Part 2, 1977.[13]

Western Australia:

Department for Community Welfare, *Report of the Committee on the Future Development of the Juvenile Judicial System in Western Australia,* undated.

Tasmania:

Report of the Committee of Review into the Child Welfare Act 1960 (Tasmania) and State Social Welfare Services, undated.

Northern Territory:

A Report of the Board of Inquiry into the Welfare Needs of the Northern Territory Community, 1979.

In the A.C.T., the reference to the Commission was preceded by an inquiry conducted by the Standing Committee on Housing and Welfare of the A.C.T. Legislative Assembly.[14] The Commission has reviewed the recommendations of that inquiry. Overseas there has been a considerable amount of recent activity in the child welfare field. In England there has been a continuous process of reassessment over the last 20 years.[15] Scotland introduced major reforms in 1968.[16] Both in

7 Muir Report.
8 Phibbs Report.
9 The Green Paper. Many of the recommendations in the Green Paper were embodied in the N.S.W. Community Welfare Bill, which was tabled in 1981. The Commission's report was substantially complete when the Bill was tabled and it was therefore not possible to include an examination of the Bill's provisions.
10 Norgard Report. In 1981 the Victorian Attorney-General and the Minister for Community Welfare Services announced a further review of the Childrens Court system.
11 Dewar Report.
12 Demack Report.
13 Mohr Report.
14 See Standing Committee on Housing and Welfare of the A.C.T. Legislative Assembly, *Report No.8: Child Welfare,* (1978).
15 *Report of the Committee on Children and Young Persons,* Cmnd. 1191, (1960), (Ingleby Report); *The Child, the Family and the Young Offender,* Cmnd. 2724, (1965); *Children in Trouble,* Cmnd. 3601, (1968); Eleventh Report from the Expenditure Committee, The Children and Young Persons Act, 1969, *(1975), (2 vols.); Children and Young Persons Act 1969,* Cmnd. 6494, (1976); *Young Offenders;* Cmnd. 8045 (1980).
16 See Social Work (Scotland) Act 1968 whose provisions were based on the recommendations contained in *Children and Young Persons Scotland,* Cmnd 2306, (1964) (Kilbrandon Report) (hereafter *Kilbrandon Report).*

Canada[17] and the United States of America[18] substantial reports on child welfare laws have recently been produced. Indeed, it seems that in many parts of the Western world child welfare policies are under continual review. 'The whole history of child welfare is a history of reform. We are never quite satisfied.'[19]

3. ***Terminology*** Throughout this report, unless otherwise indicated, the term 'child' is used in a general sense to refer to all persons under the age of 18. Although the term is an unsatisfactory one (as today it seems artificial to refer to older teenagers as 'children') any other term is equally unsatisfactory. The terms 'child' and 'children' are well established and have long been recognised by the law in Australia, and the advantages to be derived from employing a new term (such as 'youth', 'juvenile', or 'young person') are outweighed by the disadvantages of introducing new terminology. Further, for stylistic reasons, masculine pronouns in this report are intended to apply both to males and females.[20] The term 'parent' is used in a general sense and includes a child's guardian.

4. ***The Scope and Arrangement of the Report*** The terms of reference of the inquiry specifically required an examination of child welfare law *and practice* in the A.C.T. Hence this report is not confined to an analysis of the relevant legislation. In undertaking the task delineated by the terms of reference, the Commission has concentrated on the problems of children in trouble. Most of this report is concerned with procedures for dealing with young offenders, neglected, abused and uncontrollable children. Because reforms in these procedures will be of little value unless the supporting welfare services are functioning satisfactorily, recommendations regarding children in trouble must be combined with an analysis of the operation of A.C.T. welfare agencies.
Accordingly, a separate chapter has been devoted to an examination of the organisation and integration of welfare services. In addition to reviewing methods of dealing with children in trouble, the report also considers child care and the employment of children. The report includes proposed new child welfare legislation for the A.C.T.[21] This legislation is set out in Appendix A.

5. ***Topics for Future Consideration*** Limitations in time and resources have meant that it has not been possible to undertake a total review of all aspects of child welfare in the A.C.T. A number of matters are not dealt with in this report. All are sufficiently important to warrant careful examination. As is indicated below, some of the topics not covered are already under consideration. Further, the Commission recommends the establishment of a Childrens Services Council[22], to bring together

17 See The Report of the Department of Justice Committee on Juvenile Delinquency, *Juvenile Delinquency in Canada,* (1967); A Report of the Solicitor-General's Committee on Proposals for New Legislation to replace the Juvenile Delinquents Act, *Young Persons in Conflict with the Law,* (1975) (hereafter *Young Persons in Conflict with the Law);* Canadian Council on Children and Youth, *Admittance Restricted: The Child as Citizen in Canada,* (1978) (hereafter *Admittance Restricted);* Ontario Law Reform Commission, *Report on Family Law, Part III, Children,* (1973); Ryant et al., *A Review of Child Welfare Policies Programs and Services in Manitoba,* (1975); British Columbia, *Report of the Royal Commission on Family and Children's Law,* (1975).
18 President's Commission on Law Enforcement and Administration of Justice, *Task Force Report : Juvenile Delinquency and Youth Crime,* (1967), (hereafter *Task Force Report);* the series of reports produced by the Institute of Judicial Administration and the American Bar Association as part of the Juvenile Justice Standards Project (hereafter *Juvenile Justice Standards Project);* and the National Advisory Committee on Criminal Justice Standards and Goals, *Juvenile Justice and Delinquency Prevention,* (1976) (hereafter *Juvenile Justice and Delinquency Prevention).*
19 Professor A.J. Kahn, address to the national conference, 'Towards an Australian Family Policy,' Sydney, 8–12 May 1980.
20 The Commission notes the objections raised to the use of this pronoun. See, for example, Foreman, (1980) 4 *Crim LJ* 256, 257, and Lynette Inde, Oral Submission, *Transcript of Public Hearing* (hereafter *Transcript)* (Canberra 5 May 1980), 91. As to the use of the words 'child' and 'young person', see para.64.
21 The Commission is aware of the developments which, in other Australian jurisdictions, have led to the enactment of broad community welfare statutes. The Department of the Capital Territory drew particular attention to these enactments. *Submission,* 11–12. Some of the issues relevant to legislation of this kind are discussed in Chapter 13. The Commission has taken the view that a consideration of all the matters which the preparation of community welfare legislation for the A.C.T. would require is beyond its terms of reference. It has therefore confined itself to producing a draft Child Welfare Ordinance. Further, the submission prepared by the Department of the Capital Territory commented that 'the urgent need is for improved legislation relating to the residual child welfare function.' id., 13.
22 See para.516.

A.C.T. agencies and individuals involved in helping children. Several of the matters beyond the scope of this report would be suitable for examination by the proposed Council or by the Institute of Family Studies, or both.

Mentally ill and handicapped children. This report does not deal specifically with the needs of mentally ill or handicapped children. However, if these needs are such as to warrant protective intervention by the Childrens Court, a mentally ill or handicapped child, like any other child, will have the advantage of the new procedures recommended by the Commission in Chapter 8. Further, a number of the Commission's proposals (such as those relating to powers exercisable in respect of children who have been made wards by the Childrens Court) are just as relevant to mentally ill or handicapped children as to other children. In addition, those working with mentally ill or handicapped children should be represented on the Childrens Services Council. With regard to the particular problems of children who are mentally ill, it is felt that consideration of their needs must be undertaken as part of a broader study of mental health legislation. It is understood that a review of this legislation is at present being undertaken by the Capital Territory Health Commission and the Commonwealth Attorney-General's Department.[23] It should also be noted that the United Nations General Assembly has designated 1981 as the International Year of Disabled Persons.[24] It would be appropriate if a special study of the needs of handicapped children were undertaken as part of other activities in connection with the problems of the handicapped.

Guardianship of immigrant children. Under s.6 of the Immigration (Guardianship of Children) Act 1946 (Cwlth) the Minister for Immigration and Ethnic Affairs assumes the guardianship of every immigrant child who enters Australia other than in the charge of a parent or relative. Special issues are raised by this legislation. The Commission has been unable to explore these issues.[25]

Inherent wardship powers of State Supreme Courts. The power of a State Supreme Court to make a child of a marriage a ward of court is at present a matter of uncertainty.[26] This matter is under review by the Family Law Council. It is therefore preferable for the Commission not to deal with it, although the nature of wardship is relevant to questions dealt with in this report. The powers exercisable over a ward are discussed in Chapter 9.

Migrants. The Commission's attention was drawn to special problems which can arise when migrants' child-rearing practices are not in accordance with those in the majority of Australian families. Further, it was pointed out that some migrants experience difficulties in their contacts with a child welfare system which is not sensitive to their points of view.[27] However, although this report does touch on the special needs of migrants in the field of day care, it has proved impossible to undertake a detailed study of the particular problems faced by the children of migrants.

Aboriginals. Like handicapped children and the children of migrants, Aboriginal children represent a special group whose particular needs the Commission has not had the time or the resources to examine. It has not proved possible to undertake a study of any special problems of the Jervis Bay community. In the Jervis Bay Territory, where the laws of the A.C.T. apply, there are a significant number of Aboriginal children. Although the A.C.T. Child Welfare Ordinance applies to this Territory[28], it does not contain any special provisions relevant to it. In its work on Aboriginal customary law[29], the Commission is undertaking an examination of some of the problems caused by the impact of the criminal law on Aboriginals.

Police and court records. The compilation of police and court records regarding young offenders raises complex questions about the types of records which should be kept, the period for which they should be kept, the use which should be made of them, and the possibility of introducing procedures to allow certain records to be expunged or otherwise modified or dealt with after a given period has elapsed. As the Commission has received a reference on Privacy, it has been decided to deal with these matters as part of that reference.[30]

6. ***Children's Rights*** Although the possibility of identifying and articulating 'children's rights' is attracting increasing attention[31], this report does not deal with the subject as a separate topic. It is not the normal practice for legislation in Australia to enumerate abstract rights. What are often spoken of as 'rights', for example, 'a right to adequate nutrition, housing, recreation and medical services'[32], are in reality statements of broad aspirations. As such, they are not enforceable in the courts. Normally broad objectives are, in Australia, given legislative effect in statutes expressed in terms of specific duties. The fact that the Commission has not dealt separately with the subject of children's rights does not mean that it has ignored the legal safeguards which children are entitled to expect in their dealings with the criminal justice and welfare systems. Nor is the position of parents and guardians ignored. A concern for legal protections which the child welfare system should provide for parents and children is central to this report. In making recommendations regarding procedures for dealing with young offenders, for example, particular emphasis is placed on the importance of due process of law and on the need for a child charged with an offence to be afforded all the protections available to an adult in a similar situation. The need to clarify the law relating to dispositional measures is also stressed, as is the desirability of reducing the scope for administrative discretion in the implementation of the court's orders. Special attention is paid to defining the legislative grounds for coercive intervention in the lives of children who have not committed an offence. It is recommended that these grounds be narrower and more precise, so that intervention will be minimised and confined to those situations in which it is necessary to protect the child against clearly defined forms of harm. Certain principles are proposed, designed to guide the Childrens Court in selecting the appropriate order when a child has been found guilty of an offence or is in need of care. Procedures for protecting children who have been, or who are likely to be, the victims of physical or sexual abuse are outlined. Consideration is also given to the protection which the law should give to children in child care facilities and to children in employment. Thus, while not addressing 'children's rights' as a discrete topic, this report deals at length with the safeguards which the new Child Welfare Ordinance should provide for children coming within its scope. Finally, it should be noted that the Human Rights Commission Act 1981 (Cwlth) is relevant to the subject of children's rights in Australia. This Act proposes the establishment of a Human Rights Commission

---

23 See Capital Territory Health Commission, *Annual Report 1978–1979,* 15. A submission received from the Australian Association for the Mentally Retarded Inc., indicated that the Association was disturbed by the inquiry into child welfare law and practices being undertaken in isolation from the proposed Mental Health Ordinance. *(Submission,* 8 May 1979, 1). An inquiry into the special problems of the mentally handicapped is currently in progress in Victoria and a similar inquiry has recently concluded in South Australia.

24 A/RES/34/154 United Nations 105 Plenary Session, 17/12/1979, Pub 30/1/80.

25 Some of the problems raised by the legislation were considered by the Administrative Review Council. In the Council's *Fourth Annual Report,* (1980), para.68, it is recommended that these problems be considered by the Commonwealth Attorney-General's Department or be referred to the Family Law Council or the Law Reform Commission. The Administrative Review Council is itself undertaking a major examination of administrative discretions under immigration law.

26 See *Meyer* and *Meyer* (1978) 35 FLR 192, (1978) FLC 90–465. See also *Lamb* v. *Lamb* (No 1) (1977) FLC 90–225; *Third Annual Report of the Family Law Council,* para.87 and 88; Report of the Joint Select Committee on the Family Law Act, *Family Law in Australia,* Vol.1, (1980), 49; *Clarke* v. *McInnes and Others* (unreported judgment of Helsham CJ in Eq., Supreme Court of N.S.W., March 1978, see (1978) 52 *ALJ* 238 and 466); *In the Marriage of Kosmidis and Kalogaropoulos* (1980) FLC 90–849 (noted (1981) 55 *ALJ* 227).

27 Paulina Gajardo, Oral Submission, *Transcript* (Canberra 5 May 1980), 93–98.

28 By virtue of s.4(2) of the Jervis Bay Territory Acceptance Act 1915 (Cwlth) all laws, ordinances and regulations in force in the A.C.T. shall, so far as they are applicable, apply in Jervis Bay.

29 *Aboriginal Customary Law–Recognition?* ALRC DP 17, (1980).

30 On the subject of criminal records, see N.S.W. Privacy Committee, *Report on the Collection, Storage and Dissemination of Criminal Records by the Police* (1979), and submissions (dated 28 February 1979 and 4 June 1979) on the Green Paper.

31 See, for example, *United Nations Declaration of the Rights of the Child,* (1959); Burt, 'Developing Constitutional Rights of, in, and for Children,' *Law and Contemporary Problems,* 39(3), 118 (1975); Sachs, 'Children's Rights', in Bridge et. al., (eds), *Fundamental Rights,* (1973); Forer, 'Rights of Children: The Legal Vacuum', 55 *American Bar Association Journal,* 1151 (1969); Weisberg, 'Evolution of the Concept of the Rights of the Child in the Western World,' *International Commission of Jurists Review,* No. 21, December 1978, 43. See also Department of the Capital Territory, *Submission,* 14–19, and Foreman, *Submission,* 11–14.

32 Principle 4, *United Nations Declaration of the Rights of the Child,* (1959).

whose functions are to include examining, inquiring into, and reporting on federal laws and practices which are inconsistent with, or contrary to, provisions in the Declaration of the Rights of the Child, proclaimed by the General Assembly of the United Nations on 20 November 1959.

Methodology: Consultation

7. ***Consultants*** During the course of its work on the reference the Commission was assisted by a number of consultants whose names are set out in the list of participants in this project. They included a magistrate and a number of lawyers. There was also a psychiatrist, a senior police officer and several persons with social work skills.
Numerous meetings were held at which all the consultants were brought together to discuss with the Commissioners and with each other aspects of the reference. Members of the Commission also held many discussions with individual consultants. The Commission has benefited greatly from the contributions made by the consultants. It records its appreciation to them and to the institutions or individuals responsible for making their services available on an honorary basis. The recommendations made in this report are necessarily the responsibility of the Commissioners and may not reflect the views of the consultants.

8. ***Discussion Papers*** Two discussion papers were published. One, *Children in Trouble,* appeared in April 1979. The other, *Child Abuse and Day Care,* was published in April 1980. Both were widely distributed in the A.C.T. and throughout Australia. Both aroused considerable interest. The comments received have been of great assistance to the Commission in the preparation of this report.

9. ***Public Hearings*** Two public hearings were held in Canberra. The first was held on 10 May 1979 and the second on 5 May 1980. The two hearings were well attended. Many observers attended, in addition to those making submissions. The persons who made submissions at each of these hearings are listed in Appendix D. In association with the public hearings and discussion papers, the issues before the Commission were discussed by the Chairman and the Commissioner in charge in 'talkback' radio programs and interviews in Sydney, Melbourne and Canberra before audiences of several hundred thousand. As a result of these programs many written submissions were received.

10. ***Submissions Received*** The Commission has received a large number of thoughtful and helpful written submissions relating to the child welfare inquiry. These submissions have been of considerable value to the Commission. A list of the persons and organisations who made written submissions is contained in Appendix D.

11. ***Seminars*** In order to bring together persons in the A.C.T. interested in the child welfare field, the Commission organised a series of seminars. Seminars were held for each of the following groups:

- magistrates and lawyers;
- representatives of voluntary agencies;
- members of the Welfare Branch of the Department of the Capital Territory;
- members of the Capital Territory Health Commission;
- members of the Australian Federal Police;
- A.C.T. Schools Authority Guidance Counsellors; and
- A.C.T. Schools Authority School Principals.

12. ***Conferences and Meetings*** During the course of work on the reference, members of the Commission attended a number of conferences and meetings. These included the national conference on 'The Child, The Family and The Community', held in Canberra, 16–19 March 1979, the international conference 'Total Child Care', held in Sydney 29–30 September 1979, the national conference 'Towards an Australian Family Policy', held in Sydney 8–12 May 1980, the Inter-disciplinary Conference on Child Neglect and Abuse, held in Sydney 24–28 September 1980, and seminars run by the Human Resource Centre, Department of Social Work, La Trobe University, on 9 June 1980 and 1 June 1981. In addition, many meetings were attended. These included a workshop run by the Council of Social Service of the A.C.T., meetings on child abuse held at the Royal Canberra and Woden Valley Hospitals, a meeting of the N.S.W. Privacy Committee, one with the A.C.T. Parents Without Partners, a meeting of N.S.W. magistrates held to discuss the Green Paper, the A.C.T. Schools Authority Multi-Disciplinary Team Development Project, a number of A.C.T. inter-governmental meetings, a meeting of the A.C.T. Childrens Services Sub-committee, a discussion, 'Rights and Responsibilities of the Child' organised by the A.C.T. International Year of the Child Committee, and a meeting of child care students at the Canberra College of Technical and Further Education. Meetings organised by the UNICEF Committee of Australia and the Youth Refuge Association, Inc., of Canberra were also attended.

13. ***Discussions*** In addition to formal conferences and meetings, members of the Commission also spoke to very many interested individuals. It is not possible to list all of these, but they included members of the Welfare Branch and of the Australian Federal Police, representatives of the Australian Bureau of Statistics, the National Capital Development Commission and the A.C.T. Schools Authority, members of the then Legislative Assembly, officers of the A.C.T. Legal Aid Commission, the N.S.W. Council of Civil Liberties, magistrates and court staff, members of the Office of Child Care and of the Commonwealth Attorney-General's Department, family day-care co-ordinators, representatives of voluntary agencies such as the Marymead Children's Centre, Dr Barnardo's in Australia, Outreach Incorporated, and the Parent Support Service, the Lions and Salvation Army Hostel staff, representatives of the Council of Social Service of the A.C.T. and of the A.C.T. Schools Authority, Family Court Judges and Counsellors, and officers of the N.S.W. Department of Youth and Community Services.

14. ***Visits*** Members of the Commission visited a number of institutions and agencies involved in child care in the A.C.T. Included in these visits were homes run by Dr Barnardo's in Australia, homes run by Outreach Incorporated, the Lions and Salvation Army Hostel, the Marymead Children's Centre, and the Quamby Children's Shelter. In addition, members of the Commission were permitted to attend and observe sittings of the A.C.T. Childrens Court normally closed to the public.

15. ***Children's Views*** When inquiring into child welfare matters it is obviously of the utmost importance to endeavour to obtain the views of those most affected. Accordingly, the Commission arranged a series of visits to a number of A.C.T. schools in order to obtain the opinions of young people. Members of the Commission visited six schools and there spoke with children of all ages. The schools visited were St Edmund's College, Narrabundah College, Phillip College, Weston Creek High School, Ainslie Primary School and the School Without Walls. Discussions were also held with children in homes run by Dr Barnardo's and in the Quamby Children's Shelter. The Commission expresses its appreciation to all those who facilitated these processes of consultation.

Methodology: Surveys

16. ***Absence of Statistics*** At the outset of its inquiries the Commission became aware that there are no adequate statistics on the operation of the child welfare system in the A.C.T.[33] Neither the court nor the police nor the Welfare Branch of the Department of the Capital Territory produces comprehensive statistics of the cases handled and the outcome of such cases.[34] Aware of the danger of making recommendations based on 'impression and anecdote rather than solid evidence'[35], the Commission was faced with the task of assembling its own statistical information. This it did by carrying out a number of surveys. These are listed below. The absence of statistics is deplorable. The compilation of statistics should not be viewed as the pursuit of knowledge for its own sake. It is impossible to understand the impact of legal measures without adequate statistical information.[36]

---

[33] Certain relevant statistics have, however, been published by the Australian Bureau of Statistics. These are *Persons under Guardianship and Children in Substitute Care, June 1979.* The statistics in this publication have been produced by Welstat, which is a committee of the Social Welfare Ministers of Australia. Also, the Australian Institute of Criminology has begun publishing a series of statistics under the title *Persons in Juvenile Corrective Institutions.*

[34] The court known as the A.C.T. Childrens Court is in fact the Court of Petty Sessions (see para.39) The Court of Petty Sessions publishes no statistics. The annual reports of the Welfare Branch of the Department of the Capital Territory include some statistics, the most relevant for the purposes of this report being those on children in care, young offenders and institutional services. However, these are far from comprehensive. Before 1979 the annual reports of the A.C.T. Police contained statistics of cases handled by the Juvenile Aid Bureau and tables giving the age and sex of offenders apprehended. The latter tables combined all offenders under 14 and thus did not allow detailed analysis of age patterns.

[35] Chisholm, 'Children in Need of Care,' (a submission on the *Green Paper),* 1979.

[36] For a discussion of the need for national crime statistics, see ALRC 15, (1980), para.74-77. See also below, para.146.

Lawmakers must act in the dark if they are not supplied with satisfactory statistics on the operation of the laws which they enact. The collection of A.C.T. child welfare statistics should be greatly improved. Comprehensive statistics should be published annually. These should include:

- *Police statistics.* These should indicate the number of children warned and the number prosecuted, the number arrested and the number dealt with by way of summons, the use made of the power to take fingerprints and photographs, the number of children held in custody, the age and sex of those dealt with as offenders, and the offences for which they come to notice.
- *Childrens Court statistics.* These should indicate the use made of the power to remand in custody, the age and sex of those appearing before the Childrens Court, the charges faced and the grounds employed for non-criminal proceedings, and the outcome of the hearing. Full details should be published of all orders made.
- *Welfare and health statistics.* Other statistics relating to children and families assisted by the Welfare Branch of the Department of the Capital Territory, by the Capital Territory Health Commission, and by voluntary agencies should also be published. In particular, comprehensive statistics of reported cases of child abuse should be published.[37]

Later in this report attention is drawn to the fragmented and unco-ordinated nature of the child welfare system in the A.C.T.[38] Although the Childrens Court, the Australian Federal Police and the Welfare Branch of the Department of the Capital Territory could each compile statistics relating to the cases with which they deal, what is needed is a comprehensive and integrated set of statistics, published annually. The Childrens Services Council is the only agency which would be in a position to co-ordinate the collection of statistics, since it should include representatives of all agencies involved in child welfare in the A.C.T. It is therefore recommended that the Childrens Services Council assume responsibility for the preparation of an annual report on the child welfare system in the A.C.T. This report should include comprehensive statistics.

17. ***Childrens Court Statistics*** An analysis was prepared of all A.C.T. Childrens Court cases which were completed between 1 June 1978 and 31 May 1979. This analysis permitted the Commission to examine the types of offence which brought the children before the court, the number of neglected and uncontrollable children who appeared before the court, the age and sex of the children involved, and the orders which resulted from their appearance before the court. The results of these surveys are presented in tables contained in Appendix B.

18. ***Recidivism Study*** In order to obtain some information about re-offending rates among young offenders who appear before the A.C.T. Childrens Court, the Commission conducted a recidivism study. The names of all children dealt with for offences between 1 January 1976 and 30 June 1976 were extracted from the Childrens Court register. This produced a sample of 509 children. A list of their names was then forwarded to the Australian Federal Police, who checked their records for any subsequent court appearances. Care was taken to ensure the confidentiality of the names extracted. The resulting study covered all the re-appearances in court before the end of October 1979. The results of this survey are outlined in para.125.

19. ***Welfare Branch Files*** The principal government body responsible for the provision of services required under the A.C.T. Child Welfare Ordinance is the Welfare Branch of the Commonwealth Department of the Capital Territory. In order to obtain as full an understanding as possible of the work of this Branch, the Commission undertook a study of all available Welfare Branch files compiled during 1977 and 1978. Lack of research assistance meant that it was not possible to produce a systematic analysis of the material contained in these files. However, valuable information was extracted regarding the work of the Branch and the types of cases with which it has to deal. A description of the Branch and its work is contained in the chapters on offenders and children in need of care, and in Chapter 13.

---

[37] For a fuller discussion of the form and content of comprehensive child welfare statistics, see Australian Bureau of Statistics, *Final Proposals for a National System of Court Statistics for Criminal and Child Welfare Matters*, (1980).

[38] Chapter 13.

20. ***Neglect and Uncontrollability Charges*** As will be explained later in the report, the Childrens Court presently deals not only with offenders but also with children who are neglected or uncontrollable. In order to find out who these non-criminal children are and what types of problem bring them to notice, the Commission undertook a study of all neglect and uncontrollability matters brought before the court between 1 January 1979 and 30 June 1979. The results of this survey are contained in para.273–274.

21. ***Police Contacts with Children*** To gain a better understanding of police procedures in the A.C.T. and to gain information about the use made of police warnings, the Commission conducted a survey of police contacts with children. Members of the police were, between 1 June and 30 August 1979, asked to complete a brief questionnaire every time they dealt with a child. The results are referred to in para.70.

22. ***The Work of the Juvenile Aid Bureau*** There is in the A.C.T. a specialist police unit known as the Juvenile Aid Bureau. The composition and duties of the Bureau are dealt with in para.37. Cases handled by this bureau are recorded in special occurrence books. The Commission undertook an analysis of the cases recorded in these books in 1978. The results of this analysis are presented in para.38.

23. ***Children who are Charged*** Whenever a person, adult or child, is arrested and charged with an offence, the details of the charge must be recorded in a police Charge Book. The Commission undertook an analysis of the 1978 Charge Books in order to learn in what circumstances children are charged, and also to learn in what situations children have their fingerprints taken and are photographed. The results are set out in para.80.

24. ***Acknowledgments*** The Commission gratefully acknowledges the assistance received from a large number of agencies and individuals. In particular, mention must be made of those who presented oral submissions at the public hearings, those who prepared written submissions, the consultants, members of the Australian Federal Police and the Welfare Branch, and Childrens Court magistrates and staff. None of the statistical surveys undertaken would have been possible without the ready co-operation of police, welfare and court staff. The Commission is most grateful to them. Particular thanks are due to Mr W. Clifford, the Director of the Australian Institute of Criminology, and to Mr D.B. Biles, the Institute's Assistant Director (Research). They assisted the Commission by making available the resources of the Institute and by permitting Dr Seymour to work with the Commission on a full-time basis throughout the entire period of the inquiry. The Commission is also grateful to Mr C. Bevan, the Assistant Director (Training) of the Institute. He organised a seminar, 'Children's Rights and Justice for Juveniles', which was held from 29 January to 1 February 1980. At this seminar the Commission was given an opportunity to present tentative proposals and benefited greatly from the comments received. This is the second major project within two years in which the Commission has received substantial assistance from collaboration with the Institute.

Demographic Data on the A.C.T.

25. In order to put its study of the child welfare system into context, the Commission has assembled a number of relevant statistics regarding the general A.C.T. population. A high proportion of this population is young; 31 percent is under 15 years (as compared with 27 percent in the Australian population).[39] Most people in the Territory were not born there but came from interstate or overseas. Less than 20 percent were born in the A.C.T.[40] The overall educational level is high; over 11 percent of the population aged 15 years and over have a bachelor degree or higher (the figure for the equivalent Australian population is 2.7 percent). The proportion of the population with other tertiary, technical and trade qualifications is also high.[41] Income distribution is atypical. Less than 28 percent of A.C.T. families at the time of the last census earned less than $9,000 compared with over 51 percent of the families in the Australian population. More than 22 percent had incomes in excess

---

[39] Australian Bureau of Statistics, 1976 Census: *Characteristics of the Population and Dwellings in Local Government Areas – Australia*, and Australian Bureau of Statistics 1976 Census: *Characteristics of the Population and Dwellings in Local Government Areas – Australian Capital Territory* (243.0).

[40] ibid.

[41] ibid.

of $18,000 per annum, while the figure for families in the Australian population was just over 7 percent.[42] A number of other statistics have particular relevance to this reference. The proportion of married women who work is high. In July 1980, 53 percent of married women in the A.C.T. worked, compared with an Australian average of 43 percent.[43] The proportion of single parent households is high 4.3 percent of families compared with an Australian figure of 3.8 percent.[44] Further, the divorce rate in the A.C.T. is much higher than in the rest of Australia. The figures for 1978 indicate that the annual divorce rate per 1,000 of the population was 5.9 in the A.C.T. and 2.9 in Australia as a whole.[45] Finally, mention must be made of the high unemployment rate among the young in the A.C.T. The labour force survey conducted by the Australian Bureau of Statistics in February 1981 indicated that, of those eligible for the full-time work force, some 29.7 percent of young people aged between 15 and 19 were unemployed. This must be compared with the national average of 18.6 percent for this age group.[46] In short, the A.C.T. is not a typical jurisdiction of Australia. It is small and urbanised, and its population has special characteristics. The distinctive features of the A.C.T. must be taken into account in any examination of, and proposals for reform relating to, the Territory's child welfare system. This system must be responsive to the needs of the community which it serves.

[42] ibid.
[43] Australian Bureau of Statistics, *Labour Force Australia*, July 1980.
[44] Australian Bureau of Statistics, 1976 Census.
[45] Australian Bureau of Statistics, *Divorces, Australia, 1978*, Cat No. 3307, Table3.
[46] Australian Bureau of Statistics, *Unemployment, Australia, February 1981 Preliminary Estimates* (Final), (13 March 1981), 3–4.

2. Children in Trouble: The Present System

Offenders and Non-offenders: Overlapping Systems

26. The term 'children in trouble' is used in this chapter in a general sense to include not only those who have come to the notice of the criminal justice system, but also those who are dealt with as being neglected or uncontrollable.[1] Both categories of children may become the subject of procedures under the Child Welfare Ordinance 1957 (A.C.T.). Much of this report is concerned with the two overlapping systems which the Ordinance has created. As will be explained, the overlap between them is an extremely important feature of child welfare law and practice in the Territory, and gives rise to many of the problems which the system is at present facing. Before the various procedures and services for dealing with children in trouble in the A.C.T. are described, however, it will be helpful to outline the history of the Ordinance.

History of the Child Welfare Ordinance

27. ***Early N.S.W. Laws*** The Child Welfare Ordinance 1957 (A.C.T.) was based on the Child Welfare Act 1939 (N.S.W.). To understand the origins of this Act is is necessary briefly to review earlier N.S.W. enactments. In the first part of the nineteenth century, a Female Orphan School and a Male Orphan School were established in N.S.W.[2] A series of Acts permitted children from these schools, and other categories of poor children, to be placed in apprenticeships.[3] Included in the categories of children eligible to be placed in apprenticeships were children in any charitable or public institution, and children convicted of vagrancy or of any criminal offence.[4] Provision was also made, in an 1840 statute, for two justices to place a deserted child, in respect of whom a maintenance order had been made against the father, in an apprenticeship.[5] In 1858 this statute was amended to allow two justices to order that such a child be placed in the Destitute Children's Asylum or any other public institution.[6] Earlier, a special measure had been enacted with respect to persons under the age of 19 who were convicted of a felony or misdemeanour. In 1849 it was provided that anyone willing to take charge of such a person could apply to the Supreme Court of N.S.W. to have him placed in his care or custody. If successful, the applicant could assume responsibility for the offender for all or part of his minority.[7] In 1850 an Act was passed 'for the more speedy trial and punishment of Juvenile Offenders'.[8] This Act provided for summary conviction by justices of persons under the age of 14 who were charged with simple larceny. Penalties were imprisonment for a term not exceeding three months or a maximum fine of £3, or dismissal on finding sureties for good behaviour.

28. ***The Industrial Schools Act of 1866 and the Reformatory Schools Act of 1866 (N.S.W.)*** These Acts laid the foundations for a special governmental institutional system for children in trouble in N.S.W. Under s.6 of the Industrial Schools Act 1866 (N.S.W.) two or more justices could order a vagrant or destitute child under the age of 16 years to be sent to a public industrial school. The child could be detained in such a school until he attained the age of 18 years, although provision was made

[1] The meaning of these terms is discussed in para.252.
[2] Coulter, *Randwick Asylum; an historical review of the Society for the Relief of Destitute Children 1852–1915*, (1916).
[3] 5 William IV., No.3 (1834); 8 Vic., No.2 (1844); 14 Vic., No.29 (1850); 15 Vic., No.2 (1851).
[4] Preamble, 15 Vic., No.2 (1851).
[5] 4 Vic., No.5 (1840), s.XII.
[6] 22 Vic., No.6 (1858), s.11. The Destitute Children's Asylum, also known as the Randwick Asylum for Children, was permanently housed at Randwick, N.S.W., from 1858. It was established as a result of the work of the Society for the Relief of Destitute Children, founded in 1852, and incorporated by statute in 1857 (20 Vic., No.19). The Asylum was until 1915 the major child welfare institution in N.S.W. See Coulter.
[7] 13 Vic., No.21 (1849).
[8] 14 Vic., No.2, (1850).

for earlier discharge or placing out as an apprentice.[9] The classes of children liable to be placed in an industrial school are of interest, since the definition of a 'neglected child' contained in the present Ordinance[10] embodies some of the language used in the early statute. A child liable to apprehension under the 1866 Act was one who:

> shall be found lodging living residing or wandering about in company with reputed thieves or with persons who have no visible lawful means of support or with common prostitutes whether such reputed thieves persons or prostitutes be the parents or guardians of such child or not or who shall have no visible lawful means of support or who shall have no fixed place of abode or who shall be found begging about any street highway court passage or other public place or who shall be found habitually wandering or loitering about the streets highways or public places in no ostensible lawful occupation or who shall be found sleeping in the open air.[11]

Reformatory schools were intended to be distinct from industrial schools. When any person under the age of 16 was convicted of an offence punishable by imprisonment for a period of 14 days or longer, this person, in addition to, or instead of, any other sentence, could be sent to a reformatory school. He could be detained there for not less than one year and not more than five years.[12]

29. ***State Children Relief Act of 1881 (N.S.W.)*** It was not long before the institutional care of children attracted criticism. In 1874 a Royal Commission on Public Charities recommended a system of 'boarding out' for such children.[13] This system had been introduced in South Australia in 1872. [14] However, N.S.W. legislation, the State Children Relief Act, was not passed until 1881. The aim of the 'boarding out' scheme was to permit children to develop in an ordinary family atmosphere rather than in an institution. The State Children's Relief Board was established to supervise the scheme.[15]

30. ***The Criminal Law Amendment Act of 1883 (N.S.W.)*** Under this Act special provision was made for persons under 16 convicted on indictment. When dealing with such persons, the court was, under s.382 of that Act, empowered to abstain from imposing a sentence if the person entered into a recognizance to appear for sentence within three years. The power to send the offender to a reformatory school was also conferred by this section.

31. ***Children's Protection Act 1892 (N.S.W.)*** Under this statute a neglected or ill-treated child could be taken into custody and held in a place of safety[16], and a Court of Petty Sessions could commit such a child to the care of a relation or some other fit person.[17] Further, by virtue of s.21 of the Act, any Stipendiary or Police Magistrate was empowered, in lieu of committing to prison a child under 14 convicted of any offence, to 'hand over' such a child to a home for destitute or neglected children or to an industrial institution. The managers of such a home or institution were permitted to arrange the adoption or apprenticeship of such a child. In 1900 the courts' powers were extended by the Children's Protection Act Amendment Act 1900 (N.S.W.).

32. ***Crimes Act 1900 (N.S.W.)*** This provided for special penalties for young offenders. 'Boys' (males aged 10 and under 14) and 'youths' (males aged 14 and under 18) summarily convicted for the first time of certain specified offences could be fined up to 40 shillings or detained in any lock-up or police station for not less than six, and not more than 96, hours. Provision was also made for the release of the offender, after six hours detention, if an approved person entered into a recognizance for the offender's good behaviour during the next six months.[18] Provision was also made for the

9 Industrial Schools Act of 1866 (N.S.W.), s.7.
10 See para.252.
11 Industrial Schools Act of 1866 (N.S.W.), s.4.
12 Reformatory Schools Act of 1866 (N.S.W.), s.4.
13 N.S.W. Royal Commission appointed to inquire into and report upon the public charities of the colony, *Reports*, (1873 and 1874).
14 Mendelsohn, *The Condition of the People: Social Welfare in Australia 1900-1975*, (1979), 177.
15 State Children Relief Act of 1881 (N.S.W.), s.4.
16 Children's Protection Act 1892 (N.S.W.), s.19(1).
17 id., s.20(1).
18 Crimes Act 1900 (N.S.W.), s.482–484.

whipping of boys and youths convicted of certain offences, and for the whipping of males under 16 who were convicted on indictment.[19] This penalty was not abolished in the A.C.T. until 1974.[20]

33. ***Neglected Children and Juvenile Offenders Act 1905 (N.S.W.)*** This Act provided the foundation for much of the present law in force in the A.C.T. It created courts known as Childrens Courts. These courts exercised jurisdiction over 'neglected' and 'uncontrollable' children, as well as over young offenders. Virtually all the 1905 definitions of neglected children were incorporated unchanged into the present A.C.T. Ordinance. Many of the measures available to the courts were the same as those used today. Provision was made for release on probation, or committal to the care of a willing person or to an institution. Much of the language of the 1905 Act is reflected in the provisions of the A.C.T. Child Welfare Ordinance.

34. ***Child Welfare Act 1923 (N.S.W.)*** This Act, the forerunner of the Child Welfare Act 1939 (N.S.W.), was a more comprehensive piece of legislation than the 1905 statute. It dealt with the boarding out of children, special institutions, 'lying-in' homes, the protection of children, street trading by children, neglected and uncontrollable children, young offenders, affiliation proceedings, Childrens Courts and the adoption of children.

35. ***Outmoded Legislation*** From an examination of these N.S.W. enactments, it is clear that the Child Welfare Ordinance 1957 (A.C.T.) embodies concepts and procedures developed at the beginning of the twentieth century, and that some of these had their origins in the nineteenth century. A submission prepared by the Department of the Capital Territory has described the Ordinance as providing 'an outmoded legislative framework,' and reflecting 'the needs and values of the pre-War era'.[21]

> The pressure for new legislation is considerable. There are segments of the Ordinance which are not acted upon, being no longer consistent with community expectations of service. There are other services currently provided for which there is no statutory authority and services for which the provisions in the Ordinance are unsatisfactory.
>
> Piecemeal amendment seems an unsatisfactory solution. The changes required are numerous and require no less than a new philosophic approach. New legislation appropriate to modern day thinking in reasonable accord with the principles and practices adopted in the States and flexible enough to accommodate changing requirements in the future is essential.[22]

General Description of the Present System

36. ***Outline*** Many agencies are involved in dealing with children in trouble in the A.C.T. A detailed description of the role of each agency is contained in this and succeeding chapters. At this stage, however, a brief account of the system should be given in order to present a general idea of its operation and to put into perspective the analysis which follows. The system's legal framework is provided by the Child Welfare Ordinance 1957 (A.C.T.). This Ordinance deals with a wide range of matters, but for present purposes it is sufficient to examine procedures for handling young offenders and neglected and uncontrollable children.[23] As with legislation in Britain, many parts of the United States, and other Australian jurisdictions, the A.C.T. Ordinance brings together special provisions relating to offenders and non-offenders. Among these provisions are a number setting out the constitution and powers of the Childrens Court, which is a Court of Petty Sessions presided over by a magistrate who has legal qualifications. The Childrens Court is empowered to deal with all but the most serious offences committed, or alleged to have been committed, by those who have attained the age of 8 but who have not attained the age of 18. Similarly it may deal with all children under the age

19 id., s.434, 484 and 485.
20 Crimes Ordinance 1974 (A.C.T.), s.12.
21 Department of the Capital Territory, *Submission*, 1.
22 Department of the Capital Territory, Welfare Branch, 'Submission to the Inquiry into Child Welfare by the A.C.T. Legislative Assembly Standing Committee on Housing and Welfare', (1977), 1.
23 The Child Welfare Ordinance 1957, (A.C.T.) s.5, makes a distinction between 'children' (those under 16 years of age) and 'young persons' (those 16 and under 18 years of age). In this report the term 'children' is used in a general sense to include both categories. See para.3. Unless otherwise indicated, all section references are to the Child Welfare Ordinance 1957 (A.C.T.).

of 18 who are brought before it because it is alleged that they are neglected or uncontrollable.[24] Although the court may impose certain special penalties on offenders (for example, a fine or release on a recognizance), in general the measures available when the commission of an offence has been established are the same as those which may be employed when a child has been found to be neglected or uncontrollable. These measures are:

- an admonition;
- release on probation;
- committal to the care of a willing person;
- committal as a ward; or
- committal to an institution operated by the N.S.W. Department of Youth and Community Services.

Not all young offenders who come to notice in the A.C.T. are prosecuted. It is the Australian Federal Police who make the decision whether a child should be prosecuted for an offence committed in the Territory. Children who are not prosecuted receive a warning from the police. In the A.C.T. the Australian Federal Police operates a special unit known as the Juvenile Aid Bureau. Members of this unit undertake preventive work and counsel troubled and troublesome children. They deal both with offenders and non-offenders. The composition and work of this Bureau are described in the following paragraphs. Other governmental agencies which offer help and support to children in difficulties include the Welfare Branch of the Department of the Capital Territory[25], the Capital Territory Health Commission and the A.C.T. Schools Authority. The two last-named agencies are independent Commonwealth bodies established under Commonwealth Acts. The Welfare Branch undertakes general family casework, and work with truants, has a Child Life Protection Unit and provides services required by the Childrens Court. Members of the Branch write background reports, supervise probationers and those released on recognizances, arrange placements for wards and those whom the court directs to live away from home, and operate the A.C.T. remand shelter (the Quamby Children's Shelter). The Capital Territory Health Commission offers a wide range of general social work services and also operates Child and Family Guidance Clinics and a Child and Adolescent Unit.[26] A distinctive feature of the A.C.T. system is the absence of a closed institution capable of accommodating children who require specialised care. Such children are placed in N.S.W. facilities. This arrangement is described below.[27] Substantial use is made of homes run by voluntary organisations. With regard to children in trouble, the most important of the A.C.T. homes are those run by Dr Barnardo's and the Richmond Fellowship, and Marymead Children's Centre, operated by an order of the Roman Catholic Church. Later chapters of this report present separate descriptions of procedures for offenders and non-offenders. However, as certain elements of the system deal with both categories it is convenient to describe these elements at this stage. Unless otherwise indicated all statistical information contained in this and succeeding chapters has been drawn from the Commission's surveys. The methodology of these surveys has been dealt with in the first chapter.

37. ***The Juvenile Aid Bureau: Membership and Functions*** The Bureau, which is part of the A.C.T. Division of the Australian Federal Police[28], commenced operations on 12 May 1975. At the time of the inquiry it consisted of eight officers: a Senior Sergeant, five Senior Constables, a First Constable

[24] In addition to exercising jurisdiction of the kind outlined the court may deal with a wide range of matters. For example, it may cancel a day-care licence (s.34(3)), make an order concerning the placement of a child held in an unlicensed centre (s.35) or an order for care of a child under seven (s.37(1)), impose penalties on those guilty of offences relating to the employment of children (s.92 and 93) and on those who fail to provide for or ill-treat a child or young person (s.98 and 99), or terminate an agreement for the care of a ward (s.123).

[25] The Department of the Capital Territory is a Commonwealth department responsible for the administration of the A.C.T. The Welfare Branch is part of the City Manager's office. The organisation and structure of the Branch are discussed in detail in Chapter 13.

[26] For a fuller discussion of the role of the Capital Territory Health Commission, see para.256.

[27] Para.53 and 54.

[28] With the amalgamation of the A.C.T. and Commonwealth Police, responsibility for policing the A.C.T. was assumed by the Australian Federal Police. This force consists of a number of divisions. Policing in the Territory is undertaken by the A.C.T. Division which is made up of a number of branches including City, Woden and Belconnen.

and one Constable. Two members – a Constable and First Constable – were women. The Bureau is located in the former A.C.T. Police Headquarters in Canberra, and its members are responsible for the entire Territory. They will, if required, handle matters which originate in the Woden or Belconnen Branches as well as those in the city area. Bureau officers are appointed from members of the force who may apply to join or may be transferred. No special training is given when an officer makes the transfer. The more experienced members help those with less experience. When the Bureau was founded, an Instruction issued by the then A.C.T. Commissioner of Police on 7 May, 1975 defined its principal responsibilities as follows:

> The investigation of shoplifting by young people; the co-ordination of all police inquiries regarding juvenile missing persons; the patrolling of places where young people tend to congregate in conditions that may be harmful to the welfare of children; the maintenance of records of juvenile cases; the planning and co-ordination of a delinquency prevention programme; the possession or sale of obscene literature to children; and offences committed on school property.

The Instruction also stated that the Bureau had been formed 'in response to a growing need in the community amongst young people, school teachers and parents for a point of contact within the A.C.T. region.'

38. ***Analysis of the Bureau's Work*** The Commission's analysis of the Bureau's activities, based on its examination of the 1978 occurrence books[29], indicates that it concerns itself not only with offenders, but also with those at risk of offending and with neglected and uncontrollable children. The 519 children dealt with by the Juvenile Aid Bureau in 1978 fell into the following categories:

- 32% were offenders (either criminal offenders or traffic offenders);
- 29% were neglected or uncontrollable or displaying unacceptable behaviour; and
- 22% were 'runaways'.

The remaining 17% of cases comprised parents or children who came to the Bureau seeking advice or assistance. Children in trouble are brought to the notice of Bureau members by parents, school teachers, welfare workers, store detectives and other members of the community, and sometimes by other police officers. Bureau officers also undertake patrol work in such places as amusement centres and shopping centres, and are sometimes present at dances for young people. When performing such duties they encounter young offenders, children considered to be 'on the fringe of delinquency' and children in need. The sources of referral of the children dealt with by the Bureau in 1978 were as follows:

- 38% were reported by parents;
- 13% were reported by store owners or detectives;
- 9% were reported by other members of the public;
- 6% were reported by schools;
- 6% were referrals from other police; and
- 3% were referrals from the Welfare Branch.

Of the remaining cases, 19% were initiated by Bureau members, and the other 6% were either self referrals, ongoing court cases, or reports from other agencies. The Bureau does not have sole responsibility for any one group of children in trouble. The great majority of young offenders are handled by general duties officers or by detectives and do not come into contact with the Juvenile Aid Bureau. In its analysis of Childrens Court records the Commission found that, of the cases taken to court between 1 June 1978 and 31 May 1979, Juvenile Aid Bureau members initiated 1.6% of the cases involving offenders and 61.9% of these involving neglected and uncontrollable children. Because of the reputation which the Bureau has acquired, which is largely one of assisting young people rather than initiating criminal prosecutions, and because of the personal contacts which its members have developed, matters are regularly brought to members' notice by citizens who want them handled in an informal, low-key manner. In 1978, 45% of the cases noted in the occurrence book were dealt with by way of counselling. These cases included offences as well as lesser kinds of

[29] The statistics contained in this paragraph are based on an analysis, performed on behalf of the Commission by Mrs Marina Rinaldi, of the contents of Juvenile Aid Bureau occurrence books. It has not been possible to replicate her study and so obtain more recent figures. However, the Commission has no reason to believe that the pattern of the Bureau's work has changed since 1978.

misbehaviour. Only 14.6% of the cases were taken to court. As the figures quoted indicate, it is not common for general branches of the police to refer cases to members of the Bureau. Most police officers apparently feel competent to deal with incidents involving children and to follow through most matters which come to their attention. This feeling is especially strong in branches where emphasis is placed on neighbourhood policing which is designed to encourage experienced local officers to become familiar with their areas, and to deal with any problem relating to law and order occurring in them. Workloads are a key factor. A general duties officer or a detective might not always have the time to follow up a matter involving a child. For example, if a time-consuming welfare problem emerges then the officer handling the case might refer it to the Juvenile Aid Bureau.[30] Thus neglect and uncontrollability matters may be handled by members of the branch in which they originate or by members of the Bureau. Also, while continuing to handle a case of this kind, general duties officers may go to the Bureau for advice or to ascertain whether the Bureau has had previous contact with the child or with any other member of the family. Members of all branches are aware that the Bureau is small and that its ability to offer help is limited. Further, among some police, there also appeared to be some reservations about the Bureau's role. In general, although the Juvenile Aid Bureau does sometimes act as a specialist resource on which other members of the force may call, it exists primarily to serve the public. This accords with the Commissioner's reference to the Bureau as a 'response to a growing need in the community'. It serves as an identifiable agency to which parents, teachers or others who are troubled by a child's behaviour may turn, and is seen as being concerned and sympathetic. To some extent it must be acknowledged that the work of the Bureau has elements of a 'public relations' exercise. As matters handled by other branches do not find their way into Bureau records, the Bureau is not a central clearing house for all statistics relating to children in trouble. The Bureau maintains its own records of cases handled; these are kept in an occurrence book which lists brief details of all incidents and of the action taken. An example of a typical occurrence book entry is:

> 1/2/1978 John Smith d.o.b. 10/9/1964
> 34 Brown Lane, Green Hills
>
> Caught shopstealing a magazine at David Jones in the company of Peter Brown (2/10/1966) and Jeremy Smith (3/4/1965). Conveyed to the station. Boy admitted the offence in the presence of his mother. Counselled over his actions (First and last warning). Parents will devise a suitable punishment.
>
> *Note:* Frequents the Fun-Time Pinball Parlour. May come to police notice again.[31]

39. ***The Childrens Court: Constitution*** When exercising the jurisdiction conferred on it by s.12 of the Child Welfare Ordinance, the Court of Petty Sessions is known as the Childrens Court.[32] Because the Childrens Court is a Court of Petty Sessions, the Court of Petty Sessions Ordinance and the rules and regulations made under it apply to Childrens Court proceedings except to the extent that those provisions are in conflict with provisions of the Child Welfare Ordinance and the Child Welfare Regulations. The Childrens Court is presided over by a stipendiary magistrate or by a special magistrate.[33] Stipendiary magistrates and special magistrates are appointed by the Governor-General. Special magistrates need not necessarily have legal qualifications, but in practice they invariably do so.[34]

---

30 Such a referral might be made where it is thought that sustained work is required. One such case involved two young children whose parents were both unemployed and considered to be inadequate. A neighbour reported the case to the Belconnen Branch which in turn referred it to the Bureau. A factor which must be borne in mind is that in each of the three branches responsible for the general policing of the A.C.T. care must be taken to have officers available to respond to normal calls (e.g. road accidents and reports of offences). These branches cannot afford to have their members occupied for too long in dealing with time consuming cases involving children.

31 The example is entirely fictitious and has been devised to indicate the type of information noted in the book.

32 Child Welfare Ordinance 1957 (A.C.T.), s.13(1).

33 Court of Petty Sessions Ordinance 1930 (A.C.T.), s.18(2).

34 Stipendiary magistrates are appointed under s.7(2) of the Court of Petty Sessions Ordinance 1930 (A.C.T.), and special magistrates under s.10(H) of that Ordinance. Section 8 sets out the legal qualifications required for appointment as a stipendary magistrate. No equivalent section exists in relation to the appointment of special magistrates.

40. ***A Closed Court*** By virtue of s.14(1) of the Child Welfare Ordinance, the Childrens Court is not open to the public, and persons not directly interested in the matter before it must be excluded during the hearing, unless the court otherwise directs. The Child Welfare Ordinance is unusual by comparison with other legislation governing Childrens Courts as it does not contain a total prohibition on the publication of reports of proceedings. By implication, restrictions are imposed on the media, as permission to be present in court must be obtained from the magistrate. However, presence in court is not the only way of obtaining information. Those concerned could inform a reporter of the outcome of a hearing. In practice what happens is that reporters from the local newspaper, the *Canberra Times*, or from the local radio or television station obtain information from persons involved in proceedings. The *Canberra Times* publishes reports of Childrens Court hearings in the A.C.T. These reports give brief details of some offences and dispositions, but do not include any details which could lead to the identification of the children involved. Protection of the children's identities is further ensured by delaying the publication until some weeks after the hearing. On occasions, however, contemporaneous reports of Childrens Court cases are published. These do not include identifying details.[35] The Ordinance's only reference to possible publication is contained in s.14(2)(c), which states that the court may give directions prohibiting or restricting the disclosure of information regarding the Childrens Court hearing. Contravention of such a direction is an offence. In the absence of a direction of this kind, the media would be able to publish reports of Childrens Court hearings without sanction.

41. ***General Description*** At the time the Commission commenced its inquiry, five magistrates were sharing the Childrens Court work. Each sat once during the week. Later during the course of the inquiry the system was changed so that each magistrate presided over the court for a period of two weeks. The length of sitting varied from magistrate to magistrate, though most completed their lists by lunch-time. The Childrens Court is held in a moderate-sized room which is clearly a court. The magistrate sits on a raised bench with a small coat of arms above and behind him. In front of him sit the court clerk and a clerk who operates the tape recorder on which all proceedings are recorded. The child and his parents[36] sit at or near the bar table. The prosecution is undertaken by a member of the staff of the Deputy Commonwealth Crown Solicitor. There is a witness box and, at the back of the court, two rows of seats. Uniformed police and detectives waiting to be called as witnesses sometimes sit in these seats. Their presence, and the absence of members of the public, on occasions gives the court-room a predominantly 'police court' appearance. It is not the practice for members of the Welfare Branch to be present in court, but they do sometimes attend. The Branch does not provide a court officer. In March 1981 a new Childrens Court was opened in Canberra in a building attached to the Family Court. However, the court-rooms, layout and arrangements remain substantially as described above.

42. ***Remands and Interim Orders*** The law relating to remands and adjournments is confused and obscure. When dealing with a matter, the Childrens Court may wish to order an adjournment before or after a finding is made. The Child Welfare Ordinance makes provision for adjournments and for interim orders. Further, certain other powers relating to release on bail are exercisable under the Court of Petty Sessions Ordinance 1930 (A.C.T.). Each of the relevant provisions must be examined in turn. Section 54(8) of the Child Welfare Ordinance states:

---

35 For example, on 4 November 1980 a local radio station carried a report of a case in which a four month old child was charged in the A.C.T. Childrens Court with being a neglected child. A report of the case was published in the *Canberra Times* the following day. Similarly that paper carried a report of a child appearing in the Childrens Court to face charges relating to a 'hoax' phone call (*Canberra Times*, 7 February 1981) and a report relating to the sentencing of six boys who had been found guilty of vandalism (*Canberra Times*, 17 February 1981).

36 When an allegedly neglected or uncontrollable child or young person or one charged with an offence is brought before the court, the parent (defined in s.5) must attend unless the court is satisfied that it would be unreasonable to require this (s.54(1)). The parent whose attendance is required is the parent having the actual care of the child (s.54(5)); when this person is not the father, the father may also be required to attend (s.54(6)). However the parent's attendance cannot be required if, before the institution of proceedings, the child was removed from that parent's charge or custody by court order (s.54(7)). A parent who, without reasonable excuse, fails to attend the court may be arrested (s.54(3) and (4)).

> During an adjournment of the hearing of a matter or charge under [Part IX][37] the child or young person may be —
>
> (a) detained in a shelter;
> (b) permitted to go home with a parent or with any other person who is willing to take care of him during the adjournment; or
> (c) admitted to bail, with or without a surety or sureties.

Section 5 defines a shelter as a shelter established under Part IV of the Ordinance or a place of safety. By the same section a place of safety is defined as:

> a police station, hospital or other place the occupier of which is willing temporarily to receive a child or young person.

The Department of the Capital Territory regards as a place of safety a place which offers protection and a shelter as a place which also provides secure detention.[38] The only shelter in the A.C.T. is Quamby Children's Shelter[39], which is administered by the Welfare Branch of the Department of the Capital Territory. Its functions are described in detail below.[40] During adjournments it accommodates children alleged to be offenders or uncontrollable, and, after a finding has been made, children remanded in custody. A similar function with regard to allegedly neglected children and those in respect of whom a finding of neglect has been made is performed by Marymead Children's Centre, a private institution. The Centre's provision of accommodation for such children may arise from the assumption that it is a place of safety, and hence that it may receive children remanded to a shelter.[41] Presumably it could also receive children if the court chose to treat a representative of the Centre as a willing person, and placed a child in the care of such a person pursuant to s.54(8)(b). On rare occasions a child remanded under s.54(8)(a) may be placed in a psychiatric ward in one of Canberra's hospitals. The distinction between the powers conferred by s.54(8) and those set out in s.54(9) is not clear. The latter sub-section states:

> If the Court is not in a position to decide whether an order and, if so, what order should be made under [Part IX], it may make such interim order as it thinks fit with respect to the child or young person before it for his detention or continued detention in a shelter or for his committal to the care of a fit person, whether a relative or not, who is willing to undertake the care of him.

An interim order for a child's detention in a shelter may not remain in force for more than 14 days, and one for committal to a 'fit person' for more than 28 days. Before or after the expiry of the order a further interim order may be made.[42] Section 54(9) seems to add nothing to the powers conferred by s.54(8). The wording of the former sub-section suggests that the powers which it enumerates are exercisable only after a finding has been made, whereas, unless the reference in s.54(8) to an adjournment during a 'hearing' indicates that the provision does not apply once a finding has been made, it seems that the Childrens Court may invoke the provisions of s.54(8) at any time during the proceedings. Section 54(9) refers to committal to the care of a 'fit person,' and it is difficult to see any practical difference between this phrasing and the reference, in s.54(8)(b), to release to the care of a parent or other willing person. In short, s.54(8) seems to cover all the possibilities mentioned in

---

37 This Part relates to neglected and uncontrollable children and young offenders.

38 Department of the Capital Territory, *Submission*, 72.

39 By virtue of s.16(2) a shelter must be gazetted. In the past it was assumed that the centre known as Quamby Children's Shelter had been gazetted as a shelter established under Part IV of the Ordinance. In fact, although Quamby was opened in 1963, it was not gazetted as a shelter under the Ordinance until October 1979, and therefore had no power, until that date, to detain children.

40 Para.57.

41 Marymead Children's Centre comes within the definition of a place of safety, and hence within the definition of a shelter. Unlike shelters, however, places of safety have not been treated as requiring gazettal under s.16(2). It could be argued that any home or place which accommodates children pursuant to s.54(8) or (9), and hence functions as a place of safety, does require gazettal. The Minister's obligation under s.16(2) applies to any 'shelter' and this, by definition (see s.5), includes a place of safety.

42 Section 54(10). It is unclear whether this sub-section authorises the making of a series of interim orders or whether the court may renew the order only once. In practice, interim orders are renewed a number of times in some cases.

s.54(9), and it also makes provision for release on bail. Further, no time limits are attached to the former sub-section.[43] Although s.54(8) makes provision for release on bail, the details of the procedure are set out not in the Child Welfare Ordinance, but in the Court of Petty Sessions Ordinance 1930 (A.C.T.).[44] Special mention must be made of s.248A(2) of this Ordinance, which allows the court, when releasing a defendant on bail, to impose such special conditions:

> as appear to the Court likely to result in the appearance of the defendant at the time and place required or to be necessary in the interests of justice or for the prevention of crime.

There do not seem to be any provisions limiting the period for which a defendant may be remanded on bail.

43. ***Remand to Live Where Directed*** In addition to making orders specifically authorised by the various provisions discussed above, the Childrens Court, when adjourning a matter, also makes use of an order that the child 'live where directed', and accept Welfare Branch supervision. This means that, during the period of an adjournment, the child must live in a place selected by the Assistant Secretary, Welfare[45], and accept supervision by a member of the Branch. In practice such children may remain at home or may be placed with a relative or friend, in foster care, or in a home run by Dr Barnardo's or by Outreach Incorporated, or in Marymead Children's Centre. The Commission's analysis of Childrens Court records for the period 1 June 1978 to 31 May 1979 revealed that the Childrens Court remanded 32 children on a condition that they 'live where directed'. Twenty of these cases were neglect or uncontrollability matters, and twelve involved offenders. With offenders it seems that 'live where directed' orders are not made until after the charge has been established. With neglect and uncontrollability cases, however, children are sometimes remanded in this way before a finding is made. The aim is, if possible, to find a solution to the child's problems without the need to make a formal finding of neglect or uncontrollability.[46] When non-offenders are involved, cases are sometimes adjourned in this manner for periods of some months. The source of the Childrens Court's power to remand a child to live where directed is not clear. Perhaps the Assistant Secretary, Welfare, can be regarded as a willing person for the purposes of s.54(8)(b), or a 'fit person' under s.54(9). However, such an interpretation is questionable, since release to the care of a willing person, or committal to the care of a fit person, are clearly intended as alternatives to detention in a shelter. An order permitting the Assistant Secretary, Welfare, to direct where the child must live during an adjournment could result in the child's detention in a shelter, since a shelter is one of the facilities available to the Assistant Secretary for placement. It is questionable whether the two sub-sections were intended to provide two methods by which a child might be remanded to a shelter. If, notwithstanding this view, it is thought that the court is empowered to make a 'live where directed' order under s.54(9), such an order, being a 'fit person' order, may not remain in force for more than 28 days.[47] In practice, orders of this kind regularly specify a period longer than 28 days. It can be argued that the court's power to require a child to live where the Assistant Secretary, Welfare, directs, derives from s.248A(2) of the Court of Petty Sessions Ordinance 1930 (A.C.T.). Certainly this sub-section confers broad powers, although it is not clear whether it is intended to permit the court and the Assistant Secretary to fashion a residential order during an adjournment. If a remand to 'live where directed' is made pursuant to s.54(8)(c) and s.248A(2), the child must be old enough to execute a bail bond. One further question is raised by the addition to a 'live where directed' order of a condition that the child accept supervision. Nothing in s.54(8) or (9) seems to authorise the imposi-

---

43 Although s.73(2) states that a child or young person shall not be kept in a shelter for more than 30 days except with the approval of the Minister, this sub-section appears in the middle of a section which deals with committal to a N.S.W. institution. It seems most unlikely that it is intended to provide a general limitation on periods of remand. Clearly s.73(2) was intended to be applied only to the situation of a child being placed in a shelter pending removal to a N.S.W. institution to which he has been committed by the Childrens Court. If s.73(2) was intended to apply to all situations, it is difficult to explain the reason for s.62(2) of the Ordinance which also sets a 30 day time-limit in different circumstances.

44 See s.73, 77—81, 84(2) and 248A—248D of the Court of Petty Sessions Ordinance 1930 (A.C.T.). Sections 73 and 77—81 seem to apply only to proceedings relating to committal for trial in the A.C.T. Supreme Court.

45 The Assistant Secretary, Welfare, is the officer in charge of the Welfare Branch. He is often referred to as the Director of Welfare, but this title is incorrect.

46 See discussion in para.266.

47 Section 54(10).

tion of such a condition. Again, reliance may be placed on the breadth of the language used in s.248A(2) of the Court of Petty Sessions Ordinance. However, it is at least questionable whether, before a finding of neglect has been made, the imposition of a requirement that the child accept supervision can be justified as being a condition 'likely to result in the appearance of the defendant' or 'necessary in the interests of justice or for the prevention of crime.' Obviously it is most unsatisfactory that the law governing adjournments in general and, in particular, that relating to the court's power to require a child on remand to live away from home, should be so unclear. Recommendations regarding the clarification of the law concerning remand procedures for offenders[48] and for non-offenders[49] are presented later in this report.

44. ***Legal Representation*** Accurate statistics about legal representation in the A.C.T. Childrens Court are not available. When a child is unrepresented the hearing commonly begins with an inquiry, by the magistrate, as to whether the child and parents have discussed the matter with a lawyer and, if not, whether they would like an adjournment to permit them to seek legal advice. The availability of legal aid is explained. The issue of legal representation is discussed in Chapters 5 and 8.

45. ***Reports*** If the court is satisfied that the commission of an offence has been established, or that the child is neglected or uncontrollable, the court may request the Welfare Branch to prepare a written pre-sentence or social inquiry report. If a report is required, the case is adjourned, a typical period of adjournment being four to six weeks if the child is not already known to the Branch. The Ordinance obliges the court to 'give consideration to reports, if tendered'.[50] Upon receiving a request for a report, the Welfare Branch allocates the case to a field worker. The report may be prepared by either a welfare officer or a social worker.[51] In both instances the report must be approved by someone more senior before it is forwarded to the Childrens Court. To gather all the necessary information the field worker arranges interviews, usually by letter, with the child and the immediate members of the family. Occasionally the child or the parents or both will approach the Branch of their own accord, knowing that a report must be prepared. The interviews are conducted at the welfare office or the family home. If the child is remanded in custody they are conducted at the home or institution in which the child is held. Often other relevant people may be contacted to provide further information for use in the report. These include such people as the arresting police officers, school teachers or principals, employers, and former counsellors from other welfare services. Other relatives may be interviewed in person or contacted by telephone. If the child has come to the notice of the Branch before, an existing file will provide much of the necessary background information. If no previous record exists the details must be obtained from the interviews. It is not uncommon for many contacts to be made during the preparation of the report. The report tends to follow a standard format.[52] However, if the remand period is not long enough or it is difficult to obtain all the necessary information, the worker may submit a shorter report that contains the major details of the child's background. Although any information considered to be useful to the magistrate may be included in the report, the Commission typically found the following details under these section headings.

Family background. Information about the child's family environment includes:

- the age and sex of all nuclear family members;
- parent's marital status (whether married, divorced, separated or de facto);
- the number of siblings and the subject child's position in the birth order;
- the occupation of the parents;

[48] Para.172.

[49] Para.327.

[50] Section 69(2). This provision describes the reports as:

> setting out the details and results of investigation into the antecedents, home environment, companions, education, school attendance, habits, recreation, character, reputation, disposition, medical history and physical or mental characteristics and defects, if any, of the child or young person.

[51] The Welfare Branch appoints two categories of fieid worker. Social workers hold formal social work qualifications, but welfare officers do not necessarily do so. Welfare Branch staffing is discussed in Chapter 13.

[52] A copy of a typical report is to be found in Appendix C.

- the occupation of the siblings (if working) and their addresses if they are living away from home;
- the family's country of origin, if they are not Australian; and
- the length of time the family has resided in Canberra.

Ocasionally family histories, beginning with the marriage of the parents will be included in this section. The officer preparing the report may also comment on relationships within the family. Of particular interest is the child's relationship to the family unit (i.e. whether he appears to be well supported by loving parents, or whether he appears to be the family outcast constantly causing friction amongst the other members of the household).

Previous offences. This section notes any existing police record of convictions. In some instances interstate records are cited.

Health. This lists any major illness the child has suffered. Information of this nature is generally supplied by the parents.

Education. Using either school records or information given by the parents and the child, this section will comment upon the educational level attained, the child's scholastic ability and peer relationships.

Employment. If the child has left school, the officer will comment upon the sort of work engaged in and the hopes for a future occupation.

Interests. The purpose of this section is to provide the magistrate with an insight into the child's personality by listing his interests, sports activities and hobbies.

Attitude to the offence (in the case of an offender). This section states the circumstances of the offence as described to the worker by the child. It also notes any feelings of indifference or regret he may have expressed to the welfare worker about the offence.

Personality. This section contains a general impression of the child's character as gained by the worker through the interviews. It serves to foreshadow the recommendation given at the end of the report by stressing aspects of the child's nature that may have led to the involvement in the offence before the court.

Recommendation. At its conclusion the report may suggest a measure that seems appropriate, or recommend that a specific condition such as a supervision or live where directed order be attached to whatever disposition the magistrate proposes. By summarising all the information the worker may conclude that the parents are supportive and the offence was totally out of character for the child. In such circumstances, especially if it was a relatively minor matter and the child's first offence, no fu.ther welfare intervention will be recommended. However, if the worker concludes the family to be unstable and the child at risk of further deviance due to his character or poor family environment, supervision will be strongly recommended. On the other hand the report may highlight the futility of a supervision order, by stating how unco-operative the child was during the interviews.

The above details are ordinarily reported for all offenders in respect of whom reports are ordered. The reports prepared for non-offenders follow much the same format, except that more emphasis is placed upon the family background, especially in neglect cases. Sometimes the court requests an oral report, in which case a short adjournment, sometimes of a few hours, is ordered. Towards the end of 1980 the Welfare Branch introduced a new practice, and now prepares reports on any child remanded to Quamby Children's Shelter, whether or not the Childrens Court has requested such a report. The Commission analysed court records for the period 1 June 1978 to 31 May 1979. The records indicate that during this period written reports were requested for 117 or 19.9% of offenders and 53 or 84.1% of neglect and uncontrollability matters.[53] In 67.7% of these, the court accepted the

[53] It must be stressed that these figures may be underestimates. In some cases, where welfare workers are familiar with the child, an oral report will be given before the court. In such circumstances no record of a report request will be made. Also magistrates may, on occasions, have omitted to record their request for a report. The figure quoted for offenders relates to offenders facing 'criminal' charges. The 392 children who faced traffic charges were not included in the total on which the calculation was based.

recommendation. However, the court rejected the recommendations in favour of a more severe measure in 10.4% of cases and a less severe measure in 8.3% of cases. In 13.7% of the reports there was no specific recommendation. On occasions the court may require a psychiatric or psychological assessment of a child. Such an assessment is prepared by a member of the Child and Adolescent Unit of the Capital Territory Health Commission. It sometimes happens that the preparation of such an assessment is suggested in the welfare report. Three copies of a social inquiry report are prepared and handed to the magistrate. He, at his discretion, makes one available to the prosecutor, and one to the solicitor representing the child or to the family itself.[54]

The Measures Available To The Childrens Court

46. ***Probation*** In addition to the power to admonish and discharge, the court has open to it a number of measures which may be employed whether the child is an offender or whether he is adjudged to be neglected or uncontrollable. The measures available for non-offenders are listed in s.55 of the Ordinance, and are repeated in s.57 and 58, which are two of the provisions relating to offenders. Release on probation is authorised by s.55(b), s.57(1)(a) and s.58(a). The Ordinance does not prescribe a maximum term of probation. It is left to the court to impose the term which it thinks fit, and this may expire after the child attains the age of 18. Nor does the Ordinance indicate the terms and conditions which may form part of a probation order. These may be as prescribed by regulation[55] or as the court thinks fit. Sometimes the court spells out the conditions of an order and sometimes much is left to the Welfare Branch (which invariably assumes responsibility for the supervision of probationers). A condition which confers broad powers on the Branch is one requiring the child to 'obey all reasonable directions' of a welfare worker. Other typical conditions in probation orders are: to be of good behaviour, not to associate with named persons, and to accept supervision for a specified period. Less common is a condition that the child accept psychiatric counselling. One unusual feature of probation in the A.C.T. is that it need not necesssarily involve supervision. Such an order is no more than a conditional release with the possibility of being again brought before the court to be dealt with in respect of a breach of the conditions of the order. Probation with a condition that the defendant accept supervision or reside where directed by the Director of the Welfare Branch will be discussed separately.

47. ***Supervision*** A child may be placed under supervision as a condition of a recognizance or as a condition of probation. Most of the provisions relating to release on a recognizance apply only to offenders and are therefore better discussed in the next chapter. In practice, the staff of the Welfare Branch make no distinction between the different types of order to which conditions of supervision are attached. An attempt is made to provide supervision appropriate to the child's needs regardless of the form the order takes. As might be expected, the size of the individual welfare worker's caseload is a key factor. Although no detailed statistics were available on this matter, the social workers and welfare officers interviewed estimated their caseloads at between 60 and 70 cases each. In addition, some field officers must perform other duties such as arranging adoptions, writing reports for the courts, and undertaking general family casework. In one region it was estimated that of the 60 to 70 probationers in a field officer's caseload approximately 20 were children. Probation work with children is considered difficult. The children are likely to want to leave home because they are at odds with their parents. Furthermore, they are typically experiencing difficulties at school. Supervision tends to be a family affair. It takes the form of interviews at the office and home visits. Although no hard data exists, impressionistic evidence suggests that the supervision given is of variable quality. The field officers do not have time to provide an adequate service for all their clients. Some receive cursory attention and are seen rarely. With some, more intensive work is possible; a member of the Commission was told that in one region some children are initially seen weekly or more frequently. The supervision is then tapered off, but attempts are made to arrange a

[54] Department of the Capital Territory, *Submission*, 54.

[55] Certain conditions are prescribed by regulation 22 of the Child Welfare Regulations. This regulation deals with the duties of a person having the care of a child or young person released on probation and of a person to whose care a child or young person is committed. Most of the duties listed may more appropriately be performed by the person with day-to-day responsibility for the child's care than by a person designated to act as a supervisor under a probation order.

meeting at least once a month. The officer tries to adapt his supervision to the nature of the case, the length of the order, and the needs of the child. The Commission undertook an analysis of Welfare Branch files to substantiate some of the impressionistic evidence. By locating 87% of all files created in 1977, and 80% of all those created in 1978, the following results were obtained:

- Nearly one third of all files studied for both years were children's cases.
- An average of seven contacts (office interviews and home visits) was recorded with children on a 12 month probation order or recognizance. There is, of course, no way of determining how many unrecorded contacts were made.

48. ***Live Where Directed*** When a child or young person is released on probation or on a recognizance a condition of this release may be that he live where directed by the Assistant Secretary, Welfare. In this way the court can fashion a measure which permits sustained intervention in a child's life. The fact that there is no A.C.T. institution to which children and young persons can be committed provides a reason for the court to make substantial use of orders with live where directed conditions. A child or young person in respect of whom such an order has been made may be placed with parents, a relative, a friend, an interested person, or in a home run by one of the voluntary organisations (e.g. Marymead, the Lions and Salvation Army Hostel, a home operated by Dr Barnardo's or by Outreach Incorporated, or accommodation provided by the Y.M.C.A or the Y.W.C.A.). An important feature of a live where directed order is that it is flexible. If one placement proves unsatisfactory another can be tried without the need to take the matter back to court. Normally placement is arranged in the A.C.T., but sometimes the child or young person may go to N.S.W. Usually the placement decision is left to the Welfare Branch. Occasionally a magistrate will explain in court that a particular placement has been arranged and make a more specific order. Normally a live where directed order is accompanied by an order that the child accept Welfare Branch supervision. The amount of supervision which the Branch can offer varies. Some of the children interviewed said that they had had very little contact with their supervising officer. While the child is living away from home, whether in the A.C.T. or in N.S.W., the Welfare Branch pays the cost of his maintenance.

49. ***Variation, Termination and Breach of Probation*** The Ordinance makes provision for the court to vary the period or conditions of a probation order, or to terminate it.[56] Occasionally the court does vary the term, or order that the conditions be varied. For example, a condition that the child 'attend school regularly' might be varied if the child wishes to leave school to obtain employment. There is also a provision which allows the court to substitute another person for the one named as the supervisor in the original probation order.[57] The last-mentioned provision seems to be obsolete, as it is not the practice for the court to specify a person responsible for the child's supervision. The sections of the Ordinance which deal with probation do not require that supervision must be undertaken by a member of the Welfare Branch. The Ordinance seems to have been drafted in such a way as to permit the court to select a suitable member of the community as supervisor in an appropriate case. Were this power to be exercised, the possibility of substituting one supervisor for another might usefully be kept open. Breach of probation is dealt with in a loosely worded section.[58] Where a child who has been released on probation 'breaks or is reasonably suspected of having broken the terms or conditions of his release' the child may be arrested and brought before the Childrens Court. Alternatively he may be dealt with by way of summons. If the breach is proved the court may:

> notwithstanding that that person has then attained the age of eighteen years, deal with him in accordance with section fifty-five, fifty-seven or fifty-eight of [the] Ordinance.[59]

Presumably this means that any of the measures which would have been available in respect of the original offence may be employed at the subsequent hearing. Thus, for example, if the original offence was one triable summarily it seems that a court dealing with a breach of probation would be limited to the measures set out for an offence of this kind. Similarly if the child had been placed on

[56] Section 72(1).

[57] Section 72(2).

[58] Section 71.

[59] Section 71(3).

probation under s.55(b), it seems that the court would be limited to measures available under that section. The position is far from clear. In practice, the initiation of proceedings against a child on the ground that he has broken the terms of his probation order is rare. For example, if there has been an alleged failure to obey the directions of the supervising officer, proceedings may be initiated by the Welfare Branch, but this is not common. The appropriate procedure is for the Branch to bring the alleged breach to the notice of the police and the matter is then dealt with in the normal manner. If a prosecution is authorised, the Deputy Crown Solicitor's office is instructed to proceed. Charges of breach of probation are, however, regularly laid against children by the police when children on probation come to notice for a subsequent offence. When the police prosecute a probationer for a later offence, it is their practice to add a charge of breach of probation. Usually both matters are dealt with together and, if the subsequent offence is proved, normally a single penalty is imposed. One difficulty brought to the Commission's attention is that which arises when the acceptance of psychiatric treatment has been made a condition of a probation order. The Commission has been informed that medical personnel tend to take the view that there is no point in offering psychiatric treatment to an unwilling patient. Hence they discontinue the treatment if the child is unco-operative. This places the supervising officer in a dilemma. He may decide to rely on persuasion and, if this fails, take no action, or he may decide that breach proceedings are appropriate. In order to overcome problems of non-compliance, the Childrens Court occasionally remands children and imposes conditions such as the acceptance of supervision or psychiatric treatment. Such a course is taken in the view that a child is more likely to co-operate if he knows that he will have to appear before the court on a specified date.

50. ***Committal to a Willing Person*** Committal to the care of a willing person is authorised by s.55(c), 57(1)(b) and 58(b). The provisions refer to committal 'on such terms and conditions as are prescribed or as the Court, in a special case, thinks fit'.[60] The court specifies a period of committal, which may expire after the child attains the age of 18. Guardianship does not pass to the person nominated by the court. A relative or other suitable person may accept the care of a child so committed. The Commission was told of a case where such a committal was employed to permit a girl to be placed with an aunt. Alternatively responsibility for the child's care may be assumed by a voluntary organisation, such as Marymead. Two views have been expressed to the Commission about a committal of the latter kind. On the one hand it is said that committal directly to a voluntary organisation is desirable as it allows the organisation to make all the necessary decisions without reference to the Welfare Branch. On the other hand it is argued that it is undesirable to make the organisation fully responsible for a child as this can cause problems if the placement proves unsuitable. For example, what is the organisation to do if the child runs away? The Ordinance does, however, make specific provision for bringing the matter back to court.[61] In practice, the power to commit to the care of a willing person is rarely used. It was employed twice in the A.C.T. Childrens Court between 1 June 1978 and 31 May 1979. Both cases involved non-offenders.

51. ***Wardship*** One of the most far-reaching measures available to the court is committing a child or young person to the care of the Minister for the Capital Territory[62] to be dealt with as a ward admitted to government control.[63] By virtue of s.19(1) of the Child Welfare Ordinance guardianship passes to the Minister, to the exclusion of the parent or other guardian. According to Welfare Branch statistics supplied to the Commission, 112 wards were in the care of the Director on 30 June 1979. Seventy two (64.3%) had been committed to wardship by the courts. The remainder had been administratively admitted to wardship.[64] Although no figures are published as to the number of

[60] Certain conditions are prescribed by regulation 22 of the Child Welfare Regulations. These conditions apply both to probation and to committal to a willing person.

[61] See s.71(1) and (3).

[62] The responsible Minister is the Minister for the Capital Territory. By virtue of s.10(1) of the Seat of Government (Administration) Ordinance 1930 (A.C.T.), this Minister administers all Capital Territory Ordinances except those specified in the Second Schedule. The only reference in the Second Schedule to the Child Welfare Ordinance is to Part III of that Ordinance, which is administered by the Commonwealth Attorney-General. Part III deals with the jurisdiction and procedure of the Childrens Court and with appeals to the A.C.T. Supreme Court. See also s.23(1) of the Interpretation Ordinance 1967 (A.C.T.).

[63] Sections 55(d), 57(1)(c) and 58(c).

[64] Discussed below, para.270.

children committed to wardship each year, the Commission's own analysis of court records found six children were made wards between 1 June 1978 and 31 May 1979. All the orders were made in respect of children found to be neglected or uncontrollable. The Minister has a duty to provide for the accommodation and maintenance of a ward or to make arrangements for a ward's accommodation and maintenance.[65] In practice what happens is that a senior member of the Welfare Branch, acting on the Minister's behalf, arranges the placement of a ward. Admission to wardship is a very flexible device[66] under which a child may be placed with relatives, with foster parents, in a hostel or boarding house, in an A.C.T. institution operated by a voluntary organisation (such as Outreach, one of Dr Barnardo's homes or Marymead), in a similar interstate home or institution, or in a depot or home run by the N.S.W. Department of Youth and Community Services.[67] Where an A.C.T. ward is placed in a N.S.W. State depot or home, the child becomes a ward of the N.S.W. Minister for Youth and Community Services.[68] Hence he becomes a ward of both the Commonwealth and the N.S.W. Ministers. The 72 committed wards referred to above were placed in the following care:

One or both parents	25
Private foster care	22
Other relatives	4
Marymead Children's Centre	4
Dr Barnardos	4
N.S.W. voluntary institution	4
Adoptive parents	3
Independent accommodation	3
N.S.W. State home	1
Y.M.C.A.	1
Chapman Hostel[69]	1
	72

If one arrangement fails, another can be tried. Whatever placement is arranged the Welfare Branch is responsible for the child's financial support. For children who remain within the A.C.T. supervision is provided by officers of the Welfare Branch.[70]

52. ***Termination of Wardship*** The Ordinance does not make it clear when wardship terminates. A historical analysis of repealed provisions of the Ordinance suggests an assumption that wardship automatically terminates at the age of majority, which is now 18 years.[71] Before 5 April 1979 there

[65] Section 21(1).

[66] Before the 1979 amendment, s.18(2) of the Ordinance underlined this flexibility by listing the Minister's powers in respect of a ward. This sub-section was repealed.

[67] The removal to N.S.W. of an A.C.T. ward who has not been committed to an institution, but who can most appropriately be dealt with in a N.S.W. State home designed to meet his special needs, is covered by clause 3 of the Second Schedule of the Child Welfare Agreement Ordinance 1941 (A.C.T.) By virtue of clause 3(2) of the Second Schedule, an A.C.T. ward may be transferred to a depot or home established under s.21 of the Child Welfare Act 1939 (N.S.W.). When such a child is received into the care of the person in charge of the depot or home he becomes and remains subject to the terms and provisions of the N.S.W. Act 'in all respects as if the child were a ward admitted to State control under the State Act'. (Second Schedule, clause 3(5)). Hence the range of placements available to the State Minister in respect of N.S.W. wards is also available in respect of A.C.T. wards who have been transferred pursuant to clause 3(2).

[68] Child Welfare Agreement Ordinance 1941 (A.C.T.), clause 3(5).

[69] A hostel for retarded children.

[70] Section s.27(2) imposes an obligation on a person caring for a ward to permit an officer to interview the ward.

[71] Before 1974, the Ordinance provided that when a ward attained the age of 18 years the Minister could terminate his guardianship (s.19(2)). The section also provided that where the Minister did not terminate his guardianship when the ward attained 18 years, the Minister remained the guardian until the ward attained 21 years (s.19(3)). It appears that s.19 was intended to provide that, failing intervention by the Minister, wardship should automatically continue until the ward attained the then age of majority, 21 years. By the Age of Majority Ordinance 1974 (A.C.T.), the age of majority was reduced to 18 years and in the same year, 1974, the abovementioned provisions of s.19 were repealed. (Ordinances Revision Ordinance 1974 (A.C.T.)). It seems to have been assumed that wardship would automatically terminate at the age of 18.

was no provision for discharging a child before the period of wardship expired.[72] Since that date it has been possible for the Minister at any time to revoke the admission of a child or young person to government control.[73] Further, a parent or relative[74] may, at any time after the child's admission, request the Minister to revoke the admission to government control. Where the Minister refuses to do so or has not within three months replied to the request, application may be made to the Supreme Court.[75] The Supreme Court may revoke the admission and may make orders for the custody, guardianship and upbringing of the child and for access to the child.[76] Where the application is refused, no further application may be made within 12 months, except with the leave of the Supreme Court.[77]

53. ***Committal to an Institution*** Where a Childrens Court wishes to ensure that a child or young person is placed in an institution[78] a committal order is made under s.55(e) s.57(1)(d) or s.58(d). Under such an order the child or young person is held in a N.S.W. institution; by virtue of the Child Welfare Agreement Ordinance 1941 (A.C.T.) children who are committed under those provisions are held in facilities operated by that State.[79] The Commonwealth Government pays the cost of the child's maintenance.[80] A committal may be general[81], which means that no term is specified by the court, or it may be specific, in which case the court sets a term of months or years. The maximum for such a term is three years, which can expire before or after the date on which the child attains the age of 18. Between 1 June 1978 and 31 May 1979, 19 young offenders were committed generally, and 13 were committed for a set term. Together, the cases represent 5.4% of all young offenders (excluding traffic offenders) dealt with by the courts in that period. During the same period, 13 uncontrollable children were committed generally, and four were committed for a set term. Following committal a child is held in the Quamby Children's Shelter until transport to a N.S.W. institution can be arranged.[82] The magistrates act on the assumption that they can exercise greater control if they order a specific committal rather than a general one. Thus lengthy specific terms are reserved for the most serious matters. However, as will be explained, the N.S.W. Minister for Youth and Community Services is able to exercise complete discretion regarding the term of detention in a N.S.W. institution.[83] In one case which came to the Commission's notice a 16 year-old girl who had been specifically committed until her eighteenth birthday was released after $5\frac{1}{2}$ months.[84] A child or young person who is committed to an institution automatically becomes a ward[85] and the Minister for the Capital Territory assumes guardianship. The Minister's guardianship lasts throughout the child's detention in an institution, but whether in law it then terminates or continues until he attains the age of 18, or beyond, is unclear. It seems that a child committed to an institution has a dual status. Clause 2(c) of the First Schedule to the Child Welfare Agreement Ordinance 1941, provides that when the committed child[86] is received into the care of a N.S.W. shelter, he

> shall become and remain subject to the terms and provisions of the [Child Welfare Act 1939 (N.S.W.)] in all respects as if such child had been ... lawfully committed to a [N.S.W.] Institution ... and the ... State Minister ... may exercise any powers, discretions, duties and authorities vested in [him] by or under the ... Act.

Under N.S.W. law a committed child becomes a ward of the Minister for Youth and Community Services.[87] Thus, a child committed to an institution by the A.C.T. Childrens Court is a ward both of the Minister for the Capital Territory and of the N.S.W. Minister for Youth and Community Services. By virtue of s.20(b) of the Child Welfare Ordinance, the former Minister is not responsible for the care of the ward while he is an inmate of an institution. This responsibility devolves upon the N.S.W. authorities.

54. ***Committed Children*** A child who has been committed to a N.S.W. institution is taken first to a N.S.W. assessment centre. Boys over 16 and girls of all ages go to Minda Remand Centre and younger boys to Yasmar Remand Centre. Both centres are in Sydney, which is approximately 320 km from Canberra. The assessment process includes psychological, educational and medical assesements, and normally takes two weeks. The remand centre staff recommend a placement, and transfer to the appropriate institution is authorised by an executive officer in the residential care division of the N.S.W. Department of Youth and Community Services. The N.S.W. institutions which are most commonly used to accommodate those dealt with in the A.C.T. Childrens Court are:

- *Daruk,* in Windsor, approximately 740 km from Canberra up to 200 boys aged between 13 and 15 .
- *Endeavour House,* in Tamworth, approximately 740 km from Canberra: 20 older boys who require maximum security.
- *Ormond,* in Thornleigh, approximately 320 km from Canberra: up to 40 boys and 20 girls who have been dealt with for school default and associated problems.
- *Mt Penang,* in Gosford, approximately 370 km from Canberra: up to 200 boys aged 15 or over.
- *Kamballa,* in Parramatta, approximately 280 km from Canberra: 10 girls with severe behaviour problems.
- *Reiby,* in Campbelltown, approximately 250 km from Canberra: younger boys and all girls except those held in Kamballa or Ormond; capacity 100.

It should be noted that the figures quoted for each institution represent the maximum capacity. Some of the institutions regularly operate at well below maximum capacity. In recent times, for example,

---

72 This was the date when the Child Welfare (Amendment) Ordinance 1979 came into force. This amendment was passed following criticism expressed in *Director of Child Welfare* v. *Ford and Another* (1976) 12 ALR 577.

73 Section 26(2). No indication is given of the criteria which should guide the Minister in making his decision. Nor is it clear whether s.26(2) is intended to confer upon the Minister the power to revoke not only administrative admission to wardship (see para.270) but also admission to wardship following a court order.

74 'Relative' is defined in s.26(1).

75 Section 26(3). As to who may make application see s.26(4) and (5).

76 Section 26(3) and (7).

77 Section 26(10).

78 Section 5 defines an institution as a 'State institution' and indicates that this term has the same meaning as in the Child Welfare Agreement Ordinance 1941. In that Ordinance a 'State institution' means a New South Wales institution or place established under the Child Welfare Act 1939 (N.S.W.) or under any other Act passed in amendment of, or in substitution for, that Act.

79 The reciprocal legislation is the Child Welfare (Commonwealth Agreement Ratification) Act 1941 (N.S.W.). The Commission is aware of the possibility that the existing arrangements between the Commonwealth and N.S.W. Governments will be re-negotiated. However this report is based on the current law and practice. It would be unwise for the Commission to attempt to anticipate the terms of a re-negotiated agreement. Further, experience teaches that the process of re-negotiation is likely to take a substantial time.

80 Child Welfare Agreement Ordinance 1941 (A.C.T.), First Schedule, clause 5.

81 The Ordinance does not specify a maximum term for a general committal; it seems to have been assumed by those who drafted the Ordinance that such a committal expires when wardship expires. However, as has been explained (para.52) the Ordinance does not indicate when, failing Ministerial action under s.26(2), wardship terminates.

82 Section 73(1). The maximum period of detention in a shelter is 30 days (s.73(2)). Section 74 provides authority for the removal of a committed child (but not, it seems, a committed young person) to a New South Wales institution.

83 By virtue of clause 2(c) of the First Schedule to the Child Welfare Agreement Ordinance 1941 (A.C.T.) a committed child becomes subject to the provisions of the Child Welfare Act 1939 (N.S.W.). Hence the N.S.W. Minister for Youth and Community Services assumes responsibility for release decisions. The relevant section of the N.S.W. Act is s.54(2) which states that:

> The Minister may discharge from any institution any child or young person who has been committed thereto and restore him to the custody of his parent or other suitable person absolutely or on such terms and conditions as may be prescribed or as he may, in any special case, deem desirable.

Further, by virtue of clause 4 of the First Schedule to the Child Welfare Agreement Ordinance 1941 (A.C.T.), the child or young person can be discharged by the State Minister from the institution at any time and for any reason, despite the fact that the period of the committal by the court has not yet expired. Neither the Child Welfare Agreement Ordinance nor the Child Welfare Ordinance requires the participation of the Minister for the Capital Territory in the making of the release decision.

84 See discussion para.199.

85 See definition of 'ward' in s.5.

86 Clause 1 of the First Schedule defines a 'child' as a boy or girl under the age of 18.

87 See definition of 'ward' in s.4 of the Child Welfare Act 1939 (N.S.W.).

Daruk's population has been approximately 100 while Mt Penang's has been approximately 150. Within the limits of the court's order, discharge from one of these institutions generally depends on progress. A child who has been committed will usually be discharged before his full term has been completed. When a child arrives at an institution a case plan is prepared. The aim is to identify areas to which particular attention should be paid (e.g. the plan might draw attention to a need for special educational assistance). The staff carries out two-monthly case reviews and, when satisfied that the child should be discharged, makes a recommendation to this effect. At this stage a distinction is made between general and specific committals. With regard to a child who is the subject of the former type of order the discharge decision is made by an executive officer of the residential care division. This officer acts on behalf of the N.S.W. Minister for Youth and Community Services. When a child has been committed for a specific period, however, it is the N.S.W. Minister who makes the decision, acting on the advice of an executive officer of the residential care division. A typical term for a child on a general committal is between four and five months. A child who has been committed for a specific term is normally discharged after approximately two thirds of the term has expired, although there is no legislative rule to this effect. However, in special circumstances the N.S.W. Minister will accept a recommendation that a child be discharged after a much shorter period. An analysis of nine cases of specific committals revealed that four children were held for the full term ordered by the court, three were held for two thirds of the specified term, one for five of the specified six months, and one girl who had been committed for 12 months was discharged after five months. When a child has been placed in a N.S.W. institution the A.C.T. Welfare Branch does not maintain routine contact with him, although reports on his progress are supplied to the Branch by the N.S.W. authorities. The Branch should be informed of his discharge, although this does not always happen. Before discharge, it is usual for the A.C.T. Welfare Branch to provide the N.S.W. institution with information about the child's home so that the staff are aware of the situation to which he will return. The Child Welfare Ordinance makes no provision for the supervision in the A.C.T. of a child who has been discharged from a N.S.W. institution, and there is no regular program of after-care when a child returns to the Capital Territory. It has been suggested to the Commission that there is room for better liaison between members of the A.C.T. Welfare Branch and members of the N.S.W. Department for Youth and Community Services. However, it should be noted that the Department is a large one and that A.C.T. children are placed in a number of relatively autonomous institutions. It is therefore sometimes difficult for the necessary liaison regarding particular children to be arranged. One further possibility must be mentioned with regard to a child who has been committed. Such a child may be granted leave from an institution to attend the Stanmore Community Youth Centre, in Sydney, N.S.W.[88] This course has, on rare occasions, been adopted with A.C.T. children. The problem is that, before such a placement can be arranged, accommodation must be found near to the centre. Thus the measure is more suitable for Sydney residents than for those from the A.C.T.

55. ***Committed Wards*** The reference in s.55(e), 57(1)(d) and 58(d) to the power given to the court to commit a child or young person to an institution either generally or for a specified term 'whether expiring before or after the date on which the child or young person attains the age of eighteen', implies that a committal may end after the child attains the age of eighteen. Since a child who is committed to an institution automatically becomes a ward, it is arguable that if the committal extends beyond the eighteenth birthday, so does the wardship. Alternatively it could be argued that the child or young person ceases to be a ward when he attains the age of 18 although the committal may continue. It seems unlikely that such a result was intended, but the Ordinance leaves the matter in doubt. The question of the status of committed children is dealt with later in this report.

56. ***Suspended Committal*** To complete this description of measures which are available both in criminal and neglect and uncontrollability matters, mention should be made of the court's power, conferred by s.60(1), to suspend a committal order made under s.55(e), s.57(1)(d) or s.58(d). This power may be exercised if the child or young person enters into a recognizance, with or without sureties, to be of good behaviour and to comply with any conditions set by the court. The court may require a child dealt with under s.60 to accept supervision and, less commonly, to live where directed.

---

[88] This course is authorised by the Child Welfare Act 1939 (N.S.W.), s.53(1)(d).

The A.C.T. Supporting Services

57. ***Quamby Children's Shelter*** A number of the services available in the A.C.T. have already been mentioned. The roles of the Welfare Branch and the Capital Territory Health Commission have been outlined, and will be more fully described elsewhere in this report.[89] In this section certain facilities which are available both for offenders and for non-offenders are described. The Quamby Children's Shelter accommodates children and young persons in respect of whom criminal or uncontrollability proceedings have been instituted. In addition, on rare occasions, children who are the subject of neglect proceedings are held in Quamby. The shelter caters for both boys and girls, but does not accept those under the age of eight. The following categories of children in trouble may be held in the shelter:

Children charged. Children and young persons who have been charged by the police and who are held in custody pending their court appearance. Normally when a child is being held in custody the police notify the staff of Quamby that the child will be brought to the shelter. However, occasionally the police simply arrive with the child. Children awaiting their first court appearance are normally held until the next sitting of the Childrens Court. Thus a child brought to Quamby in the evening will be taken to court the next morning. However it seems that, on occasions, those placed in the shelter on a Friday evening do not appear in court until the following Monday morning.

Court remands. Children remanded by the Childrens Court (under s.54(8) of the Child Welfare Ordinance) to a shelter (which includes a place of safety). Children may be remanded in custody by the Childrens Court when, for any reason, the hearing cannot proceed, or when a welfare or psychiatric report is required. When remanding a child, the Childrens Court may recommend that he be held in the Belconnen Remand Centre. The decision about placement in such cases rests with the Assistant Secretary, Welfare. He may also authorise the transfer of a remanded child from Quamby to the Belconnen Remand Centre.[90]

Committed for trial. Children committed for trial in the Supreme Court.[91] By virtue of s.65(4) a child so committed must be held in a shelter unless the Childrens Court certifies that he is too unruly or depraved to be held there or that the charge is too serious to permit detention in a shelter.

Awaiting appeal. Children who have been committed to an institution and who are awaiting the outcome of an appeal to the Supreme Court.[92]

Awaiting N.S.W. placement. Children who have been committed to a N.S.W. institution and are awaiting an escort to take them to a N.S.W. facility. The placement of such children in Quamby is specifically authorised by s.73(1).

Children involved in court proceedings. Children who are being held in N.S.W. institutions and are required to come to court to give evidence in court proceedings in the A.C.T.

N.S.W. children. By agreement Quamby will accept children for whom the N.S.W. Department of Youth and Community Services is responsible. This can occur when a child appears in a N.S.W. Childrens Court in a town adjoining the A.C.T. If such a child is remanded in custody or committed to a N.S.W. institution, the Quamby Children's Shelter may assist the Department of Youth and Community Services by providing temporary accommodation.

Child fine defaulters. Children detained in default of payment of a monetary penalty.[93] This use of Quamby is authorised by s.62(1), although the Childrens Court may, if it chooses, commit a

---

[89] See para.254, 256, and Chapter 13.

[90] By virtue of s.16(1)(f) of the Remand Centres Ordinance 1976 (A.C.T.) a 'juvenile' (defined as a person under the age of 18) may be detained in a remand centre if a court of the Territory has ordered that he be kept in custody, and, in the opinion of the Minister, he is not a suitable person to be detained in a shelter. The decision-making power has been delegated by the Minister to the City Manager and the Assistant Secretary, Welfare Branch.

[91] For a discussion of committal for trial, see para.104.

[92] See Child Welfare Ordinance 1957 (A.C.T.), s.15(3).

[93] For a discussion of procedures for fine defaulters, see para.96.

defaulting child to a prison or to a N.S.W. institution. When a child is in default the maximum period of committal to a shelter is 30 days.[94] Fine defaulters have been held in Quamby for up to 10 days.

Holding orders. Children held under a holding order made by the Assistant Secretary, Welfare or by his delegate. This is an administrative procedure whereby interstate runaways or A.C.T. children whose parents cannot be located are held for a short time until their parents can collect them or until arrangements can be made to send them home. The normal maximum for detention of this kind is 48 hours and the child's written consent is obtained.

It should be noted that, while the role of the Belconnen Remand Centre is defined by Ordinance[95], there is no Ordinance which deals specifically with Quamby. Its role has evolved, and not all of its functions have specific legislative sanction. For example, the Child Welfare Ordinance does not expressly authorise the Superintendent of Quamby to hold a child or young person before the initial court appearance, and it can be argued that it is only the police who have the authority to detain children at the pre-court stage of the process. The staff of Quamby work three shifts. They are from 7 a.m. to 3 p.m., 3 p.m. to 11 p.m., and from 11 p.m. to 7 a.m. The normal staff for the two day-time shifts comprises a Chief Custodial Officer and two male and two female custodial officers. The Superintendent is on duty from 8.30 a.m. to 5 p.m. At night a Chief Custodial Officer and one custodial officer are on duty. The shelter can accommodate 10 children in single cells. Each has its own toilet. In addition there is accommodation, in less secure conditions, for four more children. There are three outdoor yards which are used for recreation. Visiting facilities are limited and children talk with their visitors in the dining room, the staff room, and, in fine weather, in the yards. The children get up at 7.00 a.m. and, before breakfast, clean their rooms. Those who are going to court are collected by the police at 8.45 a.m. Those spending the day at the shelter do general cleaning work for the first part of the morning and then play games in the yards, play indoor games or watch television. There is no formal program, and the day is spent in a combination of sporting and recreational activities. Each child is locked in his cell for the night. The average length of stay during April 1980 was 10.35 days. Some stay much longer. For example, in 1978 a boy was reported to have spent 51 consecutive days in the shelter[96] and early in 1980 a girl remained in the shelter for 30 days.

58. ***Homes Run by Dr Barnardo's and Outreach Inc*** Dr Barnardo's in Australia is a welfare organisation operating throughout Australia and overseas. Outreach Incorporated is a charitable organisation operating in the A.C.T. At the time of this report, Outreach's work with children in trouble was being gradually transferred to the Richmond Fellowship, an English agency which began work in Australia in 1973. The homes established in the A.C.T. by Dr Barnardo's and Outreach Inc., in the main provide accommodation for children who have been the subject of court proceedings. These are children whom the Childrens Court has ordered to live where directed by the Assistant Secretary, Welfare (such an order may be made as a condition of a remand, of a probation order, or of a release on a recognizance) and those who have been made wards. On very rare occasions the homes run by these two organisations also accommodate children who have been voluntarily placed in their care. Dr Barnardo's runs two group homes in Canberra suburbs, one in Downer and the other in Curtin. Its two houses provide long-term care for children, most of whom are aged between 12 and 17. Each of its homes accommodates both boys and girls. The Downer home accommodates 10 children and the Curtin home nine. Each is a suburban home and the children go out to school or work, and are permitted to go out in the evenings and at the weekends. The houses are run by full-time residential youth workers. Provision is made for the care and support of a child after he leaves one of the homes. A typical length of stay is 10 months. The homes established by Outreach Inc., are also in Canberra suburbs, one being in Curtin and the other in Lyneham. The Lyneham house has accommodation for seven children and the Curtin house for six. The age range is from 13 to 18. The Outreach homes were run in a manner similar to those operated by Dr Barnardo's. They provided open accommodation under the control of house parents. A typical stay was four to five months, although some children stayed for a year or more.

---

94 Child Welfare Ordinance 1957 (A.C.T.), s.62(2).
95 Remand Centres Ordinance 1976 (A.C.T.).
96 *Canberra Times*, 24 September 1978.

59. ***Marymead Children's Centre.*** Marymead is run by the Franciscan Missionaries of Mary, of the Roman Catholic Church. It houses a maximum of 50 children. The average number at any time is something over 30. They reside in five cottages. Each cottage has a housemother and houses a range of children of different ages. The population fluctuates. At the time a member of the Commission visited the home in 1979 there were 29 children in Marymead. There is also a cottage which provides day-care for families with difficulties. The categories of children held in Marymead before, during, or after court proceedings are as follows:

- those whom the police have apprehended as potentially neglected or uncontrollable or (very rarely) children who will be dealt with as offenders;
- children remanded by the court;
- children who are released on probation or on a recognizance with the condition that they live where directed; and
- children who are wards.

Thus all categories of children in trouble are catered for, i.e. offenders, neglected and uncontrollable children. Also those who are the victims of child abuse might be brought to Marymead by the police or, more rarely, by the Welfare Branch. Marymead houses both boys and girls but normally does not hold boys over the age of 12. It is unusual for Marymead to house offenders, but it does happen occasionally. For example, a girl who is remanded in the care of the Assistant Secretary, Welfare might be thought by the welfare staff to be better suited to Marymead than to Quamby. The other major category of children held at Marymead consists of those who are voluntarily placed there by their parents when family circumstances do not permit the parents to care for them. For example, one of the parents may be ill.

60. ***Other Facilities*** Other facilities available for wards and children ordered to live where directed include hostels operated by the Y.M.C.A. and the Y.W.C.A., although the latter organisation is not normally able to cater for difficult children. There is also the L.A.S.A. Youth Centre (Lions and Salvation Army) which provides temporary accommodation for up to nine children. Although this hostel accepts children dealt with by the courts, it also acts as a refuge for children in difficulty, and will accept young people referred by the police, Welfare Branch, the Salvation Army, the Capital Territory Health Commisssion and other agencies. Older children in need of psychiatric care may be placed in an adult psychiatric ward in Woden Valley Hospital. Children aged between two and 12 may be treated in a small psychiatric in-patient unit for children in the Royal Canberra Hospital. For children who are mentally retarded there are the Bruce and Chapman Hostels, while those who are grossly retarded may be placed in the Grosvenor Hospital in N.S.W. Other N.S.W. hospitals occasionally accommodate A.C.T. children who are emotionally disturbed. Other facilities in that State on which the Welfare Branch can call are, for example, the Westmead Boys' Home, St Catherine's School, the Arncliffe Girls' Home, Boys' Town, Bungarimbil Children's Home, and the Melrose Boys' Home. All are church institutions. In addition, the Dr. Barnardo's Home at Lindfield in N.S.W. caters for severely emotionally disturbed children.

A Unified System for Separate Groups

61. From the foregoing it is clear that there is substantial overlap between the systems for dealing with offenders and non-offenders. Both groups are handled within a legal framework created by the one Ordinance, the Child Welfare Ordinance. The title of the Ordinance suggests that the various categories of children in trouble can be viewed as having a good deal in common, and that, in general terms, their problems can be seen as the concern of the welfare services. Although it is important not to over-emphasise this aspect – at no stage has the present Childrens Court in the A.C.T. been seen as an extension of the Territory's welfare agencies – the Ordinance does bring together procedures in which the concerns and techniques of the law enforcement officer and the criminal lawyer are mingled with those of the welfare worker. Thus, with regard to children in trouble, the role of the Australian Federal Police is not confined to dealing with those who com mit offences. Members of the force undertake preventive work and bring neglected and uncontrollable children before the court. When court proceedings are considered to be necessary, a non-offender is charged with being a neglected or uncontrollable child. The same court deals with offenders and non-offenders, and the procedures employed for one group are often very similar to those used for the other group. Most of the measures available to the court may be utilised whether the matter is a

criminal or a non-criminal one. For example, a young offender might be made a ward, or a neglected infant might be placed on probation. When supervision is required, it is the Welfare Branch which provides it, whether the child came to notice as an offender or because he was adjudged neglected or uncontrollable. Finally, when children must be removed from home, many of the institutions which are used make no distinction between offenders and non-offenders. In short, the present A.C.T. system for dealing with children in trouble is one in which criminal and non-criminal procedures and responses are inextricably intertwined. This is perhaps the system's most important characteristic. Society is ambivalent as to how to treat its troubled and troublesome children. With regard to tne offender it feels it cannot ignore his offence, but, wishing to respond in a benevolent manner and to meet his special needs, it also concerns itself with the characteristics which he shares with the non-offender. With regard to the neglected or uncontrollable child, although the primary objective is to offer help, this objective is pursued within a framework which, by reason of its personnel, procedures and outcomes, has much in common with the criminal process. For both groups the result is a system which must endeavour to combine conflicting objectives. Many critics of child welfare systems in Australia and overseas have argued that the attempt to pursue divergent objectives has produced practices which satisfy neither the lawyer nor the welfare worker.

> A recurrent theme of the literature has been that the [Children's] Courts and other agencies have sought to achieve two basically incompatible objectives, namely to provide help for children in need and to deal with children who commit offences or are otherwise troublesome. It has been argued that in practice the system succeeds neither in effectively providing needed welfare services, nor in punishing fairly and deterring children whose behaviour threatens the community.[97]

The resulting combination of objectives raises fundamental questions about the purposes which society should pursue when dealing with offenders and non-offenders. An analysis of society's objectives with regard to the former category is contained in Chapters 5 and 6, and policies for non-offenders are examined in Chapters 8 and 9. Before turning to these matters, however, it is necessary to examine the setting of relevant age limits and so to define the classes of persons to whom child welfare laws should apply. This task is undertaken in Chapter 3. The report then examines the current law and practice in relation to young offenders in the A.C.T. (Chapter 4).

---

97 Commission of Inquiry into Poverty, *Law and Poverty in Australia, Second Main Report*, (1975), 300 (hereafter *Commission of Inquiry into Poverty*).

3. Age Limits

Defining the 'Child'

62. ***Legally Prescribed Ages*** Before separate consideration is given to offenders and non-offenders, there is one general issue which requires attention. Consideration must be given to the age at which a person ceases to be a child, and so passes outside the ambit of the special systems outlined in this report. The setting of age limits controlling the lives of the young is an arbitrary process. Examples of legally prescribed ages applicable in the A.C.T. are:

6 Age at which a child must be enrolled at school.[1]

7 Age at which a child may be given a licence to take part in public entertainments.[2]

8 Age of criminal responsibility.[3]

10 Age at which a child may, subject to parental consent, effect an insurance policy upon his own life.[4]

12 Age at which the consent of a child must normally be obtained before that child is adopted.[5]

14 Age at which a child is presumed to understand the wrongness of a criminal act.[6]

Age at which a boy is presumed to be capable of sexual intercourse.[7]

Age at which a child must be heard in custody, guardianship or access proceedings in the Family Court.[8]

Age at which a girl may be given judicial authority to marry.[9]

15 School leaving age.[10]

Age at which a child may be granted a licence to engage in street trading.[11]

16 Age at which a girl may consent to sexual intercourse.[12]

Age at which a child becomes a young person.[13]

Age at which a gun licence may be granted.[14]

Age at which a boy may be given judicial authority to marry.[15]

Age at which a child becomes eligible for unemployment benefits.[16]

Age at which child endowment normally ceases.[17]

Age at which a young person may freely effect an insurance policy upon his own life.[18]

17 Age at which a driving licence may be obtained.[19]

18 Age of majority.[20]

---

1 Education Ordinance 1937 (A.C.T.), s.8(1).
2 Child Welfare Ordinance 1957 (A.C.T.), s.90 and 92.
3 Child Welfare Ordinance 1957 (A.C.T.), s.108.
4 Life Insurance Act 1945 (Cwlth), s.85(1).
5 Adoption of Children Ordinance 1965 (A.C.T.), s.31.
6 See discussion (para.67–68) of the *doli incapax* rule.
7 See *R.* v. *Willis* (1864) 4 SCR (NSW) 59,60.
8 Family Law Act 1975 (Cwlth), s.64(1)(b).
9 Marriage Act 1961 (Cwlth), s.11 and 12.
10 Education Ordinance 1937 (A.C.T.), s.8, and see definition of 'the school leaving age' in s.5.
11 Child Welfare Ordinance 1957 (A.C.T.), s.88(1)(a); s.88(1)(b) contains a special exemption for 14-year-olds.
12 Section 71 of the Crimes Act 1900 (N.S.W.) as it applies in the A.C.T. creates the crime of carnal knowledge where the girl is under 16 years.
13 Child Welfare Ordinance 1957 (A.C.T.), s.5; see definitions of 'child' and 'young person'.
14 Gun Licence Ordinance 1937 (A.C.T.), s.6(1)(a); s.6(1)(b) provides for a pistol licence at 18 years.
15 Marriage Act 1961 (Cwlth), s.11 and 12.
16 Social Services Act 1947 (Cwlth), s.107.
17 Social Services Act 1947 (Cwlth), s.94–95.
18 Life Insurance Act 1945 (Cwlth), s.85(2). See also sub-section (3) of that section.
19 Motor Traffic Ordinance 1936 (A.C.T.), s.10(3).
20 Age of Majority Ordinance 1974 (A.C.T.), s.5. The section provides that upon a person attaining the age of 18 years, the person 'attains full age for all purposes of the law of the Territory' (s.5(1)) and 'is not subject to any want of legal capacity by reason only of his age'. (s.5(2)).

Voting age.[21]

Age at which a person is liable to serve as a juror.[22]

Age at which a person may make a valid will.[23]

Age at which a young person normally ceases to be eligible to appear before the Childrens Court.[24]

Age at which it is no longer possible for the Family Court to make a custody, guardianship or access order.[25]

Age at which parents are no longer normally liable for a child's maintenance.[26]

Age at which a young person may lawfully be on licensed premises or purchase liquor.[27]

Age at which a young person is liable to serve in the Defence Force.[28]

19 Age at which a young person is liable for registration under the National Service Act 1951 (Cwlth)[29]

21 Age of majority at common law.[30]
Age at which a young person is entitled to be registered as a tax agent[31], a patent attorney[32] or a minister of religion[33]

Age at which a young person is qualified to be a member of the House of Representatives.[34]

Age at which, in respect of immigrant children, the Minister for Immigration and Ethnic Affairs ceases to be the children's guardian[35].

Age at which a young person's parent or guardian may no longer claim certain expenses, incurred in respect of the young person, as deductible for certain income tax[36] or superannuation[37] purposes.

Age at which a parent of a child, or a person in loco parentis, ceases to have an insurable interest in the life of the child.[38]

Upper Limits

63. ***The Jurisdiction of the Childrens Court*** In seeking to determine the age limits which are relevant to the A.C.T. Childrens Court, the Commission is aware that there are no objectively right answers. For example, it cannot be said that the age of criminal responsibility is based on any universally observable facts of child development. The attainment of a particular birthday does not confer on a child the instantaneous ability to understand the nature and consequences of his actions. The fixing

21 Electoral Act 1918 (Cwlth), s.39(1).
22 Juries Ordinance 1967 (A.C.T.), s.9. This section provides that a person whose name is on the roll of electors is, unless disqualified or exempt, liable to serve as juror.
23 Wills Ordinance 1968 (A.C.T.), s.8. An exception is made for members of the Defence Force: s.16.
24 See definition of 'young person' in Child Welfare Ordinance 1957 (A.C.T.), s.5.
25 Family Law Act 1975 (Cwlth), s.61(2).
26 Family Law Act 1975 (Cwlth), s.73 and 76(2). The Court can order maintenance beyond 18 years to enable the child to complete education or because he is mentally or physically handicapped (s.76(3)).
27 Liquor Ordinance 1975 (A.C.T.), s.80–84.
28 Defence Act 1903 (Cwlth), s.59.
29 National Service Act 1951 (Cwlth), s.10(1). The National Service Termination Act 1973 (Cwlth) terminated the obligations of persons to register or to render national service.
30 Now virtually eclipsed by legislation: see Finlay, *Family Law in Australia,* (1979), 160. For reference to the principle at common law, see Blackstone, *Commentaries,* Book 1, 464, and *King* v. *Jones* (1972) 128 CLR 221, 263, per Gibbs J.
31 Income Tax Assessment Act 1935 (Cwlth), s.251J(3).
32 Patents Act 1952 (Cwlth), s.133(3)(b).
33 Marriage Act 1961 (Cwlth), s.29(d).
34 The Constitution, s.34(i).
35 Immigration (Guardianship of Children) Act 1946 (Cwlth), s.6.
36 Income Tax Assessment Act 1936 (Cwlth) ss.82F(3)(b), 82JA(1).
37 Superannuation Act 1922 (Cwlth), s.4.
38 Life Insurance Act 1945 (Cwlth), s.86(1)(a).

of the age of criminal responsibility is no more than the reflection of a vague feeling that the very young should be shielded from the rigours of the criminal law.

> The age of responsibility is, in effect, not the age at which the child can tell right from wrong – most five year olds can do that – but the point at which society feels it can unashamedly *punish.* Most of the efforts that have gone into raising the age of criminal responsibility have really been efforts to mitigate the full severity of the law that might otherwise fall on children whom we recognise as being imperfectly socialised rather than morally ignorant.[39]

A similar comment can be made about the setting of the age at which a child passes out of the jurisdiction of the Childrens Court. Society feels that there comes a time when a child should be treated as an adult. However, some of those who are labelled 'adults' might still be very immature, while some of those who have not attained the specified age might display adult attitudes and behaviour. The Commission has concluded that the law should continue to reflect the feelings on which the two existing age limits are based. The problem of the age of criminal responsibility will be discussed later in this chapter. On the subject of the upper limit of the Childrens Court's jurisdiction, the Commission concludes that, in spite of the range of ages cited above, the age of eighteen has a particular significance. In our society it seems to be the age which is most closely associated with 'adulthood'. Many of the school pupils to whom members of the Commission spoke regarded the attainment of the age of 18 as marking a significant change of status. Eighteen is the age of majority and the voting age. Its selection by those who framed the Family Law Act 1975 (Cwlth) is also important. At the age of eighteen a young person can no longer be the subject of a guardianship, custody or access order. Nor can he normally secure court ordered maintenance from his parents. This suggests that someone who has attained this age is no longer dependent. He can and should make his own decisions. With regard to children dealt with as offenders, it has been pointed out to the Commission that there is a further reason for retaining the age of 18.[40] This is the upper limit of the Childrens Court's jurisdiction in N.S.W.[41] and difficulties would arise if a different age limit were adopted in the A.C.T. As is explained later in this report[42], the A.C.T. Childrens Court does not normally sentence children to imprisonment. If the upper age limit of that court's jurisdiction were reduced to 17, the result would be that 17-year-olds would sometimes be sentenced to imprisonment. Since there is no prison in the A.C.T., persons sentenced to imprisonment by A.C.T. courts serve their sentences in N.S.W. prisons. The N.S.W. prison system is not designed to deal with 17-year-olds and difficulties would arise if it had to make special provision for a small number of A.C.T. 17-year-olds. The age of 18 should be retained as the upper limit of the A.C.T. Childrens Court's jurisdiction. A similar recommendation was made by the N.S.W. Green Paper.[43]

64. ***Children and Young Persons*** The Child Welfare Ordinance distinguishes between 'children' (those under 16) and 'young persons' (those 16 and under 18).[44] At first sight, the arguments supporting the preservation of this distinction are strong. It can be argued that distinctions should be made within the broad age range over which the Childrens Court has jurisdiction. 'Young persons' are in a transition stage. They are almost adult, and hence the law should differentiate between them and children. The notion that legislative recognition should be given to the fact that they are more responsible is attractive. However, quite apart from the fact that acceptance of these views requires the creation of a further arbitrary dividing line, the Commission has concluded that the distinction cannot be given practical significance.[45] Several possible ways of distinguishing between children and young persons were considered:

39 Morris, 'Struggle for the Juvenile Court,' (1966) *New Society,* 7(176), 17. Emphasis in original.
40 Mr R.D. Blackmore, S.M., *Submission,* 3.
41 See definition of 'young person' in s.4(1) of the Child Welfare Act 1939 (N.S.W.).
42 Para.100.
43 *Green Paper,* 32 and 45. The Department of the Capital Territory also favoured the retention of the existing upper limit of 18. *Submission,* 45.
44 Child Welfare Ordinance 1957 (A.C.T.), s.5.
45 Although the existing Ordinance creates a distinction between 'children' and 'young persons', very little reliance is placed on it. With the exception of certain provisions relating to the employment of 'children' (see Parts XI and XIA of the Ordinance), the Ordinance applies equally to 'children' and 'young persons'. The employment of children is discussed in Chapter 12.

- *Diversion from court.* As will be explained in Chapter 5 the Commission favours a policy of diverting the maximum number of young offenders from the court. If this policy is accepted, less emphasis could be placed on diverting 'young persons' from the court: diversionary strategies could be directed mainly towards 'children'. This possibility was rejected by the Commission as the offender's age will always be an important factor when the decision to prosecute is made. A 12-year-old charged with theft is far less likely to appear in court than a 17-year-old facing a similar charge. Rather than arbitrarily excluding members of a certain age group from the screening process, it is preferable to allow those making the prosecution decision to exercise their discretion, unhampered by a further age limit which may have no bearing on the actual capacities of the accused.
- *More severe penalties.* 'Young persons' could be made liable to more severe penalties than 'children'. Difficulties are encountered when an attempt is made to put this principle into practice. It would be undesirable to provide that detention in an institution should be more readily employed when the juvenile is a young person. Placement in an institution should be a last resort, both for children and young persons. At first sight it might seem that a fine is a penalty which is appropriate for young persons rather than for children, for it may be more likely that a young person is in employment. However, with the fine a most important consideration is the ability to pay. It should not be universally assumed that a child will be unable to pay a fine. Nor should it be assumed that a young person will have the necessary funds. Many young people attend a college. As the figures quoted above[46] show, many young people in the A.C.T. are unemployed. They would not be better off than the average child. When considering the penalties which should be available to the court the primary objective should be flexibility. The making of the child-young person distinction would reduce this flexibility and impose an arbitrary dividing line which may have nothing to do with the facts of the individual case.
- *Adult criminal trial.* A 'young person' could be at greater risk of being dealt with in the system for adults. Again, such a suggestion can be rejected on the grounds that it would hinder the pursuit of flexibility at the dispositional stage. Age is one factor which the magistrate takes into account when he is deciding whether to commit a juvenile for trial, and it is proper that he should do so. A 17-year-old charged with a very serious offence is more likely to be committed for trial than is a 13-year-old charged with a similar offence. But there may be occasions when it is appropriate that the 13-year-old should be tried by a jury. The enactment of a rule designed to impede or prevent this result is undesirable.
- *Limits to care proceedings.* A distinction between children and young persons could be utilised in defining the grounds for non-criminal proceedings. Perhaps society should have restraints imposed on its ability to initiate protective intervention in the lives of young persons? The argument has some merit. As will be shown in Chapter 8, there is support for the view that society should be prevented from intervening on the basis of misconduct not amounting to a criminal offence. Even if this view is not wholeheartedly accepted, it could lead to the conclusion that misconduct by older juveniles should not result in coercive action. For example, it might be decided that a child who persistently runs away should in some situations be made the subject of non-criminal proceedings, but that a young person who behaves in a similar manner should be left to run. Though the Commission subscribes to this view, it does not believe that it is necessary to rely on a chronological classification in order to achieve this result. If the screening process operates as it should, there should be extreme reluctance to intervene coercively when non-criminal misconduct is alleged, whatever the juvenile's age.
- *Nomenclature.* The only remaining justification for the distinction is one of terminology. Some persons aged between 16 and 18 resent being described as 'children'. Furthermore, in the community a person of that age is not normally called a 'child'. Although these considerations must be given weight, the Ordinance should not embody distinctions of no legal consequence. Arguments relating to nomenclature do not in themselves justify the retention of the existing terminology.

Having explored each of the above possibilities the Commission has concluded that no practical benefit would result from the maintenance of the existing distinction between 'children' and 'young

[46] Para.25.

persons'. The distinction in the present Ordinance should be abolished. The chapters which follow refer to 'children', a term intended to apply to all young people under the age of 18.

Lower Limits

65. ***The Age of Criminal Responsibility*** Section 108 of the Child Welfare Ordinance states that there is a conclusive presumption that a child under the age of 8 years cannot be guilty of an offence. A number of the submissions received by the Commission suggested that the age of criminal responsibility in the A.C.T. be raised to 10.[47] Others suggested that it remain unchanged.[48] The arguments in favour of raising the age of criminal responsibility in the A.C.T. from eight to 10 are as follows:

- Ten is the age of criminal responsibility in N.S.W.[49] and there should not be a different age in the A.C.T., which is an island completely surrounded by that State. Further, there would be practical benefits in setting the same age in each jurisdiction. As has been explained, the Territory relies on N.S.W. facilities, and there are obvious advantages in ensuring that the A.C.T. children who use these facilities are in the same age group as their N.S.W. counterparts.
- The age of 10 has been accepted in many jurisdictions[50] and the Commission knows of no moves to reduce it in those countries where this age has been adopted.
- Intervention by the criminal law, particularly in the lives of the young, is a drastic, and generally clumsy process and, although the age of criminal responsibility is an artificial concept, raising it is consistent with a general policy of diversion.

Notwithstanding these arguments, the age of criminal responsibility in the A.C.T. should remain unchanged. To raise the age from eight to 10 would simply be to substitute one arbitrary age for another. What is needed is a fundamental re-examination of the concept of the age of criminal responsibility.[51] The concept is an artificial one which does not reflect observable facts of child development. Nor does it rest on principles embodied in the criminal law. If society's concern is with protecting from the criminal process those whose incapacity deprives them of the *mens rea* which normally must be established as an ingredient of any offence, it can be argued that there is no need to set a minimum age of criminal responsibility. It might be possible to rely on basic principles of criminal law which require the prosecution affirmatively to establish the *mens rea* of a defendant in every case. Thus a satisfactory examination of the age of criminal responsibility would raise fundamental questions, the answers to which would have ramifications throughout the criminal justice system in Australia. Such an examination should be undertaken on a national basis and not as an isolated decision in a Territory project confined to child welfare law. The concept of a minimum age of criminal responsibility is part of the law in every jurisdiction in Australia.[52] It would be inappropriate for the Commission to undertake an examination of the concept in the context of one jurisdiction. Further, the concept of an age of criminal responsibility is artificial in another sense. Whatever the age set, it is a common practice throughout Australia for non-criminal

[47] Foreman, *Submission,* 22; Department of the Capital Territory, *Submission,* 45; Capital Territory Health Commission, *Submission,* 2; Mr R.D. Blackmore, S.M., *Submission,* 2; Mr B.A. Holborow, *Submission,* 1.

[48] A.C.T. Police, *Submission,* 17; Catholic Welfare Advisory Committee of the Archdiocese of Canberra and Goulburn, *Submission,* 9–10.

[49] Child Welfare Act 1939 (N.S.W.), s.126.

[50] In addition to N.S.W., two other Australian States have adopted 10 as the age of criminal responsibility. These are South Australia (see Children's Protection and Young Offenders Act 1979, s.66) and Queensland (see The Criminal Code, s.29). Ten is the age selected in England (see s.50 of the Children and Young Persons Act 1933 (U.K.) as amended by s.16 of the Children and Young Persons Act 1963 (U.K.)). In the United States the Juvenile Justice Standards Project recommended the age of 10. (See Juvenile Justice Standards Project, *Standards Relating to Juvenile Delinquency and Sanctions,* (1977), 14.)

[51] For a discussion of the concept of the age of criminal responsibility see Kean, 'The History of the Criminal Liability of Children', (1937) 53 *Law Quarterly Review,* 364; Williams, 'The Criminal Responsibility of Children', [1954] *Crim. LR* 493, Williams, *Criminal Law – The General Part,* (2nd ed., 1961), 814–820; and Westbrook, 'Mens Rea in the Juvenile Court', 5 J *Family Law,* 121 (1965).

[52] The Australian jurisdictions which have set the age of criminal responsibility at 10 have been noted above (n.50). Eight is the age set in Victoria (Crimes Act 1958 (Vic), s.335). Seven is the age set in Western Australia (Criminal Code (W.A.), s.29) and in Tasmania (Criminal Code (Tas), s.18(1)). In the Northern Territory there is no legislative age of criminal responsibility. The common law, which sets the age at seven years, is in force.

proceedings to be initiated against children under the minimum age who commit acts which would be criminal were the children over that age. If the child is too young to be charged, the offence is used as a ground for neglect or uncontrollability proceedings. Thus the fact that a child is under the age of criminal responsibility does not make him immune from court action in respect of 'criminal' behaviour. Society does not ignore his behaviour. It employs a procedure which, though nominally different from a prosecution, can result in the imposition of measures which are very similar to those imposed in respect of children who are explicitly dealt with as offenders. Everyone involved in this procedure—including the child— knows that the basis for the proceedings is the act which would have been an offence if the child had been of sufficient age. Hence it is necessary to ask whether a raising of the age of criminal responsibility would confer any real benefit on children in the A.C.T. Finally, the available evidence does not suggest that there is a pressing need to raise the age of criminal responsibility in the A.C.T. The statistics compiled by the Commission showed that very few children aged eight and nine were brought to court as offenders between 1 June 1978 and 31 May 1979.[53] The raising of the age of criminal responsibility from eight to 10 would make virtually no practical difference to the operation of the criminal justice system in the A.C.T.

66. ***Offences by the Very Young*** A recommendation in favour of retaining a minimum age of criminal responsibility raises questions about society's reaction to anti-social behaviour by those under that age. Having set such an age, how should society react when a child under that age commits an act which would be criminal were it committed by someone over that age? Reference has been made to criticisms of the use of neglect or uncontrollability proceedings. The problem is further compounded by the fact that, later in this report, the Commission recommends the abolition of neglect and uncontrollability proceedings in their present form and proposes that care proceedings be substituted.[54] In formulating the grounds for these proceedings the Commission has sought to produce a series of specific definitions designed to limit intervention, in the main, to situations in which the child has suffered, or is likely to suffer, harm. Broad concepts such as 'uncontrollability' have been rejected.[55] Consideration was given to recommending that the alleged commission of an offence by a child under the age of criminal responsibility should be made a specific ground for the initiation of care proceedings in respect of the child. This course has been advocated in the United States.[56] In a submission to the Commission, the Department of the Capital Territory suggested that the prosecution of all children under the age of 14 should cease and that children aged between 10 and 14 who are alleged to have committed an offence should be made the subject of care proceedings when court action is thought to be necessary.[57] The Commission does not believe that non-criminal proceedings should be used to deal with offenders. Such an approach is inherently artificial.[58] It is also open to fundamental legal objections. If non-criminal procedures are employed to deal with conduct which, in the case of an adult, would amount to a criminal offence, should the civil standard of proof, rather than proof beyond reasonable doubt, be adopted? Such a course would be objectionable, for a young child dealt with by way of care proceedings would receive fewer protections than an adult charged with a crime. If an attempt were made to solve the problem by importing the criminal standard of proof into proceedings which are otherwise of a civil nature the resulting procedure would be complex and confusing.[59] The second problem posed by an attempt to deal with

---

53 Of the young offenders in respect of whom the A.C.T. Childrens Court made a final order between 1 June 1978 and 31 May 1979, three were aged nine, and there were none aged eight. Two of the nine-year-olds were charged as uncontrollable children as well as with offences. Two of the nine-year-olds were placed on unsupervised probation and one was admonished and discharged.

54 See para.304.

55 See para.299.

56 *Juvenile Justice and Delinquency Prevention,* 331.

57 Department of the Capital Territory, *Submission,* 44.

58 The Holt Committee has stated that it would be a 'mistake' to deal with young offenders by way of care proceedings. In the Committee's view, the reality of a system for dealing with young offenders is that it must reflect a public demand that action be taken to prevent youthful offending. '[I]t is desirable that the system should accurately reflect this reality and not disguise it by misleadingly labelling its proceedings as 'care' or protection. We believe that it is possible and desirable to establish a system which deals with young people frankly on the basis that they have committed offences . . .' *Holt Report,* 15.

59 For an example of legislation which attempts to combine criminal and civil procedures in the manner described, see the Children and Young Persons Act 1969 (U.K.), s.3.

criminal behaviour by way of non-criminal proceedings is that a decision must be made about any mental element (the *mens rea*) which, in the case of an adult, would be an ingredient in the crime charged. By definition, a child under the age of criminal responsibility cannot possess this *mens rea.* Yet any procedure which disregarded the mental element which would have to be proved if an adult were charged would be objectionable. These considerations provide insuperable obstacles to the utilisation of non-criminal proceedings to deal with behaviour by a young child which would be criminal if committed by an adult. A rule setting a minimum age of criminal responsibility should mean what it says. It should not be possible to circumvent it by employing non-criminal procedures. Having set an age of criminal responsibility, society must accept that those below this age are immune from court proceedings in respect of behaviour which, but for their age, would amount to a criminal offence. If the child's situation justifies the initiation of care proceedings, these should be employed. Such a conclusion reflects the view that if a child's situation does not warrant the initiation of care proceedings, and his behaviour is such as would amount to a criminal offence were he over the age of criminal responsibility, the control of his behaviour is the responsibility of the parent or guardian, rather than of the state. It is recognised that this approach leaves unanswered the question of how society should endeavour to protect itself from and otherwise deal with harmful behaviour by children under the age of criminal responsibility. Though the use of uncontrollability proceedings is open to the criticisms listed above, such proceedings do provide a basis for police action designed to prevent the continuance of harmful behaviour by very young children. It would be an intolerable situation if a police officer who, for example, observed a seven-year-old child placing obstacles on a railway line, were unable to take any action at all. The solution to this problem lies in the creation of a special procedure which permits the police to intervene and return the child to his parents, but does not lead to the initiation of court proceedings. Provision for a procedure of this kind should be made in the new Child Welfare Ordinance. A precedent for special, very limited powers of intervention of the kind envisaged is to be found in the N.S.W. legislation dealing with intoxicated persons. Under s.5 of the Intoxicated Persons Act 1979 (N.S.W.) the police are authorised to detain and take to a 'proclaimed place' a person who is found intoxicated in a public place.

67. ***Special Presumption Regarding Children under 14*** There is a special common law rule regarding the criminal capacity of children who are over the age of criminal responsibility but who have not attained the age of 14. Whereas there is an *irrebuttable* presumption of criminal incapacity in respect of those under the age of criminal responsibility, when a child of this age and under 14 is charged with a crime there is a rebuttable presumption that the child did not know that his act was wrong. Before such a child may be found guilty of an offence, evidence must be adduced by the prosecution that he knew that his act was wrong. The *rebuttable* presumption regarding children under 14 is often described as the *doli incapax* rule. This Latin term simply means 'incapable of wrongdoing', and the phrase can also be applied to those under the age of criminal responsibility. The rule has been expressed as follows:

> At common law a child under 14 years is presumed not to have reached the age of discretion and to be *doli incapax;* but this presumption may be rebutted by strong and pregnant evidence of a mischievous discretion, expressed in the maxim *malitia supplet aetatem*[60]; for the capacity to commit crime, do evil and contract guilt, is not so much measured by years and days as by the strength of the delinquent's understanding and judgment.[61]

The questions formulated in *Archbold* are as follows:

(1) whether the accused committed the acts constituting the elements of the offence;
(2) if yes, whether he knew that he was doing wrong;
(3) if again yes, and where applicable, whether he appreciated the natural and probable consequence of what he was doing.

It must be emphasised that the evidence which the prosecution must present in order to rebut the presumption is of a different kind from that needed to prove any mental element which may be an ingredient of the offence charged. An illustration should make this clear. If a 12-year-old child is

---

60 Malice makes up for the want of mature years.

61 *Archbold Pleading, Evidence and Practice in Criminal Cases* (39th ed., 1976), 17—18. See also *Halsbury's Laws of England,* (4th ed., 1976), Vol 11, 29.

charged with an assault because he has punched another child, the mental element which the prosecution must establish is the intentional application of force. The prosecution must, however, do more than establish the existence of this intention. The child might make it clear that he does not know it is wrong to punch another child. Unless the prosecution can prove beyond reasonable doubt that the child does have the necessary knowledge of wrongness, the prosecution must fail. Further, the law presumes the absence of such knowledge. It is not up to the child to raise doubts about his capacity to appreciate the wrongness of the act alleged. In each case the prosecution must affirmatively establish the existence of the requisite knowledge. Although some attention has been paid to the meaning of a knowledge of wrongness in this context, it is not clear whether it is an appreciation of moral or legal wrongness which must be established.[62]

68. ***Current Law and Practice*** The *doli incapax* presumption has been reproduced in the Queensland, Western Australian and Tasmanian Criminal Codes.[63] The common law presumption appears to continue to be part of the law in the other States and Territories of Australia. For example, in 1921 the Supreme Court of Victoria quashed the convictions for larceny of two boys because there was no evidence to rebut the presumption.[64] In 1977 the Supreme Court of South Australia applied the presumption and made detailed observations on the proof required from the Crown to rebut the presumption and the directions to be given to a jury in a prosecution for murder where the presumption applies.[65] It seems clear that the common law presumption forms part of the present law in the A.C.T.[66] In practice a statement by the apprehending police officer that the child had admitted to him that he knew the act was wrong is generally accepted as sufficient evidence to rebut the presumption. Occasionally a magistrate asks a child whether he knew that the act was wrong. In such a situation the child tends to 'act on cue' and admit that he knew the act was wrong.[67] The *doli incapax* rule has been criticised on the ground that the courts have found difficulty in attaching practical meaning to it.[68] Also this part of the law has been described as 'steeped in absurdity'.[69] In the Supreme Court of South Australia Chief Justice Bray remarked:

> I think it is hard to regard this ancient rule about the capacity of a child ... as altogether satisfactory or suited to modern conditions ...[70]

Nevertheless, as with the concept of the age of criminal responsibility, the reform or abolition of the rule should be undertaken only in the context of a thorough-going review of the relevant criminal law principles, preferably on a national basis. For the time being the *doli incapax* rule should be retained in the A.C.T.[71] It does embody a recognition of children's immaturity and of the need to give them special protections in their dealings with the criminal justice system. It is thus consistent

---

62 For a discussion of what is meant by a knowledge of wrongness in this context, see Howard, *Australian Criminal Law*, (3rd ed., 1977), 355–56; Williams (1954), 493–494 and Williams (1961) 818–820. Relevant English authorities are *R.* v. *Gorrie* (1919) 83 JP 136; *B* v. *R* (1960) 44 Cr App R 1; *R* v. *B, R* v. *A* [1979] 3 All ER 460. For the purposes of the interpretation of the law in the A.C.T. probably the most relevant decision is *The Queen* v. *M* (1977) 16 SASR 589.

63 Criminal Code (Qld), s.29; Criminal Code (W.A.), s.29; Criminal Code (Tas), s.18(2). It should be noted that, with respect to the presumption, the Queensland Act sets the upper age at 15.

64 *McDonald* v. *Lucas* [1922] VLR 47. (Cussen J also held that the Childrens Court Act 1915 (Vic) did not affect the presumption.)

65 *The Queen* v. *M* (1977) 16 SASR 589.

66 The relevant English common law became part of the law of N.S.W. in 1828 when the Australian Courts Act (9 Geo IV c.83) was passed. Section 24 of that Act provided, among other things, that:

> ... all laws and statutes in force within the realm of England at the time of the passing of this Act ... shall be applied in the administration of justice in the Courts of New South Wales and Van Diemen's Land respectively, so far as the same can be applied within the said colonies ...'

The Seat of Government Acceptance Act 1909 (Cwlth), s.6(1), applies all laws in force in N.S.W. to the A.C.T. 'until other provision is made'.

67 For a similar appreciation of the significance of the rule in the English juvenile courts, see Williams, (1961), 820–821.

68 Howard, 355.

69 Williams, (1961), 820.

70 *The Queen* v. *M* (1977) 16 SASR 589, 595.

71 The A.C.T. Police have expressed the view that the *doli incapax* rule should remain part of the A.C.T. law. *Submission*, 17–18.

with the Commission's view, discussed below[72], that distinctive procedures for young offenders should be retained and that these procedures should be designed, in appropriate cases, to take into account the fact that they do not always act in a fully responsible manner. In order to remove any doubt about the applicability of the *doli incapax* rule in the A.C.T., the rule should be embodied in the new Ordinance. There is, however, some uncertainty as to whether the rule should be expressed in terms of a child's actual knowledge of the wrongness of his actions or in terms of his capacity to appreciate their wrongness. Each of the existing Australian statutory formulations of the rule refers to the child's capacity to appreciate the wrongness of his act or omission. [73] In the interests of uniformity, and because there is no reason to believe that these formulations are defective, a similar approach should be adopted in the relevant provision of the new Child Welfare Ordinance.

---

72 Para.116.

73 See Criminal Code (Qld), s.29; Criminal Code (W.A.), s.29; Criminal Code (Tas), s.18(2).

CONTINUED

1 OF 6

4. Young Offenders: Current Law and Practice

Outline

69. In this chapter a description is given of A.C.T. procedures for dealing with children alleged or found to be guilty of an offence. First, the practices employed by the Australian Federal Police will be described. This is followed by an analysis of the jurisdiction and procedure of the A.C.T. Childrens Court, together with an outline of the measures available to that court when a child is found to have committed an offence. The law governing appeals from the Childrens Court to the A.C.T. Supreme Court is discussed. Finally, the powers of the Supreme Court with regard to child offenders are considered. The descriptive material in this chapter, like all such material in this report, is based on information obtained from numerous interviews with magistrates, members of the Australian Federal Police, court staff, members of the Welfare Branch and members of other agencies involved in the A.C.T. child welfare system. This information was supplemented by that derived from the Commission's own statistical surveys which have been described in Chapter 1. During the preparation of this report drafts of descriptive material were submitted to A.C.T. magistrates, members of the Australian Federal Police, a member of the Childrens Court staff, and to members of the Welfare Branch. Comments and criticisms were invited, and changes made when these were received. In addition, a number of the consultants to the Commission were actively involved in the Territory's child welfare system, and they scrutinised the descriptive material while it was in draft form.

Australian Federal Police Procedures

70. ***On the Street Work*** When on patrol a member of the police might notice a child misbehaving, e.g., littering or acting in a rowdy manner at a shopping centre. Such a child is normally spoken to, but no further action taken. Occasionally, such an incident results in the child being taken home by the police. This might occur if he is cheeky and the officer concludes that it is desirable to talk to the parents about the child's attitude and behaviour. It is common practice for the officer to note the incident in a notebook; sometimes a field report[1] will also be completed. If the officer is a member of the Juvenile Aid Bureau a record will be made in the occurrence book. Police officers who deal with children on the spot are conscious of the need to keep a written record in case their actions are later questioned. If an irate parent comes to a station to complain, the notebook or field report entry can be consulted. In deciding whether to make a written record an officer might be influenced by a child's attitude. If the child is insolent or aggressive some police feel that this is a reason for noting his name. To estimate how often the police informally warn[2] children, the Commission conducted a survey of police practices between 1 June and 30 August 1979. Officers were asked to complete a questionnaire every time they dealt with a child.[3] For the period, 300 children were recorded as being dealt with, the majority by way of an informal warning (54%).[4] Of these warnings, 89.5% were recorded in one or more of the following:

1 A field report is a brief report completed for the Crime Collation Unit (see para.83).

2 Some police speak of 'warnings' in this situation and others of 'cautions'. In this report the term 'informal warning' refers to informal on-the-street admonitions, while the term 'formal warning' is used to describe oral or written admonitions administered once a case has resulted in the completion of a report and has thus been brought into the official system.

3 The Commission has no way of assessing the precise reliability of the results obtained in this survey. It is not known to what extent the police complied with the request to complete the relevant questionnaires. Nor is it known how many of the contacts recorded were the result of behaviour which could have constituted a criminal offence (and so could have been dealt with by the Childrens Court) or how many resulted from youthful misbehaviour which was not criminal.

4 This figure must not be taken as an indication that the remaining 46% of contacts resulted in prosecutions. Of the 46%, an unknown number of cases resulted in the administration of formal warnings after a report had been submitted to a senior officer.

- field report 27.6%
- officer's notebook 20%
- message card 14.7%
- Juvenile Aid Bureau occurrence book 35.9%
- criminal offence report 1.2%
- official report 0.6%

If a field report or a criminal offence report is completed regarding any of the incidents described above, this means that the child's name will find its way into the central records maintained by the Crime Collation Unit.[5] Also in one branch members keep their own records of local children who have been in trouble. In another branch, records of all local offenders (adult and child) are maintained. However, some contacts are not recorded. The Commission was told of one child who had been spoken to on six occasions by a general duties police officer and no record had been made of any of these encounters. A decision to complete a field report usually reflects the view that there are suspicious circumstances: the child might appear likely to become an offender (e.g. because he is spoken to on two successive nights as a result of suspicious behaviour) or might be noticed because he is in the company of a known offender. The Juvenile Aid Bureau keeps a record of matters handled, and its occurrence book is a source from which the Crime Collation Unit extracts information. Because this book lists cases which would not normally result in the completion of field reports, the Unit does not record the names of all children who appear in the occurrence book. If a Bureau officer believes it is imperative that a matter be recorded by the Unit he will mark his entry in the occurrence book accordingly.

71. ***Minor Offences: Investigation Procedures*** Offences committed by children come to police notice in a number of ways. A member of the public (usually the victim) may report that he has observed a child committing an offence, an investigation of a reported offence may lead to a child, or a police officer on patrol may apprehend a child breaking the law. Normally reports by a member of the public are made by telephoning or (rarely) by visiting a police station. Alternatively, a victim or witness might report a matter to a police officer who happens to be in the vicinity. A telephone call may be made to Police Operations or to the Woden or Belconnen police stations. A message card (containing brief details of the incident) is completed and the operations room despatches a car to the scene. The normal procedure is that the nearest and most appropriate car (general duties or Criminal Investigation Division) will be despatched. However, if the victim of an offence has telephoned the Juvenile Aid Bureau, or if the incident has occurred in the area patrolled by City Branch, Bureau officers may attend. Except in the City Branch area, members of the Juvenile Aid Bureau do not become involved in the routine investigation of child crime. Even in the City Branch area their involvement depends on their availability; other members of the force are called upon when Bureau officers are working on other cases or when they are not on duty.[6] When an investigation begins in the normal way and the offence is traced to a child the investigating officer will almost invariably continue to handle the case. As an example of investigative procedures employed when an offence is reported, an allegation of theft from a shop may be considered. In such a case the complainant shopkeeper or an employee telephones the police and an officer will be sent to the place where the child is being detained. He ascertains the child's name and age and then the complainant states the allegation in the child's presence. The child is asked whether what has been said is correct. The statement is written out by the officer in long-hand and the complainant signs it. It is later put in typed form. If there appears to be sufficient evidence to take the matter further, the child will be driven home[7] or, more commonly, requested to accompany the officer to a police station. If the latter course is taken efforts must be made to contact the parents if the child is under 16. The purpose of this is to secure their presence when the child is interviewed.[8] The parents are asked to come to the station. Not all offences involve the presence of the complainant at this stage. For example, a

5 See para.83.

6 Bureau officers are divided into two basic shifts. One works 8.00 a.m. to 4.00 p.m.; the other, 2.00 p.m. to 10.00 p.m. On Thursday, Friday and Saturday members are rostered 4.00 p.m. to 12.00 p.m. or 6.00 p.m. to 2.00 a.m.

7 When a child is taken home it is common practice for the police to ask to see his room so that a check can be made for stolen property.

8 See discussion of interviewing, para.74.

burglary may be reported and the details recorded on a criminal offence and modus operandi report. This may be later traced to a child who will then be taken to a station to be interviewed. At some time during the initial investigation (usually at the police station) the officer contacts the Crime Collation Unit to check whether any warnings are recorded against the child's name and also contacts the Criminal Records Unit for details of any previous court appearances by the child. In addition, some officers contact the Juvenile Aid Bureau, as it may hold information about children whose names are not recorded by the Crime Collation Unit or further information about those whose names are so recorded.

72. ***Warnings*** If the child denies the allegation and guilt is not clear or if the offence is trivial (e.g., the theft of a very minor item) the apprehending officer may decide to take the matter no further. Where an admission has been obtained, the child, who at this stage will either have been taken home or will be at a police station, will be counselled and formally warned in the presence of a parent. The officer will prepare a brief report for the branch inspector[9]. This will give details of the offence, an indication of the attitudes of the child and parents, and will request that no further action be taken. When an officer acts in this way and a warning is administered this does not appear to be in accord with a 1977 instruction[10] issued by the then Deputy Commissioner of the A.C.T. Police. This states:

> A practice appears to be developing whereby some members investigating offences committed by juveniles take it upon themselves to caution the offender and elect not to proceed with the preparation of briefs of evidence for adjudication by the Legal Division. This procedure is in conflict with Departmental policy.
> It is accepted that there are a limited number of minor matters investigated where it is reasonable and proper that Court proceedings should not eventuate and the preparation of a brief of evidence is not warranted. In such circumstances, and those occasions will be few, investigating members are authorised to submit an appropriate report to the Officer in Charge of their Division recommending a caution.
> To ensure no unnecessary delay in the submission of briefs of evidence, reports seeking approval for no further action must be submitted immediately upon completion of an investigation.
> Under no circumstances should an investigating officer inform any offender or other person that action will not be taken until so authorised by the Officer in Charge of the Division to which he is attached.

Notwithstanding this instruction it is clear that it is not uncommon in practice for decisions to be reached about minor offences without the authorisation of the branch officer. It may not be strictly accurate to use the word 'decisions'. Although in general in such a situation the branch officer is presented with a *fait accompli* it is always possible for this officer to order a prosecution. Such a course is extremely rare and places the apprehending officer in a difficult position for he must then return to the child and parents (who are under the impression that the matter has been concluded) and inform them that the case is to be taken to court. Further, the officer must then locate the witnesses, obtain statements and prepare a brief of evidence.

73. ***Decision-making Process*** To understand how this departure from official procedures occurs it is necessary to understand something of the organisation and attitudes of the police. A police force is a hierarchical structure and the Australian Federal Police is no exception. Generally, a junior member will share a patrol with someone more experienced. He will be under the supervision of a shift sergeant, who will be aware of the matters being investigated and who will endeavour to oversee the handling of cases. The reports which those on patrol submit are scrutinised by a shift sergeant and by a station sergeant. Before concluding that a child's offence is not serious enough to warrant a prosecution, the apprehending officer will normally discuss the matter with the shift sergeant. The report on the incident will include a recommendation by the sergeant that court proceedings are not required. Thus the decision not to initiate a prosecution will be the result of a process in which experienced police officers have participated. Further, these members will be aware of the branch officer's requirements and expectations. Some branch officers delegate decision-making powers to their station sergeants. One branch officer interviewed by the Commission thought it desirable for non-commissioned officers to handle minor offences without consulting him. In his opinion these members of the force find more satisfaction in their work if they are permitted to exercise responsibility. He also believed that the decisions in these minor matters could be made more sensitively if the apprehending officer participated in them. This was because the officer on the spot was frequently better able to assess the personalities of those involved than the commissioned officer who must rely on reports. The apprehending officer has the feel of the case and knows how the child and parents reacted. Finally, there is the need to avoid unnecessary paperwork. A brief of evidence in respect of a simple larceny can take some hours to prepare. If the apprehending officer can correctly identify those cases which need not go to court and can deal with them at once with a minimum of paperwork[11] a much more efficient system results. Indeed, if this 'short circuiting' did not occur, the system would probably bog down in a mass of paperwork. Alternatively, if official procedures were strictly enforced, and it was necessary to submit a full brief of evidence to enable a branch officer to reach a decision, it is very likely that unofficial handling of cases would continue, but that no written record would be kept. An insistence on formal procedures could drive warnings underground. Another branch officer interviewed also accepted that decisions on minor matters should be made without reference to him. His view was that it is proper for the apprehending officer to make decisions in consultation with a sergeant who is aware of the inspector's policy. It is the sergeant's function to advise the apprehending officer whether a full brief of evidence should be submitted to the inspector (in doubtful cases this brief can be submitted with a recommendation that a formal warning be administered) or whether the case can be handled more appropriately by way of a one-page report. In short it was this inspector's opinion that it is for a sergeant to sift out matters which do not require his consideration. A number of arguments can be put forward in favour of the unofficial procedure described. It allows for the quick handling of trivial offences with a minimum of paperwork. The child can be warned at once whereas going through the official channels can mean that the child must wait for some days before the outcome is known. There are many who believe that, especially where children are concerned, it is most important that decisions should be reached as soon as possible. Further, the ability to make a quick decision is relevant to the way in which the interview with the child is conducted. If there is a possibility of court proceedings the interview must be conducted reasonably formally so that evidence can be assembled in a form acceptable to a court. However, if the apprehending officer has already decided that court proceedings are unnecessary then the interview can be conducted more informally and the encounter turned into a counselling session rather than an interrogation. Often the officer does both, and after a formal interview offers informal counselling. The argument against unofficial warnings can be briefly stated. What is involved is the unsystematic exercise of discretion. Without a finding of guilt by a court, the child's name is entered on a record maintained by the police. The Australian Federal Police do not have written guidelines as to which children's offences are more appropriately dealt with by way of a warning. In the absence of such guidelines, decisions can be made on the basis of an individual officer's attitudes, rather than on the basis of consistently applied rules. In practice, as might be expected, the child's age, the seriousness of the offence and the existence or otherwise of a record of previous offences are the main factors which the police take into account. Thus a 10 year-old accused of a minor theft is unlikely to be taken to court. A 16 year-old alleged shoplifter will probably be prosecuted. When formal warnings are administered in the situations outlined, a criminal offence and modus operandi report should go to the Crime Collation Unit so that the child's name can be recorded. Information that the child has been warned will therefore be available should he come to notice again.

74. ***Matters Handled More Formally: Interviewing*** Before describing more formal procedures it is necessary to make a distinction between children who are either formally warned or dealt with by way of summons, and those who are arrested and later charged. Police practices employed for the former group will be described first. The initial stages of an investigation have already been described. When a child is apprehended, a preliminary interview is conducted and statements taken. If a child denies the allegation against him, the apprehending officer must decide whether the evidence is sufficient to take the matter further. If he decides to proceed, the alleged offender is normally taken to a station and checks are made concerning any previous dealings with the police. More questions may be put after the child has been cautioned that the answers may later be used as evidence. The

---

[9] During the day there is a chief inspector in charge of each of the three general branches (City, Woden and Belconnen). At night all three come under the command of a single duty officer.

[10] Although this instruction was superseded when the Commonwealth and A.C.T. Police amalgamated, it is still on occasions followed.

[11] The only paperwork required if a matter is handled in the manner described is a one-page report outlining the facts and the outcome, and a criminal offence and modus operandi report.

Australian Federal Police General Instructions[12] state that questioning of a child under 16 should not occur until an adult witness is present. The relevant paragraphs of General Instruction 13 state:

2 Where it is necessary to interview a child[13], the interview shall be conducted in the presence of the child's parents or guardian, if practicable.
3 Where the person is to be interviewed at a Police Station and the parent or guardian is not available, the interview shall be conducted in the presence of a senior member[14] of the Australian Federal or State Police who has no involvement in the inquiry.
4 If this is not possible by means of isolation of the Police Station, an independent responsible adult shall be present.

In the past, these rules have not always been obeyed.[15] The Commission has no way of knowing how strictly they are observed at present. It should be noted that other than parents and senior police officers it is normally only persons who fulfil the role of guardian who may be present. Except in isolated police stations, it is not up to the child to choose an adult such as a welfare worker or clergyman, although this sometimes happens. It seems that the number of cases in which a police witness must be used (because no other person is available) is small. The police usually prefer to have a parent or other independent adult present. Some officers hold the view that the courts are more likely to be suspicious of the evidence obtained if an interview is conducted in the presence of a police witness rather than a parent or guardian. Sometimes locating the parents is difficult. When this happens it may be necessary to keep the child for a time at a station. In some cases the parents refuse to come to the station. In the case of young persons aged 16 or 17 there are no regulations as to the presence of witnesses, and interviews are normally conducted as they would be if the suspect were an adult. However, usually an effort will be made to contact the parents before the interview begins, and it is common for a parent or other adult to be present. If a child or young person is in a shelter or residential institution, special rules apply. Para.7 of General Instruction 13 states:

> A member may be permitted to interview a child or young person[16] in a shelter or institution managed by a Department with the approval of the person in charge of that shelter or institution. The child or young person shall not be interviewed unless one of the following people are present:
> (a) an officer of that Department;
> (b) a parent or guardian of the child or young person.

Special rules govern the interviewing of children and young persons at school. Para. 6 of General Instruction 13 states:

> Where it is necessary to interview a child or young person at a school, the consent of the parent should be first obtained. If the parents cannot be located, consent should be obtained from the Duty Officer or other senior member of the Division to which the member requiring the interview is attached. In all instances where an interview takes place at school, the Headmaster or some other teacher nominated by him shall be present.

---

12 Under s.14 of the Australian Federal Police Act 1979 (Cwlth) the Commissioner may issue 'General Orders' and 'General Instructions'. Before the amalgamation of the Commonwealth and A.C.T. Police, the Commissioner of the A.C.T. force issued similar directives, known as 'General Orders and Instructions'. These were issued pursuant to s.18(1) of the Police (Disciplinary Provisions) Ordinance 1972 (A.C.T.). Although the former A.C.T. Police 'General Orders and Instructions' are no longer in force, the practices developed under these orders and instructions are still followed when they are appropriate.

13 Under para. 1 of General Instruction 13, a 'child' means a person under the age of 16.

14 Under para. 1 of General Instruction 13, a 'senior member' means a member of, or above, the rank of Senior Sergeant who is senior to the interviewing member.

15 See, for example *Pascoe* v. *Little* (1979) 24 ACTR 21. The facts of the case were that in 1976 a 14-year-old girl was taken to a police station and questioned by a policewoman and a male sergeant. No caution was administered. The girl confessed to a charge of theft and it was only then that arrangements were made to have the girl's mother brought to the police station. A similar incident – involving the questioning of a girl and the obtaining of a confession before the parents arrived – is recorded in an unreported decision of the A.C.T. Childrens Court (25 September 1978). Note also the following comments by the Department of the Capital Territory on police interviewing of children: '[T]here have been occasions when youngsters have claimed that they have been subject to duress. It is not possible to substantiate these claims. It has also sometimes been claimed that parents were not informed that their youngster had been detained until some time had lapsed.' *Submission*, 53.

16 Under para.1 of General Instruction 13, a 'young person' means a person who has attained the age of 16 years and is under 18 years.

During an interview the apprehending officer may take notes of what is said or may decide to make a full record of the interview. A formal record of interview is normally made only if the offence is very serious. It takes the form of questions and answers. The officer takes these down in long-hand or on a typewriter. The child is given the opportunity of reading the record or having it read to him and signing it if he wishes. The document is also signed by the witness.[17] The child may be given an opportunity to make a written statement and, if he does so, this must also be signed by the witness. The initial stage of the process is now complete and the child is told that the matter will be reported.

75. ***Police/Welfare Branch Liaison*** It is not normal practice for the police to advise the Welfare Branch that the child has been apprehended. However, occasionally an apprehending officer telephones a welfare worker. Much depends on the sort of relationship which has been developed between particular welfare staff and police. There are no formal arrangements to ensure regular liaison between the Welfare Branch and the police. Among Welfare Branch staff views differ about the liaison which exists between the two agencies. Some believe that it is now less close than it used to be and that contacts were easier to maintain when Welfare Branch and police numbers were not so large. It was also pointed out that when the Welfare Branch caseloads were smaller the welfare worker who prepared a background report for the court would accompany the child to court and this gave the officer the opportunity of getting to know local members of the police. The making of such contacts facilitated pre-court liaison. On the other hand, some members of the Welfare Branch believed that liaison with the police is now better than it was in the past. Some welfare staff telephone members of the police when they are preparing reports. Liaison is likely to be initiated by the police if they are aware that the Welfare Branch is working with the child or with his family. On the subject of liaison generally one police officer commented that it 'could be closer'. Members of the Welfare Branch are never involved in the decision as to whether the child should be warned or prosecuted. This decision is solely the responsibility of the police.

76. ***Formal Warnings*** The apprehending officer's report of the incident, the record of interview (where one has been completed), the complainant's statement (if available) and statements by any other witnesses make up the brief of evidence. To this are added details of the child's previous court appearances, if any. This information is obtained from the Criminal Records Unit. In his report the apprehending officer refers to any recorded warnings. This officer must also complete a criminal offence and modus operandi report for the Crime Collation Unit. Having completed the necessary paperwork the apprehending officer usually submits the file (via his supervising sergeant) to the branch officer. This officer considers whether the child will be prosecuted or dealt with by way of a formal warning. The apprehending officer is required to make a recommendation about the outcome. If a formal warning is recommended and the recommendation is accepted, the brief may come back to the apprehending officer with a direction to administer the warning. This may be done in the child's home in the presence of a parent, or the parent and child may be asked to come into a station. Alternatively, a formal warning may be administered at a station, by a sergeant (or occasionally the branch inspector). Sometimes when a child is formally warned the apprehending officer will advise the child and/or the parent to contact a welfare agency.[18] For example, a parent might be advised to get in touch with the Welfare Branch, or a Capital Territory Health Commission service, such as a Community Health Centre, a Child and Family Guidance Clinic or the Child and Adolescent Unit. However, this does not amount to a formal referral. It is up to the family to decide whether to act on the advice given. Further, some police undertake a limited amount of follow-up

---

17 The need for the witness to sign any written statement made by a person under 16 is made clear in para. 5 of General Introduction 13. This states:

> Whenever a written statement or record of interview is taken from a child or young person, the signature of the parent or guardian, independent responsible adult or senior member present not involved in the inquiry shall be obtained on the document.

There seems to be some inconsistency in the General Instruction, for this provision applies to children and young persons, whereas the provision dealing with the need for an adult witness seems to apply only to children.

18 The Juvenile Aid occurrence book indicated that such a recommendation was made in 48 cases (9.2% of all cases). It should be remembered that this figure relates only to cases dealt with by the Juvenile Aid Bureau. No figures are available with regard to cases handled by other members of the force. Also, some of the 48 cases might have involved behaviour not amounting to an offence.

work and might visit a child who has been formally warned. If the child has denied the offence, the apprehending officer will note this fact in his report and the branch officer will decide whether the evidence is sufficient to take the matter further. If he decides that it is not, no action will be taken.

77. ***Prosecution*** If a recommendation that a child be formally warned is not accepted, the file is returned to the apprehending officer with a direction that proceedings by way of summons be initiated. The officer then prepares an application for a summons. Alternatively the apprehending officer might have concluded that a prosecution is appropriate and will have submitted the file with the application already prepared. The brief of evidence is forwarded to the Legal Branch.[19] It is in this branch that the decision about the issuing of a summons is made. In the Legal Branch both the evidence and the appropriateness of a prosecution are re-considered. Factors taken into account include the child's age, previous history and the seriousness of the alleged offence. Notwithstanding the earlier conclusion that the child should be taken to court, it might be decided that there are circumstances which justify the taking of no further action or the administration of a formal warning. If approval is given for the issue of a summons the brief goes from the Legal Branch to a typing pool where the summons and information are prepared. The brief comes back to the Criminal Adjudication Section of the Legal Branch so that it may be checked. A sergeant in the section signs the information and a hearing date is then set. The summons and information are lodged with the court and the summons is forwarded to the Police Warrant and Process Section for serving. The summons is served on anyone of sufficient age at the child's home. Two to three days before the date set for the hearing the brief is taken to the Deputy Crown Solicitor's Office. A member of this office conducts the prosecution on behalf of the informant police officer. If a plea of guilty is entered the matter proceeds. If the child pleads not guilty a date for hearing is fixed, generally within four to six weeks. The file is forwarded to the Criminal Adjudication Section where the attendance of witnesses is arranged. After every adjournment members of the Criminal Adjudication Section check with the Criminal Records Unit to see whether the child has, in the interim, come to notice for further offending.

78. ***Children Who Are Charged: The Law and Police Instructions*** Section 352(1) of the Crimes Act 1900 (N.S.W.) as it applies in the A.C.T., provides for the arrest without warrant of persons in the act of committing or immediately after having committed an offence (whether punishable summarily or on indictment) or any person who has committed a felony for which he has not been tried.[20] Wide powers of arrest without warrant are also conferred on police officers in the A.C.T. by s.18–20 of the Police Ordinance 1927 (A.C.T.). Further provisions dealing with police powers of arrest in the A.C.T. are s.8 and 8A of the Crimes Act 1914 (Cwlth). Section 8 provides that the common law powers of arrest without warrant which are exercisable by a constable or by any person with respect to breaches of the peace may be exercised by any constable or any person with respect to offences against the Commonwealth Crimes Act involving a breach of the peace. Section 8A provides that any constable may arrest any person without warrant if he has reasonable grounds to believe that the person has committed an offence against a Commonwealth or Territory law and proceedings by summons would not be effective.[21] In an unreported A.C.T. case, Mr Justice Blackburn referred to the complicated state of the law and said:

> In my opinion the law of this Territory regarding the powers of a police officer to arrest is in an appalling state. The interests both of the public and of the police force require its complete revision and its replacement by clear provisions all to be found in one place.[22]

---

19 Before the office of the Commonwealth Deputy Crown Solicitor assumed responsibility for prosecutions in the A.C.T., the Legal Division of the A.C.T. Police was known as the Prosecutions Section and had responsibility for the initiation and prosecution of proceedings. The Legal Branch has retained the former of these functions and hence continues to exercise on behalf of the Commissioner the ultimate control over the prosecution decision.

20 See also s.352(2) of the Crimes Act 1900 (N.S.W.) as it applies in the A.C.T.

21 For a discussion of s.8A of the Crimes Act 1914 (Cwlth) and of s.18 of the Police Ordinance 1927 (A.C.T.), see *Webster* v. *Mc Intosh* (1981) 32 ALR 603. See also [1980] 4 *Crim LJ* 233. Cf. *Criminal Investigation,* ALRC 2, (1975), 10ff.

22 *Ivan Stefanchuk and John Chaloupka* v. *Charge and Another,* S.C. Nos.938 and 939 of 1973. Unreported reserved decision of Blackburn J on 6 June 1974, p.645 of the transcript.

The Police General Instructions lay down special rules regarding the arrest and charging of children. These are set out in para. 10 and 12 of General Instruction 13. The permission of a commissioned officer must be obtained before a child under 16 is *charged.*[23] On the use of the power of *arrest* para. 10 states:

> A child or young person may be arrested when one or more of the following circumstances exist:
> (a) the offence is of a serious nature;
> (b) the necessity for preventing the continuation or repetition of the offence;
> (c) the need to ensure the appearance of the offender before a Court;
> (d) the necessity to preserve evidence of, or relating to, an offence;
> (e) the necessity to ensure the safety and welfare of the child or young person;
> (f) belief by the member that proceedings by summons would be ineffective or inappropriate;
> (g) the parents are unable to give an undertaking to produce the child or young person at Court on summons;
> (h) the offence is one of uncontrollable, neglected or under incompetent parental control;
> (i) the parents do not reside in the locality and the offender cannot be released into the custody of a responsible adult or guardian;
> (j) the child has attained the age of 14 years and has a previous history of crime;
> (k) the offence is committed in company and failure to arrest will result in the escape of the other offenders or the loss of evidence;
> (l) the offence discloses a systematic course of conduct by the offender.

The purpose of these rules is to impose restraints on the use of the power to arrest children and young persons. The General Instructions explicitly state that, where practicable, proceedings against children and young persons are to be intitiated by way of summons.[24] It should be noted that two of the factors listed as being relevant to the decision to arrest might more appropriately be included in an instruction dealing with charging. Arrests frequently occur on the street before there is time to inquire into the attitude or place of residence of the parents (see factors (g) and (i) above). In many cases it will only be when a child is back at a station that the apprehending officer will be able to give consideration to these matters. There will be occasions, however, when an apprehending officer – having decided that a matter may be handled by way of a warning or summons – will reverse this decision when he cannot locate the parents or finds them unable to give an undertaking to produce the child in court. The child will then be arrested. Because the decision to charge (which must, under current practice, be made by a commissioned officer) is separate from the on the spot arrest decision it is possible for a child to be arrested and then to be released without being charged. Under para. 11 of General Instruction 13 a duty is imposed on the arresting officer to notify the parents or guardians forthwith when a child or young person has been arrested. The Commission has been informed that this does not always occur. Further, the officer in charge of the station has, under s.54(2) of the Child Welfare Ordinance, a duty to see that the parent of a child who has been arrested is warned to attend the court when the child appears.

79. ***Charging Procedure*** When a child has been brought back to a station, the apprehending officer normally discusses the case with his station sergeant and then contacts the appropriate commissioned officer to seek permission to charge the child. If approval is given, the child is then charged by the watch house sergeant. A bench sheet is prepared and the child's fingerprints and photograph may be taken. The arresting officer completes the arrest sheet. Particulars are entered in the charge book[25] and the child is asked whether there is anything he wants to say. Paragraphs 13 and 14 of General Instruction 13 state that the charging of a child or young person should not occur in the

---

23 Para. 12 of General Instruction 13.

24 Para. 9 of General Instruction 13.

25 The charge book is a bound volume of forms that stipulates the details to be recorded during charging. Name, age, address, date and the specific charge are noted, as well as the time the person was apprehended, the time of charging, and the time of release from the watch-house. If a search is carried out, any items found on the person are recorded. These items must be signed for when the person departs. Whether the person has been fingerprinted, photographed or subjected to a hand-writing analysis is noted. Whether bail was allowed, and if so, the amount of bail, is recorded. The bottom of each page has room for comment. In this space is usually recorded the details of where a child was taken or placed if bail was not allowed.

watch house.[26] The fingerprinting and photographing of children who are in custody are governed by para. 5 of General Instruction 27. This states that the power to fingerprint and photograph which s.353A(3) of the Crimes Act 1900 (N.S.W.) confers on the officer in charge at a police station may be exercised in respect of a child aged 14 or over who has been arrested and charged with a criminal offence.[27] After being charged the child may be released on bail[28] or kept in custody. The Child Welfare Ordinance does not deal with the detention of offenders in custody before a first court appearance. The decision is made by the watch house sergeant on the recommendation of the apprehending officer. Before making the decision the sergeant checks whether there are any outstanding warrants. Where bail is allowed the sergeant fixes the amount. Normally no money is required to be put up at this stage, although on occasions cash bail is required. A parent or other adult acts as a surety and signs a bail bond. If the child is kept in custody the usual practice is for the watch house sergeant to telephone the Quamby Children's Shelter. The child may be briefly held in a police cell until a transfer to Quamby can be arranged. A child who has been placed in Quamby may, with the written approval of the Assistant Secretary, Welfare, be transferred to the Belconnen Remand Centre. Sometimes the police unilaterally decide that a child is too much of a problem for Quamby to handle. In one such case, the police decided that a 15-year-old youth, whom they had charged with stealing, would be too difficult for Quamby to contain as he had prior convictions in N.S.W. for escaping lawful custody. Consequently, he spent the night in a watch house cell. When a child is so detained, he must be held in a cell which does not allow contact with adult prisoners.[29] Paragraph 20 of General Instruction 43 clearly authorises the holding of a child in a cell.[30] Other than the arrest sheet, the paperwork which the apprehending officer must assemble in respect of a child who has been charged consists of the officer's report on the incident (which may incorporate a record of interview) and any other statements. To this is added the child's criminal record sheet if he has previously appeared in court. The relevant papers are forwarded to the Legal Branch for processing before the court hearing. In addition to the paperwork for the hearing, the officer must also complete a criminal offence and modus operandi report for records purposes. Although this paperwork is frequently all that is required (as much of the necessary detail is in the arresting officer's head) sometimes further statements must be obtained. These are needed if the arrested child pleads not guilty. Such a plea necessitates the preparation of a full brief. Further statements may also be needed even if there is a guilty plea. A Childrens Court may be reluctant to accept such a plea at the first hearing, and if the matter is remanded the police may consider it desirable to gather further evidence. Thus the police might go to the first hearing with the bare essentials of a case, but add to this during the remand period. These additions may result in paperwork almost as extensive as that required for a summons matter. A person taken into custody for an offence without a warrant must,

[26] These two paragraphs state:
13 Where a child or young person is to be charged with an offence at a Police Station in the A.C.T., it shall be the responsibility of the Officer in Charge of the Watch-House to charge the person in an area or room remote from that Watch-House.
14 All particulars required shall be obtained and entered in the Charge Book in that area.
Note also para. 15, which states:
The child or young person should only be permitted to enter the Watch-House area for the purpose of having photographs and fingerprints taken. On other occasions, it shall be at the discretion of the Officer in Charge of the Watch-House.

[27] Under the previous General Orders and Instructions (issued by the A.C.T. Police Commissioner) the power to fingerprint and photograph children was more restricted. Para. 638 stated that these powers should be exercised only in respect of children charged with 'a serious indictable offence'.

[28] The power to release on bail is conferred by s.50(2) of the Court of Petty Sessions Ordinance 1930 (A.C.T.), and by s.24(1) and (2) of the Police Ordinance 1927 (A.C.T.), on a police officer in charge of a police station. Although the former provision makes this power available in respect of matters where it is not practicable to bring the accused before a magistrate within 24 hours of his being taken into custody, in fact it is exercised when the delay between apprehension and trial would be much shorter than this.

[29] See para. 20 of General Instruction 43. Usually children are held in cells reserved for females.

[30] Para. 20 of General Instruction 43 authorises the Officer in Charge of a police station to make a decision to hold a child at the Watch-House if the circumstances of the case indicate that there would be a security risk if the child were held in a shelter or if the child's actions indicate that a shelter would not be the proper place of confinement. The paragraph does not oblige the officer to contact Quamby Children's Shelter before making the decision.

by virtue of s.50(1) of the Court of Petty Sessions Ordinance 1930 (A.C.T.), be brought before a court 'as soon as practicable'. In practice a child arrested while the Childrens Court is sitting will be taken before a court the same day. One arrested in the evening may be held overnight, normally in Quamby Children's Shelter, and appear the next morning, unless the arrest occurred on a Saturday night, in which case the first hearing will occur on Monday morning. A child in custody is taken to court by the police. He will be taken by car to the holding rooms at the Childrens Court and may be held in a room until the time for the court appearance. When a child is released on bail he is not brought to court immediately. Section 24(2) of the Police Ordinance 1927 is the only provision which sets limits to the period for which a person may be released on police bail. This states that a person arrested under the Police Ordinance or in respect of an offence punishable upon summary conviction may be released on bail to appear before a magistrate within 14 days, unless this period expires on a public holiday.[31]

80. ***Survey of Children Charged*** The Commission undertook a detailed analysis of the 1978 police charge books. During the year, 712 children[32] were charged; of these 611 were offenders. Older children were charged more frequently.

Table 1: Age of Children Charged with Offences in the A.C.T. During 1978

	10	*11*	*12*	*13*	*14*	*15*	*16*	*17*	*Total (%)*
Criminal Offence	1	4	14	22	66	91	135	210	543 (88.9)
Traffic Offence				1		1	9	57	68 (11.1)
Total	1	4	14	23	66	92	144	267	611

A record was kept in relation to a high proportion of those charged with offences. Thus:
- 473 were fingerprinted (77.4%);
- 347 were photographed (56.8%); and
- 12 had their handwriting analysed (2%).

As many children were both fingerprinted and photographed (348 or 57%) the above percentages total more than 100%. Once charged, the majority of children were released on bail (56.3%) and, of the remainder, 19.4% were taken to Quamby Children's Shelter, 2.8% were detained in the watch house cells, 2.3% were taken to Marymead and 13.3% were taken directly to the Childrens Court.[33] Another significant trend identified during the analysis was the higher proportion of males charged than females. Of 611 total, 545 (89.2%) were males and 66 (10.8%) were females. The following table gives details of the types of offence:

Table 2: Types of Offences for which Children Charged in the A.C.T. in 1978

	Males	*Females*	*Total*
Property offences	313	53	368
Drug offences	10	1	11
Disorderly behaviour	79	4	83
Sex offences	11	–	11
Other	63	7	70
Traffic offences	67	1	68
Total	545	66	611

81. ***Charge or Summons: The Procedures Compared*** Although para. 9 of General Instruction 13 states that, where practicable, proceedings against children and young persons shall be instituted by summons, the Commission's analysis of Childrens Court records for the period 1 June 1978 to 31

[31] If the offence is an indictable one in respect of which the police have the power to grant bail the practice is to observe the fourteen-day rule.

[32] For the purpose of this analysis a child was counted every time his name appeared in the charge book. Thus the 712 total includes those arrested more than once.

[33] In the remaining 5.9% of the cases, the decision was either not clear or not stated.

May 1979 indicates that 61% of non-traffic offenders were charged.[34] The use of a summons causes substantial delays. For example, at one sitting of the Childrens Court it was noted that two traffic matters had taken over five months to reach the court, and four had taken over eight months. A charge of theft heard at the same sitting had taken seven months. There are many who believe that if a child is to be prosecuted he should be taken to court as soon as possible after the alleged offence.[35] A desire to handle cases speedily seems to be a major reason for the high number of arrests.[36] Some experienced officers interviewed frankly stated that they prefer to charge children in order to bring cases to court quickly.[37] A number of officers expressed vehement criticism of summons procedures. One, for example, described them as 'archaic' and another regarded as 'scandalous' the time taken to bring a child to court on a summons. Interviews with police indicated that, on occasions, parents have requested them to proceed by way of a charge rather than by way of summons. These requests were made when the parents realised how long it would take to bring a summons matter to court. Another factor is the amount of paperwork which the use of a summons involves. By comparison the arrest and charging procedures are simple.[38] This analysis naturally raises questions why the summons procedure is so slow. The answer seems to lie in the fact that the use of a summons brings into play an elaborate system. Under para. 5(b) of General Instruction 11 an apprehending officer who wishes to use the summons procedure must, within 14 days of interviewing the alleged offender, submit a brief of evidence and an application for a summons or a report explaining the delay. The brief is carefully scrutinised and must satisfy the standards set by the Legal Branch. The brief must in every case be prepared on the assumption that a not guilty plea will be entered. A formal process of checking and re-checking occurs as the brief progresses through the system. A common informant, who is a member of the Legal Branch, swears the information. Accordingly the evidence must be presented in such a form to convince him that the allegation can be proved. Administrative factors may intervene. For example, there may be a delay in serving the summons or the apprehending officer (who is required to give evidence in court) may go on leave. These delays and difficulties are

[34] To distinguish between charge and summons matters on the Childrens Court bench sheets, the time lapse between the recorded date of the offence and the date of the first court appearance was noted. Lapses of 14 days and less were assumed to be indicative of a charge, as children charged must appear in court 'as soon as practicable' (Court of Petty Sessions Ordinance 1930 (A.C.T.), s.50(1)) or, if released on bail, within 14 days (Police Ordinance 1927 (A.C.T.), s.24(2)). Longer lapses were assumed to be indicative of the use of a summons. This method may have produced inaccuracies in the final totals in that it is possible , but highly unlikely, for a summons matter to reach court within 14 days. Conversely, if after lengthy investigation a child is charged with an offence committed some time earlier, the time lapse may be longer than 14 days, causing the matter to be mistaken as a summons matter. As the latter of the two circumstances seems more likely to have affected the totals, it is possible that the percentages given for the number charged may be an underestimate.

[35] Mr. K.T. Dobson, S.M., has criticised the police for the length of time taken to bring a child to court by way of summons. The case involved a theft which occurred in May 1978. Following the issue of a summons the child appeared in the Childrens Court in September 1978. Mr Dobson commented: 'The whole fact of the matter is, of course, it has been hanging over the girl's head for four months now. In my view it should have been before the court the day after the offence happened. Four months delay is ridiculous.' The girl was admonished and discharged. In such a situation the police feel that they are being criticised for not using the power to arrest and charge.

[36] The use of the power of arrest in order to bring children to court quickly is not peculiar to the A.C.T. An English study has noted that it used to be the practice for the London Metropolitan Police to proceed by way of arrest and charge, rather than summons, when a juvenile was involved. Oliver, *The Metropolitan Police Approach to the Prosecution of Juvenile Offenders*, (1978), 34–36, 40.

[37] Another alternative — sometimes used — is to employ a priority summons procedure, which results in a hearing approximately three weeks after the alleged offence.

[38] During discussions on the matter a member of the Commission was shown a four-page police statement regarding a woman who had been arrested and charged with seven counts of larceny. The statement was the apprehending officer's outline of the facts on all matters. To bring the case to court the only additional paperwork needed was a bench sheet and an arrest sheet. If the matters had been handled by way of summons the following would have been required: seven applications for a summons (one for each count), seven statements by the apprehending officer, seven statements by the officer who accompanied him, seven witness statements, proof of the value of the items allegedly stolen, and seven certificates of incorporation (as the property had allegedly been stolen from a company). It was estimated that all this paperwork would have taken three days to prepare.

avoided by the charge procedure, with the added incentive that, if the child pleads guilty — as most do — the whole process is over quickly. However, use of the charge procedure may put the child and his parents at a disadvantage as they are placed under pressure to make a decision very quickly in a situation which may be unfamiliar and even frightening.

82. ***Traffic Offences*** A Traffic Division forms part of the Australian Federal Police in the A.C.T. This division has primary responsibility for the enforcement of traffic laws, although other members of the force stationed in the A.C.T. also apprehend persons who have committed driving offences. The age at which a driving licence may be obtained in the A.C.T. is 17, and many children who come to notice for traffic offences are unlicensed drivers. There is one type of situation in which children are particularly likely to be involved. The riding of trail bikes in public places is a form of behaviour which results in many complaints to the Traffic Division. Often a complaint is made because of the noise which this activity causes. Investigation frequently reveals that the young rider is unlicensed, that the bike is unregistered and that no third party insurance has been arranged. Although the procedure employed in respect of traffic offences is similar to that for other offences, there are some differences. Very minor infractions (such as a failure to signal before turning) may be dealt with on the spot by way of an oral warning. Usually the incident is recorded in a police notebook. This approach is adopted by police generally. With regard to more serious matters the practice is to complete a field breach report which is a special form for traffic offences. There is no 'on the spot fine' procedure in the A.C.T. as there is in other Australian jurisdictions. Introduction of such a procedure has been foreshadowed for some years. In all branches there is a distinctive procedure for processing field breach reports. The field breach reports are not referred to the branch inspector. Instead, after checking by a sergeant, they go to the Criminal Records Unit, which adds details as to previous warnings, or court appearances and thence to the Legal Branch. It is in this branch that the decision about police action is reached. One of the following choices may be made:

- No further action.
- The administration of a written warning. If this course is adopted the Legal Branch arranges for a letter to be sent to the offender.
- The issue of an invitation to be present at a lecture on traffic safety. A letter is sent to the offender inviting attendance; if he fails to attend and no explanation is offered a summons is issued.
- A summons may be issued requiring attendance at court or the alleged offender may be invited to enter a plea by post.[39]

The paperwork which the apprehending officer must complete with regard to minor traffic offences is extremely simple. The field breach report takes the place of an application for a summons. Occasionally it is necessary to attach a statement by the apprehending officer or a witness. Normally nothing more is required to take the matter to court. The apprehending officer may make a suggestion as to outcome. For example, he might, in his report to the Legal Branch, note that the alleged offender was polite and co-operative and therefore suggest a warning. If the alleged offence is a very serious one (for example, culpable driving causing death) a full brief of evidence is required in every case.

83. ***Police Records: Information Branch (Crime)*** The Australian Federal Police maintains two types of centralised records in the A.C.T. The Crime Collation Unit (C.C.U.) collects details of offences and information likely to be of value in solving crimes. For example, the names of persons acting suspiciously and of persons to whom police officers speak when on patrol are recorded, as are personal characteristics, make of car and associates. The aim is to accumulate information about those thought likely to offend. The Criminal Records Unit (C.R.U.) maintains data about court appearances and outcome. The two units together make up the Information Branch (Crime). With regard to children, the C.C.U. relies on four sources of information. These are: field reports, criminal offence and modus operandi reports, Juvenile Aid Bureau occurrence books, and briefs of evidence where an application for summons has been completed. The information from each of these sources is transferred to a central card index. When a child has been warned in respect of a minor offence often a field report is all that the apprehending officer completes. However, sometimes the officer will also complete a criminal offence and modus operandi report; when this occurs the details are

[39] Of the youthful traffic matters which went to court between 1 June 1978 and 31 May 1979, 80.3% were initiated by way of summons.

checked and the fact that the second report has been furnished will be noted. Not all the incidents in the occurrence books are recorded. The officer in charge of the C.C.U. uses his discretion and does not enter trivial matters on a card. Details of offences in respect of which a summons has been applied for are recorded from the brief before it reaches the Legal Branch. This source is used where the apprehending officer has neglected to complete a criminal offence and modus operandi report or a field report. With respect to offences dealt with by way of charge it is the criminal offence and modus operandi report which provides the normal source of information. Only police officers should have access to the records maintained by the C.C.U. This includes officers in other forces: for example, the Unit might make information available to members of the N.S.W. force. All requests for information are logged so that it is known which officers have sought information on particular individuals. C.C.U. records are kept indefinitely, although there is informal culling of the central card index. Cards whose last entry is 10 years old are removed from the index, but not destroyed. This means that a routine inquiry will not normally elicit information about an offender whose card has been removed. However, if a special inquiry is made (for example by an officer who remembers dealing with a person several years earlier) a search can be made and the card found.

84. ***Records of Court Appearances*** After a child has appeared in court the C.R.U. receives the police brief and records the disposition details noted on the bench sheet. For each offender a criminal record sheet is compiled. This lists every court appearance in respect of a criminal offence, including acquittals, dismissals, discharges and releases on recognizance. It does not list traffic matters dealt with by way of summons. A separate card is compiled for these. If the C.R.U. is notified of the death of an offender in respect of whom a criminal record sheet is held, the record is removed from current records but is not destroyed. Some culling of traffic records occurs. If the last entry on the card is a minor traffic matter (e.g., a speeding offence) and it occurred some years previously an officer who notices this might destroy the card. However, this is not done on a systematic basis and there is no instruction requiring the destruction of traffic records after a certain period. A major purpose of the criminal record sheet is to provide information should the child appear in court again. A photocopy of the entire sheet (including acquittals) is attached to the brief before a person goes to court. After a finding of guilt it may be handed to the court or the prosecutor may read out details from it. Information from the sheet is also furnished to police officers engaged in inquiries. When a member of the Welfare Branch is preparing a background report on a child, he can, provided he obtains the child's written consent, obtain a complete copy of the child's criminal record sheet. Inquiries made by Commonwealth departments to whom a person has applied for employment are normally made via the Australian Federal Police. A copy of any Childrens Court record (with the acquittals deleted) is provided. On rare occasions these inquiries are made by the department concerned (e.g., the Defence Department). In the case of the Defence Department such a check is made only if the person seeking employment has authorised the making of an inquiry. Other departments to which a copy of the criminal record sheet is provided are the Immigration Department (which makes inquiries about aliens) and the Attorney-General's Department (which carries out checks on prospective Justices of the Peace). Also, when a person makes an application for a visa, the embassy of the country concerned may, if the applicant gives a written authorisation to the police, be given a copy of any record. In such a case the police require fingerprints so that they can be sure of the identity of the applicant. Whenever the C.R.U. responds to a request in respect of a named individual the record is stamped to indicate that the Unit cannot guarantee that the record relates to that individual unless a fingerprint check is carried out. With the exception of records supplied to the court, it is the practice of C.R.U. staff to require the child's written consent before it supplies a copy of the child's criminal record sheet.

85. ***Screening of Cases by the Commonwealth Attorney-General's Department*** A procedure has existed for many years whereby cases involving offences against laws of the Commonwealth alleged to have been committed by children under 16 have been referred to Canberra for decision whether the prosecutions should be undertaken.[40] This procedure involves the approval of the Attorney-General or, more generally, the Secretary of the Attorney-General's Department, to the institution of such proceedings. When an investigation of such an offence has been completed by a State force or by the Australian Federal Police, the brief of evidence should be forwarded to the local office of the

[40] This procedure is not legislatively prescribed. It is an aspect of the exercise of the discretion to prosecute. This subject is discussed in ALRC 15, (1980), para.94–109.

Commonwealth Deputy Crown Solicitor. This office checks whether there is sufficient evidence to establish a prima facie case. If there is, the file is forwarded to the Commonwealth Attorney-General's Department in Canberra, together with a recommendation whether the child should be prosecuted or warned. Any recommendation by the apprehending police officer will also be included. A formal submission is then presented to the Secretary of the Department. If a prosecution is approved, the Deputy Crown Solicitor is instructed to proceed. If it is not, a written warning is delivered by a member of the Australian Federal Police to the child and his parents. Two aspects of this procedure are worthy of note. First, the delay between the offence and the decision by the Attorney-General's Department is sometimes considerable.[41] This factor has a substantial effect on the outcome. By the time a matter reaches the Department it is occasionally so 'stale' that it is decided that there is no point in prosecuting. Secondly, very few children whose cases are considered by the Attorney-General are prosecuted. Of the 32 children whose offences were referred to the Department in 1976 and 1977, the Attorney-General's Department approved a prosecution in only one case. Of the cases considered in 1978 and 1979, 10 resulted in prosecutions and 17 in warnings.[42] Commonwealth offences are not always dealt with in the manner described. Despite the existence of the special procedure, it seems clear that allegations involving Commonwealth offences are regularly dealt with by the General Policing Division (A.C.T.) of the Australian Federal Police without the matter ever reaching the Attorney-General's Department.[43] Not all police know of the procedure instituted by the Commonwealth Attorney-General's Department, although amalgamation of the A.C.T. and Commonwealth police forces may have facilitated its more universal implementation.

The Childrens Court

86. ***Jurisdiction in Criminal Matters: General Statement*** The Childrens Court has jurisdiction to hear and determine all charges involving offences which may be dealt with summarily. In addition, it may hear and determine most indictable matters. If the presiding magistrate declines to exercise jurisdiction in respect of an indictable offence, or if the offence is one which must be dealt with by the A.C.T. Supreme Court, proceedings to determine whether the offender should be committed for trial in the A.C.T. Supreme Court are heard in the Childrens Court.

87. ***The Relevant Time*** In criminal matters the Childrens Court has jurisdiction over children (those aged between 8 and 16) and young persons (those who have attained the age of 16 but have not attained the age of 18).[44] If a young person attains 18 years after he commits an offence but before he is charged or appears in court, a question arises as to whether such a person is within the jurisdiction of the Childrens Court. There are four dates which could be relevant in answering this question:

- the date of the offence;
- the date of the charge;
- the date the court hearing commences; or
- the date on which the hearing is completed and the case is finally disposed of by the court.

In the A.C.T., it seems that the relevant time is the time of the charge. Sections 57 and 58 of the Ordinance state what action the court may take where a child or young person is 'charged before the

[41] For example, in a case involving offences allegedly committed on 25 January, 1977, the administration of a warning was approved on 23 June, 1977. In another, almost exactly a year elapsed between the date of the alleged offence and the approval of a warning, and in a third the period was almost eight months. Procedures employed in the Commonwealth Attorney-General's Department are not the sole cause of such delays. In each of the cases cited a substantial period had elapsed between the alleged commission of the offence and the submission of the file to the Department.

[42] Figures supplied by the Commonwealth Attorney-General's Department. The figures relate to cases from all jurisdictions in Australia.

[43] For example, in a case which came to the Commission's notice involving an alleged breach of the Telecommunications Act 1975 (Cwlth) and by-laws, the alleged offence was committed at 3.10 p.m. on 21 January 1981, the boy was charged at 6.20 p.m. the same day and appeared in the Childrens Court two days later. It is clear that the matter was not referred to the Commonwealth Attorney-General.

[44] The age of criminal responsibility in the A.C.T. is eight: Child Welfare Ordinance 1957 (A.C.T.), s.108. For definitions of 'child' and 'young person' see id., s.5.

Court' with an indictable offence which is heard summarily, or with an offence triable summarily. It is clear from the decision of Mr Justice Kerr in *Wright* v. *McQualter*[45] that the young person must be under 18 *at the time of the charge.*

> I am satisfied that when, after the defendant became 18 years of age, he came back to answer the charge already made against him and in respect of which he had already several times attended at Court, he was within the jurisdiction of the Court in the same way as he would have been if, during or after the hearing he had turned 18 years of age before the decision was made. The relevant point of time is when the defendant is charged before the Court. If at that time he is under 18 years of age then the Court is to be known as the Childrens Court and the other provisions of the Ordinance apply.[46]

In this case the defendant was apprehended during an anti-Vietnam war demonstration for obstructing a policeman in the course of his duty. A preliminary objection was made before the Supreme Court, that when the defendant first appeared before the Childrens Court and on the next two appearances which he made before that court, he was not formally charged as a young person. It was only on the fourth occasion of his appearance (by which time he had attained the age of 18 years) that the charge was formally read to him. Mr Justice Kerr held that even though the defendant had not had the charge read to him while he was under 18 years of age, he had been dealt with by the court as a person so charged and therefore came within the jurisdiction of the Childrens Court.[47] Inconsistencies could arise from the application of the rule that the relevant time is the date on which the child or young person is charged. This is seen if the type of situation which arose in *Wright* v. *McQualter* is examined. If a young person allegedly commits an offence just before he attains the age of 18, and the relevant date for jurisdictional purposes is the date of the charge, this would permit the police to remove the young person from the jurisdiction of the Childrens Court by postponing the laying of the charge. A rule which allows this to happen is undesirable in principle. Notwithstanding the difficulties which will arise regarding a young person who attains the age of 18 before his case is completed, it is preferable that a clear and certain rule be formulated to determine the relevant date for jurisdictional purposes. The new legislation should provide that the relevant time is the time of the alleged commission of an offence. Such a conclusion reflects the view that the system for the young offender should embody the basic principles of criminal law. To speak of criminal responsibility is generally to speak in terms of the defendant's mental capacity at the time of the alleged commission of a criminal act. The new legislation should make it clear that, in order to come within the jurisdiction of the Childrens Court, a child must be aged eight years or over and under 18 at the time of the alleged commission of the offence. The legislation should further provide that, in order to avoid difficulties which could arise if charges were laid against an adult in respect of offences allegedly committed long before in his youth, no person should make an initial appearance before the Childrens Court after he has attained the age of 18 years and six months.[48] In such a case the matter should proceed to the Court of Petty Sessions.

88. ***Summary Matters*** The Childrens Court's jurisdiction over children and young persons who commit offences is not specifically conferred by the Child Welfare Ordinance. Section 13(1) of that Ordinance does no more than state that, when dealing with a child or young person 'charged . . . with an offence against a law in force in the Territory', the Court of Petty Sessions is known as the Childrens Court. The section does not indicate the offences with which such a court is competent to deal. To discover this it is necessary to turn to s.19 of the Court of Petty Sessions Ordinance 1930 (A.C.T.) under which jurisdiction over any offence against any law in force in the Territory may be exercised by a Court of Petty Sessions in respect of: offences triable summarily; offences for which no other provision is made; offences triable by a Court of Petty Sessions, by a court of summary jurisdiction, by any court constituted by a Police or Stipendiary Magistrate or justices; or offences triable by a Magistrate, by a justice or justices or by a Childrens Court. As the Childrens Court is a

[45] Unreported decision of the A.C.T. Supreme Court, S.C. No. 318 of 1970.
[46] Page 64 of the transcript.
[47] Pages 61–2 of the transcript.
[48] The Commission's recommendation that the relevant time should be the time of the alleged commission of the offence accords with the law in N.S.W. See Child Welfare Act 1939 (N.S.W.), s.20(2). In respect of a person tried after attaining the age of 18, however, this provision confers jurisdiction over persons up to the age of 21. The retention of s.20(2) was recommended in the *Green Paper*, 45.

Court of Petty Sessions, it may automatically exercise the above-described jurisdiction. Section 19 of the Court of Petty Sessions Ordinance is, however, merely the starting point for an inquiry into the criminal jurisdiction of the Childrens Court. The jurisdiction over offenders which is exercisable by a Court of Petty Sessions is expanded when the offender is a child or young person.

89. ***Indictable Matters*** In addition to the power to deal with summary matters, the Childrens Court may, by virtue of s.56 of the Child Welfare Ordinance, deal summarily with most indictable offences, the exceptions being certain very serious offences and offences against a law of the Commonwealth.[49] The Childrens Court is not compelled to deal with all indictable offences other than those listed in s.56; the magistrate may decline jurisdiction if he wishes. Under s.65(2) he may commit for trial to the Supreme Court of the Australian Capital Territory.[50] With regard to indictable offences outside the jurisdiction of the Childrens Court the relevant provision is s.65(1). This states that when a child or young person is charged with such an offence the court may commit the child or young person to take his trial according to law. The use of the word 'may' in the sub-section is clearly not intended to suggest that the Childrens Court has a discretion to decide whether to hear the case itself or to commit for trial in the Supreme Court. The wording of the sub-section must be taken as indicating that the Childrens Court need only commit for trial if the evidence is sufficient to put the child or young person upon his trial.

90. ***Commonwealth Offences Triable Summarily*** Reference has already been made to s.13(1) of the Child Welfare Ordinance which speaks of the child or young person being charged before the court 'with an offence against a law in force in the Territory'. This implies that the A.C.T. Childrens Court has jurisdiction over offences against all laws, including Commonwealth laws. The legal position is, however, unclear, and it is necessary to look separately at the court's jurisdiction over summary offences and its jurisdiction in respect of indictable matters. With regard to the former category of offence, the A.C.T. Childrens Court may, as a Court of Petty Sessions, exercise the jurisdiction conferred by s.19 of the Court of Petty Sessions Ordinance 1930 (A.C.T.).[51] Hence it seems to be empowered to deal with Commonwealth offences which are triable summarily.[52] However, s.58 of the Child Welfare Ordinance, which sets out the measures which the A.C.T. Childrens Court may employ when an offence triable summarily has been admitted or proved, excludes offences against a law of the Commonwealth. The reason for this exclusion is not apparent. The result seems to be that prior to 1960 the A.C.T. Childrens Court had jurisdiction over Commonwealth offences triable summarily, but could not employ any of the special Childrens Court measures when such an offence was admitted or proved. In 1960 the Crimes Act 1914 (Cwlth) was amended by the insertion of s.20C. This states:

> A child or young person who, in a State or Territory, is charged with or convicted of an offence against a law of the Commonwealth may be tried, punished or otherwise dealt with as if the offence were an offence against a law of the State or Territory.[53]

It seems that the intention of s.20C was to allow a child charged with an offence against a Commonwealth law to be dealt with as any other child would be. Thus it seems by implication that this section amends s.58 and that there are no restrictions on the A.C.T. Childrens Court when it deals with a

[49] The offences listed in s.56 which are outside the Childrens Court jurisdiction are murder, manslaughter, poisoning or attempted murder, rape, carnal knowledge of a girl under 10, break and enter and while therein assault with intent to murder or inflict grievous bodily harm, interfering with a light or signal or exhibiting a false light or signal with intent to bring any vessel into danger. (See ss.17, 19, 24, 27, 28, 63, 67, 110 and 240 of the Crimes Act 1900 N.S.W. in its application to the Territory). Each of these offences is punishable by imprisonment for life.
[50] Section 65(3) requires a magistrate taking this course to transmit to the Commonwealth Attorney-General and to the Minister for the Capital Territory a statement of his reasons for doing so.
[51] See para.88.
[52] Section 43 of the Acts Interpretation Act 1901 (Cwlth) provides which Commonwealth offences are, unless the contrary intention appears, punishable on summary conviction. These are offences punishable by imprisonment for a period of six months or less or offences which are not punishable by imprisonment and are not declared to be indictable offences. Thus, in any Commonwealth Act in which an offence is created, the maximum punishment for that offence determines whether the offence is 'punishable on summary conviction' and therefore whether it can be dealt with by the Childrens Court as a summary offence.
[53] The Commonwealth Crimes Act does not contain a definition of 'child' or 'young person'.

child who has committed a Commonwealth offence triable summarily. It therefore seems that, when such an offence has been admitted or proved, the A.C.T. Childrens Court may employ the special measures listed in s.58.

91. ***Commonwealth Offences Triable on Indictment*** Section 56 of the Child Welfare Ordinance excludes indictable offences against a law of the Commonwealth from the jurisdiction of the A.C.T. Childrens Court. At the time when a Child Welfare Ordinance was being considered for the A.C.T., the question whether an A.C.T. Childrens Court could deal with Commonwealth offences was researched in detail. Section 80 of the Constitution requires that 'the trial on indictment of any offence against any law of the Commonwealth shall be by jury, . . .'. By virtue of s.69(1) of the Judiciary Act 1930 (Cwlth), 'indictable offences against the laws of the Commonwealth shall be prosecuted by indictment'. Thus Commonwealth indictable offences must be prosecuted on indictment in a Supreme Court and must be heard by a jury. In the view of those drafting the Ordinance it followed that indictable offences against laws of the Commonwealth could not be heard in the Childrens Court (which deals with offences summarily without a jury). It was decided to exclude all such indictable offences from the jurisdiction of the Childrens Court.[54] However, since 1957 when the Child Welfare Ordinance was passed, clarification of the law suggests that it may now be possible for the Childrens Court to exercise jurisdiction over Commonwealth indictable offences. In a case decided in 1915, *R.* v. *Bernasconi*[55], the High Court had held that s.80 of the Constitution did not apply to criminal proceedings in the Northern Territory. There was for some years doubt whether the decision also applied in the A.C.T., but this doubt was set at rest in 1965 by the decision of the High Court in *Spratt* v. *Hermes.*[56] The Court held that the laws of the A.C.T. are exclusively made pursuant to s.122 of the Constitution.[57] The joint effect of *R.* v. *Bernasconi* and *Spratt* v. *Hermes* is that there seems to be no constitutional objection to Commonwealth indictable offences being heard summarily in the A.C.T., if the A.C.T. law so provides. There still remains the restriction created by the requirement in s.69(1) of the Judiciary Act that all indictable offences against laws of the Commonwealth be prosecuted by indictment (and therefore be heard before a jury, not in a Childrens Court). It seems unlikely that this restriction has been removed by s.20C of the Crimes Act 1914 (Cwlth). Notwithstanding the clear intention of this provision to permit children charged with Commonwealth offences to be dealt with as any other young offender would be, this section cannot be interpreted as conferring on the A.C.T. Childrens Court a jurisdiction which s.56 of the Child Welfare Ordinance explicitly withheld. It is clearly most undesirable that the law relating to the jurisdiction of the A.C.T. Childrens Court over offences against a law of the Commonwealth, whether these offences be triable summarily or on indictment, should be in such an unsatisfactory state. The position should be clarified. The new Ordinance should make it clear that the Childrens Court may exercise jurisdiction in respect of offences against a law of the Commonwealth.

92. ***Description of Proceedings*** The hearing may commence with the reading of the charge or, if the child is represented, by the solicitor's entry of a plea. If the charge is read, this may be done by the magistrate, the officer from the Commonwealth Deputy Crown Solicitor's office[58] or the clerk. Although all use legal terminology, the magistrate frequently attempts to simplify the charge. During one hearing attended in the course of the inquiry a member of the Deputy Crown Solicitor's Office read the charge in a rapid, mechanical manner, wholly unsuited to a child's understanding. Indeed, one 13-year-old boy commented, 'It was a bit fast', when asked whether he had understood the

[54] Doubts about jurisdiction over Commonwealth matters are also reflected in s.66. This section (which empowers the Supreme Court to deal with a young offender who is committed for trial and convicted of an indictable offence) also excludes any offence against a law of the Commonwealth. Why the exclusion of Commonwealth indictable offences was felt necessary is unclear.

[55] (1915) 19 CLR 629.

[56] (1965) 114 CLR 226, 291–2. Compare this decision with the earlier decisions in *Federal Capital Commission* v. *Laristan Building Investment Co Pty Ltd* (1929) 42 CLR 582 and *Australian National Airways Pty. Ltd.* v. *The Commonwealth and Others* (1945) 71 CLR 29. See also Ewens, 'Where is the Seat of Government?' (1951) 25 *ALJ* 532.

[57] See Ewens, and Lumb and Ryan, *The Constitution of the Commonwealth of Australia Annotated* (1977), 199.

[58] Before 1973 prosecutions in the Court of Petty Sessions were conducted by members of the A.C.T. Police Force. In that year staff of the Commonwealth Deputy Crown Solicitor (A.C.T.) assumed responsibility for conducting prosecutions in this court.

charge. The magistrate instructed that the charge be read again, more slowly. Similarly, one clerk read the charge in a rapid, formal manner akin to the style adopted in the Court of Petty Sessions. It was clear that some of the children did not fully understand what was said to them. Any hesitation on the child's part produced an equally rapid repetition of the legal formula. It is normal practice for an unrepresented child and his parents to be asked by the magistrate whether they understand the charge. If both indicate that they understand, the child is asked whether he admits or denies the offence. Most make an admission. Following an admission the apprehending police officer gives evidence. This evidence is not given on oath. The officer gives evidence in narrative form, referring to the record made at the time. This evidence tends to follow a set pattern. The officer's attendance at the incident is recited, as is his initial questioning of the suspect. Usually a suspect is taken to a station and questioned further. This is described and mention is made of the fact that the questioning occurred in the presence of a parent or of some other adult witness. Any admissions made by the child are quoted (e.g. 'Yeah, I just did it', and 'Yeah, it was me'). If a written statement has been signed, this is tendered. If the defendant was under 14 at the time of the alleged offence the witness may make reference to the child's admission that he knew his acts to be wrong. In this way the *doli incapax* rule is acknowledged. The magistrate may also put a question as to the child's knowledge of wrongness. It is common for the officer from the Deputy Crown Solicitor's office to ask the witness whether compensation is sought. At the end of the evidence the child and parents, or the child's solicitor, are asked if they have any questions to put to the witness. Children and parents rarely ask questions. It is common for the child's legal representative to ask whether the child was co-operative and appeared truthful. Child, parents or solicitor are then given an opportunity to make a statement about the allegations.[59] If the magistrate is satisfied he finds the facts proved. The next step is for him to ask if there is 'anything known'. If the child has had previous court appearances a photocopy of the record held by the Criminal Records Unit is passed to the magistrate or, more commonly, its contents are read out. The magistrate is not informed of police warnings. He may then make the dispositional decision or he may adjourn the matter for a written or oral report by the Welfare Branch. An example of a case in which the presiding magistrate felt able to proceed without an adjournment was one involving a 13-year-old boy appearing in court for the first time for the theft of goods worth $21.74. In that case the boy was placed on a good behaviour bond. If the matter is adjourned, the magistrate endorses a request for a report on the bench sheet, which is forwarded to the Welfare Branch. The Branch does not have a duty officer in court to whom such requests can be directed. In one case observed the matter was adjourned for five weeks for the preparation of a report by the Branch. On occasions the court also calls for a psychiatric report.

93. ***Measures Available for Young Offenders*** As has been explained in Chapter 2, the more important measures available to the Childrens Court may be employed whether the child is an offender or neglected or uncontrollable. These measures are:

- probation;
- committal to the care of a willing person;
- committal to the care of the Minister to be dealt with as a ward admitted to government control; and
- committal to a N.S.W. institution run by the N.S.W. Department of Youth and Community Services; such a committal may be either general or for a specified term.

Each of these measures has been described and discussed, and the analysis which follows is confined to a consideration of the way they are used with regard to offenders and of special methods which are available only for children in this category.

94. ***The Two Categories of Offences*** The Child Welfare Ordinance draws a distinction between indictable offences and summary offences. Section 57 lists the penalties available in respect of the former, and s.58 those which may be imposed when the latter type of offence has been admitted or proved. It is possible, however, to argue that this distinction is meaningless. Section 58 lists the

[59] Section 69(1) states that where a child or young person is charged with an offence or is brought before the Court as a neglected or uncontrollable child or young person,

> the Court, if satisfied that a *prima facie* case has been made out, shall give the child or young person or his parent an opportunity to call evidence and shall hear any evidence that may be tendered by or on behalf of the child or young person.

powers of the Childrens Court in respect of 'an offence triable summarily'. By virtue of s.56 most indictable offences are so triable in the Childrens Court. Does this mean that the penalties listed in s.58 may be employed when a Childrens Court deals with an indictable offence? Such a conclusion seems unlikely, as it would run counter to the obvious purpose of the Ordinance, which is to distinguish between the penalties available in respect of the two categories of offence. The analysis which follows is based on the assumption that the Ordinance does succeed in making such a distinction.

95. ***Discharge under Section 59*** Section 59 applies to both categories of offence. Under this section once the allegation has been admitted or proved, the court may 'without proceeding to a finding of guilt', decide that it is inexpedient to make an order under s.57 or s.58.[60] In such a case the court may dismiss the charge[61] or admonish and discharge the child[62] (the difference between these two courses is not clear). Court statistics reveal that these options are moderately used by the magistrates. Between 1 June 1978 and 31 May 1979, 43 offenders (4.4%) were dismissed and 56 (5.7%) were admonished and discharged. These figures include traffic offenders. Alternatively, the court may, under s.59(c), discharge the child conditionally on his entering into a recognizance to be of good behaviour, to comply with such terms and conditions as the court specifies, and to appear for a finding of guilt and to be further dealt with under s.57 or 58 at any time during the period specified by the court. The specified period must not exceed three years. A surety or sureties may be required. When a child is released under this provision a monetary bond is set. A typical bond is $50, but the sum may be as low as $10. Between 1 June 1978 and 31 May 1979, an order under s.59(c) (with or without conditions) was the most frequently used disposition, being imposed on 198 or 20.2% of offenders. As with the above figures, traffic offenders are included in this calculation. Section 59(c) authorises the court to impose terms and conditions. This is interpreted as empowering the court to order supervision, a topic which has been discussed in Chapter 2. An example of the use of the power to release on a recognizance was observed in the case of a young boy who had admitted a theft from a shop. He was released on a $50 bond with a surety (his mother) bound in a similar sum. A condition of the release was that he be of good behaviour for 12 months. He was not placed under supervision. In another case, release was on a two-year good behaviour bond, a condition being that the boy pay $17.10 compensation. Section 61(1) empowers the court at any time to direct that a child released under s.59(c) appear before the court. Notice may be directed to the child or young person's parent and to the surety or sureties, or to the child or young person himself. If the child fails to appear he may be arrested.[63] Section 61 does not indicate how the child may be dealt with. Presumably the court may employ any of the measures listed in s.57 or 58. Further, if the child or young person commits another offence during the term of the recognizance, he may be charged with a breach of his recognizance, if the later offence is proved. When the child comes to police notice on the second occasion the police Criminal Records Unit checks its records and notifies the Legal Branch that a charge of breach of recognizance may be brought. A bench sheet is prepared by the Legal Branch and the representative of the Commonwealth Deputy Crown Solicitor is instructed to proceed on the breach if the subsequent charge is proved. One interesting example of breach proceedings in the Childrens Court involved a youth of 18. Earlier in the day the Court of Petty Sessions had found him guilty of a series of offences. At the time of these offences he was on a recognizance as a result of a Childrens Court appearance. Thus, though now an adult, he was brought back before the Childrens Court and charged with a breach of recognizance. He was fined $50, with 2 days' imprisonment in default for the breach, in addition to the penalties imposed in the Court of Petty Sessions.

96. ***Financial Penalties*** The use of financial penalties is not dealt with explicitly in the Ordinance. However, authority to impose a fine or to require the payment of compensation, damages or costs seems to be conferred on the Childrens Court by s.58(e) which allows the court to deal with a child or young person 'according to law'. Section 62(1) makes it clear that the use of these penalties was

[60] The court may make this decision 'having regard to all the circumstances and to the welfare of the child or young person'.
[61] Section 59(a).
[62] Section 59(b).
[63] Section 61(2).

envisaged by those who made the Ordinance. The Commission's court statistics show that 119 child offenders (or 20.2%) were ordered to pay fines as the major means of punishment during the twelve month period analysed. As an example of the fines imposed, 'bad behaviour' (such as using indecent language, or being drunk in a public place) most frequently attracted a $10 fine (although the fines ranged from $1 to $150). Offences against property, such as stealing and breaking and entering, more frequently attracted fines between $100 and $200 (with the range extending from $10 to $500). An interesting feature of the Territory's law is that it seems that the power to impose a monetary penalty may be exercised only when the offence is triable summarily and not when it is indictable. The possibility of dealing with a child 'according to law' is referred to in s.58 but not in s.57. This produces an odd result. If the separate listing of penalties in the two sections has any significance no other interpretation seems possible. When there has been default in the payment of a monetary penalty a child or young person may be committed to a shelter, a N.S.W. institution or a prison.[64] Committal to a shelter is for a period not exceeding 30 days[65]; the Ordinance contains no limit when an institution or a prison is used. From time to time the power conferred by s.62(1) is used by the Childrens Court to detain a defaulting child in Quamby Children's Shelter. A default period is specified at the time the fine is imposed. This period is calculated on the basis set out in s.189 of the Court of Petty Sessions Ordinance 1930 (A.C.T.). To gain an impression of how often fines are paid, and under what circumstances action is taken against children failing to pay fines, the Commission analysed the payment of all Childrens Court fines imposed during the first six months in 1979. In that time, 468 charges[66] resulted in fines. Table 3 was correct on 31 July 1979.

Table 3: Payment of fines by children dealt with in the A.C.T. Children's Court between 1 January 1979 and 30 June 1979.

Progress	*Total*	*%*
Warrant issued (no attempt at payment)	50	(10.7)
Warrant issued (fine part paid, but next instalment well overdue)	8	(1.7)
Overdue	24	(5.1)
Held at court (young person committed to N.S.W. or other charges)	4	(0.9)
Not finalised		
Paid	157	(33.5)
Total	225	(48.1)
	468	

97. ***Probation*** Table 4, derived from the Commission's court statistics, details the length and conditions of probation imposed on offenders during the period 1 June 1978 to 31 May 1979.

Table 4: Conditions and length of term of probation orders made by the A.C.T. Children's Court in respect of offenders between 1 June 1978 and 31 May 1979.

Condition	*Until 18*	*12 months*	*18 months*	*2 years*	*3 years*	*Total*
No supervision requirement	1	22	4	13	1	41
Accept Welfare Branch supervision	2	13		14	3	32
Live where directed		2	2			4
Total	3	37	6	27	4	77

[64] Section 62(1). The possibility of committal to a N.S.W. institution should be noted. As has been explained (para.53) a committed child is placed under the joint guardianship of the Minister for the Capital Territory and the N.S.W. Minister for Youth and Community Services. Committal seems a cumbersome process by which to deal with fine default. During the period 1 July 1979 to 30 June 1980, 12 fine defaulters were held in Quamby Children's Shelter. Figures supplied by the Welfare Branch of the Department of the Capital Territory.
[65] Section 62(2).
[66] These figures relate to charges, not individual children. Several charges may have been brought against one child.

As has been explained in Chapter 2, an unusual feature of probation in the A.C.T. is that it need not necessarily involve supervision. An example of a case which resulted in the making of a probation order without supervision was one in which a youth faced a number of charges of larceny, one of breaking and entering, and one of illegally taking and using a car. The charges were proved and the boy was placed on probation for 12 months; the conditions of the order were that he be of good behaviour, obey all his father's directions, continue to accept treatment from the psychiatrist who had been seeing him, and pay $185.15 compensation (this was to be paid to the car owner as the vehicle had been damaged). Another example of a probation order without supervision also involved the illegal taking and use of a car. The magistrate considered that the boy came from a 'good home' and placed him on probation for 18 months. The conditions were that he live at home, accept his parents' directions, avoid excess of alcohol, and be home each evening by 9.30 unless he had his parents' consent to be out later. These illustrations indicate the type of conditions which may be attached to a probation order. Others may be to pay court costs and not to associate with specified persons.

98. ***Release on a Recognizance*** Release on a recognizance is authorised not only by s.59(c) but also by s.57(1)(e) and s.60(1). Conditions similar to those attached to a probation order may be imposed. Under s.57(1)(e), when an indictable offence has been proved, the court may, in addition to, or in substitution for, a committal to an institution, require the child or young person to enter into a recognizance to be of good behaviour and to comply with any conditions specified by the court. Sureties may be required and the term must be not less than 12 months or more than three years. The Commission's analysis of court records found 21 cases resulting in such an order between 1 June 1978 and 31 May 1979. This represents 2.1% of the total number of offenders (including traffic offenders) appearing before the Childrens Court in that period. If the child does not enter into the recognizance the court may direct that he be detained in a shelter for a period not exceeding 30 days or in an instutition for a period not exceeding three months, unless, in the meantime, the child enters into the recognizance. This measure is sometimes used when the magistrate wishes to fashion a 'split' measure, i.e. a period in an institution followed by a period on a recognizance. In Chapter 2 reference was made to the court's power, under s. 60(1), to suspend a committal order. With regard to offenders, a committal order under s.57(1)(d) or s.58(d) may be suspended if the child or young person enters into a recognizance to be of good behaviour. A surety or sureties may be required, and the child may be required to comply with any conditions set by the court. In one case observed, a youth who had committed a series of offences — including the unlawful taking and using of a motor vehicle, malicious damage, stealing, and breaking and entering — was dealt with under s.60(1). He was committed generally to a N.S.W. institution, but this committal was suspended and he was placed on a twelve-month bond of $100, he was required to be of good behaviour, to accept Welfare Branch supervision, and to pay $382.75 in compensation.

99. ***Supervision within the Community*** If the court decides that a young offender should remain in the community but be subject to supervision there are a number of methods of achieving this. The fact that there are several provisions under which supervision may be ordered is a particularly confusing feature of the Ordinance. Supervision may be made a condition of release on probation under s.57(1)(a) or under s.58(a). Alternatively supervision may be made a condition of a discharge upon a recognizance under s.59(c) or a condition of a recognizance under s.57(1)(e) or s.60(1). The use of release on recognizance — whether under s.59(c), s.57(1)(e) or s.60(1) — as a means of placing a child or young person under supervision seems undesirable in view of the fact that both s.57 and 58 make specific provision for probation orders. However, the court has no choice if it wishes to suspend an order committing a child to a N.S.W. institution and place the child under supervision, or if it wishes to ensure that a period of committal to such an institution will be followed by supervision. A genuine choice can be made between supervision under s.59(c) and probation under s.57(1)(a) or s.58(a); no doubt the former is often preferred to avoid a finding of guilt.

100. ***Dealt with According to Law*** As has been indicated, when an offence is triable summarily the child or young person may be 'dealt with according to law'.[67] This is interpreted as meaning that the A.C.T. Childrens Court is able to employ any of the penalties available to it in its capacity as a Court

[67] Section 58(e).

of Petty Sessions. The imposition of a fine is the commonest use of this power. The suspension or cancellation of a driving licence[68] is also a penalty which is regularly employed. Occasionally the court employs powers conferred by s.556A[69] or s.556B[70] of the Crimes Act 1900 (N.S.W.) in its application to the Territory or by s.19B[71] or s.20[72] of the Crimes Act 1914 (Cwlth). When a child has been found to have committed an offence triable summarily the power to deal with him according to law includes the power to impose a sentence of imprisonment. However, it seems that in practice the A.C.T. Childrens Court does not employ this penalty, and that matters thought serious enough to warrant imprisonment result in committal in the A.C.T. Supreme Court.

101. ***The Effect of Childrens Court Orders*** The Ordinance makes a distinction between children dealt with under s.59 and those dealt with under s.57 and 58. Section 59 creates measures which the Childrens Court may employ 'without proceeding to a finding of guilt'. Clearly the intention is that a magistrate's decision to invoke the powers created by this section should confer a significant benefit on the child or young person. The implication is that orders made under s.57 or s.58 must be accompanied by a finding of guilt. However, these two sections make no reference to a finding of guilt, but instead provide for orders consequent upon an admission or a finding that the charge is proved. Police records do not always reflect a distinction between different types of Childrens Court orders. All appearances are recorded on a criminal record sheet. Matters dealt with under s.59 are not invariably marked as being in a special category. For example, a child dealt with under s.59(c) might have the outcome of his case recorded as a 'recognizance' on his criminal record sheet. The record will therefore not show that there was no finding of guilt. Nevertheless, Childrens Court magistrates appear to act on the assumption that use of the powers created by s.59 confers worthwhile benefits on children and young persons. When acting under this section two magistrates observed were careful to say, 'I find the offence proved but without proceeding to a finding of guilt'. One explained this to the child by saying that 'it [the offence] won't come against you in later life', and that, if asked, the child could truthfully say that he has not been 'found guilty of any offence'. Another told a child that an order under s.59 meant that there was 'no Childrens Court conviction against your name'. In one case this magistrate told a boy, who had expressed a hope to become a teacher, that he was acting under this section as any record would hamper the boy in pursuing this career. It is not known how these comments were interpreted by the children involved. In spite of the legal distinction made in court, details of the offence would be entered — and remain on — their criminal record sheets, and be available to public authorities. Mention must also be made of s.110 of the Child Welfare Ordinance which states:

> The words 'conviction', 'sentence' and 'imprisonment' shall not be used in relation to a child or young person dealt with summarily and a reference in a law in force in the Territory to a person convicted, a conviction, a sentence or imprisonment shall, in the case of a child or young person so dealt with, be construed as a reference to a person found guilty of an offence, a finding of guilt, an order made upon such a finding or a detention, as the case may be.

The legal effect of this provision is uncertain. The confusion and uncertainty should be removed. There are practical reasons why this should be done. For example, a person seeking employment may be asked whether he has been 'convicted' of any offence. A child or young person in respect of whom a charge had been found proved, but no finding of guilt made, could answer truthfully that he had not been 'convicted' of an offence. Whether a child dealt with under s.57 or s.58 could do the same is open to question. It seems reasonable that the specific reference in s.59 to the absence of a finding of guilt implies that there *is* a finding of guilt under s.57 and s.58. If the meaning of s.110 is simply that the word 'conviction' is not to be used, but use of the words 'finding of guilt' has the same

[68] Under the Motor Traffic Ordinance 1936 (A.C.T.), s.193(5).

[69] Under this provision the Court of Petty Sessions may dismiss a charge or, without proceeding to conviction, discharge the defendant on a recognizance.

[70] Under s.556B(1)(a) of the Crimes Act 1900 (N.S.W.) in its application to the Territory, the court may convict a person and, without passing sentence, release him on a recognizance.

[71] This permits a court of summary jurisdiction before which an offence against a law of the Commonwealth is proved, without proceeding to conviction, to dismiss the charge or to discharge the defendant on a recognizance.

[72] Under this provision a court may, without passing sentence, release on a recognizance any person convicted of an offence against the law of the Commonwealth.

legal effect, then a finding of guilt under s.57 or s.58 would amount to a conviction.[73] An examination of the legal effect of a finding under s.57, s.58 or s.59 also raises questions regarding an offender's liability to special penalties under certain Ordinances. For example, a person *convicted* of an offence under s.129 of the Motor Traffic Ordinance 1936 (A.C.T.)[74] may by virtue of s.193(5) of that Ordinance have his licence suspended or cancelled. Presumably if a child or young person charged under s.129 has been dealt with under s.59 there is no possibility that he could be regarded as having been convicted for the purposes of s.193(5). But what of the position of a child or young person dealt with under s.57 or s.58? If an offence under s.129 is found proved, may this child or young person have his licence cancelled? The answer depends on whether the finding under s.57 or s.58 amounts to a 'conviction' for the purposes of s.193(5).[75]

Appeal to the Supreme Court

102. ***The Right to Appeal*** There has been considerable confusion, particularly over the last four years, concerning the question of appeals to the Supreme Court under s.15 of the Child Welfare Ordinance. Section 15(1) of the Child Welfare Ordinance states:

> Subject to this section, an appeal lies to the Supreme Court from a determination, finding of guilt or order of the Court by the persons and in the manner provided by Part XI of the Court of Petty Sessions Ordinance 1930–1953.

There are two difficulties with this sub-section:

- What is the meaning of 'determination, finding of guilt or order of the Court'?
- What types of appeals are provided for by Part XI of the Court of Petty Sessions Ordinance?

A further grammatical problem exists in relation to the words 'by the persons'. As was said by Mr Justice Blackburn in the 1977 case of *Manning* v. *Rowley*[76], those words should have been followed by the words 'referred to'. Before 1972, persons who came within Part XI of the Court of Petty Sessions Ordinance and therefore who could appeal under its provisions were persons aggrieved by a conviction of the Court imposing a fine of five pounds or more or any term of imprisonment in default of payment of a fine (this was an appeal by virtue of s.207 of the Court of Petty Sessions Ordinance) and, by virtue of s.208, persons aggrieved by a conviction or order other than a conviction or order referred to in s.207. Appeals under s.208 could only be made with the leave of the Supreme Court. In 1958 a minor amendment deleted the reference to orders in s.208 and a new s.208A was added which dealt specifically with a right of appeal from an 'order' of the Court. In 1972 s.207, 208 and 208A were repealed, and amended appeal provisions were set out in a new s.208. In addition, a new Division 3, of Part XI, consisting of s.219A to 219F, introduced a right of appeal by way of order to review. For present purposes the most important provisions of the new s.208 are those set out in s.208(1)(a) to (c).[77] The new right of appeal by way of order to review was confined to

---

73 The N.S.W. Supreme Court took this view in relation to identical wording in the N.S.W. Child Welfare Act in *Ex Parte Ambrey,* (1946) 63 W.N. (N.S.W.) 244, 245.

74 This section deals with negligent or reckless driving.

75 Other examples of provisions creating penalties which may be imposed following the entry of a conviction are ss.192A and 193(10) of the Motor Traffic Ordinance 1936 (A.C.T.). On the other hand, s.25(3) of the Motor Traffic (Alcohol and Drugs) Ordinance 1977 (A.C.T.), enables the court to impose certain penalties on a person against whom an offence has been proved even if the court did not proceed to conviction. With regard to liability to special penalties under this Ordinance, a child dealt with under s.59 of the Child Welfare Ordinance would be in the same position as one dealt with under s.57 or s.58.

76 Unreported decision of the A.C.T. Supreme Court, No.630 of 1977, p.30 of the transcript.

77 Section 208(1) provides:

> Each of the following appeals is an appeal to which this Division applies:
> (a) an appeal, by the person convicted, from a conviction for an offence dealt with by the Court of Petty Sessions under Part VII, or under section two hundred and fifty-five of this Ordinance;
> (b) an appeal, by the person against whom the order is made, from an order made in pursuance of section one hundred and thirteen or section one hundred and fourteen of this Ordinance in proceedings dealt with by the Court of Petty Sessions under Part VII;
> (c) an appeal from a sentence or penalty imposed by the Court of Petty Sessions by a person convicted of an offence dealt with by that Court under section ninety A or two hundred and fifty-five of this Ordinance or under Part VII; whether or not that person appeals against the conviction in respect of which the sentence or penalty was imposed.

heads of appeal similarly expressed (s.219B(b) and (c))[78], but without specific reference to appeals from sentence. The difficulty with the new grounds of appeal in s.208(1)(a) to (c) is that they refer specifically to offences dealt with by the Court of Petty Sessions under Part VII of the Court of Petty Sessions Ordinance. It is unclear whether the Childrens Court, although a Court of Petty Sessions, can be said to be dealing with young offenders under Part VII as well as under the Child Welfare Ordinance. Hence it is not apparent whether a dissatisfied child or young person may invoke those amended appeal provisions. In 1976 in *Pascoe* v. *Little*[79] a child was charged in the Childrens Court with an offence relating to alleged theft from a cash register. The court found the offence proved but, applying s.59 of the Child Welfare Ordinance, admonished and discharged the child without proceeding to a finding of guilt. There was some confusion as to whether the child had been dealt with under s.59(b) or s.59(c) but argument on that point is not relevant here. The child appealed to the Supreme Court by way of order to review. The Crown took the preliminary objection that the 1972 amendments of the Court of Petty Sessions Ordinance had removed the right of appeal from the Childrens Court to the Supreme Court. The argument was that as the magistrate's finding was not 'a decision' under Part VII of the Court of Petty Sessions Ordinance, the appeal procedures created by Part XI of that Ordinance were not available under s.15 of the Child Welfare Ordinance. Mr Justice Connor did not rule on the Crown's submission. Instead he suggested that the Attorney-General could rectify the problem by making regulations under s.13(3) of the Child Welfare Ordinance.[80] It may be questionable whether the regulation making power in s.13 would extend to the conferring of such a fundamental right as a right of appeal to the Supreme Court. Another case which dealt with the question of appeals from the Childrens Court to the Supreme Court was *Manning* v. *Rowley.*[81] There it was held that s.15 of the Child Welfare Ordinance had to be read as referring to Part XI of the Court of Petty Sessions Ordinance as it stood before the 1972 amendments, because to read the section as referring to the amended Ordinance would render s.15 meaningless. In his judgment Mr Justice Blackburn considered the rule in s.41 of the Interpretation Ordinance 1967 (A.C.T.). That section provides that where in an Ordinance reference is made to a law of the Commonwealth or to another Ordinance and that law or that other Ordinance is subsequently amended, then, *unless the contrary intention appears,* that reference shall be deemed to be a reference to that law or other Ordinance as amended.[82] Mr Justice Blackburn held that this did not prevent an interpretation based on the pre-1972 Court of Petty Sessions Ordinance. In Manning's case there was also some discussion of the general appeal right provided by s.11(c) of the Australian Capital Territory Supreme Court Act 1933 (Cwlth).[83] Mr Justice Blackburn decided that that general appeal right should be read subject to s.15 of the Child Welfare Ordinance. The result of this case is that an appeal right still exists in relation to Childrens Court matters and is defined in Part VII of the Court of Petty Sessions Ordinance as it stood before its amendment in 1972. The question was further considered in 1978 in *Zeccola* v. *Barr*[84], an appeal by an offender who had been dealt with under s.59(c) of the Child Welfare Ordinance. Mr Justice McGregor accepted that s.15 of the Child

---

78 The relevant parts of s.219B provide:

> Each of the following is a decision of the Court of Petty Sessions from which an appeal by way of order to review may be made in accordance with this Division:
> (b) a conviction by the Court of Petty Sessions for an offence dealt with by that Court under Part VII;
> (c) an order made in pursuance of section one hundred and thirteen or one hundred and fourteen of this Ordinance in proceedings dealt with by the Court of Petty Sessions under Part VII.

79 Unreported decision of the A.C.T. Supreme Court, Nos. 1190–193 of 1976. The case is reported at (1979) 24 ACTR 21, but not on this point.

80 Section 13(13) states that:

> The Attorney-General may make regulations, not inconsistent with this Ordinance, providing for modification or adaptation of the provisions of the Court of Petty Sessions Ordinance 1930–1953 and the rules and regulations made under that Ordinance in their application to and in relation to the Court and to and in relation to proceedings before the Court.

81 Unreported decision of the A.C.T. Supreme Court, No.630 of 1977.

82 Emphasis added.

83 Section 11(c) of the Australian Capital Territory Supreme Court Act 1933 (Cwlth) provides *inter alia* that:

> The Supreme Court . . . has jurisdiction, with such exceptions and subject to such conditions as are provided by Act or by Ordinance, to hear and determine appeals from all judgments, convictions, orders and sentences of inferior courts having jurisdiction in the Territory.

84 (1978) 19 ACTR 1. See also (1978) 2 *Crim LJ* 287.

Welfare Ordinance was to be read as referring to the Court of Petty Sessions Ordinance as amended in 1972. The Court did not consider the question whether the 1972 amendments rendered the section meaningless. No reference was made to Manning's case. Mr Justice McGregor held that Part XI as amended in 1972 did provide for an appeal in the case before the court. Section 208(1)(b) of Part XI provides for an appeal from an order under, *inter alia*, s.114[85] (which is contained in Part VII) of the Court of Petty Sessions Ordinance. Mr Justice McGregor's discussion of this section indicates that he considered that the Childrens Court order could be said to be an order under s.114 as well as an order under s.59(c) of the Child Welfare Ordinance. However, as Mr Justice Blackburn said in Manning's case, 'We should not have to go into all this complication to discover whether we have got jurisdiction'.[86] The Commission agrees. The jurisdiction of the Supreme Court to hear an appeal should be made clear. Two of the remaining grounds of appeal in s.208(1) are relevant to Childrens Court proceedings. Section 208(1)(d) and (e) deal with rights of appeal from decisions of the Court of Petty Sessions made in pursuance of s.556A or s.556B of the Crimes Act 1900 (N.S.W.) as it applies in the A.C.T. The rights of appeal provided by s.208(1)(d) and (e) were not discussed in any of the above cases.[87]

103. ***The Nature of the Appeal Right*** A further question concerns the nature of the appeal right, if any, which exists in relation to Childrens Court proceedings. Before the 1972 amendments to the Court of Petty Sessions Ordinance, it was not clear how the hearing of an appeal should be conducted. In 1972 the amendments specifically conferred a right of appeal by way of order to review.[88] Because Mr Justice Blackburn decided in Manning's case that the reference in s.15 of the Child Welfare Ordinance was to Part XI of the Court of Petty Sessions Ordinance as it was prior to 1972, it would appear that he considered that the only appeal right which existed was by way of a general re-hearing. On the other hand, Mr Justice McGregor in *Zeccola* v. *Barr* considered that s.15 must be read as referring to Part XI as amended in 1972, thus providing for both types of appeal. This uncertainty should also be removed and it should be made clear that both types of appeal are available.

Offenders Dealt With in the Supreme Court

104. ***Committal for Trial*** As has been indicated in the discussion of the Childrens Court's jurisdiction, s.65 of the Child Welfare Ordinance provides for the committal for trial of offenders charged with indictable offences. Committal for trial occurs either because the magistrate lacks jurisdiction or because he has exercised his right to decline jurisdiction. No mention is made in the Child Welfare Ordinance of committal to the Supreme Court for sentence, although this is possible under s.92A of the Court of Petty Sessions Ordinance. Yet in a situation in which committal proceedings are in progress in the Childrens Court and the child or young person, during the course of these proceedings, admits his guilt, the Childrens Court may consider its powers under s.57 to deal with the offender insufficient and commit him to the Supreme Court for sentence. It could be argued that because the Ordinance specifically provides only for committal for trial, committal for sentence is not within the Childrens Court's power.[89] This is yet another example of a conflict between two pieces of relevant legislation.

---

85 Section 114 deals with proceedings on an information when the defendant does not admit the truth of the information.

86 At p.46 of the transcript.

87 It is arguable that if these provisions had been considered in Manning's case, the decision might have been different. A child dealt with under one of those provisions would be a child dealt with in the manner provided by Part XI of the Court of Petty Sessions Ordinance as it was after the 1972 amendments were made, since the power to deal with a child pursuant to an order made under another Ordinance was unaffected by those amendments. (See s.207(2) of the Court of Petty Sessions Ordinance.) Therefore, it would be possible to make sense of the amended appeal provisions and it would not be necessary to interpret s.15 as having been rendered meaningless. This section would provide appeal rights, but only against orders made by the Childrens Court under s.556A or s.556B of the Crimes Act 1900 (N.S.W.).

88 That is, an appeal on a point of law – see s.219B of the Court of Petty Sessions Ordinance 1930 (A.C.T.).

89 Applying the *expressio unius* rule.

105. ***Trial by Jury.*** It seems that there are no provisions entitling a child or young person appearing before the Childrens Court to request a trial by jury when charged with an indictable offence. The child's situation contrasts in this respect with that of an adult. The Court of Petty Sessions may exercise jurisdiction in respect of a wide range of indictable offences. By virtue of s.476(1) of the Crimes Act 1900 (N.S.W.) as it applies in the A.C.T., certain indictable offences (listed in s.476(2)) may be dealt with summarily without the defendant's consent. Under s.477 indictable offences (other than those punishable by imprisonment for life or for a term exceeding 10 years: see s.478) may be dealt with summarily if the accused consents. With regard to offences to which s.477 applies, the defendant is able to insist on a jury trial. No such right in conferred on a child. With the exception of certain very serious offences, it is for the Childrens Court to decide whether it wishes to exercise jurisdiction. A corollary of the fact that a child is not in a position to insist on committal for trial is that he cannot gain the benefit of the advance disclosure and testing of evidence set out in the depositions.

106. ***Powers of the Supreme Court*** If, when a child is committed for trial and he pleads guilty to, or is convicted of, the offence, the Supreme Court can exercise any of the powers conferred on the Childrens Court by s.57 (release on probation, committal to the care of a willing person, committal to the Minister's care or to a N.S.W. institution, or – in addition to, or in substitution for, a committal to a N.S.W. institution – require the child to enter into a recognizance). Alternatively the Supreme Court may sentence him according to law.)[90] If the Supreme Court sentences a child or young person to imprisonment, it can direct that he be detained in an institution and can recommend the type of institution without stating a particular institution.[91] Alternatively, it can simply impose a term of imprisonment. When a child or young person is sentenced to imprisonment he may be administratively transferred to an institution operated by the N.S.W. Department for Youth and Community Services.[92] It would appear that any sentence which can be imposed on an adult can be employed in the case of a child or young person. If, following a finding of guilt, the Supreme Court does not consider it appropriate to impose sentence it may remit the case to the Childrens Court.[93] When so remitting a case the Supreme Court may give directions as to the offender's custody or release on bail.[94] When a case has been remitted a person dissatisfied with the Childrens Court's order may appeal to the Supreme Court.[95] An appeal does not lie against the order of remission, but this provision does not affect any right of appeal against the Supreme Court's original verdict or finding.[96] An additional situation in which the Supreme Court has jurisdiction is when the Childrens Court has committed a child or young person to a N.S.W. institution. Such a child or young person must be medically examined and, following this examination, an officer authorised by the Minister for the Capital Territory may apply to the Supreme Court to have the committal order reviewed.[97] The Supreme Court may confirm the order, or revoke it and make any other order which might have been made under s.55, 57 or 58.[98]

107. ***Imprisoned Children*** Because there is no prison in the A.C.T., offenders, both adults and children, who are sentenced to imprisonment, are held in N.S.W. prisons by virtue of s.4 of the Removal of Prisoners (Australian Capital Territory) Act 1968 (Cwlth) and complementary N.S.W. legislation.[99] In considering the law relating to the imprisonment of children, it is necessary to distinguish between the following categories:

---

90 Child Welfare Ordinance 1957 (A.C.T.), s.66.

91 id., s.66. and 68.

92 See Child Welfare Act 1939 (N.S.W.), s.94(1). This permits the Minister administering the Prisons Act 1952 (N.S.W.) to direct the transfer of any prisoner under the age of 21 to an institution established under the Child Welfare Act 1939 (N.S.W.).

93 Section 67(1). For details of the certificate which must be transmitted to the Clerk of the Court when a case is remitted to the Childrens Court see s.67(4).

94 Section 67(4).

95 Section 67(3).

96 Section 67(2).

97 Section 63(1) and (3).

98 Section 63(4).

99 Prisons Act 1952 (N.S.W.), Part IX.

- a child sentenced to imprisonment;
- a child sentenced to imprisonment but administratively transferred to an institution run by the Department of Youth and Community Services; and
- a child sentenced to imprisonment but ordered by the court to be detained in an institution.

With regard to a child sentenced to imprisonment, it seems that eligibility for release on parole is determined by the Parole Ordinance 1976 (A.C.T.), notwithstanding the fact that an A.C.T. prisoner removed to a N.S.W. prison becomes subject to all laws in force in that State.[100] When a child, by virtue of s.94(1) of the N.S.W. Child Welfare Act 1939, has been administratively transferred to an institution, his release is governed by s.54(4) of the N.S.W. Act which permits the N.S.W. Minister for Youth and Community Services to discharge him on specified terms and conditions. Thus the Minister is authorised to exercise the powers normally exercised by the N.S.W. Parole Board in respect of adults. It seems that a child or young person transferred to an institution under s.94(1) becomes a ward of both the N.S.W. and A.C.T. Ministers as a result of s.94(2) which deems such a child to have been committed to an institution.[101] The law relating to the discharge of a child in the third category is unclear. Section 54(4) does not apply to these children as it expressly deals with those who have been transferred to an institution under s.94(1) following a sentence of imprisonment. In default of a provision which expressly confers powers over this group on the N.S.W Minister, it seems that their release must be determined in accordance with the Parole Ordinance 1976 (A.C.T.).

108. ***Publicity in the Supreme Court*** In Chapter 2 it was pointed out that, by virtue of s.14(1) of the Child Welfare Ordinance, the Childrens Court is a closed court.[102] It seems that a young offender committed for trial in the Supreme Court under s.65 has none of the s.14 protections. Although s.83 of the Evidence Ordinance 1971 (A.C.T.) does provide for the Supreme Court to prevent the disclosure of evidence or the names of witnesses, the normal practice in the Supreme Court is the same as in the Court of Petty Sessions. The court hearings are open unless special directions are given. Children appealing to the Supreme Court are in the same situation as those who have been committed for trial. The law should make it clear whether proceedings in the Supreme Court should be open when children are involved. In formulating the relevant provisions, it will be necessary to determine whether a distinction should be made between proceedings which have resulted from a committal for trial or sentence and proceedings relating to the hearing of an appeal.

100 Removal of Prisoners (Australian Capital Territory) Act 1968 (Cwlth), s.5(3). For the relevant provisions governing the release of A.C.T. prisoners who have committed Commonwealth offences, see the Commonwealth Prisoners Act 1967 (Cwlth).

101 See para.53. As in the A.C.T., a child or young person who is committed to an institution in N.S.W. becomes a N.S.W. ward — see definition of ward in s.4 of the N.S.W. Act. As explained in Chapter 2, an A.C.T. child committed to a N.S.W. institution automatically becomes an A.C.T. ward.

102 Para.40.

5. Young Offenders: The Childrens Court

Needs or Deeds?

109. ***The Debate*** It is now necessary to identify the more important issues raised by the foregoing description of proceedings for dealing with young offenders in the A.C.T. The aim is to formulate certain fundamental principles against which existing practices can be judged and on the basis of which any necessary changes can be developed. In Chapter 2 attention was drawn to the fact that there is a substantial overlap between the system for dealing with offenders and that for dealing with non-offenders. With regard to the offender, this overlap raises complex questions. When designing procedures for the young offender, should society treat him as a troubled child whose needs happen to have manifested themselves in the commission of a criminal offence, or should the offence be the object of the law's concern? Although it is something of an over-simplification to see the problem in terms of a dichotomy of this kind, an attempt to answer the question posed does assist in identifying many of the major issues. In practical terms the question to be addressed is whether efforts should be made to build on those features of the existing system which emphasise how much young offenders and neglected and uncontrollable children have in common, or whether the distinction between the two categories should be sharpened. The implications for the non-offender will be considered in Chapter 8. At this stage the analysis is confined to an examination of policies for dealing with the young offender. In recent years an enormous amount has been written on this subject.[1] What follows is an analysis of some of the main issues in the debate. Substantial reference is made to United States material. Although an analysis of this material does help to clarify certain fundamental problems, extreme care must be taken before conclusions based on United States experience are applied to the Australian system. As will be explained, a commitment to a 'child-saving' philosophy[2] underlay the development of the juvenile courts in the United States. In Australia acceptance of this philosophy has never been so whole-hearted. Furthermore, the recent reaction against the child-saving philosophy in the United States can be fully understood only against the background of specific constitutional provisions relating to due process which do not apply in Australia. Nevertheless, an examination of United States experience is illuminating. The problem is that of defining the grounds for state intervention in the life of a child who is alleged to have committed an offence. Should the alleged offence itself provide this ground (so that society's response is directed towards social control) or should the offence be viewed as a symptom of personal or social problems (so that society's response is directed towards meeting the child's needs)? This question can be put in simple form by asking whether society's concern should be with the child's deeds or with his needs. In the opinion of the critics of the United States child-saving movement, a system designed to look beyond the offence to the needs of which it is a symptom carries with it certain dangers. The more important points made by these critics will be outlined in turn.

110. ***Dangers of Paternalism*** The first juvenile court in the United States was established in Illinois in 1899. Other States quickly followed suit. The classic statement of the paternalistic or child-saving philosophy on which these early courts were based was made in 1909.

> Why is it not just and proper to treat these juvenile offenders, as we deal with the neglected children, as a wise and merciful father handles his own child whose errors are not discovered by the authorities? Why is it not the duty of the state, instead of asking merely whether a boy or a girl has committed a specific offense, to find out

1 For example, English material includes the Ingleby Report; *The Child, the Family and the Young Offender,* (1965); and *Children in Trouble* (1968). In Scotland there was the Kilbrandon Report. Of the extensive United States literature mention can be made of Platt, *The Child Savers, The Invention of Delinquency,* (2nd ed., 1977); Fox, 'Juvenile Justice Reform: An Historical Perspective,' 22 *Stanford LR,* 1187 (1970); *Task Force Report;* Simpson, 'Rehabilitation as the Justification of a Separate Juvenile Justice System,' 64 *California LR,* 984 (1976); and Hazard, 'The Jurisprudence of Juvenile Deviance,' and Schultz and Cohen, 'Isolationism in Juvenile Court Jurisprudence,' both in Rosenheim (ed.), *Pursuing Justice for the Child,* (1976). For a comparative study, see Parsloe, *Juvenile Justice in Britain and the United States,* (1978).

2 For an analysis of the child-saving movement, see Platt.

> what he is, physically, mentally, morally, and then if it learns that he is treading the path that leads to criminality, to take him in charge, not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen.[3]

The juvenile courts which embodied these principles have been described as 'anti-legal' in orientation and methods.[4] It has been said that the crucial distinction between the traditional criminal court and the juvenile court is that between a court which directs its efforts 'to do something *to* a child because of what he *has done',* and a court concerned with 'doing something *for* a child because of what he *is* and *needs.'*[5] The result was a tribunal which sought to avoid the atmosphere and procedure of a criminal court and in which the adversary system had little place: 'the mutual aim of all was not to contest or object but to determine the treatment plan best for the child.'[6] In the view of the child-savers it followed that, as there could be no quarrel with the state's benevolent motives, there was no need to grant the child constitutional protections. It was this contention which has attracted fierce and persistent criticism. The critics have pointed out that, no matter how well intentioned it may be, juvenile court intervention frequently results in coercive action and substantial interference with children's liberty.

> Whatever one's motivations, however elevated one's objectives, if the measures taken result in the compulsory loss of the child's liberty, the involuntary separation of a child from his family, or even the supervision of a child's activities by a probation worker, the impact on the affected individuals is essentially a punitive one. Good intentions and a flexible vocabulary do not alter this reality.[7]

The critics of the juvenile court believed that constitutional and traditional due process safeguards should be retained and that an insistence on fair procedures should not be dismissed as legalistic. Some opponents of the child-saving movement have even urged that the state's claim to treat and save young offenders is fraudulent: special treatment programs were not made available and thus the benefits which it was assumed that the child would receive in return for the surrender of legal protections were illusory.

> If the result of an adjudication of delinquency is substantially the same as a verdict of guilty, the youngster has been cheated of his constitutional rights by false labeling. We cannot take away precious legal protection simply by changing names from 'criminal prosecution' to 'delinquency proceedings.'[8]

In 1966 in the United States Supreme Court, Mr Justice Fortas, delivering the majority opinion in *Kent* v. *United States,* spoke of a gulf between theory and practice.

> While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guarantees applicable to adults .... There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.[9]

Kent was one of a series of cases in which the Supreme Court of the United States has examined the operation of the juvenile court.[10] These and other decisions, together with academic writings, have focused attention on legal safeguards. They have raised significant doubts about the child-saving philosophy.[11]

111. ***Appropriateness of the Criminal Process*** Other arguments relate to the proper function of the criminal law. Viewing a criminal prosecution as a means of seeking to meet a child's needs can be

3 Mack, 'The Juvenile Court', 23 *Harv LR* 104, 107, (1909).
4 Platt, 141.
5 Waite, 'How Far Can Juvenile Court Procedures Be Socialized without Impairing Individual Rights?' 12 *Journal of Criminal Law, Criminology and Police Science,* 340, (1921).
6 *Task Force Report,* 3.
7 Allen, *The Borderland of Criminal Justice,* (1964), 18
8 Paulsen, 'Fairness to the Juvenile Offender', 41 *Minnesota LR,* 547,550, (1957).
9 383 U.S. 541,555–6 (1966).
10 The most important of these cases were: *In re Gault* 387 U.S. 1 (1967); *Re Winship* 397 U.S. 358 (1970); *McKeiver* v. *Pennsylvania* 403 U.S. 528 (1971); *Breed* v. *Jones* 421 U.S. 519 (1975).
11 See also the comment in a Canadian report that the juvenile court system in that country had evolved to the stage that the child's only right was to receive from adults the treatment they felt was in their best interests. *Admittance Restricted,* 14.

seen as a misconception of the purposes which criminal proceedings can effectively and appropriately fulfil. Although these proceedings can be modified when a child is involved, the essential characteristics of the criminal process – the pursuit of fairness and the controlled use of coercive powers – engender procedures and philosophies which do not lend themselves to the provision of services designed to meet personal and social needs. A United States commentator has characterised the nature of the criminal justice system in this manner:

> [T]he philosophies of courts, commitment institutions, and probation bureaus are preponderately *(sic)* correctional and punitive. Their roles have been clearly assigned in the mind and reactions of the defendant by the stereotypes of the 'cop', the criminal court, the reform school, and the probation officer. Similarly the public attitude towards these institutions and the adolescents subjected to them renders it wholly unrealistic for the court to attempt to operate as a general social agency; they bear the indelible stamp of public stigma and ostracism. Thus the frame of reference within which the court may legitimately and effectively operate is narrowly limited by public and institutional definition.[12]

Further, it can be argued that a commitment to fairness requires careful proof of factual allegations as a pre-requisite to intervention, whereas, if the objectives are benevolent, pre-occupation with legal considerations such as these should not be allowed to stand in the way of a wide-ranging search for ways of meeting a child's needs. Also, a belief in fairness carries with it the notion that the measures employed by the state should be proportionate to the seriousness of the offence, whereas proportionality is irrelevant if the aim is to meet needs of which the offence is merely a symptom. Similarly, the element of coercion which is inseparable from criminal proceedings inhibits – some would say renders impossible – the pursuit of therapeutic policies. In short, the invocation of the criminal process can be seen as an unsatisfactory way to attempt to bring good influences to bear. If the aims are benevolent they should be pursued in an unambiguous manner. The goal should be help untainted by legal threats.

112. ***Assumption of Personal Pathology*** The critics have also attacked the assumption of pathology on which the child-saving movement rests. The assertion that, when an offence by a child comes to notice, society's response should be directed towards his needs reflects the assumption that the offence is indicative of a personal problem. The offence may well indicate the existence of such a problem, but it may not. The notion that 'delinquents' have personal characteristics which distinguish them from 'non-delinquents' and that the causes of their offending are to be found in these differences, is now viewed sceptically.[13]

113. ***Efficacy of Available Measures*** Doubts have been raised regarding the remedies available to the courts. In those cases in which it is clear that the offender does have personal or social problems the court's ability to alleviate or solve those problems is limited. Not only is it inappropriate to attempt to find solutions within the context of criminal proceedings. Equally important are reservations about the efficacy of available techniques. There is a great deal of overseas evidence which casts doubt on the ability of therapeutic programs to produce the changes in human attitudes and

12 Tappan, *Juvenile Delinquency,* (1949), 203.
13 See Schur, *Radical Non-Intervention,* (1973), 29–45 and 153–155, and Matza, *Becoming Deviant* (1969). But see West and Farrington, *Who Becomes Delinquent?* (1973), chapter 11.

behaviour which they have been designed to achieve.[14] The evidence, it is claimed, gives rise to serious doubts about the rehabilitative potential of available methods. Further, more is involved than simple disillusionment with the types of programs which have been tried in the past. The human and social problems encountered in the criminal courts are dauntingly complex. A United States report has expressed the following view:

> Study and research tend increasingly to support the view that delinquency is not so much an act of individual deviancy as a pattern of behavior produced by a multitude of pervasive societal influences well beyond the reach of the actions of any judge, probation officer, correctional counselor, or psychiatrist.[15]

The argument is that there is a need for a realistic awareness of our limitations and for a recognition that the court system is better at diagnosing personal and social problems than at solving them.

114. ***Importance of Frankness*** It has also been urged that there is a need for frankness in the statement of the purposes pursued and that there is something unconvincing about a claim that, when an offence comes to notice, society's concern is with the child's needs rather than with his behaviour. There is some evidence that the young are likely to find a system based on fair retribution more comprehensible than one purportedly based on benevolence.[16] Further, if realistic and honest policies towards the young are to be pursued, the offence should not, it is claimed, be used as a pretext. If a child comes to notice because of a relatively minor offence, but investigation reveals serious needs which the welfare system should attempt to meet, the offence should not be seized upon as a justification for the imposition of therapeutic measures. If society's purposes are to be clearly expressed a choice must be made between a prosecution and non-criminal proceedings which make the objectives explicit.

115. ***The Commission's View*** In designing a system to deal with young law-breakers, the object must be to combine procedures specially adapted to the needs of the young with procedures which reflect a concern for the objectives traditionally pursued by the criminal justice system. It is not practicable to make a choice between a 'punitive' and a 'therapeutic' approach. Both approaches must be accommodated. Any system designed to achieve social control must take children's needs into account. Similarly, any system which wishes to offer help to the young cannot repudiate the tasks of the criminal law. It must be frankly acknowledged that the objective is the synthesis of principles

---

[14] As an example, mention can be made of a review of various types of intervention undertaken in the United States. After examining a number of studies of social work practice in that country, the researcher concluded:

> In none of the studies was there clear evidence that professional social work services produced results superior to no treatment at all, or in any way better than the minimal services provided by non-professional workers . . . In essence, not a single controlled study could be located providing clear evidence that any form of social work is effective.

On the use of psychotherapy, it is stated that:

> [A]n unequivocal conclusion about effectiveness cannot be reached; psychotherapy has neither proven its case for effectiveness nor has it been completely refuted. However, it does appear as though the bulk of the research in this area either cannot be used to reach a conclusion, because of design deficiencies, or shows null or negative results.

The results of research on correctional programs were described in the following terms:

> To date there is no evidence supporting any program's claim of superior rehabilitative efficacy . . . In examining over 200 studies involving hundreds of thousands of individuals, the correctional programs that have been reported to date appear to have had no appreciable effect on recidivism.

See Fischer, 'Does Anything Work?' 1 *J Social Service Research,* 215, 218–223, (1978). A number of other researchers have reached similar conclusions about the effectiveness of therapeutic programs. See Lipton, Martinson and Wilks, *The Effectiveness of Correctional Treatment,* (1975); Cornish and Clarke, *Residential Treatment and Its Effects on Delinquency,* (1975); and Riedel and Thornberry, 'The Assessment of Correctional Programs: An Assessment of the Field,' in Krisberg and Austin (eds.), *The Children of Ishmael, Critical Perspectives on Juvenile Justice,* (1978), 418.

[15] *Task Force Report,* 8.

[16] See Scott, 'Juvenile Courts: The Juvenile's Point of View', (1959), 9 *British Journal of Delinquency,* 200. An unpublished study of a N.S.W. Childrens Court supports Scott's findings and suggests that the children appearing before it regarded the court as pursuing retributive policies: Appleby, Moss and Miller (1979). See also Morris and Giller, 'The Juvenile Court – The Client's Perspective', [1977] *Crim LR,* 198. The Department of the Capital Territory has drawn attention to the confusion which a child can feel if the measure imposed is designed to meet his needs rather than to reflect the seriousness of the offence. *Submission,* 27.

which will sometimes be in conflict.[17] A tension between the two perspectives can never be eliminated. It is at the very heart of processes for coping with the young law-breaker. On the one hand it is necessary to accommodate the lawyer's demand for fair procedures and the law enforcement officer's concern with the detection and prevention of crime. On the other hand, it is important to respect the welfare worker's desire to respond in a humane and understanding manner to the special needs of the young. What must be sought is a proper balance between these often conflicting requirements. The attempt to achieve such a balance is central to all the recommendations which follow. In its discussion of the desirability of retaining a distinctive court for children, and of the character and aims of that court, the President's Commission on Law Enforcement and Administration of Justice made the following statement:

> What is required is ... a revised philosophy of the juvenile court, based on recognition that in the past our reach exceeded our grasp. The spirit that animated the juvenile court movement was fed in part by a humanitarian compassion for offenders who were children. That willingness to understand and treat people who threaten public safety and security should be nutured, not turned aside as hopeless sentimentality, both because it is civilised and because social protection itself demands constant search for alternatives to the crude and limited expedient of condemnation and punishment. But neither should it be allowed to outrun reality. The juvenile court is a court of law, charged like other agencies of criminal justice with protecting the community against threatening conduct ... What should distinguish the juvenile from the criminal courts is their greater emphasis on rehabilitation, not their exclusive preoccupation with it.[18]

The Commission endorses this statement. Both at the adjudication stage and the dispositional stage it must be recognised that a system for dealing with young offenders rests on, and cannot and should not divorce itself from, certain basic assumptions which are fundamental to the criminal law. Any person accused of a crime is, whatever his age, entitled to fair procedures designed to protect him against the power of the state. All allegations should be carefully proved. The surrender of the legal safeguards on which our system of criminal justice rests must not be seen as the price which a child must pay in return for society's provision of a specialised children's court system.[19] As has been observed:

> We tend to think of the criminal law merely as a way of punishing crime and criminals, and to lose sight of its role as a means of containing government power.[20]

116. When charged with a crime, a child is entitled to all the protections afforded to an adult in a similar situation. In some respects the safeguards provided should be greater when a child is involved. Further, just as fundamental as the safeguarding of children's rights is the protection of the public. Notwithstanding society's desire to display a positive and understanding approach to children who break the law, it is unrealistic to deny that the system which deals with them must attempt to protect, re-assure, and satisfy the community of which it is part. With regard to the measures employed once a child's offence has been proved, a United States report has commented that, although there are many who talk the language of compassion, help, and treatment,

> it has become clear that in fact the same purposes that characterize the use of the criminal law for adult offenders – retribution, condemnation, deterrence, incapacitation – are involved in the disposition of juvenile offenders too.[21]

But does this emphasis on the features which procedures for dealing with young offenders have in

---

[17] Indeed, it can be argued that the system's attempt to combine conflicting perspectives is not necessarily a disadvantage. Proponents of one approach can challenge and seek to moderate the views of proponents of another approach. Parsloe, *Juvenile Justice in Britain and the United States,* (1978), 23.

[18] President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society,* (1967), 81.

[19] '[T]here should be no erosion of fundamental rights of juveniles under the guise of helping them or putting their interests "as of paramount importance" '. *Green Paper,* 44. The Department of the Capital Territory has expressed support for this view. *Submission,* 29. The Department also agreed that greater emphasis on legal safeguards for children is desirable provided the distinctive benefits offered by the Childrens Court are not sacrificed. ibid. However, attention was also drawn to the danger that responses to criticisms of the child-saving philosophy might lead to the creation of a new set of ills. id., 30.

[20] Fox, 'Philosophy and the Principles of Punishment in the Juvenile Court,' 8 *Family Law Quarterly,* 373, 375, (1974).

[21] *Task Force Report, 8.*

common with those employed in respect of adult offenders mean that the benevolent philosophy which inspired the creation of special methods for dealing with young offenders should in future have no place in our legal system? In particular, does it mean that courts for dealing with the young law violator should be indistinguishable from adult courts? Indeed, do the arguments set out above call into question the desirability of maintaining a separate court for children?[22] The Commission considers that a distinctive system for the young should be retained. This report deals with children. Special procedures should be maintained which take into account their lack of maturity and the fact that they do not, and cannot, always act in a fully responsible manner. Sometimes children act in an unreflective way, without completely comprehending the consequences. Depending on their age and maturity they should normally be treated as being less culpable than adults. They are not generally free agents, but are subject to parental or other adult influence. Because of their youth they are usually dependent, malleable and vulnerable. They are developing and their personalities are changing. Also, as a recent Australian report has pointed out, a factor which is often unacknowledged is our emotional reaction to the young, a reaction which evokes in adults a desire to provide sympathetic care and guidance.[23] Finally, children are more likely than adults to have difficulty understanding legal procedures. The retention of a special court for children allows procedures adapted to their understanding to be employed. All of these factors suggest the need to preserve a distinctive system for dealing with the young offender, a system which, in appropriate cases, allows leniency to be displayed and which facilitates the pursuit of positive policies.

117. ***The Rehabilitative Ideal*** The Commission's conclusion that a system for dealing with young offenders should endeavour both to meet the special needs of the young and to fulfil the traditional purposes of the criminal law indicates that it shares the reservations which have been expressed about the child-saving philosophy. This conclusion does not, however, represent a rejection of the rehabilitative ideal. Recognition that the rehabilitative ideal cannot be singlemindedly pursued in a system for dealing with young offenders, and disillusionment with available treatment measures, should not be allowed to engender opposition to the development of imaginative measures for dealing with young offenders who appear before the court. As the Department of the Capital Territory has pointed out, the arguments for the pursuit of rehabilitative purposes are particularly strong when youthful offenders are involved.[24] Emphasis on legal principles must not be allowed to produce a system in which there is no room for compassion and no concern for children's special needs. Further, the view that 'nothing works' must not be unhesitatingly accepted. There are those who question the results of research which purports to demonstrate the failure of therapeutic policies.[25] It can always be argued that there has been insufficient commitment to these policies and that an increase in this commitment and an allocation of more resources would produce better results.[26] These arguments should not be ignored. The search for imaginative and positive approaches should not be abandoned. But this search should be undertaken in such a way as to take into account the points made by critics of child-saving strategies. It must also take into account the rather depressing evidence about the efficacy of therapeutic programs. The available evidence does not justify the taking of extended powers over a young offender's life for rehabilitative purposes.

---

22 In view of the disillusionment with the child-saving philosophy and the emphasis on the need for due process in the juvenile court, a number of United States commentators have suggested that the continued existence of a special court for young offenders might no longer be justified. See Wizner and Keller, 'The Penal Model of Juvenile Justice: Is Juvenile Court Delinquency Jurisdiction Obsolete?' 52 *New York University LR*, 1120, (1977); and McCarthy, 'Delinquency Dispositions under the Juvenile Justice Standards: The Consequences of a Change of Rationale,' 52 *New York University LR*, 1093, 1116–1119, (1977).

23 Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Australian Discussion Paper, Topic 2. Juvenile Justice: Before and After the Onset of Delinquency* (Report of a Working Party convened by John Seymour) (1979), 8.

24 Department of the Capital Territory, *Submission*, 41.

25 See Gendreau and Ross, 'Correctional Treatment: Bibliotherapy for Cynics,' 25 *Crime and Delinquency*, 463, (1979); Gottfredson, 'Treatment Destruction Techniques', 16 *J Research in Crime and Delinquency*, 39, (1979); and Murray and Cox, *Beyond Probation: Juvenile Corrections and the Chronic Delinquent*, (1979) (but see reviews, 26 *Crime and Delinquency*, 387–398, (1980)).

26 This point was made by the Department of the Capital Territory, which noted that the resources made available to achieve the goals of the child welfare system have always been inadequate. *Submission*, 27.

> [B]enevolence within powers otherwise taken is a fine virtue; the taking of power over another *because of* benevolence without other authorization, is a clumsy exaggeration of our own competences.[27]

Rehabilitative purposes should still be pursued by the Childrens Court, but they should be pursued in a realistic manner. Further, reservations about available therapeutic skills should not be interpreted as implying that efforts should not be made by health and welfare services to meet the personal and social needs of children in trouble. Later in this report there are discussions of the need for preventive services[28], of deficiencies in existing welfare services[29] and of the problems faced by health and welfare agencies in the A.C.T.[30] The recommendations made on these topics reflect a recognition of the importance of properly organised health and welfare services. Yet the problems of delivering those services must be seen as quite separate from the problems with which a criminal justice system is designed to deal. If this differentiation is not made, and the criminal justice system is seen as an appropriate vehicle for the pursuit of benevolent policies, the result will be procedures marred by an ambiguity and confusion of purposes. If an attempt is made simultaneously to identify and meet a child's needs and to respond appropriately to the alleged commission of an offence, it is highly likely that neither task will be performed satisfactorily.

118. ***The Separation of Offenders and Non-Offenders*** The conclusion that it is not appropriate to regard young offenders simply as a category of children in need has important implications not only with regard to youthful offenders but also with regard to those who are dealt with as neglected and uncontrollable children. At present in the A.C.T. both offenders and non-offenders who appear before the Childrens Court are dealt with in a similar manner and the distinction between the two categories is blurred.[31] Members of both are subjected to a modified form of criminal procedure and are liable to the same types of measures. As a result, the confusion of purposes which exists in the system for young offenders also marks that for dealing with non-offenders. As with procedures for dealing with the former, there is a need to clarify the objectives which should be pursued with regard to the latter. This can be accomplished only if a clear distinction is made between the procedures for dealing with the two categories of children in trouble. If young offenders cannot be regarded as indistinguishable from non-offenders, nor should members of the latter category be grouped with offenders and subjected to the same stigmatising procedures. As the grounds for intervention in the lives of members of each group are quite different, the methods employed for dealing with each should, as far as possible, relfect this difference. Recommendations for new procedures for children at present dealt with as neglected or uncontrollable, and the principles underlying those recommendations, are the subject of Chapter 8. One matter of principle should, however, be mentioned at this stage, for it relates to the foregoing discussion of the rehabilitative ideal. Although it has been suggested that, with regard to offenders, the pursuit of benevolent purposes should not provide a justification for coercive intervention, such a principle clearly cannot prevail in the non-criminal jurisdiction of the Childrens Court. By definition the purpose of non-criminal proceedings in that court is benevolent. Yet some of the most important insights which can be derived from a study of the United States child-saving movement are equally relevant to the non-criminal jurisdiction of the Childrens Court. Doubts about the efficacy of available therapeutic techniques and about the appropriateness of employing court proceedings for the pursuit of benevolent purposes suggest that the grounds for non-criminal proceedings should be carefully and narrowly defined, that the purposes of intervention should be precisely enunciated, and that court proceedings should be a last resort. Thus, though it must be conceded that there will be many occasions when a child's situation will make the initiation of benevolent non-criminal proceedings unavoidable, reservations about the rehabilitative ideal should also be reflected in the design of new procedures for non-offenders. This matter is further discussed in Chapter 8.

---

27 Morris, 'In re Gault: A Comparative Background', in Nordin (ed)., *Gault: What Now for the Juvenile Court? (1968)*, 25, 34. Emphasis in original.

28 Para.287.

29 Para.288–290.

30 Chapter 13.

31 The clearest example of the way existing procedures obscure the real issues and fail to indicate society's objectives with regard to children in trouble, is to be found in the present uncontrollability proceedings. These reflect an uneasy combination of social control and benevolent philosophies.

119. ***Distinguishing Characteristics of Procedures for Young Offenders*** Having concluded that the system for dealing with the young offender should combine a respect for the fundamental principles of criminal justice with a concern for the special needs of the young, it is now necessary to attempt to identify the features which should distinguish this system from that for adults. The distinctive features of procedures for coping with young law-breakers should be:

- *Diversion.* A willingness to divert young offenders from the court on the grounds that a prosecution is often a cumbersome and inappropriate response to a child's breach of the law.
- *Avoidance of stigma.* A desire to shield the young, as much as possible, from the stigmatising and harmful effects of the criminal process.
- *Comprehensible procedures.* Procedures which are comprehensible to the child and in which the young and their parents can have an opportunity to participate.
- *Understanding.* In court a wise humanity which allows for the display of understanding and sympathy where these qualities are required.
- *Imaginative remedies.* A court which is imaginative and willing to take risks at the dispositional stage.
- *Variety and flexibility of dispositions.* A diverse range of dispositions, and dispositions whose form is flexible enough to accommodate the changing needs of the children who are subject to them.

It should not be inferred from this list of the characteristics which should distinguish procedures for young offenders that most of the features listed are not also important in the case of adult offenders. For adults, too, it is important to have humane and comprehensible procedures and to provide a varied range of dispositions. However, special attention should be given to these factors when young offenders come before the court. Further, two of the characteristics in the above list do distinguish the system for the young from that for adults. In the normal course of events an adult who comes to notice for the alleged commission of an offence will be prosecuted. When a young offender comes to notice it is, as will be explained, now widely accepted that vigorous efforts should be made to find an alternative to a prosecution. In many jurisdictions a young offender will be diverted from the court when an adult who has allegedly committed the same offence will be prosecuted. The second distinguishing characteristic applies to the dispositional process. A recognition of children's immaturity leads to the imposition of more lenient penalties than would be employed for adults. In addition, a number of the measures used for young offenders permit adaptations to be made to the changing needs of the children who are subject to them. This is in contrast to once-and-for-all orders made in courts for adults. Normally these orders are not subject to subsequent variation. Pursuit of alternatives to the prosecution of young offenders, usually referred to as 'diversion'[32], will be discussed in the following paragraphs. The distinguishing features of dispositional procedures for the young will be discussed in Chapter 6.

Diversion

120. ***Reasons for Diversion*** The suggestion that one of the distinguishing features of procedures for dealing with young offenders should be a willingness to divert them from the court naturally prompts the question: why should efforts be made to keep children who break the law out of court? There are a number of reasons.

- *Cumbersome.* The triviality of many offences committed by children makes court intervention inappropriate. A prosecution is a cumbersome weapon with which to confront a child who has committed a minor crime. In many such instances it is not necessary to have recourse to the full criminal process. A prosecution should be reserved for those cases where resort to formal court procedures is necessary.
- *Delay.* Except when children are arrested and charged, bringing them to court is inevitably a slow process. Some of the delays resulting from the use of summons procedures are described

[32] The term 'diversion' is often used loosely. Some writers use it to apply not only to diversion from the court, but also to post-adjudication diversion from institutional measures to less severe penalties such as community service orders. See Davies, 'The Pitfalls of Diversion – Criticism of a Modern Development in an Era of Penal Reform,' (1976), 14 *Osgoode Hall LJ*, 759. In this report the term 'diversion' is used to describe procedures employed as alternatives to a prosecution.

above.[33] Unless it is argued that virtually every child should be arrested, in many cases there will be significant delay between the child's commission of an offence and the final decision. Although the avoidance of unnecessary delay should be an objective of all legal procedures – whether adults or children are involved – the pursuit of this objective is particularly important when we are dealing with the young. The A.C.T. Police have drawn attention to the need to avoid delay when dealing with children:

> Probably more than anywhere else in the criminal justice arena there is a need for a direct response to, and the speedy resolution of, juvenile problems.[34]

It makes little sense to a child to be taken to court for an offence committed some months earlier. Indeed, his memory of the incident may become dim if a lengthy period elapses between the alleged offence and the court appearance. The informal handling of a case will normally be much quicker than a prosecution.

- *Immaturity of children.* The immaturity of children leads adults to adopt a generally lenient, protective stance towards them. Manifestations of this approach are a reluctance to prosecute, the extensive use of police warnings and the creation of the special Juvenile Aid Bureau.
- *Less serious offenders.* A policy of diversion is particularly relevant to offenders at the less serious end of the scale. With regard to many of these there is little that the court can usefully do. This is borne out by the A.C.T. statistics relating to young offenders. Of the 981 criminal cases which resulted in a finding of guilt by the A.C.T. Childrens Court between 1 June, 1978 and 31 May, 1979, 102 (10.4%) resulted in an admonition, no action or a dismissal, while 205 (20.8%) resulted in unsupervised probation or unsupervised release on a recognizance. It is not intended to suggest that none of these cases should have resulted in a prosecution. No doubt many of the children involved had previously received police warnings, and prosecutions had been initiated only after the children's failure to respond to these warnings. Nevertheless, 31.2% of the prosecutions resulted in minimal action. The presiding magistrates did not believe that more intensive intervention was required.
- *Uneconomic use of resources.* Consideration must also be given to the effect which the processing of a large number of minor matters has on the criminal justice system. Even a relatively simple case takes up a good deal of official time and the procedure is costly. The time of the police, the magistrate and the court staff could be more efficiently utilised. A vigorous policy of diversion allows the court to concentrate on the more difficult cases and on the most serious offences.
- *Stigma.* In recent years a number of theorists have pointed to the way in which the criminal justice system can 'label' those subjected to it.[35] According to these writers, the way society views and responds to a child can be changed if it is known that he has been dealt with for an offence. Moreover, not only can the process be stigmatising in that it affects the way others see him, it can also affect the way he perceives himself. Thus, both in his own eyes and in the eyes of other people he is a 'delinquent'. The label can become a prediction and the child may play the role in which he is cast. Although the work of those who have drawn attention to the system's labelling effects tends to rest on assertions rather than on hard evidence, it seems clear that, for some children, a prosecution can have harmful effects. Certainly the acquisition of a court record and the entry of a conviction are stigmatising and can represent a consequence disproportionate to the seriousness of the offence. While it is by no means certain that stigma is completely avoided if the child is diverted from the court, adverse labelling is less likely to ensue when informal procedures are employed.
- *Radical non-intervention.* Awareness of the harm which the official system can cause, together with doubts about the efficacy of the measures available to courts for the young, have led some writers to argue that society should leave children alone wherever possible. The best-known

[33] Para.81.
[34] A.C.T. Police, *Submission*, 5.
[35] See, for example, Becker, *Outsiders*, (1963); Kitsuse, 'Societal Reaction to Deviant Behavior', 9 *Social Problems*, 247, (1962); Lemert, *Human Deviance, Social Problems and Social Control*, (1972); and Rubington and Weinberg, *Deviance: The Interactionist Perspective*, (1968).

advocate of this view uses the term 'radical non-intervention' to describe the approach which he favours.[36]

121. ***Arguments against Diversion*** A number of arguments reflect the view that a pursuit of a policy of avoiding the court is a dangerous and unjustifiable course.

- *Uneven administrative discretion.* Diversionary strategies require the exercise of administrative discretion. A system which depends on administrative discretion is open to abuse. As a Canadian commentator has noted:

  > A danger . . . exists that the police will use their discretion of referral selectively and capriciously, and, consequently, decide that two offenders who have committed similar offences, who are of the same age, and who have similar backgrounds ought to be subject to different treatment.[37]

  A particular danger exists if the decision to prosecute a child takes into account his likelihood of re-offending. A child thought to come from a 'good' home might be diverted from the court on the grounds that his parents are concerned about his behaviour and can deal with it themselves. On the other hand, the offence might be used as a pretext for intervention in the life of a child from a 'poor' home, with the result that the child is prosecuted. Such a process could unfairly favour middle class children and prejudice poor children.
- *Removal of protections.* Diversion from the court deprives an alleged offender of the protections offered by the long established and tested procedures of a criminal trial. In such a trial guilt or innocence is judicially determined according to rules of evidence, and, in the case of a finding of guilt, there is a right of appeal.[38] A system which emphasises diversion increases the possibility that children will admit, and have recorded against them, offences in respect of which a court hearing would have resulted in an acquittal.
- *Delays court reforms.* The extensive use of alternatives to a prosecution is no more than a policy based on expediency, an ill-considered and unprincipled attempt to control the number of cases with which a hard-pressed criminal justice system must cope. If this view is accepted, then, rather than seeking to avoid the courts, efforts should be directed towards improving them and providing a more adequate range of dispositions.
- *Deprivation of court benefits.* Young offenders should not be denied the benefits which an appearance before a special court for children can bring. This argument is based on a belief in the Childrens Court's rehabilitative capacities.
- *Misplaced leniency.* A policy of diversion embodies a misplaced leniency. The prosecution of law-breakers can be seen as a necessary and appropriate means of vindicating the law. It satisfies the community's demand that criminal behaviour should not go unpunished and indicates to the offender the wrongfulness of his conduct. In addition to re-assuring the community, the initiation of a prosecution and the imposition of a sanction are the means by which it is sought to deter further offending. There are many persons, including some High School pupils to whom a member of the Commission spoke, who regard a prosecution as a more effective deterrent then a police warning or other informal alternative.
- *Effectiveness unproved.* Many diversionary programs are in an experimental phase, and it is unwise to jettison established court procedures for alternatives which may conceal dangers and whose effectiveness is unproven. In the view of one writer:

  > There is no empirical evidence available to indicate that diversion will be more effective in . . . lowering recidivism rates, deterring offenders, and protecting society more effectively.[39]

---

36 Schur. See also Lemert's concept of 'judicious non-intervention'. Lemert, 'The Juvenile Court — Quest and Realities,' in *Task Force Report,* 91, 96–97.

37 Davies, 765. The exercise of police discretion has been the subject of much comment. See, for example, Davis, *Discretionary Justice,* (1969); Kadish, 'Legal Norm and Discretion in the Police and Sentencing Process,' 75 *Harvard LR,* 904, (1962); Rosett, 'Discretion, Severity and Legality in Criminal Justice,' 46 *Southern Californian LR,* 12 (1972); Wexler, 'Discretion: The Unacknowledged Side of Law,' (1975) 25 *University of Toronto LJ,* 120; Packer, *The Limits of the Criminal Sanction,* (1968), 290–92; and Vorenberg, 'Narrowing the Discretion of Criminal Justice Officials,' 4 *Duke LJ,* 651 (1976).

38 Davies, 763.

39 id., 767.

Disillusionment with present methods, the search for something new, something which 'works' can all too easily lead to the sacrifice of existing procedures without any guarantee of success.

- *Intrusive intervention.* Diversionary programs which involve informal referral to welfare or other agencies pose special dangers. The potential for intrusive intervention, intervention which may be unscrutinised and unregulated, is great. Further, the informal referral of a young offender to a welfare service, although ostensibly on a voluntary basis, can involve an element of coercion, since such a referral will still be part of the criminal process.

122. ***Widespread Acceptance of Diversion*** Notwithstanding the arguments against a policy of diverting young offenders from the court, this policy has been enunciated, and put into practice, in many jurisdictions, both in Australia and overseas. In South Australia Children's Aid Panels have been established and in Western Australia there are Children's Panels.[40] The introduction of these panels reflects the view that alternatives to the court are to be preferred. Similar panels, known as Children's Boards, operate in New Zealand.[41] In Scotland, local officials known as reporters are responsible, in the majority of cases involving alleged offences by those under 16, for making the decision whether proceedings should be initiated. The provisions under which they operate are designed to encourage the pursuit of a policy of diversion.[42] Although the proposals contained in the English White Paper, *Children in Trouble,* have not been fully implemented, recommendations designed to place restrictions on the use of court proceedings in respect of offenders were an important feature of that document.[43] The Canadian Solicitor General's Committee recommended the creation of screening agencies whose task it would be to make the prosecution decision in respect of alleged offences by those under the age of 21. In the draft legislation prepared by the Committee it is stated that, when considering each case, the screening agency should have regard to the principle

> that no information should be laid against a young person unless there are clear indications that the needs and interests of the young person and of the public cannot be adequately served without the use of procedures and facilities that are available to the court.[44]

In the United States particular emphasis has been placed on the desirability of diverting young offenders from the juvenile court. In 1967 a report issued by the President's Crime Commission stated:

> [A] great deal of juvenile misbehavior should be dealt with through alternatives to adjudication, in accordance with an explicit policy to divert juvenile offenders away from formal adjudication and authoritative disposition and to nonjudicial institutions for guidance and other services. . . . The preference for nonjudicial disposition should be enunciated, publicized, and consistently espoused by the several social institutions responsible for controlling and preventing delinquency.[45]

This principle was adopted in that Commission's general report, which included the following recommendation:

> Court referral of juveniles by the police should be restricted to those cases involving serious criminal conduct or repeated misconduct of a more than trivial nature.[46]

Following the publication of these reports diversionary programs have been developed throughout the United States. Much has been written on these programs and on the subject of diversion generally.[47]

123. ***The Commission's View*** Notwithstanding the contrary arguments, the Commission has concluded that a policy of diversion should be explicitly adopted in the A.C.T. with regard to young

---

40 For a description of these panels, see para.129.

41 See Children and Young Persons Act 1974 (N.Z.), Part II.

42 See Social Work (Scotland) Act 1968, s.39. For a description of the role of the reporter, see Finlayson, 'The Reporter,' in Martin and Murray (eds.), *Children's Hearings,* (1976), 48.

43 *Children in Trouble,* para.14–17.

44 *Young Persons in Conflict with the Law,* 88, proposed Young Persons in Conflict with the Law Act, s.9(3).

45 *Task Force Report,* 16.

46 President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society,* (1967), 83.

47 See, for example, Cressey and Mc Dermott, *Diversion from the Juvenile Justice System,* (1973); Carter and Klein, *Back on the Street: The Diversion of Juvenile Offenders,* (1976); and Klein, 'Deinstitutionalization and Diversion of Juvenile Offenders: A Litany of Impediments,' in Morris and Tonry (eds.), *Crime and Justice: An Annual Review of Research,* Vol.I, (1979), 145.

offenders. This recommendation is based on the view that children's immaturity requires that they be given special consideration and treated more leniently than adults in like circumstances. One of the most obvious ways to achieve this aim is by exercising restraint when the decision to prosecute is made. Policies relating to the making of the prosecution decision should be viewed in the context of a general theory of punishment which seeks to balance the special interests of the offender with those of the community.[48] A decision to divert should be seen as a decision to take the least severe course in respect of an alleged offender. The adoption of a policy of diversion with regard to the young is no more than a particular application of the principle that, provided proper attention is paid to upholding the law and protecting the public, it is the least intrusive form of intervention which should be preferred.[49] The Commission's conclusion is also based on an acceptance of the argument that the prosecution of children is, for many types of offence, unnecessary and inappropriate. Further, the need to avoid the stigma which can result from a court appearance is, when the young are involved, a particularly important reason for adopting a policy of diversion. The Commission rejects the view that diversion is to be discouraged in order to permit the Childrens Court to fulfil a therapeutic role. This role has already been to a large extent discredited.[50] Arguments relating to the deterrent efficacy of court proceedings, as compared with that of less formal methods, are particularly difficult to deal with satisfactorily, since only a limited amount of empirical data is available, and it is not conclusive. At first sight it would seem that it should be possible to obtain clear answers to the question whether court proceedings are a more 'effective' deterrent than diversion from the court. A number of points can be made about questions of this kind.

- *Lack of reliable data.* Few studies have been undertaken of Australian procedures for dealing with young law-breakers, and, though the Commission has assembled some statistical data, it has not been possible in the time available to carry out detailed, carefully controlled analyses of the impact of existing methods.
- *Doubts about effectiveness.* Claims about the effectiveness of intervention in inhibiting further illegal behaviour should generally be viewed sceptically. Surveys based on official statistics can show whether a child has again come to notice after his initial brush with the criminal law. They cannot indicate whether he has committed further offences and not been apprehended. Even if it is certain that a particular child has not re-offended it is impossible to be sure that his subsequent avoidance of crime is the result of the intervention. A change in behaviour which is claimed as a 'success' of the system might be the result of maturation rather than of any action taken by society.

124. ***Available Evidence*** Among the Australian studies there are some which seem to point to high 'success rates' with children. In Victoria, it has been shown that only a small proportion of children re-offend after a police warning.[51] In South Australia and Western Australia the number of children

[48] Scharf, 'Towards a Philosophy for the Diversion of Juvenile Offenders,' *Journal of Juvenile and Family Courts*, 13, (February 1978). Scharf urges acceptance of the notion that diversion is 'a negative act of punishment.' (id., 19).

[49] This principle accords with the principle of economy of punishment advanced in ALRC 15, (1980), para.66.

[50] See discussion, para.109–117. Note also the following comment by the Law Council of Australia. '[T]he Childrens Court systems as they have existed in the past have tended to bring more official resources to bear on the problem than was either necessary or desirable. Often the courts cannot adequately handle the problems of a particular child and lose credibility in the eyes of those the courts are there to help.' *Submission*, 1.

[51] This is indicated by research conducted by Horman who studied the records of 1551 children warned by Victorian Police in 1969 and 2281 warned in 1972. The follow-up period for members of the former group was five years, and for those in the latter group was two years. The overall success rate was 74.8%. Horman, 'Juvenile Delinquents and the Role of the Police in Victoria', unpublished LL.B. (Hons) Thesis, Monash University, (1975).

who are dealt with by the special panels and who again come to notice is not large.[52] Similarly, in N.S.W. a study showed that 62.3% of a sample of males who had appeared before the Childrens Court did not re-appear before that court.[53] All of these findings can be advanced as indicating the efficacy of the particular method employed. Proponents of a police warning or panel system could claim that these diversionary strategies were a 'success', while supporters of the court could also claim a relatively high 'success rate'. The difficulty with such studies is that they did not employ control groups. There is no way of knowing whether other methods would have achieved similar or better 'success rates' with comparable groups of children. Reference can, however, be made to a United States study which compared the results achieved by diversion programs with those achieved by the use of the court process.[54] Young offenders were randomly assigned to: release (i.e., the equivalent of a police warning was administered), referral (i.e., informal diversion to community and welfare agencies), and prosecution. Significantly lower re-offending rates were found among those who had been informally referred than among those who had been taken to court. Those who had simply been released fared significantly better than both other groups. Although this is only one study, it does directly compare the results achieved by different methods, and casts some doubt on the view that a court appearance is more effective than a less formal response in preventing re-offending. Reference must also be made to an English study in which the criminal careers of a large number of young males were carefully followed.

> The results supported the hypothesis that, in comparison with equally badly behaved youngsters who escaped conviction, the convicted youngsters became still more delinquent. . . . This result obviously lends support to the deviance amplification theory, according to which the attachment of an official stigmatizing label, in the shape of a criminal conviction, is likely to increase rather than to diminish delinquent behaviour.[55]

125. ***A.C.T. Study of Re-offending*** The two studies cited, together with the Australian evidence relating to re-offending rates following a police warning or an appearance before a panel, suggest that diversion might, for a wide range of young offenders, be just as effective as a prosecution. In an effort to obtain relevant data on the operation of the Childrens Court system in the A.C.T., the Commission undertook its own study of re-offending rates. Limitations in time and resources made it impossible to undertake a study comparing the impact of a police warning with the efficacy of a prosecution. However, it was possible to examine re-offending among a sample of young offenders dealt with by the A.C.T. Childrens Court between 1 January 1976 and 30 June 1976. The size of the sample was 509. All subsequent court appearances before the end of October 1979 were noted. These included appearances relating to traffic offences, and encompassed appearances both in the Childrens Court and in courts for adults. The results indicate a high rate of re-offending following an appearance before the A.C.T. Childrens Court. Overall, 72.7% of the sample subsequently came to notice for re-offending. Among those who made their first appearance before the Childrens Court during the sample period, 65.9% re-appeared before a court. Details of the subsequent offending of

[52] A study of re-offending rates of children who appeared before Children's Aid Panels in South Australia found that 21.6% were known to have re-offended. This re-offending rate was very similar to that demonstrated by children who had appeared before the Childrens Court. See Richmond, 'Juvenile Offenders in South Australia 1972–1977: Appearance Patterns of Individuals', unpublished, (1978). See also *Report of the Director General of Community Welfare for the Year Ended 30 June 1980*, 25, Tables 17 and 20. In Western Australia, although legislative provision for Children's Panels was not made until 1976 (see Child Welfare Amendment Act (No.2) 1976 (W.A.)), an informal panel system was in operation from 1964. The Western Australian Department for Community Welfare undertook a study of the records of children who appeared before a panel. Each child was followed up until he attained the age of 18 (the upper limit of the Childrens Court jurisdiction in Western Australia). The study covered only subsequent Childrens Court appearances. It revealed that, of those children who had appeared before a panel and who had, between 1972 and 1980, attained the age of 18, more than 80% did not subsequently appear in the Childrens Court. The figures ranged from 83% to 89%, with a mean of 85%. (Figures supplied by the Western Australian Department for Community Welfare).

[53] This figure is derived from a study of a random sample of 1250 male juvenile offenders in N.S.W. Of these, 37.7% had more than one conviction by the time they reached their eighteenth birthday, i.e. 62.3% appeared only once in the Childrens Court. These figures do not include subsequent appearances as adults, nor do they include any appearances relating to traffic offences. See Kraus, 'On the Adult Criminality of Male Juvenile Delinquents', undated.

[54] Klein, 192.

[55] West and Farrington, *The Delinquent Way of Life*, (1977), 138–139.

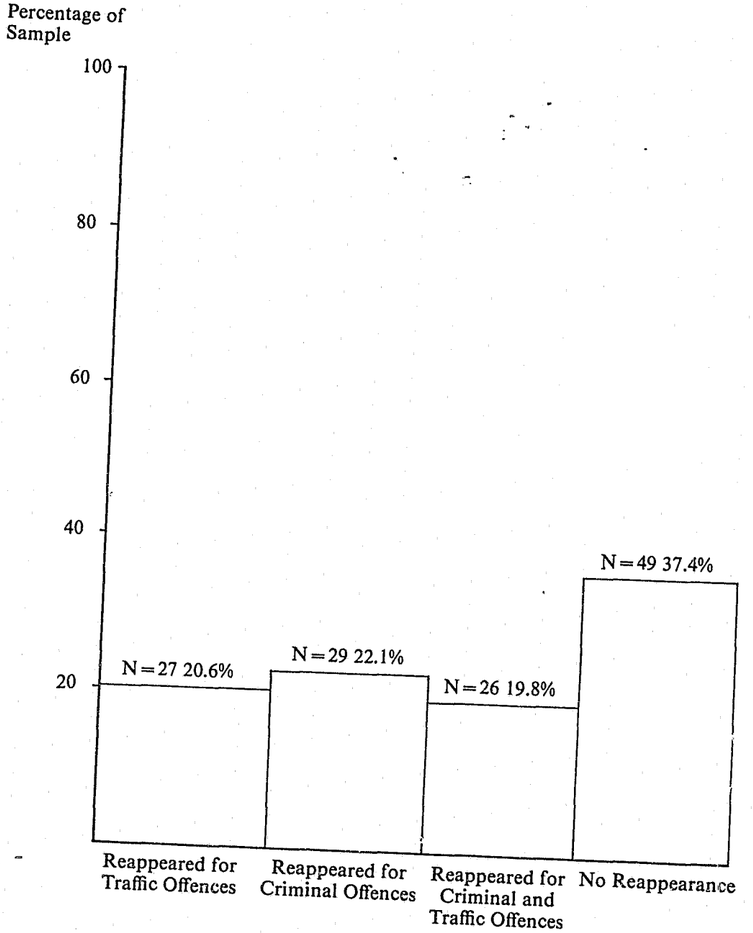
the first offenders are presented in diagrammatic form in Tables 5 and 6. Of the children who were making their second or subsequent appearance before the Childrens Court during the sample period, 89.2% were known to have re-offended. These results must be interpreted with great caution. As the tables relating to first offenders indicate, a substantial proportion of the known re-offending took the form of traffic offences (41.8%). The same was true of those who were making a second or subsequent appearance during the sample period: of those among this group who were known to re-offend 30.4% subsequently came to notice for traffic offences. If traffic offenders were to be excluded from the sample (as they were in the N.S.W. Childrens Court study mentioned above), a different picture would emerge. For example, of the first offenders who came to notice for criminal offences, 42% subsequently appeared in court for another criminal offence. The Commission's statistics are open to differing interpretations, depending on the view adopted as to the desirability of including traffic offending in a study of the kind conducted. The evidence must be regarded as inconclusive. If the re-offending rates of the entire sample are examined the statistics certainly lend no support to the view that an appearance before the A.C.T. Childrens Court acts as a particularly effective deterrent. If the statistics for 'criminal' first offenders are extracted a reasonable 'success rate' could be claimed. However, low rates of re-offending can also be claimed by supporters of police warnings and of panels. Clearly, more research is needed, research which will take into account the results achieved with comparable groups of children who have been dealt with by different methods. In the absence of such research it is suggested that existing Australian and overseas data are not inconsistent with the pursuit of a policy of diversion. As there is no convincing evidence that one approach is more 'effective' than another, and in view of the theoretical arguments in favour of diversion, the Commission has concluded that those under 18 who are allegedly guilty of an offence should be prosecuted only when this course is clearly justified. Guidelines, designed to assist those responsible for the making of the prosecution decision, are discussed later in this chapter.[56]

126. ***Characteristics of an Acceptable Diversion Policy*** It is important to indicate the precise nature of the policy which is being advocated:

- *Features to be avoided.* A distinction must be made between a simple desire to divert young offenders from the court and a more active policy of diverting them to informal welfare services. It is diversion in the former sense which this report recommends. Diversion to informal welfare agencies represents the old child-saving movement in new guise. As was the case with this movement, a strategy of diverting the young towards welfare services reflects paternalism and a conviction that the commission of an offence is a demonstration of a need for help. The new element is disillusionment with the court and the realisation that it is an inappropriate forum in which to pursue benevolent purposes. The child-saving philosophy survives, but in a new setting. Society still wishes to use the offence as an opportunity to bring good influences to bear. At first sight the pursuit of such a policy at the pre-court stage seems attractive. A United States commentator has argued that the provision of assistance on an informal basis would keep alive the humanitarian impulses which gave rise to the juvenile court while at the same time ensuring that the offer of help is not marred by legal threats.[57] Yet a number of objections can be raised to a policy of the kind envisaged in this comment. First, it is not correct to describe pre-court referrals as unmarred by legal threats. The threat of court action may be implicit or explicit if the child fails to co-operate. The referral to, or invitation to participate in, a therapeutic program will be — and will be seen by the child and his parents to be — part of the criminal process if it follows official action resulting from a wrongful act by the child. In theory participation will be voluntary. However it must be asked whether it is possible to achieve genuinely voluntary involvement in the context of procedures initiated following allegedly criminal behaviour. The problem of confusion of purposes, to which attention has already been drawn, re-appears. Avoidance of the court does not necessarily allow a complete escape from a coercive framework. The objectives remain ambiguous. At the pre-court stage a clear distinction should be made between society's response to the alleged offence and society's desire to attempt to solve the personal or family problems which the offence may uncover. Secondly, the conditions on which an informal referral is made can lead

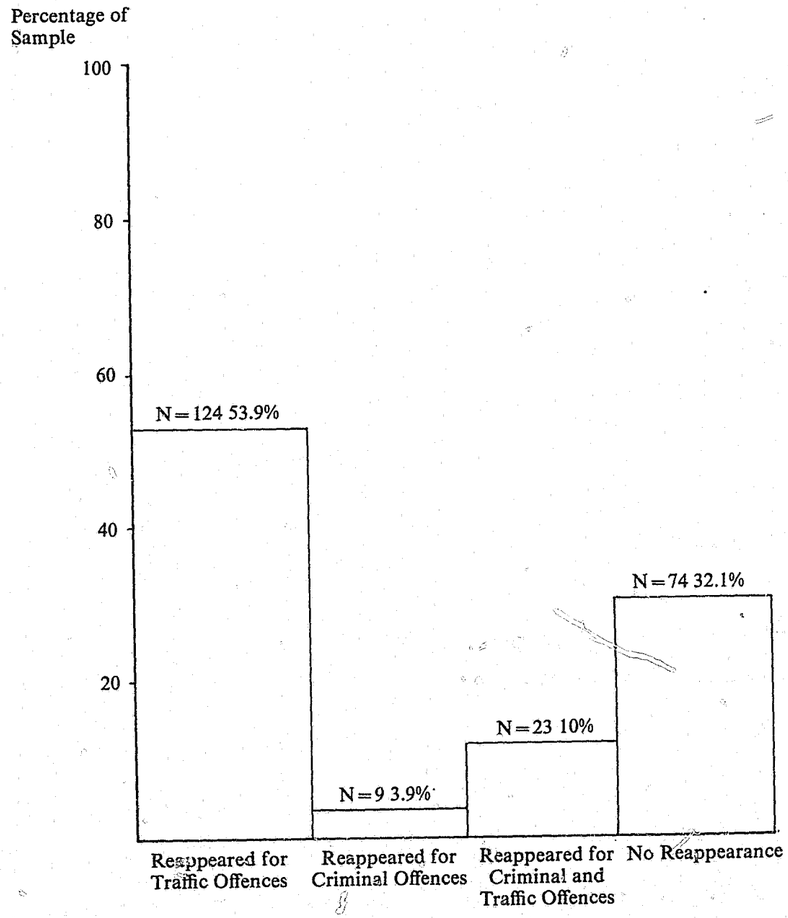
[56] Para.138.
[57] Rubin, 'Retain the Juvenile Court?' 25 *Crime and Delinquency*, 281, 292 (1979).

Table 5: First Offenders Who Came to Notice During Sample Period for Criminal Offences: Subsequent History N. = 131*



** The total number of first offenders was 361. The subsequent records of 131 of these are shown in this table, and of 230 in the table which follows. Five children who faced combined criminal and traffic charges are included in the total who faced criminal charges.*

Table 6: First Offenders Who Came to Notice During Sample Period for Traffic Offences: Subsequent History N. = 230



to a form of double jeopardy. If, when such a referral occurs, provision is made for the matter to be brought before a court if the child does not comply with the requirements of the informal program, then a harsher penalty might be imposed, since the court will deal not only with the original offence but also with the failure to take advantage of assistance offered. When an informal referral is combined with the possibility of court action if the child's participation is unsatisfactory, the pretence that this participation is 'voluntary' cannot be sustained. Thirdly, there are special dangers if diversion from the court and entry into informal programs are dependent on the child pleading guilty to the charge. The plea and the 'voluntary' acceptance of help can become the price which must be paid for the decision not to take the matter to court. Fourthly, the resulting intervention takes place on the basis of an allegation which has not been properly proved. It is far from clear that society is justified in requiring a child's participation in a therapeutic program on the basis of an unproved allegation. Fifthly, diversion to informal services can lead to a widening of the net of social control.[58] Some studies have suggested that the children 'diverted' to these services are frequently those who would have been warned and released. It is all too easy to create new procedures and new agencies — what has been called a "semilegal, semiwelfare bureaucracy"[59] — which will collect, and offer treatment to, children in this category. Sixthly, there is some evidence that outright release is at least as successful as programs offering informal assistance and support.[60] Reservations about the efficacy of the treatment measures available to the courts apply equally to the methods employed at the pre-court stage. For these reasons it is recommended that a decision to divert a young offender from the court should be clearly understood to be a decision not to prosecute, not a decision to refer him to a welfare agency.[61]

- *Not a panacea.* The policy of diversion which is being advocated is not offered as a panacea. Diversion is not being recommended as a more effective means than a prosecution of inhibiting criminal behaviour. Nor is it sought to justify this policy on rehabilitative grounds.
- *Controlling administrative discretion.* Arguments about the dangers inherent in a system in which substantial reliance is placed on administrative discretion are valid and must be met. The active pursuit of a policy of diversion requires the formulation of clear guidelines to assist those who make the prosecution decision. However the dangers of the abuse of administrative discretion are reduced if it is clearly recognised that a child diverted from the court cannot be required to participate in an informal program.
- *Provision of welfare assistance.* The view that the criminal process should not be invoked as a means of providing welfare services to children and their families does not mean that these services should not be made available, on a genuinely voluntary basis, to those who need them. If appropriate services are not available, or if potential clients are not aware of their existence, the welfare system should be improved. Later in this report A.C.T. welfare and health services are described and discussed and certain recommendations are made.[62] In particular, attention is drawn to the importance of preventive services.[63] It should be noted that one of the recommendations made later in this report relates to the upgrading of the

---

58 Evidence which seems to confirm that certain diversionary schemes can have a 'net-widening' effect is beginning to emerge in Australia. See Sarri and Bradley, 'Juvenile Aid Panels: An Alternative to Juvenile Court Processing in South Australia', 26 *Crime and Delinquency,* 42, 55 (1980). For United States studies, see Blomberg, 'Diversion and Accelerated Social Control', 68 *Journal of Criminal Law and Criminology,* 274, (1977); Lincoln, 'Juvenile Referral and Recidivism', in Carter and Klein, 321; and Empey, *American Delinquency:* Its Meaning and Construction, (1978), 541–2.

59 Empey, 575.

60 Rose and Hamilton, 'Effects of a Juvenile Liaison Scheme', (1970), 10 *Brit J Criminol,* 2; and Klein, 192. However, for a more positive assessment of the effect of diversion programs, see Palmer and Lewis, 'A Differential Approach to Juvenile Diversion', 17 *J Research in Crime and Delinquency,* 209, (1980). As has been pointed out, some of the United States studies of the impact of diversion programs are open to criticism and firm conclusions must await further, more sophisticated research. See Gibbons and Blake, 'Evaluating the Impact of Juvenile Diversion Programs', 22 *Crime and Delinquency,* 411, 420 (1976).

61 Cf. Scharf, 18.

62 See para.254–258, 288–290, and Chapter 13.

63 Para.287.

Welfare Branch of the Department of the Capital Territory to a Welfare Division of that Department. It is also recommended that this Division be headed by a Director of Welfare appointed under the new Child Welfare Ordinance. In the proposals which follow, reference is made to the new Welfare Division and to the Director of Welfare.

Screening Procedures

127. ***The Present System*** The screening of cases involving offences alleged to have been committed by the young in the A.C.T. is at present unsystematic. Among the police there seems to be widespread acceptance of the view that special efforts should be made to divert certain categories of young offender from the court. Yet no clear policy has been enunciated. Some young offenders are prosecuted. Some are not. There are no written guidelines which establish criteria or procedures.[64] In some matters, a relatively formal process, in which a branch inspector participates, is employed, and in others the decision to divert a case from the court is taken at a lower level in an informal manner. Although a specialist unit – the Juvenile Aid Bureau – has been set up, the majority of young offenders are dealt with by other members of the force. Existing procedures give the impression that they have simply evolved. The conclusion that these practices are unsatisfactory raises the question whether there is a need for a new type of screening agency. Such an agency could take the form of a panel which, on the basis of police and other reports, decides whether or not a child should be prosecuted. Alternatively there could be created a panel which holds informal hearings and which refers to the Childrens Court only those cases which cannot be settled by way of a voluntarily accepted solution.

128. ***A Screening Panel?*** The Commission was initially attracted to the idea of a screening panel consisting of a police officer and a member of the proposed Welfare Division.[65] It could be made obligatory for the police to refer all cases involving alleged offences by children to such a panel; the panel could decide whether a prosecution should be instituted. This model was rejected because of serious doubts about the role of the Division at the screening stage. If a child's case were to be discussed by such a panel, and the child or members of his family had not previously come to the notice of the Welfare Division, there would be little that the Division representative would be able to contribute. The relevant information would all be provided by the police. The only way to overcome this problem would be for a member of the Division to make inquiries about the child's background. This would result in a cumbersome and probably slow system if such inquiries were to become the norm every time an alleged offence were to come to notice. Further, the carrying out of such inquiries before the allegation had been established would be objectionable. Different problems would arise if the child's family were already known to the Welfare Division. In such a situation it could be undesirable for the Division to make available to the police background information collected in the course of its work with the family. Finally, questions must be asked as to why social work information is required at the screening stage. The conflict between the social welfare and criminal justice functions of the system for dealing with young offenders has already been stressed. The creation of procedures which require representatives of the two perspectives to participate in the initial decision-making process could well add to the conflict inherent in the system. It might be objected that the above analysis overlooks the benefits which early welfare involvement can sometimes bring. It may, for example, allow for the detection of matters which can be better handled by agencies other than courts. Although there is some truth in this view, the Commission has already made it clear that it does not favour the use of the criminal justice system as a means of identifying individuals' needs and of referring these individuals to welfare agencies. There are in the A.C.T. many such agencies capable of performing diagnostic and referral functions. If they are performing these tasks badly, or if potential clients are unaware of the services available in the community to help them, then the welfare network should be improved. There is another objection to the interposing of a screening device between the police and the courts. Members of the police are not the

[64] The A.C.T. Police have conceded the validity of criticisms of this kind: 'We concede that there are deficiencies in the present police warning system in the Territory, which would be eliminated if the practice could be streamlined and formalised as part of the machinery of criminal justice.' *Submission*, 26.

[65] The Department of the Capital Territory favoured the introduction of a screening panel in the A.C.T. However, the proposal did not consider the membership or procedure of such a panel. See *Submission*, 44.

only persons who may initiate criminal proceedings. Representatives of other government bodies may lay an information. More important, any member of the public may do so. Although the number of occasions on which persons other than police officers initiate criminal proceedings is small, their power to do so raises an important question of principle. It would be anomalous to place a curb on the police (whose power to lay an information is exactly the same as that of any other member of the public) while at the same time leaving others free to initiate a prosecution. Yet it would be undesirable to attempt to take away the power of private prosecution, at least in respect of a limited and special class of offences such as those committed by children.[66]

129. ***A Hearing Panel?*** Hearing panels of the kind operating in South Australia and Western Australia offer an informal alternative to the Childrens Court. The South Australian Children's Aid Panels, which operate under the Children's Protection and Young Offenders Act 1979 (S.A.), may deal with all offences by children except homicide and certain road traffic offences. The panels deal with those matters referred to them by a Screening Panel. A Children's Aid Panel consists of a policeman and a member of the Department for Community Welfare. The child and at least one parent or guardian must be present for the panel to proceed, and the panel must refer the matter to the Childrens Court if the child so requests or if he does not admit the offence. After discussing the offence and the surrounding circumstances with the child and his parent or guardian, the panel may warn or counsel the child and his parent or guardian, request the child or his parent or guardian to sign an undertaking, or refer the matter to the Childrens Court. Provision for Western Australia's Children's Panels is made in the Child Welfare Act 1947 (W.A.). Panels in that State deal with first offenders under the age of 16. There are restrictions as to the type of offence with which a panel may deal. A schedule to the Act lists offences over which a panel has no jurisdiction. Each panel is made up of a police officer or a retired police officer and a field worker from the State Department for Community Welfare. As in South Australia the child must have admitted the offence before the panel is able to deal with him. The child may elect, or his parent or guardian may request, to have the matter heard by a Childrens Court. A panel's powers are: to dismiss the complaint, to ask the parent and child to enter into a voluntary supervision agreement, or to refer the matter to a Childrens Court.

130. ***Functions of a Panel*** [67] The functions which a hearing panel of the kind operated in South and Western Australia can perform are:

- It can administer admonitions.
- It can perform a symbolic role. Referring a child to a panel can be seen as a response to the community's demand to 'do something' about an offence, without necessarily bringing it to court.
- It can provide a venue for involving parents and child in a discussion of their problems and family relationships.
- It can serve as a forum for on-the-spot counselling.
- It can refer children and parents to the help they need or, by consent, arrange informal intervention and oversight of a kind beyond the scope of a police Juvenile Aid Bureau.

There is merit in the argument that a hearing panel provides a particularly appropriate forum for the performance of these functions. It has an air of authority. The admonitions it administers may have more impact than a police warning, and perhaps just as much as one delivered by a magistrate. Because of this authority, child and parents may take the matter seriously, whereas informal handling by the police might be interpreted as a 'let-off'. Yet a good panel can also combine an air of authority with informality and so provide a setting in which real discussion can take place. By contrast a court tends to frighten many of those who appear before it, whatever the intentions and efforts of those involved to create an informal atmosphere. In a submission, the Department of the Capital Territory examined a number of the functions of a panel and outlined arguments for and

[66] For a brief discussion of private prosecutions, see *Access to the Courts – I. Standing: Public Interest Suits*, ALRC DP 4, (1977), 21–24.

[67] For a further analysis of the functions of panels, see Seymour, 'Children's Boards in New Zealand: Some Unanswered Questions', (1977), 10 *ANZJ of Criminology*, 233. See also Gamble, 'Children's Hearing Panels for New South Wales?' (1976) 50 *ALJ* 68.

against the introduction of a hearing panel in the A.C.T.[68] The Department concluded that the establishment of such a panel in the Territory could be justified only if there were sufficient evidence that a panel system clearly promotes the best interests of children and their families. In the view of the Department, South Australian experience provides such evidence.[69] As has been pointed out, however, the Commission has doubts about the conclusiveness of the available evidence as to the comparative efficacy of various methods of dealing with young offenders.[70] Further, the Department of the Capital Territory did not unequivocally recommend the introduction of a hearing panel. Its submission drew attention to a number of criticisms of a panel system.

> The establishment of an intervening system with its own administrative costs is not necessarily a more efficient way of dealing with an overloading of the Court, and whilst informality in proceedings is an attractive concept, a panel would not be without formal requirements such as the determination that facts were not in dispute. In any event, a great deal of such formality as there is in the Childrens Court might be dispensed with by the Court itself. The use of a panel would not necessarily mean the end of informal diversionary devices; nor can a panel really be non-coercive if it has powers of referral to the Court.[71]

The A.C.T. Police made it clear that they did not support the establishment of a hearing panel in the Territory.[72] A different view was taken by the Capital Territory Health Commission, which recommended the creation of an informal, non-coercive panel consisting of a senior police officer, a social worker and a psychologist.[73] The Catholic Welfare Advisory Committee of the Archdiocese of Canberra and Goulburn also favoured such a panel, to be known as the Children's Protection Tribunal. It was recommended that this tribunal consist of a teacher, social worker or other person professionally concerned with the education or behaviour of children, a lay member and a lawyer.[74]

131. ***A Panel for the A.C.T.: The Commission's View*** The desirability of introducing a hearing panel to deal with certain categories of young offender in the A.C.T. has not been demonstrated. It is not clear that such a panel would remedy identifiable deficiencies in the present system. A most important factor is the comparatively small number of cases coming to notice in the A.C.T. The caseloads at present handled by the police and the Childrens Court do not justify the creation of a panel in the A.C.T. Even if new screening procedures were introduced, the police would continue to exercise their discretion to administer warnings to children who had committed trivial offences, and it is proper that they should do so. If this is accepted, then a panel would assume a role mid-way between the police and the court. The result would be an unnecessarily cumbersome three-tier system in which a relatively small number of offenders coming to notice would be divided up among police warnings, the panel and the court. Further arguments in support of the Commission's conclusion emerge from an examination of the functions of a panel listed in the previous paragraph. Most of them can be performed equally well by other means. If the panel is seen as a venue for discussion and counselling, and a referral agency, the advice which it provides might be just as satisfactorily made available by welfare workers. Indeed, it can be argued that a panel would inevitably introduce elements of formality where informality is required. With regard to other functions which the panel might perform, there is a danger that it might become a court under another name, but one which fails to provide legal safeguards. Certainly those who appear before it would frequently see it as a kind of court. As a United States report has pointed out, although informal procedures appear informal to those who administer them, to those caught up in the net they are impressively authoritative and formal.[75] The Commission has other reservations about a panel. In time an appearance before such a panel would probably be regarded as stigmatising and so one of the benefits of avoiding court proceedings would be lost. Also, as has been indicated, there are dangers in a system which makes the avoidance of a prosecution dependent on an admission of guilt. The South Australian and Western Australian panels require such an admission before they will deal with a

---

68 Department of the Capital Territory, *Submission,* 46–50.
69 id., 49.
70 Para.123, 124.
71 Department of the Capital Territory, *Submission,* 49.
72 A.C.T. Police, *Submission,* 27–28.
73 Capital Territory Health Commission, *Submission,* 2–4.
74 The Catholic Welfare Committee of the Archdiocese of Canberra and Goulburn, *Submission,* 5–9. See also *Green Paper,* 40–42.
75 *Task Force Report,* 10.

case. Further, if a hearing panel were introduced into the A.C.T., it seems that there is a real possibility that some of the children with whom it would deal would be children who are at present warned and released. Thus the introduction of a hearing panel, far from facilitating diversion of offenders, could have the net-widening effect to which reference has already been made.[76] The Commission's recommendation against the introduction of a panel accords with its preference for the least intrusive form of intervention. It also accords with the belief that it is important to identify and, as far as possible, to disentangle our objectives with regard to young offenders. A panel is open to criticism as an uneasy and ambiguous compromise between a welfare agency and a criminal court, with neither the informality and expertise of the former nor the concern for due process traditionally displayed by the latter.

132. ***Police Prosecution: The Commission's View*** It is recommended that, when an offence is alleged by the police, the power to decide between a prosecution and the informal handling of a case should remain with the police. This recommendation is consistent with the Commission's view that the prosecution decision should be based on considerations relevant to the operation of a criminal justice system.[77] A young offender should not be prosecuted in order to meet his personal or social needs.[78] A decision *not* to prosecute might appropriately be made on the grounds that a child is disadvantaged or has particular personal or social problems. However, such a decision would be a decision to adopt a lenient course. It would accord with the principle of economy of punishment.[79] It would thus be a decision made in the context of a criminal justice, rather than a welfare, system. Decisions made in a context of this kind should be taken by the police. A further reason for the recommendation that responsibility for the prosecution decision should remain with the police is that there is no evidence to suggest that the police are at present making inappropriate decisions. This is not to say that the Commission is sure that the right decision is being made in each case. The information which has been assembled does not indicate that the police are at present prosecuting too many children and that therefore the decision-making power should be removed from them. Indeed, the existing evidence suggests that the police in the A.C.T. do divert a substantial number of offenders from the court. The Commission's survey of police practices indicated that something over 50% of troublesome children who came to notice were dealt with informally.[80] These figures may be inaccurate. There is no way of knowing how comprehensive and universal was the completion of the relevant forms. There is no way of knowing how many of the incidents reported by the police involved behaviour which could have resulted in a prosecution as opposed to troublesome behaviour which was not criminal. However, the figures at least lend no support to the view that the police in the A.C.T. are too ready to bring children before the court. Further, experience in other jurisdictions suggests that a properly operated police warning scheme can be effective in diverting young offenders from the court.[81] The introduction of new screening agencies for a relatively small number of cases would inevitably involve the creation of a bureaucracy, the generation of more paperwork and could cause delays in the decision-making process. The Commission is not convinced that such a change is justified by the present evidence. Further, with regard to the possibility of the police making inappropriate decisions to prosecute, it must not be overlooked that it is always open to a magistrate to dismiss a charge if he feels that the prosecution should not have been initiated. Thus, he is in a position to influence police prosecution policy. By making adverse comments, as magistrates and judges do from time to time, they can do something to correct any tendency to prosecute children too readily.

---

76 Para.126.
77 See discussion in para.123, 126.
78 Cf. the criteria recommended by the Canadian Solicitor General's Committee (quoted para.122). These contemplate the laying of an information against a young person in order, among other things, to serve 'the needs and interests' of the young person.
79 Cf. ALRC 15 (1980), para.66.
80 See para.70.
81 In Victoria, for example, 59.5% of the young offenders who came to police notice in 1978 received a formal warning (known in that State as a 'caution'). See Victoria Police, *Annual Report 1978,* 35. In England in 1974 66.2% of known offenders aged between 10 and 13 were cautioned and 36.1% in the 14–16 age group. See D itchfield, *Police Cautioning in England and Wales,* (1976), 7.

Police Procedures

133. ***The Importance of the Police Role*** The principles adopted by the Commission regarding the implementation of a policy of diversion require that the importance of the police role in the A.C.T. system for dealing with young offenders be fully recognised. Not only is it proposed that the police retain the responsibility for making the prosecution decision, but it is also proposed that the administration, by the police, of a formal warning be the major alternative to a prosecution. The implications of the development and formalisation of a police warning system in the Territory must be faced. As has been said of the English police, though traditionally they have not been much concerned with what happens to offenders after they have been apprehended, the widespread use of police warnings suggests that this attitude must change.

> [I]n respect of juveniles, the police can now justly claim to be playing a very major role in helping to decide upon the appropriate 'treatment' or 'disposal' of apprehended offenders.[82]

It is the appreciation of the significance of this role, not its performance, which is new. The police have always had a major part to play in the diversion of young offenders from the court. They should continue to perform this function. The Commission agrees with the United States Juvenile Justice Standards Project that the difficulty is not the police's continued performance of this task. The difficulty is that most police actions are taken on an *ad hoc* basis by individual officers and are not guided by clearly formulated policies. Also such actions are subject to little accountability either within or outside the police force.[83] The A.C.T. Police have provided a clear statement of the difficulties attending police decision making in respect of young offenders. Although the statement refers specifically to juvenile aid work, the comments have a broader application.

> The fundamental problem which bedevils police juvenile aid work is that there is likely to be a conflict of interests when police, attempting to discharge their responsibilities to both the law and the community and yet wishing to do what they feel may be best for a juvenile, have to make a decision whether to prosecute or caution. Because of the subjective nature of each and every case, difficulties may be overcome to some degree if consistency of action is achieved, as well as it is humanly possible, by the articulation of workable, flexible administrative guidelines, supported by close supervision, which would tend to ensure that the interests, both of the community and the young person, are properly safeguarded.[84]

The primary aim should be to attempt to control and regularise the way the police exercise their power to divert young offenders or to refer them to the court. Further, this and other aims with regard to the police handling of young offenders must be pursued in the context of the wider police role. Dealing with children is only a part of police work. In formulating recommendations for special police procedures the reformer must have due regard for the attitudes, practices and skills of the police and the wide and diverse range of their responsibilities. As the Juvenile Justice Standards Project has pointed out, this does not mean that reform proposals should be compromised to ensure their favourable reception by the police,

> but they must be drafted with full regard for realities, without which they will be fated to a place on dusty shelves, the familiar graveyard of good but impractical suggestions.[85]

134. ***Changes Needed in Police Procedures*** A number of the Commission's recommendations relate to the way in which the police should approach the task of deciding whether to prosecute a child and, more generally, to their part in implementing a policy of diversion. An examination of the subject of police diversion raises a number of interrelated issues. It is clear that certain changes are needed in police procedures. These changes should be designed to achieve the following objectives:

- a significant reduction in the use of the power to arrest, without warrant, children alleged to have committed offences;
- the introduction of simplified summons procedures which will be attractive to the police and which will encourage them to proceed by way of summons rather than by way of a charge;
- the formalisation of the warning system and the adoption of guidelines to ensure that a policy of diversion is pursued in a consistent and principled manner;

---

82 Bottoms, introduction to Oliver, (1978), vi.
83 Juvenile Justice Standards Project, *Police Handling of Juvenile Problems,* (1977), 32.
84 A.C.T. Police, *Submission,* 21.
85 Juvenile Justice Standards Project, *Police Handling of Juvenile Problems,* (1977), 14.

- avoidance of the dangers of intrusive intervention by the use of procedures which ensure that, when a child is diverted from the court, undue pressure is not placed on him or his family to co-operate with a welfare agency or police in an informal treatment program;
- the provision, to children diverted from the court, of services which he and his family are genuinely free to accept or reject;
- the establishment of close liaison between the police and health and welfare agencies;
- a substantial reduction in the time taken to process cases, so that every child accused of a crime is either warned or makes his first court appearance within 28 days of being apprehended by the police[86]; and
- the creation of statistical procedures to enable the monitoring of the way in which the police exercise their discretion to prosecute children.

In addition to pursuing these aims, attention must be given to the rules governing the questioning, fingerprinting, photographing and pre-trial detention of children. If the argument that children require special protection is accepted, clear and enforceable guidelines are needed in these important areas. Finally, proposals regarding police procedures in respect of young offenders in the A.C.T. prompt questions about the Juvenile Aid Bureau. Its present role lacks clarity. A more rigorous definition of its functions is necessary. Recommendations on this subject, and on other aspects of police work with children in the A.C.T. are set out below. Before setting out the various recommendations in detail, however, it is important to emphasise that the Commission is aware of the danger of creating cumbersome, time-consuming procedures which are so demanding that the police feel hamstrung and, as a result, fail to take appropriate action when the circumstances demand it. The A.C.T. Police have pointed to the need to preserve a system in which the police are not impeded by daunting and complex 'red tape'.[87] The Commission appreciates police concern on this matter. The object of the recommendations which follow has been to create a rational system, requiring the minimum of paperwork. Although certain guidelines relevant to the exercise of the discretion to prosecute are laid down, these guidelines are flexible, and are designed to allow the police to initiate court proceedings when this is appropriate. They are not designed to create impediments which will deter the police from performing their duties.

135. ***Arrest and Charging Policies*** The three objectives of discouraging the use of the power of arrest without warrant, encouraging the use of summons procedures, and formulating guidelines to implement a policy of diversion are closely intertwined. A decision to arrest and charge a child is a decision to prosecute him and so must reflect a due regard for the need to avoid court action where possible. The willingness of a member of the police to seek permission to lay a charge against a child, and the responsible officer's readiness to grant permission to do so, are affected by the attractiveness of summons procedures. The use, in the A.C.T., of the power to arrest a child without warrant and to charge him is the most important of the matters requiring attention. Before the screening process can be made more systematic, it is imperative that changes be introduced to ensure that the great majority of children prosecuted will be taken to court by way of summons rather than following arrest. The proportion of children arrested in the A.C.T. (something over 60% of non-traffic offenders prosecuted[88]) is quite unacceptable.[89] In its report *Criminal Investigation,* the Commission recommended that the police should proceed by way of summons rather than by arrest whenever possible.[90] The Commission reiterates this view. The principle is particularly important when children are involved. The use of the power to arrest without warrant and charge is undesirable if a less

---

86 In 1979 new procedures regarding the handling of young offenders were introduced in Victoria. One of the aims of the revised procedures was to 'reduce the time between a child coming to Police notice and any subsequent disposition, so that ideally the delay does not exceed 28 days'. *Victoria Police Gazette,* 14 December 1978, 640.
87 A.C.T. Police, *Submission,* 25.
88 See para.81.
89 The Commission's findings regarding the proportion of children arrested in the A.C.T. contrast with the figures relating to the overall arrest rate in the A.C.T. Figures quoted in the Commission's report, *Criminal Investigation,* indicate that, in 1974–75, the overall ratio of arrests to proceedings by way of summons was 1:4. ALRC 2, (1975), 11.
90 ALRC 2, (1975), para.29.

oppressive procedure can be employed. It also impedes the pursuit of a policy of diversion. A decision to arrest and charge a child is normally made soon after he is apprehended and hence the opportunity to give careful consideration to the decision, as required by a commitment to a policy of diversion, is limited. There are a number of steps which should be taken regarding police procedures in respect of young offenders in the A.C.T.

- Although a directive limiting the use made of the power to arrest a child without warrant is included in the Australian Federal Police General Instructions[91], the criteria governing the exercise of this power should be more restrictive and they should be incorporated into the new Ordinance.
- The exercise of the power to arrest a child without warrant should not inevitably lead to the laying of a charge against the child.
- There should be laid down clear guidelines on the basis of which an authorised member of the police should grant or refuse permission for the institution of a prosecution against a child.
- If, having applied these guidelines, the authorised officer decides that a prosecution is appropriate, he should be encouraged to proceed by way of summons rather than by directing the laying of a charge.
- Summons procedures should be simplified to counter-balance the obvious attraction of speedy arrest and charging procedures.

136. ***Arrest without Warrant*** In its report, *Criminal Investigation,* the Commission recommended that the power to arrest without warrant in respect of Commonwealth and Territorial offences should not be exercised unless the police officer has a reasonable belief not only that the person has committed an offence, but also that proceedings against him by way of summons would not be effective or appropriate. It was further recommended that the decision to arrest could be justified only by the need to:

- ensure the alleged offender's appearance in court;
- prevent the continuation or repetition of the offence; or
- prevent the loss or destruction of evidence relating to the offence.[92]

The A.C.T. Police expressed strong opposition to the introduction of statutory criteria of this kind.[93] In the view of the police, the Commission's opposition to the use of the power to arrest and charge an offender is misconceived. The point was made that the procedures involved in the processes of arrest and charge 'are more humane and less ponderous' than those employed when a summons is used.[94] The nature and advantages of an arrest were described as follows:

> The real problem is that the term 'arrest' is an emotive one; it conjures up visions of oppression and infringement of human dignity in some fertile minds. We would contend that nothing is further from the truth. In our experience many offenders *prefer* arrest to summons because of the anguish caused not only by delays in the criminal justice system but by the sure knowledge that a summons will be served upon them at their home, place of work or anywhere else police fortuitously find them, occasionally, unavoidably, in the most public of atmospheres.[95]

The argument advanced by the police was that the proper performance of their duties requires them to interview a suspect. When the suspect is a child, the interview should be conducted in the presence of a parent. The child must be detained when an alleged offence is detected and again pending the arrival of a parent. In the opinion of the police the most appropriate place in which to conduct the interview is in the privacy of a police station. If the interview is conducted there and it is decided that a prosecution will be instituted, the police view is that it is far more logical to charge the child at once rather than to expose him to the uncertainty and delay which result from the use of a summons. The police argument is that the laying of a charge is not objectionable, since it involves no more than

91 See para.78.
92 ALRC 2, (1975), para.38–44. See also *Webster* v. *McIntosh* (1981) 32 ALR 603, Brennan J.
93 A.C.T. Police, *Submission,* 22.
94 ibid.
95 id., 23.

the entry of the child's name in a charge book and, in the great majority of cases, the immediate release of the child on bail.[96]

137. ***Arresting Children: The Commission's View*** Notwithstanding the police arguments, the Commission reiterates the view which it expressed in the *Criminal Investigation* report. The recommendations made in that report regarding the exercise of the power of arrest are equally relevant to children, perhaps more so. If they are not enacted in a Commonwealth Criminal Investigation Act applicable in the A.C.T. they should be incorporated into the new Child Welfare Ordinance. There are two reasons for the Commission's belief that the use of the power to arrest and charge a child should be strictly controlled.

- Although arrest and charging procedures are simple and efficient, the result of the use of these procedures is to deprive a child of his liberty. Maximum safeguards should be provided to protect the child before this important step is taken.
- By its nature, a decision to arrest and charge a child is taken quickly and it therefore allows less time for the considered and consistent application of guidelines relating to the prosecution of children. As has been noted, the Commission favours the pursuit of a policy of diversion with regard to young offenders. In order to encourage the pursuit of this policy, there should be laid down statutory criteria to guide the police in the making of the prosecution decision. The use of summons procedures gives greater opportunities for the application of these criteria, both by the police and by members of the Deputy Crown Solicitor's office. The use of a summons thus allows additional screening procedures to be employed. It also allows the defendant more time to prepare his case. Finally, resort to a summons results in less traumatic procedures.

In spite of these objections to the use of the power to arrest and charge a child, the Commission is sympathetic to the arguments which the police have advanced regarding the desirability of employing simple, speedy procedures to bring children before the court. Given the existing cumbersome and protracted summons procedures, the Commission can understand the view, held by some police, that it is preferable to proceed by way of arrest and charge. Until summons procedures are simplified there is much to be said for the present practice of arresting and charging a high proportion of young offenders. However, ultimately the solution to the problems which have been identified lies in the improvement of summons procedures in the A.C.T. and not in an acceptance of existing arrest and charging practices. The factors justifying the use of the power of arrest without warrant have been outlined in the previous paragraph. Further, a decision to initiate a prosecution against a child should not inevitably follow the child's arrest. If a policy of diversion is to be consistently pursued, provision should be made for an arrested child to be released without a prosecution being laid. If this is to occur, however, it will be necessary for the arresting officer to be protected against unreasonable proceedings for unlawful arrest. The new Child Welfare Ordinance should make it clear that where a child is arrested and it is subsequently decided not to prosecute the child, the arrest is not to be regarded as unlawful simply because such a decision has been made. Similarly, if the child is prosecuted and acquitted, the fact that he was acquitted should not of itself be regarded as an indication that the arrest was unlawful.

138. ***Guidelines for the Exercise of Police Discretion*** If, as recommended, the police in the A.C.T. are to continue to make the prosecution decision in respect of young offenders, it is important that they should be subject to clear and public guidelines.[97] In the absence of guidelines designed to restrict resort to court proceedings, the consistent pursuit of a policy of diversion will be impossible. Further, only if there are such guidelines can the police be made accountable in an effective way for

96 id., 22–24. Cf. the following comment:

> [T]here is little practical difference between informing a child following investigation that he will be reported and probably summoned, and the notion of releasing a child to his parents' care following investigation and arrest with an undertaking to appear at court on a certain date.

Mr R.D. Blackmore, S.M., *Submission,* 3.

97 The call for public guidelines controlling the exercise of the discretion to prosecute is consistent with the Commission's recommendation, in its interim report *Sentencing of Federal Offenders,* that the Commonwealth Attorney-General should lay down similar guidelines for Federal prosecutors. ALRC 15, (1980), para.103 and 107.

the manner in which they exercise their discretion.[98] The new Child Welfare Ordinance should clearly indicate that a child should be prosecuted only if such a course is clearly justified. At present in the A.C.T. the approval of a senior member of the Australian Federal Police and (in the case of a matter dealt with by way of summons) a member of the Legal Branch of the force must be obtained before a child is prosecuted. This practice should be formalised and the new Ordinance should provide that no child should be prosecuted in the A.C.T. without the approval of an authorised officer of the Australian Federal Police. The Ordinance should provide that this officer should not authorise the prosecution of a child unless, having regard to

- the evidence available as to the commission of the offence;
- the seriousness or circumstances of the alleged offence;
- the prevalence of offences of the kind alleged;
- the child's previous record of offending;
- the age, maturity or mental capacity of the child;
- the ability and willingness of the child's parents to discipline and control the child; or
- the need to protect the public from offences of the kind alleged

the officer concludes that a formal warning is not appropriate.[99] Two further constraints should be incorporated into the law. The authorised officer should be required to consider whether a prosecution would be a harmful or inappropriate response in view of the child's background, personality or circumstances. There may be cases in which, though the application of the above guidelines suggests that a prosecution is warranted, the child's situation is such as to make the administration of a warning the wise and humane course. The second consideration relates to children coming to police notice for the first time. Although an arbitrary rule should not be established, the system should operate in such a way that 'first offenders' should not normally be prosecuted, except in cases of serious crime. In order to discourage the prosecution of 'first offenders', the officer making the decision in respect of such an offender should be required to give written reasons explaining why the case cannot be dealt with by way of a warning.[100] The suggested guidelines are designed to divert the maximum number of cases from the court. The objective is to focus the attention of the authorised officer on the appropriateness of a prosecution in the particular case before him, bearing in mind both the special needs and difficulties of the child and the criminal law's concern with the protection of the community. However, the importance of avoiding a system which operates in such a way as to impede access to the court when the child denies the offence must be stressed. Pursuit of a policy of diversion must not be allowed to prevent a child from putting the police to the proof of the allegations against him. It must also be emphasised that it is not intended to reduce the power of the police to deal with children who commit serious offences. As a United States study has pointed out, concern about serious juvenile crime is growing and it is 'clear that sentiment toward juveniles who commit serious crimes is hardening.'[101] Clearly those who formulate policies for dealing with young offenders must take these facts into account and the system must be able to deal effectively with serious crime by the young. The guidelines listed above are intended to control the exercise of the discretion to prosecute a child. They are also intended to be sufficiently flexible to allow the police to institute prosecutions in appropriate cases.

139. ***Instituting a Prosecution*** If, after applying the criteria listed in the previous paragraph, the authorised officer decides that the prosecution of a child is appropriate, the law should be such as to encourage him to proceed by way of summons rather than by way of charge. The Australian Federal Police General Instructions indicate an acceptance of this objective, since they require that the

---

98 Police accountability can be promoted by special complaints procedures. See ALRC 1, (1975) and ALRC 9, (1978). See also Complaints (Australian Federal Police) Act 1981 (Cwlth).

99 Cf. the criteria set out in Victorian Police Standing Order 311(2)(a) and those suggested by Oliver, (1978), 43. For further statements on the need for guidelines to control the initiation of proceedings against young offenders, and for suggested guidelines, see *Young Persons in Conflict with the Law*, 88–89, and Juvenile Justice Standards Project, *Police Handling of Juvenile Problems*, (1977), 31–33.

100 Such a requirement already exists in Victoria. Para.311(2)(d) of the Victorian Police Standing Orders states: 'If an officer of Police authorises prosecution of a child first offender, his reasons for not using the Police Cautioning Programme must be endorsed on the brief at the time of authorisation.'

101 Juvenile Justice Standards Project, *Police Handling of Juvenile Problems*, (1977), 52–53.

permission of a commissioned officer be obtained before a child under 16 is charged. They also state that, where practicable, proceedings against children and young persons are to be initiated by way of summons.[102] Clearly the General Instructions have not been particularly effective in promoting the use of summons procedures. The new Child Welfare Ordinance should contain a clear directive that a police officer shall not charge a child with an offence unless he is satisfied that proceedings by summons would not be effective. In reaching his decision on the appropriateness of a charge, the officer should be required to have regard to the same criteria as are set out in the section relating to the use of the power of arrest.[103] It should be noted that, in line with the Commission's recommendation that the distinction between 'children' and 'young persons' need not be preserved[104], the relevant provisions should apply to all children under the age of 18.

140. ***New Summons Procedures*** In part the high rate of arrest of children in the A.C.T. is the product of the deplorably cumbersome and slow procedures employed when it has been decided to proceed by way of summons.[105] There is something ironic about the fact that the more serious offences (which typically result in arrests) reach the court quickly, while the less serious matters drag their way through the careful sifting and checking process which the issuing of a summons presently requires. Urgent attention should be given to the improvement of police procedures for processing cases taken to court by way of summons. It should be possible to design procedures which are simple, efficient and – above all – rapid. Changes should be made to enable a child dealt with by way of summons to make his initial appearance in court within 28 days of having been apprehended. Unless the case is an exceptional one, the police should complete their preparation of the evidence within this period. It is not intended that the object of this reform should be defeated by routine requests for an adjournment at the first hearing. It is not appropriate for the Commission to make detailed recommendations for administrative changes which might be made to simplify existing summons procedures. This task would be best performed by those responsible for the day-to-day operation of the system. A committee should be established to undertake the reform of summons procedures with respect to young offenders. This committee should include representatives of the police, of the Deputy Crown Solicitor's office, of the Court of Petty Sessions and of any other persons involved in police and court procedures. The aim of the committee should be to formulate procedures which will ensure that neither the paperwork nor the delay involved in bringing a matter to court by way of summons acts as a disincentive to the use of this procedure. As far as possible the paperwork should be the same, whether a matter is dealt with by way of a formal warning, summons, or arrest and charge. Victorian Police procedures provide a model which could well be employed in the A.C.T.[106] A distinctive feature of these procedures is the use of a special form[107] which must be completed every time a matter involving a child has been brought into the official police system. This form, together with the investigating officer's statement and any record of interview, provide the basis for the police brief, whether the child is warned, arrested or dealt with by way of summons. Although copies of other statements may need to be included if the matter goes to court, the basic paperwork is the same, whatever the outcome of the case. Consideration of the paperwork which the police must complete raises a further important issue. The procedure proposed by the Commission should not have a 'net widening' effect.[108] Although an attempt has been made to minimise the

---

102 See para.78. See also the Standing Orders of the Victorian Police which state, 'A child should only be arrested in extreme cases where it is thought that a summons will not meet the case'. (Victorian Police Standing Order 311(2)(c)). The Victorian Police have achieved a low arrest rate with regard to children. Figures compiled by the Victorian Police Department for the period 1 February 1981 to 30 April 1981 reveal that approximately 80% of the children prosecuted during that period were dealt with by way of summons procedures. Figures supplied by the Victorian Police Department.

103 See para.136.

104 See para.64.

105 See para.81.

106 For a description of Victorian Police procedures, see *Victoria Police Gazette*, 14 December 1978, 640–643.

107 Known as Form 276.

108 For a discussion of this effect, see para.126. However, another view of the impact on the police of the pursuit of a policy of diversion can be put forward. It has been argued that, in England, emphasis on such a policy can cause the police to ignore young offenders 'rather than become involved in a scheme which they believe causes a great deal of work and enquiry and which ends up with very little effective result'. Oliver, (1978), 3.

paperwork for all types of case, the amount of such work which should be completed when a formal warning is administered should not be insignificant. The proposed special form would require careful attention by the apprehending officer. While the aim has been to encourage the use of formal warnings, it is not intended that these warnings should be employed in respect of cases which would previously have been dealt with informally, without a record being made. The need to complete a special form should do much to prevent the use of formal warnings when informal procedures would suffice.

141. ***Interviewing of Children*** Although the Australian Federal Police General Instructions deal specifically with police questioning of children under 16, it is clear that the relevant instruction is not always obeyed.[109] In its report, *Criminal Investigation,* the Commission dealt with the subject of the interviewing of children.[110] It reiterates the view, expressed in that report, that the administrative rules formulated by the police should be put in legislative form. The Child Welfare Act 1939 (N.S.W.) has a special provision dealing with the questioning of those under 18[111], and the Criminal Investigation Bill 1977 (Cwlth), which was substantially based on the Commission's recommendations, also dealt specifically with the topic.[112] With regard to children in the A.C.T., it is recommended that the new Child Welfare Ordinance should provide that, before specified types of interview are conducted by the police, an appropriate adult witness should normally be present. 'Interview' should be defined in broad terms and should include the asking of questions. The requirement for the presence of an appropriate witness should apply to interviews conducted by a police officer:

- in respect of offences punishable by imprisonment for a period exceeding six months;
- in respect of offences against the person or property; or
- when a child is under restraint.

For the purposes of the new Ordinance, a child should be regarded as being under restraint if:

- he has been lawfully arrested or detained;
- he is under restraint in respect of an offence and a police officer believes on reasonable grounds –
  - that the child has committed the offence; or
  - that he would be authorised to arrest the child for the offence.

A child should not be regarded as being under restraint if he is in the company of a police officer by the roadside for the purpose of the investigation of a minor traffic offence. When conducting interviews to which the relevant provisions of the new Ordinance apply, the police should be required to ensure that an appropriate adult witness, such as a parent, relative or friend of the child, or a lawyer, is present. The provisions should, however, permit the police to proceed in the absence of such a witness where reasonable steps have been taken to secure the presence of a witness and the person selected is not able to be present within two hours. In these circumstances a police officer should be permitted to proceed with the interview in the presence of another police officer who has not been concerned in the investigation. The Commission's proposals relating to the interviewing of children in the A.C.T. are similar to those contained in cl.28 of the Criminal Investigation Bill 1977 (Cwlth). There is one important difference. Clause 28 of that Bill applied only to interviews involving children under 16. The recommendations in this report relate to the interviewing of children under 18. In the child welfare field all provisions embodying chronological ages are arbitrary. For the purposes of the new Child Welfare Ordinance the making of a distinction between 'children' and 'young persons' has been rejected.[113] The selection of the age of 18 as the upper limit with regard to the proposed interviewing requirements is consistent with this approach. Further, the relevant

[109] See para.74.

[110] ALRC 2, (1975), para.265f. For a further discussion of the police interrogation of children, see *Report of an Inquiry by the Hon. Sir Henry Fisher into the circumstances leading to the trial of three persons on charges arising out of the death of Maxwell Confait and the fire at 27 Doggett Road, London SE6,* (1977).

[111] Child Welfare Act 1939 (N.S.W.), s.81C. It should be noted that this provision was not completely satisfactory since it laid down procedures only in respect of interviews conducted in a police station.

[112] Criminal Investigation Bill 1977 (Cwlth), cl.28.

[113] See para.64.

N.S.W. provision applies to interviews involving children under 18, and, where possible, it is desirable that the law in the two jurisdictions be uniform. If the Commission's recommendations are enacted in the new Child Welfare Ordinance, the relevant provision would, of course, apply only in the A.C.T and the broader question of legislation which would apply throughout the Commonwealth would have to await the passing of a revised Criminal Investigation Bill.

142. In formulating its recommendations regarding the interviewing of children, the Commission was aware of the need to avoid the imposition of impractical restraints. When considering the proposals set out in the previous paragraph it is important to note the following points:

- With regard to the interviewing of children in the A.C.T. the police are already subject to controls imposed by the Australian Federal Police General Instructions.[114] The controls proposed by the Commission have much in common with and in many ways reinforce those incorporated in the General Instructions. Further, as noted in the previous paragraph, the Commission's proposals apply to specified types of interviews.
- It can be argued that general controls on the interviewing of children are undesirable, since these controls prevent the police from asking preliminary questions which might permit suspects to exculpate themselves. However, the protections which provisions relating to interviewing are designed to achieve will be lost if too restrictive an approach is taken to limiting the circumstances in which the provisions apply. A clear line between preliminary questioning and questioning to elicit evidence admissible in court is impossible to draw.
- As has been noted in the previous paragraph, the proposed restrictions on the interviewing of a child do not apply if it takes more than two hours to secure an appropriate witness.
- The proposed sanction for non-compliance with the interviewing requirements is not the imposition of a criminal sanction on the police officers concerned, but simply the exclusion of evidence obtained in contravention of these requirements. Further, when deciding the question of admissibility when a breach of these procedures has occurred, the court should be required to exercise a wide discretion. Notwithstanding a breach of the recommended procedures, the court should be permitted to admit the evidence if this course would benefit the public interest without unduly prejudicing the rights of the child. In reaching its decision as to the admissibility of evidence obtained in contravention of the recommended procedures the court should be directed to have regard to:
  - the seriousness of the alleged offence;
  - the urgency of the matter and the difficulty of detecting the offender;
  - the need to preserve evidence;
  - the nature and seriousness of the contravention; and
  - the extent to which the evidence obtained in contravention of the proposed procedures might have been lawfully obtained.[115]

It can confidently be expected that a police officer who acts reasonably will not be unduly impeded by the proposed provisions.

143. ***Fingerprints and Photographs*** The *Criminal Investigation* report also dealt generally with the subject of the taking of fingerprints and photographs. Recommendations made were designed to limit the police power to take fingerprints or photographs.[116] The Commission reiterates the view that legislative restrictions on the use of these powers are necessary. They are particularly necessary with regard to children. Whenever possible the use of stigmatising procedures should be avoided when children are involved. Further, the Commission's analysis of A.C.T. police procedures suggests that, when dealing with children, the police make extensive use of their power to take fingerprints and photographs and are subject to few controls.[117] The high proportion of children dealt with by way of arrest in the A.C.T. makes police readiness to use these powers more disturbing. The

[114] See para.74.

[115] Cf. Criminal Investigation Bill 1977 (Cwlth), cl.73.

[116] ALRC 2, (1975), para.113 and 115.

[117] See para.80. The Commission's survey of children arrested in the A.C.T. in 1978 indicated that 77.4% had their fingerprints taken and 56.8% were photographed. For a discussion of the English law and practice relating to the fingerprinting of children, see Levenson, 'The Fingerprinting of Children', [1980] *Crim LR* 698.

recommendation contained in the Commission's *Criminal Investigation* report was that the police power to take fingerprints, photographs and other material for identification purposes should be limited to situations where the obtaining of this material is reasonably believed to be necessary for the identification of the person with respect to, or for affording evidence as to, the commission of the offence for which he is in custody. In all other situations it was recommended that a magistrate's order should first be obtained.[118] These recommendations are reflected in the draft Bill attached to the Commission's report.[119] With one important addition the Commission's proposals were incorporated into the Criminal Investigation Bill 1977 (Cwlth).[120] The additional provision was designed to permit the police to take fingerprints and other identifying material when a person is in lawful custody in respect of an offence and the obtaining of this material is reasonably believed to be necessary for the purpose of identifying the person as the person who committed another offence. Both this additional ground and the recommendations made in the *Criminal Investigation* report should be incorporated into the new Child Welfare Ordinance. As a further modification of the proposals advanced in that report it is recommended that, with regard to children, the power to take fingerprints or photographs should generally be exercised only in respect of those who have attained the age of 14. Such a requirement would not represent a change, since the existing police powers with regard to the fingerprinting or photographing of a child are exercisable only if the child has attained that age.[121] The Commission's recommendation regarding children under 14 is designed to do no more than give legislative force to the existing police instruction. In cases in which the police wish to take the fingerprints or photograph of a child under the age of 14, they should be required to obtain special permission from the Childrens Magistrate. The proposed requirements, while not imposing undue restrictions on the taking of identifying material, should inhibit unnecessary fingerprinting and photographing of children.

144. ***Pre-Trial Detention*** Once a decision has been made to arrest and charge a child there arise certain questions as to the powers and duties of the police. The existing requirement[122] that the arresting officer should immediately notify the child's parent or guardian should be given legislative force. The decision to release a child on bail or to hold him in custody should be made on the basis of the same guidelines as are applicable to the initial decision to place the child under arrest.[123] The officer in charge of the police station to which an arrested child is taken should, on the basis of these guidelines, make a separate decision about the need for the child to be held in custody. Cases might arise, for example, in which the original decision to exercise the power of arrest was justified by a reasonable belief that the child would abscond. When the child is brought back to the police station the officer in charge might conclude that the child's parents are able and willing to ensure his attendance at the Childrens Court and that detention in custody is therefore not necessary. The new Child Welfare Ordinance should also make it clear that a child who is held in custody before his first court appearance must be taken to a shelter, unless the seriousness of the alleged offence, his violent behaviour, a history of such behaviour, or previous escape attempts make it inappropriate for him to be held in a shelter. The possibility of the shelter being full should also be covered. If any of these circumstances arise, the police should be empowered to take the child to a remand centre. If a child is placed in a shelter and his behaviour is such as to indicate that it is inappropriate to hold him there, the Director of Welfare should be empowered to order his transfer to a remand centre. A child should not be held in the police cells, except pending a transfer to the shelter or remand centre. If he is held in a cell he should, as at present[124], be held in a cell which does not allow contact with adult prisoners. In order to prevent the holding of children in police cells, the new Ordinance should provide that a child held in custody must be taken to court or to the shelter or the remand centre as soon as practicable after being charged. Further, as the police are responsible for transporting children from a shelter to the court, it sometimes happens that children are briefly held in police cells before being taken to court. Where practicable this should be avoided. Similarly, if the court

118 ALRC 2, (1975), para.113 and 115.
119 Draft Bill, cl.42.
120 Criminal Investigation Bill 1977 (Cwlth), cl.38.
121 See para.79.
122 See para.78.
123 See para.136.
124 See para.79.

remands a child in custody, efforts should be made to avoid returning the child to the police cells before he is taken to a shelter. Under s.50(1) of the Court of Petty Sessions Ordinance 1930 (A.C.T.) a person arrested without warrant and taken into custody must be brought before a court 'as soon as practicable'. In its report, *Criminal Investigation*, the Commission fully discussed the various statutory rules governing the maximum period for which a suspect may be held in police custody before being taken before a court.[125] With regard to a child arrested and held in custody in the A.C.T. the Commission's view is that the existing requirement that the child be taken before the Childrens Court 'as soon as practicable' should be retained. However, the law should also state that in any case the child must be brought before the Childrens Court within 48 hours of being taken into custody. This 48 hour period should not be regarded as the normal period of detention. The overriding obligation should be to bring the child before the next sitting of the Childrens Court. If a child in custody is not brought before the court within 48 hours he should be released. The period of 48 hours was chosen to allow for the fact that the Childrens Court will not normally sit during a weekend. It has been suggested to the Commission that an upper limit of 72 hours would be more appropriate, as it is not uncommon for the police in the A.C.T. to apprehend children at the weekend and to discover that the children's parents are spending the weekend out of Canberra. A 72 hour limit would ensure that the children's parents would be available before the matter was taken to court. However, in the Commission's view it is less important to accommodate cases of this kind than to impose strict limits on the period for which a child may be kept in custody without being taken before a court.

145. ***Informal Assistance*** From time to time an alleged offence brings to light personal and social needs which the welfare services should endeavour to meet. Although it might be objected that the procedures outlined in this section of the report must inevitably lead to certain problems going undiagnosed and certain needs therefore being unmet (as some police are insensitive to, and not trained in, welfare matters), it must be reiterated that the criminal justice system should not be or become a routine doorway to the welfare services. The danger of creating a potentially intrusive sysem which will embrace a large number of alleged offenders outweighs the danger of procedures which will fail to recognise a small number of welfare problems. Nevertheless, although society's response to an offence should be kept quite separate from its provision of informal assistance, efforts should be made to provide this assistance for young offenders who have been diverted from the court. The police have a part to play in putting a child and his parents who are in need in touch with welfare agencies. When an offence has come to notice and a decision not to prosecute has been made, both the investigating officer and the officer who authorises the administration of a warning should be required to consider whether the child or his family might benefit from informal assistance. When it is thought that help is needed, the police should provide the family with information about the health, welfare and recreational services available in the community. These should be listed in a simple pamphlet which should be given to the family by the policeman who administers the warning or advises the child that no further action is to be taken. It would then be up to the child or his parents to approach the appropriate agency. Only by putting the offer of help on this basis will it be possible to ensure that society's response to the family's needs will not be seen as part of the criminal process. With regard to the family whose members are not knowledgeable enough to select the most suitable agency, the system should operate in such a way as to emphasise the role of the proposed Welfare Division. The pamphlet should bring the existence of the Division to the family's notice and explain that, because its staff are familiar with the range of services in the A.C.T., they are particularly well qualified to advise those in need of help but unsure as to how to obtain it. In a case where the police are doubtful whether the child or his family will understand the pamphlet or have the necessary motivation or determination to avail themselves of suitable services, the police officer visiting to administer the warning should alert the Welfare Division so that members of its staff may judge whether any welfare initiative should be taken. Further, with regard to those children who do have serious problems and whose families seem unlikely to approach a welfare agency, it must not be overlooked that, once the police have decided not to prosecute, it would be open to them to alert the Director of Welfare and the proposed Youth Advocate[126] to the existence of a problem which

125 ALRC 2, (1975), para.87–98.
126 The functions of the Youth Advocate are discussed below, para.163, 313f.

might justify the initiation of care proceedings.[127] These proceedings will offer a mechanism by which children's needs can be investigated and made the subject of court action without the ambiguities and pressures inherent in a process which seeks to combine criminal justice and welfare considerations. Mention must also be made of the role of the Juvenile Aid Bureau in providing children and their families with advice and information on the services available in the community. The future role of the Bureau is discussed in detail elsewhere.[128] It is recommended that the Australian Federal Police place greater emphasis on the Bureau's ability to assume responsibility for child welfare matters which come to police notice. If an investigating officer or the officer who authorises the administration of a warning considers that a family might need help, police instructions should encourage him to refer the matter to the Juvenile Aid Bureau and leave to its specialised staff the task of providing the necessary information and advice. On occasions it will be appropriate for the authorising officer to direct that the warning be administered by a member of the Juvenile Aid Bureau so that this task and the provision of advice may be combined in one visit. Bureau staff could also undertake further inquiries in cases which indicate that the initiation of care proceedings might be appropriate.

146. ***Monitoring of Police Procedures*** The police do not compile statistics about the number of children who are dealt with by way of a warning. This is most unsatisfactory, since it means that a significant part of their work with children is hidden from public and even official view. New procedures should be introduced which will allow for the simple recording of cases informally handled. It is not intended that these new procedures should apply to matters which are dealt with on the street and which go no further. The Commission accepts that informal warnings will continue and that there are minor matters which can be appropriately handled without any record being kept at all. The need to avoid stigmatising children unnecessarily makes it undesirable to insist on the recording of each and every police contact with a child. However, when a situation arises which, under the present system, would result in a record being made of the child's name (i.e. whenever a case occurs which would be brought into the formal system), the police, in future, should be required to complete a simple form. This form, which should be modelled on the Victorian Police Form 276, should be completed only for children. It would provide a basis for the compilation of reliable and accurate statistics relating to all children's cases which are officially recorded. It is not the intention to create extra paper work for the police. The new form should replace all other forms, including those required by the Information Branch (Crime), which must be completed when a case is brought into the official system. It should also serve as the basic document for a brief of evidence in those cases where the matter goes to court. In addition to details regarding the child and his alleged offence, the form should indicate whether the outcome is a warning or a prosecution. These forms would thus provide statistics on the basis of which it would be possible to monitor the way the police exercise their discretion to prosecute children. For the first time, reasonably accurate information would be available on the proportion of children warned and the proportion prosecuted. It should also be possible to extract data on the types of cases taken to court and the types diverted. In addition to providing a source of statistics on the diversion of young offenders from the court, the proposed form should provide a source from which the following information can be compiled:

- in respect of cases which go to court, the proportion dealt with by way of arrest and charge and the proportion dealt with by way of summons;
- the proportion of arrested children who have their fingerprints or photographs taken;
- the proportion of arrested children who are held in custody prior to their first appearance in court; and
- the outcome of cases which go to court.

The new form should therefore become the primary source of statistics with regard to all juvenile offending which is officially recorded in the A.C.T. Too often so-called 'juvenile delinquency' statistics in Australia include only those matters which are taken to court. Such figures, which exclude the large number of cases dealt with informally, are of little value. The proposed form is intended to provide the basis for the first comprehensive A.C.T. statistics on juvenile offending. The

[127] Later in this report it is recommended that care proceedings replace neglect and uncontrollability proceedings: see para.304.
[128] Para.150–157.

creation of a unified system of statistics would be preferable to a system in which the Australian Federal Police compiled one set of statistics and the Childrens Court compiled another. As will be explained below[129], it is recommended that a new official, to be known as the Youth Advocate, be appointed. One of his duties should be to assume responsibility for the preparation of comprehensive statistics on juvenile offending in the A.C.T. The police should be required to forward to him copies of all the special forms relating to cases which have resulted in no further action or the administration of a warning. Similarly, Childrens Court staff should be obliged to forward to him all forms relating to cases in which a child has been prosecuted. The statistics compiled by the Youth Advocate should form part of the annual report of the proposed Childrens Services Council.[130] In addition to ensuring the regular collection of statistical information, provision should also be made for an assessment, five years after the new Child Welfare Ordinance comes into force, of the screening procedures recommended in this report. Attention should be given to:

- the use, by the police, of their power of arrest;
- when a prosecution is initiated, the proportion of children dealt with by way of summons;
- police compliance with the guidelines relating to the exercise of the discretion to prosecute;
- the effectiveness of the new procedures in diverting children from the court;
- the time taken for summons matters to reach the court; and
- the provision of informal assistance to children who have been diverted from the court.

If this analysis indicates that the system is not operating satisfactorily, changes, which would then be firmly based on detailed empirical data, could be considered. It might, for example, be necessary to re-consider the introduction of a screening panel in which the police would share with other agencies the task of deciding whether a matter should be taken to court. The proposed Childrens Services Council should be specifically charged with the responsibility for undertaking such a review.

147. ***Offences against a Law of the Commonwealth*** The special screening procedures established by the Commonwealth Attorney-General's Department in respect of children alleged to have committed offences against a law of the Commonwealth have been described earier in this report.[131] Since these procedures are designed to apply throughout Australia, and the Commission's terms of reference are confined to A.C.T. child welfare law and practice, it is not appropriate for the Commission to make general recommendations regarding the handling of Commonwealth offences allegedly committed by children. It might be thought that, with the amalgamation of the A.C.T. and Commonwealth Police, there is now less justification for the retention of special procedures in respect of Commonwealth offences committed in the Territory. The amalgamation of the two forces has meant that the A.C.T. Division of the Australian Federal Police has assumed responsibility for dealing with all offences committed in the Territory.[132] The view might be taken that it is unnecessary to require the A.C.T. police to refer to the Commonwealth Attorney-General's Department a small number of cases involving alleged offences against a Commonwealth law. However, for the reason given, the Commission does not propose to make a recommendation on this matter. Instead, it is recommended that members of the Commonwealth Attorney-General's Department confer with representatives of the Australian Federal Police on the desirability of retaining special procedures for dealing with Commonwealth offences allegedly committed in the A.C.T. The present situation, whereby screening procedures nominally applicable in the A.C.T. remain in existence but are not observed, is clearly most unsatisfactory. Either the procedures laid down should be consistently followed or they should be abolished in respect of the A.C.T. If it is decided to retain these procedures, attention should be given to reducing the delays which can occur between the alleged commission of an offence against a law of the Commonwealth and the decision to administer a warning or to institute a prosecution.[133] Elsewhere in this report emphasis has been placed on the desirability of dealing quickly with offences by the young.[134]

[129] Para.163.
[130] The role of the Childrens Services Council is outlined below, para.516.
[131] These procedures are described in para.85.
[132] See para.37, n.28.
[133] For examples of these delays, see para.85.
[134] Para.120.

148. ***Juvenile Aid Bureau: Present Functions*** The work of the Juvenile Aid Bureau has been described in detail in Chapter 2.[135] The Instruction under which the Bureau operates is a haphazard list of ill-defined functions.[136] Reference is made to responsibility for investigating shoplifting by young people and for dealing with the possession or sale of obscene literature to children and with offences committed on school property. In addition to assuming responsibility regarding these particular types of offences, the Bureau is required to co-ordinate police inquiries regarding juvenile missing persons, patrol undesirable places where childen congregate, maintain records of juvenile cases and plan and co-ordinate a delinquency prevention program. In practice, the functions undertaken by members of the Bureau are as follows:

- dealing, either by way of a warning and counselling or a prosecution, with children who come to notice for the alleged commission of an offence;
- dealing, either informally or by way of court action, with neglected and uncontrollable children, runaways, and other children in trouble;
- providing advice and assistance to children, parents and other members of the community;
- providing information to other members of the police force regarding children who come to notice;
- patrolling such places as amusement centres and shopping centres; and
- maintaining records of cases which come to the Bureau's notice.

Several comments should be made on the functions performed by the Juvenile Aid Bureau. First, the Bureau does not exercise exclusive responsibility in respect of any category of children in trouble. It deals only with those children who happen to come to its notice. Other members of the force are not required to refer cases to it and only a small proportion of the Bureau's work comes from other police officers.[137] Secondly, the fact that so few of the cases which come to the notice of the Bureau staff are referred by other members of the police indicates that one of its major purposes is to provide a direct and distinctive service to the community rather than to act as a specialist resource to the police. The Bureau is able to deal with cases in an informal, low-key manner and to offer advice and assistance to members of the public. Thirdly, the Bureau may be described as a 'welfare arm' of the police, and this can create role conflicts.[138] Its members must endeavour to combine welfare and law enforcement functions, and this further complicates the task of identifying its role. Before this task is attempted, however, it will be helpful to consider other special police units which have been created to deal with children in trouble.

149. ***Special Police Units*** Although Queensland is the only other Australian jurisdiction in which a Juvenile Aid Bureau is operated[139], special police units for dealing with children are well established overseas. Juvenile liaison schemes and juvenile bureaux have existed for some time in England[140], and the New Zealand Police operate a Youth Aid Section.[141] In the United States many police departments have juvenile bureaux or have appointed juvenile officers.[142] Such arrangements indicate an acceptance of the view that the police should adopt a specialised approach to the problem of dealing with children in trouble. Recent studies in the United States have stressed the value of police

[135] See para.37, 38.
[136] This instruction is reproduced in para.37.
[137] The Commission's analysis of the work of the Juvenile Aid Bureau in 1978 revealed that only 6% of its cases had been referred to it by other members of the police.
[138] Cain, 'Role Conflict among Juvenile Police Liaison Officers', (1968), 8 *Brit J Criminol,* 366. Such role conflicts are not, however, limited to members of the Bureau. As the A.C.T. Police have pointed out, in the area of child welfare generally difficulties arise in differentiating the roles and responsibilities of the police from those performed by welfare personnel. *Submission,* 3.
[139] For a description of the staffing and functions of the Queensland Juvenile Aid Bureau, see Queensland Police Department, *Annual Report* 1979, 25–26.
[140] See Oliver, (1978); Mack, 'Police Juvenile Liaison Schemes', (1963), 3 *Brit J Criminol,* 361; and Taylor, *Study of the Juvenile Liaison Scheme in West Ham 1961–1965,* (1971).
[141] Some details of the work of the Youth Aid Section are provided in the *Report of the New Zealand Police Department for the Year Ended 31 March 1980,* 12–13.
[142] Kobetz, *The Police Role and Juvenile Delinquency,* (1971), Chapter 2.

specialisation with regard to the young.[143] As has been observed in a report of the Juvenile Justice Standards Project:

> [J]uvenile criminality would seem to be deserving of more determined and more methodical attention than it has received in the past. . . . [P]olice departments may no longer hope to somehow muddle through in their dealings with young people. They must assign resources to the task on a planned basis and they must develop and engage special skills for dealing with it.[144]

The Commission agrees that police work with children 'calls for special procedures and involves special considerations'[145] and therefore favours the retention of the A.C.T. Juvenile Aid Bureau. The Bureau has an important role to play in the development of special procedures for dealing with children. It is recommended that its role be clarified and strengthened. It is to the problem of defining the Bureau's functions that attention must now be given.

150. ***Juvenile Aid Bureau: Role in Criminal Cases*** Examination of the role of the Bureau with regard to children who come to notice because of the alleged commission of an offence reveals a paradox. Although the Bureau is a specialist unit, its role with these children is very limited. It does not play a major part in dealing with the Territory's young offenders[146] or in formulating policies regarding juvenile delinquency. It deals only with those criminal cases which are brought to its attention. When consideration is given to the Bureau's future role three possibilities suggest themselves:

- removal of responsibility for criminal matters;
- development of an expanded and formalised role in criminal matters; or
- retention of existing responsibilities regarding young offenders.

It would be impracticable to attempt to deprive the Bureau of all responsibility for dealing with young offenders. By virtue of their work with children in trouble, its members inevitably come into contact with children who have allegedly committed offences. Further, members of the Bureau are in a position to make an important contribution to the continued growth of distinctive procedures for dealing with young offenders. For this reason they should continue to be involved in the handling of criminal cases. An examination of the feasibility of the second possibility, the expansion and formalisation of the Bureau's role in criminal matters, raises a number of complex issues. Such an expansion and formalisation could take one of several forms.

151. ***Exclusive Responsibility in Criminal Matters?*** At first sight it might seem desirable for specialist Bureau members to deal with all cases involving offences allegedly committed by children. However, such a change would also be impracticable[147], for the following reasons.

- *Number of cases.* The total number of young offenders at present dealt with by the police in the A.C.T. is large.[148] Transfer to the Juvenile Aid Bureau of responsibility for dealing with all juvenile crime in the Territory would require a substantial increase in the size of the Bureau. The creation of a special unit responsible for investigating all crimes allegedly committed by children in the A.C.T. would involve a major reorganisation of the police force in the Territory.
- *Transfer cumbersome.* If the Bureau were given exclusive responsibility for dealing with juvenile crime in the A.C.T., a general duties officer or detective investigating a crime would be required to hand a case over to a Bureau member as soon as it became apparent that a child was involved. Such a requirement would be resisted, since investigating officers quite naturally

[143] *Juvenile Justice and Delinquency Prevention,* (1976), 245; and Juvenile Justice Standards Project, *Police Handling of Juvenile Problems,* (1977), 83f.
[144] Juvenile Justice Standards Project, *Police Handling of Juvenile Problems,* (1977), 83–84.
[145] id., 85–86.
[146] The Commission's analysis of cases dealt with by the A.C.T. Childrens Court between 1 June 1978 and 31 May 1979 revealed that members of the Juvenile Aid Bureau initiated only 1.6% of the prosecutions.
[147] A submission prepared by the A.C.T. Police indicates that the force shares this view. Attention was drawn to the need to retain a central police unit, responsible for authorising all prosecutions, whether involving an adult or a child. Reference was also made to the substantial re-deployment of staff which would be necessary if one specialist unit assumed responsibility for dealing with all juveniles. *Submission,* 20.
[148] Although existing statistics are unsatisfactory, since they do not include children dealt with informally, published police statistics for the year ended 30 June 1979 indicate that, of the offenders who came to the notice of the A.C.T. Police, 897 or 33.7% of the total were under 18. See A.C.T. Police, *Annual Report for the Year Ended 30 June 1979,* 32–33.

want to see a case through, once they have begun an investigation. Further, a requirement of the kind outlined would be unworkable, since many matters are, and will continue to be, dealt with on the spot. Any attempt to alter this, by requiring a report to a specialist officer in every case involving a child, would be impracticable. With regard to alleged offences which result in an arrest and the laying of charges, the involvement of the Juvenile Aid Bureau would achieve little, since the case will go to court anyway, and the contribution which a member of the Bureau would be able to make would be limited. It is noteworthy that the United States National Advisory Committee on Criminal Justice Standards and Goals, while emphasising the value of police units consisting of specialist juvenile officers, was very guarded in its definition of the role of such a unit. The relevant parts of the recommendation merely state that such units 'should be assigned responsibility for conducting as many juvenile investigations as possible' and for 'assisting field officers in juvenile cases'.[149] In contrast are the more ambitious proposals put forward by the Juvenile Justice Standards Project. This recommended that specialist officers should be involved with all cases other than those dealt with on the spot. The stated aim was that no extended police dealings with children should occur without participation by juvenile officers. In cases in which it was decided not to initiate a prosecution, the Project recommended that specialist officers should assume responsibility for any subsequent counselling and advice provided by the police. In cases in which it was decided to prosecute a child, juvenile officers should be involved in any further investigation and in the making of the decision.[150] The Project was less clear about procedures for dealing with serious offences. At one point it was suggested that all matters other than those handled on the spot should be transferred to juvenile officers[151], but elsewhere it was indicated that primary responsibility for dealing with serious crimes by juveniles should remain with other members of the force.[152] Nevertheless, the intention appeared to be that juvenile officers should have some involvement with the handling of serious offences. It is interesting to compare these propsals with the instructions under which the Juvenile Aid Bureau in Brisbane operates.[153] Although the instructions under which the Brisbane Bureau operates require that alleged offences by children should be investigated by a member of the Bureau, allowance is made for certain significant exceptions.[154] The Queensland Police General Instructions permit a detective who is not a member of the Bureau to investigate an allegation of murder, rape, arson or other serious crime. More important is the fact that a member of the police force who detects a child committing an offence, or who is taking action in respect of a young offender soon after the commission of an offence, or who, through investigation, gains evidence on the basis of which a child may be prosecuted or warned, is directed to handle the matter himself and to seek assistance from a member of the Bureau only if he considers it necessary.[155] The latter instruction makes it clear that the Brisbane Juvenile Aid Bureau cannot claim to have exclusive responsibility in respect of young offenders. The situation in Queensland has been dealt with at some length as the instructions under which the Juvenile Aid Bureau operates in that State are much more detailed than those of their A.C.T. counterparts. The instructions quoted make it clear that, as in the A.C.T., the Queensland Bureau provides alternative procedures for some young offenders. It does not, and cannot, offer a comprehensive system for dealing with all young offenders who come to notice.

152. ***Responsibility for Summons Matters?*** A second approach to the problem would be to recognise that officers on patrol must be free to deal with minor matters on the spot and that, at the other end of the scale, there is no need to involve members of a specialised unit in dealing with children who have been charged. Cases which do not fall into either of these categories, i.e., cases which have been

149 *Juvenile Justice and Delinquency Prevention*, (1976), 245.
150 Juvenile Justice Standards Project, *Police Handling of Juvenile Problems*, (1977), 90.
151 id., 98.
152 id., 87 (Standard 4.2E).
153 Special police instructions apply to the role of the Juvenile Aid Bureau in Brisbane.
154 Queensland Police General Instruction 4.365.
155 Queensland Police General Instruction 4.368.

brought within the official system and in which a decision must be made between a warning and a prosecution, could be referred to the Juvenile Aid Bureau. Under such a system the Juvenile Aid Bureau would function as a specialist screening agency for the whole of the A.C.T. A model of this kind would be consistent with the emphasis which this report has placed on the diversion of young offenders from the court. By reason of their experience and special knowledge of children, members of the Juvenile Aid Bureau would be well equipped to make the choice between a warning and a prosecution. Further, Bureau staff would be well placed to offer advice regarding the various welfare services available to those who had been diverted from the Childrens Court. Procedures of the kind outlined are in operation in London. Under the Metropolitan Police Juvenile Bureau Scheme a child who has allegedly committed a crime and who is not dealt with on the spot is normally taken to the nearest police station. His parents are sent for and, unless the matter is serious enough to warrant the immediate laying of a charge, the operation of the Juvenile Bureau Scheme is explained to them. If they agree to co-operate they are told that a member of the Juvenile Bureau will visit their home in approximately 10 days. In the meantime the apprehending officer completes the necessary paperwork with regard to the alleged offence and the file is forwarded to the Juvenile Bureau. When the home visit is made, the Bureau member conducts an interview with the parents and child about the alleged offence and obtains information about the child's background. The officer may also contact relevant agencies, such as the social services department of the local authority, the probation service and the education service. The purpose of the home visit and these inquiries is to assist in determining whether a prosecution is necessary or whether a warning would be more appropriate. The Bureau member reports to the officer in charge of the Bureau, who must decide whether no further action will be taken or whether the child will be warned or prosecuted.[156] For the purposes of this report, the most important feature of the procedure described is that the process has two separate phases. The investigation of the offence is carried out by the apprehending officer and his reports are supplemented by background information assembled by a specialist unit. It is this unit which decides whether the case should be taken to court. A variant of the scheme described allows members of the specialist police unit to provide informal supervision to children diverted from the court.[157] The adoption, in the A.C.T., of procedures such as those employed by the London Metropolitan Juvenile Bureau would have a number of advantages. A specialist screening unit would be able to make informed decisions, to pursue a consistent and vigorous policy of diversion, and to offer advice and assistance to children diverted from the court. Nevertheless, it is not recommended that the role of the A.C.T. Juvenile Aid Bureau with regard to offenders be expanded to permit it to fulfil functions in non-arrest cases similar to those performed by the Metropolitan Juvenile Bureau in London. The arguments against such a change are as follows.

- Existing A.C.T. procedures for making the prosecution decision are complex and cumbersome. The creation of new procedures, whereby the investigating officer would be required to hand each case over to the Juvenile Aid Bureau, which would then conduct its own background inquiries, would further complicate the system. Under such a system the Bureau would probably be required to work in conjunction with the Legal Branch, which would no doubt retain responsibility for assessing the strength of the evidence against a child.
- Objection could be made to procedures which required a member of the Bureau to make a home visit some time after the investigation of the allegation had been completed. Such a visit could be seen as intrusive. Also, police officers are not specially trained to conduct background inquiries of this kind.
- A requirement that no decision could be made until the Juvenile Aid Bureau had considered the case would inevitably further delay the outcome.[158]
- Introduction of procedures of the kind discussed would have an undesirable effect on the Juvenile Aid Bureau. If it were responsible for screening all non-arrest cases in the A.C.T., it

156 This description is based on that given by Oliver, (1978), 65–67; and Oliver, 'The Metropolitan Police Juvenile Bureau Scheme', [1973] *Crim LR*, 499.
157 For a description of the type of supervision provided by the police under such a scheme, see Taylor, 20–24.
158 '[T]he delays inherent in the Juvenile Bureau Scheme are arguably its biggest single failing'. Oliver, (1978), 130.

would run the risk of becoming a bureaucratic organisation, much of whose time would be spent in processing files relating to children.

153. ***Responsibility for Certain Types of Offence?*** A third possible solution to the problem of defining the Juvenile Aid Bureau's role with regard to young offenders in the A.C.T. would be to confer on the Bureau responsibility for dealing with specified types of offences. This is the approach adopted in the instruction under which the Bureau at present operates, although it is clear that the Bureau does not exercise exclusive responsibility in respect of the offences mentioned in the instruction. This solution is not accepted. There is no logical reason why the Bureau should assume responsibility for dealing with certain types of offences and not for others. Further, there would be disadvantages in any system which required an investigating officer to terminate his inquiries and hand a matter over to the Bureau simply because the alleged offence fell within a particular category. At first sight it is appropriate for Bureau staff to assume responsibility in respect of offences allegedly committed on school property. However it is not recommended that a rule to this effect should be retained. Although members of the Bureau will often be particularly well suited to dealing with matters which arise in a school, a requirement that only they should deal with such matters would be arbitrary. There will be occasions on which it is more appropriate for a general duties officer to conduct an inquiry in a school. For example, if such an officer is part of a successful neighbourhood policing scheme[159] he might sometimes prove to be a more suitable person to undertake the task.

154. ***The Bureau's Role with Young Offenders*** Although a system in which members of the specialist Juvenile Aid Bureau deal only with those young offenders who happen to come to their notice has some unsatisfactory features, the Bureau's assumption of any other role with regard to criminal cases in the A.C.T. would be impracticable. It is not recommended that the Bureau assume exclusive responsibility for all, or particular categories of, criminal cases involving children. With regard to young offenders the Bureau should fulfil two functions. First, the community relations aspect of its work should be explicitly recognised and members of the public should, as at present, be able to bring cases involving alleged offences by children directly to the notice of Bureau staff. In order to ensure that the Bureau will be able to fulfil this aspect of its role as effectively as possible, it is necessary that much greater publicity be given to the work of the Bureau. Members of the public should be encouraged to regard a direct notification to the Bureau as the appropriate method of bringing an alleged offence by a child to police notice. Secondly, the Bureau should provide a resource on which other members of the police may call. Police training should place particular emphasis on the work of the Bureau and members of the police should be made more aware of the assistance which the Bureau can provide. The figures compiled by the Commission suggest that other members of the police force refer cases to the Bureau infrequently.[160] Information about the reason for this is not available. Members of the police may be insufficiently aware of the role of the Bureau, they may lack confidence in its ability to provide effective assistance (either because they are unsympathetic to its aims and methods or because they believe it to be understaffed), or they may prefer to handle their own cases themselves. Probably all these factors play a part. One specific function which the Bureau should perform with regard to criminal cases handled by other members of the force is the provision of advice and assistance to a child and his family following the administration of a warning. Earlier in this report emphasis was placed on the danger of intrusive intervention and the inappropriateness of using the commission of an offence as a pretext for involving a family with welfare services.[161] Nevertheless, if the commission of an offence brings to notice difficulties which a family is experiencing, appropriate assistance should be offered, provided no undue pressure is brought to bear. The Juvenile Aid Bureau has an important role to perform in making assistance available. When a decision has been made to warn a child following the commission of an offence, the police officer responsible for handling the case should be encouraged to consider the possibility of arranging a home visit by a member of the Bureau. The officer should make such an arrangement only if he considers that the child and his family could benefit from further advice and assistance and the parents are agreeable to such a visit being made. The purpose of the visit by the member of the Bureau would be solely to offer advice and to provide information about appropriate welfare services. Supervision such as that provided under some English Juvenile Liaison Schemes should not be undertaken. The member of the Juvenile Aid Bureau should not maintain continuing involvement with the child and his family. The Commission agrees with the view that members of such units should not act the part of social workers or therapists.[162] Performance of such a function can exacerbate the role conflict to which reference has been made.[163] Although the Juvenile Aid Bureau is the 'welfare arm' of the police, wherever possible it is important to avoid the expenditure of police time on duties which can more appropriately be performed by trained welfare personnel. Further, a study of the effects of an English Juvenile Liaison Scheme suggests that the supervision provided under the scheme did not substantially affect the rate of recidivism.[164]

159 For a description of neighbourhood policing in the A.C.T. see para.38.
160 See para.38.
161 Para.126.

155. ***The Bureau's Role in Non-Criminal Proceedings*** In Chapter 8 it is recommended that neglect and uncontrollability proceedings be abolished and replaced by care proceedings, and that the police should not be responsible for the initiation of care proceedings. It is proposed that a new official, to be known as the Youth Advocate, should be appointed, and that one of his functions be the initiation of care proceedings. These recommendations have significant implications for the future of the Juvenile Aid Bureau, for, in the past, members of the Bureau have played an important role in the handling of neglect and uncontrollability matters. Whereas most prosecutions of children reach the Childrens Court without the involvement of members of the Bureau, statistics compiled by the Commission suggest that the majority of neglect and uncontrollability cases which are taken to court are initiated by Bureau staff.[165] As the 'child welfare arm' of the police force in the A.C.T., it seems that the Juvenile Aid Bureau is viewed by other members of the police and by the community at large as the appropriate agency to assume responsibility for children who are neglected or otherwise in trouble. The recommendation that the police should not be responsible for the initiation of the new care proceedings is not intended to indicate that the police should no longer have any involvement in non-criminal matters. It would be unrealistic to act on the assumption that their involvement in such matters can or should come to an end. By the nature of their work and their round-the-clock availability the police are major 'case finders'. Their duties bring them into contact with neglected and abused children, runaways and other children at risk or in trouble. When a child in need of care comes to the notice of the police it is necessary for them to be able to undertake preliminary inquiries, contact the appropriate welfare or health authorities and, in extreme cases, immediately remove the child from the custody of his parents or guardians. It is recommended that primary responsibility for police work with children in need of care should remain with the Juvenile Aid Bureau. It should be noted that, although work with neglected and uncontrollable children forms an important part of the duties of the Bureau, no mention is made of it in the instruction under which the Bureau at present operates. Any new instructions should make it clear that, in normal circumstances, it is a member of the Juvenile Aid Bureau who should deal with cases involving children in need of care. A member of the Bureau can be expected to have a closer knowledge of the Territory's welfare services than the average member of the police and to be accustomed to working with health and welfare personnel. In the next paragraph it is recommended that members of the Bureau should establish close liaison with health and welfare agencies. In addition, it is important that Bureau staff should work very closely with the proposed Youth Advocate. It is appropriate that police work with children in need of care should be undertaken by a specialist unit which has established links of this kind. However, although the Bureau should have primary responsibility for this work and other members of the force should, where possible, be obliged to refer care cases to the Bureau, it would not be realistic to require that exclusive responsibility for dealing with these cases should be given to Bureau staff. Cases will arise when they are not available and sometimes emergency action will be necessary. Any new instructions should make provision for this possibility.

162 Juvenile Justice Standards Project, *Police Handling of Juvenile Problems,* (1977), 103. The A.C.T. Police share the view expressed by the Commission. 'No matter how appealing it may be for police to be permitted to follow through each warning, time staffing and overall role are inhibiting factors. Long-term follow-up action seems to be the natural province of the numerous and diverse welfare groups in the Territory.' *Submission,* 20.
163 Para.148.
164 Rose and Hamilton.
165 The Commission's analysis of cases dealt with by the A.C.T. Childrens Court between 1 June 1978 and 31 May 1979 revealed that members of the Juvenile Aid Bureau initiated 61.9% of the neglect and uncontrollability matters.

156. ***Other Functions of the Bureau*** In addition to duties with regard to young offenders and non-offenders, the Bureau should perform a number of other functions.

- *A point of contact.* Reference has already been made to the need to publicise the work of the Bureau and to encourage members of the public to regard a notification to the Bureau as the appropriate method of bringing an alleged offence by a child to police notice. The Bureau's public role should not, however, be confined to receipt of information on alleged offences. Together with health and welfare agencies, the Juvenile Aid Bureau should be seen as an agency from which parents and other members of the community may seek advice about children in trouble.
- *Liaison.* The work of the Bureau should provide a means of ensuring that close liaison is maintained between the police and members of the health and welfare agencies concerned with children. In particular, it should be the responsibility of the Bureau to establish close liaison with the proposed Welfare Division. Earlier in this report attention has been drawn to the fact that the relationship between the police and the present Welfare Branch could be closer.[166] Mention has also been made of differences in attitude between police and Welfare Branch staff. These differences do not make for good relations between the two agencies. Difficulties such as these can be overcome only if close liaison is established. One practical step which should be taken as soon as possible is the introduction of regular meetings between representatives of the police and the proposed Welfare Division. Recommendations regarding the establishment of a Childrens Services Council and a Standing Committee of that Council are set out later in this report.[167] It is envisaged that these bodies will fulfil co-ordinating and policy-making roles. It would be appropriate if a member of the Juvenile Aid Bureau were the police representative on each of these bodies. Participation in the work of these bodies would ensure that the Bureau is able to fulfil its function of encouraging better liaison between the police and child welfare agencies. Further, members of the Bureau are well placed to bring to the attention of the appropriate authorities deficiencies in existing services for children and their families.
- *Education.* Members of the Bureau should perform an educational role, both in the community and among other members of the police. As an example of community education, mention can be made of the educational activities undertaken by the Youth Aid Section of the New Zealand Police. Members of the Section regularly visit schools to give talks on the work of the police and also give talks to groups and organisations interested in the problems of youth. In London, Juvenile Bureau officers also undertake duties of this kind.[168] The Juvenile Aid Bureau should assume similar responsibilities in the A.C.T. Members of the Bureau can also fulfil an important role in police training. They can explain the functions of the Bureau and encourage other members of the force to take advantage of the assistance which it offers. Among police there is a widespread view that dealing with children is low status work. Police patrolmen 'assign a low priority to working with troublesome juveniles'.

> Their experience teaches them that the majority of cases in which they are called upon to act are trivial, that most of these cases allow no good solutions, and that even a successful treatment of a case is not considered an accomplishment of note in the hierarchy of police values. The risk of frustration and the absence of credit lead patrolmen to shun assignments involving young people, to get involved as little as possible when they cannot be avoided. Consequently, skill in the handling of juvenile problems is less well developed than skill in other areas of police work ... No points are gained by careful and considerate handling of a juvenile problem, and there is some risk that attention given to it will be judged excessive in relation to problems deemed more important.[169] Members of the Juvenile Aid Bureau should play a part in questioning attitudes such as these and in emphasising the importance of careful handling of cases involving children. Further, the Bureau has a special role to play in implementing a policy of diversion. Through participation in training courses members should encourage the perceptive and consistent application of the criteria governing the decision to prosecute or warn a young offender.

166 Para.75.
167 Para.282–284 and 516.
168 Bureau officers are constantly involved in giving talks, discussions and seminars and showing films on a whole range of subjects which are of concern to youth'. Oliver, (1973), 504.
169 Bittner, 'Policing Juveniles: The Social Context of Common Practice', in Rosenheim, 69, 80.

- *Monitoring.* Members of the Juvenile Aid Bureau should monitor police practices with regard to children and, where they consider it necessary, make suggestions for changes in procedure. It is not, however, appropriate that the Bureau should as at present, be responsible for 'delinquency prevention' or for the formulation of broad policies for dealing with children in trouble. The Bureau has neither the expertise nor the resources to undertake these tasks. Nevertheless, the Bureau should endeavour to analyse trends emerging from cases which come to notice and so identify particular problems with which the child welfare system should seek to deal.
- *Patrol work.* As at present, members of the Bureau should continue to undertake a limited amount of patrol work. Patrols should concentrate on places in which children congregate.

157. ***General Comments on the Bureau*** The Juvenile Aid Bureau has an important role to play in further developing distinctive procedures for dealing with children in trouble in the A.C.T. It is to be hoped that the Australian Federal Police will demonstrate a strong commitment to the concept of this specialist unit. It is desirable that the Bureau and its staff be accorded appropriate status within the force. Attention should be paid to the careful selection and training of members of the Bureau. Also, care should be taken to see that the unit does not become isolated.[170] Greater emphasis should be placed on the Bureau's role as a resource on which all members of the force in the A.C.T. can call. With a unit such as the Juvenile Aid Bureau there is a serious risk that two quite separate sets of procedures for dealing with children in trouble will co-exist. On the one hand there will be the methods employed by the Bureau and, on the other, there will be those used by the rest of the force, the procedure adopted in a given case depending more on chance than on logic. It is not appropriate for the Commission to make recommendations about the size of the Bureau in the A.C.T. It is for the Australian Federal Police to make manpower decisions on the basis of priorities within the force. Further, any decisions on the size of the Bureau have important implications with regard to neighbourhood policing, a matter which is not within the Commission's terms of reference. However, it is recommended that the Australian Federal Police give consideration to the creation of regional Juvenile Aid Bureau offices. At present all members of the unit operate from the centre of Canberra. There might be advantages in having members available at suburban stations.

The Role and Procedures of the Courts

158. ***The Nature of a Special Court for Young Offenders*** Earlier in this chapter it was suggested that procedures for dealing with young offenders should be characterised by an appropriate balance between conflicting philosophies.[171] What are the practical implications of this conclusion with regard to the design of a court for the young law-breaker? Such a court must be able to understand and respond to the special needs of children in trouble while at the same time keeping sight of the offence and of the importance of fair and careful adjudicative and dispositional procedures. In seeking to identify the type of court best suited to perform these tasks in the A.C.T. the Commission considered a number of possible models:

- retention of the existing system under which stipendiary magistrates preside in rotation over the Court of Petty Sessions sitting as the Childrens Court;
- retention of the existing system but with the Childrens Court presided over by a specialist magistrate;
- creation of a separate Childrens Court presided over by a specialist magistrate;
- replacement of the Childrens Court by a panel of persons specially skilled in dealing with children; and
- the transfer of jurisdiction over young offenders and other categories of children in trouble to the Family Court of Australia, so producing a court exercising a wide-ranging jurisdiction over family matters.

The existing system is unsatisfactory since it gives insufficient recognition to the importance of work with children and to the need to bring to bear special skills in dealing with them. It is fallacious to assume that all magistrates are equally well suited to preside in a court dealing with children. Such an assumption reflects a failure to recognise that the court is a distinctive one and that the work

170 Cf. Juvenile Justice Standards Project, *Standards Relating to Police Handling of Juvenile Problems*, (1977), 86.
171 Para.115.

which it does is specially demanding and important. There is a clear need for the development of a more specialised approach to the problems of children in trouble in the A.C.T. The way to achieve this is discussed in greater detail below. Before this topic is considered, however, a choice must be made between two fundamentally different models. On the one hand there is the court – whether it be the existing court presided over by a specialist magistrate, a new court or the Family Court of Australia – and on the other hand there is the radically different model of a special panel. The latter model was advocated in two of the submissions received by the Commission.[172]

159. ***A Panel to Replace the Court?*** The argument for the replacement of the court by a panel is that the latter would bring to bear the skills of persons experienced in dealing with children and their problems. In assessing this argument it is necessary to make a distinction between the adjudication decision and the dispositional decision. Earlier in this chapter emphasis was placed on the importance of fair adjudicative procedures for children.[173] A commitment to these procedures requires that the adjudicative decision continue to be made by a person with legal qualifications rather than by a multi-disciplinary panel. A knowledge of the ingredients of the alleged offence and of possible defences, an awareness of the need for the careful proof of these ingredients by legally admissible evidence, and an appreciation of procedural rules are the province of the lawyer. Much more difficult – and far more controversial – is the question of the skills required for the dispositional decision. It has been argued that at this stage of the process legal skills are irrelevant or insufficient and that the lawyer must give place to treatment experts or at least let them join him on the bench.[174] In its analysis of the principles underlying the retention of distinctive procedures for young offenders the Commission concluded that these procedures should be characterised by a balance between the often conflicting requirements of a criminal justice system and a system designed to take children's special needs into account.[175] This conclusion could be seen as an argument for a multi-disciplinary panel to make the dispositional decision. The skills of the lawyer could be combined on such a panel with the skills of persons expert in dealing with children and knowledgeable about therapeutic techniques. The essential question is whether it is appropriate to combine these skills on the bench in order to achieve the necessary balance between the two perspectives. In the Commission's view it is not. The reasons for this conclusion are as follows.

- *Purposes pursued.* The Commission has expressed its reservations about some of the assumptions underlying the child-saving movement, its doubts about the efficacy of available therapeutic techniques, and its view that the system for dealing with young offenders in the A.C.T. cannot repudiate the proper tasks of the criminal law. Further, it has expressed the opinion that the criminal justice system is not an appropriate vehicle for the pursuit of benevolent policies.[176] All of these arguments cast doubt on the need for a multi-disciplinary panel to make dispositional decisions. In the course of its thorough review of juvenile court procedures, the United States Juvenile Justice Standards Project recommended against the introduction of special panels to make dispositional decisions. After stating that, 'Authority to

[172] The Capital Territory Health Commission recommended a panel consisting of a magistrate, a social worker and a psychologist. *Submission*, 5. The A.C.T. Council of Social Service proposed a panel comprised of 'a magistrate and two other people chosen for their expertise . . . The two other people would be chosen from a list of people experienced in welfare, health, child development and psychology and youth work who are prepared to serve on panels.' Such a panel was recommended only for the purpose of dealing with children in need of care, not with offenders. *Submission*, 4.

[173] Para.116.

[174] For a clear statement of this view, see Kilbrandon Report, Chapter 3. Most of the recommendations contained in this report were enacted in the Social Work (Scotland) Act 1968. Under this Act a three person tribunal (known as a children's hearing) has been set up; this tribunal is responsible for making dispositional decisions regarding children under 16. Under the Scottish system, if there is any dispute as to the allegations against a child the matter must be referred to the Sheriff Court. Similarly, the Capital Territory Health Commission proposed that a panel, consisting of a magistrate, a social worker and a psychologist should assume responsibility for the dispositional decision. It was not intended that this panel should have any involvement in the adjudication decision. *Submission*, 4–5. See also the proposal by Mr. P. Opas. He advocated the abolition of Childrens Courts and their replacement by community panels chaired by persons trained and qualified in social work. *Submission*, 4.

[175] Para.115.

[176] Para.109–117.

determine and impose the appropriate disposition should be vested in the juvenile court judge',[177] the report commented:

> As the juvenile court moves further in the direction of functioning as a court of law, the need increases for persons educated in law and familiar with its processes. With delinquency no longer viewed as some form of human pathology, and the court itself no longer seen as a dispensary employing physicians, this hardly seems the time to resurrect the call for experts.[178]

- *Nature of decision.* Although the selection of the right measures for young offenders requires certain special skills, the dispositional decision remains predominantly a legal one. Those involved in the treatment of the young should not make or share in the making of the decision. When an offence has been admitted or proved, a court or panel may employ nominal measures (such as an admonition), measures which are frankly punitive (such as a fine), or measures which entail sustained intervention (such as supervision or placement in a home). It is with regard to the making of decisions on the last-mentioned types of disposition that non-legal skills might be thought appropriate. The Commission's rejection of this argument is based on the view that the decision made on the bench is not primarily a diagnostic one. The belief that experts (e.g. persons with qualifications in social work, psychiatry or child development) should participate in the dispositional decision rests on the assumption that those making this decision must diagnose a child's problems and prescribe a remedy. In practice they can do neither. Diagnosis cannot be undertaken in the strained and artificial atmosphere of a court or panel. It is a task which must be undertaken elsewhere and the results incorporated into reports. It is a task for an adviser rather than an adjudicator. Nor does a dispositional order resemble a prescription.[179] It is no more than a general framework within which those with 'treatment' expertise may work. Although it may embody specific conditions (e.g. that the child accept counselling), these are authorisations directed towards the therapist rather than sophisticated remedies. Also, the idea of prescribing a remedy suggests that certain needs can usually be accurately identified at the outset. What often happens in practice when a child is placed under supervision or in an institution is that needs and problems emerge gradually as a relationship is built up between the child and the therapist. It is only when the child's problems have emerged that effective treatment can begin. Thus, rather than a prescription of a remedy, a dispositional order is an authorisation for a search for one. Further, children's needs change. An order must be flexible enough to accommodate these changes, a consideration which gives further support to the conception of an order as a framework rather than a fixed, specific prescription. The essential and inescapable characteristic of a dispositional order designed to control or assist a child is that it involves coercive intervention. A clear recognition of the nature of the decisions which must be made at the dispositional stage can best be ensured by entrusting them to a single legally qualified person. These decisions involve the sanctioning of state interference in individuals' lives.
- *An independent arbitrator.* Dispositional orders require the making of decisions as to conflicting interests. The views of parents, the child, the prosecutor, and health and welfare workers may be irreconcilable. It is idle to contend that once the time comes to make the dispositional decision there is no further conflict. To say that this decision is one involving no more than a determination of what is in the best interests of the child (and that all are therefore agreed on the objectives to be pursued) is to over-simplify the problem facing those responsible for making the dispositional order. Other objectives – retribution, condemnation, deterrence and incapacitation – must also be taken into account. Further, an important function of a court for young offenders is to impose restraints, where necessary, on treatment agencies. For this

[177] Juvenile Justice Standards Project, *Standards Relating to Dispositional Procedures*, (1977), 21.

[178] id., 22.

[179] '[I]n more complicated situations the "diagnosis" of a problem is something the social worker and client have to achieve together; it is not a preliminary to "treatment" but a process that may continue over a long period – a process that may . . . actually constitute the "treatment" or help the social worker gives. Frequently, therefore, human problems cannot be "diagnosed" by one unit and passed on to other services for "treatment" '. (Donnison, 'Social Services for the Family,' in Fabian Society, *The Ingleby Report, Three Critical Essays*, (1963), 1, 7.

reason it must stand apart and be truly independent. Our political system rightly places great emphasis on checks and balances. A court is one of these. It is an independent arbitrator and must attempt to reconcile conflicting considerations. It must strike an appropriate balance having regard to:

- the interests of the child (who will no doubt want his liberty);
- the interests of the parent (who may take the child's part or who may wish to be relieved of responsibility for him);
- the claims of the state (which demands punishment and protection from further offending);
- the demands of the treatment agencies (which may wish to intervene in the child's life not because of what he has done but because he has unmet needs); and
- the interests of the general public and of particular victims.

To place spokesmen for the treatment agencies on the bench could threaten this balance by according undue weight to particular considerations.

- *Adverse consequences.* Although the making of the dispositional decision is often extremely difficult, the process involved is an unsophisticated one. If a multi-disciplinary panel were created and if, for example, a psychiatrist and a social worker were to form part of that panel, they would be likely to respond to difficult cases by requiring more information than is normally available to a court. Yet this information would not ultimately make the task any easier. A hard decision (usually whether to remove the child from home or to leave him there) must still be made. Sophisticated information about the child is unlikely to contribute significantly to the making of it. The time taken to obtain this information would cause delay. One result of bringing increased expertise to the bench and of the provision of the additional information which this bench would require could well be indecision. There is also considerable merit in the view that it is inherently undesirable to entrust to treatment experts a power to make decisions affecting liberty. One result of such a transfer of power is that more substantial intervention in children's lives would probably ensue. An expert panel might prove more ready to use the offence as a pretext for wide-ranging inquiries into children's lives and the lives of those around them, and for the imposition of long-term controls. Further, treatment expertise is scarce both in the A.C.T. and elsewhere, and it is probably better to employ it in the provision of services rather than in the performance of quasi-judicial functions.

- *Nature of caseload.* Of the 981 criminal cases which resulted in a finding by the A.C.T. Childrens Court between 1 June 1978 and 31 May 1979, 102 (10.4%) resulted in an admonition, no action or a dismissal, 205 (20.8%) resulted in unsupervised probation or unsupervised release on a recognizance, and 437 (44.5%) in a fine. Although it can be argued that some of these cases could well have been diverted from the court, these figures suggest that a high proportion of the cases handled formally do not warrant a more sophisticated decision-making process than exists at present.[180] Even with more rigorous screening by police, there will probably be a substantial number of cases which must be dealt with formally, but which can appropriately result in simple, clear-cut orders. No doubt there are some who would take the view that a specialist tribunal is still required to deal with the relatively small number of children whose actions necessitate sustained intervention. However, a system which requires two types of tribunal — one for the straightforward cases and another for the more difficult ones — would be unwieldy and involve further delays. The system must be designed with an eye to its suitability for the simple cases as well as for the complex ones.

160. ***The Need for a Specialist Court*** The conclusion that both adjudication and dispositional decisions should continue to be made by a court consisting of a single judicial officer will satisfy the advocates of due process. However it does not meet the requirement that the court be a distinctive one able to respond expertly to the special needs of the young. It is therefore necessary to return to a consideration of the nature of the court for young offenders in the A.C.T. A choice must be made between the retention of the existing Childrens Court, but presided over by a specialist magistrate, the creation of a new Childrens Court, and the transfer of jurisdiction to the Family Court of

[180] Another interpretation of the figures quoted is that they are a reflection of just how limited are the options open to the Childrens Court. However, even if the range of measures were increased these figures suggest that a significant proportion of Childrens Court cases can be dealt with relatively simply.

Australia. In Chapter 8 there is a detailed discussion of the Family Court of Australia and of the possibility of this Court assuming jurisdiction in respect of care proceedings.[181] The conclusion is reached that the nature of the Court, the way that it has developed, and other stated considerations make it an unsuitable forum for care proceedings. The arguments put forward in that chapter apply with even greater force to young offenders. It would not be appropriate to transfer to a superior court, whose primary concern is with matrimonial matters, jurisdiction over criminal proceedings against children. If in the future the Family Court of Australia were to assume a comprehensive jurisdiction over family matters the possibility of allowing that Court to deal with criminal matters could be re-considered. At present the Family Court of Australia does not offer a suitable setting in which to deal with young offenders. If the transfer of a criminal jurisdiction to the Family Court should be rejected, so also should the creation of an entirely separate and special court to deal with young offenders in the A.C.T. The creation of an entirely new court would require special administrative arrangements and the enactment of legislation governing the court's procedure. Clearly it would be far more efficient for the Childrens Court to remain a Court of Petty Sessions. The basic procedure for this court is laid down by the Court of Petty Sessions Ordinance 1930 (A.C.T.) and its administrative structure is well established. Nothing which the Commission has learned during its inquiries suggests that the court for young offenders in the A.C.T. should not continue to be a Court of Petty Sessions. The court should continue to be called the Childrens Court, and should consist of a single, legally qualified magistrate. However, two changes are needed if the necessary balance between a concern for due process and the preservation and further development of special procedures for the young is to be achieved. First, the court should be presided over by a specialist magistrate. Secondly, he should have better access to information which will assist him in the making of dispositional decisions. Before examining these changes, however, it is necessary to identify the tasks for which specialised skills are needed. In addition to pursuing the traditional objectives of the criminal justice system, a specialised court for young offenders should endeavour to achieve a number of special objectives:

- *To encourage participation.* Earlier it was stated that one of the characteristics which should distinguish a court for children from one for adults is proceedings which are specially adapted to children's understanding and in which the young can feel that they have an opportunity to participate. This is important if children are to feel that they have been treated fairly. They may be resentful if they believe that they have had no real chance to express their views. It is likely that many children at present dealt with by the Childrens Court feel that they are entering an alien, intimidating and incomprehensible world. They become part of a process over which they feel they have little control. Perhaps these feelings can never be entirely removed. However, an effort must be made to introduce much greater understanding and participation by children and their parents. The appointment of a specialist magistrate, who will be sensitive to the problem and imaginative enough to seek solutions, offers the best prospect for change. A magistrate who divides his time between the Childrens Court and a court for adults can, without realising he is doing so, bring with him to the Childrens Court attitudes and practices which are more appropriate to a court for adult offenders. Parents, too, must be encouraged to participate. One A.C.T. Childrens Court magistrate observed during the Commission's inquiry did not acknowledge the parents' presence in some cases. It is most important that, where possible, the court should take advantage of parents' attendance to involve them in the proceedings.
- *The better identification of cases in which background reports are required.* The magistrates who at present preside in the A.C.T. Childrens Court have no special training to assist them in deciding when reports on the child's background and personality are needed. Sometimes reports are ordered and sometimes they are not. A specialist magistrate would be likely to display a greater appreciation of situations in which reports are required and, equally important, those in which reports are not required. He would also be more likely to bring greater consistency to the court's use of reports.
- *The interpretation of background reports.* Having received reports, it is important for the magistrate to be skilled in interpreting and assessing them. In particular, it is necessary for him

[181] Para.307f.

to be able to look critically at the information which the reports contain and at any recommendations made. The magistrate must be able to enter into a discussion with a report writer and to probe and question him.

- *The making of informed dispositional decisions.* The development of a specialised court demands a magistrate with a close and detailed knowledge of the needs of children and of the facilities and services on which the court may call. At the dispositional stage the aim should be to combine a respect for legal protections with a desire to meet children's needs. The magistrate must accordingly not only be a lawyer but must also possess specialised knowledge which will allow him to take a fully informed part in the dispositional decision. Orders which are so general that virtually all the control resides with those who administer them are not desirable. But if the court is to have more control, if its orders are going to be more specific than they have been in the past, it is necessary that the magistrate who presides should have a specialist knowledge of the measures available to the court. A good understanding of the welfare system will also be needed if, as the Commission recommends[182], the court is to assume responsibility for monitoring the implementation of the orders which it makes.

161. ***The Childrens Court*** The Commission recommends that the Childrens Court be presided over by a specially designated magistrate. He should be a member of the Court of Petty Sessions, but specifically appointed to hold office as the magistrate in the Childrens Court. Initially he should hold office for five years. At the end of this period he should be eligible for re-appointment. If not re-appointed to the Childrens Court he should be able to take his place on the bench of the Court of Petty Sessions and a new specialist magistrate should be appointed to the Childrens Court. The type of special qualifications which the magistrate should possess are:

- an interest in, and enthusiasm for, work in the Childrens Court;
- experience of practice in Childrens Courts and Courts of Petty Sessions or Magistrates' Courts;
- an aptitude for work with children and experience in dealing with them; and
- some training in the behavioural sciences (e.g. psychology or sociology).

Possession of all of these qualities should not be a pre-requisite to appointment. The list is intended as a guide to the thinking of the Commission, and the new legislation should contain a provision (similar to s.22(2)(b) of the Family Law Act 1975 (Cwth)) which gives a general indication of the qualities which the Family Court Judges should have.[183] Since the appointment should be to the Court of Petty Sessions, the special qualifications should be in addition to those required of a magistrate in the A.C.T. (i.e., a legal qualification together with five years in practice).[184] It is not possible for the Commission to assess whether all the tasks which the specialist magistrate should perform would occupy him full time. If they do not, the magistrate designated to serve in the Childrens Court should be available to sit in the Court of Petty Sessions when his other duties permit, to relieve other members of that court. However, it is envisaged that work in the Childrens Court, together with associated duties discussed below, will absorb most of the time of the Childrens Court magistrate. As provision must be made for the magistrate's absence (for example, on holiday or because of illness), all other magistrates of the A.C.T. Court of Petty Sessions should be empowered to sit in the Childrens Court. However, the legislation should make it clear that other magistrates should preside only when the specially designated magistrate is unavailable. Some opposition can be anticipated to the recommendation that a specially designated magistrate preside in the Childrens Court. However, the Commission is not impressed by the argument that the nature of the work in the present Childrens Court is such that no magistrate could cope with it full time.

---

182 Para.200.

183 Section 22(2)(b) of the Family Law Act 1975 (Cwlth) provides that a person shall not be appointed as a Judge of the Family Court of Australia unless he has prescribed legal experience and 'by reason of training, experience and personality, he is a suitable person to deal with matters of family law'. Cf. the recommendation by the Childhood Services Council that those involved in dealing with children in trouble should have training in child development. *Submission,* 1. The Catholic Welfare Advisory Committee of the Archdiocese of Canberra and Goulburn also recommended that the Childrens Court be constituted of a magistrate with a special interest in and specially trained for the work. *Submission,* 19.

184 See discussion in para.39.

Varying degrees of specialisation are well established in N.S.W.[185], Victoria[186], Queensland[187] and South Australia.[188] The N.S.W. Green Paper recommended that legislative provision be made for specific appointments to a Childrens Court of N.S.W. The Green Paper supported

> the goal of having all juveniles who have to be dealt with by a court, dealt with by a person who sits full time and exclusively in the juvenile jurisdiction.[189]

The Special Magistrates presiding in the N.S.W. Childrens Courts stated that they agreed with this aim.[190] The selection of a specialist magistrate is imperative if proper recognition is to be given to the importance of the work entrusted to the court. Only by emphasising the significance of the court will it be possible to counteract the unfortunate impression, held by some, that a court for children is a lowly and uncongenial tribunal. In recommending that a specialist magistrate preside, the Commission envisages that the person appointed would take a close and active interest in the development and operation of the court. He would have to work closely with the proposed Youth Advocate, would, after a finding of guilt, discuss individual cases with him, and would co-operate with him in the analysis and interpretation of court statistics and trends. Further, part of the role of the Childrens Court magistrate would be to make himself familiar with A.C.T. welfare services, to maintain regular contacts with them, to make frequent visits to institutions (both in the A.C.T. and N.S.W.), to attend seminars on juvenile offending and related problems, and to keep abreast of the most important developments in the relevant literature. The magistrate performing these tasks should find the role a challenging one and should be in a position to make a valuable contribution to the creation of a distinctive court for young offenders. One objection raised to the Commission's proposal was that the specialist magistrate might, after a time, seek to resign his post while retaining his appointment as a magistrate in the Court of Petty Sessions. Although this possibility exists, it can be expected that care in the selection of the specialist magistrate, and the reaching of a clear understanding of what is expected of him, would render this development unlikely.

162. The Commission is aware of the desire of at least some of the current A.C.T. magistrates to have a variety of work (including some in the Childrens Court). Furthermore the premises of the new Childrens Court in Canberra, opened in March 1981, provide accommodation for magistrates which is superior to that in the Court of Petty Sessions. The Commission neither ignores nor underestimates the importance of these considerations as practical impediments to the appointment of a specialist Childrens Magistrate permanently based in the new Childrens Court building. The possible need to appoint a new magistrate to fill the specialist appointment is also weighed. It is realised that in times of financial restraint this may not be a welcome option. Many institutional considerations are likely to favour inertia in relation to this recommendation. However, the Commission regards the appointment of a specialist magistrate as most important to the success of new child welfare laws in the A.C.T. Providing a new building – though timely – is ultimately less important than providing an appropriately qualified and specially interested judicial officer. Such an appointment is necessary for the further development of expertise, uniformity of treatment and the discharge of a number of extra curial functions which have been described above.

---

185 In the Childrens Courts of Sydney Newcastle and Wollongong Special Magistrates preside full-time.

186 In the Melbourne metropolitan area, some stipendiary magistrates are administratively appointed to the Childrens Court for a set term (generally for five years). Magistrates so appointed spend the bulk of their time presiding in the Childrens Court, but also spend a limited period each month presiding in the Melbourne Magistrates' Court.

187 In Brisbane there is a Childrens Court Magistrate who devotes his time exclusively to Childrens Court matters.

188 In South Australia Judges appointed under the Local and District Criminal Courts Act 1926 (S.A.) and special magistrates are specifically designated to preside in the Childrens Court. See Children's Protection and Young Offenders Act 1979 (S.A.), s.8(1). The Judges and magistrates so appointed do not find the task an unduly onerous or disagreeable one.

189 *Green Paper,* 43. See also the recommendation, in a Victorian report, that Childrens Court magistrates should undergo a special course of training, have a special interest in the welfare of children, and be familiar with available welfare services. Victoria, *Report from the Statute Law Revision Committee upon the Law Relating to Children's Courts* (1973), para.6.

190 See the submission on the Green Paper prepared by Mr R.D. Blackmore, Senior Special Magistrate in N.S.W. This submission expressed the collective view of the full-time Special Magistrates.

163. ***A New Official: The Youth Advocate*** The appointment of a specialist magistrate to the Childrens Court would reflect a recognition of the distinctiveness of that court and of its need to combine a concern for legal safeguards with a special understanding of children. In addition, however, it is desirable for the court to have the benefit of non-legal expertise when the time comes to make the dispositional decision.[191] For this and other purposes[192] a new office should be created, the holder of which would have an important role in assisting the court to fulfil its dual functions. This person should be known as the Youth Advocate. The Youth Advocate should have appropriate qualifications, for example in social work or behavioural science. He should be appointed for a set term and could perhaps be drawn from the ranks of the Family Court Counsellors (as this would give him a wider career structure than that offered by the Childrens Court). The office of the Youth Advocate and recommendations for his staff are dealt with later in this report.[193] The Youth Advocate would have a role to play with regard to non-offenders as well as offenders, and his principal duties should be legislatively prescribed. When assisting the Childrens Court in its dealings with offenders the Youth Advocate's functions should be as follows:

- *Assistance regarding background information.* Once the allegations have been admitted or proved the magistrate must consider whether he wants information about the child's personality and background. The subject of social inquiry and psychiatric reports is dealt with below.[194] When the court has decided that a report should be prepared on a child, it should be the Youth Advocate's function to make the necessary arrangements and to see that the reports are submitted before the next hearing. He should not, however, be limited to these tasks. He might suggest to the court that a social inquiry or background report is desirable. He might conclude that further reports on the child would be valuable. For example, he might feel that a report by a teacher or clergyman would assist the court. If the child and his parents consent, the Youth Advocate should be able to approach such a person and request a written report or should be able to invite him to attend the dispositional hearing to present an oral report. If the child has been remanded to a shelter or to the care of a voluntary agency, this would provide an obvious situation in which the Youth Advocate could arrange for the court to receive additional information. With the child's consent he could invite a member of the staff of the shelter or a houseparent from the voluntary agency to present a report to the court. It would be the Youth Advocate's task to tap these and other sources, and so make available to the court information likely to assist it in reaching a fully informed decision as to disposition. The new Ordinance should give explicit recognition to the Youth Advocate's role at the dispositional stage by conferring on him a right to call witnesses and to address the court. It should be noted that the Youth Advocate should not write background reports, but should obtain them from other agencies. It is not intended that the Youth Advocate should usurp the role at present performed by the Welfare Branch of the Department of the Capital Territory or by the Capital Territory Health Commission. The difference between the role envisaged for the Youth Advocate and that performed by the welfare worker who prepares a social inquiry report must also be emphasised. The welfare worker is clearly the servant of the court. The Youth Advocate should have a much higher status. With regard to the magistrate he should occupy a position similar to that occupied by a Family Court Counsellor in the Family Court. The Youth Advocate should be seen to be a professionally qualified adviser.
- *Assistance at the dispositional stage.* If the magistrate does not request a report or if he accepts its recommendation, the Youth Advocate may not need to make a contribution. However, the magistrate may be dissatisfied with the report or with the recommendation. For example, the report may recommend a committal to a N.S.W. institution. The magistrate might be reluctant to commit the child. He might therefore call upon the Youth Advocate (who should be present in court) to make inquiries about the existence of a suitable alternative placement.

191 The appointment of a person with social work skills to assist the court was suggested by the Catholic Welfare Advisory Committee of the Archdiocese of Canberra and Goulburn, *Submission,* 14–15, 22. It was suggested that such an official might play a role similar to that played by a Family Court Counsellor.

192 Further arguments relating to the need for the Youth Advocate, who would also perform important functions with regard to children in need of care, are set out in para.313f.

193 Para.320.

194 Para.169.

Alternatively, if the Childrens Court magistrate has not finally determined the order to be made, he might, in court, ask the Youth Advocate for his comments on a proposed disposition. Another function which the Youth Advocate should perform in appropriate cases is the specification of the details of an order. For example, the magistrate might wish to make a specific residential placement, but might not have a recommendation before him. In such a situation he could ask the Youth Advocate to suggest a suitable placement. The matter could then come back to court for the magistrate's approval of the placement proposed by the Youth Advocate. Similarly, there will be cases in which the exact conditions of a probation order can best be settled in private. The Youth Advocate could undertake this task in consultation with the child, his parents and the supervisor named in the probation order. He should then bring the matter back to court so that all the conditions proposed or agreed on may be incorporated into the magistrate's order. In all cases it should be the Youth Advocate's responsibility to ensure that those who are to take charge of a child have formulated an adequate plan for his supervision or placement. In such a situation he would mediate between the court and the treatment agencies.

- *Monitoring court orders.* A major deficiency in the present system is the complete absence of any procedure whereby orders involving children's supervision or their removal from home are monitored on the court's behalf and information about the children's progress supplied to the court. Orders of this kind are such that a substantial amount of discretion is vested in those who administer them, and the court is not advised how this discretion is exercised.[195] For the welfare worker flexibility in dispositional orders is essential if he is to be able to respond to the particular needs of children for whom he is responsible. Yet, as has been indicated, the system should not only reflect the views of welfare personnel but should also respect the lawyer's demand for accountability and court control. The Youth Advocate should have the primary responsibility for overseeing, on the court's behalf, the implementation of dispositional orders. In doing so he should protect both the child's interests and the wider interests reflected in the court's orders. If an order directs that a child be given assistance and support, it should be the Youth Advocate's task to determine whether the necessary help is being provided. If an order envisages the maintenance of a certain level of control, he should check to see whether it is sustained. His role should be to make the welfare agencies accountable to the court for the provision of the services which a court order postulates, and to endeavour to ensure that the court's expectations are realised. The manner in which he should perform this role is described below.[196]
- *The preparation of statistics.* As has been pointed out in Chapter 1, there are no adequate statistics on the operation of the A.C.T. Childrens Court. In that chapter recommendations are made as to the type of statistics which should be compiled and published by the proposed Childrens Services Council.[197] The Youth Advocate should assist the Council by preparing statistics on criminal cases dealt with informally by the police[198] and on cases dealt with by the Childrens Court.

In addition to the formal tasks listed above, the Youth Advocate would be in a position to make a further contribution to the operation of the Childrens Court. It would be expected that the magistrate would work closely with him and would discuss general problems with him. On occasions he would no doubt discuss individual cases after a finding of guilt has been made. Although the magistrate would be expected to make himself familiar with the operation of the welfare services, the Youth Advocate's knowledge would be more extensive and he would be in a position to contribute a special sensitivity to welfare issues, an understanding of behavioural problems, and an awareness of community and institutional resources. He should work closely with, and acquire a detailed knowledge of, welfare services in the A.C.T. As a result he would be able to offer general advice to the magistrate as required. For example, he might learn that a particular agency is encountering difficulties because of the inexperience of its staff and therefore advise the magistrate temporarily to avoid making placements with that agency.

195 For a fuller discussion of this matter, and of the form of dispositional orders, see para.197–200.

196 Para.242f.

197 Para.16.

198 See para.146.

164. ***Comprehensible Procedures*** The importance of comprehensible procedures in which the young and their parents can have an opportunity to participate has been stressed. The role of the specialist magistrate in developing appropriate procedures has also been emphasised.[199] The Childrens Court magistrate should be willing to be innovative. An effort should be made to introduce informality when this is appropriate. One practice which the Commission favours is the holding of some hearings in chambers.[200] This would be justified in some cases (e.g. those involving young children or those who, in court, prove too inhibited to speak out). Some cases lend themselves to a round-table discussion in chambers or at the bar table in the courtroom. However, it is not proposed that all criminal proceedings involving children should be conducted informally. Often formal procedures are required if legal safeguards are to be provided. In many cases, perhaps the majority, it will be appropriate for the proceedings to be relatively formal and for the tribunal manifestly to be a court. In the case of a serious charge against a 17-year-old youth, for example, it might be desirable for the procedure to be virtually indistinguishable from that employed for adult defendants. Further, a certain degree of formality may be useful in many cases to emphasise the seriousness of the court's business. However, what should be avoided is a system so lacking in flexibility that it is invariably assumed that formal courtroom procedures provide the only possible framework for a hearing. Nevertheless, it must be conceded that the modification of the procedures is not always easy. The design of courtrooms tends to impose formality on proceedings. The new Canberra Childrens Court is no exception. It has an elevated bench, a distant bar table and a dark carpet which tends to emphasise the atmosphere of formality. In order to make the proceedings as comprehensible as possible the new legislation should impose on the magistrate a duty to explain, in simple language, the nature of the charge and the effect of any order made by the court.[201] Other innovations which should be seriously considered are the holding of some hearings in the evenings and at weekends and the introduction, where practicable, of an appointment system which would obviate the inconvenience caused to witnesses as well as parties by all cases being set down at the same time. This practice requires some defendants and their parents to wait for lengthy periods in the precincts of the court.

165. ***Attendance of Parents*** The presence of a parent is dealt with in s.54 of the present Ordinance, and there is no need for substantial amendment. One parent should be required to attend the hearing unless the court considers that this would be unreasonable, and the new legislation should make this clear. It should be open to the court to require the presence of both parents if the special circumstances of the case make this desirable. When the parents are separated, the law should, as at present, require the presence of the parent who has the actual custody of the child. One amendment is, however, needed to the existing law. Section 54(7) states that the attendance of a parent shall not be required where the child has, before the institution of the proceedings, been removed from 'the custody or charge' of that parent by court order. In view of the Commission's belief that, wherever possible, parents should be encouraged to maintain responsibility for their children, it is recommended that attendance of a parent should be automatically dispensed with only if the parent has been deprived of the guardianship of the child. There is no reason, for example, why the parents of a child resident in a home run by the Richmond Fellowship should not be required to attend a court hearing, provided they are still the child's legal guardians.

166. ***An Open or Closed Court?*** Under the present Child Welfare Ordinance the Childrens Court is not open to the public, and persons not directly interested in a matter before it must be excluded during the hearing, unless the court otherwise directs.[202] There is no general prohibition on the publication of details of proceedings in the Childrens Court.[203] However, access to information

199 Para.160.

200 The difficulty of creating informal proceedings in which children feel they can participate should not, however, be underestimated. In one case observed by a member of the Commission the presiding magistrate took the boy and his father into his chambers. Subsequent discussion with the boy revealed that he felt that it was only his father's views to which the magistrate had paid attention.

201 Cf. r. 16(1) of the Magistrates' Courts (Children and Young Persons) Rules 1970 (U.K.). The need for the A.C.T. Childrens Court to take all possible steps to ensure that the child and his parents understand the proceedings was stressed by the Department of the Capital Territory. *Submission,* 57.

202 Child Welfare Ordinance 1957 (A.C.T.), s.14(1)

203 But see discussion para.40.

about cases is effectively limited by closure of the court. The practice of operating special courts for children as closed courts is well established. Throughout Australia, Childrens Courts are normally closed to the public.[204] Similarly, the Children and Young Persons Courts in New Zealand are closed[205], as are the juvenile courts in England[206] and in most States of the United States.[207] This policy reflects a desire to protect children's privacy and to deal with young offenders in a setting which is more informal and less intimidating than the criminal courts for adults. The use of a closed court is also designed to reduce the stigma which results from a prosecution and finding of guilt. In Australia the use of closed courts has recently attracted attention. In Western Australia a provision preventing the publication of details relating to young offenders dealt with in the higher courts was criticised[208], and the law was subsequently amended to remove a prohibition on the reporting of proceedings against juveniles in the higher courts.[209] In Queensland a provision dealing with the publication of details of proceedings concerning children[210] has been questioned by the Court of Criminal Appeal.[211] A former Judge of the South Australian Juvenile Court has urged press access to courts for children.[212] Concern about proceedings being heard in closed courts has not been restricted to courts for children. By virtue of s.97(1) of the Family Law Act 1975 (Cwlth) proceedings in the Family Court must be heard in closed court. Both the Family Law Council[213] and the Joint Select Committee on the Family Law Act[214] have recommended the repeal of this provision, and the Commonwealth Attorney-General has announced the government's intention to change the provisions of s.97(1).[215] The doubts which have been expressed by these organisations and individuals reflect a distrust of the conduct of court proceedings behind closed doors.

> Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial . . . The security of securities is publicity.[216]

Two separate but closely related questions are raised by any proposal to open court proceedings. First, is it desirable that the Childrens Court be open to the public, so that any person may observe the proceedings? Secondly, if it is thought that the court should not be open to members of the public, should representatives of the media have access, so that they can provide the public with general information about the operation of the court? It is not recommended that the Childrens Court should be opened to the public. Such a change would remove one of the court's most distinctive characteristics. A major reason for retaining a special court for children is to allow them to be dealt with in private, in surroundings which are less intimidating than those in which the trials of adults take place, and which facilitate the participation of child and parents in the proceedings. Further, there is a particular reason for continuing to close the Childrens Court in the A.C.T. to the public. The Territory is a small community and the number of cases dealt with by the Childrens Court is not large. If the public were allowed free access to the court, there would inevitably be gossip about cases, and details of children and their families would quickly become known to a large number of people. The resulting stigma could impede the rehabilitation of a child. The new Child Welfare Ordinance should therefore state that the Childrens Court is not open to the public, and that

204 See, for example, Childrens Court Act 1973 (Vic.), s.18(1); Children's Services Act 1965 (Qld), s.27; Children's Protection and Young Offenders Act 1979 (S.A.), s.92(1); and Child Welfare Act 1947 (W.A.), s.23(1). It should be noted that the Western Australian provision merely empowers the court to exclude members of the public.

205 Children and Young Persons Act 1974 (N.Z.), s.23.

206 Children and Young Persons Act 1933 (U.K.), s.47(2).

207 Levin and Sarri, *Juvenile Delinquency: A Study of Juvenile Codes in the U.S.,* (1974), 49.

208 *The West Australian,* 28 July 1979.

209 Child Welfare Amendment Act 1979 (W.A.), s.4.

210 Children's Services Act 1965 (Qld), s.138.

211 Unreported decision, 2 February 1979. See also Anderson, 'Children in Queensland Courts', (1979) *ACPC Forum,* 2(4), 9.

212 Judge A. Wilson reported, *Sydney Morning Herald,* 7 June 1976.

213 Family Law Council, *Annual Report 1979–80,* para.226. Note also the general discussion of privacy and publicity, para.218–230.

214 Report of the Joint Select Committee on the Family Law Act, *Family Law in Australia,* Vol 1, (1980), recommendation 59. Note also the extended discussion of open and closed courts, 157–163.

215 *Press Release,* 11 December 1980.

216 *Scott* v. *Scott* [1913] AC 417, 477–478.

only those persons directly interested in the proceedings should be permitted to be present.[217] Provision should, however, be made for the attendance, at the discretion of the presiding magistrate, of persons with a legitimate interest in learning about the operation of the court. For example, trainee social workers and those undertaking research on the Childrens Court should be able to seek permission to attend. Consideration must now be given to the related issue of the attendance of representatives of the media. If they are permitted to be present, there is an opportunity for the work of the court to be scrutinised and for the general public to obtain general information regarding the court and its methods. The community has a legitimate interest in learning how matters affecting children are dealt with. Further,

> [W]e cannot expect the public to become educated and concerned about the rights and needs of children if a main forum for decisions about children is closed to the public.[218]

167. ***Reporting of Proceedings*** The need to allow public scrutiny of the Childrens Court should be balanced against the need to protect the privacy of the child and his family. This can best be achieved be enacting that, though the general public should be excluded from the Childrens Court, representatives of the media should be entitled to be present and to report the proceedings, provided no details which could identify the child or his family are disclosed. Similar recommendations have been made in a number of reports[219], and provisions of the kind proposed have been enacted in South Australia[220] and Ontario.[221] It must be emphasised that the Commission's recommendation is that representatives of the media should have a right to be present in the Childrens Court. It should not be necessary for them to obtain the magistrate's permission before attending a hearing. The Commission considered the possibility that an upper limit might be placed on the number of media representatives who could be present. Such a requirement would be artificial and difficult to apply. However, a court should have a general power to limit the number of persons present whenever it considers that it is in the child's interests or the interests of justice to do so. With regard to the reporting of proceedings, it is the Commission's view that the prohibition on the reporting of identifying details should be complete. This is not the view taken by the Department of the Capital Territory. The Department recommended that the prohibition on publication of identifying details should apply only to 'first offenders who have committed minor offences'. The Department proposed that it should be possible, at the magistrate's discretion, to publish identifying details relating to young offenders in other categories.[222] Provisions such as these would be difficult to draft and apply. It would be necessary for the new Ordinance to define the 'minor offences' in respect of which reporting would be prohibited. Enactment of the proposed provisions would also require the magistrate, in every case other than one involving a minor first offender, to make a decision on the publication of identifying details. Publication of these details could, in effect, become an additional penalty available to the Childrens Court. The Commission believes that adoption of the Department's proposals would introduce unnecessary complexities into the law. The Commission does, however, agree with the Department's submission that restraints on media reporting:

> should not prevent publication of reports in publications of bona fide technical character intended for circulation among members of the legal, medical, teaching, psychological or social work profession.[223]

There is no need for specific legislative provisions relating to publications of this kind. Technical publications, like media reports, should not include identifying details.

168. ***Proceedings in the Supreme Court*** As has been noted, the holding of proceedings in a closed court is a well established feature of Childrens Courts both in Australia and overseas. With regard to proceedings in the higher courts, however, a tradition of openness is long established. Mr Justice

---

217 This provision should be strictly enforced. It should not, for example, be permissible for police officers or welfare workers who are waiting to give evidence in another case to be present in court while an earlier matter is heard. Nor should a solicitor waiting to appear in a later case be permitted to be present.

218 *Admittance Restricted,* 91.

219 *Green Paper,* 50; *Mohr Report,* 78–84; Commission of Inquiry into Poverty, 305; and *Young Persons in Conflict with the Law,* 60. See also Mr R.D. Blackmore, S.M., *Submission,* 7.

220 Children's Protection and Young Offenders Act 1979 (S.A.), s.92 and 93. But note s.93(5).

221 Child Welfare Act 1978 (Ontario), s.57.

222 Department of the Capital Territory, *Submission,* 56.

223 ibid.

Gibbs has emphasised the importance of the rule, enunciated in *Scott* v. *Scott,* that the proceedings of the Supreme Court should be conducted 'publicly and in open view'.[224]

> This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected. Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts. The fact that courts of law are held openly and not in secret is an essential aspect of their character.[225]

The problem to be considered is whether this rule should prevail over the principle that proceedings involving children should be held in private. Proceedings which have been initiated in the Childrens Court may subsequently be heard in a higher court if the child is committed for trial or sentence or if an appeal is lodged. Should such proceedings be heard in open court? The arguments are finely balanced. To require proceedings to be conducted in private in the Childrens Court, while at the same time allowing Supreme Court proceedings involving children to be held in open court, would produce some inconsistency. Further, if the Supreme Court were to conduct proceedings regarding an indictable offence in open court, this might discourage a child from electing trial by jury in circumstances in which he would otherwise do so. A similar comment can be made regarding the hearing of appeals. If the protections offered in the Childrens Court were not available in the court hearing appeals, this might act as an unwarranted disincentive to the lodging of an appeal. A child who exercises his right of appeal should not be penalised for doing so. Nevertheless, in the Commission's view, the tradition of openness in the higher courts is well established and should prevail. However, this does not mean that children who appear before the Supreme Court should automatically be deprived of the protections to which they are entitled in the Childrens Court. When dealing with a child, the Supreme Court should be empowered to close the court to the general public and hence should be able to exclude all persons other than representatives of the media and persons with a direct interest in the case. The Supreme Court should also be empowered to make an order prohibiting the publication of the child's name or of any details likely to identify the child. A general power to prohibit the publication of a party's name is conferred on the Supreme Court by s.83 of the Evidence Ordinance 1971 (A.C.T.), but this power is expressed as being exercisable in the interests of the administration of justice. The Supreme Court's power to prohibit the publication of the name of a child appearing before it should be exercisable if this course is in the best interests of the child.

169. ***Social Inquiry and Psychiatric Reports.***[226] The new Child Welfare Ordinance should make clear the court's power to order a social inquiry report and a psychiatric report. The court should be permitted to order a report only after the offence with which the child is charged has been admitted or proved. The intrusion into the privacy of a child, and often of his family, which the preparation of a report involves should be authorised only after society's right to take action against the child has been established to the satisfaction of the court. Dispositional information should be collected in a regulated manner.[227] First, a clear decision should be made about the persons and agencies who should be placed under an obligation to furnish reports. This obligation should be imposed only on governmental agencies and the new Ordinance should place a duty on the Director of Welfare and on the Capital Territory Health Commission to prepare reports when ordered to do so. The court should also be able to obtain reports from other agencies and individuals, such as staff of the Marymead Children's Centre or of a home run by the Richmond Fellowship. The court should be permitted to do no more than request reports from sources of this kind. Secondly, an effort should be made to identify the type of inquiries which a member of the Welfare Division or the Capital Territory Health Commission should be entitled to undertake when ordered to provide a report. The new Ordinance should indicate that an order for a social inquiry report is an authorisation for:

---

224 [1913] AC 417, 441.

225 *Russell* v. *Russell* and *Farrelly* v. *Farrelly* (1976) 50 ALJR 594, 604.

226 For a general discussion of social inquiry reports, see Daunton–Fear, 'Social Inquiry Reports: Comprehensive and Reliable?' (1975) 15 *Brit J Criminol,* 128; and Perry, *Information for the Court,* A New Look at Social Inquiry Reports, (1974).

227 *Juvenile Justice and Delinquency Prevention,* 443. Mention must also be made of the use of hearsay information in reports. The Commission is aware of the problem and a general examination of the hearsay rule will be undertaken in the course of the evidence reference.

- interviews with the child and his parents;
- home visits;
- interviews with school personnel; and
- interviews with doctors, psychologists, health workers and representatives of other agencies which have dealt with the child.

An order for a psychiatric report should be regarded as an authorisation for:

- interviews with the child and his parents;
- psychiatric, psychological or physical assessments of the child; and
- interviews with doctors, psychologists and other health workers.

A third method of regulating the collection of dispositional information would be to formulate legislative guidelines which would indicate when a report should be ordered. A striking example of such a provision is to be found in New Zealand's Children and Young Persons Act 1974. Under s.41(3) of that Act, a Children and Young Persons Court must have available to it a social worker's report before it 'makes any order or imposes any fine following a finding that a charge or complaint has been proved'.[228] The enactment of a similar provision for the A.C.T. is not recommended. It should be left to the magistrate to determine when a report is appropriate. This recommendation should be read in conjunction with the recommendation that a specialist magistrate should preside in the A.C.T. Childrens Court. Such a magistrate should be well qualified to assess when a report would be helpful. It must also be remembered that in making the decision he will have the benefit of the Youth Advocate's advice. Further, any arbitrary rule as to the circumstances in which a report is to be ordered should be avoided. Such a rule could result in the routine and time-consuming production of reports in situations when they will clearly not be needed. Also such a rule would reflect an unquestioning acceptance of the utility of dispositional information in all cases falling within a designated category. The court should be encouraged to be discriminating in its requests for social inquiry reports.

> [In adopting this view] the objective is not to discredit the collection and use of relevant data but to challenge those who subscribe to a 'more is better' philosophy, believing it improves the quality of decisionmaking. Further, the commitment to that philosophy has real costs in terms of money, the allocation of other scarce resources, and the privacy of juveniles and those closest to them. This philosophy also can draw out problems of racial and class bias in seemingly objective tests, and a tendency to accept judgments and predictions of future conduct where real expertise simply is lacking.[229]

Other arguments against routine requests for reports are that their preparation inevitably delays the making of a dispositional order, and that the time of welfare and health workers can, in many cases, be better spent in the provision of supervision and assistance. However, although an arbitrary rule governing requests for reports is undesirable, there are certain situations in which a report should normally be requested. Before a child is placed on probation or made the subject of a residential, attendance centre, custodial or committal order[230], it should be the usual practice to obtain a social inquiry report. With regard to the making of a probation order, such a report is desirable to indicate to the court how likely the child is to respond to supervision and to assist in the formulation of appropriate conditions. When an attendance centre order is being considered a report would usually be needed to indicate the appropriateness of such an order. Similarly, if the court is considering a residential, custodial or committal order, a report would normally be necessary to give assistance on the selection of a suitable placement. It would be an exceptional case in which the court felt able to make a residential, custodial or committal order without first obtaining a social inquiry report.

170. ***Access to Reports*** The Child Welfare Ordinance does not make it clear whether the child or his parent is entitled to see a report prepared for the court. The main argument in support of the view

---

228 By virtue of the Children and Young Persons Act 1974 (N.Z.), s.41(6), this provision does not apply to proceedings in respect of the possession, purchase, or consumption of alcohol, or in respect of presence on licensed premises.

229 *Juvenile Justice and Delinquency Prevention,* 443. See also Thorpe, *Social Inquiry Reports: A Survey,* Home Office Research Study No.48 (1979); 'Probation Reports -- More Harm than Good?' (1979) 143 *Justice of the Peace,* 221; and Rinaldi, (1980) 4 *Crim LJ* 309, and (1981) 5 *Crim LJ* 62; Pearce and Wareham, 'The Questionable Relevance of Research into Social Enquiry Reports', (1977) 16 *Howard J,* 97.

230 These orders are discussed in para.216f.

that such a right should be conferred on both child and parents is that only if they have access to a report are they able to challenge and answer the information and opinions which it contains. The main argument against granting such access is that it is sometimes necessary for reports to include material which reflects badly on the parents or information which is best kept from the child. In such a situation a report writer who knew that parents and child would have access to the report could decide to omit material which might prove upsetting and so fail to present a full picture of the child's circumstances. Earlier, emphasis was placed on the need to strike a balance between the provision of legal safeguards and the maintenance of special procedures designed to promote children's welfare.[231] This balance cannot be achieved unless the law makes it clear that, in normal circumstances, the child, his parents and their legal representatives are entitled to a copy of any report tendered. As Mr Justice Walters remarked in *Porter* v. *Sinnott*:

> [T]he court must give the child a full opportunity to be heard and a fair opportunity to correct, or to contradict, any statement or allegation prejudicial to his interests. In my opinion, the principles of fundamental justice entitle a child, and I include his parent, guardian, counsel or solicitor, to know the contents of a 'social background report', and to require the person who prepared it ... to submit himself for cross-examination on the matters dealt with therein.[232]

Provisions allowing a child, his parents and their legal representatives to obtain access to reports exist in a number of child welfare statutes.[233] The new Child Welfare Ordinance should make it clear that the child's parents, their legal representatives, and the child's legal representative should be given a copy of any report prepared for the court. The child should also normally be entitled to a copy of the report. However, provision should be made for situations in which it is necessary to include in a report material which is likely to be harmful or distressing to the child. Also there will be cases in which the court considers that the child is too young to be given a copy of a report. The new Ordinance should therefore permit the court to make an order that a child appearing before it is not to receive a copy of a report and that all or some of its contents must not be disclosed to him. The purpose of provisions permitting access to reports is, of course, to give those affected by them an opportunity to challenge their contents. The new Ordinance should therefore provide that the child and his parents have the right to tender evidence in rebuttal of that contained in a report and to cross-examine the report writer.

171. ***Citing Police Warnings in Court***[234] In this chapter emphasis has been placed on the diversion of young offenders from the Childrens Court and on the use of formal police warnings as the major alternative to a prosecution. The recommendation that the use of these warnings should be encouraged and formalised poses the question whether the police should be permitted to cite them in court if a child is subsequently prosecuted and the later offence is proved. The arguments against warnings being brought to the notice of the court are as follows.

- *Not properly proved.* Warnings relate to allegations which have not been properly proved before a court. In particular there is the danger that a child who has been warned could be shown to have admitted the allegations in order to avoid a court appearance. The child's desire, and possibly that of his parents, to escape court proceedings might have resulted in the admission of an offence of which the child was not guilty. Evidence that a child has received a police warning can be regarded as no more than an expression of opinion, by a police officer who is not in court, that certain facts gave rise to a criminal offence. The magistrate before whom the later offence has been proved has no opportunity to assess those facts.[235]
- *Stigma.* The citing of warnings in court would be inconsistent with a policy of diversion, since one of the major reasons for pursuing this policy is to minimise the stigmatising effects of contacts with the system. One of the objectives of administering a warning is to deal with a

---

231 Para.115.

232 (1975) 13 SASR 500, 505. See also *B* v. *W (wardship: appeal)* [1979] 3 All ER 83; and *Re K (infants)* [1965] AC 201.

233 See, for example, Children's Protection and Young Offenders Act 1979 (S.A.), s.88; Childrens Court Act 1973 (Vic.), s.25(2); and Children and Young Persons Act 1974 (N.Z.), s.42.

234 For a discussion of this topic, see Oliver, (1978), 81--88; Austin, Goodman and Cavanagh, 'Citing Cautions in the Juvenile Court,' (1974) 138 *Justice of the Peace,* 661--664; and Home Office Circular 49/1978, 18 April 1978, reproduced in (1978) 142 *Justice of the Peace,* 271.

235 Goodman, 662.

child in a way which does not label him. To provide the court with a formal record of a warning would not achieve this objective.[236]

- *Makes leniency less likely.* Pursuit of a policy of diversion is also based on the principle of parsimony or economy of punishment.[237] If the aim is, wherever practicable, to adopt a lenient approach to young offenders, police warnings should not be brought to the court's notice, since knowledge of them is likely to make the court less willing to display leniency.

The arguments in favour of the citation of police warnings in the Childrens Court are as follows:

- *Relevant information.* Information about previous police warnings is relevant and necessary once the offence has been admitted or proved before the Childrens Court. If the magistrate is denied knowledge that a child has been warned, it is impossible for him to make a fully informed dispositional decision. Details of prior warnings are part of the background information to which the magistrate should have access. A magistrate who is not given information about police warnings must treat as a 'first offender' a child who has been warned, perhaps several times, by the police. This is an intolerably artificial situation.
- *Encourages use of warnings.* If it is not possible for the police to refer in court to the warnings which a child has received, this could act as a disincentive to the use of warnings.
- *Magistrate can assess weight.* Although it is true that the citing of police warnings brings to the court's notice allegations which have not been proved before a court, the magistrate is, by training and experience, able to reach a conclusion as to the weight which should be attached to a warning. He will appreciate the fact that a warning relates to an unproved allegation. He is in a position to treat evidence of a warning as he would treat any other evidence which he received after an offence has been proved before him. An analogy can be drawn with material contained in a social inquiry report. When he receives such a report the magistrate must assess the reliability of the information and opinions which it contains. Evidence of a police warning can be treated in exactly the same way and viewed as part of the background information.

Although the arguments are finely balanced, it is recommended that the new Ordinance permit the police to bring previous warnings to the notice of the Childrens Court.[238] This should be done only after the offence with which the child has been charged has been proved. This recommendation should be seen against the background of the report's proposals relating to the greater formalisation of police warning procedures. It has been recommended that the use of these warnings should be legislatively recognised and formally controlled.[239] Only if a properly administered system of police warnings is introduced should it be possible to refer to a previous warning in the Childrens Court. Further, the new legislation should make it clear that the citation in court of a previous police warning should be treated only as evidence that such a warning has been administered. It should not be treated as evidence that the child committed the offence in respect of which he received the warning.

172. ***Remands*** The powers of the court when remanding a case should be clearly listed in the new Child Welfare Ordinance. When it is necessary to adjourn a case the court should be empowered to:

- release the child if he and a parent give an undertaking to be present in court at the next hearing of the matter;
- release the child on bail;
- place the child in the custody of a suitable person;
- place the child in an approved home;
- order that the child be detained in a shelter; or
- order that the child be detained in a remand centre.

236 Cavenagh, 663.
237 See para.200.
238 The recommendation as to the citing of police warnings in court has been limited to the Childrens Court as the possibility that they could be cited in courts for adults raises broad questions about the preservation and use of children's records. These questions will be considered in the Commission's privacy reference.
239 See para.134, 138.

The maximum term for such an adjournment should normally be 21 days, although provision should be made for longer adjournments in exceptional circumstances. The power to release on an undertaking or on bail are self explanatory. The court should exercise direct control over the selection of a placement when a child is not permitted to return home. It should not delegate this task to the Director of Welfare and hence the power to remand a child on condition that he live where directed by the Director of Welfare should not be retained in the new Ordinance. The power to place the child in the custody of a suitable person is intended to permit the court to place the child with a relative or other person who is willing to look after him. Alternatively the court may wish to place the child in a home or hostel run by a voluntary agency such as Dr Barnardo's or the Richmond Fellowship. The Ordinance should make provision for the Director of Welfare to approve homes of this kind and to designate them 'approved homes' for the purposes of the Ordinance. When secure detention is required the court should normally order the child's placement in a shelter. The definition of a shelter should not, as is the case under the present Ordinance, include a 'place of safety'.[240] The definition of the latter is broad enough to permit a child's placement in a non-secure home. If it is the court's intention that a child be held in open conditions, it should make an approved home order. A shelter order should be used when it is felt that the child should be kept in custody. In exceptional circumstances it should be open to the court to order that the child be placed in the Belconnen Remand Centre. This power should be exercised only if the court considers that the nature of the offence, the child's violent behaviour, the history of such behaviour, or previous escape attempts make it inappropriate for him to be held in shelter. The power should also be exercisable if the shelter is full. A situation in which the Childrens Court is particularly likely to use the power to remand a child to the Belconnen Remand Centre is when that child has been committed to the Supreme Court for trial or sentence.[241]

173. ***Quamby Children's Shelter*** It is not appropriate for the Commission to make detailed recommendations regarding the operation of Quamby Children's Shelter. Nevertheless, the Commission has been made aware of a number of criticisms of the shelter. The regime in the shelter has been described earlier in this report.[242] Critics of this regime have urged that more effort could be made to develop imaginative and stimulating programs.[243] In particular, attention has been drawn to the lack of educational programs. It has been pointed out that there are

> virtually no resources of an educational nature, apart from a few games and a few items of sporting equipment, even though all the young people in that institution are of school or college age, the majority being below the legal age for leaving school (15 years) and many others desire to have some worthwhile educational activity whilst on remand at the centre.[244]

This statement was made in a report evaluating the need for educational services in Quamby. This report contained a series of recommendations[245] to which the Welfare Division should give early consideration. Although the practical difficulties which would be encountered in providing educational services for Quamby's small and changing population should not be underestimated, the Commission has had its attention drawn to the fact that the Capital Territory Health Commission is able to provide educational services for a similar type of population.[246] Mention must also be made of the fact that various categories of children are held in Quamby. Given that the shelter is small and that it would not be practicable to establish a second centre, this mixing is at present unavoidable. However, it is a matter which should be kept under review by the Childrens Services Council. In particular, it is desirable that the Welfare Division give consideration to providing a different type of

240 See Department of the Capital Territory, *Submission,* 72. For definitions of 'shelter' and 'place of safety' see Child Welfare Ordinance 1957 (A.C.T.),s.5.
241 Cf. *Green Paper,* 49.
242 Para.57.
243 The A.C.T. Council of Social Service has urged that an upgrading of Quamby's physical facilities and an upgrading of educational and recreational facilities 'should be given top priority.' *Submission,* 3. Another comment on Quamby referred to its 'prison-like appearance.' Catholic Welfare Advisory Committee of the Archdiocese of Canberra and Goulburn, *Submission,* 14.
244 Coates, 'An Evaluation of the Need for Educational Resources at the Quamby Children's Remand Centre,' (1978), 1.
245 id., 6–7.
246 Seminar for A.C.T. School Counsellors, Canberra, 18 July 1979.

remand accommodation for children who are the subject of non-criminal proceedings. In Quamby at present these children are subjected to the same level of security as offenders. It is clearly undesirable that a young 'uncontrollable' child should be held in precisely the same conditions as a 17-year-old charged with a serious offence. The design of the shelter makes this unavoidable. However the Welfare Division should consider the possibility of developing an alternative approach to the accommodation of those non-offenders who cannot at present be placed in homes run by voluntary organisations. Finally, there is a clear need for legislative provisions relating to Quamby Children's Shelter. As has been pointed out, the existing Child Welfare Ordinance does not deal adequately with the role of the shelter.[247] The legal position of the shelter must be contrasted with that of Belconnen Remand Centre, the operation of which is controlled by a special Ordinance.[248] There are in existence detailed administrative rules relating to the operation of Quamby Children's Shelter[249], but it is desirable that the more important provisions in these rules be given the force of law.[250] This could be done either by enacting a special Ordinance to cover the operation of the shelter, by amending the Remand Centres Ordinance 1976 (A.C.T.) so that it also applies to the shelter, or by making appropriate regulations under the new Child Welfare Ordinance. Whatever method is chosen, the new legislative provisions should deal with matters of the following kind:

- The categories of children who may be held in Quamby.
- The powers and duties of the Superintendent and his staff. For example, attention should be given to defining the situations in which the use of force is justified and to the clarification of staff powers with regard to the searching of inmates and the prevention of escapes.
- Powers and procedures as to the discipline and punishment of inmates.
- Powers and obligations of the Welfare Division and staff to authorise the examination and medical treatment of inmates.[251]
- Temporary absences from the shelter. It should be made clear whether children may be taken out of the shelter for sporting or other recreational purposes.
- Inmates' rights generally. For example, matters such as entitlement to mail and visits should be made clear.

174. ***Traffic Offences*** The view that a special court for children should not exercise jurisdiction in respect of alleged traffic offences has been put to the Commission.[252] It is a view which was accepted in the N.S.W Green Paper.[253] The argument for removing young traffic offenders from the jurisdiction of the Childrens Court is that driving a motor vehicle is an adult activity and that those who engage in it should be treated as adults. Nevertheless, it is recommended that the Childrens Court in the A.C.T. should continue to exercise jurisdiction in respect of all offences against traffic laws allegedly committed by those under 18. There are several reasons for this recommendation:

- The making of a distinction between 'criminal' and 'traffic' offences implies that offences in the latter category are not 'real' crime and need not be treated as seriously as 'criminal' matters. This implication is rejected. Although some traffic matters are trivial, some are serious. If it is felt that a specialist approach should be adopted to the young offender, it is illogical not to employ that approach with regard to all offences allegedly committed by children. Most traffic matters will be dealt with in a rapid manner, in just the same way as in the Court of Petty Sessions, but there will be the occasional case in which the offence discloses problems requiring the resources of the specialist Childrens Court.
- The making of an effective distinction between the two categories of offences would require a detailed legislative definition of a 'traffic offence.' As has been pointed out to the Commission, any such definition should be drafted in a manner which excludes from the Childrens Court only children old enough to hold a driver's licence. It would be absurd if young children who, for example, committed offences involving trail bikes were to be dealt with in the Court of Petty Sessions.[254]
- The Commission's survey of children's re-offending following an appearance before the A.C.T. Childrens Court suggests that there is substantial overlap between children dealt with for traffic offences and those dealt with for criminal offences.[255] This is particularly true of those first offenders who initially came to notice for criminal offences. Many of them were subsequently found guilty of traffic offences or of criminal and traffic offences. It must not be assumed that young offenders guilty of traffic offences are necessarily in a different category from those guilty of criminal offences. One important example of the overlap between criminal and traffic offences has been brought to the Commission's attention.[256] It is not uncommon for older children who face charges relating to the illegal use of a motor vehicle also to face traffic charges relating to the use of that vehicle. It is desirable that such offenders should be dealt with in the Childrens Court.
- The Commission's study of re-offending patterns also shows high re-offending rates among children who initially came to notice only for traffic offences. Traffic offending among the young cannot be dismissed as an insignificant problem which can be dealt with just as easily in one court as in another.
- If children who commit traffic offences were to be dealt with in the system for adults and the remainder in the Childrens Court, this could create difficulties with regard to children charged with both traffic and criminal offences. Reference has already been made to the child who faces both traffic charges and charges relating to the illegal use of a motor vehicle. The N.S.W. Green Paper has recommended that, when a child is charged with a traffic offence and a non-traffic offence, jurisdiction should be given to the N.S.W. Childrens Court and to magistrates exercising jurisdiction in Courts of Petty Sessions. The child would therefore need to appear only before one court. The Green Paper also recommended that, with the exception of the power to commit to prison, the Childrens Court and the magistrate exercising jurisdiction in a Court of Petty Sessions should be able to employ any of the sentencing options available to him in either court.[257] The disadvantage of this solution is that it requires specialist Childrens Court measures to be imposed by non-specialist magistrates. One of the justifications for the retention of a special court for children is that the magistrate presiding in this court has a particular knowledge of the measures available for children. If it is conceded that these measures might sometimes be appropriate for children guilty of traffic and criminal offences, it is unnecessary and undesirable to create procedures which allow such children to be dealt with in courts for adults. It is more logical for the Childrens Court to exercise jurisdiction, particularly as this court should, with certain exceptions, retain the power to deal with children 'according to law'.[258]

175. ***Transfer to Non-Criminal Jurisdiction*** Notwithstanding the use of the screening procedures recommended by the Commission, it may sometimes happen that the magistrate will conclude that a child who has been brought before him on a criminal matter could more appropriately be made the subject of care proceedings. In such a case it should be open to the court to deal with the charge and to refer the matter to the Youth Advocate. The Youth Advocate could then give consideration to the institution of care proceedings.[259]

176. ***Children Jointly Charged with Adults*** Determining the venue for a child's trial when he is jointly charged with an adult requires a decision to be made between two conflicting principles. On the one hand is the principle that all offenders concerned with the same or related offences should normally be tried by the same court. Application of this principle makes it more likely that co-offenders will be

247 Para.57.
248 Remand Centres Ordinance 1976 (A.C.T.).
249 Welfare Branch of the Department of the Capital Territory, *The Procedures at Quamby Children's Shelter.*
250 The Department of the Capital Territory has drawn attention to the need for legislative provisions relating to Quamby Children's Shelter. *Submission,* 72.
251 The subject of the examination and medical treatment of certain categories of children is discussed in para.351–353.
252 Department of the Capital Territory, *Submission,* 60; A.C.T. Police, *Submission,* 29. See also Standing Committee on Housing and Welfare of the A.C.T. Legislative Assembly, *Report No 8: Child Welfare,* (1978), 61.
253 *Green Paper,* 45.
254 Mr R.D. Blackmore, S.M. *Submission,* 5.
255 Para.125 and Tables 5 and 6.
256 Mr R.D. Blackmore, S.M., *Submission,* 5.
257 *Green Paper,* 45.
258 See para.203.
259 Care proceedings are discussed in Chapter 8.

dealt with in an even-handed manner.[260] On the other hand is the principle that children should be dealt with in a court specially designed for them. It is recommended that, in general, children jointly charged with adults should be dealt with in the Childrens Court and that they should therefore be dealt with separately from their adult co-offenders. However, when a child and an adult are jointly charged with an indictable offence and committal proceedings ensue, the Chief Magistrate of the Court of Petty Sessions should be permitted to order that the committal proceedings in respect of the child be combined with those in respect of the adult. Sometimes committal proceedings are lengthy, and if it were necessary to conduct separate preliminary hearings in respect of a child and an adult the result could be the duplication of time-consuming and expensive procedures. For this reason the Chief Magistrate should, at his discretion, be permitted to order joint committal proceedings. When this course is adopted, the court should sit as a Court of Petty Sessions, since the Childrens Court would not be able to exercise jurisdiction over adult offenders. The need for the court to sit as a Court of Petty Sessions should not automatically deprive the child of the protections to which he would be entitled if the matter were heard in the Childrens Court.[261] By virtue of s.52 of the Court of Petty Sessions Ordinance 1930 (A.C.T.), a court in which a preliminary inquiry is conducted is not deemed to be an open court and, if it appears in the interests of justice to do so, the magistrate may exclude persons from the court. A similar power to exclude persons from the court should be embodied in the new Child Welfare Ordinance. This power should be exercisable in respect of committal proceedings involving a child, but its use should not be restricted to situations in which the interests of justice require persons to be excluded. With regard to children who are the subject of joint committal proceedings, the power should be exercisable if closure of the court is in the best interests of the child. A Court of Petty Sessions hearing committal proceedings involving a child should also be empowered to make an order prohibiting the publication of the child's name or of any details likely to identify the child. A general power to prohibit the publication of a party's name is conferred on the Supreme Court and the Court of Petty Sessions by s.83 of the Evidence Ordinance 1971 (A.C.T.) but this power, like that conferred by s.52 of the Court of Petty Sessions Ordinance, is exercisable in the interests of the administration of justice. The power to prohibit the publication of the name of a child who is the subject of joint committal proceedings should be exercisable if this is in the best interests of the child. If, when a child has been committed for trial to the Supreme Court, a joint trial results, the Supreme Court should be permitted to exercise similar powers with regard to the closure of the court and the prohibition of the publication of the child's name.[262]

177. ***Very Serious Offences*** It is not recommended that the proposed specialist Childrens Court should exercise jurisdiction over all offences alleged to have been committed by those under 18. Provision should be made, as at present, for certain very serious matters to be dealt with in the Supreme Court of the A.C.T. There is something paradoxical about the removal of some young offenders from the jurisdiction of a court specially created to deal with them:

> Any transfer of jurisdiction strikes at the most basic philosophical elements of the juvenile court system, for it is an admission that the system cannot or does not want to try to rehabilitate one member of the class of individuals for whom it was created. The very existence of juvenile court is predicated upon recognition of the fact that a child is capable of rehabilitation no matter what he may have done and that he has a *right* to expect no less than that society, through the special establishment of juvenile court, will seek to identify and treat the root causes of the trouble in which he is involved rather than seek retribution against him.[263]

Nevertheless, an answer to arguments such as these is to be found in a recognition of the fact that the system for dealing with young offenders can no longer be seen as a system dedicated wholly to

---

260 See Richman, (1979) 143 *Justice of the Peace,* 130. For a discussion of some of the problems which can arise with regard to disparity of sentence when one offender is dealt with in the adult system and his co-offenders appear before a Childrens Court, see Rinaldi, (1980) 4 *Crim LJ,* 174, and Gamble, (1977) 1 *Crim LJ,* 160. For Australian provisions relating to children who are jointly charged with adults, see Children's Protection and Young Offenders Act 1979 (S.A.), s.67, and Child Welfare Act 1960 (Tas.), s.14(3) and (4).

261 These protections are discussed in para.166, 167.

262 Supreme Court proceedings involving children are discussed in para.168.

263 Stamm, 'Transfer of Jurisdiction in Juvenile Court: An Analysis of the Proceeding, Its Role in the Administration of Justice, and a Proposal for the Reform of Kentucky Law,' 62 *Kentucky LJ,* 122, 145 (1973). Emphasis in original.

rehabilitation. Although, where possible, the emphasis should be placed on a compassionate, understanding response, the system cannot ignore the traditional objectives of the criminal law, such as retribution and the protection of society.[264] A number of reasons can be advanced for the retention of mechanisms which allow a small minority of young offenders to be removed to a court for adults[265]:

- *Older children.* The more serious offences by the young are typically committed by older children, who are nearing the maximum age for Childrens Court jurisdiction. Many of these children are as mature and sophisticated in their conduct as adult offenders. They should therefore be dealt with as adults. The criminal sophistication and the seriousness of the offences of these children makes their retention in the Childrens Court system inappropriate, since they do not display the immaturity and lesser culpability which are the justifications for the special treatment of the majority of young offenders.
- *Community feelings.* Attention must be paid to the reality that 'highly visible, serious offences evoke community outrage or fear that only the punitive sanction of an adult conviction can mollify'. The availability of a mechanism for prosecuting the hard-core youthful offender as an adult is thus an important safety valve, permitting the expiatory sacrifice of some youths to quiet political and community clamor and to preserve a more benign system for those remaining. In the absence of transfer procedures, the pressures to lower the maximum age of juvenile court jurisdiction could be almost irresistible. While lowering the maximum age would reach most of these older, sophisticated juvenile offenders, it would also sweep many youths who might be rehabilitated (or who perhaps are simply less culpable) into the adult criminal process.[266]
- *Very serious offences by younger children.* Procedures allowing the removal of young offenders from special Childrens Courts cannot be limited to older children. Sometimes younger children commit very serious offences. On these rare occasions it is the seriousness of the offence, rather than the degree of maturity and sophistication of the child, which justifies the removal of the child to the adult court system.
- *Legal safeguards.* When charged with a crime, a person under 18 is entitled to all the protections afforded to an adult in a similar situation. It therefore follows that the benefits of a jury trial, rather than summary proceedings, should be granted to a child whenever these benefits would be available to an adult.[267] This argument alone is enough to lead to a rejection of the contention that the Childrens Court, a court of summary jurisdiction, should exercise exclusive jurisdiction over all offences committed by persons under 18.

178. ***Removal to a Higher Court*** There are several procedures by which certain offences committed or allegedly committed by those under 18 may be dealt with in courts for adults.

- *Legislative prescription.* The categories of offence and offender over which a special court for children may not exercise jurisdiction may be legislatively prescribed. However, the legislation may not apply to all children charged with the specified offences. In some States in the United States, for example, a child charged with a specified type of serious offence must be dealt with in a court for adults only if he has attained a certain age.[268] In Australia, however,

---

264 See para.115.

265 These arguments are taken from Feld, 'Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions,' 62 *Minnesota LR,* 515, 517–519 (1978).

266 id., 518–519.

267 For a similar view, see the N.S.W. *Green Paper,* 48, though that report recommended that the right be limited to those who have attained the age of 16.

268 Feld, 556. For a discussion of legislative restrictions on the jurisdiction of juvenile courts in the United States, see Feld, 556–571. See also the view expressed in a Canadian report that 'young persons under the age of 16 are too young to be subjected to the full weight of the adult criminal justice process'. *Young Persons in Conflict with the Law,* 38.

certain indictable offences are legislatively excluded from the jurisdiction of the Childrens Court, regardless of the age of the child charged.[269]

- *Judicial transfer.* The decision as to the appropriateness of a trial in a special court for children may, in each case, be left to the discretion of the presiding judge or magistrate. In many United States jurisdictions, for example, judicial transfer is the only mechanism for adult prosecution.[270] Australian child welfare legislation commonly makes provision for a Childrens Court to decline jurisdiction in respect of indictable offences.[271] When a court acts in this manner it is, in effect, employing the most drastic measure available to it, since the decision exposes the offender to the possibility of a much more severe penalty than a special court for children may impose.
- *Special procedures.* A special procedure may be created, designed to identify those cases which can more properly be dealt with in the system for adults. A particularly interesting example of such a procedure is to be found in South Australia's Children's Protection and Young Offenders Act 1979. Under s.47(1) of that Act, where the State Attorney-General is of the opinion that a child charged with an indictable offence (other than a minor indictable offence[272]) should be tried in the appropriate adult court, the Attorney-General may apply to a Judge of the Supreme Court of South Australia for an order that the child be so tried.[273]

The approach adopted in the existing A.C.T. Child Welfare Ordinance, and in the legislation at present in force in every Australian jurisdiction other than South Australia, combines the first two procedures. Certain specified indictable offences are excluded from the Childrens Court's jurisdiction, and the presiding magistrate may, at his discretion, decline to exercise jurisdiction over other indictable offences. The Commission recommends that this pattern be preserved in the new A.C.T. legislation. However, certain changes in the law are required.

179. ***Serious Offences: Recommendations*** The guiding principle should be that, wherever possible, persons under 18 who are charged with an offence should be dealt with in the Childrens Court. Only in exceptional circumstances should a child be dealt with in the adult system. Therefore the legislatively prescribed list of offences over which the Childrens Court may not exercise jurisdiction should be kept to a minimum. It is recommended that s.65(1) of the Child Welfare Ordinance 1957 (A.C.T.)[274] should be repealed, but that the principle which it embodies should be retained in the new Ordinance. This should state that the A.C.T. Childrens Court may not exercise jurisdiction in respect of crimes punishable by a sentence of life imprisonment. These are crimes which our society regards as particularly serious. Considerations of public sentiment, together with the need to make available

269 In N.S.W. the Childrens Court may not exercise jurisdiction in respect of homicide, rape or an offence punishable by death or penal servitude for life (Child Welfare Act 1939 (N.S.W.), s.86(1)). In Victoria the only offence excluded is homicide (Childrens Court Act 1973 (Vic.), s.15(1)), and the same is true in South Australia (Children's Protection and Young Offenders Act 1979 (S.A.), s.45). In Queensland the excluded offences are those punishable by imprisonment with hard labour for life (Children's Services Act 1965 (Qld.), s.29(1)), and in Western Australia they are wilful murder, murder, manslaughter and treason and attempting any of those crimes (Child Welfare Act 1947 (W.A.), s.20(8)). In Tasmania a Childrens Court must deal with all offences committed by children under 14 except murder, attempt to murder, manslaughter, or wounding with intent to do grievous bodily harm. With regard to children who have attained the age of 14, the same offences are excluded, together with rape and robbery with violence (Child Welfare Act 1960 (Tas.), s.27(1) and (2)). Under A.C.T. law the Childrens Court may not deal with a number of specified offences, all of which are punishable by imprisonment for life (Child Welfare Ordinance 1957 (A.C.T.), s.56). For a discussion of A.C.T. laws, see para.89.

270 Feld, 523. For a discussion of judicial waiver of jurisdiction, see Feld, 523–556, and Juvenile Justice Standards Project, *Standards Relating to Transfer Between Courts*, (1977).

271 See, for example, Child Welfare Act 1939 (N.S.W.), s.86(2); Childrens Court Act 1973 (Vic.), s.15(3); Children's Services Act 1965 (Qld.), s.29(2); Child Welfare Act 1947(W.A.), s.20(4); Child Welfare Ordinance 1957 (A.C.T.), s.65(2). But cf. Child Welfare Act 1960 (Tas.), s.27(1) and (2). The Western Australian and Tasmanian provisions are distinctive as they indicate that, where a Childrens Court has jurisdiction it cannot decline to exercise that jurisdiction in respect of an indictable offence committed by a child under the age of 14.

272 As defined in the Justices Act 1921 (S.A.).

273 For a discussion of s.47(1), see *In Re Szekely* (1980) 25 SASR 112.

274 See para.89.

to a person charged with such a crime all the protections which a jury trial can offer, require that the Childrens Court should not exercise jurisdiction to hear and determine allegations relating to these matters. The Childrens Court should, as at present, continue to be responsible for the conduct of the preliminary hearing.[275] When dealing with any other indictable offence it should be open to the Childrens Court to decline jurisdiction and to commit the child to the A.C.T. Supreme Court for trial or sentence. The new legislation should include guidelines indicating the factors which the court should take into consideration when deciding whether to hear and determine a charge involving an indictable offence.[276] These factors are:

- the seriousness of the alleged offence;
- the nature of the facts and the difficulty of any questions of law which are likely to arise[277];
- the suitability of the penalties available to the Childrens Court; and
- the age, maturity, health or mental condition of the child.

With regard to the decision whether to commit for sentence, the court, in addition to the above factors, should take into account any history of previous offending by the child and the contents of any social inquiry or psychiatric reports. Information in these reports and details of previous convictions should be taken into account only after a finding of guilt has been made. It is not recommended that a minimum age be set below which committal for trial or sentence is prohibited. The creation of an arbitrary dividing line is undesirable. The magistrate should be free to exercise his discretion in each case, taking into account the factors listed. Two possible objections can be raised to reliance on discretionary powers. On the one hand it can be argued that a specialist magistrate might show too much concern for the children appearing before him and be unwilling to commit even the most serious matters for trial or sentence. This objection can be met by making provision for the Deputy Crown Solicitor to apply to the Childrens Court to have a matter removed to the A.C.T. Supreme Court for trial or sentence. Thus the Crown would be able to require the magistrate to determine the question. If the magistrate rejects the application he should be obliged to give reasons. Thus it is possible to build into the system a procedure designed to ensure that the public is adequately protected against dangerous juvenile offenders. It should also be noted that whenever an indictable offence is alleged in the A.C.T. the Commonwealth Attorney-General has an over-riding power to file an *ex officio* indictment.[278] Certain safeguards also suggest themselves to protect against the possibility that the magistrate might be too ready to commit children to the Supreme Court for trial or sentence. Under the present Ordinance[279], a magistrate who commits a child to the A.C.T. Supreme Court for trial must transmit to the Attorney-General and to the Minister for the Capital Territory a statement of his reasons for so doing. It is recommended that this provision be retained, although a report to the Attorney-General alone would seem to be sufficient. Further, before a child is committed for trial or sentence, the Youth Advocate would have an opportunity to make submissions on the desirability of this course. Finally, if a matter is committed to the Supreme Court and a finding of guilt made, it should, as is recommended below, be open to the presiding Judge to employ any of the special Childrens Court measures rather than imposing an adult penalty. The imposition of a more severe penalty need not, therefore, be the inevitable result of a committal to the Supreme Court. In addition, the Supreme Court should retain the power, conferred by s.67 of the present Ordinance[280], to remit a matter to the Childrens Court after a finding of guilt.

180. ***Right to Elect Trial by Jury*** Emphasis has been placed in this report on the importance of giving a child charged with an offence all the protections which an adult would have in a similar situation. In the A.C.T. one of these protections is a right, when charged with one of a number of

275 See s.89–93 of the Court of Petty Sessions Ordinance 1930 (A.C.T.) for the procedure governing the conduct of preliminary hearings.

276 Cf. the N.S.W. *Green Paper*, 48, which also suggested the setting of statutory guidelines.

277 These two factors were among those listed in s.476(2) of the Crimes Act 1900 (N.S.W.) as amended in its application to the A.C.T. This provision dealt with the making of the decision to deal summarily with certain indictable matters. Section 476 was repealed by s.10 of the Crimes Ordinance 1974 (A.C.T.) and a new section substituted.

278 Australian Capital Territory Supreme Court Act 1933 (Cwlth), s.53.

279 Child Welfare Ordinance 1957 (A.C.T.), s.65(3).

280 See discussion para.106.

specified offences, to refuse to consent to the matter's being dealt with summarily.[281] The new Child Welfare Ordinance should make it clear that a child charged with such an offence should be given the opportunity to withhold consent to a summary trial and so have the matter taken before a jury. Similar provisions are in force in Victoria[282] and Queensland.[283] When a child is charged with an indictable offence in respect of which an adult would be entitled to request trial by jury, the Childrens Court should be required to inform the child that the matter may be dealt with summarily only if the child consents. The court should not proceed with the matter until it is satisfied that the child understands the consequences of the choice which he is required to make.[284]

181. ***Penalties Available to the Supreme Court*** If the child is found guilty, the Supreme Court should be permitted to impose any of the measures available to the Childrens Court, or to employ any of the penalties available to the Supreme Court when it deals with an adult offender convicted of the offence of which the child has been found guilty.[285] It should not be overlooked that, if the Supreme Court does decide to deal with a child as an adult and imposes a sentence of imprisonment, it is, under s.94(1) of the Child Welfare Act 1939 (N.S.W.) possible for the child to be administratively transferred to an institution run by the Department for Youth and Community Services.[286] It should be possible for the Youth Advocate to assist the Supreme Court, if required, in the making of the disposition decision. He should fulfil the same role in that Court as in the Childrens Court.[287]

182. ***Appeal Rights*** In Chapter 4 it was shown that the law relating to appeals from decisions of the Childrens Court is confused and uncertain.[288] It should be clarified. The new legislation should embody the following principles:

- Appeals from decisions of the Childrens Court should be heard by the Supreme Court of the A.C.T.
- The provisions of Part XI of the Court of Petty Sessions Ordinance 1930 (A.C.T.), appropriately amended, should provide the framework for these appeals. The Childrens Court is the Court of Petty Sessions exercising a special jurisdiction.[289] It is appropriate that appeals from that court should continue to be governed by the provisions of the Court of Petty Sessions Ordinance. However, Part XI of that Ordinance should be amended to deal specifically with appeals in criminal proceedings heard in the Childrens Court.
- The appeals should be instituted only by the child himself, or by one of the following persons on the child's behalf and in the child's name:
  - a parent or guardian of the child;
  - the Officer-in-Charge of the Childrens Court (who would only lodge an appeal where the child is not legally represented, and with the express consent of the child)[290]; or
  - the 'next friend' of the child.[291]
- The Supreme Court should be specifically empowered to entertain the following:
  - an appeal against a finding of the Childrens Court that an offence is proved;
  - an appeal against a conviction entered by the Childrens Court;
  - an appeal against an order of the Childrens Court.
- The Supreme Court should be specifically invested with the powers of review which it may at present exercise in respect of decisions of the Court of Petty Sessions. Provision should be made in the new Ordinance for an appeal by way of order to review. Such a procedure is set out in Division 3 of Part XI of the Court of Petty Sessions Ordinance. This would give the Supreme Court express power *inter alia* to remit the matter to the Childrens Court for re-hearing or for further hearing with or without further directions of law.
- There should be no provision in the new Ordinance for a child to be under an obligation to give a security for the costs of the appeal. The present provision in the Court of Petty Sessions Ordinance[292] creates unnecessary hardship, particularly in the not uncommon case where a child appeals without parental or legal aid assistance. As the child would, in any case, rarely provide the security, there seems to be no justification for re-enacting such a provision. However appropriate such a provision may be in the case of an adult, it will often not be appropriate in the case of a child who is not working or who has limited means.
- Where a child who has been committed and sent to a N.S.W. institution wishes to appeal against the committal, the present law is not clear. Special arrangements should be made to cover such a case. It should be the responsibility of the Minister for the Capital Territory to authorise a person to arrange for the child to be brought to the A.C.T., if necessary, for the hearing of the appeal. The law should provide that the N.S.W. Minister for Youth and Community Services should be required to co-operate with such an arrangement. The necessary inter-governmental negotiations should be undertaken to achieve the amendment of the present law to assure an effective right of appeal notwithstanding a child's committal to a N.S.W. institution.

Legal Representation: Current Law and Practice and Proposals

183. ***Legal Aid*** The Legal Aid Commission (A.C.T.) took over the functions of the Australian Legal Aid Office and the Legal Aid Committee in the A.C.T. on 3 July 1978. The Commission is an independent statutory body which provides legal assistance under the name 'Legal Aid Office (A.C.T.)'. A child may gain the assistance of the Legal Aid Office in any of the four following ways:

- the child may see the duty solicitor, (if there is one present at the time), immediately before being brought before the court, and be represented by the solicitor in the court;
- the child may gain legal advice from a Legal Aid Commission solicitor over the telephone;
- the child may telephone the Legal Aid Commission, make an appointment, and consult a solicitor on any particular legal problem, provided the advice is not likely to be of a substantial or continuing nature (in which case the child should make an application for legal assistance)[293];
- the child may make an application (direct to the Legal Aid Office or through a private lawyer) and gain substantial assistance either from a solicitor employed by the Legal Aid Office or a private practitioner to whom the case is referred.

Of the solicitors employed at the Legal Aid Office in the A.C.T. there are at present three who act in children's matters. However, the bulk of the work of each of the three solicitors is in other areas, mainly adult criminal jurisdictions. The number of solicitors at the Office who are acting in children's matters at any one time may increase to five when the demand for legal services requires this.

184. ***Duty Solicitors*** The Legal Aid Office conducts a duty solicitor service at the Childrens Court in Canberra.[294] The service is free[295] and normally consists in the giving of immediate legal advice on

---

281 The law in the A.C.T. on this matter is to be found in the Crimes Act 1900 (N.S.W.) as amended in its application to the A.C.T. Under s.476(1) of that Act, certain indictable offences (listed in s.476(2)) may be dealt with summarily without the defendant's consent. Under s.477 indictable offences (other than those punishable by imprisonment for life or for a term exceeding 10 years: see s.478) may be dealt with summarily if the accused consents.

282 Childrens Court Act 1973 (Vic.), s.15(1).

283 Children's Services Act 1965 (Qld.), s.29(2).

284 Cf. Children's Protection and Young Offenders Act 1979 (S.A.), s.46(1).

285 This power is available under the existing law: Child Welfare Ordinance 1957 (A.C.T.), s.66.

286 See discussion para.107.

287 For a description of this role, see para.163.

288 Para.102 and 103.

289 Child Welfare Ordinance 1957 (A.C.T.), s. 13.

290 At present, the Officer-in-Charge of the Childrens Court is a Deputy Clerk of the Court of Petty Sessions. The need for that officer to be permitted to exercise the power of appeal is illustrated in this hypothetical (but not uncommon) case:

> A child is committed to a N.S.W. institution. The child then decides to appeal against the committal. The superintendent of the institution telephones the Childrens Court seeking advice on the appeal procedure. The Officer-in-Charge contacts the solicitor who previously acted for the child and advises him of the child's request. The solicitor decides that he cannot continue to act any further in the matter, so the parents are contacted and the situation is explained to them. The parents decide to do nothing. The child waits in the institution, wishing to appeal. He is dependent on the Officer-in-Charge for assistance in lodging the appeal.

291 A recommendation that a court be empowered to appoint a 'next friend' for a child is contained in para.331.

292 Court of Petty Sessions Ordinance 1930 (A.C.T.), s.211.

293 Legal Aid Ordinance 1977 (A.C.T.), s.75(4).

294 In addition to the service at the Court of Petty Sessions in Canberra.

295 Legal Aid Ordinance 1977 (A.C.T.), s.30(1)(b).

both the nature of the charge and how to plead, and in appearing in relation to undefended matters. When a defended matter which has been allocated to a legal aid solicitor has been listed on a particular day, the allocated solicitor becomes duty solicitor whilst he is at the court. The Legal Aid Office telephones the Childrens Court each morning to inquire of the Clerk of the Court whether there are any children in custody. If there is a child in custody, a solicitor is sent to the court. Should a child be arrested during the day, charged, and brought before the court after 2 p.m., the Clerk of the Court usually telephones the Legal Aid Office which sends out a solicitor. Despite these arrangements, it appears that a considerable number of children are brought before the court without legal representation.[296] When the Commission examined the system in November 1980 the practice was for the salaried duty solicitors from the Legal Aid Office to deal only with applications for bail or adjournments, or with pleas of guilty. A child who wished to defend proceedings had to make an application to the Legal Aid Office for assistance. It is the general practice of magistrates sitting in the Childrens Court to advise an unrepresented child that he might be eligible for legal aid and to suggest that an adjournment be sought whilst he contacts the Legal Aid Office for advice. The magistrate gives the child the address and telephone number of the Office. According to the Legal Aid Office there is always an available duty solicitor, even on Saturday mornings. The only occasions upon which the Office does not send a solicitor are when the Office is too short-staffed or when it is advised in the morning that there is no person in custody.

185. ***Applications: The Child*** Under the Legal Aid Ordinance 1977 (A.C.T.) an application for legal assistance may be granted if, and only if:

(a) the person is in need of that legal assistance by reason that he is unable to afford the cost of obtaining from private legal practitioners the legal services in respect of which legal assistance is sought; and
(b) it is reasonable in all the circumstances to provide the legal assistance.[297]

The Legal Aid Commission has a duty to formulate, and make known to the public, guidelines to be applied in determining whether legal assistance may be provided to an applicant. It must also decide when the assistance should be conditional upon some contribution by the applicant, whether the Commission may pay costs awarded against an assisted person, and the amount of costs or disbursements which an assisted person who has been successful in the proceedings should be liable to pay the Commission.[298] The guidelines are now contained in a booklet entitled 'Rules, Procedures, Guidelines, and Standard Letters of Referral and Scales of Costs of the Legal Aid Office (A.C.T.)', applying from 30 April 1980. In accordance with its duty to 'determine priorities in the provision of legal assistance as between different classes of persons or classes of matters'[299], the Commission indicates in the booklet six classes of persons who have priority for the receipt of legal assistance.[300] The sixth category is that of 'minors, except where legal costs and fees in the ordinary course can be provided by the parents or guardians'. The common experience of applicants is that if the parent satisfies the means test, and the case is a serious one, and it has some prospect of success, legal assistance is granted to the child. As a matter of practice there have developed a number of rough exceptions to the general rule of assessing the parents' income. The child's income, not the parents' must satisfy the means test where:

[296] This impression is gained after observation in the Childrens Court and interviews with magistrates, private legal practitioners, staff of the Legal Aid Office, police and court personnel.

[297] Legal Aid Ordinance 1977 (A.C.T.), s.28(1). In reaching a decision whether a person is able to afford the cost of private legal services, regard is to be had to all relevant matters including income, available cash, debts and liabilities, the cost of living, the cost of legal services and any other matter affecting the ability of the person to meet the cost of private legal services: s.28(2). The A.C.T. system's reliance on a means test should be contrasted with the approach adopted in N.S.W. A legal aid scheme for children involved in court proceedings in N.S.W., begun by the Law Society of N.S.W. in May 1975, had as its basic concept that every child who so desired should be afforded representation before a Childrens Court. The scheme is currently administered by the Legal Services Commission of N.S.W. A critical analysis of that scheme may be found in Legal Services Commission of N.S.W., *Report of the Legal Services for Children Sub-committee* (1980). See generally Kershaw, 'Serving Our Clients – The Disadvantaged', (1979) 53 *ALJ* 509, 512.

[298] Legal Aid Ordinance 1977 (A.C.T.), s.12.

[299] id., s.6(1)(j).

[300] 'Rules, Procedures and Guidelines of the Legal Aid Office (A.C.T.),' (1980), 3.

(a) the child is working full time;
(b) the child lives separately from his parents or guardian, and is of independent means;
(c) the child has been abandoned by his parents or guardian; or
(d) in case of neglect proceedings, there is serious hostility between parent and child, as, for example, where the parent has initiated the laying of a charge that the child is neglected or uncontrollable.

186. Because financial constraints have limited the availability of legal aid, the Legal Aid Office has adopted a separate set of guidelines providing for legal assistance to be declined in specified cases and in respect of specified categories of applicants.[301] One of the categories in which assistance is declined is that of:

- prosecutions in the Court of Petty Sessions (not entailing pleas of guilty, remand or bail applications only which might reasonably be attended to by a duty solicitor) where a conviction is not likely to result in:
  (a) imprisonment or detention without option; or
  (b) the loss of the applicant's livelihood or vocation.

However, the category is qualified by a note that 'in Childrens Court matters the criteria mentioned shall be taken into account but the overall consideration shall be the need of the child for representation having regard to all the circumstances of the matter'. The qualification did not appear in the initial 'Guidelines' of 30 June 1978 or the 'Interim Further Guidelines'. Each of these documents contained a notation to the effect that in such matters 'the Director or a Legal Aid Committee has the discretion, in appropriate cases, to authorise the granting of legal aid'. Thus, before 1 May 1980, in the absence of such a discretionary grant, legal assistance would have been declined in prosecutions of children except in the case of a plea of guilty, an application for remand or bail, or in a case where conviction was likely to result in detention without option, or the loss of the applicant's livelihood or vocation.

187. ***Private Practitioners*** A child who desires representation by a private legal practitioner, but funded by the Legal Aid Office, may complete an application form supplied by the practitioner[302] or obtain a form from the Legal Aid Office and nominate the desired private practitioner. Pursuant to s.32 of the Legal Aid Ordinance 1977 (A.C.T.), the Legal Aid Commission prepares and maintains a list of private legal practitioners who have notified the Commission that they are willing to act as barristers or solicitors on behalf of legally assisted persons.[303] The list indicates whether the practitioner is available generally, or on a particular class of matters (such as children's work) or in particular courts or tribunals (such as the Childrens Court).[304] However, persons who are not on this list are not now precluded from acting on behalf of legally assisted persons. In selecting a private practitioner for a particular case, the paramount considerations of the Commission are the interests of the legally assisted person and any expressed choice of a particular private practitioner, but subject to those considerations, work is allocated among the practitioners equitably, having regard to their individual practices and particular expertise.[305] Where a private practitioner has had previous contact with a client, the child often returns to the practitioner and seeks legal aid for the new matter by way of application. A new client is referred to a private practitioner in any of three possible situations:

- the name of the practitioner may have been recommended to the child by another person and the child nominates the practitioner in his application;
- the Legal Aid Office may decide that where there is a conflict of interests between members of a family or two co-accused, and both persons seek legal aid, that either one or both matters should be referred to a private practitioner; or
- the Legal Aid Office may not be able to handle a case, because its workload is too great at the particular time.

[301] id., 11.

[302] The Legal Aid Commission may distribute to private legal practitioners application forms for completion by persons wishing to apply for legal assistance: Legal Aid Ordinance 1977 (A.C.T.), s.25(5).

[303] Legal Aid Ordinance 1977 (A.C.T.), s.32(1).

[304] ibid.

[305] id., s.32(7).

188. Fewer applicants for legal assistance now nominate a private practitioner than was the case in the past. The Legal Aid Office interprets this trend as indicative of the increasing popularity of several members of the Office, together with the withdrawal of several private practitioners from children's legal work in the A.C.T. Some private practitioners who have accepted legal aid work for children expressed the view that the public sector legal aid officers had adopted a policy of seeking to exclude the private practitioners from such work. Further, solicitors interviewed by the Commission during its inquiry criticised the scale of fees set by the Legal Aid Office. They believed that the scale of fees was so unreasonably low that it was economically impossible for a medium sized firm to accept more than the occasional matter. The scale set fees amounting to 80 – 90% of the normal rates. The scale did not take into account the additional time which is often spent in children's cases in taking instructions and preparing submissions. Whilst private practitioners do not typically depend upon the income gained from children's legal aid cases, some have told the Commission that they normally expect to cover costs if more than the occasional case is to be accepted. There is evidence that three firms in Canberra have over recent months decided to reject any further legal aid work. Private practitioners to whom the Commission has spoken claimed that, although the Legal Aid Office wishes to cut costs by pruning the scale of fees payable to private practitioners, the Office does not have the resources to handle all the children's work itself. The funding which is no longer paid to private practitioners will, it was claimed, be diverted to the payment of salaries of legal officers in the Legal Aid Office who do not spend their time exclusively in providing legal assistance to children. In assessing these comments, however, it should be noted that, at the time of writing, a new scale of fees was being negotiated. The introduction of an appropriate scale could well overcome the difficulties to which the Commission's attention was drawn.

189. ***Legal Representation: The Need*** Earlier in this report it was argued that a court for dealing with young offenders should endeavour both to meet the special needs of the young and to fulfil the traditional purposes of the criminal law.[306] One of the latter purposes is the maintenance of fair procedures designed to protect an alleged offender against the power of the state. The Commission has expressed the view that a child is entitled to all the protections afforded to an adult in a similar situation, and that in some respects the safeguards provided should be greater when a child is involved.[307] Adequate legal representation is perhaps the most important means of ensuring that the necessary safeguards are afforded to children appearing before the Childrens Court. The point has been made emphatically in a United States report:

> There is no single action that holds more potential for achieving procedural justice for the child in the juvenile court than provision of counsel. The presence of an independent legal representative of the child, or of his parent, is the keystone of the whole structure of guarantees that a minimum system of procedural justice requires. The rights to confront one's accusers, to cross-examine witnesses, to present evidence and testimony of one's own, to be free of prejudicial and unreliable evidence, to participate meaningfully in the dispositional decision, to take an appeal – all have substantial meaning for the overwhelming majority of persons brought before the juvenile court only if they are provided with competent lawyers who can invoke those rights effectively ... The most informal and well-intentioned of judicial proceedings are technical; few adults without legal training can influence or even understand them; certainly children cannot. Papers are drawn and charges expressed in legal language. Events follow one another in a manner that appears arbitrary and confusing to the uninitiated. Decisions, unexplained, appear too official to challenge.[308]

In Australia, there would appear at present to be no absolute right to the provision of legal representation in childrens courts or elsewhere.[309] However, the necessity for children to be represented is strongly advocated in reports[310], the literature[311], and in submissions[312] to the Commission. The Report of the Commission of Inquiry into Poverty, for example, attests:

> In our view legal representation for children appearing before the childrens court, whether in the criminal or protective jurisdiction, is necessary if justice is to be done.[313]

Several arguments can be marshalled to support this view. Justice is seen to be done where the court process and the approach of decision-makers conform to citizen expectations of a judicial hearing before an impartial official.[314] Representation assists the court in making an accurate decision by enabling relevant points of law or fact to be brought to its notice, and by allowing for the testing of evidence before the court by cross-examination and other procedures. It also enables the adjudicator to concentrate on his role as decision-maker and to leave the articulation of the child's wishes and interests to the child's representative.[315] Above all, representation helps the child to participate and be heard in the proceedings. In an adversarial setting, where the court's decision is usually influenced by the views put to it during the proceedings, children suffer particular disadvantages. Because of their immaturity, children may be specially unable to understand legal procedures, to cross-examine witnesses or take the other steps which the adversary system requires if defendants in criminal proceedings are to put their case effectively.[316] It is unacceptable that a child should be the subject of orders which may have a far reaching impact upon his future life, without having had an opportunity effectively to influence the court's decision. The child's legal representative has an indispensable role to fulfil in criminal proceedings.

190. ***Role of the Child's Representative in the Childrens Court*** It might be thought by some that in criminal proceedings the child's interests are protected by the magistrate, the proposed Youth Advocate and the welfare or health worker who makes the principal report to the court. A lawyer representing the child could well hinder the court in its rehabilitative role by insisting upon adversarial procedures and utilising technicalities to prevent the child's obtaining the treatment he needs. This view is misconceived. Legal representation of the child is not incompatible with the purposes of the Childrens Court. Moreover, the role of the child's representative is quite separate from the roles of the other members of the court system and need not obstruct the court's proper functioning. The magistrate's role is to make the decision upon the basis of the evidence and arguments put to him. The welfare or health worker's role is to present to the court a factual report as evidence upon which the magistrate may base his decision. The Youth Advocate has the limited role in criminal proceedings of arranging for the preparation of background reports, if the magistrate so

---

306 Para.115.

307 Para.115, 116.

308 *Task Force Report*, 32.

309 *McInnes* v. *The Queen* (1979) 27 ALR 449; (1980) 54 ALJR 122. Cf. the dissenting judgment of Murphy J who cited United States authority (*Gideon* v. *Wainwright* 373 U.S. 335 (1963); *Argersinger* v. *Hamlin* 407 U.S. 25 (1971)) and concluded that an accused has the right to legal representation in all serious cases and in all cases in which the accused may be imprisoned. See also *In re Gault* 387 U.S. 1 (1967) (right of children to legal representation in delinquency proceedings).

310 See Commission of Inquiry into Poverty, 301; A.C.T. Legislative Assembly Standing Committee on Housing and Welfare, *Report No. 8 Child Welfare* (1978), 62–3; *Juvenile Justice and Delinquency Prevention*, 559; N.S.W. Anti-Discrimination Board, *Discrimination and Age* (1980), 53; International Year of the Child National Committee of Non-Government Organisations, 'Comments on Family Law Questions Referred to the Sub-committee on the Law and the Rights of the Child', (unpublished) (1979), 1; Justice, *Parental Rights and Duties and Custody Suits*, (British Section of International Commission of Jurists, Chairman of Committee: Gerald Godfrey Q.C.) (1975), 25.

311 There is a very substantial literature on the representation of children. Many of the references are cited in Lucas, 'Advocacy in Childrens Courts', (1980) 4 *Crim LJ*. 63. Cf. Royal Commission Inquiry into Civil Rights (Ontario), Report 1, Vol. 2 (1968), 554–5, McRuer J; and generally Connolly, 'The Adversary System – Is it Any Longer Appropriate?', (1975) 49 *ALJ* 439, 440–1; Rubenstein, 'Procedural Due Process and the Limits of the Adversary System', 11 *Harvard Civil Rights – Civil Liberties Law Review*, 48 (1976); Eggleston, 'What is Wrong with the Adversary System?', (1975) 49 *ALJ*, 428; Brouwer, 'Inquisitorial and Adversary Procedures – A Comparative Analysis', (1981) 55 ALJ, 207.

312 Written submissions from Ms P. Tapp, Ms D. Craig and the Family Life Education Council (Canty.) Inc. (N.Z.) were strongly in favour of the legal representation of children. The Department of the Capital Territory was more cautious: 'The Department concurs with the view that the availability of legal representation and legal aid to all juveniles may be a necessary measure to safeguard civil rights, particularly in cases where there is doubt whether the interests of the parent and of the juvenile are identical'. *Submission*, 51.

313 Commission of Inquiry into Poverty, 301.

314 Ellis, 'Juvenile Court: The Legal Process as a Rehabilitative Tool', 51 *Washington LR*, 697, 700 (1975–6); Kittrie, *The Right to be Different: Deviance and Enforced Therapy*, (1976), 116.

315 Handler, 'The Juvenile Court and the Adversary System: Problems of Function and Form', *Wisconsin LR*, 7, (1965).

316 Commission of Inquiry into Poverty, 301.

CONTINUED

2 OF 6

orders, assisting the magistrate at the dispositional stage, and monitoring the implementation of court orders. The function of the Youth Advocate in this case is to assist the magistrate in ensuring that the interests of society and of the child are protected. The primary function of the child's representative, however, is to express the wishes of his client and to seek to influence the decision of the court accordingly.[317] Although the context is slightly different, this view gains support from decisions of the Family Court of Australia. They emphasise the importance of putting the child's point of view before the court[318] and distinguish the separate representative's role from that of a witness.[319] In those cases where a child is unable to give instructions to his representative, the representative is, at present, unnecessarily hampered in carrying out his primary duty. Provision should, accordingly, be made in the new Ordinance for the appointment by the Childrens Magistrate of a 'next friend' to assist the child and the child's representative. As the need for such an appointment would normally arise in the course of care proceedings, the appointment of a 'next friend' is discussed in detail in the chapter dealing with those proceedings.[320] The child's representative also has a general professional duty which exists in all cases, but more noticeably in those cases where the child is not sufficiently mature to express his wishes. This duty is to assist the court in its functions. It involves the representative's ensuring that the fullest information is available to the court and that all interpretations which have a bearing on the substance of the case and which affect the court's perception of the child's welfare are canvassed.[321]

191. ***Access to Legal Representation*** The imposition of a means test in respect of applications for legal aid in Childrens Court matters does not indicate that those who do not qualify for assistance can necessarily afford the cost of obtaining private legal services. Further, even in cases where the parents of a child can afford private legal representation, a conflict may exist between parent and child, such as to cause the parent to refuse to obtain representation for the child. In such a case the parent may have a desire to 'get it over with' or believe that the child should have a 'taste of discipline' in an institution or otherwise. For the same reasons, a child who would otherwise qualify for legal aid may be prevented by his parents from obtaining legal aid, or his parents may be ignorant of its availability. Ideally, all children should be entitled to full representation. At the same time, the Commission acknowledges that the implementation of such a proposal would require a substantial increase in the funds presently devoted to legal aid in Childrens Court matters. It could also be difficult to justify in the face of present restrictions on legal aid to other disadvantaged groups in society.[322] These restrictions are likely to continue in the forseeable future. Finally, there will be some criminal cases where a child's interests would not be adversely affected to any significant degree by an absence of representation. Where a child is unrepresented, magistrates usually exercise greater care in conducting the proceedings. In minor cases, the magistrate may be able to elicit the necessary information from the child and from the parties. Nevertheless, the magistrate should not, and cannot, be expected to be responsible for ensuring that all children participate and are heard in criminal proceedings as they would be if they were assisted by skilled representatives. The new Ordinance should provide, therefore, for a power to be vested in the Childrens Court to appoint a representative for the child where such a need is *manifest.* Section 65 of the Family Law

317 Lucas, 69f; Legal Services Commission of New South Wales, 8.
318 *In the Marriage of Lyons and Boseley* [1978] FLC 90–423; *Waghorne* and *Dempster* [1979] FLC 90–700.
319 *In the Marriage of E and E* [1979] FLC 90–645, 78, 368.
320 Para.331.
321 Lucas, 76.
322 An analysis of 'disadvantaged people and the law' may be found in Commission of Inquiry into Poverty, Part IV.

Act 1975 (Cwlth)[323] and s.90 of the Children's Protection and Young Offenders Act 1979 (S.A.)[324] are useful precedents for the enactment of such a power. If a child is not represented by a lawyer, and the court considers that he should be so represented, the court should be empowered, in proceedings under the new Ordinance, to make such provision for the child's representation as it thinks fit. Where the court makes an order for representation, it should adjourn the proceedings until the representative has been appointed and received instructions from the child. To permit an order for representation to be speedily dealt with, the Legal Aid Commission should endeavour to ensure that a duty solicitor is available at the Childrens Court whenever the court is sitting.[325]

192. ***Servicing of Legal Aid*** The Commission was informed that tension has existed among private legal practitioners with respect to the servicing of children's legal aid matters. Legal aid administrative procedures relating to duties to provide notification of various matters, detailed reports of the outcome of an action, together with itemised accounts on the Legal Aid Office form have caused some antagonism.[326] It seems clear that these procedures significantly increase the workload of a private practioner who is funded by legal aid. The practitioner does not receive specific reimbursement in respect of this additional work, nor with respect to interviews, letters and communications with the client and with the Legal Aid Commission.[327] In agreeing to act in a matter the private practitioner assumes an ethical duty to represent the client until the matter reaches its conclusion. Yet when a matter becomes unavoidably extended beyond the proceedings specified in the letter of assignment, the practitioner may feel compelled to proceed without being able to obtain the written approval of the Legal Aid Commission to the extended provision of aid.

193. Although there is clearly a need for specialist lawyers to represent children, there is no evidence that excellence as a specialist is attained by full-time rather than part-time practice in the area of helping children or by salaried government employment rather than private practice.[328] It would be unfortunate if the private legal profession were to be effectively edged out of the work to which some lawyers feel a strong social commitment despite comparatively low financial returns. The arguments for and against the concentration of legal aid services in the the public sector rather than regulated distribution between the public and the private sectors will not be undertaken here.[329] The provisions of s.11 of the Legal Aid Ordinance 1977 (A.C.T.) are, however, called to attention:

> The Commission shall determine guidelines for the allocation of work between officers of the Commission and private legal practitioners having regard to the following considerations:
>
> (a) the need for legal services to be readily available and easily accessible to disadvantaged persons;
> (b) the need to make the most efficient use of the moneys available to the Commission;
> (c) the desirability of enabling a legally assisted person to obtain the services of the lawyer of his choice;
> (d) the desirability of maintaining the independence of the private legal profession; and
> (e) the desirability of enabling officers of the Commission to utilize and develop their expertise and maintain their professional standards by conducting litigation and doing other kinds of professional legal work.

323 That section provides as follows:

> Where, in proceedings with respect to the custody, guardianship or maintenance of or access to, a child of a marriage, it appears to the court that the child ought to be separately represented, the court may, of its own motion, or on the application of the child or of an organisation concerned with the welfare of children or of any other person, order that the child be separately represented, and the court may make such other orders as it thinks necessary for the purpose of securing such separate representation.

324 That section provides as follows:

> Where, in any proceedings before the Childrens Court . . . the court is of the opinion that the child the subject of the proceedings needs legal representation and that such representation has not been arranged by or on behalf of the child, the court may, by order, make such provision for the legal representation of the child as it thinks fit.

325 For an analysis of children's perception of duty solicitors and the dangers of locating duty solicitors at the Childrens Court, see Catton and Erikson, *The Juvenile's Perception of the Role of Defence Counsel in Juvenile Court: A Pilot Study* (1975).
326 'Rules, Procedures, and Guidelines of the Legal Aid Office (A.C.T.),' 'General Conditions of Referral', 14–18.
327 'General Conditions of Referral', Item 15, 16.
328 See the discussion in Platt, Schachter and Tiffany, 'In Defense of Youth: A Case of the Public Defender in Juvenile Court', in Hahn (ed.), *The Juvenile Offender and the Law,* 97 (1971); Gamble, 'Children's Hearing Panels for New South Wales?', (1976) 50 *ALJ* 68.
329 See *Juvenile Justice and Delinquency Prevention,* 548; generally Kershaw.

The Legal Aid Ordinance contemplates that an allocation of work will occur between officers of the Legal Aid Office (A.C.T.) and private legal practitioners. It also draws attention to the desirability of enabling a legally assisted person to obtain the services of the lawyer of his choice. The implicit goal to be fulfilled by legal aid services is the equalisation in appropriate cases of access by disadvantaged persons to legal assistance and representation. Financially assisted legal representation is not on its own sufficient to secure such equality. As far as possible the child should also have the right to choose the practitioner he believes best able to represent him, in the same way that other more privileged litigants do.

194. ***Continuing Legal Education*** Officers of the Legal Aid Office and private practitioners who frequently appear in the Childrens Court need to have a thorough practical knowledge of available health and welfare services, of the effect of dispositional orders, and a theoretical knowledge of the behaviour of children.[330] However, very few lawyers are so equipped. Further, many lawyers who represent children are unclear what their precise role should be in the Childrens Court.[331] High priority should be given to the organisation of tours and seminars which promote the acquisition of knowledge relevant to practice in the Childrens Court.[332]

195. ***Role of Childrens Services Council*** The Commisson is conscious that the report has not presented an exhaustive coverage of the issues raised by the provision of adequate legal representation for children in Childrens Court cases. This is an area in which the law is developing. Furthermore it is in some ways inconvenient to tackle the subject of legal assistance for children in isolation from the provision of legal aid and legal costs generally.[333] The Childrens Services Council should monitor the operation of the proposals contained in the report. Specifically it should consider the availability of funds for the proper representation of children, the involvement of the private legal profession in the representation of children, the provision of continuing legal education in this area, and the courts' use of their powers to appoint a next friend or a legal representative. In consultation with the Legal Aid Commission, the Council should make recommendations for the improvement and extension of the Commission's scheme.

330 *Juvenile Justice and Delinquency Prevention,* 568–9; Lucas, 76.

331 The Legal Services Commission of N.S.W. has recently reported that '[t]here appeared to be considerable confusion over the client/lawyer role ... a clarification of the role of the lawyer is vital, and should be included in solicitor training.' (Legal Services Commission of N.S.W., 8). The same problem appears to exist in the A.C.T., according to court personnel and members of the police force who talked to the Commission.

332 Cf. *Juvenile Justice and Delinquency Prevention,* 569.

333 The Criminal Law Consultative Committee for the A.C.T., convened by the Chairman of the Commission, is currently examining the circumstances in which professional legal costs are not presently recoverable in the A.C.T. Recommendations on this subject may be expected.

6. Young Offenders: Dispositional Orders

The Dispositional Process

196. ***The Problems: Needs v. Deeds Again*** In the previous chapter attention was paid to the identification of the principles on which a system for dealing with young offenders should be based. Several of these principles are just as relevant to the dispositional stage as to the earlier stages of the criminal process. They may be conveniently re-stated here.

- Orders made following an admission or finding of guilt should not be seen primarily as measures for seeking to meet children's needs. The court's objectives should be clear. The offence should not be used as a pretext for therapeutic intervention. If the offence is used in this manner, the result is likely to be a confusion of purposes and procedures which neither fulfil the objectives of the criminal justice system nor provide the child with the help he needs.[1]
- Dispositional orders should reflect the reservations which have been expressed about the efficacy of available therapeutic techniques.[2]
- In making provision for the orders which should be available on a finding of guilt, regard should be had to the dangers implicit in the application of a paternalistic, child-saving philosophy to young offenders. In particular there is the danger that if attention is focused on the child's needs rather than on the gravity of his offence, the resulting order will be much more severe than would be imposed on an adult guilty of a similar offence.[3] The N.S.W. Green Paper has noted that, under that State's law,

  > there is provision for indeterminate or 'general' committals and it is possible for a juvenile to be committed to an institution for the commission of an offence which, if committed by an adult, could not possibly be the cause of that adult going to prison.[4]

  A similar comment can be made about the A.C.T. law.
- Notwithstanding the desire to deal in a humane and benevolent manner with young offenders, it must not be overlooked that the same purposes which the criminal law pursues with regard to adult offenders are also relevant to the making of dispositional decisions affecting the young.[5]

197. As with other stages of the process, the dispositional stage should be characterised by a search for balance. The desire to deal with the young in a sympathetic and understanding manner should be combined with procedures which recognise that the concerns of the criminal law cannot be ignored. Yet when the measures employed once an offence has been admitted or proved are examined, it is found that the attempt to achieve this combination raises particularly difficult problems. On the one hand is the criminal lawyer's view that the dispositional process should be 'seen as an effort to reflect the relative seriousness of the offense'.[6] This means that the selection of an appropriate measure should be guided by the court's assessment of an offender's culpability, together, in some cases, with a concern for deterrence and removal from society. Although these considerations may be rejected

1 See para.114, 117.

2 See para.113.

3 Gault's case provides an example of this danger. In the juvenile court the offence allegedly committed by the boy resulted in an order under which he was liable to detention in an industrial school for up to six years. An adult convicted of a similar offence would have been liable to a fine of $50 or imprisonment for a maximum of 2 months. In *re Gault* 387 U.S. 1 (1967). An Australian example is provided by the case of a 15-year-old N.S.W. boy who was convicted of stealing petrol worth $5 and driving a motor vehicle while unlicensed. The penalty was a general committal. See Chisholm, 'Bail for Children?' (1979) 4 *Legal Service Bulletin,* 193. See also N.S.W. Anti-Discrimination Board, *Discrimination and Age,* (1980), 55-57, and Commission of Inquiry into Poverty, 296–297.

4 *The Green Paper,* 44.

5 See para.115.

6 Juvenile Justice Standards Project, *Standards Relating to Dispositional Procedures,* (1977), 5.

by some as punitive, such an approach has a positive side. The system must, above all else, be fair. At the dispositional stage this means that the measures imposed must be proportionate to the gravity of the offence. The concept of 'just deserts', to which the Commission referred in its interim report, *Sentencing of Federal Offenders*[7], imposes an upper limit on the use of official powers. The traditional approach of the criminal justice system also requires dispositional orders to be reasonably specific. There are several reasons for this. A specific order safeguards both the offender and the community, the former because it protects the offender from arbitrary treatment at the hands of those who administer the correctional system, and the latter because an explicit order indicates the nature of the restraint to which the offender is to be subjected. In short, a specific order allows the court – an independent and authoritative agency which acts on behalf of society – to exercise control. Also, if an order is explicit, an offender has something definite against which to appeal. The contrary view is that, where children are involved, dispositional orders should not reflect the aims and assumptions of the criminal law. Instead, they should be designed to meet the needs of the young offender. Because these needs are likely to change, and because they will be best understood by those skilled in working with the young, court orders, far from being specific, should be sufficiently broad and general to permit those administering them to do what is in the best interests of the children. Rather than control by the court, it should be left to those in day-to-day contact with the child to make the highly specific decisions about the type and duration of care required. Further, because the needs of the child might be quite unrelated to the seriousness of the offence, the power to intervene should not be artificially circumscribed by notions of 'just deserts'. It is the philosophy of the welfare worker rather than that of the criminal lawyer which at present dominates the dispositional process in the A.C.T. Childrens Court. As has been explained, the orders which permit sustained intervention in the lives of children are non-specific and flexible. These orders are:

- supervision by the Welfare Branch;
- an order requiring a child to live where directed by the Assistant Secretary, Welfare;
- an order making a child a ward of the Minister for the Capital Territory; and
- an order committing a child to an institution operated by the N.S.W. Department for Youth and Community Services.

198. ***Administrative Discretion*** The scope for administrative discretion permitted by each of the orders listed above is very considerable. When a child is required to accept supervision, it is the Welfare Branch which determines the nature and frequency of the interviews. He might be seen regularly or most infrequently. The supervision might amount to intensive casework or the most cursory meetings at which little is achieved. When a child is required to 'live where directed' it is usually the staff of the Welfare Branch which makes the placement decision. The Assistant Secretary, Welfare may at any time move the child from one place to another. A wardship order is the measure most clearly intended to confer wide powers on the Welfare Branch. When a child is made a ward, the Assistant Secretary, Welfare exercises guardianship rights on behalf of the Minister for the Capital Territory and may place the child wherever he wishes. When the Childrens Court wishes to commit a child to an institution run by the N.S.W. Department of Youth and Community Services, it may make either a general committal order or an order specifying a term of months or years. If the court chooses the latter course, the result is a reasonably specific measure. Nevertheless, whether or not such a term is nominated, the N.S.W. Department for Youth and Community Services determines the actual period which a child will spend in an institution, within the judicially or legislatively prescribed maximum. Also, committal carries with it the transfer of guardianship rights to the N.S.W. Minister for Youth and Community Services and to the Minister for the Capital Territory.[8] Clearly the four orders permit the Childrens Court to exercise little actual control, either as to the type of supervision or custody or its duration. The real control is vested in administrators. If the court has little control over what happens to the child it has even less information about what becomes of him. Once one of the above orders is made there are no procedures by which the Welfare

[7] ALRC 15, (1980), para.41–44. The 'just deserts' principle has been defined as 'the link between established crime and deserved suffering [that] is a central precept of everyone's sense of justice, or, more precisely of everyone's perception of injustice.' Morris, 'The Future of Imprisonment: Toward a Punitive Philosophy,' 72 *Michigan LR*, 1161, 1173 (1974).

[8] For a discussion of the law relating to committals to N.S.W. institutions, see para.53, 54.

Branch of the Department of the Capital Territory or the N.S.W. Department for Youth and Community Services is made accountable to the court. Once the orders are made those subject to them have no safeguards under the Child Welfare Ordinance.[9] They may or may not receive the support and assistance which the court envisaged when the orders were made. Where the court has sought to protect the public by means of a custodial order, there is no certainty that this protection will be provided for the term fixed by the court, since the actual duration of custody is administratively determined.

199. ***Case Study*** Although it does not involve an offender, the following case, brought to the attention of the Commission by the Attorney-General, illustrates the gulf between the lawyer's perception of a court order and the perception of those who work with the child and put the order into practice. Late in 1978 the Childrens Court committed a 15 year-old girl to a N.S.W. institution. She had been found to be 'uncontrollable' under s.55 of the Child Welfare Ordinance. It was ordered that the period of committal expire five months later, on her sixteenth birthday. The girl appealed to the Supreme Court. The appeal was heard in March 1979 and dismissed. Mr Justice Blackburn ordered that the girl be committed to a N.S.W. institution until her eighteenth birthday. On the same day that the appeal was heard, the Childrens Court dealt with the girl on a further uncontrollability charge and made a committal order in identical terms to that made by the Supreme Court. In July 1979 (less than six months later) the Welfare Branch of the Department of the Capital Territory was telephoned by an officer in the institution in which the girl had been placed. The officer inquired whether the girl's parents would have her back, as she 'was not seen to be gaining anything from the program'. The parents indicated that they were not willing to have her back. In August 1979 the Welfare Branch was again telephoned, and informed that the girl would be returned to her parents' care the following day. This occurred, and thus the girl remained in an institution for less than six months. When the matter later come to the notice of Mr Justice Blackburn, he drew the case to the attention of the Attorney-General. Notwithstanding the Judge's order (which had increased the term of committal), a release decision had been made by persons in no way answerable to the court which made the order, indeed without the court being consulted or informed in any way.

200. ***Guiding Principles*** In its interim report, *Sentencing of Federal Offenders,* which dealt with adult federal offenders, the Commission emphasised the importance of clear, certain penalties proportional to the gravity of the crime.[10] These qualities were seen as being essential to a fair dispositional system. Yet, although these principles provide a foundation on which to build procedures for dealing with adult offenders, they do not provide a complete answer to all the questions raised in relation to children. This does not mean that, when children are involved, the principles which have been identified as central to the criminal justice system should be rejected. The difficulty is that, if a distinctive system for the young is to be retained, and that system is to be characterised by a balance between criminal justice and welfare considerations, the guidelines adopted in the above report must be modified in order to permit the special needs of the young to be taken into account. To achieve the necessary balance between competing objectives the following principles should be pursued.

- *A combination of flexibility and court control.* Although existing measures leave too much room for administrative discretion, the resulting flexibility is a quality which should not be removed from court orders directed towards young offenders. Greater flexibility is a feature which should distinguish procedures for children from those for adults. Humanitarian and imaginative measures which allow the special needs of the young to be taken into account should be utilised. Rigid, once-and-for-all orders are inimical to such an approach. However, if the concerns of the criminal law are to be given increased prominence, as the Commission believes they should, flexibility must be combined with greater court control. This combination should be achieved in two ways:
  - Greater emphasis should be placed on specific, limited and well defined orders rather than on orders which permit those who administer them to exercise a virtually unfettered discretion during their operation. For example, in the proposals which follow, attention is

[9] The only exception is the special procedure for discharge of wardship created by s.26 of the Child Welfare Ordinance.

[10] ALRC 15, (1980), para.66.

drawn to the importance of precise conditions in probation orders and to the desirability of the court making more use of specific placements rather than orders that the child live where directed by the Director of Welfare. However, if the necessary flexibility is to be achieved, provision must also be made for court monitoring and review of orders so that variations can be made. The argument that specific orders are to be avoided since they may necessitate further court proceedings if a variation is required does not provide a sufficient ground for rejecting these proposals. It is envisaged that the specialist magistrate should have a close and continuing involvement with children who are subject to Childrens Court orders. Review proceedings should constitute an important element in the court's performance of its role.

- Non-specific orders should, nevertheless, be retained. Such orders represent a determination by the court that in some cases certain matters can appropriately be left to the discretion of the persons working with the child. Because, by definition, these orders permit flexibility, the necessary control should be produced by making provision for the Youth Advocate to monitor the way in which those responsible for the child's care exercise their discretion. If the Youth Advocate has this information it will be possible for him to intervene and to bring the matter back before the court should the implementation of the order seriously conflict with the court's expectations and objectives.

- Whatever form the orders take, court monitoring of children's progress is crucial to the Commission's proposals. This monitoring will introduce into the system public accountability which has so far been largely lacking in those situations in which non-specific orders have been employed.[11] Such a system would permit a proper sharing of control between the court and those who implement its orders. Although the exercise of this control would permit the magistrate to have regard to the protection of the public, it would be wrong to see the court's assumption of a more active role solely in these terms. Greater court control would also protect and assist the child. If the offender is to be protected, he should not be simply consigned to a correctional agency. The interference with his liberty which probation or removal from home entails, and the consequent diminution of normal rights should be subject to precise legal rules. This can best be achieved if the court exercises close and routine control. Similarly, regular court supervision, rather than a surrender to administrative discretion, permits a check to be made on the health and welfare agencies' provision of appropriate services. A court may make an order to ensure that certain forms of assistance will be made available to a child. Continuing court scrutiny will make the responsible agencies accountable for any failure to provide this assistance. The adoption of monitoring procedures is designed to ensure that a court order means what it says. If such an order is seen as an expression of the community's will, expressed by a judicial officer according to law, it is necessary for the system to make provision for ensuring, as far as possible, that the community's expectations are realised, whether these expectations relate to the provision of therapeutic services or the imposition of restraints. Detailed recommendations for monitoring procedures are set out below.[12]

- *Upper limits for intervention.* If a balance is to be struck between legal and welfare considerations, it is imperative that the seriousness of the offence should determine the upper limits of society's intervention in the life of a young offender. Society should not lay claim to extended powers in order to try to meet a child's needs. '[P]ower over a criminal's life should not be taken in excess of that which would be taken were his reform not considered as one of our purposes.'[13] The setting of upper limits by reference to tariff principles is necessary to protect

[11] The importance of accountability and judicial control is stressed in a Canadian report. After pointing out the dependence of children on decisions made by adults, the report continues: 'Those decisions are sometimes left to one person or group of persons who are accountable to no one. It has become apparent that this absence of checks and balances in the legal and social welfare processes is unsatisfactory. The child who comes into contact with child welfare authorities should have the benefit of frequent reviews of his or her status in care. In reform legislation, we believe that judicial reviews of the child's status should be a cornerstone for building accountability into child welfare practices.' *Admittance Restricted,* 95.

[12] Para.242f.

[13] Morris and Howard, *Studies in Criminal Law,* (1964), 175.

the child against sustained intervention of questionable value which can result from the pursuit of child-saving policies.[14] This protection should be further assured by the adoption of the principle, advanced in the N.S.W. Green Paper, that the penalty suffered by a child for a particular offence should be no greater than that which would have been suffered by an adult who committed the same offence.[15] The most important practical implication of this principle is that it should not be possible for a court to make an order depriving a child of his liberty if the offence is not punishable by imprisonment when committed by an adult. Further, any such order should not remain in force for a period longer than the term of imprisonment which might have been imposed on an adult convicted of a similar offence. It cannot be too strongly emphasised, however, that the view that the response to a child's offence should not be disproportionate to the seriousness of the offence does not mean that the approach should be punitive and nothing more. Within the limits set by the 'just deserts' principle, the measures employed should reflect the imagination and humanitarianism which should particularly mark our methods of dealing with the young lawbreaker.

- *Economy of punishment.* In addition to advocating the concept of 'just deserts', the Commission's interim report on sentencing federal offenders adopted the principle of economy.[16] This principle requires that the amount of punishment imposed on an offender should be limited to the minimum necessary to achieve community objectives. If this principle should guide the courts when sentencing adults, it should also be observed when young offenders are involved. Decisions affecting the young should be characterised by a special understanding of their immaturity, and hence particular care should be taken to limit the measures imposed.

- *Avoidance of institutional measures.* As detention in an institution is the most severe measure available to the courts, adherence to the principle of economy requires that wherever possible community-based measures[17] should be employed. By utilising such measures as probation and orders requiring evening or weekend attendance at appropriate centres every effort should be made to avoid removing convicted children from their homes. Reliance on alternatives to institutions should be adopted as an objective in its own right. This conclusion is based on what is known about the harmful effects of institutional life and about the consistently high rates of re-offending among those released from institutions for young offenders.[18]

201. ***Legislative Statement of Principles*** In some Australian[19] and overseas[20] jurisdictions the relevant statutes include general statements of the principles which should guide the Childrens Court in its dealings with children in trouble. In some instances the appropriate section does no more than place a general duty on the court to have regard to the future welfare of the child.[21] An example of a more detailed provision is to be found in the South Australian legislation. Section 7 of the Children's Protection and Young Offenders Act 1979 (S.A.) states that in any proceedings under that Act:

> any court, panel or other body or person, in the exercise of its or his powers in relation to the child the subject of the proceedings, shall seek to secure for the child such care, correction, control or guidance as will best lead to the proper development of his personality and to his development into a responsible and useful member of the community and, in so doing, shall consider the following factors:

[14] The argument regarding the setting of upper limits is strengthened by the evidence which casts doubt on the efficacy of available treatment techniques. See para.113.

[15] *Green Paper,* 45. The Department of the Capital Territory has expressed approval of this principle. *Submission,* 57.

[16] ALRC 15, (1980), para.45 and 66.

[17] This is an imprecise but convenient term to describe measures which allow a convicted offender to remain in the community. These measures include probation, community service or other measures which require weekend or evening attendance, and residence in a hostel which allows an offender to go out to school or work.

[18] See discussion, para.228.

[19] For example, Child Welfare Act 1960 (Tas.), s.4; Child Welfare Act 1947 (W.A.), s.25(1); and Children's Protection and Young Offenders Act 1979 (S.A.), s.7.

[20] For example, Children and Young Persons Act 1933 (U.K.), s.44 (1).

[21] For example, Child Welfare Act 1947 (W.A.), s.25(1).

(a) the need to preserve and strengthen the relationship between the child and his parents and other members of his family;
(b) the desirability of leaving the child within his own home;
(c) the desirability of allowing the education or employment of the child to continue without interruption;
(d) where appropriate, the need to ensure that the child is aware that he must bear responsibility for any action of his against the law; and
(e) where appropriate, the need to protect the community, or any person, from the violent or other wrongful acts of the child.

The N.S.W. Green Paper expressed support for legislative statements of principle to guide those administering child welfare legislation.[22] With regard to the making of the dispositional decision it was recommended that members of the Childrens Court should proceed on the basis:

> that juveniles who commit offences should bear responsibility for their actions, but because of their state of dependency and immaturity, require as well, guidance and assistance; and
> that it is desirable, wherever possible, to allow the education or employment of the juvenile to proceed without interruption and to allow him to reside in his own home.[23]

The principles suggested in the Green Paper suggest a search for a balance, as proposed by this Commission, between a response to the child's offence and a response designed to take his special needs into account. Such a balance cannot be achieved under legislation which does no more than direct the court to consider the child's welfare. Commenting on the English provision requiring a court dealing with a child to 'have regard to the welfare of the child'[24] the Ingleby Committee drew attention to the confusion of purposes which a directive of this kind can produce.

> The weakness of the present system is that a juvenile court often appears to be trying a case on one particular ground and then to be dealing with the child on some quite different ground.[25]

When a court acts in this manner the result can be more sustained intervention than is warranted by the seriousness of the offence. Accordingly, the new Child Welfare Ordinance and the practice of the Childrens Court should reflect the following principle:

- Although the court must have regard to the welfare of a young offender, this objective must be pursued within the framework of orders whose upper limits are determined by the seriousness of the offence of which the child has been found guilty.

Further principles which should be reflected in the new procedures are:

- an order depriving a child of his liberty should be employed only in respect of an offence for which an adult would be liable to imprisonment;
- wherever possible a child should be permitted to remain in his own home and to maintain his relationship with his family and continue his education and/or employment; and
- intervention should be limited to the minimum necessary to achieve community protection.

Measures for Young Offenders

202. ***Outline of Proposed Measures*** It is recommended that, if the facts of an offence are admitted or proved, the following measures should be available to the A.C.T. Childrens Court. Each of these measures should be available in respect of summary and indictable offences. The existing distinction between penalties for each category of offence should not be retained.[26] The proposed measures are:

---

22 *Green Paper,* 9. The Department of the Capital Territory recommended that the new legislation contain a statement of guidelines, and favoured the approach adopted in s.7 of the Children's Protection and Young Offenders Act 1979 (S.A.). *Submission* 42–43.

23 *Green Paper,* 43.

24 Children and Young Persons Act 1933 (U.K.), s.44(1).

25 *Ingleby Report,* para.66.

26 A similar approach was advocated in the Green Paper. There it was stated that, with regard to penalties, there is no need to retain the distinction between indictable and summary offences. Instead it was recommended that, for the purpose of sentencing, a distinction should be made between offences which, if committed by an adult, are punishable by imprisonment and those which are not. *Green Paper,* 46.

- dismissal;
- reprimand;
- conditional discharge;
- monetary penalties (i.e. restitution or a fine);
- probation;
- attendance centre order;
- residential order placing the child in an open home or hostel;
- custodial order placing the child in an A.C.T. institution for a maximum of six months;
- committal to a N.S.W. institution[27] for a specific period not exceeding two years;
- other penalties available to the court in its capacity as a Court of Petty Sessions.

203. ***General Changes*** Two general comments must be made about this range of penalties:

- *Restrictions on sentencing 'according to law'.* The power of the Childrens Court to deal with a child 'according to law' and so employ measures other than those recommended above should be carefully circumscribed by the new legislation. For example, for reasons which are explained below[28], the power to release a child on a recognizance is not included in the above list, and it is not intended that the court should be permitted to employ it under the guise of dealing with a child 'according to law'. The object has been to provide the Childrens Court with a range of measures specifically designed for those under 18. It would defeat the purpose of the proposed reforms if the Childrens Court regularly employed measures which had not been so designed. However, there will be occasions on which penalties other than those listed will be appropriate. An example of an adult penalty which might be employed is the suspension or cancellation of a driver's licence.[29] The imprisonment of children by the Childrens Court should be explicitly prohibited. When a custodial sentence is required, the Childrens Court should have available to it custodial and committal orders allowing for children's detention in institutions specifically adapted to the incarceration of the young. If a child's offence is so serious that these custodial measures are inappropriate, the Childrens Court should employ its power to commit the child to the Supreme Court for trial or sentence. The Commission's recommendation should not be interpreted as a recommendation that in no circumstances should a child ever be imprisoned. Imprisonment should continue to be available as a penalty for very serious offences by those under 18. However, it is the Supreme Court, and not the Childrens Court, which should exercise the power to imprison in such cases. The imprisonment of the young is inherently undesirable. When an institutional committal is required, children should not be confined with adult offenders, but in institutions whose regimes are as far as possible adapted to their special needs. In its interim report on sentencing the Commission criticised the conditions in N.S.W. prisons.[30] Every effort should be made to avoid confining A.C.T. children in these institutions, and pursuit of this policy is most likely to be facilitated if the use of imprisonment for children is seen as an exceptional course, open

---

27 In this chapter and in Chapter 9 the Commission's recommendations regarding the power of the Childrens Court to make an order placing a child in a N.S.W. institution employ the terminology used in the present Ordinance. The proposals refer to the power to commit a child to a N.S.W. institution. This terminology has been retained notwithstanding the fact that the Green Paper has recommended the adoption of a new legislative formula. The formula proposed is committal to the control of the Minister and hence the Green Paper refers to control orders. (*Green Paper,* 61) The retention, in this report, of the existing A.C.T. formula makes for greater clarity and it is also the formula used in the Child Welfare Agreement Ordinance 1941 (A.C.T.). If it is decided to re-negotiate the agreement between the Commonwealth and N.S.W. governments, consideration should be given to bringing A.C.T. and N.S.W. terminology into line.

28 Para.209f.

29 The power to cancel or suspend a driving licence is conferred by s.193(5) of the Motor Traffic Ordinance 1936 (A.C.T.). See also Motor Traffic (Alcohol and Drugs) Ordinance 1977 (A.C.T.), s.31–33.

30 ALRC 15, (1980), para.207–211.

only to the Supreme Court. Further, the N.S.W. Green Paper has endorsed the general principle that the Childrens Court should not have the power to imprison a child.[31]

- *Control of adjournments.* The Childrens Court should be discouraged from fashioning its own penalties by employing adjournments. In many jurisdictions it is a regular practice for the Childrens Court to postpone sentence, adjourn a case and indicate that a particular course should be adopted during the adjournment. It might be suggested, for example, that the child receive psychiatric or other care. The implication is that, if this is done, the sentence will be lighter than would otherwise be the case. In the Commission's view it is the legislature's responsibility to state with reasonable precision the orders which a Childrens Court should make. The legislature cannot effectively exercise this responsibility if the power of adjournment can be employed to achieve a type of sentence for which the legislation makes no provision. However, it is clear that the court must retain the power to adjourn a matter, whether before or after a finding of guilt. It may order that a report be prepared to assist it in the making of the dispositional decision, and obviously the exercise of such a power requires an adjournment. Similarly, there will be situations in which, though the court does not require a formal report, further information or the happening of a particular event will assist the court in determining the appropriate sentence. For example, a youth may have applied to join the armed forces and the court may feel that, if his application is successful, the imposition of a penalty would be unnecessary or even undesirable. In such a situation it is obvious that the court should be able to order an adjournment in order to make the most appropriate decision. Use of the power of adjournment in this manner is, however, quite different from the imposition of imprecise and unauthorised forms of conditional penalty. Although, while the power of adjournment exists, resort to penalties of this kind can never be wholly eliminated, significant controls can be imposed if the length of adjournments is strictly limited. Accordingly, the Childrens Court should be obliged to make one or more of the above orders within six months of a finding that an offence has been proved. The Commission appreciates that such a requirement could be rendered ineffective by the simple expedient of the court's refraining from making a finding or delaying such a finding. However, it would be the Commission's expectation that the legislative intent of the proposed reform would be observed.

204. ***Dismissal*** In its interim report on sentencing, the Commission discussed s.19B of the Crimes Act 1914 (Cwlth), and commented favourably on the value of a dismissal of the kind for which provision is made in that section.[32] In the A.C.T. a similar power is made available to the Childrens Court under s.59(a) of the Child Welfare Ordinance. The power to dismiss a charge is typically used when the court considers a matter to be trivial. It should be retained.

205. ***Reprimand*** Section 59 of the present Ordinance also makes provision for a child to be admonished and discharged. This power, often referred to as a power of absolute discharge, should also be retained. However, the terminology should be simplified and the new Ordinance should authorise the court to make an order reprimanding the child. The powers created by s.59 may be exercised 'having regard to all the circumstances and to the welfare of the child or young person.' The new Ordinance should make it clear that the power to dismiss a charge or to reprimand a child, like other powers exercisable without the entry of a conviction[33], should be employed if the court considers such a course to be in the interests of the child's welfare.

206. ***Restitution*** An order requiring an offender to make restitution to the victim of his offence has obvious appeal. It is rational that the offender should be asked to make redress. Such an obligation is one which a child will readily understand. The requirement is a constructive and positive one, and is

---

31 *Green Paper,* 49. The only exception envisaged by the Green Paper was the retention of a special power of imprisonment in respect of older juveniles guilty of serious misconduct in a training institution. The Commission has not dealt with the difficult question of methods of handling misconduct in institutions. See *Green Paper,* 49, 51, 63–64, *Muir Report,* 97, and Child Welfare Act 1939 (N.S.W.), s.57. As has been noted (para.173) there is a need for regulations or an Ordinance dealing with Quamby Children's Shelter. If an institution for juveniles is established in the A.C.T., the regulations or the Ordinance should cover methods of dealing with misconduct in this institution.

32 ALRC 15 (1980), para.356–357.

33 The orders which it should be possible to make without the entry of a conviction are discussed in para.240.

explicitly concerned with the victim and the loss or injury suffered by him. Too often the criminal law ignores the victim.[34] An order to make restitution is directly related to the offence.

> There is a reality involved: society does not sanction fraud or other forms of theft; it does not approve injury inflicted upon an innocent person. Society wants to make sure the offender realises the enormity of his conduct, and it asks him to demonstrate this by making amends to the individual most affected by the defendant's depredations.[35]

Notwithstanding the advantages of a restitution order, it is necessary to take into account the need for the court, before ordering monetary restitution to be made, to ensure that the sum is one which the offender is able to pay. This consideration is of particular relevance to children, who are less likely than adults to have money of their own. It must be emphasised that it is the *child's* means which should be the subject of inquiry. Although it must be recognised that often parents will pay, every effort should be made to see that the making of restitution is accepted as the child's responsibility. There may be little point in imposing a monetary penalty on a child if the parents pay and the child is not made answerable for his offence. Resort to such a penalty will generally be inappropriate if there is no reasonable possibility that the child will be able to pay. However, care should be taken to avoid too rigid an approach. There will be occasions on which the court might wish to impose a financial penalty on a child and leave it to the family to arrange how payment should be made. The parents might initially make payment. In such a case the penalty should be limited to a sum which the child will be able to repay. Further, in reaching a conclusion about the appropriateness of ordering a child to make restitution, the court must also take care not to prevent or discourage parents from offering to pay restitution on behalf of the child. To do so would be unfair to the victim. In its report on sentencing, the Commission discussed some of the matters raised by a requirement that a court take into account the means of an offender before imposing a financial penalty.[36] A Victorian Act at one stage imposed such an obligation on magistrates and justices, but the relevant provision was repealed.[37] The Commission was not impressed by the arguments which led to its repeal. Accordingly it recommended the enactment of a Commonwealth provision obliging a court, when sentencing a federal offender, to make an assessment of the offender's means whenever the imposition of a financial penalty is contemplated.[38] A provision in similar terms should be embodied in any new legislation dealing with the powers of the A.C.T. Childrens Court to order a child to make monetary restitution or to pay a fine. The amount of the restitution ordered should be directly related to the child's ability to pay. It should also, of course, be directly related to the actual harm caused, although on occasions it will be appropriate to order the making of partial restitution. Payment of the amount ordered should be by way of a lump sum or in instalments. One further issue raised by an examination of restitution and other monetary penalties is that such measures favour the more affluent. Care must be taken to avoid the making of orders, which, in effect, permit children of more affluent parents to receive more lenient treatment. The point is particularly relevant to the making of restitution orders. A child of more affluent parents who is in a position to make good the loss or damage caused could well be released without any further action being taken against him. The child who is not in a position to do so could, as a result, suffer more severe consequences. This is not a matter which may be readily dealt with in legislation[39], but it is one to which the courts must be continually sensitive. Provision should also be made for restitution in kind. There will be situations in which the court may wish to order a child to perform work which will benefit the victim or to make good damage caused. Such a requirement could be imposed as part of an order conditionally

---

34 For a discussion of the desirability of the criminal law paying greater attention to the victim, see ALRC 15, (1980), para.387.

35 Dressler, *Practice and Theory of Probation and Parole* (2nd ed., 1969), 241.

36 ALRC 15, (1980), para.382–385.

37 The relevant provision was s.57 of the Magistrates' Courts (Jurisdiction) Act 1973 (Vic.) This stated:

> In fixing the amount of a monetary penalty a Magistrates' Court or justice shall take into consideration among other things the means of the offender so far as they appear or are known to the Court or justice.

This section was repealed by the Magistrates' Courts (Amendment) Act 1975 (Vic.), s.3.

38 ALRC 15, (1980), para.385.

39 One possible legislative approach would be the formal adoption of the Swedish day fine system. With regard to children, such a system would be feasible only in respect of older children who are in employment. For a discussion of the Swedish day fine system see ALRC 15, (1980), para.383-384.

discharging a child.[40] A requirement of this kind should be limited to the performance of services for the victim. Where it is felt that a child should undertake some form of community service this objective should be pursued within the framework of an attendance centre order.[41] In the United States some restitution programs bring about a victim–offender confrontation, and involve the victim in the development of a restitution plan.[42] This course might be a particularly suitable one in some cases involving property offences. Obviously the arrangement of confrontations of this kind will not always be appropriate. However, there will be occasions on which such a meeting will benefit both offender and victim. The court should consider this possibility. Finally, it should be noted that the subject of restitution orders raises a number of complex issues. A thorough examination of these issues must await the completion of the Commission's sentencing reference. Although existing A.C.T. laws do deal in a limited manner with the courts' powers to order restitution[43], it is desirable that, as an interim measure, the new Ordinance should clearly indicate that the Childrens Court's powers include the power to make a restitution order.

207. ***Fines*** The fine is a measure which should continue to be available to the Childrens Court. The imposition of a fine provides a simple, clear penalty which can be readily adapted to the seriousness of the offence. A further advantage is that fines are economical, since they produce revenue for the state and usually cost little to administer. Although the Court of Petty Sessions Ordinance 1930 (A.C.T.) contains a general provision relating to the imposition of fines, this provision is very limited, as it sets a maximum fine of $50.[44] For offences not covered by this section, the power to impose a fine is available to the Childrens Court only if it is conferred in respect of a specific offence. It is therefore necessary to make a distinction between those offences in respect of which a power to impose a fine has been specifically conferred, and those in respect of which no such power, or the very limited power under s.188(2) of the Court of Petty Sessions Ordinance 1930 (A.C.T.), is available. Where the offence of which a child is found guilty is, in the case of an adult, punishable by a fine, the maximum fine which the Childrens Court is authorised to impose should be that set by the enactment creating the offence. This limitation is in line with the basic principle that a young offender should not be liable to a greater penalty than an adult convicted of the same offence could receive. When there is no provision for the imposition of a fine other than that contained in s.188(2) of the Court of Petty Sessions Ordinance 1930 (A.C.T.), it should be open to the Childrens Court to impose a fine regardless of the nature of the offence and of the penalty laid down in the enactment creating the offence. To cover this situation, the new legislation should set a maximum fine. It is recommended that this figure be $1000.[45] Provision should be made for a fine to be paid in a lump sum or in instalments. Where necessary, the child should be given a specified time to pay. The amount of the fine should be directly related to the seriousness of the child's offence, any prior convictions, and to his ability to pay. In the discussion of restitution it was emphasised that the court should inquire into the child's means and should endeavour to ensure that the sum is paid by the child himself. These comments are equally applicable to the fine. The possibility of discrimination against the less affluent is greater when fines are employed, since, although it is a common practice for magistrates in the A.C.T. Childrens Court to put questions as to the child's ability to pay, there is

40 Conditional discharge orders are discussed in para.215.

41 See para.224.

42 For a discussion of this practice, see Scutt, *Restoring Victims of Crime*, (1980), 23–26.

43 See s.437 of the Crimes Act 1900 (N.S.W.) as amended in its application to the A.C.T. and Crimes Act 1914 (Cwlth) s.21B.

44 The relevant provision is s.188(2) of the Court of Petty Sessions Ordinance 1930 (A.C.T.). This states that where the Court of Petty Sessions 'has authority under an Ordinance, other than [the Court of Petty Sessions Ordinance] or any law, whether past or future, to impose imprisonment for an offence punishable on summary conviction, and has no authority to impose a fine for that offence, it may . . ., if it thinks that the justice of the case will be better met by a fine than by imprisonment, impose a penalty not exceeding Fifty dollars . . .' Further, an offender in default must not be made liable to a greater term of imprisonment than that to which he is liable under the Ordinance authorising the imprisonment. Cf. Crimes Act 1914 (Cwlth), s.16.

45 Cf. *Green Paper*, 46, which suggested that a fine imposed by the Childrens Court should not exceed the maximum prescribed under the relevant Act or law, or $500, whichever is the lesser. The setting of an overall maximum seems arbitrary and unnecessary. The Commission's preference is for the adoption of the maximum prescribed by law or, where no provision is made for the imposition of a fine, a maximum fine of $1000.

always the possibility that standard fines, calculated on a tariff basis, will be imposed. As a matter of principle, restitution orders are generally preferable to fines.[46] The fine is simply a penalty, whereas restitution confers benefits on the victim and makes the offender responsible for compensating him. A fine should not be imposed if it will stand in the way of the offender making recompense to the victim. 'It is certainly undesirable for the state to compete with the victim for the often meager resources of the defendant.'[47] Procedures for dealing with non-payment of monetary penalties are discussed below. When the subject of default is considered, it should not be overlooked that the figures quoted earlier on payment of fines imposed on children[48] suggest that the problem may not be an unduly serious one. However, it is not known whether this is because a large number of fines were paid by the parents on the children's behalf.

208. ***Failure to Pay*** If monetary penalties are employed, it is necessary to decide on the course to be adopted if the child defaults, either by failing to make any payment or by not paying as ordered. The sanction provided by the Child Welfare Ordinance for default is committal to a shelter, institution or prison.[49] In practice young fine defaulters are held in Quamby Children's Shelter. It is normal for the Childrens Court, when imposing a fine, to specify the number of days' detention which are to be served in default. Such a practice can also produce discrimination against the less affluent. It is unjust to expose a person to a custodial penalty simply because he lacks the means to obey the court's order. To avoid this possibility, the Commission, in its interim report on sentencing, recommended that, so far as offences against Commonwealth and A.C.T. laws are concerned, the imprisonment of adults for the non-payment of a fine should be permitted only if the default is wilful and without reasonable excuse.[50] It should be noted that this recommendation was designed not only to limit the use of custodial penalties for fine default, but also to put an end to the automatic resort to detention when a fine is not paid. Both these objectives should be reflected in the revised legislation for dealing with young offenders in the A.C.T. Where a child has failed to pay a fine or monetary restitution ordered by the court, he should be brought before the Childrens Court to explain his default. A custodial measure should be imposed only after it has been established that the default was wilful and without reasonable excuse. The court should not, however, be limited to the imposition of a custodial penalty when a wilful default has been established. As an alternative it should be open to the court to make an attendance centre order.[51] The custodial penalty should take the form either of a committal to a shelter, to an A.C.T. institution, or to a N.S.W. institution for a specified number of days not exceeding 30. The only shelter in the A.C.T. is Quamby Children's Shelter. The detention of fine defaulters in this shelter is most undesirable, since they must be held with children on remand and the institution is small and its resources limited.[52] However, until the A.C.T. establishes its own institution for sentenced children[53], there is no alternative if the detention of fine defaulters in N.S.W. is to be avoided. Where the failure to pay a fine or a sum ordered by way of restitution is not wilful and without reasonable excuse, it should be open to the court to order:

- that the fine be reduced or remitted;
- that the child be given time or further time to pay;
- that, where the order directed a lump sum payment, the sum be paid in instalments; or

46 See discussion, Juvenile Justice Standards Project, *Dispositions*, 53. See also ALRC 15, (1980), para.387.

47 American Bar Association Project on Standards for Criminal Justice, *Standards Relating To Sentencing Alternatives and Procedures*, (1968), 126.

48 See para.96.

49 Child Welfare Ordinance 1957 (A.C.T.), s.62(1).

50 ALRC 15, (1980), para.380. See also s.18B which was proposed by the Commission as an amendment to the Crimes Act 1914 (Cwlth), id., 570.

51 Discussed para.224. For an example of a provision permitting the imposition of a similar type of sanction for the non payment of a fine, see s.10A of New Zealand's Criminal Justice Amendment Act 1962. See also s.99a of the Children's Protection and Young Offenders Act 1979 (S.A.) which makes provision for a fine defaulter to serve a period of detention on a periodic, non-residential basis. Provision is also made for the defaulter to participate in a work project or program, (id., s.99a(3)(d)).

52 The Department of the Capital Territory has expressed the view that it is inappropriate to confine fine defaulters in Quamby Children's Shelter, *Submission*, 71.

53 See discussion, para.229f.

- the imposition, in lieu of the fine, of any other measure open to the Childrens Court in respect of the original offence (other than an attendance centre order or committal to a shelter or institution).

As a further protection for children who are unable to pay a fine or other financial penalty, provision should be made for the child to apply to the court for an order that the financial penalty be wholly or partly remitted, or that the time to pay be extended.[54]

209. ***Release on a Recognizance: The Nature of the Order*** Before considering release on a recognizance, it is necessary to undertake a detailed examination of the nature of the different types of order which make provision for the conditional release of offenders. A distinction must be made between an order postponing sentence and one by which the court divests itself of the matter on the understanding that the defendant will observe certain conditions. The Child Welfare Ordinance makes provision for both types of orders. Under s.59(c), when an offence has been admitted or proved, the Childrens Court may, without proceeding to a finding of guilt,

> discharge the child or young person conditionally on his entering into a recognizance, with or without a surety or sureties, to be of good behaviour, to comply with such terms and conditions as the Court specifies and to appear for a finding of guilt and to be further dealt with in accordance with the provisions of [s.57 or s.58] if called on at any time during such period, not exceeding three years, as the Court specifies.

This provision, by creating an obligation to appear in court to be further dealt with if called upon, makes it explicit that no sentence has been imposed for the offence and that the possibility of imposing a sentence is to be kept open. In contrast is s.57(1)(e) under which the court may

> in addition to or in substitution for a committal [to an institution], require the child or young person to enter into a recognizance, with or without a surety or sureties, to be of good behaviour, and to comply with such terms and conditions as the Court specifies, for a term of not less than twelve months or more than three years.

Release on probation, under s.57(1)(a) or s.58(a), seems to represent the same type of conditional discharge. The nature of the different types of release order has been examined in a number of Australian decisions. In *Griffiths* v. *The Queen*[55] the High Court heard an application for special leave to appeal against a decision of the N.S.W. Court of Criminal Appeal. The appellant had been dealt with by Judge Goran in the N.S.W. District Court after pleading guilty to a number of offences of breaking and entering and stealing. The Judge had remanded him for 12 months for sentence, and had released him on a bond, the conditions being that he was to be of good behaviour for the period, accept supervision from the Probation and Parole Service, and appear in court for sentence if called upon to do so during the period. The Attorney-General for the State of New South Wales appealed to the N.S.W. Court of Criminal Appeal on the ground that the disposition was inadequate. That Court allowed the appeal. The Attorney-General's appeal was brought under s.5D of the Criminal Appeal Act 1912 (N.S.W.), which confers on him the right to appeal against 'any sentence pronounced' by the Supreme Court or by the District Court. The main question argued before the High Court was whether Judge Goran's order was a 'sentence' within the meaning of s.2 and 5D.[56] The Court held that it was not, and that therefore the Court of Criminal Appeal had no jurisdiction to hear and determine the appeal under s.5D. It must be emphasised that the High Court was considering an order in the form of a *deferred sentence.* Judge Goran had prefaced his explanation to the appellant with the words, 'I won't deal with you today, I will deal with you in twelve months time.'[57] The order which the Judge fashioned was very similar to the so-called 'common law bond'. Both Mr Justice Jacobs and Mr Justice Aickin pointed out that there was no essential legal difference between such a bond and Judge Goran's order.[58] The order also had a good deal in common with one made under s.556A of the Crimes Act 1900 (N.S.W.), the important difference being that an order made under this section is made without the entry of a conviction, whereas Griffiths had been convicted. Section 556A(1)(b), when read in conjunction with s.556A(1A), is the equivalent of s.59(c) of the A.C.T. Child Welfare Ordinance. The significant passages in the judgments in *Griffiths* are those

---

[54] Cf. ALRC 15, (1980), para.386 and Motor Traffic (Alcohol and Drugs) Ordinance 1977 (A.C.T.), s.30.
[55] (1977) 137 CLR 293.
[56] 'Sentence' is defined in s.2 of the Criminal Appeal Act 1912 (N.S.W.).
[57] (1977) 137 CLR 293, 296.
[58] id., 323–4 and 344 respectively.

dealing with the nature of the order made by Judge Goran, especially the comments made by Justices Jacobs[59] and Aickin.[60] The latter emphasised the provisional nature of the order by citing[61] a passage from *R.* v. *David*[62]:

> It is commonly said that a person is brought up for breach of recognizance . . . The phrase is a natural one to use, but it is an inaccurate phrase. The person in those circumstances, and the appellant in this case in these circumstances, was not brought up for a breach of recognizance. He was brought up before the court to receive the judgment of the court, upon a conviction recorded against him, which up to that date had never been passed. In other words, he was brought up for sentence.

In the view of Mr Justice Aickin the authorities establish that:

> when, on breach of a condition of a recognizance, the offender is brought before the court it is for sentence on the original offence, not for breach of the recognizance. Accordingly the original order cannot be a sentence in the ordinary meaning of that term.[63]

210. The conclusions reached in *Griffiths* v. *The Queen* apply to a certain type of order only, an order of the kind characterised above as a postponement of sentence. They do not apply to all recognizances. That this is so was made clear in *The Queen* v. *Carngham*[64], where the High Court had to consider a case involving a decision to release an offender under s.20 of the Crimes Act 1914 (Cwlth). The relevant parts of s.20 are as follows:

> (1) If the Court thinks fit to do so, it may release any person convicted of an offence against the law of the Commonwealth without passing any sentence upon him, upon his giving security, with or without sureties, by recognizance or otherwise, to the satisfaction of the Court that he will be of good behaviour for such period as the Court thinks fit to order and will during that period comply with such conditions as the Court thinks fit to impose, or may order his release on similar terms after he has served any portion of his sentence.
> (2) If any person who has been released in pursuance of this section fails to comply with the conditions upon which he was released, he shall be guilty of an offence.
> Penalty: Imprisonment for the period provided by law in respect of the offence of which he was previously convicted.

In the District Court of N.S.W. Judge Smith had sentenced Carngham to two years imprisonment, but had ordered that, pursuant to s.20(1), he be released on a recognizance after he had served six months of the prison sentence. The Commonwealth Attorney-General appealed, under s.5D of the Criminal Appeal Act 1912 (N.S.W.), to the Court of Criminal Appeal of N.S.W. against the sentence. The Court of Criminal Appeal relied on *Griffiths* and held that it had no jurisdiction to entertain the appeal. In dealing with the Commonwealth application for special leave to appeal against this decision, the High Court placed particular emphasis on the fact that Judge Smith's order had produced a 'split sentence' different in kind from the order considered in *Griffiths.* It viewed the order in its entirety and therefore ruled that it was a 'sentence' within the meaning of s.5D. Only two of the Justices expressed an opinion on the nature of a release on a recognizance under the first part of s.20(1). Mr Justice Jacobs stated that the orders envisaged under s.20 are significantly different from the kind of orders considered in *Griffiths.* The orders considered there 'were essentially releases on bail pending a final determination of the matter of sentence'.[65] After pointing out that it was not necessary in the case before him to determine the nature of an order under the first part of s.20(1), Mr Justice Jacobs stated that he inclined to the view that it did not follow from *Griffiths* that such an order is not a sentence as defined in the Criminal Appeal Act.

> First, it is a final order and, secondly, it is an order for release only upon giving security. It is implicit that the defendant will be imprisoned unless and until the security is given. It is more akin to an order for recognizances for good behaviour as a punishment for a misdemeanor than a deferral of sentence.[65]

---

[59] id., 319–324.
[60] id., 339–345.
[61] id., 343.
[62] [1939] 1 All E.R. 782, 785. See also *R* v. *Spratling* [1911] 1 K B 77, 81, and *R* v. *Nicholson* [1951] VLR 273, 274.
[63] (1977) 137 CLR 293, 345.
[64] (1978) 140 CLR 487.
[65] id., 495.
[65] id., 496.

Although basing his decision that the order against Carngham was different from that considered in *Griffiths* (since the former included the imposition of a period of imprisonment), Mr Justice Aickin also made some comments on the nature of the powers conferred by s.20(1). In his view the provisions of s.20 give 'a power of quite a different nature from that exercised by the District Court Judge in *Griffiths* v. *The Queen*.'[67] Under the order made against Carngham there was

> no possibility . . . that the respondent could come back before the trial judge for the imposition of a sentence, or a different sentence, upon the original offence. The statutory context seems to me to make that abundantly clear.[68]

211. It should also be noted that, in *Griffiths*, Chief Justice Barwick seems to have regarded an order under s.20 as definitively disposing of the consequences of a conviction, in contrast to the order made by Judge Goran.[69] Further support for the view that release on a recognizance under s.20 of the Crimes Act 1914 (Cwlth) is fundamentally different from a deferred sentence is to be found in *Devine* v. *The Queen*.[70] The interest of this case lies in the High Court's examination of an order releasing an offender on a recognizance. This order was made under s.20, and the trial Judge had included in it a direction that the offender appear for sentence when called upon to do so. Section 20(1) makes no provision for the imposition of such a condition. The judgments of Justices Windeyer and Owen suggest that a direction to come up for sentence if called upon is incompatible with an order under s.20. Although he did not find it necessary to express a concluded opinion on the point, Mr Justice Owen stated that he felt 'considerable doubt' whether a convicted person who has been released under s.20(1) can later be called up and sentenced for the offence of which he has been convicted.[71] Mr Justice Windeyer went further. In his view an obligation to come up for sentence on the original charge cannot be made a condition of a release under s.20.

> That is because when s.20 speaks of releasing an offender 'without passing sentence upon him', it does not, I consider, refer to releasing him from custody with sentence postponed, but to releasing him absolutely from liability in respect of the conviction. He may still, if he breaks his bond, suffer a penalty equivalent to that provided by law for the offence of which he was convicted. But that is because s.20(2) creates a new substantive offence, namely failure to comply with the conditions on which he was released. The possibility of conviction and sentence for that offence is not I consider compatible with a continuing liability to be sentenced for the old offence.[72]

212. ***Implications*** What do these authorities establish of relevance to this inquiry into the types of order which are and ought to be available to a court dealing with young offenders? They support the view that a broad distinction can be made between two types of order releasing an offender on a recognizance. On the one hand there is an order which can properly be described as a deferred sentence, and on the other, there is a release which, though subject to conditions, amounts to a final disposition of a case. The most important feature of the former kind of order is that, although it may include conditions, no sentence is imposed in respect of the offence. The possibility that a sentence will be imposed for the offence is kept open. This may be done either by way of a provision requiring the defendant to come up for sentence if called upon, or the court may remand the defendant to re-appear before it on a specified date to face sentence. The second type of order can properly be described as a conditional discharge: the court has reached its decision regarding the offence. The defendant is discharged on certain conditions, and if he obeys these conditions nothing further will occur. His obligation to conform to these conditions is his sentence in respect of the offence. Since *Griffiths* v. *The Queen* dealt with the former type of order only, it would be wrong to regard it as establishing that in no circumstances can a release on a recognizance be regarded as a sentence. As will be shown, this point becomes important when consideration is given to the desirability of retaining a release on a recognizance as a disposition available to the courts. Finally, the foregoing analysis indicates how complex and confusing the law in this area is. The law governing the various forms of release on a recognizance lacks the clarity which the criminal law should exhibit. It is

67 id., 500.
68 id., 500.
69 (1977) 137 CLR 293, 304.
70 (1967) 119 CLR 506.
71 id., 524.
72 id., 516.

unsatisfactory that the law should be unclear on such fundamental questions as when an order can be regarded as a final disposition and when the court retains the right to recall an offender to be dealt with for the original offence. The proposals which follow outline new forms of order which do not exhibit the uncertainty and potentiality for injustice, actual or perceived, inherent in the existing releases on recognizance.

213. ***Abolish Release on Recognizance?*** An order which permits the Childrens Court to impose conditions on an offender and to keep open the possibility of bringing him back to be dealt with for the original offence is objectionable for several reasons.

- *Double jeopardy.* On one view of the matter, orders of this kind result in a form of double jeopardy. The crucial question is whether a release on a recognizance amounts to a 'sentence' in its own right. If it does, any further proceedings in respect of the same offence are open to the objection that the child should not be sentenced twice. In considering this objection it is necessary to refer to the three High Court decisions discussed above. On the basis of these decisions it would be possible to argue that, though a genuine conditional discharge (which represents a final disposition of a case) must be regarded as a sentence which precludes a further disposition in respect of the same offence, an order in the form of a deferred sentence cannot be regarded as a sentence. It could be argued, on the authority of *Griffiths*, that a child on whom a deferred sentence has been imposed could not complain that he has been sentenced a second time if he is subsequently dealt with for the original offence. It is, however, possible to challenge such an argument. The judgments in *Griffiths* can be viewed as limiting themselves to an interpretation of s.2 and 5D of the Criminal Appeal Act 1912 (N.S.W.). They do not address themselves to the broader question of the impact of a release on a recognizance. Such a release can impose substantial obligations on an offender. For example, he can be required to accept supervision. To claim that the imposition of such obligations is not a 'sentence' because they are incorporated into an order postponing sentence, is artificial. Finally, though a careful reading of *Griffiths, Carngham* and *Devine* reveals important theoretical distinctions between the two types of orders, in practice their effects may be indistinguishable. Unless (as in *Griffiths*) the court sets a date on which the offender must re-appear before it to be dealt with for the original offence, an order made under a provision such as s.59(c) of the Child Welfare Ordinance (which keeps open the possibility that the child will be re-called to be further dealt with) is normally regarded as a final disposition. Usually the court and the offender act on the understanding that the matter has been completed, and that the offender will re-appear before the court only if he is in breach of any of the conditions attached to the discharge order. Thus it can be argued that there is little practical difference between a conditional discharge and a deferred sentence.[73] If this argument is accepted it follows that, whichever type of order is made, subsequent proceedings in respect of the same offence expose the child to a form of double jeopardy.
- *Finality of punishment.* A sentencing court should make up its mind. In reality a release on a recognizance represents a court's decision that, because the offence is not serious, or because there are extenuating circumstances, a release on certain specified conditions is all that is required. It should not be open to the court to re-consider the matter months or even years after the offence occurred. It is very likely that, if re-called to be sentenced for the original offence (which under s.57(1)(e) or s.59(c) can be as long as three years after the initial appearance), a child would often find the procedure incomprehensible.
- *Nature of conditions.* One condition which is commonly attached to a release on a recognizance is an obligation 'to be of good behaviour'. In its interim report on sentencing the

73 For a further discussion of this point, see Rinaldi's note on *Griffiths* in the *Criminal Law Journal*. He comments: 'That the decision to respite sentence was inconsistently accompanied by an order to enter into a good behaviour bond subjecting the applicant to supervision seems to indicate that the 'non-sentence' was in fact accompanied by an order which did qualify as a sentence, and this ought to have sufficed to activate the jurisdiction of the Court of Criminal Appeal. The relevance of the additional order made by the trial judge was not considered in depth by any member of the High Court . . . Judged against the realities of the situation rather than by the minor formal difference created by the trial judge specifying an actual date for finalising sentence . . . the bind-over in [*Griffiths*] is difficult to distinguish from a sentence.' Rinaldi, (1977) 1 *Crim LJ*, 333, 335.

Commission has expressed reservations about this imprecise requirement.[74] The phrase is a vague one which lends itself to a number of different interpretations. A directive 'to be of good behaviour' does not give the offender a precise indication of his obligations or of the type of activity which will be classified as a breach of the conditions of his release. The phrase lacks the certainty and clarity which should characterise a penal provision. Further, it would be unjust to bring a child released on such a recognizance back before the court as a result of minor misbehaviour not amounting to a criminal offence.

- *Commission of a further offence.* In practice, breach proceedings will normally be instituted only if the child commits a further criminal offence during the period of his conditional discharge. This being so, the undesirability of a procedure which focuses on the original offence becomes more obvious. The child will be dealt with for the later offence and, in fixing the penalty for this offence, the court will take into account the fact that its trust was misplaced and that the child has not responded to its earlier leniency. It may therefore decide to impose a more severe measure. This the court may do without invoking the powers conferred by the recognizance provisions. Thus the imposition of a penalty for the original offence may not only be unjust and inappropriate, it may also be unnecessary.
- *Forfeiture of bond.* Another feature of a release on a recognizance is the liability of the child and of any surety to forfeit a specified sum of money. The threat that the money will be forfeited is intended to act as a deterrent to a breach of the conditions imposed. This aspect of the measure is also open to criticism. A breach amounting to an offence can be satisfactorily dealt with without resort to the obligations of the bond. If, when a subsequent offence comes to notice, a monetary penalty is appropriate, then the court may impose one. It may do so without being tied to a sum which the passage of time may have rendered inappropriate.
- *Unfair punishment.* A procedure whereby the breach of a condition of a recognizance makes it possible to sentence the offender for the original offence is potentially unjust. It is, for example, theoretically possible for a person to be released on a bond for a period of 12 months, to live a blameless life and to adhere to all the conditions imposed, and then to be recalled for sentence. If the purpose of the recall is to deal with the original offence, the court is under no obligation to take into account the offender's adherence to the conditions of the recognizance. Concern with the original offence can also be thoroughly inappropriate if the offender's breach of the recognizance takes the form of an offence quite different from the original one. The facts of *Devine* v. *The Queen*[75] clearly illustrate the problem which can arise. There the offender had been placed on a bond following a conviction for carnal knowledge of a girl below the age of consent. The subsequent offences which amounted to a breach of the condition to be of good behaviour were traffic offences. For these offences he was sentenced to three months imprisonment and fined. Although there was some doubt about the legality of requiring the offender to appear in court to face sentence for the original offence, this situation presents a striking example of the absurdity which can result from a procedure which makes this possible. Mr Justice Windeyer put the point well:

  > I cannot perceive the rationale of the proposition that by driving a motor car at more than thirty miles an hour the offender would render himself liable to be punished for having had intercourse with a girl under the age of sixteen.[76]

- *Confusing proceedings.* After serving the term of imprisonment imposed in respect of the subsequent traffic offences, Devine was brought back before the Judge who had dealt with him on the carnal knowledge charge. It seems that the traffic offences were treated as a breach of the condition to be of good behaviour. At this hearing he was sentenced to three years imprisonment, and it was against this sentence that he applied to the High Court for special leave to appeal. It was unanimously held that special leave should be granted and the appeal was allowed. The judgments delivered in the High Court show that the procedure by which Devine was brought back before the court was so confused that it was not possible to decide for which offence the sentence of three years imprisonment had been imposed. Mr Justice

74 ALRC 15, (1980), para.360.
75 (1967) 119 CLR 506.
76 id., 515.

McTiernan took the view that the defendant had been sentenced for the crime of carnal knowledge.[77] Justices Windeyer[78] and Owen[79] were of the opinion that he had been sentenced for a breach of s.20(2) of the Crimes Act 1914 (Cwlth). This subsection creates a specific offence of failing to comply with the conditions of a release on a recognizance. The extent of the confusion is indicated by the fact that, though the court records led these two Justices to their conclusion, a letter from the trial Judge revealed that it had been his intention to sentence the offender for his original crime.[80] As Mr Justice Owen commented:

> This, to say the least of it, discloses a most unsatisfactory state of affairs, particularly when the record which is said to be incorrect is one which concerns the liberty of the subject.[81]

A procedure by which a substantial term of imprisonment can be imposed without the charge being clearly specified is objectionable. The potential for confusion and injustice implicit in such a situation becomes obvious when one examines the courses open to a sentencing court when an offender is released upon a recognizance. If he commits a further offence and is recalled to court he might be sentenced for:

- the original offence;
- the subsequent offence;
- the separate offence of breaching the conditions of his release;
- an unspecified combination of all of the above; or,
- a general failure to display 'good behaviour'.

Although in *Devine* there was some doubt about the offender's liability for sentence for the original offence[82], the procedure employed was such that he could be sentenced both for the subsequent offence (indeed, he had already served three months imprisonment for this offence) and for the offence of breaching the conditions of the recognizance. Clearly Mr Justice Windeyer had doubts about such a possibility:

> [S]hould the offender be punished for a breach of his obligation of good behaviour, being the breach of the traffic law when he had already served three months in prison for that offence? Can an offender who has been punished once for an offence be punished again under s.20(2) on a charge of failure to comply with the conditions upon which he was released?[83]

In addition to this double punishment there is the further possibility that – as occurred in *Devine* – the offender will also be ordered to forfeit the sum of money specified in the recognizance. Such a system of cumulating punishments is undesirable. Use of a release on a recognizance can create a situation in which, for relatively minor crimes, persons are enmeshed for a very long period in the criminal justice system. They are at risk of being entangled in a maze of penalties. It must also be added that, if the members of the High Court had such difficulty in determining the basis on which the offender had been sentenced, any child caught up in a similar process would find the proceedings utterly incomprehensible.

214. ***Recommendation*** Apart from a new and very limited form of conditional discharge[84] and an adjournment (the duration of which should be brief[85]) all forms of order which keep open the possibility of recalling a child to court for sentence for the original offence should be abolished. This recommendation applies both to existing orders which take the form of a deferred sentence and to those which represent a conditional discharge. With regard to the measures for which provision is made in the Child Welfare Ordinance, acceptance of the recommendation would mean that neither the power of discharge embodied in s.59(c) nor the power to release on a recognizance under s.57(1)(e) should be re-enacted in the new legislation. The former provision explicitly keeps open the possibility of a lengthy period during which the child can be dealt with for the original offence, and

77 id., 511.
78 id., 518–519.
79 id., 524 and 527.
80 id., 526.
81 id., 526
82 Discussed para.211.
83 (1967) 119 CLR 506, 520.
84 See para.215.
85 See para.203.

is objectionable for that reason. The latter provision is unsatisfactory, since nowhere does the Child Welfare Ordinance make clear the basis on which the court may deal with a breach of the conditions of release. If breach proceedings were instituted, the court before which they were heard would be faced with an even more confusing situation than that which confronted the High Court in *Devine*, since there would not be available even the limited guidance provided by s.20 of the Crimes Act 1914 (Cwlth). The use of a release on a recognizance as an all-purpose order is undesirable. It is an unnecessary and unfair device by which to impose obligations on a child. The imposition of a vague (and frequently meaningless) obligation to be of good behaviour should not be among the orders open to a Childrens Court. If the offence really is one which may properly be dealt with by way of a direction to the child to go away and behave himself, the court should reprimand the child, knowing that, if a further offence comes to notice, the child may be more severely dealt with next time. Though at first sight the use of a release on a recognizance offers a general measure by which to modify an offender's behaviour and to encourage and compel him to avoid misbehaviour, viewing it in this manner obscures the functions which the criminal law can perform. In practice the only forms of misbehaviour which will result in breach proceedings will be a further offence or a failure to comply with a specific condition of the court's order (such as a requirement to accept supervision). The new law relating to child offenders should reflect this. If a child commits a further offence he should be dealt with for that offence. In dealing with him the court will be able to take into account the fact that he has not responded to its earlier leniency. If the child fails to comply with a specific condition of the court's order he should be dealt with for that failure. In future, if it is desired to impose sustained obligations on a child, these should be made conditions of a probation order. The new legislation dealing with probation should make it clear that a failure to comply with the conditions of a probation order should be a separate offence. The child should be dealt with for that failure, and not for the original offence. Procedures for dealing with such a failure will be outlined later in this report.[86] The importance of the specificity of probation orders should be emphasised. Both the obligations attaching to an order and the precise consequences of a breach of the order should be made clear.

215. ***Conditional Discharge*** Notwithstanding the conclusion that the existing release on a recognizance should no longer be a measure available to the Childrens Court, it is clear that a limited form of conditional discharge should be retained. The reasons for this are as follows:

- If, as it is obvious it must, the court is to retain the power to adjourn a case after a finding of guilt has been made, then it will always be open to the court to fashion conditional orders, compliance with which will determine the sentence ultimately imposed.
- If the aim is to provide the court with a flexible and varied range of measures, there is a need for a measure mid-way between a reprimand and release on probation.
- If no such measure is available, the result may be that a magistrate who is reluctant to order a reprimand will place on probation a child who does not need, and cannot benefit from, the supervision which a probation order entails.

The issues raised by a consideration of a release on a recognizance suggest that the nature and purposes of the conditional discharge which the Childrens Court should employ should be clearly defined. A new form of conditional discharge is required. The order should exhibit the following characteristics:

- The order should make it explicit that the child has not been sentenced for the original offence and that the possibility of sentence for that offence remains.
- A procedure which permits a child to be brought back before the court and sentenced for the offence is unfair and likely to be incomprehensible to the child if the delay between the offence and final sentence is long. Therefore the length of time a conditional discharge can remain in force should be strictly limited.
- The condition or conditions which the child must fulfil to avoid being sentenced for the offence should be clear and specific. He must know precisely what actions are required of him if he is to escape the sentence. It follows that a discharge on a vague condition such as to 'be of good behaviour' should not be possible.

[86] Para.244.

- The conditions which may be imposed should not include a condition to avoid the commission of a further offence. If the child the subject of a conditional discharge comes to notice following the commission of a further offence he should be dealt with for the subsequent offence. In so dealing with him the court would be able to take into account the fact that the child has not responded to its earlier leniency. If it were possible for the court to make the avoidance of further offending a condition of the order, the result would be that breach proceedings would be confused and unfair. It would not be clear whether the later hearing was dealing with the child in respect of the original offence, the subsequent offence, or the breach of a condition of the order. The recommendation against making the commission of a further offence a condition of the discharge should not, however, be interpreted as indicating that the magistrate should not warn the child against further offending. Obviously the magistrate should be free to give such a warning.
- If the child does breach a specific condition it should be made clear that any penalty imposed relates to the original offence.

Provision should therefore be made for the conditional discharge of a child who has been found guilty of an offence. The maximum period specified in such a discharge should be six months, being the period earlier recommended as the maximum period for which a matter may be adjourned following a finding of guilt.[87] When conditionally discharging a child, the Childrens Court should impose conditions and these conditions should be incorporated into a written undertaking signed by the child. The conditions should be clear and specific. No further penalty should be imposed in respect of the offence if the child complies with the conditions. Examples of the types of conditions which should be employed are:

- a condition to pay restitution or otherwise make amends to the victim;
- regular reporting to the office of the Juvenile Aid Bureau;
- regular attendance at school; and
- performance of other clearly specified tasks.

Avoidance of the commission of a further offence should not be made a condition of the order. The Youth Advocate should, on the court's behalf, monitor the child's compliance with the conditions of the order and provision should be made for the child to be brought back before the court if he fails to comply with the order. It is not intended that a requirement that a child accept supervision by Welfare Division staff should be made a condition of conditional discharge. If such supervision is necessary the appropriate course would be the making of a probation order.

216. ***Probation: Nature of the Measure*** The probation order should be retained and further developed as a distinctive measure for dealing with young offenders. A probation order should not be seen as a token measure[88], to be used for offences the seriousness of which seems to warrant something more than a reprimand and something less than a custodial placement. The order should be employed in a purposeful manner to allow the pursuit of clearly defined and achievable objectives. The objectives which may be appropriately pursued within the framework of a probation order are the imposition of restraints and the provision of counselling, guidance and other services designed to assist the child. A probation order should not be made unless the nature and circumstances of the offence and the offender's background indicate the need for continuing control and support.[89] The making of an order when no such need is apparent not only robs the measure of its distinctive character. It also places an unnecessary burden on those responsible for supervision and diverts them from work with children who do need their assistance and may benefit from it.

217. ***Conditions*** The conditions attached to a probation order should be specific and enforceable. The need for specificity has two aspects. Any condition attached to a probation order should give the

[87] Para.203.

[88] Clarke, 'What is the Purpose of Probation and Why Do We Revoke It?' 25 *Crime and Delinquency*, 409, 420, (1979).

[89] Cf. the Morison Committee's list of conditions justifying the use of probation. The offender must need continuing attention, since, otherwise, a fine or discharge will suffice, and the offender must be capable of responding to this attention while he is at liberty. *Report of the Departmental Committee on the Probation Service* (Morison Committee), Cmnd. 1650 (1962), para.15.

offender a precise indication of his obligations and hence of the conduct which will be classified as a breach of the order. Conditions such as a requirement 'to be of good behaviour' or 'to obey all reasonable directions' of the supervising officer do not sufficiently satisfy the criterion of specificity. A move towards more precise conditions would be a move in the direction of fairer procedures. The second argument against imprecise conditions is that their use represents an abdication of its responsibilities by the court. Such a course is consistent with and even encouraged by the philosophy of the present Child Welfare Ordinance, which makes provision for general orders conferring a substantial amount of discretion on those who implement them. It is inconsistent with the principle, advanced earlier, that a specialist court should exercise greater control and should be more closely concerned with the determination of the precise content of the orders employed. An order to 'obey all reasonable directions' of the supervising officer leaves too much discretion to that officer. Just how unsatisfactory such a condition is becomes apparent when the possibility of breach proceedings is considered. If proceedings of this kind were based on an alleged failure to obey a direction, it would first be necessary to determine whether the direction allegedly disobeyed was 'reasonable'. The uncertainty of the condition inevitably means uncertainty as to when the institution of breach proceedings is justified. When the enforceability of probationary conditions is examined, complex questions are raised about the type of obligations which can and should be enforced. Under the present Ordinance a common form of probation order requires a child to accept supervision from a member of the Welfare Branch, to be of good behaviour and to obey the supervisor's reasonable directions. Such requirements are no more than a pious expression of hope.[90] They are the antithesis of the types of condition which the Commission advocates. In fact such a probation order contains only one clear obligation — to report to the supervisor when so requested — and even this is not spelled out. Requirements as to treatment may not be enforceable. There are certain types of treatment which an offender cannot and should not be compelled to undergo. For example, a court cannot compel an unwilling child to accept psychotherapy. Such treatment demands the patient's voluntary co-operation. Psychologists and psychiatrists normally reserve the right to choose whom they should treat and in what manner. They might be quite willing to assist the court and offer treatment. But in practice the court is no more able to compel them, if they are unwilling, to provide psychotherapy than it is to compel the unco-operative child to accept it.[91]

218. ***Restraint and Therapy*** Scrutiny of a requirement to accept treatment raises theoretical problems. Before addressing these it is helpful to make a broad distinction between conditions designed to impose restraints on a child and conditions which can be described as 'therapeutic'. This distinction reflects the twin objectives of a probation order. Examples of conditions imposing restraints are a direction to report to a supervising officer and to notify a change of address. Examples of the latter are any requirement to accept therapy or to undertake a course designed to assist and improve the child. The question to be considered is whether, quite apart from the practicality of enforcement, both types of requirement may legitimately be imposed by the Childrens Court. It is clear that conditions imposing restraints may properly be made the subject of enforcement procedures. The application of controls is a legitimate and undisputed function of the criminal law. Much more

[90] Another example of an unenforceable condition is a condition that a child should not associate with a named person or persons. At a meeting of A.C.T. school principals convened by the Commission a number of those present criticised orders which included this condition. The Commission was informed that teachers regularly observed children the subject of such orders associating with the named persons in school playgrounds and were powerless to prevent it. Similar criticisms were expressed at a meeting with school counsellors.

[91] An English study of probation has noted that difficulties which can arise when acceptance of psychiatric treatment is made a condition of a probation order. Commenting on three orders which included such a condition, the study pointed out that, though efforts had been made to check the probationers' willingness to co-operate and their suitability for treatment, once the orders had been made none of the three kept any of the appointments. The author commented that the case records suggested that the doctors were not over-concerned. Reference was made to the view that the ease with which probationers could evade the treatment requirement, knowing that the doctor would promptly discharge them, was an incentive not to co-operate. The author of the study doubted that it was practicable to enforce a psychiatric treatment requirement. See Lawson, *The Probation Officer as Prosecutor, A Study of Proceedings for Breach of Requirement in Probation,* (1978), 20–21. But cf. *Report of the Committee on Mentally Abnormal Offenders,* (Chairman, Lord Butler) Cmnd.6244, (1975), Chapter 16. See also para.49.

questionable is the use of compulsion to compel obedience to remedial conditions. Objections include those based on the right of the state to employ the criminal law as a means of seeking a 'coerced cure'.[92] Further, there are dangers in reliance on an offender's 'consent'. In the context of a criminal trial the will of the defendant may be readily overborne. Reference has already been made to the principle that 'power over a criminal's life should not be taken in excess of that which would be taken were his reform not considered as one of our purposes'.[93] The imposition of therapeutic conditions and their enforcement by way of further court proceedings would represent a violation of that principle, if coercive measures were imposed solely for benevolent purposes. On the basis of this objection it can be argued that, when the aim is to help, the approach adopted should be *facilitative* rather than *coercive.*[94] Such an approach requires the viewing of therapeutic conditions as collateral[95] to the other purposes of a probation order, i.e. to those designed to impose restraints. A distinction must therefore be made between those services to which a probationer may be led and not driven, and those requirements which can be effectively enforced. Nevertheless, although such principles are theoretically important, putting them into practice is extremely difficult. The problem is that it is not always easy to distinguish between a requirement which, because it seeks to achieve a 'coerced cure', is both inherently objectionable and unenforceable, and one which, though designed to benefit the probationer, does not involve unacceptable therapy and does not depend on voluntary co-operation. For example, a condition requiring participation in a program involving aversion therapy would clearly violate the principles discussed, but what of a requirement to attend as an out-patient for treatment for alcoholism? If neither aversion nor drug therapy is employed can such a requirement be regarded as objectionable? Even if the probationer is unwilling to co-operate he might derive some benefit from being compelled to attend. Such a program can be broadly described as 'educational,' but the line between it and one which can more properly be regarded as 'therapeutic' is impossible to draw. It therefore follows that it is not practicable to translate into legislative form the suggested distinction between the types of conditions which may properly be imposed and those which cannot. Nevertheless, the considerations to which attention has been drawn should not be overlooked and the court should be sensitive to them. When formulating the conditions of a probation order, the court should be aware of possible objections based on the 'coerced cure' argument or on doubts about enforceability. The obligations imposed should be realistic and should reflect a recognition of the fact that certain forms of assistance can only be offered. They cannot be imposed. The specialist Childrens Court magistrate, whose appointment is recommended in this report, should be well placed to assess the appropriateness of various types of conditions. This is because it should be part of his duties to maintain regular contact with those responsible for carrying out the court's orders. As a result of his discussions with treatment personnel and with the Youth Advocate, the specialist magistrate should have access to information which will allow him to impose obligations which he knows will be enforceable. Only obligations which meet this test and are specific should be made conditions of a probation order. With regard to various forms of intervention which cannot or should not be imposed in the form of conditions, it should be open to the court to make suggestions, and to direct the supervising officer to explore with the probationer the possibility of the latter becoming involved in a therapeutic, recreational or educational program. It should be made clear to the probationer that neither the court nor the supervisor has the power to compel participation. The only legal obligation should be on the supervisor to make the necessary inquiries and to hold the necessary discussions with the probationer. The new legislation should, therefore, make provision for *conditions* and *requirements.* Breach of a *condition* should expose the child to further court proceedings. It should be up to the Youth Advocate, on the court's behalf, to monitor the supervisor's adherence to a *requirement.* This should be an informal process by which the Youth Advocate discusses the case with the supervisor and informs himself of the efforts which have been made to involve the child in a suitable program. There should be no question of further court proceedings with regard to a *requirement.* It should be left to the supervisor to develop the necessary relationship with the child and, on the basis of that relationship, to offer the child advice

[92] Clarke, 415.

[93] Morris and Howard, *Studies in Criminal Law,* (1964), 175.

[94] Morris, *The Future of Imprisonment,* (1974), 18.

[95] See Morris, ibid., who speaks of the need to see rehabiliative programs in prison as collateral to prison purposes.

on participation in an appropriate remedial program. It must be emphasised that it has not been the purpose of the foregoing analysis to cast doubt on the importance of the relationship between probationer and supervisor. A probation order offers a framework for combining control with support and assistance. Having created this framework by selecting the appropriate conditions, the court should turn its mind to the identification of a child's particular needs. These can be the subject of a direction, to the nominated supervisor, regarding the provision of services which the child is free to accept or reject. Such a model is designed to reflect the distinction between restraint and benevolence. On the one hand are objectives which can effectively and properly be pursued by way of a court order. On the other, are those which, because they require a child's voluntary co-operation, or because they embody an unacceptable use of coercive power, cannot or should not be made a condition of a court order.

219. ***The Probation Order*** The requirement that the conditions of a probation order be specific, enforceable, and not unacceptably intrusive, suggests the types of obligation which should be embodied in the new legislation. Obligations which can be made conditions of a probation order should be as follows:

- To report to the supervisor or to permit the supervisor to visit the child at home. Decisions about the frequency of contact should be left to the supervisor. Normally, however, all probationers should be seen by their supervisor at least once a month. If a child needs to be seen less frequently than once a month a probation order should probably not be made. If the order is made and it becomes apparent that regular meetings are no longer required, the proper course is for the Youth Advocate or the supervisor to bring the matter back to court so that consideration can be given to varying or revoking the order.
- To attend school regularly or to work in approved employment and not to leave his school or employment without the supervisor's prior permission.
- To attend a prescribed course or program. A program for persons with alcohol or other drug problems might be appropriate, as might a course of lectures designed to improve driving skills. It is with regard to obligations under this heading that the court must display a keen awareness of the purposes and limitations of the criminal process.
- To abstain from alcohol or other drugs.
- Not to frequent specified places, such as a particular hotel.
- Not to change a place of residence without the supervisor's prior permission.
- To be home each evening by a specified time.

This is not intended to be an exhaustive list. Obviously the court must be left free to exercise its discretion and to devise further conditions appropriate to the particular offender's behaviour. Hence the new legislation must, in addition to listing particular conditions of the kind recommended above, contain a general provision allowing for the imposition of such other conditions as seem appropriate. In fashioning these additional conditions, and in selecting from those listed, the court should be guided by two considerations.

- The order should be specific.
- No condition should be imposed unless the supervisor can verify compliance.[96] Empty admonitions should be avoided. Only if the child's obedience can and will be monitored should further court proceedings be a real possibility. Some of the conditions suggested above should be imposed in some circumstances but not in others. For example, the imposition of a curfew might be appropriate if a child has concerned parents who will co-operate with the supervisor, but inappropriate if there is no one with whom the supervisor can check compliance. Similarly, it will not always be possible to police a direction to abstain from alcohol or other drugs, but in some situations this condition will be a realistic one to impose. The resulting order should be explicit and should reflect the court's close and active involvement in the formulation of conditions specifically tailored to the child's behaviour.

In settling the terms of a probation order it is envisaged that the magistrate should regularly be assisted by the Youth Advocate. On occasions it will be appropriate for the Youth Advocate, the

[96] Clarke, 422.

child, his parents and the nominated supervisor to settle the terms of a probation order and for the resulting arrangement to be incorporated into the court's order if it is approved by the magistrate.

220. ***Term*** The sections of the Child Welfare Ordinance which deal with probation make no reference to a maximum term.[97] Two of the provisions relating to recognizances set three years as the upper limit for a period of conditional release.[98] The former are unsatisfactory since they give the court no guidance, and a three year term is far too long for a child. For a rapidly maturing child a lengthy period of supervision is inappropriate. Towards the end of a three year term, for example, the offence may have been forgotten or, if remembered, viewed by the child as the action of a much younger — and therefore different — person. Alternatively a long period of probation may soon deteriorate into a nominal measure, so that, after an initial period of activity by the supervisor, only adults, the Commission, in its interim report on sentencing, suggested an upper limit of two years for a period of supervision in the case of adults convicted of federal offences.[99] The Commission noted the existence of research showing that most supervised probation orders in Australia are for periods no longer than two years.[100] Its report commented that the longer the period, the less likelihood that the offender will benefit, and the greater the danger of his committing minor offences and continuing his involvement in the criminal justice system.[101] These arguments against long terms of probation are particularly applicable to children. Further, A.C.T. Childrens Court practice seems to reflect a recognition of the undesirability of very long terms of probation. The Commission's analysis of probation orders made by the court is set out in Table 7.

Table 7: Probation Orders Made by the A.C.T. Childrens Court during the Period 1 June 1978 and 31 May 1979: Offenders Only*

Term of 3 years	4 (5.4%)
Term of 2 years	27 (36.5%)
Term of 18 months	6 (8.1%)
Term of 12 months	37 (50.0%)
	74

Any recommendation about the maximum term which should be embodied in future legislation must inevitably be arbitrary to some extent. The Commission recommends that the normal maximum for a probation order for a child should be 12 months. Generally speaking, what cannot be achieved within that period cannot be achieved in a longer period. In exceptional cases, however, it should be possible for a court to impose a probation order of up to two years.[102] An extended term should be imposed only if the particular conditions of the order warrant such a term. For example, a child might agree to undertake a lengthy course of psychotherapy. It might be decided that the special circumstances of the case require an extended probation order to provide a framework while the child undertakes the course. This illustration identifies a principle which should guide the court in setting probation terms, whether these be extended terms or within the normal maximum of 12 months. The term chosen should be explicitly related to the objectives pursued. Having selected the conditions appropriate to the child's offence, the court should determine how long those conditions should remain in force. Such a process should permit the court to fashion a purposeful order specifically tailored to the child's situation. The Commission's recommendation in favour of shorter terms of probation is consistent with its view that probation should become a more distinctive and positive measure. The use of reduced terms should encourage the provision of close and effective supervision and assistance for a limited period rather than infrequent and often cursory supervision

[97] Sections 57(1)(a) and 58(a).
[98] Sections 57(1)(e) and 59(c). Section 60(1), which allows for release on a recognizance following the suspension of a committal order, sets no upper limit.
[99] ALRC 15, (1980), para.369.
[100] Potas, *The Legal Basis of Probation*, (1976), 32.
[101] ALRC 15, (1980), para.369.
[102] Two years is the maximum period chosen in some other jurisdictions, although the use of this maximum is not limited to exceptional cases. See, for example, Children's Protection and Young Offenders Act 1979 (S.A.), s.51(5), and N.S.W. *Green Paper*, 48.

over a longer period. The need to make probation more purposeful has already been stressed and the adoption of reduced terms is consistent with this aim. If probation is to become a more distinctive and positive measure, the emphasis should be placed on short terms during which close and effective supervision and assistance may be provided. Long terms of probation lend themselves to desultory and aimless contact. The recommendation, far from being designed to diminish the efficacy and importance of probation, is designed to enhance the measure.

221. ***The Supervisor*** Although the Ordinance is unclear, s.72(2) seems to suggest that the court should name the person under whose supervision a child is released on probation. In practice the usual formula is that the child is 'to accept the supervision of the Director of Welfare.' Such a formula allows the Director to appoint a staff member of the Welfare Branch as a supervisor, and to change the supervisor should this prove necessary. This power should be retained, so that, when placing a child on probation, the court should be able to order that the child be placed under the supervision of a member of the proposed Welfare Division nominated by the Director. In addition, however, the new legislation should also make explicit the court's power to place a child under the supervision of any other person, not being a member of the Welfare Division. This power would permit the utilisation of the services of members of voluntary organisations and of individuals in the community. There are in the A.C.T. many agencies and concerned individuals, and the possibility of harnessing the services of voluntary probation officers should be vigorously explored. If the court wishes to place a child under the supervision of a volunteer it should be open to it to name this person as the official supervisor. Alternatively, the court may wish to provide the volunteer with the support and advice of a member of the Welfare Division, although leaving the child effectively in the volunteer's care. In such a case the Director should be nominated as the official supervisor and the volunteer should act as a case aid.

222. ***Variation and Revocation*** As with other measures, the law relating to probation must not only make provision for specificity and court control. It must also allow flexibility. It therefore follows that provision should be made for the variation or revocation of a probation order if a change in the child's circumstances makes any of the conditions of the order or its term inappropriate. Although s.72 of the Child Welfare Ordinance deals with the variation or termination of a probation order, it does not indicate how the matter may be brought to court or who may apply. It should be made clear that the child, his parent, the supervisor, or the Youth Advocate may at any time file an application for the variation or revocation of a probation order. A copy of the application should be served on those affected. On hearing such an application the Childrens Court should be empowered to make any of the following orders:

- an order that all or any of the conditions of the probation order be varied, or that a condition be deleted;
- an order that the term of the order be varied;
- an order, where a particular person has been named as a supervisor, substituting another person for the person so named; and
- an order revoking the probation order.

Although the making of an application for the variation or revocation of a probation order should normally be made only when all parties agree, provision should be made to cover the unlikely situation of a refusal by a person affected by the order to attend the hearing. To deal with such a situation the court should be empowered to direct the appearance of such a person. The procedure employed should be similar to that available in breach proceedings.[103] The supervisor should attend or be represented at the hearing of the application.

223. ***Attendance Centre Order: The Need for an Intermediate Measure*** It is clear that the range of dispositional measures available to the A.C.T. Childrens Court should be increased. At present the court must choose between supervised release, a monetary penalty, and a residential placement or committal to an institution run by the N.S.W. Department of Youth and Community Services. There is a need for new and imaginative programs mid-way between probation and complete removal from home. The development of such programs is consistent with the Commission's expressed

[103] See para.246.

preference for the use of alternatives to removal from home.[104] It would help to meet the need, stressed by the A.C.T. magistrates, for such alternatives. There are several models from which to choose.

- *Victoria's Youth Welfare Services.* Established under the Community Welfare Services Act 1970 (Vic.), these services provide a range of programs. Each service has developed its own identity and approach. In one, for example, weekday, evening and Saturday attendance are combined. The major elements in the day program are education (the centre has full-time teachers) and work training. The evening program consists of classes and discussions concerning practical problems likely to face the children. The Saturday activities are designed to help the children in the constructive use of leisure time. In another service the emphasis is on attitude change. This is sought through group therapy and individual counselling. The program involves evening and Saturday attendance. On Saturday, community work and recreational activities are undertaken. Attendance at one of these services may be made a condition of a Childrens Court order (such as a probation order), the Director-General of Community Welfare Services may require a ward to attend, or attendance may be made a condition of parole when a youth is released from a youth training centre.[105]
- *South Australia's Youth Project Centre.* The South Australian centre runs two programs, one during the day and the other in the evening. The day program is directed towards young unemployed persons and involves attendance on four days per week. One day per week is devoted to recreational activities, and the remaining time is devoted to group counselling and to attempts to meet problems encountered in finding employment. The evening program involves attendance on three evenings per week, and all day on Saturday. There are educational and recreational activities, followed by group counselling.[106] Attendance at a youth project centre is ordered by the Childrens Court as a condition of a discharge upon a recognizance.[107] The court may not order a child to attend a youth project centre unless it has first obtained and considered a report from an assessment panel.[108]
- *N.S.W. Attendance Centres and Youth Project Centres.* An attendance centre order requires participation in community work and recreational activities every Saturday afternoon over a period of several months. Attendance at a youth project centre is employed as an alternative for youths who have been committed to an institution. Selected youths who have been committed may be released to take part in a youth project centre program. Attendance is required at afternoon and evening sessions on an intensive basis over a period of some months. The Child Welfare Act 1939 (N.S.W.) does not make specific provision for an attendance centre order. Attendance is made a condition of release on probation or on a recognizance. Attendance by a committed child at a youth project centre is in the discretion of the Minister for Youth and Community Services. He is empowered to grant such a child leave from an institution and to direct him instead to attend a centre.[109]

[104] See para.200, and ALRC 15, (1980), para.160. Among the submissions received, that presented by the then A.C.T. Police expressed reservations about periodic detention, but did support a work order scheme, provided the operation of the scheme did not deprive wage earners of employment opportunities. A.C.T. Police, *Submission,* 33–34. The submission presented on behalf of the A.C.T. Council of Social Service favoured the development of new sentencing options such as periodic detention. A.C.T. Council of Social Service, *Submission,* 3. The submission prepared by the Catholic Welfare Advisory Committee recommended that the Childrens Court should have the power to make weekend detention and community service orders. Catholic Welfare Advisory Committee of the Archdiocese of Canberra and Goulburn, *Submission,* 16. The Department of the Capital Territory also pointed to the need for a greater range of alternatives, including weekend detention. Submission, 57.

[105] Community Welfare Services Act 1970 (Vic.), s.92(d).

[106] For a fuller description of the youth project centre's programs, see Department for Community Welfare, South Australia, *The Services of the Department,* (1979).

[107] Children's Protection and Young Offenders Act 1979 (S.A.), s.51(1)(b)(ii).

[108] id., s.71. An assessment panel is a multi-disciplinary group which prepares detailed assessments of children and their problems; see Community Welfare Act 1972 (S.A.), s.58(2).

[109] Child Welfare Act 1939 (N.S.W.), s.53(1)(d).

- *New Zealand's Periodic Detention.* Periodic detention is available both for adult and young offenders, provided the latter have attained the age of 15.[110] A typical program at a periodic detention centre for the young involves attendance from Friday evening until mid-day on Sunday, together with attendance on one evening per week. Each centre adopts a distinctive style and approach. In some, the emphasis is placed on strict discipline and hard work, both at the centre and in the community. In others the regime is more relaxed and education is stressed. Components of periodic detention centre programs include community work, sporting and recreational activities, education, and group and individual counselling.[111] An order to attend a periodic detention centre is in the form of a specific sentence.[112] No more than 60 hours attendance per week may be required,[113] and the usual practice is for the sentencing court to leave it to the warden of the relevant centre to determine, within this statutory maximum, the number of hours of attendance. A sentence of periodic detention may not exceed 12 months.[114]
- *England's Intermediate Treatment.* Though the term 'intermediate treatment' is used in a Government White Paper[115], it does not appear in the Children and Young Persons Act 1969 (U.K.). The term was employed to describe a range of services and activities to be made available by way of an order allowing the child to remain in his own home but also bringing him into contact with a different environment. A Juvenile Court wishing a child to undergo intermediate treatment makes a supervision order which requires the child to comply with the supervisor's directions. Under the Act these directions may include a direction to:
  - live at a specified place,
  - present himself at a specified place, or
  - participate in specified activities.[116]

  The aggregate period which may be specified by the supervisor under any of these directions is 90 days.[117] In giving directions, the supervisor may select only those facilities and services which have been approved for the purposes of the Act by the Secretary of State.[118] Regional committees are obliged to list services in their areas and to assume responsibility for developing new ones. These are then submitted for approval. When the legislation came into force, it was intended that a wide range of possibilities should be opened up to supervisors. The activities of clubs, societies and community organisations were to be brought within the framework of approved schemes. In making facilities of this kind available to a child it was hoped to 'provide a means for broadening his experience in ways likely to be beneficial to his development as an individual and as a member of society.'[119] In practice these objectives have not always been achieved, but examples of the types of activities envisaged were given in a government guide on planning intermediate treatment. They include participation in sport, drama and artistic activities, craft work, community service, evening classes, and assistance for backward readers.[120]

224. ***Recommendation: Attendance Centres*** The Commission recommends the establishment of an attendance centre and the introduction of an attendance centre order as an additional measure available to the A.C.T. Childrens Court when dealing with offenders. To be consistent with the

[110] Criminal Justice Amendment Act 1962 (N.Z.), s.9(1).
[111] For a more detailed description of periodic detention centre programs, see Research Section, New Zealand Justice Department, *Periodic Detention in New Zealand,* (1973).
[112] The legislative framework is described in detail by Seymour, 'Periodic Detention in New Zealand,' (1969), 9 *Brit J Criminol,* 182.
[113] Criminal Justice Amendment Act 1962 (N.Z.), s.16(3).
[114] id., s.9(1).
[115] *Children in Trouble,* Cmnd. 3601, (1968), 9.
[116] Children and Young Persons Act 1969 (U.K.), s.12(2), as amended by Schedule 12 of the Criminal Law Act 1977 (U.K.).
[117] id., s.12(3)(a), as amended by Schedule 12 of the Criminal Law Act 1977 (U.K.).
[118] id., s.19(5).
[119] Department of Health and Social Security, *Intermediate Treatment: A guide for the regional planning of new forms of treatment for children in trouble,* (1972), 14.
[120] id., 30.

principles enunciated earlier in this report, the order should be specific and make it clear that the court assumes responsibility for imposing obligations on an offender. Yet at the same time provision must be made for a reasonable degree of flexibility. Analysis of the models discussed above reveals a variety of approaches to the problem of requiring attendance at a centre or participation in a program. The obligation may be made a condition of a probation order or of a release on a recognizance. In Victoria when a child has been made a ward, and in N.S.W. when the child has been committed to an institution, the decision as to participation is an administrative one. The same is true in respect of those paroled from Victorian youth training centres. Each of these approaches permits the administrators to exercise a considerable amount of discretion. In every case it is the administrators who determine the duration of the program, and, with regard to Victorian wards and parolees and N.S.W. children who have been committed, the administrators determine whether the child will participate at all. The English model provides a striking example of an order conferring very wide discretionary powers on those who implement it. It is for the supervisor to determine whether intermediate treatment is appropriate and, if so, its nature and duration. The New Zealand legislation, in contrast, provides for the making of a specific order the duration of which is determined by the court. Further, the Act lays down a maximum number of hours attendance each week and states that a sentence of periodic detention may not exceed 12 months. It is this model which the Commission favours. It allows for the combination of court control and flexibility on which emphasis has been placed. The solution adopted in New Zealand is preferable to the imposition of an obligation by way of a condition of a probation order. There will be occasions when an attendance centre requirement should be combined with a probation order, but there will also be times when there is no need for continuing supervision. The creation of a discrete order will allow the court to make this distinction. It will not be able to do so if it is forced to rely on an all-purpose probation order. It is not appropriate that the Commission should make detailed recommendations regarding the staffing or types of programs which should be developed within the framework of the new attendance centre order. The Welfare Division should administer the scheme and assume responsibility for designing appropriate programs. It should explore the possibility of involving suitable non-government agencies and of using the facilities which they provide. The number of cases handled each year by the A.C.T. Childrens Court is small, and therefore the scheme should be developed slowly. Large expenditure on buildings should be avoided. It should be possible for existing facilities — perhaps Beauchamp House — to be used. Care must be taken to ensure that attendance centres are accessible to children living in Canberra's suburbs. An order which allows for evening, weekday and weekend attendance offers a framework within which to create a flexible range of imaginative activities. The models discussed above give some idea of the possibilities, though the distinction (to which attention was drawn in the discussion of probation) between obligations which can be imposed and activities to which a child may be led and not driven, must not be overlooked. However it should be feasible, without ignoring this consideration, to design programs which combine educational and recreational activities with the undertaking of community work.[121] Wherever possible existing organisations — such as service groups, clubs and educational facilities — should be utilised, so that the children are involved with the wider community and are not confined to a group consisting solely of offenders. The draft Child Welfare Ordinance, contained in Appendix A of this report, sets out the legislative framework for the proposed attendance centre orders. When children the subject of these orders engage in work, it is important that they should be covered in respect of injuries. Although the draft Ordinance does not include provisions relating to workers' compensation, this is a matter to which consideration should be given before the Commission's proposals are put into effect.

225. ***Residential Orders*** When the court decides that a child must be removed from home, but need not be committed to a N.S.W. institution, it should have a choice between two orders:

- an order placing the child in an approved home or in the care of a suitable person, or
- an order that the child live away from home at a place directed by the Director of Welfare.

[121] The A.C.T. Police expressed general support for work orders. *Submission,* 33. The submission also suggested that the courts should be able to order traffic offenders to attend lectures and defensive driving courses. id., 30. Such requirements could be made part of an attendance centre order.

In this report these orders are referred to as 'residential orders'. The court should specify the period for which a residential order should remain in force. The maximum term should be two years. The recommendation that two forms of order should be available is based on the view that in some situations the court will wish to make a specific placement, and in others will prefer to make a flexible order under which the welfare authorities may exercise a considerable amount of discretion. A specific order should be made when the court wishes to exercise a substantial degree of control; a change of placement should require a further hearing. The Commission's proposals relating to the use of specific orders must be read in conjunction with those dealing with the appointment of a specialist magistrate. It is envisaged that such a magistrate would very probably be more willing to make an order of this kind than the magistrates exercising jurisdiction under the present Ordinance are to commit a child to the care of a suitable person. By reason of his specialist role he would have the opportunity to gain a detailed knowledge of available welfare services, and hence would be likely to wish to make a specific placement and to be reluctant to leave the placement decision to welfare personnel. The A.C.T. Childrens Court should be encouraged to make greater use of orders resulting in specific placements. This is not only because live where directed orders allow for the exercise of a considerable amount of administrative discretion. Specific orders have certain inherent advantages. The agency providing the day-to-day residential care is often better placed to make decisions affecting the child than is the Welfare Branch. A specific order allows for the agency's responsibility to be explicitly recognised. Further, when the agency providing the residential care must share its responsibilities with the Welfare Branch, problems can arise as to the exact role of each.[122] When it is necessary to make decisions affecting the child it is sometimes unclear whether the responsibility rests with the agency or with the Welfare Branch. Confusing situations can result. A specific order avoids this ambiguous sharing of responsibility. Nevertheless, there will be cases in which the magistrate is content to leave the placement decision to the Director of Welfare. When the magistrate does so, he will know that the child's progress will be monitored, on the court's behalf, by the Youth Advocate. Further, it is likely that, before making a non-specific order, the magistrate will require a case plan to be submitted to him or to the Youth Advocate. The Commission's emphasis on the need for greater court control over dispositional measures could be seen as an argument for the abolition of non-specific orders. However, the recommendation that orders similar to the existing live where directed orders be retained is based on the following factors:

- There are in the A.C.T. a number of persons and agencies who, though willing to accept the care of children, feel unable to accept full responsibility for them. Rather than having a child specifically committed to their care, such persons and agencies prefer a procedure whereby the Director of Welfare is identified as the responsible person, and is able to take immediate action if the placement proves unsatisfactory or if the child runs away. Further, there are some who require a person in authority to whom they can refer difficult questions, such as questions regarding a child's access to his parents or medical treatment for the child. It must not be overlooked that, though the care provided by individuals and voluntary agencies may be just what the children need, those who provide it may lack the experience and training to assume the legal responsibility for the children. The system should be designed in such a way as to permit the utilisation of the contribution which these persons and agencies can make, while at the same time not imposing on them responsibilities which they feel unable to accept.
- The flexibility permitted by live where directed orders is necessary in certain situations. The court may wish to make provision for changes of placement without requiring a court hearing each time such a change is needed.

The proposal that two forms of residential order be available to the court reflects a broad acceptance of existing procedures. Under the Child Welfare Ordinance, if the Childrens Court wishes to make a

[122] Some of these problems are discussed in para.50. Attention was drawn to this matter in the submission prepared by the Catholic Welfare Advisory Committee. The submission recommended that the Children's Court should have the power to commit children directly to approved community agencies, that the legislation should reflect the assumption that these agencies are in general able to assume full responsibility for children committed to their care, and that the law should make it clear that government officials should be entitled to interfere only in clearly defined circumstances. Catholic Welfare Advisory Committee of the Archdiocese of Canberra and Goulburn, *Submission*, 21.

residential placement in the A.C.T. it may either commit a child to the care of a willing person or place the child on probation or release him on a recognizance with a condition that he live where directed by the Assistant Secretary, Welfare. The existing live where directed order (whether made as a condition of probation or of a release on a recognizance) is extremely flexible as such an order permits the Assistant Secretary, Welfare, to decide whether the child should be removed from home at all. The order which the Childrens Court makes merely empowers the welfare authorities to make a placement. It does not explictly direct them to do so. At first sight this appears to be wrong in principle. It could be argued that a decision whether a child should remain at home should be made only by a court. It might be thought unacceptable for a court to make an order in the expectation that the child will be removed from home and for the welfare authorities to decide that the child should remain there. However, there are situations in which great flexibility is desirable. The Director of Welfare might, for example, select a residential placement for a child and then wish to return the child to his home for a trial period. A live where directed order permits this flexibility. It should not be overlooked that, under the Commission's proposals, the Youth Advocate would be in a position to monitor the implementation of the order. If he considers that a decision by the Director to return a child to his home is inconsistent with the court's expectations, it should be open to him to take the matter back to court, so that the magistrate may review the course taken by the Director. Thus the retention of the live where directed order is recommended. However, one important change is required. An order authorising a child's removal from home should be a distinct and separate order. It is unsatisfactory that such an important decision should be expressed as a condition of probation or of a recognizance. Further, it is even more unsatisfactory that it should be necessary in every case to combine a residential placement with a release on probation or on a recognizance. In some cases the making of a combined order will be appropriate, and in others it will not. The system should operate in such a way as to compel the court to make separate decisions about the need for a residential placement and the need for any additional support and control such as are provided by the making of a probation order. Where it is thought desirable to combine a probation order with a residential order, the court should be empowered to make a probation order which is contemporaneous with the residential order, or to make a probation order which follows a residential order. There will be cases in which it is appropriate for a child to be removed from home and placed under the supervision of a probation officer, and there will be cases in which a child should be removed from home but without the imposition of any additional supervision. Even where a child is made the subject of an order that he live away from home at a place directed by the Director of Welfare, it need not necessarily follow that he will require probationary supervision, either by a member of the Welfare Division or by some other person. In defence of the existing procedure, it must be said that, by combining a live where directed order with release on probation or on a recognizance, the court was able to fashion a measure which allowed action to be taken should the child refuse to follow the Assistant Secretary's instructions on place of residence. The Child Welfare Ordinance makes provision for dealing with children in breach of a probation order. In recommending that residential orders should no longer automatically be combined with probation orders, the Commission is aware that special provision must be made for dealing with children who refuse to obey an order. This subject is dealt with below.[123] As under the present law, the making of a residential order should in no circumstances involve the transfer of the guardianship of the child to the Director of Welfare.

226. ***The Further Development of Community Based Alternatives*** Residential orders of the kind recommended by the Commission are an established feature of the A.C.T. Childrens Court system. In the past young offenders the subject of live where directed orders have regularly been placed in homes run by such organisations as Dr Barnardo's and Outreach Incorporated.[124] However, the number of such placements has been much smaller than the number of committals to N.S.W. institutions. During the period 1 June 1978 to 31 May 1979, 32 young offenders were committed to these institutions, but only 12 young offenders were made the subject of a live where directed

[123] Para.244.

[124] For a description of the facilities provided by these organisations, see para.58.

order.[125] An effort should be made to increase the use of open homes and hostels for young offenders and so divert children from the N.S.W. system. By reason of its size, urban character and the absence of a traditional closed institution for young offenders, the A.C.T. is ideally placed to offer a lead in the development of small, open facilities. Overseas evidence suggests that the full potential of such facilities has yet to be realised. An examination of United States programs reveals promising initiatives which could well be explored within the framework of the residential orders proposed by the Commission. The Silverlake experiment showed what could be achieved in a closely supervised hostel operated on the basis of a carefully formulated theory of delinquency causation.[126] Mention can also be made of Achievement Place, in Kansas, where a home-style residential treatment program has been developed.[127] Also, in 1969, Massachusetts introduced a much publicised program of 'deinstitutionalisation'.[128] Juvenile training institutions in that State were closed and alternative methods, including non-residential programs, group homes and foster homes, were employed with many of the juveniles who would previously have been held in traditional institutions. It is most important not to present a misleading picture of the Massachusetts experiment. Although that State was successful in developing imaginative alternatives to the traditional institution, it was still found necessary to detain a small number of juveniles in secure units.[129] Nevertheless, experience in Massachusetts does indicate how much can be achieved if the development of community-based measures for young offenders is vigorously pursued. In England a recent study of residential care for delinquents has proposed the creation of small, intensive care units in hostel-like accommodation for adolescents who would otherwise be in closed institutions.[130] Experimentation need not be confined to residential programs. Consideration should also be given to day care programs.[131] Further, both in England[132] and California[133] promising work has been undertaken in the field of probation. Particularly noteworthy is California's Community Treatment Project which created flexible and intensive forms of supervision and control. Also worthy of consideration is the use of group work with probationers.[134] It must be emphasised that none of these measures is being put forward as a 'cure' for delinquency. To view these innovative programs in this way would be to repeat the mistakes of the child savers. Some of the measures mentioned have certainly not lived up to expectations. Nevertheless, research has demonstrated that, though community-based programs for young offenders are not always effective in preventing re-offending, such programs frequently

125 The total of 12 relates to the number of children who were made the subject of live where directed orders as a result of criminal behaviour. There were others who, though dealt with primarily as 'uncontrollable' also faced criminal charges.

126 Empey and Lubeck, The Silverlake Experiment : Testing Delinquency Theory and Community Intervention, (1971).

127 Hoefler and Bornstein, 'Achievement Place : An Evaluative Review,' 2 *Criminal Justice and Behavior,* 146, (1975), and Fixsen *et. al.,* 'The teaching-family model of group home treatment', in Craighead Kazdin and Mahoney, *Behavior Modification: Principles issues and applications,* (1976), 310.

128 For a discussion of the reforms introduced in Massachusetts see Ohlin, Miller and Coates, *Juvenile Correctional Reform in Massachusetts, A Preliminary Report of the Center for Criminal Justice of the Harvard Law School,* (1977); Coates, Miller and Ohlin, *Diversity in a Youth Correctional System: Handling Delinquents in Massachusetts,* (1978); Bakal and Polsky, *Reforming Corrections for Juvenile Offenders,* (1979).

129 See Israelowitz, 'Deinstitutionalisation and the Serious Juvenile Offender', *Juvenile and Family Court Journal,* 30(3), 21, (1979).

130 Millham, Bullock and Hosie, *Locking Up Children: Secure Provision within the Child Care System,* (1978), 191.

131 National Association for the Care and Resettlement of Offenders, *Children and Young Persons in Custody,* (1977) 42–44 and Appendix 9. See also Dartington Social Research Unit, *Give and Take,* (1980). This describes a full-time community service program for selected persistent adolescent offenders. The program is briefly outlined in (1980) 144 *Justice of the Peace,* 722.

132 Home Office Research Studies, *Impact: Intensive Matched Probation and After Care Treatment,* 2 vols, (1974 and 1976).

133 Warren, 'The Community Treatment Project,' in Johnston, Savitz and Wolfgang, *The Sociology of Punishment and Correction,* (2nd ed., 1970). For a criticism of the project, see Lerman, *Community Treatment and Social Control: A Critical Analysis of Juvenile Correctional Policy,* (1975).

134 Home Office Research Unit, *A Survey of Group Work in the Probation Service,* (1966).

yield 'success rates' at least as high as those produced by institutions.[135] Such results create a presumption in favour of the use of community-based measures. As researchers into the effectiveness of Achievement Place have commented:

> [E]ven if the results . . . show that the Achievement Place youths do no better than youths who were sent to an institution, we would continue to advocate replacing most institutions with group home treatment programs. We would do this for two reasons. First, group home programs.are more humane than institutional programs because the youths receive more individual care; they remain in close contact with their community and parents and friends; and programs can be provided to teach them important social, family, and community-living skills. Second, group homes are less expensive to operate.[136]

227. It is clear that there are a number of models which could be adapted to A.C.T. needs if a policy of 'deinstitutionalisation' were to be resolutely pursued. The 'nothing works' philosophy should not engender despair. Although due attention must be paid to the community's demand for retributive and deterrent penalties, the search for humane, imaginative alternatives to confinement should not be abandoned. It is not appropriate for the Commission to offer detailed proposals for the types of programs which might prove most suitable for the A.C.T. This task should be left to the Welfare Division and to the Childrens Services Council. The Commission's recommendations regarding probation, attendance centre orders and residential orders are designed to provide a framework within which may be developed a range of community-based measures. The Welfare Division should have responsibility for the probation service and for the initial development of an attendance centre for young offenders. However, as has been indicated, there is no reason why voluntary agencies might not also be involved in the attendance centre program. With regard to the residential order, the facilities provided by the voluntary agencies offer a foundation on which to build in the immediate future. Certain problems have arisen in respect of the funding of these organisations, and this aspect is briefly discussed later in this report.[137] Further, the provision of homes and hostels for the young in the A.C.T. is, like so many other facets of the child welfare system in the Territory, marred by a lack of co-ordination and overall planning.[138] If the use of residential orders is to develop in the manner envisaged by the Commission, urgent attention should be given to identifying the precise role which each of the relevant agencies can play in providing residential accommodation for the young. The aim should be to provide a co-ordinated and integrated system of residential homes. The type of care which each home offers should be clearly identified. This rationalisation should be undertaken by the Childrens Services Council. In performing this task, the Council should consider the possibility that the Welfare Division might, sometime in the future, have its own home or hostel for young offenders. It must be emphasised that what is envisaged here is that the Division might operate a home of the type at present provided by Dr Barnardo's or the Richmond Fellowship. Obviously it should not duplicate the facilities provided by these organisations. It should provide an open home or hostel only if the Childrens Services Council is able to identify a specific category of child for whom the homes run by the voluntary organisations do not or cannot cater. If it is found that it is appropriate for the Division to operate such a facility, special attention should be given to the possibility that it might accommodate only offenders. At present the homes in which children who are the subject of live where directed orders are placed accommodate both offenders and non-offenders. The Commission has recommended that, as far as possible, the two groups should be dealt with separately.[139] If greater separation of the two groups is achieved it might be appropriate for the Welfare Division to assume primary responsibility for the residential care of offenders, while the voluntary agencies concentrate their efforts on non-offenders. Such an allocation of functions is, however, merely one possibility which should be explored. Rigidity should be avoided. The aim should be to create a flexible and integrated range of open homes and hostels. Thus, with regard to the future provision of these facilities, the Commission's recommendation is that, at least until the necessary review and rationalisation of existing services is

135 Fixsen *et.al.*; Empey and Lubeck; Sanson-Fisher, 'The Case Against Juvenile Corrective Institutions', (1978), *Australian Social Work,* 31(4), 7; Warren; and Kraus, 'A Comparison of Corrective Effects of Probation and Detention on Male Juvenile Offenders', (1974), 14 *Brit J Criminol,* 49.

136 Fixsen *et.al.*, 320.

137 Para.515.

138 For a discussion of the fragmentation and lack of co-ordination in the A.C.T. welfare services see Chapter 13.

139 See para.118.

undertaken, open homes and hostels should continue to be operated by voluntary organisations. The possibility that the Welfare Division might, at some future time, operate one or more such facilities should be kept open. The decision whether the Division should become involved in the provision of accommodation for children who are the subject of residential orders is quite distinct from the decision whether the Division should establish an institution for young offenders in the A.C.T. This subject is discussed below.

228. ***Detention in a Closed Institution: Deficiencies of Institutions*** The failure of detention in an institution to prevent recidivism among young offenders is now well documented. Studies in England[140], New Zealand[141], and the United States[142], reveal that a high proportion of those released from institutions for the young are known to re-offend. Unfortunately few Australian statistics are available. A study in N.S.W. indicates that, of a sample of young males committed to institutions in 1962 and 1963, 74.9% were known to have re-offended during a five year period following their discharge.[143] In fairness to institutional staff it should be emphasised that it would be wrong to interpret such figures as demonstrating that institutions for the young are a 'failure'. Many, perhaps most, of the young people who pass through institutions could be equally well regarded as failures of probation or other measures employed before their institutional committal. To lay the blame for subsequent re-offending solely at the door of the institution would be unfair. Nevertheless, available statistics do suggest that little in the way of 'reform' can be expected to result from a committal to an institution.[144] Further, the paradox of attempting to train offenders for freedom in conditions of captivity must be recognised.[145] If we wish to assist the young to function more appropriately in the community, this objective is more likely to be achieved in the real world than in the artificial environment of a closed institution. Research has revealed the harmful effects of institutional life[146], and the detention of the young in so-called 'correctional' institutions poses particular hazards.[147] Peer group pressures frequently reinforce deviant tendencies.[148] But do these conclusions support the view that society should no longer use institutions as a means of dealing with young offenders? Such a view would, in the present state of knowledge, be an unrealistic one to adopt. There is a small group of children whose behaviour requires institutional committal. In some cases the offences committed are so serious that the protection of society is the overriding consideration. In others an institution, though not able to 'reform' an offender, can offer something positive. This point was made in an English study conducted by researchers obviously unsympathetic to the use of closed facilities. They commented that secure units:

> do confer some benefits on the children. They break the persistent absconding patterns and extreme withdrawal of some neurotic children and, contrary to popular opinion, the young people are not hostile to the caring aspects of the regime. It seems unlikely that they suffer psychological damage from a short incarceration and the experience can confer on them physical and educational advantages.[149]

These comments were made notwithstanding the authors' conclusion that:

> for the majority of boys, the secure units provide a brief sojourn in an expensive ante-room to the penal system.[150]

---

140 Cornish and Clarke, *Residential Treatment and its Effects on Delinquency*, (1975).
141 Department of Social Welfare, *Juvenile Crime in New Zealand*, (1973).
142 Lipton, Martinson and Wilks.
143 Kraus, (1974), 52.
144 For N.S.W. research supporting this conclusion, see Kraus, 'Do Existing Penal Measures 'Reform' Juvenile Offenders?' (1977), 10 *ANZJ Crim*, 217.
145 Paterson, *The Principles of the Borstal System*, (1932), 12.
146 Goffman, *Asylums*, (1961); Cressey, (ed) *The Prison: Studies in Institutional Organization and Change*, (1961); Clemmer, *The Prison Community*, (1958); and Sykes, *The Society of Captives*, (1958).
147 For a concise summary, see Sanson-Fisher.
148 Polsky, *Cottage Six: The Social System of Delinquent Boys in Residential Treatment*, (1962), and Sanson-Fisher, 9.
149 Millham, Bullock and Hosie, 186–187. See also Mayers, *The Hard-Core Delinquent, An Experiment in Control and Care in a Community Home with Education*, (1980).
150 Millham, Bullock and Hosie, 187.

Reference must again be made to experience in Massachusetts, where traditional institutions for the young were closed.[151] In spite of the emphasis which was placed on the development of alternatives to these institutions, it was still found necessary to confine a small number of juveniles in secure conditions.[152]

229. ***A Custodial Institution for the A.C.T.?: The Problem*** If it is accepted that, for the foreseeable future, the total abolition of institutional committals is impracticable, the question whether the A.C.T. should have its own custodial institution for the detention of children must be faced. Should the Territory seek to bring its reliance on N.S.W. facilities to an end? Before reviewing the arguments for and against the establishment of an institution in the A.C.T., it is necessary to make clear exactly what is meant by 'an institution'. This term is used here to denote a facility in which children are confined. It is unhelpful to think in terms of 'open' and 'closed' institutions. Some traditional institutions for the young are open, in the sense that inmates are not kept in a closed building or yard. It is common in such institutions for inmates to be locked in a room or dormitory at night. The essential feature of these institutions is not that they are open or closed, but that the children are confined there. The distinction which must be drawn is between these institutions and homes or hostels from which residents are free to go out to school or work. There are in the A.C.T. a number of such homes or hostels[153], and these should continue to fulfil their present functions. The question to be faced is whether, in addition to facilities of this type, the A.C.T should have an institution in which to confine children at present committed to institutions operated by the N.S.W. Department of Youth and Community Services.

230. ***Arguments for an Institution*** A number of arguments can be advanced in support of the view that the A.C.T. should establish its own institution for the detention of young offenders. They include:

- *Removal of family support.* The 'transportation' of the young to N.S.W. is inhumane and harmful, since it separates them from their families[154] and community, and so impedes their re-integration into society on their release.
- *Reluctance to use when appropriate.* Because removal to N.S.W. is such a drastic measure, magistrates and judges are reluctant to employ it, and therefore sometimes feel compelled to make alternative orders which they believe to be inappropriate.
- *Looking after one's own.* As a matter of principle, the A.C.T. should look after its own. In redesigning the Territory's system for dealing with its young offenders, it would be an abdication of responsibility to put forward proposals which suggest that the A.C.T. authorities are unable or unwilling to cope with the most difficult cases. Continued reliance on N.S.W. facilities would reflect a refusal to face up to the problems posed by the serious, persistent offender. Reliance on these facilities also reduces the possibility of developing a total and fully integrated dispositional system, of which a closed institution is an important element.
- *Loss of control and follow-up.* Reliance on the N.S.W. institutional system means that the A.C.T. authorities have no effective control or influence over where the child is placed or how long he is detained. Decision-making powers are transferred to the N.S.W. Minister for Youth and Community Services and to members of his Department. Reference has been made to a case exemplifying this problem.[155] Loss of control may breed in the A.C.T. community a feeling that it is not responsible for the conditions in which its young offenders are held. The community may display an 'out of sight, out of mind' attitude.
- *Innovations impossible.* The A.C.T. is forced to accept the facilities provided by N.S.W. Experiment and innovation are not open to the Territory's law-makers.
- *Administrative problems.* The fact that children are detained in N.S.W. institutions impedes the operation of local complaints procedures. The Commonwealth Ombudsman is not authorised to intervene in matters under the control of State departments.[156]

---

151 See para.226.
152 See Isralowitz.
153 See para.58.
154 The Welfare Branch does, however, assist needy families by paying fares to N.S.W. so that visits can be made.
155 Para.199.
156 The Commonwealth Ombudsman's powers may be exercised only in respect of Commonwealth Departments and statutory authorities. See Ombudsman Act 1976 (Cwlth), s.5.

231. ***Arguments against an Institution*** The arguments against the establishment of a custodial institution for the young in the A.C.T. are as follows:

- *Small numbers.* The number of children who are at present committed to N.S.W. facilities is small. At any one time, N.S.W. institutions house approximately 20 children who have been committed by the A.C.T. courts.[157] Although the number might increase if the A.C.T. had its own institution, the total will remain small. It would be costly and uneconomic to build and staff an institution for such small numbers. Utilisation of N.S.W. facilities is an efficient use of scarce resources. Further, the figure quoted includes children who have been committed as non-offenders as well as those found guilty of offences. The Commission's analysis of committals between 1 June 1978 and 31 May 1979 indicates that, of the 49 children committed to N.S.W. institutions, 17 were dealt with as uncontrollable children. If it is accepted that, wherever possible, offenders should be kept separate from non-offenders, and that institutional committal should be reserved primarily for offenders, the number of children for whom an A.C.T. institution would cater would be small.
- *Discourages committals.* The absence of an institution in the A.C.T. might cause magistrates and judges to be reluctant to make committal orders.[158] In view of widespread criticisms of institutions, any factor which inhibits the use made of them is to be welcomed. If an institution were built, some of those at present released on probation (with a condition to live where directed) might be sent to an institution.[159] Although this argument is not a convincing theoretical one, in practical terms it cannot be ignored.
- *Range of children.* The establishment of an institution to accommodate all, or virtually all, of the children at present committed to N.S.W. institutions would be impracticable. In its analysis of Childrens Court cases completed between 1 June 1978 and 31 May 1979, the Commission found that the ages of those committed ranged from 11 to 17. Thirty-six were males and 13 were females. Although the majority were aged 14, 15, 16 or 17, it is clear that here there is a heterogeneous group whose needs are likely to vary greatly. In its study of A.C.T. children committed to N.S.W. institutions during the year ended 30 June 1978, a Working Party of the Department of the Capital Territory found that seven institutions and two assessment centres were used, with each catering for a particular category of children.[160] No one institution could offer a range of programs wide enough to meet the needs of so diverse a group. The Working Party's report commented:

> [I]t would be extremely difficult if not impossible (and probably undesirable) to construct one facility to contain the range of treatment facilities provided in N.S.W. It would of course be most undesirable to have a group of offenders with disparate characteristics such as widely different ages, offence histories and levels of sophistication associating closely in one institution. Segregation of very small numbers to meet this problem would be difficult.[161]

In short, even if an institution were built in the A.C.T. it would not put an end to 'transportation'. It would still be necessary to rely on the N.S.W. system to accommodate certain types of children. Further, this argument reflects a general characteristic of the A.C.T. which it would be unrealistic to ignore. The Territory is so small that it is not possible to provide facilities to deal with all the problems which occur within its borders. It must continue to rely on N.S.W. to some extent.

- *Utilisation of a unique opportunity.* It is unlikely that the A.C.T. would be able to provide satisfactory institutional care for the small and heterogeneous group of children at present placed in N.S.W. institutions. Rather than building an institution, the A.C.T. should take advantage of the existing situation to develop new and imaginative alternatives. Further, the building of an institution would have a symbolic aspect. The establishment of an institution might be viewed by some as an endorsement of the use of incarceration.

232. ***Evaluation of Arguments*** As a matter of principle the Commission believes that, to the fullest extent possible, the A.C.T. should accept responsibility for dealing with its offenders, be they adult or juvenile.[162] Unless there are compelling reasons to the contrary, the Territory should look after its own. Arguments based on the undesirability of institutional committals of the young do not provide a reason for refusing to build an institution in the A.C.T. unless it can be confidently asserted that no young offender should be committed to an institution. Such an assertion cannot be made. It would not be acceptable for the Territory to concentrate on the development of alternatives to an institution while at the same time consigning to another jurisdiction children for whom these alternatives are not appropriate. Further, although the separation of sentenced children from their families is a regrettable characteristic of systems in several parts of Australia, since many institutions for the young are in rural settings, this does not of itself provide a reason for refusing to bring 'transportation' of the Territory's offenders to an end. The hardship caused to children removed to N.S.W. institutions, and to their families, should not be allowed to continue unless it is clear that the children cannot be kept within the Territory. Finally, particular attention must be paid to the arguments relating to the Territory's loss of control over those sent into the N.S.W. system. These arguments assume special importance in view of the Commission's emphasis on the need for court control over, and monitoring of, the implementation of dispositional orders.[163] It will not be possible for the A.C.T. Childrens Court, through the Youth Advocate, to exercise close supervision over children placed in institutions if these institutions remain under the control of the N.S.W. authorities.

233. ***Practicability: Analysis of the Statistics*** The most persuasive of the arguments is that relating to the impracticality of an A.C.T. institution for the young. Although it may be desirable in principle that the Territory should look after its own and exercise control over placement and release decisions, it may not be practicable to establish an institution to cater for children who are at present committed to N.S.W. facilities. It is therefore necessary to examine the statistics regarding the number and categories of A.C.T. children in N.S.W. institutions. It is clear that it would not be feasible to establish one institution to house the heterogeneous range of children at present dispersed throughout the N.S.W. system. Such a conclusion, however, would not preclude the establishment of an A.C.T. institution for a subgroup of those at present sent to N.S.W. institutions. Although it may not be possible to abolish 'transportation', it might be feasible to reduce it significantly by creating an A.C.T. institution for a defined and reasonably homogeneous category of children. In order to explore this possibility the Commission undertook a careful analysis of the characteristics of A.C.T. children in N.S.W. institutions as at 1 August 1980. The aim was to obtain information about A.C.T. children in these institutions at any one time and so identify the population for which an A.C.T. institution would have to be designed. The details are summarised in Table 8. It should be noted that this table does not list all A.C.T. children in respect of whom it was necessary to find an interstate placement. It relates only to children who had been committed to institutions run by the N.S.W. Department of Youth and Community Services. In addition to the children described in the table there were, as at 1 August 1980, 18 children in N.S.W. homes run by voluntary organisations. Seventeen of these children were not offenders. For reasons which will be explained, none of these

---

157 On 30 April 1981 there were 24 A.C.T. children in N.S.W. institutions. Of these, 10 were non-offenders. ((Unpublished figures compiled by Dr S. Mukherjee, Australian Institute of Criminology.) A study undertaken by a Working Party of the Department of the Capital Territory found that, during the year ended 30 June 1978, there was an average of 18 A.C.T. children in N.S.W. institutions. Department of the Capital Territory, *Working Party to Consider Services for Young Offenders, Interim Report*, (1979), 3 (hereafter *Interim Report*).

158 The view that the absence of an institution renders the A.C.T. magistrates and judges particularly reluctant to make committal orders has several times been expressed to members of the Commission. Available statistics support this view. Figures compiled by Dr S. Mukherjee of the Australian Institute of Criminology show that, as at 28 February 1981, the N.S.W. committal rate (per 100 000 population aged 10–18 years as at 30 June 1980) was 70.0, while that in the A.C.T. was 40.1. Cf the figures for the imprisonment of adults in these two jurisdictions; see ALRC 15, (1980) para.168.

159 A number of persons have expressed the view that if the A.C.T. establishes an institution there will soon develop a pressure to keep it full, and as a result the number of children detained will increase. See A.C.T. Council of Social Service, *Submission*, 1, and South Australian Department for Community Welfare, *Submission*, 3.

160 *Interim Report*, 3.

161 id., 5.

162 On the subject of the Territory's responsibilities with regard to adult offenders see ALRC DP 10, *Sentencing: Reform Options*, (1979), para.34–45.

163 See para.200.

children should be regarded as being eligible for placement in an institution in the A.C.T. Thus in seeking to identify the potential population of a closed A.C.T. institution, it is to the characteristics of the children described in Table 8 that most attention must be given. The first point to note is that Table 8 includes three children who had been committed as a result of uncontrollability charges and one who had been found to be neglected. As a matter of principle it is undesirable for non-offenders to be incarcerated with offenders. Later in this report it is recommended that the charging of allegedly neglected and uncontrollable children should cease and that care proceedings should replace neglect and uncontrollability proceedings.[164] It is emphasised that the separation between children dealt with as offenders and those the subject of care proceedings should be as complete as possible. Detention of both categories of children in one institution whose size would make it impossible to separate them would be inconsistent with the pursuit of this aim. Further, even if the pool of non-offenders eligible for detention in an A.C.T. institution were greatly increased by the inclusion of a significant number of those children at present placed with voluntary agencies in N.S.W., it is extremely unlikely that there would be sufficient non-offenders to justify the establishment of a separate institution to house them in the A.C.T. In addition, it would be most undesirable to contemplate the establishment of such an institution in the Territory. The children placed with voluntary agencies in N.S.W. live in open conditions. A policy which sought to remove them from these conditions and to place them in an institution would be totally unacceptable. It seems clear, therefore, that if an institution were to be established in the A.C.T. it would have to cater solely for a sub-group of those offenders at present committed to N.S.W. institutions. Such an institution would probably have to cater only for males. Table 8 shows that only one girl committed to a N.S.W. institution had been guilty of a criminal offence. Although the number may occasionally rise, it is probable that, at any one time, there would never be more than two or three A.C.T. female offenders in a N.S.W. institution. It would be impracticable for an institution to develop and maintain appropriate programs for such a small number of girls. Hence the Commission has concluded that, though a mixed sex institution is in principle desirable, the establishment of such an institution in the A.C.T. would not be feasible. It is therefore necessary to determine whether there is a sub-group of males for whom an institution might be established. The male offenders described in Table 8 are, with one exception, serious persistent offenders aged 15 or over. The offenders in this category total eight, of whom seven were held in the Mt Penang institution. It is only males in the category represented by these eight offenders who could provide the nucleus of a population for an A.C.T. institution. Two arguments can be advanced in support of the view that such a total represents an under-estimate. First, the number of A.C.T. children in N.S.W. institutions may have been unusually low on 1 August 1980. Table 8 shows a total of 14 children, whereas other analyses suggest that the daily average is close to 20. If the composition of this group were similar to that revealed in Table 8 it is likely that the number of serious persistent male offenders aged 15 or over would be 11 or 12.[165] Secondly, it is possible that there are some male offenders whom the Childrens Court has felt compelled to place with a voluntary agency in the A.C.T., but who could be more appropriately placed in an institution, were one available in the Territory. No statistics are available as to the number of males who might fall into this category. Thus it is possible to make no more than an informed assessment of the potential population for an A.C.T. institution designed to house serious, persistent male offenders aged 15 or over. The available evidence suggests that the total would not, at any one time, exceed 15, that it is likely to be less than this, and that on occasions it will be significantly less than this. Probably it would not be too far wide of the mark to guess that if an institution were built for the group identified above, its daily average population would be close to ten.

[164] See para.280.

[165] That the Commission's analysis of the composition of the committed group is reasonably accurate is suggested by the interim report of the Department of the Capital Territory. This report noted that of the 39 children committed to N.S.W. institutions in the year ended 30 June 1978, 20 were males aged 15, 16 or 17 who were held in Daruk, Mt Penang, Yawarra or Endeavour House. *Interim Report*, 5.

Table 8: A.C.T. Children Committed to N.S.W. Institutions Details as at 1 August 1980

SEX	*AGE*	*LENGTH OF COMMITTAL*	*REASON FOR COMMITTAL*	*LOCATION*
M	18	General	Take and use motor vehicle	Mt Penang
M	15	12 months	Take and use motor vehicle (5 charges)	Mt Penang
M	17	2 years	Stealing, Break, enter and steal,	Mt Penang
M	16	6 months	Take and use motor vehicle (5 charges) Stealing (2 charges) Malicious injury Possession of stolen property Break, enter and steal (8 charges)	Mt Penang
M	15	2 months	Uncontrollable	Mt Penang
M	17	General	Possession of stolen property, Stealing	Mt Penang
M	18	6 months	Stealing (3 charges) Possession of prohibited drugs Unlawful possession	Mt Penang
M	17	General	Take and use motor vehicle	Mt Penang
M	15	General	Take and use motor vehicle (8 charges) Break, enter and steal (4 charges) Larceny (6 charges) Malicious injury Possession of stolen property	Daruk
M	11	2 months	Uncontrollable	Reiby
F	14	General	Uncontrollable Malicious Injury Assault	Reiby
F	14	General	Neglect (Exposed to moral danger)	Reiby
F	16	General	Uncontrollable	Reiby
M	13	General	Stealing	Reiby

234. ***Tangible and Intangible Benefits*** Although the establishment of an institution which would have a daily average population of approximately 10 would be expensive, the operation of an institution for such a number would not be impracticable. For some time the N.S.W. Department of Youth and Community Services has run institutions whose maximum capacity is approximately 20.[166] Further, the expense of building such an institution in the A.C.T. could be reduced if it were combined with Quamby Children's Shelter. Although the benefits to be gained by combining a remand and detention facility are not as great as might first appear, there are some advantages. The land is already available and the surrounding community has accepted the existence of an institution. The opposition which regularly accompanies a proposal to use land to build a correctional institution would not be a significant factor if an existing site were employed. Further, certain parts of the Shelter could be developed and expanded to service both the remand and the detention facilities. These include the kitchen and the central administrative areas. Nevertheless, the extent to which the two facilities can and should be combined should not be over-estimated. As a matter of principle, convicted persons should not be held with those on remand.[167] Even if this principle were occasionally violated, as, for example, by permitting children on remand to take part in programs

[166] Examples of existing small institutions in N.S.W. include: Endeavour House (maximum 20), Tallimba (maximum 20), Kamballa (maximum 12), and Keelong Centre (maximum 23). Further, at the time of writing, the N.S.W. Department of Youth and Community Services is planning a self-contained facility for 12 girls. This is to be built as part of the remand complex known as Yasmar.

[167] Article 10(2)(a) of the International Covenant on Human Rights states that accused persons shall, save in exceptional circumstances, be segregated from convicted persons. The Australian ratification of this Covenant stated that this principle of segregation is accepted as an objective to be achieved progressively.

being run for sentenced children, it would be a serious mistake to act on the assumption that children on remand would regularly swell the numbers for whom programs were made available. Often there are no children on remand or their number is very small.[168] If a new institution were built on the same site as the existing Shelter, it is important to recognise that the two should be designed, and run as separate facilities. The question which must be asked is whether the benefits which would be conferred, on the A.C.T. community and on its young offenders, by the establishment of an institution would justify the expense of building and operating such an institution. Reference has already been made to certain benefits. There is the intangible benefit which would accrue from the Canberra community's acceptance of responsibility for its own, and the real gain which would result from permitting the A.C.T. authorities to exercise control over the fate of some of those offenders at present placed in N.S.W. institutions. Questions must, however, also be asked about the benefits which those confined in the proposed institution would derive. There is the obvious benefit of proximity to family and friends and the assistance which this provides in the maintenance of relationships. Further, confinement in an A.C.T. institution would facilitate the provision of much more effective after-care than is possible under the existing system. But the real issue is the nature of the programs which an A.C.T. institution could make available for the older male offenders. The design of suitable stimulating programs for a small number of youths guilty of relatively serious or persistent offending presents a challenging, but not insoluble, problem. Unless this problem is solved there is a danger that the institution would become a sterile, claustrophobic facility which would exhibit all the well recognised evils of the small, closed correctional unit. Related to questions about the types of program which an institution in the A.C.T. could offer are questions about the programs actually available, for members of the group which has been identified, in the N.S.W. institutions to which they are at present sent.[169] It has not proved possible for the Commission to undertake a detailed assessment of the programs offered in these institutions. However, until such an analysis has been prepared, and careful consideration has been given to the types of programs which it would be feasible to offer in an A.C.T. institution, no confident answer can be given to the question whether confinement in such an institution would offer real benefits to its inmates.

235. ***Recommendation: An A.C.T. Institution*** The Commission believes that it is in principle desirable to establish an A.C.T. institution for children convicted of serious offences warranting institutional punishment.[170] With a view to establishing an institution for the detention of the group identified by the Commission, the Welfare Division, in conjunction with the Childrens Services Council, should develop proposals relating to the design of an institution and to the programs which it should offer. These proposals should take into account the programs at present provided in the N.S.W. system. An institution should be constructed only if it is clearly established that an A.C.T. institution would be able to offer programs at least as varied and as stimulating as those already available in N.S.W. facilities. If this cannot be established, there is a real possibility that confinement in an A.C.T. institution would be much worse than detention in a N.S.W. counterpart and that any benefit derived from proximity to family and friends would be offset by the debilitating and harmful nature of the regime offered in a Canberra facility. Thus the final decision must depend on further information about the practicality of creating an institutional regime which is at least as good as the combined regimes offered in N.S.W. Reference must also be made to another major practical problem which must be faced if an institution for young offenders is established in the A.C.T. It would be unrealistic and irresponsible to ignore the fact that if an institution is built for a particular group, pressures will be exerted to fill it. Although careful criteria can and should be laid down to limit the institution's intake to those for whom it is specifically designed, it is very possible that

[168] In February and March, 1980, for example, there were 8 days on which there were no children in Quamby Children's Shelter and 21 days on which there was only one occupant. Figures supplied by the Welfare Branch of the Department of the Capital Territory.

[169] The most relevant example is Mt Penang where most of the A.C.T. offenders for whom an institution might be built are at present sent. The programs at Mt Penang include remedial education and vocational training in automotive mechanics, woodwork, carpentery and joinery, metal work, bricklaying, dairying, and work in the laundry and kitchen. In addition playing fields and sporting facilities are provided.

[170] It must be emphasised that this recommendation relates to an institution for children. The need for a prison in the A.C.T. must be given separate consideration. The Commission reserves its position on this question.

pressure will quickly build to employ less discriminating criteria. Unless this pressure is resisted, the institution will be compelled to accommodate children for whom its regime is unsuited. If this happens, gradually more and more emphasis will be placed on security and less on the provision of appropriate programs. An extreme possibility, but one which should not be overlooked, is that the institution might at some time in the future be considered suitable for children who have been found to be in need of care. As will be explained in Chapter 9, it seems that it will continue to be necessary to commit a small number of non-offenders to N.S.W. institutions.[171] If this practice is retained and an institution for offenders is built in the A.C.T., the anomalous result might be that the majority of young offenders who are placed in custody will be held in the A.C.T. while the practice of 'transporting' non-offenders will continue. It is not difficult to predict that the response to that situation would be a demand to hold non-offenders in the institution designed for offenders. This would produce an even more heterogeneous institutional population than would result from an admixture of unsuitable offenders. An institution which attempted to cater for such a population would be able to offer little more than secure confinement and would not be desirable.

236. ***The Form of the Sentence*** If an institution of the kind described is established in the A.C.T. it will be necessary to make a decision on the form of the sentence under which a young offender should be placed in the institution. A choice must be made between a committal order of the kind at present employed to place A.C.T. children in N.S.W. facilities and a specific sentence to the A.C.T. institution. If the former model were employed the A.C.T. institution would, in effect, become part of a range of facilities, all but one of which were in N.S.W. The magistrate would make a committal order but would not know whether the child would be placed in the A.C.T. institution or one of the N.S.W. facilities. This would be unacceptable. The magistrate should know in advance whether a child is to be held in the A.C.T. or N.S.W. This is a factor which could influence his decision. He might, for example, be reluctant to make an order which results in a N.S.W. placement, but consider that a custodial order is appropriate if the child is to be held in the A.C.T. He might make the order hoping that an A.C.T. placement will result, only to find that, as a result of an administrative decision, the child is held in N.S.W. Such a procedure would be unjust. It is clear that if an institution for young offenders is established in the A.C.T. the Childrens Court must have available to it a discrete form of sentence which explicitly directs placement in the A.C.T. institution. The use of such a sentence would be more just than the use of a non-specific order which allowed a choice between a N.S.W. and an A.C.T. placement. It would also be consistent with the Commission's view that certainty and court control are desirable features of the sentencing process.[172] The disadvantage of utilising a discrete sentence is that there is a possibility that the court will make a mistake and sentence to detention in the A.C.T. institution a youth for whom the institution's regime is unsuitable. The difficulties confronting a small jurisdiction operating only one institution should not be underestimated. When a N.S.W. magistrate commits a child to an institution, he knows that the Department of Youth and Community Services has a range of institutions and will probably be able to find a reasonably appropriate placement. The situation would be quite different for the A.C.T. Childrens Court magistrate. Although a specialist magistrate would be well qualified to make highly specific decisions, there would always be the possibility that a child who seems suited to the programs offered by the A.C.T. institution would quickly prove to be unsuitable. Those running the institution would have no room to manoeuvre. They would not be able to solve the problem by way of an administrative decision to transfer the child to another institution. The imposition of a specific sentence to be served in the A.C.T. institution would be practicable only if clear administrative procedures were established to guide the magistrate before the sentence was imposed. Before placing a child in the A.C.T. institution he should be required to ascertain that the institution's programs are appropriate for the child. To discharge this obligation he would obviously require a social background report. He could also gain assistance from the Youth Advocate. Further, procedures would be required to permit the Youth Advocate to bring the matter back to court if the order proved unsuitable. It should then be open to the court to make an order committing the child to a N.S.W. institution or to make any other order which could have been made in respect of the original offence. If procedures such as these were introduced, the more serious problems posed by the creation of a new form of sentence could be overcome.

[171] See para.342, 343.

[172] See para.200.

237. ***Recommendation: The Custodial Order*** If an institution for young offenders is established in the A.C.T. the new Ordinance should make provision for a special sentence. To distinguish it from an order committing a child to a N.S.W. institution, the special sentence is referred to in this report as a 'custodial order'. The custodial order should be of limited duration and should permit flexibility. The requirement that a custodial order be relatively short is dictated by the fact that any institution established in the A.C.T. would be small and the programs which it could offer would be limited. To compel a child to serve a lengthy sentence in such an institution would be undesirable. Reference has already been made to the danger of creating a claustrophobic institution. Although this danger could be reduced by imaginative design and the development of stimulating programs, there are limits to the period for which a youth should remain closely confined with a group of 10 or 12 of his fellows. The maximum term of a custodial order should be six months. If the Childrens Court feels that a longer period of confinement is required it should commit the child to a N.S.W. institution or decline jurisdiction. The provisions creating the custodial order should allow flexibility. In dealing with the proposed control orders, the N.S.W. Green Paper emphasises this aspect.[173] The new Ordinance should therefore make provision for day release. This would facilitate the development of a release to work program or release to attend an attendance centre or other daytime program. A youth sentenced to a custodial order should serve the full term ordered by the court except that provision should be made for administrative grant of remission for good behaviour. This remission should not exceed one third of the sentence. Any further reduction in term should require the approval of the court which could be sought at a review hearing.

238. ***Committal to a N.S.W. Institution*** If the Childrens Court concludes that a child's offence merits a custodial sentence of more than six months, or if the child is unsuited to detention in the A.C.T. institution, the court should be permitted to commit the child to an institution run by the N.S.W. Department of Youth and Community Services. Although children who are committed to such an institution come within the jurisdiction of the N.S.W. authorities and are dealt with according to N.S.W. law, certain aspects of the committal process should be changed after due consultation and negotiation with N.S.W. authorities. The general directions of change envisaged by the Commission are:

- *The form of a committal order.* In future all committals should be for a specific period fixed by the court. The power to commit an offender generally should be abolished. A power of general committal does not satisfy the criteria of certainty and specificity to which attention has been drawn. Use of such a power is inconsistent with the 'just deserts' principle. To some extent the Commission's recommendations are inconsistent with those contained in the N.S.W. Green Paper. There it is proposed that a power of general committal, with a maximum term of 12 months should be retained as well as a power of specific committal.[174] However, the Commission believes that, wherever possible, court orders made in relation to offenders should be certain and specific and that the surrender to administrative discretion which a general order entails is undesirable. Adoption of the Commission's recommendation should not result in practical problems for the N.S.W. authorities, since their institutional system is adapted to deal with specific and general committals. The Green Paper recommended that the maximum term for a specific committal should be two years.[175] This maximum should also be adopted in the A.C.T. in relation to committal to a N.S.W. institution.
- *Transfer of guardianship.* There is no reason why a committal order should involve the removal of guardianship from the child's parents. This is not a matter which may be made the subject of a unilateral recommendation, since the transfer of guardianship at present occurs under the N.S.W. Act[176] as well as under the A.C.T. Ordinance. However, the N.S.W. Green Paper has recommended that a transfer of guardianship should not be an automatic concomitant of an order placing a child in an institution. In the view of the Green Paper, there can be little justification for terminating the guardianship of parents simply because their child has committed an offence which necessitates a placement in an institution.[177] The Commission shares this view and is in agreement with the N.S.W. recommendation.
- *Supervision after release.* There is a clear need for more formal procedures to permit a child released from N.S.W. to receive supervision and support when he returns to the A.C.T. When making a committal order the court should give consideration to combining with it a probation order to take effect from the date of the child's return to the Territory. Such an order should not be seen as a form of after care (which is best provided by way of an arrangement voluntarily accepted), but as a discrete order which may form the basis for breach proceedings if the child does not comply. It is most important that, when making such a probation order, the court fully inform the child of his obligations under it. Failure to do so would almost certainly produce resentment on the child's part, as he would see the period of probation as an additional and unfair penalty imposed on him after he believed he has discharged his obligations. Where a probation order is not employed, the Welfare Division should offer support and assistance which the child is free to accept or reject.

239. ***Older Offenders*** Fixing 18 as the age at which a person passes out of the jurisdiction of the Childrens Court raises questions about the way in which that court should deal with those who have almost attained the age of 18 and those who have attained that age before sentence is passed. Some of the orders available to the specialised court will be inappropriate for mature 17-year-olds. No difficulties should arise in respect of those who have been found guilty of very serious offences, for it should be open to the magistrate to commit them to the Supreme Court for trial or sentence. Careful consideration must, however, be given to the problem posed by offenders aged 17 or 18 who have committed offences which, though serious, do not warrant committal to a higher court for trial or sentence. The Commission has been informed that the Childrens Court in the A.C.T. encounters particular difficulties when it is faced with the task of sentencing youths in this category. Some magistrates are reluctant to send older youths to a N.S.W. institution. This reluctance arises from the feeling that the court can exercise little control over the period for which a committed youth will be held in custody. There is also a feeling that a committed youth is likely to be released from a N.S.W. institution soon after he attains his eighteenth birthday. It can therefore be argued that the Childrens Court should be permitted to imprison older youths, since the imposition of a sentence of imprisonment would ensure that the youth would be kept in custody for a fixed period. Although the Commission appreciates the concern which has been expressed about sentencing options for older juveniles, it does not consider that the problem should be solved by resort to the use of imprisonment. When it is necessary to impose a custodial sentence on a child, the child should, unless his offence is an extremely serious one, be detained in an institution specifically adapted to the incarceration of the young. A child should be imprisoned only in exceptional circumstances. This policy is most likely to be facilitated if the imprisonment of a child is seen as a most unusual course, open only to the Supreme Court. Further, it is unlikely that the A.C.T. institution whose establishment is recommended earlier in this report would be able to accommodate youths aged 17 and 18. The proposed institution is designed to cater for younger offenders and it would also be limited to dealing with those undergoing a relatively short term of detention. In the Commission's view, therefore, it is necessary for the A.C.T. to continue to look to the N.S.W. Department of Youth and Community Services to accommodate older youths who receive a medium term custodial sentence. So long as the A.C.T. makes use of N.S.W. facilities it must do so on the terms laid down by the Department of Youth and Community Services. The A.C.T. authorities must therefore accept that Department's release procedures. Two points must, however, be made about the Department's institutional system. First, that system is specifically adapted to the detention of older juveniles. Both Mt Penang and Endeavour House accommodate older youths. Secondly, like the Commission, the N.S.W Green paper recommended that the Childrens Court should not have the power to imprison children.[178] Hence it can be anticipated that the N.S.W. Department of Youth and Community Services will continue to deal with the problem posed by the older juvenile whose offence requires the imposition of a medium term custodial sentence. So long as the existing arrangements between

---

173 *Green Paper*, 62. See also Report of the Advisory Council on the Penal System, *Young Adult Offenders*, (1974), 63–82.
174 *Green Paper*, 61.
175 id., 61.
176 See discussion, para.53.
177 *Green Paper*, 61. The Department of the Capital Territory supports this view but is concerned about problems which might arise over obtaining consent to medical treatment. *Submission*, 78.
178 *Green Paper*, 49.

the Commonwealth and the N.S.W. Governments remain in force it is, therefore, not unrealistic for the A.C.T. Childrens Court to continue to commit 17- and 18-year-olds to N.S.W. institutions. If the release policies adopted by the Department of Youth and Community Services with regard to members of this age group give rise to anxiety in the A.C.T., the solution lies in inter-governmental consultation rather than in the inappropriate use of sentences of imprisonment. A further solution to the sentencing problem posed by the older juvenile lies in increasing the range of penalties available for offenders in the A.C.T. This matter is under consideration as part of the Commission's reference on sentencing. As new measures are introduced, their suitability for older juveniles should be assessed. There seems no reason, for example, why, if a community service order were introduced for adult offenders in the A.C.T.[179], such a measure should not be made available to the Childrens Court for children who have attained the age of 17.

240. ***The Power to Convict*** Both lawyers and non-lawyers make a distinction between convictions and other forms of orders made by a criminal court. An offender who has not been convicted is regarded as having been dealt with more leniently than one who has had a conviction entered against him. In practice the distinction is not as sharp as might be supposed in the Childrens Court. The Commission's research discloses that police records of Childrens Court appearances list those which resulted in a finding of guilt (which seems to be the equivalent of a conviction) and those in which the court, pursuant to s.59 of the Child Welfare Ordinance, made an order 'without proceeding to a finding of guilt.'[180] Details of both types of findings are included in the copy of the child's criminal record sheet which is handed to the magistrate if the child reappears before the court and is found to have committed another offence. Thus the distinction which the Ordinance seeks to draw between the two different types of orders seems to have little practical value. The law on this important matter should be clarified. The Commission sees little merit in refusing to use the term 'conviction' if the effect of a court's finding is indistinguishable from a conviction. The term should be employed in the new Ordinance, but the Childrens Court should be empowered to make certain types of orders without entering a conviction. A decision not to enter a conviction can confer real benefits on a child. For example, a child who has not been convicted would be in an advantageous position if he later appears in court charged with an offence which carries an additional penalty if the offender has previously been *convicted* on a similar charge.[181] Similarly the child would secure a benefit if a potential employer asked him whether he had ever been convicted of an offence. If the Childrens Court had not entered a conviction, the child could truthfully answer 'no' to this question. In order to overcome the problem presented by the form in which the police maintain their records, it is recommended that in future the court maintains its own record of a child's appearances, and that this be the record which is presented to the magistrate when a child is found guilty of a subsequent offence. Transitional arrangements will be required for a time. The court record should indicate which orders have been combined with a conviction and which have been made without the entry of a conviction. It should be noted that the important issue raised by a consideration of children's records is not the terminology employed by the court, but the use which is subsequently made of these records. In particular an argument can be made out in favour of the introduction of procedures to expunge children's records. This subject is being considered in the Commission's reference on privacy. In the meantime it is recommended that the distinction between a conviction and an order falling short of a conviction should be retained, so that any benefits conferred by a court's refusal to convict should be available to a child. Following a finding of guilt, the Childrens Court should be permitted to make certain orders without entering a conviction. The question to be determined is whether there are certain types of dispositional order which should be employed only after the entry of a conviction or whether the court should be free to make any of the orders available to it without first convicting a child. Examples of provisions permitting a Childrens Court to exercise a substantial amount of discretion regarding the entry of a conviction are to be found in the

179 See discussion in ALRC DP 10, *Sentencing: Reform Options*, (1979), para.88–102.
180 See para.101.
181 See para.101.

Victorian and South Australian law.[182] The N.S.W. Green Paper adopted an approach based on the age of the child. It recommended that a Childrens Court should not enter a conviction against a child under 16, but should be permitted to make any of the orders available to it. With regard to children 16 or over it was recommended that the court should have the power to record a conviction.[183] The Commission has concluded that any dispositional order affecting a child's liberty should be made only after the entry of a conviction by a court of law. The new Ordinance should therefore make it clear that the entry of a conviction is a prerequisite to the making of any of the following orders:

- attendance centre order;
- residential order placing the child in an open home or hostel;
- custodial order placing the child in an A.C.T. institution; or
- committal to a N.S.W. institution.

With regard to the remaining dispositional orders which the Childrens Court is empowered to make, the new legislation should provide that the court may, at its discretion, employ any of these orders with or without the entry of a conviction. Thus, for example, when the court has found an offence proved against a child, it should be permitted to convict him and place him on probation or to place him on probation without proceeding to a conviction.

241. ***Measures Abolished*** As has been indicated, it is recommended that all forms of release on recognizance and general committals to an institution be abolished. It is also recommended that it no longer be possible for the Childrens Court to commit a young offender as a ward[184] or to suspend an order of committal. Retention of the power to make an offender a ward would be inconsistent with the principle that, as far as possible, dispositional orders made against offenders should be specific and should embody an upper limit which reflects the seriousness of the child's offence. Within the uncertain limits prescribed by the Ordinance[185], making a child a ward is an indeterminate measure explicitly directed towards the child's situation rather than towards his offending. It therefore epitomises an approach which the Commission has rejected. If it is desired to intervene to meet a child's needs, care proceedings, which make the objective clear, should be initiated. The recommendation that suspended committals be abolished is in line with the view adopted in the N.S.W. Green Paper.[186] A suspended penalty of this kind is open to major criticisms. If it is to mean what it says, the suspended measure must be activated if the child is guilty of a breach of its conditions, however trivial, irrelevant, accidental or technical. This might result in a committal which a change in the child's circumstances has rendered completely inappropriate. If it is answered that the activation of the penalty is not mandatory, and that the court should keep its options open, then there is no point in the court making the suspended committal order in the first place. Further, if the matter is looked at from the broader perspective of the penal reformer, it is clear that, though intended as an alternative to an institutional penalty, in practice a measure such as a suspended committal can increase the number of offenders incarcerated. This can occur when, as a result of a subsequent minor offence, a suspended sentence is activated. Research in England has suggested that, though the introduction of suspended imprisonment was intended to reduce the prison population, in fact an increase in that population resulted.[187]

182 In Victoria a Children's Court must not enter a conviction when dismissing an information, conditionally adjourning a matter or when releasing an offender on probation. The court may impose a monetary penalty not exceeding $100 or discharge the offender on a recognizance with or without the entry of a conviction. See Children's Court Act 1973 (Vic), s.26(1). Similarly, the Children's Court in South Australia may impose a monetary penalty or release a child on a recognizance without entering a conviction. See Children's Protection and Young Offenders Act 1979 (S.A.), s.51(1).
183 *Green Paper*, 50. The Department of the Capital Territory supports the Green Paper's proposals. *Submission*, 58.
184 The Department of the Capital Territory has suggested that use of the power to make an offender a ward might be 'anomalous'. *Submission*, 58.
185 See discussion, para.52.
186 *Green Paper*, 47.
187 Sparks, 'The Use of Suspended Sentences', [1971] *Crim LR*, 384.

Monitoring of Orders by the Youth Advocate

242. ***The Youth Advocate's Duties*** It is proposed that the Youth Advocate, on behalf of the Childrens Court, should gather information about the progress of children who are the subject of a Childrens Court order. He should ascertain how orders are being implemented and the extent to which they are being complied with, and, where he considers it necessary, arrange to have cases of non-compliance brought back before the court. The suggested monitoring procedures are designed to fulfil one purpose only, namely to permit the court to exercise greater control once a dispositional order has been made. At present, as has been pointed out, the orders employed by the court result in a substantial surrender to administrative discretion. Information about the implementation of orders is not routinely collected. No one accepts responsibility for ensuring that the court's objectives and expectations are realized. It is in order to ensure, as far as possible, that orders made by the Childrens Court under the new Ordinance will mean what they say that the recommendations concerning monitoring are put forward. The Youth Advocate's monitoring duties should extend to the following:

- conditional discharge;
- probation orders;
- attendance centre orders;
- residential orders; and
- custodial orders.

The Youth Advocate's role with regard to children who have been conditionally discharged would be very simple. In the majority of cases it would involve no more than checking that a particular requirement — such as the payment of restitution — has been observed. However, more onerous duties will need to be performed with regard to the other orders. When a child has been placed on probation, the supervisor should be obliged, every three months, to provide the Youth Advocate with a written report containing the following details:

- date, place and duration of interviews;
- information about compliance with conditions;
- information about participation in special programs; and
- other comments, e.g., the probationer's attitude and any problems encountered in the implementation of the order.

These details can best be provided on a simple form which is part of the case file. Under the present system it is common practice for staff in the Welfare Branch to keep a running record of contacts with probationers, together with other comments on their progress. The Commission's proposals should not involve additional paperwork. Case notes should simply be made on a form provided by the Youth Advocate. One copy should remain on the file and one copy should be forwarded to the Youth Advocate. What is being suggested is no more than a systematisation of procedures already employed in the completion of case files. Further, it would be a mistake to place too much emphasis on paperwork. If the system operates as it should there will be a good relationship between the Youth Advocate and those supervising the children. It is to be hoped that the Youth Advocate will learn as much from informal discussions as from the formal reports. When probationers are under the supervision of members of the Welfare Division it should not be the Youth Advocate's duty to interfere in procedures whereby field staff are supervised by senior social workers. The written reports should be forwarded to the Youth Advocate by way of these senior staff members, and so existing supervisory practices should be unaffected. For children who have been placed under an attendance centre order, details of attendance and participation should be forwarded to the Youth Advocate by the supervisor of the centre or project with which the child is involved. Because attendance centre orders are likely to be shorter than probation orders, reports should be furnished monthly. Reports on children who are the subject of a residential order should be prepared for the Youth Advocate every three months. These reports should be more general than those described above. They should give an indication of the child's attitudes and behaviour, and mention any problems encountered. For a child who has been placed in the care of a suitable person, the report should be furnished by that person. For a child who has been ordered to live where directed by the Director of Welfare, the report should be completed by the officer responsible. In addition to information on behaviour and attitudes, the officer's report should indicate where the child has been placed and should explain any changes in placement. Finally, the Youth Advocate should fulfil a limited monitoring role with regard to offenders placed in the proposed A.C.T. institution pursuant to custodial orders. He should receive regular reports on the progress of children who are the subject of custodial orders. It must be emphasised that the Youth Advocate's performance of his monitoring role would not involve him in personal surveillance of the children who are the subject of the various orders. If he were to undertake this function, the result would be intolerable intrusion into the children's lives. The Youth Advocate's contacts should be with the persons responsible for the children, not with the children themselves. It should also be stressed that the Youth Advocate should not discuss the reports he receives with the Childrens Court magistrate. Clearly it would be improper for the magistrate to discuss a child's progress with the Youth Advocate and then preside at a hearing at which a child's compliance with an order was considered. The subject of judicial involvement in the decision to initiate breach proceedings has been considered by the High Court. In *Re the Queen and His Honour Judge Leckie; Ex Parte Felman*[188], some three years after the defendant had been released on a recognizance the Victorian Crown Law authorities sent the trial judge some materials which raised the question whether a condition of the recognizance had been broken. The purpose was to enable the Judge to determine if the defendant should be brought before him so that a decision could be made whether or not he was in breach of the recognizance. This was said to be the normal practice in Victoria and elsewhere. Although it was not suggested that there was actual bias on the part of the trial Judge, all the Justices of the High Court indicated their disapproval of procedures which involve a member of the judiciary in the decision on the institution of proceedings in respect of an alleged breach of a recognizance. Mr Justice Murphy made an emphatic statement:[189]

> The practice of consulting the judge who released the offender on conditional recognizance and for him to make the determination is bad. It conflicts with modern notions of fairness and procedural regularity. It involves the judge unnecessarily in the executive administration of criminal justice. The judge should not be consulted on whether the alleged breach is such that the offender should be called up for proceedings for breach. He should not be involved at all unless this is required for the issue of a notice or warrant to ensure the person's attendance. He should not, unless this is necessary for that purpose, be shown before the hearing any material which evidences the alleged breach.

Application of the principles expressed in *Felman* requires that the Youth Advocate should not refer to the magistrate any material received in the course of monitoring the implementation of court orders.

243. ***Children in N.S.W. Institutions*** Special problems arise with regard to children who have been committed and placed in N.S.W. institutions. The Youth Advocate would have no effective jurisdiction over these children, and probably no obligation could be imposed by an A.C.T. Ordinance on members of the N.S.W. Department of Youth and Community Services to supply information to him. It should, however, be possible for the Youth Advocate to establish informal links with this Department and to arrange procedures whereby he is given advance information on the proposed release of a child from an institution. If this minimal liaison is created, the Youth Advocate should at least be able to inform the sentencing court of the child's impending release. This would go some way towards meeting the complaint that committed children are released without the court being made aware of the fact. Also, the Youth Advocate would be in a position to advise the Welfare Division of the child's impending release so that members of the Division would be able to ensure that suitable accommodation is available for the child and offer further assistance and support should the child require it.

244. ***Breach of a Court Order: Principles*** When a child has disobeyed the terms of a conditional discharge order, a probation order, an attendance centre order, or a residential order, it is the Youth Advocate who should have the primary responsibility for taking action to enforce compliance. His independence of those who implement court orders is crucial to the performance of this task. When the possibility of breach proceedings arises, the Youth Advocate would be better able to make an objective assessment than would the person who is closely involved in working with the child. It is well recognised, for example, that probation officers often display an understandable reluctance to

---

[188] (1978) 52 ALJR 155.
[189] id., 161.

take a child back to court.[190] Having built up a relationship with the child, they wish to preserve it, and see the institution of further proceedings as incompatible with their role. Yet if a court order is to mean what it says, action should be taken when a clear breach of an order has occurred. This is not to suggest that the Youth Advocate would find the task of making the decision any easier than a probation officer does. In each case the decision would involve the careful exercise of discretion. Transgressions may be overlooked on the ground that the child will respond if further support and assistance are provided. Obviously the Youth Advocate should discuss the case fully with the supervisor before a conclusion is reached. Yet ultimately it is the Youth Advocate, an independent person able to appreciate both the supervisor's viewpoint and the court's objectives and expectations, who should have to make the decision. From the standpoint of the welfare worker the interposing of the Youth Advocate would be an advantage, since it would, to some extent, relieve him of the role conflict inherent in the combination of caseworker and authority figure. Quite apart from factors such as these there are, as Mr Justice Murphy has pointed out, further arguments in support of the view that the decision as to the institution of breach proceedings should be made by an independent person. Citing *Goldberg* v. *Kelly*[191], a decision of the United States Supreme Court, he stated:

> As breaches of conditions ... may be slight or technical or clearly excusable, a determination must be made by someone that reasonable grounds exist for calling up the offender so that the court may decide whether the conditions have been broken ... Ordinary requirements of fairness and due procedure suggest that this preliminary decision should be made by someone not connected with the case. Where the offender is subject to supervision, it should not be made by the officer (such as a probation officer) personally supervising him.[192]

Consideration must also be given to the basis on which a court should deal with a breach of the terms of a probation, attendance centre, or residential order. As has been explained in the analysis of the power to release a child on a recognizance[193], failure to obey a probation, attendance centre or residential order should be a distinct offence and the child should be dealt with for that failure and not for the original offence. It is therefore proposed that a new procedure be created which explicitly focuses on the breach of the terms of the court order. To be punishable the breach should be wilful and without reasonable excuse. Such an approach is consistent with the principles stated above in the discussion of recognizances. A useful example of a provision designed to deal specifically with a breach of a court order is to be found in Tasmania's legislation relating to work orders. Section 14(1) of the Probation of Offenders Act 1973 (Tas.) lists the acts which constitute a breach of a work order, and sets out the penalties which may be imposed when a breach is proved. The advantage of the suggested procedure is that it would make it plain that the subsequent hearing is concerned with the breach of the order and why it occurred. Changes in circumstances may have made the order inappropriate and the court can take this into account. The court would also be able to take into account the child's compliance with the order. He might, for example, have scrupulously obeyed the terms of a twelve-month probation order for the first eight months. This would be a factor relevant to the court's assessment of his subsequent non-compliance. The purpose of the proceedings would be clear and unambiguous and therefore a child would be much more likely to understand them. The confusion which arose in *Devine* v. *The Queen*[194] – where it was not clear whether the offender had been subsequently dealt with for the original offence or for a breach of the conditions of his release on a recognizance – would be avoided if this approach is adopted.

245. ***Breach Proceedings by Other Persons*** As an independent statutory officer, the Youth Advocate would be in the best position to decide whether to initiate court proceedings. However, it is not intended that he should be the only person able to initiate such proceedings. If the supervisor of a probationer, or the person responsible for a child under an attendance centre or residential order, feels that the order is not working, it should not be possible for the Youth Advocate to be in a position to compel that person to persevere.

---

[190] See, for example, Lawson, 57.
[191] 397 U.S. 254 (1970).
[192] (1978) 52 ALJR 155, 161.
[193] Para.214.
[194] (1967) CLR 506. See discussion, para.213.

246. ***Procedure*** Examples of the types of actions which might be treated as a breach of a court order are:

- a failure to obey the conditions of a probation order;
- a failure to attend or participate as required by an attendance centre order; and
- seriously disruptive behaviour at, or running away from, the home or hostel in which the child has been placed by the court or by the Director of Welfare.

When an action of this kind comes to the notice of the person responsible for supervising the child, or of the Youth Advocate, the Director of Welfare or a police officer, any of these persons would be able to lay an information in the Childrens Court. The court should then either issue a warrant for the apprehension of the child, or issue a summons requiring the child to appear before the court. If the child is apprehended, the rules governing his detention and appearance in court should be the same as those employed when a child has been arrested by the police for the commission of any other offence. Similarly, at the hearing, the matter should be dealt with as it would in any other criminal proceedings involving a child and the court should have the same powers regarding remands and the ordering of reports as it would in such proceedings.

247. ***Powers of the Court*** If the court is satisfied that the child has wilfully and without reasonable excuse failed to observe the terms of a probation, attendance centre or residential order, it should be empowered to revoke or vary the order or to employ any of the measures which would have been available to it when dealing with the original offence. This does *not* mean that the court would sentence the child for the first offence. The measure selected should be appropriate for dealing with the *breach.* An admonition or a small fine might be employed if the magistrate feels that this will ensure compliance in the future. More restrictive conditions might be imposed. In an extreme case another order might be substituted. For example, if a child has repeatedly run away from a home or hostel in which he has been placed under a residential order, it may be necessary for a custodial order or an order committing the child to a N.S.W. institution to be substituted. Consideration of the measures which would have been available in respect of the original offence is relevant for one purpose only: to avoid injustice. It would obviously be unjust if, in dealing with a breach, a court were to be permitted to employ a more severe penalty than was available for the original offence. For example, if a child has been placed on probation following the commission of an offence which, if commited by an adult, would not have been punishable by imprisonment, it would obviously be unjust to impose a custodial measure on him following the breach of a condition of his probation order. Slightly different principles should apply to the breach of a conditional discharge order. As such an order is an explicit deferral of sentence, a child in breach of a conditional discharge would be dealt with for the original offence.

248. ***Commission of a Further Offence*** When a child who has been conditionally discharged or who is subject to a probation, attendance centre or residential order commits a further offence, he should be dealt with for that offence. This recommendation follows from the Commission's view that a procedure which permits a court to treat a subsequent offence as a breach of a court order is both confusing and potentially unjust. Having decided what penalty is appropriate for the later offence (a decision which will take into account the fact that the child is already subject to a court order and has proved unco-operative) the court should then decide whether the order should remain in force or be discharged.

249. ***Breaches after the Age of 18*** On occasions the Childrens Court will make probation, attendance centre and residential orders in respect of children who are almost 18. As orders of this kind can remain in force after those subject to them attain the age of 18, consideration must be given to procedures vfor dealing with breaches of these orders by persons who have attained the age of 18. In Chapter 4 of this report it was recommended that, with regard to offenders, the Childrens Court should exercise jursidiction only over persons who have not attained the age of 18 years and six months at the time of their initial appearance before the court.[195] This recommendation is equally relevant to persons who are alleged to have breached a probation, attendance centre or residential order. When the alleged breach occurs before the person has attained the age of 18 years and six months, it should be dealt with by the Childrens Court. If the breach is proved, the Childrens Court

---

[195] See para.87.

should, as stated above, be permitted to vary or revoke the original order or to employ any of the measures which would have been available to it in respect of the offence for which the order was made. When the alleged breach occurs after the person has attained the age of 18 years and six months, it should be dealt with by the Court of Petty Sessions. If the breach is proved, the Court of Petty Sessions should be empowered to revoke the order or to employ any of the measures available to the Court of Petty Sessions in respect of an offence of the kind which led to the making of the original probation, attendance centre or residential order.

250. ***Special Powers of Review*** On occasions the Youth Advocate's performance of his monitoring functions might lead him to conclude that, though there has been no behaviour which could amount to a breach of a court order, there are grounds for varying or revoking an order. The subject of the variation or revocation of a probation order has been separately dealt with.[196] Provision should also be made for the Youth Advocate and any other person affected by the order to ask the court to consider the desirability of permitting an attendance centre order, a residential order, a custodial order or a committal order to remain in force. Situations may occur in which, though there has been no breach, the continuance of the order seems undesirable. A child who is the subject of an attendance centre order may be clearly unsuited to the programs offered. A child who has been placed in a home or hostel pursuant to a residential order might find the regime seriously uncongenial. In either case it should be possible for the Youth Advocate or any other person affected by the order to bring the matter back before the court to seek a variation or revocation of the order. A custodial order should be a specific measure and there should normally be no occasion to review it. However, provision should be made for the child's removal from the A.C.T. institution if it is clear that he is unsuited to its regime. Also, in special circumstances it may be appropriate for the child's early release to be authorised by the court. Similarly, in exceptional circumstances, the court should be able to authorise a child's release from a N.S.W. institution. For such an order to be effective, it would be necessary for the court to be empowered to direct that the appropriate authorities arrange for the return of the child to the A.C.T. This matter is more fully discussed later in this report.[197]

251. ***Recapitulation*** This chapter has detailed the measures which it is proposed should be available to the Childrens Court following a finding that a child is guilty of an offence. The measures for which the new Ordinance should make provision are as follows:

- dismissal;
- reprimand;
- conditional discharge;
- monetary penalties (i.e. restitution or a fine);
- probation;
- attendance centre order;
- residential order placing the child in an open home or hostel;
- custodial order placing the child in an A.C.T. institution for a maximum of six months;
- committal to a N.S.W. institution for a specific period not exceeding two years;
- other penalties available to the court in its capacity as a Court of Petty Sessions.

The aim has been to provide a range of clear and specific dispositional orders. At present the A.C.T. Childrens Court has a very limited number of measures from which to choose. Also the orders used are broad and imprecise. Further, the relevant provisions of the Child Welfare Ordinance lack clarity. Particular attention has been focused on the scope for administrative discretion which existing court orders permit. The view has been taken that greater legislative and court control are necessary if certainty and a reasonable degree of precision are to be brought to the dispositional process. Yet at the same time flexibility must be retained if there is to continue to be room for the development of imaginative approaches. A special effort has been made to provide a legislative framework which will permit the growth of community-based measures. The recommendations relating to probation, the attendance centre order and the residential order should provide a foundation on which to build a range of innovative forms of assistance, support and control. It must be strongly emphasised, however, that the enactment of new legislation will be of little value unless the necessary staff, facilities and resources are made available to implement the policies which the legislation embodies.

196 Para.222.
197 Para.366.

7. Children in Need of Care: Current Law and Practice

252. ***Present Definitions*** Although a significant amount of informal work is undertaken with children whose situation or non-criminal behaviour is causing concern, in seeking to describe the system designed to deal with them, it is best to start with an examination of the legal framework within which this system operates. By virtue of s.12 of the Child Welfare Ordinance, the Court of Petty Sessions has jurisdiction:

> where a child or young person[1] is brought before that Court as, or is charged with being, a neglected child or an uncontrollable child or young person, to hear and determine the matter or charge.[2]

When exercising this jurisdiction the court is known as the Childrens Court.[3] Section 5 of the Ordinance defines a 'neglected child' as a child or young person:

(a) who is in a brothel or lodges, lives or resides, or wanders about, with reputed thieves, persons who have no visible lawful means of support or common prostitutes, whether or not the reputed thieves, the persons or the common prostitutes include a parent of the child;
(b) who has no visible lawful means of support or no fixed place of abode;
(c) who begs in a public place, habitually wanders about public places with no ostensible occupation or habitually sleeps in the open air in a public place;
(d) who, without reasonable excuse, is not provided with sufficient and proper food, nursing, clothing, medical aid or lodging or who is ill-treated or exposed;
(e) who (in the case of a child) takes part in a public exhibition or performance whereby the life or limbs of the child is or are endangered, within the meaning of Part XI of [the] Ordinance;
(f) who (in the case of a child) is engaged in street trading within the meaning of Part XI of [the] Ordinance otherwise than in accordance with a licence under that Part;
(g) whose parents are drunkards, or, if one parent is dead, insane, unknown, undergoing imprisonment or not taking proper care of the child or young person, whose other parent is a drunkard;
(h) who is in a place where opium or a preparation of opium is smoked;
(i) who is living in conditions that indicate that the child or young person is lapsing or likely to lapse into a life of vice or crime;
(j) who is under incompetent or improper guardianship;
(k) who is destitute;
(l) whose parents are unfit to retain the child or young person in their care, or, if one parent is dead, insane, unknown, undergoing imprisonment or not exercising proper care of the child or young person, whose other parent is unfit to retain the child or young person in his care;
(m) who is suffering from venereal disease and is not receiving adequate medical treatment;
(n) who is falling into bad associations or is exposed to moral danger; or
(o) who, without lawful excuse, does not attend school regularly.

An uncontrollable child or young person is one who is 'not controllable, or not in fact controlled for the time being, by a parent or by the person in whose care he is'.[4] To this definition is added that contained in s.52:

> A child or young person who solicits a person for immoral purposes or otherwise behaves in an indecent manner shall be deemed an uncontrollable child or young person.

1 A 'child' means any person under the age of 16, and a 'young person' means a person who has attained the age of 16 but has not attained the age of 18. (See s.5) In this chapter the term 'child' is used in a general sense to cover both categories. See para.3.
2 Under s.114 and 115 of the Child Welfare Ordinance a child or young person who has been the victim of an offence may be placed in a shelter. By virtue of s.117 the court may, after any charge against the person allegedly guilty of the offence has been disposed of, 'make an order as to the care of the child or young person.' Thus this vaguely worded provision confers jurisdiction on the Childrens Court over another category of children. It is not clear why the Ordinance deals separately with such children instead of including them in the category of neglected children and young persons.
3 Section 13(1).
4 Section 5.

253. ***Charging Neglected and Uncontrollable Children*** When a child is allegedly neglected or uncontrollable, it is the police who apprehend him.[5] It seems that, when the Ordinance was drafted, it was intended that members of the Welfare Branch should also assume this responsibility, but in practice they do not do so.[6] It is the present policy of the Branch to leave the apprehension of allegedly neglected and uncontrollable children to the police. Once a child has been apprehended, he will be charged, by the police, with being neglected or uncontrollable. It is not the practice to bring such a child before the court by way of summons.[7] The Ordinance does not deal satisfactorily with the procedure to be employed when a neglect or uncontrollability matter is brought before the court. Nowhere is it made clear who may initiate court proceedings or what form they should take. There is doubt, for example, whether it is necessary to charge a child or whether he can be simply brought to court without the need for a charge or summons. Section 54(1) refers to '. . . a child or young person who is *brought before the Court as, or is charged with being*, a neglected child or an uncontrollable child or young person . . .'.[8] Two interpretations of this sub-section are possible:

- that a child or young person can simply be brought before the court as neglected or uncontrollable, and does not have to be charged or summonsed, since the words 'brought before the Court as' a neglected or uncontrollable child imply an alternative to 'brought before the Court charged with being' a neglected or uncontrollable child; or
- that a child or young person who has not been charged may only be 'brought before the Court as' a neglected or uncontrollable child as a result of a summons.

Although the provision is unclear, the first interpretation is probably the correct one.[9] The A.C.T. Ordinance was based on the Child Welfare Act 1939 (N.S.W.) and, as an aid to interpretation, reference can be made to s.81(1) of the latter statute. This states:

> Where any child or young person is brought before a court as a neglected or uncontrollable child or young person or is charged with an offence and is brought before a court, the court may thereupon hear and determine the matter or charge.

There is no reference in that provision to charging a child or young person with being neglected or uncontrollable. In N.S.W. a child or young person is simply apprehended under s.76 of the Child Welfare Act 1939, and brought before the court by way of complaint that he is neglected or uncontrollable. With regard to allegedly uncontrollable children there is a further A.C.T. provision which must be mentioned. Under s.53(1) of the Child Welfare Ordinance a person having the care of a child or young person may apply to the Childrens Court to have him dealt with as an uncontrollable child or young person. The Commission has been informed, however, that in practice parents

---

5 The power to do so is conferred by s.47 and 48 (apprehension under warrant) and by s.49 (apprehension without warrant). For a special power in respect of children who are being neglected or ill-treated, see s. 122(1).

6 In addition to authorising the police to take action, s.47, 48, 49, and 122 empower an 'officer' to apprehend children in the categories described. An 'officer' is defined as 'a person appointed by the Minister to be an officer for the purposes of [the] Ordinance'. (s.5). At present there is no officer in the Welfare Branch who is authorised to exercise the powers conferred by s. 47, 48, 49 and 122. An instrument of delegation has been issued under which the holder for the time being of any one of four senior positions in the Welfare Branch may authorise a person to act as an 'officer'. The fact that no written instruments of authorisation have been issued does not necessarily mean that no 'officer' has ever been authorised. In particular cases it is possible that, in the past, an officer has been orally authorised to take a specific course of action.

7 There is nothing in the Child Welfare Ordinance which prevents a neglected or uncontrollable child being brought to court by way of summons, but the practice is to charge the child. The Commission was told of one instance where a summons was employed; the presiding magistrate strongly criticised the police for employing this procedure. The reason for this criticism was that, under existing procedures, a summons involves substantial delay. The magistrate took the view that if the situation required intervention this should be immediate and, under the present system, only an arrest and charge permit rapid action to be taken. It should also be noted that para.10 of Australian Federal Police General Instruction 13 (quoted para.78) specifically mentions uncontrollability, neglect or incompetent parental control as being factors justifying an arrest.

8 Emphasis added.

9 This view is reinforced by the fact that s.69 of the Ordinance (which deals with procedure in the Childrens Court) refers only to *offenders* being charged. The section provides for a child to be 'brought before the Court' as a neglected child; no mention is made of charging neglected children.

usually advise the police of their children's 'uncontrollable' behaviour and leave it to the police to decide what action should be taken.[10]

Informal Welfare Services

254. ***Welfare Branch*** Although the majority of children coming to the notice of the Welfare Branch do so as a result of an appearance in the Childrens Court, the Branch also handles cases on an informal basis. Of the 1977 and 1978 children's files studied by the Commission, 159 (34.5%) cases were 'non statutory' or informal cases. The majority of these children come to notice in the following ways:

- *Parental referral.* When parents can no longer cope with an unruly teenager, many look for welfare support in an effort to avoid having him charged with being uncontrollable. Such cases are generally treated as family problems by the welfare worker concerned, and office interviews, home visits and counselling sessions will aim to involve the parents as well as the child. If the situation at home is critical the welfare worker may arrange for the child to live away from home for a short time, to allow tempers to ease, or arrange an appropriate referral, for example, to a psychiatrist.
- *School referral.* If a child is regularly absent from school, and parents seem unco-operative in assuring school attendance, the Welfare Branch may be called to investigate the circumstances. In such cases, the welfare worker generally begins by paying the family a home visit and stressing the possible consequences of truancy for the child. Follow-up visits are often planned to check the attendance record. Where possible, referrals to appropriate health and welfare agencies are arranged. If no improvement occurs, the officer may arrange for a member of the Juvenile Aid Bureau to speak to the child. The welfare worker will rarely recommend that a habitual truant be charged, unless the child is young and seriously lacking in education. In such circumstances police are called to charge the child with being a neglected child.[11] Children who are close to school leaving-age are counselled. In one case, a welfare worker monitored a child's truancy for over a year until the child became old enough to leave school. A number of teachers to whom members of the Commission spoke had reservations about the ability of the Welfare Branch to provide effective assistance in cases of truancy. At a meeting of school principals, convened by the Commission, the view was expressed that sometimes cases are brought to the notice of the Branch without action being taken. The school principals blamed this on staff shortages in the Branch.
- *Self referral.* On some occasions children will seek out a welfare worker to help them overcome a personal or family problem. In such circumstances the officer will try to secure the co-operation of parents in a search for a solution to the difficulty.

255. ***A.C.T. Schools Authority*** In addition to the staff of the Welfare Branch there are many other persons and agencies who undertake informal work with children and their families. The material which follows indicates the types of services available. The schools operated by the A.C.T. Schools Authority make use of the services of counsellors. All are trained teachers who also have qualifications in psychology and counselling. The counsellors divide their time between primary and high schools. No school, however, has a full-time counsellor attached and the normal pattern is for a counsellor to spend one or two days a week at each of the schools for which he is responsible. This can cause difficulties for a pupil who has a problem which he wants to discuss urgently, as he will have to make an appointment, unless the need arises on a day when the counsellor is at his school. As all counsellors are busy, appointments cannot always be arranged as quickly as the counsellors would like. Pupils can approach the counsellors of their own initiative, or be referred by a parent, teacher, a medical practitioner or a welfare worker. The counsellor can offer help in a range of matters, for example, personal and social problems, learning difficulties, adjustment to a new school, course selection and careers advice. With regard to the two last-mentioned subjects, the dividing line between the role of the counsellor and that of the careers co-ordinator is unclear. All the colleges and high schools have a careers co-ordinator who combines this role with teaching duties. The

---

10 Department of the Capital Territory, *Submission*, 53.

11 Failure to attend school regularly is specifically mentioned in the list of situations covered by s.5. See para.252.

amount of time available for careers work is wholly dependent on the policy of the Principal, who determines the teaching load which the co-ordinator must carry. Careers co-ordinators are thus in a different position from counsellors, who are able to specialise. However, counsellors are not engaged full time in personal counselling of pupils. In addition to providing counselling, they carry out educational and psychological assessments, design and run remedial courses for special groups, and advise teachers. Mention should also be made of the counselling work done by all teachers. The amount of such work depends on the interest and aptitude of the particular teacher, but the general teaching staff make a substantial contribution to the assistance which the school can offer to children in trouble. The work of school staff is supplemented by that done by two Education Clinics. Parents or teachers (or other persons, such as a medical practitioner) may refer a child with learning difficulties or emotional problems to such a clinic.

256. ***The Capital Territory Health Commission*** The Health Commission provides extensive health and welfare services. Social workers, psychologists and psychiatrists are attached to the Royal Canberra and Woden Valley Hospitals, to community health centres and to the Mental Health Branch. In addition there are community nurses, social health visitors and social work assistants. All offer advice and assistance and can refer children and their parents to other agencies. Those with personal and social problems come to the notice of health personnel in a variety of ways. A child might go to the casualty department of a hospital or to a general practitioner. The visit might reveal a problem which is not purely medical, e.g. child abuse or children wanting to run away from home. Similarly specialists and nurses in the two hospitals might call in a social worker to assist a patient, as might the staff of a community health centre. Nurses who visit schools and pre-schools also come into contact with families requiring counselling and assistance. The services provided by the Mental Health Branch include general child and family guidance and the operation of the Child and Adolescent Unit, which has a specialist staff experienced in the emotional, social, and behavioural problems of children and adolescents. The unit is run by a child and adolescent psychiatrist. It acts in an advisory and consultative capacity to most of the residential facilities for children and adolescents in the Territory and provides a specialist consultative service for the A.C.T. Schools Authority and the Welfare Branch.

257. ***Family Court Counsellors*** Court counsellors attached to the Family Court of Australia frequently come into contact with families which are clients of other agencies in the Territory such as the Welfare Branch or the Capital Territory Health Commission. The Family Court counsellors' work relates entirely to proceedings under the Family Law Act 1975 (Cwlth). Much of their work concerns couples who are separating and who are in dispute over custody or access to children of a marriage. Later in this report reference is made to the possibility of extending the jurisdiction of the Family Court in the A.C.T.[12] Should these developments occur, they will have the effect of extending the work of the Family Court counsellors in the A.C.T. to a wider group of children and families than at present come within their province.

258. ***Voluntary Agencies*** There are in the A.C.T. many non-governmental agencies which offer help to troubled families. The services provided by certain voluntary agencies have been described earlier in this report. These are:

- Dr Barnardo's[13];
- Outreach Incorporated[14];
- Lions and Salvation Army Hostel[15]; and
- Marymead Children's Centre.[16]

Below are described a number of agencies which have a particularly close involvement with child welfare work. The list is not intended to be comprehensive.

- *The Parent Support Service.* This provides advice and assistance for parents; originally it was set up to prevent child abuse, but now it offers help on a wide range of matters relating to child development. The service has a co-ordinator and voluntary counsellors, and can call on professional consultants, all of whom are social workers. It is the parents themselves who make contact with the service (for example, a mother who is afraid that she will abuse her child may ask for help). The initial contact is by phone, and the parent is then put in touch with a counsellor, who may be telephoned at any time.
- *'Life Line'.* This organisation offers a 24 hour-a-day counselling service. It provides both telephone and face-to-face counselling. The organisation is designed to respond to crises: where long-term help is needed the client is put in touch with another agency.
- *The Canberra Women's Refuge.* This offers accommodation for women and children when the situation at home becomes intolerable. Though described as a 'women's' refuge it accommodated 95 children between 1 July and 30 September 1980.[17]
- *St Vincent de Paul Society.* In addition to assistance and support, the society provides temporary accommodation for women, girls and mothers with young children.
- *Catholic Social Services.* This organisation offers general counselling and marriage counselling. It also offers a Homemaker service to assist parents who are experiencing difficulties.
- *Emergency Housekeeper and Home Help Service.* This is operated by the Red Cross. The Red Cross also provides material assistance.
- *The Smith Family.* Provides advice and material assistance in times of emergency.
- *The Salvation Army.* Provides accommodation and practical assistance.
- *Y.W.C.A.* Operates a hostel for single men and women and for transient families.
- *Y.M.C.A.* Operates a hostel for young people.
- *Youth Refuge.* This is jointly operated by the Youth Refuge Association and the Foundation for Youth. Funds are provided by the Foundation and the Office of Child Care of the Commonwealth Department of Social Security. This refuge, which was opened in 1980, has room for eight children.

Australian Federal Police Procedures

259. ***Matters Handled Informally*** Neglected and uncontrollable children are either warned and counselled or charged. In practice, before a charge is laid, there will usually have been a series of contacts with the family and the police officer is likely to involve the Welfare Branch at an early stage. With regard to a child who is thought to be at risk and who could come within the definition of an uncontrollable or neglected child, the police regularly take informal action. For example, a child seen at an amusement centre during school hours will be spoken to and perhaps taken home or to school. A child seen out late at night might be taken home, or the parents may be telephoned and asked to come to collect him. If the apprehending officer is a member of the Juvenile Aid Bureau, a record will be kept in the occurrence book. If it is a general duties officer who is involved, a field report may be submitted or the officer may notify the Juvenile Aid Bureau of the action taken. Similarly a child who has run away from home may be returned and the matter taken no further. However, incidents of either kind may occasionally disclose a serious situation. When the child is taken home it might become clear that he is regularly truanting or has run away several times. The child may then be apprehended (under s.49 of the Child Welfare Ordinance) and be charged with being uncontrollable or neglected. Other categories of child who are regularly dealt with as uncontrollable or neglected are promiscuous girls, children who will not obey their parents and young children who have committed a series of minor offences. Again the police role may be limited, being confined to the giving of warnings or advice, or the situation may be such that a charge is laid. Many cases involving the possibility of an uncontrollability charge come to notice as the result of normal police work. Another source of these cases is a parental complaint to the police. A parent who is unable to control a child may request the police to charge the child. Cases of neglect, however, are rather different. Although the police may come upon such matters – as, for example, when they are called to a domestic disturbance and realise that the children are not being properly cared for – usually they act upon outside information. This information comes from many sources. A school-

[12] Para. 308f.
[13] See para.58.
[14] See para.58.
[15] See para.60.
[16] See para.59.
[17] See *Canberra Times*, 12 November 1980.

teacher or school counsellor may telephone, or a call might come from a neighbour[18] or from a health clinic. Alternatively – because it is always the police who lay neglect charges and never members of the Welfare Branch – a welfare worker who has been working with a family may, after consultation with a senior member of the Branch, decide that court action is necessary and inform the police of the problem. In one such case, the Welfare Branch received a complaint from a group of neighbours that a child aged two had been severely beaten by his father. Upon investigation, the welfare worker was not satisfied with the explanation given by the mother, that the child had fallen down the stairs and bruised himself. Following consultation with senior social workers the police were called to lay a neglect charge against the child. In some cases the referral is in the opposite direction, for the police may become aware of a case which does not seem to warrant the laying of a neglect charge but which may require informal social work. In such cases police will alert officers of the Welfare Branch and leave it to them to take appropriate action.

260. ***Charging*** When a charge of neglect or uncontrollability is laid the procedure is the same as for offenders. If the child is under 16, permission to proceed must be obtained from a commissioned officer[19], and an entry is made in the charge book. Children dealt with as neglected or uncontrollable are not normally fingerprinted or photographed.[20]

261. ***Pre-trial Detention*** Following his apprehension, an allegedly neglected or uncontrollable child may, under s.49, be detained until he may be brought before the court. By virtue of s.50 a child in detention must appear before the court 'as soon as practicable after his apprehension'. Section 49 does not make it clear where a neglected or uncontrollable child is to be detained. It may be that the power of detention which the section contains is wide enough to authorise detention *anywhere* the policeman considers appropriate. If this view is correct, it implies that a person authorised under s.49 is able to delegate his power of detention to persons in charge of a shelter or place of safety. However, it may be that the only place of lawful detention is a police cell. That the law on this important question is unclear is most unsatisfactory. What happens in practice is that, when a neglected child is kept in custody, he is normally held in Marymead Children's Centre. Children charged as uncontrollable who are kept in custody are usually held in Quamby Children's Shelter.

262. ***Informal Placements*** Occasionally runaways and neglected children are informally placed in Marymead or Quamby. This might happen, for example, in the case of an interstate runaway whose parents have agreed to pay his airfare home. Such a child might be placed in Quamby overnight. Similarly a young child might be left at home by parents who are out drinking. If the police are called they might take the child to Marymead, but decide next morning that no action needs to be taken. In neither case will a charge normally be laid.

263. ***Interviewing*** The interviewing of children, and the police instruction regarding the presence of a parent or a police officer not involved in the inquiry, have been discussed in Chapter 4.[21] With regard to the interviewing of a neglected or uncontrollable child, it should be noted that it is sometimes undesirable to interview such a child in the presence of a parent. At times such children make allegations against a parent, and his presence might inhibit the child. Similarly reference to sexual behaviour might be inhibited by the presence of a parent. The presence of an acceptable independent witness is, nevertheless, important.

264. ***Records*** With regard to children dealt with as neglected or uncontrollable, the Criminal Records Unit deals with their records as it would if an offence had been committed. The court appearance and its outcome form part of the criminal record sheet. It seems that it is not common for the Crime Collation Unit to receive field reports on neglect and uncontrollability matters, but,

[18] One case described to the Commission began when late one night a neighbour complained to the police that two children had been regularly left by themselves while the parents were out drinking. The police went to the house and, when they were unable to locate the parents, broke in. They found the children in a filthy condition. The Welfare Branch was contacted, neglect proceedings instituted, and the children taken to Marymead.

[19] See para.12 of Australian Federal Police General Instruction 13, discussed para.78.

[20] The Commission did find six cases where children charged with being uncontrollable were either fingerprinted or photographed. However, it was not possible to ascertain from the charge books why these procedures had been followed in their cases.

[21] See para.74.

when these are received, the child's name enters the Unit's records. Also, as Juvenile Aid Bureau occurrence books list these cases, they can enter the Unit's records from this source. Thus, a finding that a child is a neglected or uncontrollable child can constitute a 'criminal record' in precisely the same way as a conviction for a criminal offence.[22]

265. ***Differing Views: Police and Welfare*** On the subject of proceedings in situations where the child has not committed an offence it should be noted that there are often profound differences of opinion between the police and members of the Welfare Branch. The Commission has been told of many cases where an individual police officer has been deeply disturbed by a child's situation and where the officer has felt that immediate action should be taken to protect the child. There have been cases in which the police have taken action because they believe that it is urgently needed and because they feel that, if they do not act, no one will. A police view frequently expressed to the Commission is that members of the Welfare Branch tend to be 'too passive' in many of these cases and to refuse to take resolute action in circumstances which seem to demand it. The A.C.T. Police have made the following comment on the system for dealing with 'uncontrollable' children:

> [T]he damage may already be done, possibly irreversibly so, by the time the police are finally called to take action, the undesirable behaviour has been moulded over a considerable period, is entrenched, and the rift between child and parent may be irreconcilable. ... The whole exercise is imbued with a degree of futility bearing in mind that that which could have been done to rectify behavioural deviation and to avoid an undesirable confrontation between a juvenile and his or her parent(s) may now be too late.[23]

A clear indication that the police have, in the past, felt strongly about the handling of non-criminal matters is provided by an instruction, issued on 2 April 1976 by the then Commissioner of the A.C.T. Police. This included the following direction:

> Police should endeavour at all times to have members of the Welfare Branch undertake greater responsibility in respect of the requirements of the Child Welfare Ordinance and act within the powers vested in authorised officers under that Ordinance.

In order to achieve this aim the instruction stated that, in normal circumstances, the police should not arrest any person in connection with a breach of the Ordinance, but should first refer the matter to the Assistant Secretary, Welfare. The instruction also touched on another matter which has caused the police concern in neglect and uncontrollability cases. It directed the police that, when they received a request from a member of the Welfare Branch to take action under the Child Welfare Ordinance, they should request a report in writing 'setting out sufficient information to justify the police undertaking such investigation.' The difficulty which led to this directive was that, when the police had taken action, they sometimes found that they could not obtain sufficient evidence to support a neglect or uncontrollability charge, and yet they could not gain access to information held by the Welfare Branch, as members of the Branch regarded this as confidential. Thus, though the police felt themselves compelled to act, they considered that they were handicapped when they did so. Attention must, of course, also be paid to the attitudes and problems underlying Welfare Branch practices. What the police see as inactivity by Branch staff is sometimes the product of large caseloads. Members of the Welfare Branch may be aware of the particular case, but be too busy to do more than pay irregular visits to the child's home. But at times what the police regard as inactivity reflects the field officer's view that a fragile family should be kept together, and that the institution of neglect or uncontrollability proceedings would do more harm than good. Also, by reason of their training and experience, welfare workers do not always react in the way police do. They tend to have less confidence in the utility of court proceedings and court orders than do the police. Members of the Welfare Branch spend more time than police in sub-standard homes and might as a result be more tolerant of differing life styles and less willing to intervene.[24] Another most important factor

[22] Before the introduction of new procedures in 1981, persons wishing to join the Australian Defence Force were, among other questions, asked, 'Have you been adjudged uncontrollable by a Childrens Court and/or committed to an institution by Magisterial Order?'

[23] A.C.T. Police, *Submission*, 8–9.

[24] In a submission the Department of the Capital Territory noted that difficulties can arise from differences of opinion 'as to minimum acceptable standards in a home situation'. The submission continued: 'As Welfare Branch staff work a great deal with families on very low incomes and with families with adult members of a low coping capacity, standards acceptable to Welfare Branch staff may be different from those acceptable to police officers'. *Submission*, 67.

relevant to the Welfare Branch's willingness to institute proceedings is the view, held by some welfare personnel, that the taking of court action is incompatible with the helping role of a welfare agency. For example, in a written account of a case involving a runaway girl, provided for the Commission by a member of the police, reference was made to a disagreement as to whether the police or the Welfare Branch should initiate proceedings. The police account noted, 'The welfare officer replied that it was Welfare's policy that the Branch should not commence proceedings against anybody as it would damage their image in the view of the public'. Sometimes members of the Branch find themselves in the uncomfortable position of having to suggest to the police that they take the action which the Branch feels it cannot initiate. A further consideration is the availability of experienced persons who have sufficient knowledge of court procedures to prepare and present a case in court. During the period of the Commission's inquiry there were no such persons on the staff of the Welfare Branch. Nevertheless, regardless of the explanations which may be given for the way the existing Ordinance is implemented, the police sometimes react when they learn that the Welfare Branch has been involved with a family and has not taken what they regard as 'positive' action. On the other hand, the welfare worker is occasionally irritated if the police institute proceedings (as a result, for example, of being called to a domestic disturbance). At times the police action appears to them to be precipitate, clumsy and heavy-handed, and members of the police encounter resentment from those who have been working with the family. These differences of opinion do not make for good relationships between the two agencies. A recent example illustrates the types of difficulties which can arise:

> Police were called to a block of flats late one night to investigate a neglect complaint lodged by an anonymous caller. The caller stated that a baby was in the care of an elderly incapacitated relative who neglected the child. Upon entry to the flat, the police found the premises in what they described as a state of utter filth, with an overpowering stench and animal faeces on the floor. The police claimed they found the child in a relatively healthy state, but clothed in filthy nappies and insufficiently covered for a cold Canberra night. The elderly relative informed police that a welfare worker called to see them regularly, and for this reason the police refrained from charging the child with being neglected. Upon contacting the welfare worker concerned the next morning, it was established that only spasmodic visits to the family occurred. An agreement was reached between the police and the officer that intensive support would be given to the family to improve the home environment. While these negotiations were taking place the family left their address and moved to another town.

The Childrens Court

266. ***Procedure and Remands*** The court and its procedures have been described in Chapter 2.[25] When the child makes his first court appearance, the case is invariably adjourned while the brief of evidence and a welfare report are prepared. The brief includes the apprehending officer's statement and observations and may include a record of interview with the child and statements by witnesses. In cases of neglect it is common practice to obtain photographs taken in the child's home. These indicate the conditions under which the child was living. Remand procedures have been outlined in Chapter 2.[26] When removal from home is required it is normal to remand allegedly neglected or uncontrollable children in the care of the Assistant Secretary, Welfare, to live where directed by him. As has been pointed out[27], the legal basis for this course is not completely clear. Children who are subject to an order of this kind live in such homes as Marymead or one of the homes operated by Dr Barnardo's or Outreach Incorporated. On occasions a welfare worker will, when preparing a background report, request a remand of two to three months to enable the Welfare Branch to work with the family before a finding is reached by the court. A feature of proceedings in neglect and uncontrollability matters is the frequent use of adjournments. In part this results from the need to obtain further background details on situations which are often complex, and in part from the reluctance of some magistrates to make a finding that the child is neglected or uncontrollable. This reluctance stems from their view that, in many instances, neglect and uncontrollability proceedings are repugnant. Hence the magistrates often grant adjournments in the hope that solutions will be found which will obviate the need to make such findings. In one case observed, a 16-year-old girl

[25] See para.41.
[26] See para.42 and 43.
[27] See para.43.

with psychiatric problems was before the court as an uncontrollable child. With the girl's agreement the magistrate obtained a background report without proceeding to a finding that she was uncontrollable. The girl agreed to accept treatment as an out-patient and the matter was adjourned.

267. ***Nature of Proceedings*** As has been indicated, neglected and uncontrollable children are charged. This might imply that the proceedings are criminal in nature and that therefore the facts should be established beyond reasonable doubt rather than on the balance of probabilities. In *Ex parte Dorman; Re Macreadie* the Supreme Court of N.S.W. treated neglect proceedings as civil not criminal.[28] However, in that case, the magistrate was not called upon to deal with a charge. It is not clear whether the reasoning in Dorman's case would apply in the A.C.T. to neglect or uncontrollability matters commenced by way of a charge. Presumably a matter could more readily be regarded as a civil one if the child were simply 'brought before the Court' as neglected or uncontrollable. As has been pointed out, this is not done and all such children are charged.

268. ***Measures Available to the Court*** The measures available to the Childrens Court when a finding of neglect or uncontrollability has been made have been described in Chapter 2. The relevant provision is s.55. Under this section the following powers may be used:

- admonition and discharge;
- release on probation;
- committal to the care of a willing person;
- committal to the care of the Minister to be dealt with as a ward admitted to government control; and
- committal to a N.S.W. institution run by the N.S.W. Department of Youth and Community Services, either generally or for a specified term.

Statistics on the age and sex of children dealt with as neglected or uncontrollable by the A.C.T Childrens Court between 1 June 1978 and 31 May 1979, and on the orders made by the court are contained in Appendix B, Tables 21–24. In some cases when children were charged with criminal offences as well as with being uncontrollable, powers other than those under s.55 were used. Magistrates sometimes made orders under s.57, s.58, s.59 and s.60 to impose a 'package penalty' for such multiple charges. On occasions the use of the measures provided by s.55 is clearly inappropriate. For example, in one case observed, the court solemnly placed a young baby on probation 'to be of good behaviour and to accept supervision by the Welfare Branch'. In fact it was the mother who was to receive the supervision. In another matter a four-year-old girl was placed on two years' probation, and was also required to be of good behaviour, to accept supervision and to live where directed. Here the probation order was a device to have the girl placed with her grandmother. The general comment can be made that a probation order, with its clear criminal connotations, is most unsuitable for non-offenders. Some of the neglected and uncontrollable children interviewed during the course of the Commission's inquiry showed that they felt that it was unfair that they should be dealt with in the same way as offenders. This resentment was expressed not only with regard to such consequences as being put on probation, but also, in the case of older children who had been dealt with as uncontrollable, regarding detention in police cells while awaiting a court appearance.

269. ***Appeal Rights: Defects in the Law*** In Chapter 4 there is a detailed discussion of the law relating to appeals in criminal matters.[29] Appeals from a determination, finding or order of the Childrens Court are permitted under s.15(1) of the Child Welfare Ordinance. This section incorporates the procedure embodied in Part XI of the Court of Petty Sessions Ordinance. As has been explained in Chapter 4, difficulties arise from the fact that Part XI of that Ordinance was amended in 1972. There appear to be no rights of appeal provided by legislation in respect of determinations or orders of the A.C.T. Childrens Court in neglect or uncontrollability cases. Section 11(c) of the Australian Capital Territory Supreme Court Act 1933 (Cwlth)[30] confers a general jurisdiction on the Supreme Court of the A.C.T. to hear appeals from decisions of inferior courts. Its jurisdiction is conferred 'with such exceptions and subject to such conditions as are provided by Act or by Ordinance'. Section 15(1) of the Child Welfare Ordinance 1957 (A.C.T.), the meaning of which has been discussed elsewhere in

[28] [1959] SR (N.S.W.) 271.
[29] Para. 102 and 103.
[30] This paragraph has been set out earlier in this report in Chapter 4, n.83.

this report[31], confers only those rights of appeal for which provision is made by Part XI of the Court of Petty Sessions Ordinance 1930 (A.C.T.). However, that Part refers only to offences and is therefore not applicable to neglect or uncontrollability cases. Nevertheless, the practice of the Supreme Court is to entertain appeals in neglect or uncontrollability matters. For example, in March 1979 the Supreme Court heard an appeal from an order of Mr W.K. Nicholl, S.M., who had found the appellant to be uncontrollable within the meaning of s.5 of the Child Welfare Ordinance.[32] It must be assumed that the Supreme Court deals with such matters by virtue of the suggested inherent jurisdiction to hear appeals.[33] If the lack of statutory jurisdiction to hear appeals in non-criminal matters is an oversight (and it seems to be) it should be remedied without delay.

Administrative Procedures

270. ***Admission to Wardship*** In addition to the procedure under which the court may commit a child or young person to the care of the Minister for the Capital Territory, the Minister may, under s.18 of the Child Welfare Ordinance 1957 (A.C.T.), admit a child or young person to government control without court intervention. Section 18 provides that:

> The Minister shall admit a child or young person to government control if:
>
> (a) ...
> (b) the Minister is satisfied that it is necessary in the interests of the child or young person so to do and, where the child or young person is in the custody of a parent, the parent has requested or consented to, the admission of the child or young person to government control.[34]

A child admitted to government control becomes a ward[35], and the Minister becomes the child's guardian.[36] By the wording of s.18 it seems that a parent who does not have custody of the child does not have to consent to administrative admission to wardship. Given that custody arrangements are often only temporary and subject to alteration by the Family Court of Australia or by other courts exercising jurisdiction in custody matters, it may be that a parent who has not been awarded custody should have some say in the matter.[37] When the child is in the custody of both parents it is not clear whether the consent of both is required or whether the consent of one is sufficient.[38] In situations where the parents are divorced or separated but have joint legal custody of the child, obtaining consent from both may be difficult. The wording of s.18(b) implies that where a child is not in the custody of a parent, the Minister may effect an administrative admission in the absence of the request or consent of any other person. Before 5 April 1979 admission to government control had to be for one of the purposes specified in s.18(1) of the Ordinance, namely, for the purpose of being apprenticed, boarded out, placed out or placed as an adopted boarder. The meaning of 'board out', 'place out', and 'adopted boarder' was defined.[39] Any purported admission not made specifically for one of those purposes was invalid.[40] An amending Ordinance which came into force on 5 April 1979 removed the requirement that admission be for a specified purpose. Whether a child or young person has been admitted to government control as a result of the court committing him to the care

---

31 Para.102.

32 Unreported decision of the Supreme Court of the A.C.T., No. 1859 of 1978. This case is discussed in detail in para.199. See also another unreported decision of the Supreme Court, No. 407 of 1978.

33 The issue of the Supreme Court's inherent jurisdiction to deal with appeals in Childrens Court matters does not appear to have been raised in the criminal appeal cases discussed earlier in this report (para.102 and 103).

34 See also Child Welfare Regulations 1957 (A.C.T.), regulation 6 (request must be in writing) and regulation 7 (authority for admission to depot, shelter, home, hostel or place of safety while inquiries made).

35 See definition of 'ward', s.5.

36 Section 19(1).

37 The Department of the Capital Territory has made the following statement on the Department's practice in such cases: 'If a request for admission to wardship is received from a parent with custody the Department endeavours to ascertain the views of the other parent if there is another parent who can be contacted. Occasionally a parent with custody cannot be found and the request for the child's admission to wardship is made by the parent who does not have custody.' *Submission*, 78.

38 This point may be of significance in situations where the parents are separated or divorced but continue to have joint custody of the child by, for example, an order of the Family Court or by the operation of s.61 of the Family Law Act 1975 (Cwlth).

39 Section 5. These definitions were removed by the Child Welfare (Amendment) Ordinance 1979.

40 See *Director of Child Welfare* v. *Ford and Another* (1976) 12 ALR 577.

of the Minister to be dealt with as a ward admitted to government control, or as a result of administrative action by the Minister without court intervention, the same consequences ensue.[41] Impressionistic evidence suggests that many administrative admissions to wardship are the result of parents giving their children to the care of the Welfare Branch when family units break up. On 30 June 1979 the Welfare Branch was responsible for 40 children admitted to wardship under s.18. They were placed in care as shown in Table 9.

Table 9: Placement of A.C.T. children administratively admitted to wardship as at 30 June 1979

Private foster care	16
With one or both parents	9
Other relatives	5
Marymead Children's Centre	2
Dr Barnardo's Homes	1
Lions and Salvation Army hostel	1
Bruce Hostel	2
Grosvenor Hospital (in Sydney N.S.W.)	1
St Vincent's Boys' Home, (in Sydney N.S.W.)	1
Bungarimbil Children's Home, (in Tumbarumba, N.S.W.)	2
	40

As indicated in Table 9, a large proportion are placed in private foster care. This can cause unpleasantness in certain instances.

> In one case a young mother arranged for her baby's administrative admission to wardship before moving interstate. The baby was placed with foster parents who grew to love it dearly. After some months the natural mother married and approached the Branch for the return of her child. Neither the natural mother nor the foster parents had any legal right to the custody of the baby. However, it was within the power of the Minister as legal guardian to place the child with either of the parties. After many visits by the mother and emotional interviews conducted between all parties at the welfare office, the mother agreed to leave the child with the foster parents.

It should be noted, however, that in such a situation the Minister did have the power to resolve the problem. A case in which difficulties arose because of the mother's retention of guardianship rights was brought to the attention of the Commission.

> The mother, aged 19 and a regular heroin user, had voluntarily placed her infant son with foster parents. She made frequent trips interstate, and sometimes took the child with her. Usually she kept the child for only a few days, and would then telephone the foster parents saying that she could not cope with the child and requesting them to come and collect him. This the foster parents invariably did. It was suspected by those involved in the case that she used the child to obtain a supporting mother's benefit and that, when this had been obtained, she asked the foster parents to resume responsibility for him. When the authorities questioned her eligibility for the benefit she would briefly resume the care of the child. In the absence of the voluntary surrender of guardianship rights by the mother, or the initiation of neglect proceedings, there was nothing which could be done to prevent the continuance of her unsatisfactory behaviour.

271. ***Temporary Care*** In order to avoid the unnecessary use of the power to admit to wardship by way of administrative procedures, the Welfare Branch employs a more informal method of providing care and financial assistance. A child may be temporarily accommodated in a foster home or a residential institution without the need for the parents to surrender guardianship. In such a situation the Branch underwrites the cost of care. On 24 March, 1980, 51 children were in this category. Details of the placement of the children are set out in Table 10.

---

41 For a discussion of the duration of wardship and of discharge procedures, see para.52.

Table 10: Placement of A.C.T. children in respect of whom Welfare Branch was administratively underwriting the cost of care as at 24 March 1980

Foster care	12
Marymead Children's Centre	18
Dr Barnardo's Homes	10
Homes run by Outreach Inc.	3
YMCA or YWCA	2
Boys' Town (in Sydney, N.S.W.)	1
St Vincent's Boys' Home (in Sydney N.S.W.)	3
Bungarimbil Children's Home (in Tumbarumba, N.S.W.)	2
	51

At any one time there are between 50 and 60 children in care of this kind.

272. ***Admission into a Hostel*** Under s.5 of the Child Welfare Ordinance 1957 (A.C.T.), a 'hostel' means a hostel established by the Minister under Part IV of the Ordinance for the accommodation and maintenance of expectant and nursing mothers. The Ordinance does not provide for the regulation of admission to such a hostel. No doubt admission would usually occur as a result of a child being charged with being neglected and uncontrollable, but could also be on a voluntary basis, without the request or consent of a parent. When admitted to a hostel the child automatically becomes a ward.[42] There is no reason why such a child should, as a result of accepting care during a time of need, acquire the status of a ward. It is pointed out in the A.C.T. Law Reform Commission report that if a newly born infant accompanies his mother who is admitted to such a hostel, he too apparently automatically becomes a ward.[43] No 'hostel' has ever existed in the A.C.T., and there seems no reason why the new legislation should make special provision for expectant and nursing mothers.[44]

Who are the Neglected and Uncontrollable Children?

273. As has been explained in Chapter 1[45], a member of the Welfare Branch prepared an analysis of the neglect and uncontrollability charges which were taken before the A.C.T. Childrens Court in the first half of 1979. The purpose of this analysis was to discover the types of personal and social problems which are dealt with in the court's non-criminal jurisdiction. During the period, 29 children appeared before the court. Of these, 17 faced uncontrollability charges and eight were dealt with as neglected. Two faced charges of being both neglected and uncontrollable. Details of the charges faced by the remaining two were not available, and in two of the neglect cases the Welfare Branch had no background information. Hence the analysis which follows is confined to 25 cases. Of the 17 dealt with as uncontrollable, seven were girls and 10 were boys. Details of the former are set out in Table 11, and of the latter in Table 12.

Table 11: Girls dealt with as uncontrollable by the A.C.T. Children's Court between 1 January 1979 and 30 June 1979

1. Age: 15. Parents divorced when she was four and girl reared by maternal grandmother as the mother had a full-time job. Mother remarried. Girl described as insecure, emotional, and a problem to the mother and step-father. Influenced by her peers and had a history of running away.
2. Age: 16. Mother deserted, and girl and brother lived with father, who remarried. No contact with her mother. Described as having low self-confidence and seeking acceptance; resented her brother's preferential treatment. Ran away 'to gather her thoughts about her relationship with her step-mother' and because she wished to contact her natural mother.
3. Age: 15. Parents divorced and girl had little contact with father or siblings. Mother was over-anxious and protective. Girl had repeated arguments with her, and was described as being out of control, and having a history of poor school attendance and promiscuity. The incident which brought her to notice was running away after an argument with her mother.

---

42 See definition of 'ward' in s.5 of the Child Welfare Ordinance.
43 Law Reform Commission of the Australian Capital Territory, *Report on the Law of Guardianship and Custody of Infants*, (1974), 12.
44 See *The Green Paper*, 22, for a similar recommendation.
45 See para.20.

4. Age: 17. Parents divorced and lived with mother. Described as immature, with limited interests, easily led and subject to peer group pressure. Charge resulted from excessive drinking and abusing mother.
5. Age: 15. Father had a drinking problem. Girl had a history of truancy, staying out at night, drinking and shoplifting. Described as insecure, with a poor self image, depressed and emotionally deprived.
6. Age: 16. Member of a large family, mother appeared to reject her. Girl first came to notice for stealing at the age of nine. Described as insecure, lacking in social skills, manipulative and resentful towards her mother. Charge resulted fom her mother refusing to have her in the home.
7. Age: 16. Parents did not have a close relationship and argued over money. Mother was the disciplinarian. Girl was described as a slow learner and immature; she had few interests and kept her problems to herself. Had a history of running away. Wanted more freedom, but was unable to confront her parents. Charge resulted from running away.

Table 12: Boys dealt with as uncontrollable by the A.C.T. Children's Court between 1 January 1979 and 30 June 1979

1. Age: 17. Parents divorced and boy lived with mother. Received little supervision and had a difficult relationship with her. Described as affable, influenced by his peers, impulsive and exhibiting an aimless lifestyle. Charge laid following a series of traffic offences.
2. Age: 13. Member of a large family known to the Welfare Branch for the last 10 years. Mother had no control over the boy. He was described as being influenced by his older siblings and had difficulty in accepting authority. No consistent discipline. Charged as a result of failing to attend school.
3. Age: 10. Parents separated. Lived with mother who initially did not want him and who provided poor and inconsistent discipline. History of involvement with welfare agencies. Boy had a history of stealing and showed little respect for authority and little self control. Charged after he had broken into a house and committed theft.
4. Age: 15. Father, who had a military background, had unrealistic expectations of, and poor communication with, the boy. Boy appeared caught between the strict discipline of the father and the leniency of the mother. He had had previous involvement with the police. Charge arose after he had been told to leave home and had nowhere to stay and no money.
5. Age: 14. Boy was adopted. Father showed little interest in family matters and mother was very busy with church and cultural activities. Boy had behaviour problems for many years and had a history of stealing since the age of eight. He was defensive and did not show his feelings.
6. Age: 9. Parents divorced and mother re-married. Step-father very strict. There was a history of inconsistent discipline and relationships between the boy and his parents were poor. Boy was unable to communicate, fought at school, and expressed a fear of his step-father and of men in general. Had a history of running away; it was this which resulted in the charge.
7. Age: 11. The family had been known to the Welfare Branch for four years and had a history of marital and financial problems. Father was passive and took little part in family matters. The boy had a history of wandering and was described as a dreamer and a loner; at school he was unmotivated and needed constant encouragement. He claimed his parents took no notice of him.
8. Ages: 11 and 12. Both parents came from deprived backgrounds and had communication difficulties. There were also financial problems. The parents had different views on child-rearing, the father being harsh and the mother lenient.
9. Age: 14. Parents were divorced and boy had lived with each in turn. Neither parent wanted him. Lived with mother, and did not get on with her *de facto*. The boy had threatened him and the mother with a knife and a gun. Mother had him charged in the hope of obtaining help with his behaviour.

274. Two children, both girls, were charged with being neglected and uncontrollable. One (who was aged 16) was apprehended by the police with her brother after he had stolen some goods. Rather than let him take all the blame she claimed to be a party to the offences. Later she denied the offences and the neglect and uncontrollability charges were dismissed. The other girl who faced joint charges was aged 14. The mother and father were about to separate, there was a history of family mobility and the girl at one stage was a State ward in N.S.W. The girl's school attendance was irregular and she had run away from home several times. She claimed that she ran away because of her parents' drinking and arguing and because there was little money for food or clothing. The most recent incident occurred when her mother told her to leave home. Three days later the girl was apprehended by police. The details of the neglect cases are set out in Table 13.

Table 13: Children dealt with as neglected by the A.C.T. Children's Court between 1 January 1979 and 30 June 1979

1. Boy, aged 12. One of a large family, and mother very protective. Neglect charge combined with charges relating to unlicensed use of firearms and motor vehicle offences. (Details limited as no background report requested.)
2. Family of four children, aged 11, 9, 6 and 2. Parents divorced. Mother described as inadequate and immature, with a deprived background. Previous neglect charges in N.S.W. followed by admission to homes in that State. Youngest child a N.S.W. State ward. Father not prepared to have children. Mother regularly went out overnight and left children unattended.
3. Boy, aged 5 months. Mother unemployed and had a seven-year history of drug addiction. Father of the child had deserted her. Lived in poorly furnished flat. Mother loved child, but could not overcome drug problem.

275. In the next chapter attention is directed towards the problem of defining the situations justifying coercive intervention in the lives of children who have not committed offences.[46] The question which must be asked is whether the problems described above are of a kind which court action can be expected to ameliorate or solve. The cases outlined reveal complex family problems. It is necessary to be realistic about the limited capabilities and resources of the court system and to ask whether court proceedings offer an appropriate setting in which to seek solutions to situations of the kind outlined.

276. ***Detailed Case Studies*** The foregoing outlines of neglect and uncontrollability matters give a general idea of the types of problems dealt with by the A.C.T. Childrens Court. However, they do not reveal the complexity of these cases or the way in which the various agencies respond. Further, the 1979 cases analysed above do not include any instances of child abuse. Although Chapter 10 deals specifically with child abuse, it is important at this stage to emphasise that, when dealt with under the Child Welfare Ordinance, allegedly abused children are treated as neglected children.[47] Hence, to complete this description of the current system in operation, it is necessary to provide case-studies illustrating child abuse as well as other forms of neglect and uncontrollability. Names and details have been altered to protect the privacy of those involved, but the cases are based on actual examples which came to the Commission's notice during its inquiry.

- *Case 1*

  In 1978 Gordon's mother, Mrs Smith, approached the Welfare Branch for assistance. She had left her husband who had a serious drinking problem and who had ill-treated Gordon (who was then four) and his twelve-month-old half-sister. In between drinking bouts the father showed great affection towards Gordon. The sister was at this time recovering from burns which it was suspected that the husband inflicted deliberately. However, there was no evidence on which to base a charge. Soon afterwards a divorce was granted by the Family Court of Australia in the A.C.T. The Judge was disturbed by accounts of Mr Smith's behaviour, and custody of both children was given to the mother. Some time in 1979, Mr Smith resumed contact with his wife in the hope of effecting a reconciliation. One day while they and the children were out driving, their car was involved in an accident and Mrs Smith was killed. Neither child was seriously injured. Gordon reacted to his mother's death in a cold and matter-of-fact way, and those associated with him after the accident were seriously worried about his failure to express any grief. When the two children were discharged from hospital, Mr Smith requested a Capital Territory Health Commission social worker to arrange foster home placements, and this was done. The little girl was soon claimed by her natural father, and went to live with her grandparents. The hospital social worker approached the Welfare Branch with regard to Gordon, as it was not clear whether he could be permitted to return to live with his father, in view of the Family Court's explicit refusal to grant him custody. Consideration was given to the possibility of intervention by the Assistant Secretary, Welfare[48]; it was thought by some that he might be able to assume responsibility for Gordon's care. However, the Assistant Secretary declined to take action, and Gordon returned to live with his father. He was obviously disturbed and his situation soon gave rise to concern. Also, his father was treating him badly. The next incident involved a drinking bout by the father, as a result of which he collapsed, unconscious. Gordon, thinking that his father was dead, telephoned the ambulance. When the ambulance arrived the driver explained to Gordon that his father would recover. The next day Mr Smith was furious with Gordon, beat him, smashed his toys and locked him in a cupboard. Gordon managed to escape and was seen in the street being pursued by his angry father. His father hit him several times. Gordon remained with his father, whose violent and drunken behaviour continued. Action in this case was continued by the Welfare Branch. A senior officer made contact, on the father's behalf, with relatives overseas. Subsequently arrangements were made for the boy to live with his maternal aunt.

  Comment. This case illustrates the plight of a child whose situation has come to the notice of a number of agencies, none of whom has a clear responsibility to initiate resolute action.

- *Case 2*

  The boy's mother – who was mildly mentally retarded – came to the notice of the Welfare Branch when living, with her husband, in a caravan park. Michael was then a baby, and his crying irritated the father, who made mother and baby leave the caravan and sleep in a shed. Another occupant of the caravan park was worried about the baby and telephoned the Welfare Branch. Emergency housing was arranged and also the social worker attached to the local health centre became involved, as the baby was found to be neglected and suffering from malnutrition. Thereafter this social worker and members of the Welfare Branch continued to work with the family. There was some suggestion that the father was ill-treating the boy, and at one stage he was found to have scald marks on his arm. However, there was no evidence against the father, merely suspicion. The father became dissatisfied with the emergency accommodation which had been found for them, and the family moved out. Soon after, the couple separated, and the mother retained custody of Michael. Again emergency housing was found for the mother and child and, as she was not coping well with looking after Michael, the Welfare Branch worker suggested that, during the day, Michael be cared for at Marymead Children's Centre. The mother agreed to this, and this arrangement continued for a long period, with the Branch underwriting the cost of care. Both the Welfare Branch and the health centre social worker maintained contact with the mother and child. The most disturbing incident was a serious fall sustained at home by Michael. As a result he fractured his skull and lost the sight of one eye. The mother's explanation was that he fell from a balcony. She said that she had told him not to go onto the balcony, but when he disobeyed she had done nothing to prevent him. The police investigated, but found nothing to suggest that the fall was not an accident. Some members of the Welfare Branch were deeply concerned about the case and, fearing for the child's safety, felt that court proceedings should be instituted. Ultimately, proceedings were initiated at the request of the Child Abuse Committee.

  Comment. As in Case 1, the troubling feature is the absence of an agency clearly identified as having the responsibility to act. It could well be that the provision of informal assistance was more appropriate than the initiation of court proceedings, but it seems that no one was in a position to make a positive decision about the handling of the matter.

- *Case 3*

  The mother of David and Barry was suffering from a serious psychiatric illness, experienced delusions, and was unable to care for the boys properly. For the last two years she had been receiving treatment from a private psychiatrist. After separating from her husband, the mother took the boys to live for a time in the women's refuge. She was then granted emergency accommodation. The mother and the boys came to the notice of a number of welfare agencies. The boys' situation caused concern to their teachers. The school counsellor at the college which David attended referred him to a Capital Territory Health Commission doctor, who formed the opinion that David was being seriously affected by the stressful environment in which he was living. The college's remedial teacher was also concerned that David was backward in reading, unpredictable and aggressive in his behaviour, and appeared to be severely emotionally deprived. His school attendance was erratic. When he was swimming at a school camp, a rip developed, and he ignored the teacher's call to leave the water, got into

[46] See para.292f.

[47] Among the definitions of 'neglected child' is a child 'who, without reasonable excuse, is not provided with sufficient and proper food, nursing, clothing, medical aid or lodging or who is ill-treated or exposed'. (s.5).

[48] Intervention in such a situation seems to be authorised by s.61(4) or s.92(1) of the Family Law Act 1975 (Cwlth). It should be noted that s.92(1) does not create a right of intervention. Under this sub-section any person may apply for leave to intervene in proceedings other than proceedings for principal relief.

difficulties and had to be rescued. The teacher involved formed the opinion that the boy was depressed and had deliberately remained in the water. Barry attended a special pre-school and his behaviour there gave rise to serious concern. At one stage an itinerant teacher was provided to work on a one-to-one basis with him. Also it was arranged that he should attend a special program run by a physiotherapist, but his mother did not co-operate and Barry was found to be too difficult to manage in a group. Barry was described as being a most disturbing influence and extremely emotionally disturbed. Reports on his behaviour in class indicate that he was easily distracted, very active, disruptive and aggressive, unable to respond to requests or correction, unwilling to participate in group activities, and unable to sit and listen to his teachers. Educational and psychological assessments were performed and referral to a psychiatrist arranged. David's behaviour was so erratic and disruptive that at one stage some of the parents of other children at the pre-school considered withdrawing their children. The family was also known to the staff of the local health centre, and two community health nurses made regular (sometimes daily) visits to the home. At one stage Barry had an infection, but, though three prescriptions were made up, the mother did not administer the necessary medication. After a time the mother became hostile to the community health nurses, claimed that they were not properly qualified, and refused to admit them to her home. In the middle of 1979 a community health nurse reported on the family's situation to the Child Abuse Committee. Also a neighbour brought the case to the notice of the Welfare Branch. In June 1979 a member of the Welfare Branch advised the police Juvenile Aid Bureau of the family's continuing problems. A member of the Bureau maintained contact with the family, and by the end of July formed the opinion that court action was necessary. Both David and Barry were taken into custody at their schools on 26 July 1979, and charged with being neglected children. They appeared in court the same day. They were remanded for a week to live as directed by the Welfare Branch. At the hearing on 2 August the matter was adjourned to 20 August. At that hearing a Welfare Branch report was requested. This recommended that the interim custody of the children be granted to the father. This recommendation was accepted at the hearing on 13 September. The children were also placed under Welfare Branch supervision. The matter was then adjourned to 15 November and further adjourned until 15 February 1980. At the first of these hearings the interim order was continued. On 15 February the police did not offer evidence and the neglect charges were dismissed. The boys remained in their father's custody.

Comment. In addition to the demanding and difficult nature of the problems experienced by the two boys, the case exhibits a number of interesting features:

- The resources made available, and the time expended by health, welfare and educational personnel, are noteworthy. An enormous amount of effort was expended in attempting to help the boys and their mother. It is instructive to note the number of persons and agencies involved with the case:

  private psychiatrist;
  concerned neighbour;
  Capital Territory Health Commission school medical officer;
  teachers;
  school counsellor;
  remedial teacher;
  pre-school consultant;
  Women's Refuge;
  pre-school staff;
  itinerant teacher;
  physiotherapist;
  Assessment Panel (in addition to the above-mentioned medical officer, the teacher in charge of the pre-school, the pre-school consultant and the school counsellor, this panel included a psychologist and a social health visitor);
  Capital Territory Health Commission psychiatrist;
  health centre doctors;
  community health nurses;

  Welfare Branch;
  Child Abuse Committee;
  Juvenile Aid Bureau; and
  Childrens Court.

- The various services were made available in an unco-ordinated fashion.
- The use of a neglect 'charge' was manifestly inappropriate, but it was the usual procedure in such a situation when the time came to take decisive action.
- As frequently happens in such cases, the court made use of a number of adjournments, and sought a solution without making a finding of neglect. The police co-operated in this procedure by ultimately offering no evidence.
- The case is also illustrative of the situation which creates misunderstandings between the police and the Welfare Branch. In the police view, although members of the Welfare Branch had been involved with the family for some time, they had failed to take action notwithstanding the fact that the boys' situation was disturbing. The police officers involved believed that it should not have been left to them to take action. A police minute on the case noted: 'The community nurses . . . indicated that prior to police intervention they had tried to attract the attention of proper authorities, including the Child Abuse Committee, without success.' This comment may be an unfair one. The health and welfare workers, and the Committee, may have believed that all possible efforts were being made, and that court proceedings would serve no useful purpose. However, it does reflect the police perception of the handling of the case. The police involved felt that they had been forced to act to make good what they saw to be deficiencies in the welfare system. Further, when the time came to take action they regarded themselves as hampered by the fact that members of the Welfare Branch would not make available background information, since this was considered by welfare staff to be confidential.

- *Case 4*

  Judith came to the notice of the Welfare Branch in 1976, when she was 14. Her parents separated and soon after coming to notice she and her mother moved to Victoria. Judith became unsettled and ran away from home. She began drinking heavily and taking drugs, and engaged in a number of sexual liaisons. Hearing of this behaviour, the father went to Victoria and persuaded Judith and her mother to return to the A.C.T. to make a fresh start. In 1977, after a severe beating from her father, Judith again ran away, this time to Brisbane. After four months she returned of her own accord, but, when her parents learned that she had been living with a married man, they refused to have her back home. She returned to Victoria to live with a married sister, but soon moved out and again fell into bad company. Late in 1977 the Victorian police charged her with drug use and prostitution. The Victorian Childrens Court obtained background details from the A.C.T. Welfare Branch, as the possibility of sending her home was being considered. However, her parents refused to have her home, and she was placed in foster care in Victoria. Soon afterwards she became pregnant and her parents persuaded her to have the pregnancy terminated. At Christmas 1977 Judith returned to the A.C.T. for a holiday with her parents. Trouble developed and she took a drug overdose. Some weeks later she took another drug overdose. In hospital she was described as a depressive personality and further suicide attempts were feared. She was placed in a psychiatric ward and discharged a month later. She obtained employment and maintained close contact with a welfare officer. However, further suicide attempts followed, and she was several times admitted to hospital for psychiatric care. By this time she had no money and nowhere to live, as her parents had rejected her. Late in 1978 she made another suicide attempt. A further period in a psychiatric hospital followed and a hospital social worker became involved with her case. The staff of the Welfare Branch concluded that there was little more they could do for Judith and the case was left in the hands of the hospital social worker.

Comment. Although Judith was not made the subject of uncontrollability proceedings, she is an extreme example of a so-called 'uncontrollable' child. Friction between her and her parents was continual, she regularly ran away from home, drank heavily, took drugs, engaged in sexual misbehaviour, was assaulted by her father, and finally faced criminal charges. Underlying her behaviour were severe psychiatric problems. The criminal justice system, and health and welfare

agencies became involved with her case, but none of these was in a position to endeavour to deal with her total situation.

- *Case 5*

  Two children, Grant, aged 4, and Margaret, aged 5, came to notice because the care which they were receiving was seriously inadequate. Both parents came from broken homes and had tragic family histories. As a teenager the mother had treatment for a psychiatric illness. The father was unemployed and received Social Security pension on the grounds of 'social inadequacy'. The pension had been granted because he was unable to hold a job and the Commonwealth Employment Service had concluded that it was futile to send him to job interviews. The mother was employed as a clerk. The family moved from house to house. Because of their poor standards they were regularly evicted and, at the time the children came to notice, were in emergency housing provided by the Housing Branch of the Department of the Capital Territory. The house was in an extremely dirty condition and the children poorly fed and clothed. It was the father's practice to stay in bed until lunchtime. He took little interest in caring for the children. He frequently left them alone in the house. Neither parent was receptive to counselling or to other forms of assistance. A report noted that the family had exhausted the resources of informal welfare services. Help had been received from the Welfare Branch and the Capital Territory Health Commission. Community health nurses had regularly checked the children's health, and Grant was several times admitted to hospital suffering from ailments which the pediatrician attributed to neglect. The hospital records were, however, regarded as confidential, and it was felt that they could not be made available as evidence to support a neglect charge. For a time Grant attended a physiotherapy centre to assist his development. Voluntary organisations also helped. For example, the Smith Family provided food. There were continuous problems with the Housing Branch of the Department of the Capital Territory, financial crises through mismanagement, and trouble arising from the non-payment of fines for driving offences. The various forms of assistance were provided despite persistent objections and lack of co-operation from both parents. They were clearly unwilling to change their behaviour. For a short period the children were voluntarily placed in daycare at Marymead Children's Centre. It was common for them to arrive at the centre hungry and with soiled clothes. The staff there had to bathe and feed the children and give them clean clothes before they were able to take part in the centre's activities. The parents were continually hostile to Marymead staff. Eventually neglect proceedings were instituted and the children were placed in Marymead on a full-time basis. The parents refused to contribute to their upkeep. The Welfare Branch court report noted that the parents saw the Welfare Branch and Marymead as intefering in their lives. The report described the parents as 'immature, socially inadequate people, totally unable to cope with the task of bringing up young children'. They were also described as having 'an almost childlike, dependent relationship, with limited capacity for change'.

Comment. Like Case 3, this case illustrates a situation in which a number of agencies were involved. Intensive assistance and support were provided. The distinctive feature of this case-study is that it provides an extreme example of the type of problem which can lend to neglect proceedings based on the ground that children are under incompetent or improper guardianship.

8. Children in Need of Care: A New Procedure

Basic Principles

277. ***Objectives*** The foregoing description of current procedures for dealing with neglected and uncontrollable children in the A.C.T. raises a number of theoretical issues. Some of these may be more conveniently discussed later, when attention is given to the problem of defining the circumstances in which society is justified in intervening coercively in the lives of children who have not committed an offence. Broadly speaking, such intervention is at present undertaken when a child is found to be abused, neglected, abandoned, uncontrollable or in a harmful situation. Although an examination of each of these categories raises different considerations, with regard to all of them the objective is to promote and protect the welfare of children thought to be at risk. The assumption embodied in child welfare legislation dealing with non-offenders is that society has the right and duty to intervene when parental failure or inadequacy or the situation in which a child is living is such as to cause concern for the child's well-being. The state assumes a parental role.[1]

278. ***Avoidance of Court Action*** Two principles should be reflected in the new legislation designed to meet the problems faced by troubled or unfortunate young people and their familes. The first is that court action should be avoided wherever possible. The reasons for seeking to avoid the court are:

- the adversarial procedures of our court system are ill-suited to the resolution of the personal and social problems raised by these cases;
- by its nature a court order cannot offer a complete and continuing solution to a family's problems, which may be better met by the provision of immediate welfare assistance;
- court proceedings, whatever modifications are introduced, and whatever the motivation of participants, inevitably tend to be stigmatising and disturbing to those involved; and
- resort to court proceedings can sometimes reduce parents' willingness to accept personal responsibility for their children and damage the relationship between parent and child.

279. The adoption of the principle that court action should be avoided where possible should not be taken as indicating a lack of concern for children in trouble. Like the United States Juvenile Justice Standards Project, the Commission's recommendation that the scope of coercive intervention be restricted reflects doubts about the effectiveness and appropriateness of coercive action, not about the need for services.[2] Every effort should be made to provide informal services on a genuinely voluntary basis. The various child-care agencies in the A.C.T. are already making substantial efforts to see that this principle is observed. More could be done. The new legislation should provide a framework which limits resort to court action to those cases where it is essential or may be useful, and which facilitates the exploration of informal solutions. Court proceedings should, as a general rule, be a last resort. A court is usually an unsatisfactory forum in which to pursue benevolent policies. Coercion and benevolence rarely make a good combination. If the aim is to help, this is

---

1 For a discussion of the reasoning underlying the state's assertion of the right to intervene to safeguard a child's welfare, see Teitelbaum and Harris. After referring to the arguments adopted, early in the Nineteenth Century, by the New York Public School Society regarding the need for anti-truancy laws, they comment that the theory used by the Society 'could and did stand for the proposition that parental control over their children was generally subject to official invasion when the former were guilty of neglect so as to compromise the capacity of infants to become good citizens. It also suggested that official agencies of social control could effectively be used to remedy family failure.' Teitelbaum and Harris, 'Some Historical Perspectives on Governmental Regulation of Children and Parents,' in Teitelbaum and Gough, (eds.) *Beyond Control, Status Offenders in the Juvenile Court,* (1977), 1,19. See also the following, from *Ex parte Crouse,* 4 Wharton (Pa.) 9 (1838).' [M]ay not the natural parents, when unequal to the task of education, or unworthy of it, be superseded by the *parens patriae,* or common guardian of the community? It is to be remembered that the public has a paramount interest in the virtue and knowledge of its members, and that, of strict right, the business of education belongs to it.' Although these statements referred to a failure to provide education, they could equally well apply to any other situation thought to justify protective intervention by the state.

2 Juvenile Justice Standards Project, *Standards Relating to Abuse and Neglect,* (1977), 6. See para.2, n.18, for the full reference to this project.

much more likely to be achieved by avoiding resort to court proceedings and by offering assistance on an informal basis. Compulsion often generates resistance.[3] The role which a court can play is very limited. It is not an all-purpose welfare agency. When dealing with the child in need of care, its primary purposes are to rule on disputed questions of fact and to sanction coercive intervention. With regard to the latter function it is, as the N.S.W. Green Paper points out, imperative that there be no interruption of parental rights contrary to the wishes of parents without parents and child having an opportunity to be heard in court.[4] The emphasis on the avoidance of court proceedings should not be allowed to obscure the importance of the positive role which a court can play. Courts are concerned with the protection of rights and it must not be overlooked that there will be occasions when the child or his parent denies the allegations on which non-criminal proceedings are based. A desire to restrict the role of the court in these proceedings should not be permitted to lead to the creation of a system in which this basic consideration is ignored. Mention must also be made of a principle closely related to that of court avoidance. A commitment to restricting coercive intervention can be taken as implying a commitment to the preservation of parental autonomy. The Juvenile Justice Standards Project, for example, advocated a deference to parental autonomy as being fundamental to its proposed reforms. In the opinion of those associated with the project, the nature of a democratic society requires that diverse views and lifestyles should be accommodated and that child-rearing should normally therefore be left to the parents.[5] Although these arguments are valid, and it is most important that parental autonomy be preserved wherever possible, respect for parental autonomy should not be elevated into the sole principle on which the system for dealing with non-offenders is built. The relationship between a parent and child is a special one, and a child welfare system should attempt to balance the rights and interests of both children and parents.

280. ***Distinctive Procedures*** The second principle is that, when it is necessary to take a matter to court, the procedure employed should be distinctively different from that used for alleged child offenders. The procedure of charging children with being neglected or uncontrollable is inappropriate and absurd, and has been widely criticised.[6] It is objectionable for a number of reasons.

- Despite the efforts of magistrates and police, the procedure suggests that it is designed to establish culpability rather than to provide the specific assistance which the child needs.
- Some of the stigma attached to the young offender is invariably attached to the neglected or uncontrollable child. To some members of the public both types of child are 'delinquents'. This attitude is reinforced by practices regarding the keeping of criminal records. Records of cases of neglected and uncontrollable children are kept together with, and inseparable from, records of child offenders.
- A charge forces the police and the court to concentrate on the proof of a specific incident or situation, whereas an appropriate procedure ought to be such as to permit the examination of a pattern of events indicating a child's need for care. Working within the framework of a criminal system tends to produce responses which narrowly focus on the individual defendant rather than on his family situation and personal and social circumstances.
- The charging process involves the use of police procedures to deal with a situation which should be viewed as a child welfare problem.
- The charge is explicitly directed against the child; the parents are not parties.

When it is necessary to bring them before a court, neglected and uncontrollable children should be dealt with in a manner which clearly separates them from offenders. They should not be subjected to, and should not feel themselves to be subjected to, criminal procedures in a criminal court.[7] As is explained later in this Chapter[8], it is proposed that a new form of procedure should replace neglect

3 Andrews and Cohn, 'PINS Processing in New York: An Evaluation,' in Teitelbaum and Gough, 45, 88.
4 *The Green Paper,* 32.
5 Juvenile Justice Standards Project, *Standards Relating to Abuse and Neglect,* (1977), 37.
6 The Law Reform Commission of the Australian Capital Territory has described the charging of children as neglected or uncontrollable as 'manifestly absurd'. See *Report on the Law of Guardianship and Custody of Infants,* (1974), 13. Similarly, Barwick CJ has referred to it as 'a very odd proceeding'. (*Minister for the Interior* v. *Neyens* (1964) 113 CLR 411, 422.)
7 The Department of the Capital Territory supports the view that care proceedings should be treated as civil matters. *Submission,* 34, 36.
8 Para.304.

and uncontrollability proceedings. When a child's situation necessitates court action he should be made the subject of an application for a declaration that he is in need of care. The Youth Advocate, whose role with regard to offenders has already been described[9], should normally assume responsibility for the initiation of care proceedings. Before setting out details of the proposed new procedure, it is necessary to examine the pre-court process.

Pre-court Intervention

281. ***Problems of Co-ordination*** Attention has already been drawn to the multiplicity of welfare agencies in the A.C.T. The help which they are able to give at the pre-court stage is often marred by a lack of co-ordination.[10] Too many agencies and individuals operate without reference to each other. Added to this are jealousies and rivalries and bureaucratic impediments. The organisational problems faced by the Territory's welfare agencies are discussed in greater detail in Chapter 13. At this stage it is sufficient to point out that, when difficult cases arise, no one person or agency has the responsibility for endeavouring to ensure that efforts are co-ordinated. This responsibility should be given to the Standing Committee of the Childrens Services Council.

282. ***The Standing Committee of the Childrens Services Council*** In Chapter 13 the Commission's recommendations regarding a Childrens Services Council for the A.C.T. are outlined.[11] It is proposed that this Council fulfil a broad policy formulation and co-ordination role with regard to the various welfare agencies in the Territory. It will not, however, assume responsibility for the handling of individual cases. At present it is the practice, both in the Welfare Branch of the Department of the Capital Territory and the Capital Territory Health Commission, to convene informal case conferences when they are needed. At these conferences representatives of government and voluntary agencies discuss particular cases and consider the most appropriate course of action. These case conferences should continue in their present form. It is not intended that the Youth Advocate should take part in them. Nothing in this report is intended to limit or control the work of these conferences. The disadvantage of the existing system is that, when a difficult case arises, no one is clearly in a position to take resolute action and to assume responsibility for initiating court proceedings. As has been indicated, it is recommended that the Youth Advocate should assume responsibility for taking the necessary action. In reaching a decision on the desirability of initiating care proceedings in a particular case, it is clear that the Youth Advocate should have access to advice from representatives of the agencies responsible for working with the child and his family. In order to achieve this it is recommended that a Standing Committee of the Childrens Services Council should be established. This committee should be empowered to consider cases which are causing difficulty. It must be emphasised that the proposed procedure would apply only with regard to the making of a decision as to the initiation, in court, of care proceedings. Quite different procedures would be available to ensure that urgent action is taken in an emergency. These procedures are discussed later in this report.[12] Further, it is not intended that the Standing Committee should assume a role with regard to all, or even the majority, of potential care cases. If a case is being handled satisfactorily, it should continue to be handled as at present. However, if any person involved with a case is anxious about the child, that person should be able to bring the case to the notice of the Youth Advocate. He would then convene a meeting of the Standing Committee so that he could obtain information to assist him in making a decision on the initiation of care proceedings. Alternatively a case conference might reach the conclusion that the initiation of care proceedings is desirable in a particular case. A representative of the conference would then notify the Youth Advocate in much the same way as the police are at present notified when members of a conference have concluded that a child should be charged with being a neglected or uncontrollable child. The difference would be that the Youth Advocate would then convene a meeting of the Standing Committee and would discuss the case with its members. In many cases these meetings will be short

9 Para.163.
10 It is not suggested that a lack of co-ordination in complex cases is peculiar to the A.C.T. A dramatic example in England was the Maria Colwell case. See the Report of the Committee of Inquiry, *Care and Supervision Provided in Relation to Maria Colwell,* (Field-Fisher Report), (1974). See also Petrie, Berry and Smith, 'Juvenile Delinquency and the Labyrinth of Services: A Case Study,' (1980), 13 *ANZJ Criminol,* 52.
11 Para.516.
12 Para.305.

and it will be apparent that informal methods have been exhausted. It will be clear that the initiation of care proceedings is the only alternative. However, the meeting will give the Youth Advocate an opportunity to make an independent assessment of the handling of the case. It will permit him to question members of relevant agencies. On occasions he might conclude that further efforts should be made on an informal basis. Before initiating care proceedings, the Youth Advocate should be required by the legislation to discuss the case with the committee. Its members may persuade him to hold his hand in a particular case or to take action where he was originally disinclined to do so. The result should be the careful scrutiny of the decision to take a matter to court. The creation of mechanisms to ensure that such scrutiny is carried out in every case is central to the Commission's proposals regarding care proceedings. In practice the number of occasions on which the Youth Advocate will disagree with a committee recommendation that care proceedings should be taken will probably be extremely small. The major function of the consultation and decision-making procedures envisaged by the Commission would be to allow for the independent assessment of cases where failure to take decisive action is putting a child at risk. Thus the Standing Committee would perform a limited role. It would assist the Youth Advocate in reaching a decision regarding difficult cases which have been brought to his notice by persons concerned about the welfare of a particular child. The Youth Advocate would normally be notified of such cases by persons concerned about the informal handling of a case or by persons who have concluded that the initiation of care proceedings is desirable. It must be emphasised that the committee would not assume responsibility for the day-to-day management of all cases. It should not take over a case from a field worker or interfere with the work of a case conference. It should be involved with individual cases only when these are difficult and the Youth Advocate or any other person has concluded that the system is not functioning as it should. The importance of consultation between the Youth Advocate and the Standing Committee must be stressed. Obviously a co-operative spirit must be engendered so that members of the committee and the Youth Advocate work together in the interests of the child. When a decision has been made to initiate care proceedings, the information available to members of the Standing Committee will be of great assistance to the Youth Advocate. It is to be hoped, for example, that the members of the committee would assist the Youth Advocate in the preparation of the necessary application and in marshalling the evidence necessary to support it.

283. ***Limited Powers*** Before deciding to initiate care proceedings, the Youth Advocate should be required to ensure that all informal alternatives have been explored. Since the proposed Youth Advocate should be an independent official, he would have no direct access to, or control over, those who provide welfare services in the A.C.T. He would not, for example, be in a position to compel diverse agencies to co-ordinate their activities, or to make a reluctant agency provide a particular service. If the provision of informal welfare services in an individual case is unsatisfactory, it is the Standing Committee which should assume responsibility for examining the difficulties which have arisen and endeavouring to resolve them. When performing this function, the committee should provide a forum for the critical appraisal of the handling of individual cases. It should not be overlooked that, like the Youth Advocate, the Standing Committee would not have the power to compel a welfare agency to take a particular course of action. Its membership, discussed below, should consist of representatives of appropriate organisations and it is not suggested that the committee can or should be given authority over these organisations. So long as they retain their independence, co-ordination can only be requested. It cannot be compelled. The only course open to a member of the Standing Committee who was dissatisfied with the handling of a case would be to refer it to the Childrens Services Council. The Council would be able to consider the policy issues raised by the case.

284. ***Membership of Standing Committee*** The committee should consist of the Youth Advocate (who should act as the Chairman), the Director of Welfare, at least one senior representative of the Capital Territory Health Commission, and at least one senior member of the Australian Federal Police. In Chapter 5 emphasis has been placed on the special welfare role which the police Juvenile Aid Bureau should perform.[13] The police representative on the committee could appropriately be a member of that Bureau. In addition, the members of the committee should be able to request other persons to attend, either in an individual or representative capacity, when the particular problem to

[13] Para.155.

be discussed requires this. For example, if a difficulty has arisen regarding the placement of a child in Marymead Children's Centre, obviously a member of the Marymead staff should be invited to attend the meeting. Reliance on a 'core' committee, augmented where necessary, seems preferable to the creation of a large and cumbersome committee, some of whose members would have no direct interest in the particular problem being discussed. Although consideration was given to the need to include a permanent representative of the voluntary agencies — since these agencies make such a substantial contribution to the welfare services in the A.C.T. — this did not seem to be feasible. It is unrealistic to expect that, given the committee's functions, a member of one agency could represent the range of non-government services. A member of Dr Barnardo's could not, for example, effectively represent Marymead Children's Centre on the committee. The committee should meet on an *ad hoc* basis, whenever the Youth Advocate or another member requests a meeting.

285. ***Voluntary Admission to Wardship*** As has been explained[14], a parent may, under s.18 of the Child Welfare Ordinance, agree to a child's admission to government control (and so transfer guardianship to the Minister for the Capital Territory). Voluntary admission to wardship is possible in a number of other jurisdictions, both in Australia and overseas.[15] A procedure which enables a child to come under the care of a welfare authority without appearing in court has undoubted advantages. Among these are speed, the minimisation of stress on family members, and the avoidance of stigma. Further, court proceedings may sometimes hamper subsequent case-work with a family.[16] Nevertheless, the procedure is open to serious criticism. It allows for a far-reaching and significant change in the child's status to be made as a result of an administrative decision. Sometimes consent to this major change may be given under pressure of circumstances and may not be free, knowing and informed.[17] Admission precipitated by social pressures may later give rise to enduring regret on the part of a single, immature or intellectually handicapped parent. In the A.C.T. and some other jurisdictions, the relevant legislation contains no criteria to guide or restrict the Minister or other governmental official when making a decision on a parent's application.[18] The A.C.T. Law Reform Commission report[19], the Green Paper[20] and the Norgard report[21], although all conceding that administrative admission is useful to cover a range of cases in which a court appearance would be both undesirable and unnecessary, put forward proposals designed to prevent abuse of the procedure. Suggested safeguards included the issue to the parents of a certificate that the child had been made a ward[22], the requirement of a court order where no parental request or consent

[14] Para.270.

[15] For example, Children's Services Act 1965 (Qld.), s.47; Community Welfare Services Act 1970 (Vic.), s.35; Child Welfare Act 1960 (Tas.), s.35; and Child Welfare Act 1947 (W.A.), s.47C. In England a child may be received into care under s.1 of the Children Act 1948 (U.K.), and under s.2 of that Act the local authority may pass a resolution assuming parental rights over such a child. For a discussion of the English provisions, see *London Borough of Lewisham* v. *Lewisham Juvenile Court Justices and another* [1979] 2 AllER 297.

[16] See discussion, Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Australian Discussion Paper, Topic 2, *Juvenile Justice: Before and After the Onset of Delinquency,* Report of a Working Party convened by John Seymour, (1979), 18. For a discussion of the principles underlying the relevant English provisions, see Eekelaar, 'Children in Care and the Children Act 1975,' (1977) 40 *Modern LR,* 121.

[17] The Ford case illustrates the dangers of the procedure. In proceedings relating to a child's admission to government control under s.18 of the Child Welfare Ordinance it was pointed out that the document which the parents of Steven Ford signed was commonly referred to as an 'admission form'. In the Supreme Court of the A.C.T. the judge said, 'In all the circumstances I am not satisfied that Mr and Mrs Ford understood at the time they signed the form that an incident of wardship was that the Minister was to be guardian of Steven to the exclusion of themselves.' *Director of Child Welfare* v. *Ford and Another* (1976) 12 ALR 577, 579–80.

[18] The Queensland legislation, however, does provide some criteria relevant to the decision which the Director of the Department of Children's Services must make when he is asked to admit a child to his care. Before agreeing to admit the child to care he must make inquiries, hear objections, and must be satisfied that the child is in need of care and protection and that such care and protection cannot be secured under Part V of the Act (which deals with children in need of assistance). See Children's Services Act 1965 (Qld), s.47(1) and (2). Cf. Community Welfare Act 1972 (S.A.), s.39(2).

[19] Law Reform Commission of the Australian Capital Territory, *Report on the Law of Guardianship and Custody of Infants,* (1974), 12–13.

[20] *The Green Paper,* 23–24.

[21] *Norgard Report,* 84.

[22] Law Reform Commission of the Australian Capital Territory, (1974), 13.

is available[23], the provision of a right of appeal to a court or tribunal in respect of all administrative admissions[24], the restriction of the duration of wardship to a period of 12 months (subject to renewal)[25], and the provision of the intermediate alternative of a 'temporary care order'.[26] In 1978 the Victorian Act was amended to allow agreements by which a child has been administratively admitted to care to be terminated by any party on giving 21 days notice.[27] Also the relevant Queensland legislation provides that any such arrangement admitting a child to care must terminate within one month of an application by the child's parent or guardian to undertake the care of the child.[28] The question which must be considered is whether the creation of safeguards satisfactorily meets the objections which have been raised to administrative admission. Is the procedure inherently so unsatisfactory that no safeguards can make it acceptable? The s.18 procedure is objectionable and should be abolished. As a matter of principle it is undesirable that such an important change in status should be made administratively. A procedure by which a parent, together with an administrative authority, may sanction a change, of immense consequence, in the status of a child without the knowledge or consent of the child, disregards any claim the child might have to personal determination or even to make known his own wishes to those in control of his fate. Further, because the procedure confers extensive powers on the Minister or responsible officer, including powers of placement, questions of liberty arise. In normal circumstances only a court should be empowered to deal with the transfer of guardianship of a child[29] and with matters affecting his status and liberty. The importance of ensuring review by an independent body before such a radical change in status is effected, and such wide powers conferred, outweighs the advantages of 'low key' administrative procedures and the avoidance of stress and stigma. Section 18(b) of the Child Welfare Ordinance should be repealed.

286. ***Child Care Agreements*** The conclusion that administrative admission to wardship should be abolished does not mean that informal alternatives to court proceedings are opposed. On the contrary, such alternatives should be used wherever possible. However, it should not be necessary for parents to relinquish every parental right or power for an indefinite period in order to obtain assistance in caring for the child.[30] The new legislation should make provision for child care agreements which will provide a framework for voluntarily accepted support and assistance without the need for the parents to surrender guardianship.[31] The Welfare Branch is already underwriting the cost of care of a number of children.[32] This is an important initiative which allows help to be provided on an informal basis. Legislative recognition should be given to this practice. Under a child care agreement, which should be in writing, a parent or guardian should be able voluntarily to surrender the custody of a child and the Welfare Division should be authorised to provide financial support to allow the child to be placed with foster parents or in a home. The purpose of such an arrangement should be to allow the welfare agencies to 'work with the family toward an early reunification with the child without a court order which unnecessarily restricts or suspends the

23 id., 13.
24 *The Green Paper,* 23; *The Norgard Report,* 84.
25 *The Norgard Report,* 28–29. This restriction was incorporated into the Victorian law. See Community Welfare Services Act 1970 (Vic.), s.35(3).
26 *The Green Paper,* 24.
27 Community Welfare Services Act 1970 (Vic.), s.35(4)
28 Children's Services Act 1965 (Qld), s.48.
29 There are exceptional situations in which a Minister should, by administrative process, be able to assume the guardianship of a child. See, for example, Immigration (Guardianship of Infants) Act 1946 (Cwlth).
30 Cf. the Department of the Capital Territory: '[T]here is a case for temporary care without termination of parental rights.' *Submission,* 80.
31 For a similar recommendation, see *The Green Paper,* 24. Cf. Community Welfare Act 1972 (S.A.), s.40.
32 See para.271. The Commission agrees with the statement, made by the Department of the Capital Territory, that the practice of underwriting the cost of children's care has proved to be a very positive one. The Department expressed concern that the appointment of the Youth Advocate might limit the ability of the Welfare Branch to continue this practice. *Submission on D.P. 12,* 2. The appointment of the Youth Advocate would not in any way interfere with the practice of underwriting the cost of care. It is not intended that it should be necessary for the proposed Welfare Division to consult him before entering into a child care agreement.

authority and position of the parents.'[33] Regarding Canadian experience with what is known as 'custody by agreement,' it has been pointed out that the balance between the parents and the welfare agency must be fair and equal. 'A minimum requirement should be an equal right to terminate the agreement'.[34] The equal partnership concept can be totally empty unless the parents are confident that their past incapacities will not be used against them.[35] The fact that parents have voluntarily surrendered custody under a child care agreement must not of itself be used as a ground for the initiation of court proceedings. If parents who seek help run the risk that their request will be interpreted as indicating that coercive intervention is desirable, obviously they might be discouraged from approaching the welfare authorities. Further, there should be strict time limits on the period for which a child care agreement may remain in force. A parent should not be permitted to abandon a child for an indefinite period. In Manitoba the relevant legislation states that the maximum aggregate term for a custody agreement should be 18 months[36] and in Ontario 12 months is the upper limit.[37] In British Columbia a 15 month term has been recommended.[38] In selecting an appropriate upper limit for a child care agreement attention must be given to the fact that an agreement of this kind is designed to provide short-term care, that regard must be paid to children's sense of time[39], and that there must be opportunities for regular review.[40] A Canadian proposal for a 15 month limit, composed of a three month initial term with the possibility of two further renewals of six months each, meets these criteria.[41] This approach should be adopted in the new Child Welfare Ordinance. Under such a provision the child, his parents and the person or agency responsible for the child's care would know that the child's situation would be regularly reviewed. Although time limits should be set, the placement of the child would rest on an agreement, freely entered into by the Director of Welfare and the parents. The agreement should be terminable by either party. The parents should be able, by notice in writing, to terminate the agreement at any time and regain custody of the child.[42] No doubt a parent's exercise of this right will on occasions cause distress to those who have assumed responsibility for a child's care under a child care agreement. Those responsible may believe that the parent is unfit to resume the care of the child. Nevertheless, if a clear distinction is to be maintained between voluntary arrangements and those which involve coercive intervention, this result must be accepted. Coercive measures should be employed only following a declaration, by the court, that a child is in need of care. If a member of a welfare agency is disturbed by a parent's resumption of responsibility for a child, his remedy should be to approach the Youth Advocate so that consideration may be given to the initiation of care proceedings. The rights of the child should be recognised in legislation relating to child care agreements. When the making of a child care agreement is being contemplated, the views of the child should be ascertained and taken into account if he is old enough to express an opinion.[43] This requirement should be incorporated into the new Ordinance. The Ordinance should provide also that no agreement should normally be entered into without the consent of a child who has attained the school leaving age.[44]

33 Ontario, Ministry of Community and Social Services, *Consultation Paper on Short Term Legislative Amendments,* (1977), 8.
34 Cruickshank, 'Alternatives to the Judicial Process: Court Avoidance in Child Neglect Cases', (1978), *12 UBC Law Rev.* 248, 262.
35 id., 263.
36 Child Welfare Act 1974 (Manitoba), s.13.
37 Child Welfare Act 1978 (Ontario), s.25(2).
38 British Columbia, *Fifth Report of the Royal Commission on Family and Children's Law 'Children and the Law,'* (1975), Part V, 15.
39 Goldstein, Freud and Solnit, *Beyond the Best Interests of the Child,* (1973), 40-42.
40 Cruickshank, 262.
41 id., 262.
42 id., 262. See also Child Welfare Act 1978 (Ontario), s.25(12).
43 Cf. Community Welfare Services Act 1970 (Vic.), s.35(2)(a).
44 In the A.C.T. this is 15. See Education Ordinance 1937 (A.C.T.), s.5 and 8. Cf. Community Welfare Act 1972 (S.A.), s.39(5) and 40(3) and Child Welfare Act 1978 (Ontario), s.25(8). Provision must be made for a child who has attained the specified age but who is unable to give informed consent: Child Welfare Act 1978 (Ontario), s.25(9).

287. ***Preventive Services*** In addition to making provision for child care agreements, the new Child Welfare Ordinance should clearly authorise and direct the proposed Director of Welfare to provide preventive services designed to make resort to care proceedings unnecessary.[45] At present the Welfare Branch undertakes a substantial amount of informal welfare work.[46] These activities are described by the Branch as 'non statutory' work, a term which indicates that work of this kind must inevitably take second place to duties associated with the Childrens Court. The new legislation should indicate that preventive work should be given high priority, and that it should not be undertaken only when other duties permit. Examples of provisions which impose on welfare agencies a positive duty to provide preventive services are to be found in England and New Zealand. Section 1 of the Children and Young Persons Act 1963 (UK) imposes on local authorities a general duty:

> to make available such advice, guidance and assistance as may promote the welfare of children by diminishing the need . . . to bring children before a juvenile court.

The New Zealand provisions are more detailed. A general duty is placed on the Director-General of Social Welfare to take positive action to assist in preventing children from being exposed to unnecessary suffering or deprivation or from becoming seriously disturbed or committing offences.[47] In addition, he has a specific duty to make inquiries when a child comes to notice because of ill-treatment, inadequate care or control, or because his behaviour is causing concern. He is also required to provide financial and other assistance likely to overcome deficiencies in the care which a child is receiving or to improve the behaviour of the child.[48] Finally, there are general directions regarding the promotion of family and community well-being, and the encouragement of co-operation among child welfare agencies.[49] Provisions such as these indicate that high priority should be given to pre-court services. In addition to imposing duties of the kind discussed on the proposed Director of Welfare, the new Ordinance should require appropriate Commonwealth Departments to co-operate with, and provide adequate asssistance to, the Youth Advocate and the Standing Committee of the Childrens Services Council.

288. ***Gaps in Existing Services: Hostels*** If effect is to be given to the Commission's principle that wherever possible court proceedings should be avoided and informal solutions employed, obviously the pre-court services must be adequate. There must be services and facilities on which the welfare agencies and the Standing Committee can call, and there must also be homes and hostels able to accommodate children pursuant to child care agreements. In Chapter 7 there are descriptions of the health and welfare services in the A.C.T.[50] These descriptions, together with the analyses of the handling of neglect and uncontrollability cases[51], indicate that the range of available services is wide. Although, as has been explained, problems are caused by lack of co-ordination, in general it is true to say that, at the pre-court stage, obvious gaps in existing services are few. Two major deficiencies have, however, been brought to the Commission's attention. First, there is a need for more residential accommodation for children in trouble. Following its review of welfare services in the A.C.T. in 1975, the Family Services Committee drew attention to the difficulty of finding adequate and suitable semi-independent boarding or foster-home accommodation for adolescents, particularly for adolescents with problems.[52] Similarly, the Council of Social Service of the A.C.T. has pointed to the need for a range of accommodation for young people.[53] The Council suggested that the following needs should be met:

---

45 The Department of the Capital Territory has drawn attention to the need for legislation which facilitates the provision of supportive and preventive assistance for the child and his family. *Submission,* 13.

46 See para.254.

47 Children and Young Persons Act 1974 (N.Z.), s.5(1).

48 id., s.5(2).

49 id., s.6(1) and (2).

50 See para.254–258.

51 See para.273–276.

52 Family Services Committee, *Families and Social Services in Australia, A Report to the Minister for Social Security,* (Two vols., 1978), Vol.2, 549. See also A.C.T. Police, *Submission,* 9. In 1981 the Senate Standing Committee on Social Welfare began an inquiry into the problems of homeless youth in Australia.

53 Council of Social Service of the A.C.T., *Submission,* 7. See also Department of the Capital Territory, *Submission,* 71–72.

- immediate accommodation following a family crisis such as conflict between a child and his parents, sexual abuse or violence;
- short-term accommodation following disruption caused, for example, by a family being evicted for non-payment of rent;
- long-term, low cost accommodation for young unemployed people who are ineligible for government housing and who cannot afford to pay the rents demanded by private landlords; and
- accommodation for older high school and college students whose parents have moved from Canberra or who are experiencing difficulties at home.[54]

289. Although a detailed analysis of the needs of A.C.T. youth was beyond the purposes of the reference and the resources of the Commission, the information available to it suggests that the Council of Social Service has correctly identified some of the most important deficiencies in the existing welfare system. Certainly it seems clear that further refuges and hostels are required for older children who are unable to continue living at home.[55] At present there are several such hostels in the A.C.T. These include one operated by the Lions and Salvation Army which can accommodate 10 children[56], and another operated by the Youth Refuge Association and the Foundation for Youth. It has room for eight children. It is desirable that further hostels and refuges be established to provide short and long-term accommodation to meet the needs identified by the Council of Social Service. The operation of hostels and refuges raises certain questions which must be squarely faced. Careful procedures must be established to control entry into hostels. It is neither practicable nor desirable for a hostel to accept all who turn up on its door-step. Selection procedures are needed to screen out those whose needs are not such as to require residence away from home. Much more difficult is the problem as to the age at which a hostel or refuge may accept a child without his parents' consent. This directly raises the question as to the age at which a child may leave home against his parents' wishes. The law does not lay down any positive guidelines on this matter. It has been argued that, under the common law, the age at which a child can become independent of his family is 14, and that there is therefore no legal reason why children aged 14 or over should not be received into refuges and hostels.[57] It is unlikely that criminal charges (for example, charges founded on the abduction, detention or kidnapping of children) would be laid against the staff of refuges and hostels.[58] All children under 18 come within the Childrens Court's civil jurisdiction, so if the conditions in which they are living in a hostel or refuge are such as to justify intervention (for example, because they are being neglected), or if their refusal to live at home is regarded as an indication that they are 'uncontrollable', their decision to live where they choose can be over-ruled. Nevertheless, the law is unclear and does not provide answers to the questions which those who operate hostels ask about their powers and duties. In particular such persons express doubt whether they are under an obligation to inform a child's parents when a child arrives at a hostel and whether they may provide accommodation for a child when the parent objects and demands the child's return. The Commission has concluded that the law should not explicitly state that there is a certain age at which a child has a 'right' to leave home without parental consent. The promulgation of such an age could be interpreted by some as an encouragement to the young to leave home. More important, however, is the fact that the setting of an arbitrary age – such as 15, the school-leaving age in the A.C.T. – would be inconsistent with the Commission's conclusion that those under 18 should continue to be subject to care proceedings. It would be illogical to assert that protective intervention in the lives of persons under 18 is permissible, while at the same time conceding that there is an age below 18 at which the young may proclaim their independence. Failure to recommend a specific age at which a child may leave home means that procedures must be formulated which those in charge of refuges and hostels may employ when confronted by a runaway. It is not

---

54 Council of Social Service of the A.C.T., 7.

55 Some evidence on student needs in the A.C.T. was collected by Hogan. See Hogan, 'A Report on Student Accommodation Problems in the A.C.T. Based on a Survey Conducted in October – November 1978,' unpublished.

56 See para.60.

57 Gamble, 'Teenagers Leaving Home: The Legal Position,' a paper presented at the Australian National University Centre for Continuing Education National Conference, *Living Together: Family Patterns and Lifestyles,* 2–5 July 1979.

58 ibid.

recommended that these persons should have a legal obligation in every case to contact the parents of a child who arrives at a hostel or refuge. Such a requirement would soon become known and would simply discourage young runaways from seeking accommodation in refuges. It would cause them to seek less satisfactory accommodation. The person in charge of the hostel or refuge should endeavour to persuade the child to agree to contact with the parents being made. If the child will not agree to this, or if, when notified, the parent expresses opposition to the child's residence in the refuge or hostel, the person in charge should be obliged to inform the Youth Advocate as soon as possible. It should be the task of the Youth Advocate to cause inquiries to be made to see whether a settlement of the dispute can be arranged. Normally in such a case he should rely on the staff of the refuge, though in exceptional circumstances he might make his own inquiries. It should be the duty of the Youth Advocate to see that the child's parents are informed. If the Youth Advocate were unable to obtain parental agreement to the child's residence in the refuge or hostel, and the child was adamant that he would not return home, the Youth Advocate would have no alternative but to institute care proceedings on the grounds that there was an incompatibility between the child and his parent or guardian.[59] It should thus be ultimately for the court to decide in the particular circumstances of the case whether the child may leave home in defiance of the wishes of the parents or guardians.

290. ***Gaps in Services: Counselling and Information*** The second major problem which was brought to the Commission's attention is the need for counselling services which are both readily accessible to the young and acceptable to them. As has been explained in Chapter 1,[60] members of the Commission visited a number of schools and colleges in the A.C.T. Some of the private discussions with school pupils dealt with the services which are, and ought to be, available to young people seeking help with a personal problem. Not surprisingly, opinions differed. Much depends on children's perceptions, be they accurate or inaccurate, of the services available. Some children found the school counsellor a helpful and appropriate person to whom to turn. Others felt that they would be labelled in the eyes of their peers if they were seen to need the counsellor's help. Also, great concern was expressed about the importance of confidentiality in the relationship with the counsellor. A number of students claimed that the day after they had had what they thought was a confidential interview with a school counsellor, they found that at least some of their teachers knew about their situation. The Commission has not verified these complaints, but, whatever the truth of the claims, it is clear that doubts about confidentiality troubled some pupils. For some pupils, too, the school counsellor is part of the school system and is seen as being associated with authority. When asked to whom they would go if they had a personal problem, some pupils answered that they would approach their peers, while others were scornful of this and said that, by definition, counselling requires a maturity which their peers did not possess. Of those who would prefer to approach an adult for advice, some said that they favoured someone whom they already knew, such as a class teacher. Others did not like the idea of taking their problems to a person who knew them. What emerged from these discussions? Clearly pupils' needs differ and there is room for a variety of solutions to the problem of providing counselling services for the young. The majority of pupils who expressed an opinion agreed that such services should ensure confidentiality and should not be seen to be official or stigmatising. It seems that a service which 'masks' the fact that it offers personal counselling is a particularly attractive model. For example, at a school, a staff member whom pupils may visit for 'careers advice' or 'curriculum advice' is appealing to many, since a pupil will not feel self-conscious about approaching such a person, ostensibly to discuss employment or the choice of subjects. Any counselling service must be easily accessible and information about its existence must be widely disseminated. In spite of the criticisms which have been levelled against it, the school counselling service offers an obvious base on which to build. A counsellor in a school or college is readily accessible and it is easy to ensure that pupils know that the service is available. The major difficulty with the system as it operates in the A.C.T. is that a counsellor is not attached full-time to a school. As has been explained[61], each counsellor is responsible for more than one school. It is common for a counsellor to spend no more than two days per week at a school. This has two

[59] The suggested grounds for care proceedings include a definition to cover this situation: see para.301.
[60] Para.15.
[61] Para.255.

disadvantages. The counsellor may not be at the school when a pupil needs him. Even if he is at the school when the pupil wishes to discuss a problem, the pupil may not be able to obtain an immediate appointment. Also, if the counsellor were at a school full-time, he would become identified with it and would be known to the pupils. He would cease to be a distant professional with limited involvement in the life of the school. It has not been possible to carry out a close analysis of the work done by school counsellors. Hence a firm recommendation would not be appropriate. Nevertheless, it is recommended that the A.C.T. Schools Authority and, where appropriate, the responsible authorities in private schools, give consideration to the appointment of full-time counsellors in those large schools and colleges where there is already a heavy demand on counselling services. Such a solution will not, of course, meet the needs of young people who regard as unappealing or unapproachable any service or activity associated with their school. Nor will it meet the needs of those whose problems require urgent solution out of school hours, or of those who are no longer at school. For the members of these groups two possibilities could be explored. One – favoured by a group of High School students – was a telephone counselling service for youth. For these students the attraction of a youthful 'life line' would lie in the fact that no one would know if they sought help (whereas a young person walking into a counsellor's office feels conspicuous) and that they could remain anonymous. The second possibility is the creation of suburban 'drop in' centres. Such centres would need to be seen to be unofficial and not in any way threatening. It is recommended that the Childrens Services Council give specific consideration to the possibility of establishing a telephone counselling service and 'drop in' centres. Finally, whatever approaches are adopted, it is important that the services be widely advertised. Reference has already been made to the wide range of agencies operating in the A.C.T., yet those in need may not know of the existence of the services designed to help them. As an A.C.T. medical practitioner has pointed out in an analysis of the Territory's services for the young, frequently a dilemma exists as to whom to contact. The fragmentation, overlapping and lack of co-ordination displayed by the various services make it difficult for an inexperienced adolescent to choose appropriately.[62] There is *The Help Book*[63], compiled by the Commonwealth Department of Social Security, which lists health, welfare and other services in the A.C.T. There are also *Canberra's Community Services*[64], compiled by the Department of the Capital Territory, and the *Directory of Social Services in the A.C.T.*[65] prepared by the A.C.T. Council of Social Service. Such publications are valuable guides and should be regularly revised and made widely available to those involved in the provision of services to young people. In the view of the Council of Social Service of the A.C.T. the absence of information on the services available represents the most obvious gap in the Territory's welfare system. The Council recommended the establishment of a computerised children's services directory which would provide adequate information on the extent, nature and distribution of services.[66] There is a need for a central, clearly identified office to which children can go to obtain informa tion about the facilities which exist to help them. It is possible that, in time, the office of the Youth Advocate would be able to provide such an information service. However, in 1981 the Department of the Capital Territory appointed a Youth Affairs Co-ordinator. He works closely with all child welfare agencies in the A.C.T. If his role is well publicised and the youth of the A.C.T. regard him as approachable, this officer could well meet the need for a central contact point for young people seeking advice and assistance.

291. ***Child Care Conference*** The further development of preventive services, the remedying of deficiencies in existing services, and the use of child care agreements, have all been recommended in order to create a system in which primary emphasis is placed on the avoidance of coercive solutions to child welfare problems. Another innovation designed to further this aim is the child care conference. This would provide a procedure whereby an informal solution could be reached notwithstanding the fact that care proceedings had been instituted. One of the defects of the existing neglect and uncontrollability proceedings is that, by their nature, they place emphasis on whether certain facts are proved or not proved. If a child is not proved to be neglected he may not receive the help he needs. Although the careful proof of facts giving rise to jurisdiction is extremely important, it is

[62] Dr M. Wallner, unpublished notes on services for adolescents in the A.C.T.
[63] Commonwealth Department of Social Security, *The Help Book*, (1978).
[64] Department of the Capital Territory, *Canberra's Community Services*, (1980).
[65] A.C.T. Council of Social Service, *Directory of Social Services in the A.C.T.*, (1980).
[66] A.C.T. Council of Social Service, *Submission*, 7.

necessary to recognise that the court's role is not only to see that certain facts are established, but also to determine the way in which a child may best be helped. To some extent the Childrens Court in the A.C.T. is already attempting to perform both functions. In the past the court's disquiet about the use of neglect and uncontrollability charges has repeatedly led it to adjourn matters in the hope that a solution could be found which would avoid the need to make a finding of neglect or uncontrollability.[67] Under the new care proceedings the court's difficulties should be greatly reduced, since the finding which would be made would be quite different from a finding that the 'charge' is proved. Nevertheless, there may still be occasions on which the court, feeling that it should still be possible to find a solution without a court order, would prefer not to make a declaration that a child is in need of care. In such a situation it should be open to the court to adjourn the proceedings and to order that a child care conference be convened.[68] This conference should be chaired by the Youth Advocate and attended by the child (if he is old enough), his parents or guardians, and such of those persons working with the family as the court orders. The court should also be permitted to grant leave to a lawyer acting for any of the participants to attend. The object of the conference would be to attempt to reach an agreement as to the care and assistance which should be provided for the benefit of the child. The Youth Advocate should report the outcome to the court, which should then decide whether the application should be dismissed. Since it has been recommended that care proceedings should lapse if a final order is not made within six months of the filing of the original application[69], such a report should be made within that period. If an agreement acceptable to the court is reached at a child care conference, but that agreement subsequently breaks down, it would be necessary for the Youth Advocate to consider the initiation of further care proceedings. The new Ordinance should provide that no statement made at a child care conference should be admissible in any court, except with the consent of all who participated. Further, there should be a general prohibition on the disclosure of information furnished to a conference.

Care Proceedings: Grounds for Intervention

292. *A New Procedure* A new form of procedure should replace the present practice of charging children as neglected or uncontrollable. This new procedure should be based on the twin principles of avoiding court action wherever possible, and of ensuring that, where such proceedings are necessary, they should have no criminal connotations. What are proposed are care proceedings. A child in need or in danger should be brought before a court by way of an application for a declaration that he is in need of care.[70] This new procedure is designed to give the court jurisdiction when a child's situation requires intervention, while at the same time underlining the fact that the proceedings are not criminal in nature and are utterly different from a prosecution. Although it would be unrealistic to claim that a mere procedural change will eradicate the public's tendency to

67 See para.266.

68 A child care conference, of the kind proposed, has also been recommended in British Columbia by the Royal Commission on Family and Children's Law. See *Fifth Report of the Royal Commission on Family and Children's Law 'Children and the Law'*, (1975), Part V, 10-32. See also Cruickshank, 271-274. Australian precedents for an adjournment designed to permit a search for an informal solution are to be found in s.14 and 62 of the Family Law Act 1975 (Cwlth). Under s.14 (2) and (2A) a court hearing proceedings for a dissolution of marriage may adjourn the proceedings and advise the parties to obtain counselling. See also s.14(5). Under s.62 the court may order parties to proceedings under the Act to attend a conference with a court counsellor or a welfare officer to discuss the welfare of a child of the marriage.

69 Para.327.

70 The recommendation that care proceedings be introduced is similar to that contained in the N.S.W. *Green Paper*, 33. There emphasis is placed on the need for procedure with 'as little similarity as possible with criminal proceedings.' (ibid.) The Green Paper proposals are based on procedures contained in the South Australian legislation. See Children's Protection and Young Offenders Act 1979 (S.A.), s.12. The Department of the Capital Territory drew attention to the South Australian procedure and to the Green Paper's proposals, and expressed a preference for care proceedings 'free of criminal overtones.' *Submission*, 35–36. See also the Department's *Submission on D.P. 12*, 1, and A.C.T. Council of Social Service, *Submission*, 4. The A.C.T. Police have also stated that neglect proceedings should be decriminalised. The police have indicated their concern about stigmatisation and the maintenance of criminal records in respect of those found neglected. *Submission*, 7.

regard these troubled children as 'delinquents', it is suggested that the change is a step towards a reduction of the stigma which such children carry. A further feature of the new procedure is that it is designed to operate in such a way that court proceedings will be a last resort. The Youth Advocate should normally be the person responsible for the initiation of care proceedings. This aspect of his role is discussed in greater detail below.[71]

293. ***Children in Need of Care: the Problem of Definition*** The various definitions of 'neglected child' such as are contained in the A.C.T. Ordinance are, as the N.S.W. Green Paper points out in respect of like definitions in the N.S.W. Act, 'archaic or Victorian'.[72] The Department of the Capital Territory has pointed out that many of the definitions are unnecessary.[73] Further, the definitions of neglected and uncontrollable children which are embodied in the Ordinance reflect a particular philosophy. Provision is made for coercive intervention in an extremely broad range of situations. The number and wording of the definitions reflect the view that the legislation should erect few barriers to court intervention, since this intervention is benevolent, and is designed to further the best interests of the young. Elsewhere in this report attention has been drawn to the dangers of benevolent intervention and to the need for policies based on a realistic awareness of the objectives which the legal system can appropriately and effectively pursue.[74] At first sight the issues raised by a consideration of the needs of neglected and uncontrollable children are less complex than those which must be examined when we are dealing with offences by the young. The aim – the promotion and protection of the welfare of children thought to be at risk – is unambiguous. Nevertheless, the drafting of legislation designed to give effect to this aim raises difficult questions about the types of situation in which society is justified in intervening coercively in the lives of children who have not committed an offence. The problem which must be faced is whether the legislative definitions of the grounds for such intervention should be expressed in broad or narrow terms. On the one hand is the view that the situations requiring protective intervention by society are so diverse that a restrictive approach is undesirable. It can be argued that the legislation should provide a net within which can be brought a wide variety of circumstances and that lack of precision is a virtue.[75] The Child Welfare Ordinance's definitions of neglect and uncontrollability reflect such arguments. On the other hand is the view that, as the role which a court can perform is limited, the aim must be to restrict the grounds for intervention in non-criminal matters. Failure to do so reflects an inability to distinguish between situations in which help is needed and those in which coercive intervention is warranted. Further, broad definitions lend themselves to subjective interpretations and permit findings which are virtually unchallengeable. For example, one of the existing definitions of a 'neglected child' is one 'who is under incompetent or improper guardianship.'[76] Such a formula is so vague that virtually anything may be accepted as evidence to support an allegation that the child is neglected. Definitions of this kind require that those in the field exercise wide discretionary powers. If the formulas used are broad and vague, it is left to those who administer the law to determine when intervention is desirable. The greater the breadth of the criteria, the more scope there is for differing interpretations based on personal values. Earlier in this report emphasis was placed on the need, when dealing with young offenders, to balance legal considerations against those relevant to children's welfare.[77] This balance should also be sought in non-criminal proceedings. Coercive intervention should be permitted only after the careful proof of clearly defined matters. Vague definitions are inimical to such an approach and do not reflect the necessary concern for due process. They do not, for example, permit the court or counsel to focus on specific issues. They make it difficult for the legal representative of the child or the parents to prepare a case, cross-examine, or object to evidence. Another point is that if courts need not justify their decision to intervene on the basis of specific criteria, they are unlikely to make sound decisions about the appropriate disposition even when intervention is justified.

71 Para.313f.

72 *Green Paper*, 32.

73 Department of the Capital Territory, *Submission*, 36.

74 Para.110-117.

75 For example, '[N]eglect statutes recognize that 'neglectful' behavior can . . . vary, and thus cannot be easily or specifically defined . . . The broad neglect statutes allow judges to examine each situation on its own facts.' Katz, *When Parents Fail: The Law's Response to Family Breakdown*, (1971), 64.

76 Child Welfare Ordinance 1957 (A.C.T.), s.5.

77 Para.115, 116.

Such decisions require weighing the harms to be prevented or alleviated against the harms likely to result from a specific intervention program. This cannot be done when the harms to be prevented are ill defined.[78]

294. ***The Commission's Approach*** Although it is recommended that the grounds for care proceedings should be more precisely and narrowly defined than are the grounds for the present neglect and uncontrollability proceedings, the solution to the definitional problem is not to be found solely in a stringent legislative prescription of the personal and social circumstances which justify intervention. The definition of these circumstances must be seen as part of a broader strategy to strengthen and develop alternatives to court proceedings. The aim should be the creation of a system which discourages the use of the court as a vehicle for benevolent purposes. Such purposes can best be pursued outside the court. The Commission's proposals regarding care proceedings have been framed with such a strategy in mind. In order to erect a barrier to premature or unnecessary court proceedings it is recommended that, before a court can make a declaration that a child is in need of care, the court must be satisfied that the child falls within one of the definitions of a child in need of care (these definitions are set out below[79]) *and* that the child's situation is such as can be met only by way of a court order.[80] Thus what is proposed is a dual test. Not only must the existence of an undesirable situation ('the primary ground') be established, but also it must be shown that this situation is not susceptible to an informal solution. With regard to the latter ground it should be necessary for the applicant to lead evidence indicating that informal solutions have been tried and failed or that they are manifestly inappropriate. Comment must be made on the Commission's recommendation that the new procedure should embody two types of test. It can be argued that only the second requirement (the need to show that an informal solution is inappropriate) is necessary to minimise court action. If this argument is accepted then there is no need to adopt a restrictive approach to the definition of the primary grounds for intervention. The Commission does not accept this argument. Reasonably narrow definitions of these grounds are in themselves desirable in order to focus attention on the appropriateness of invoking the court process. It is possible to imagine situations which, though not susceptible to an informal solution, do not justify court proceedings. The second element in the proposed definition is not in itself sufficient to ensure that the jurisdiction of the court in non-criminal proceedings is defined with the requisite precision. The problem of formulating clear and reasonably precise definitions of the primary grounds for care proceedings must therefore be faced. Recently, critics of juvenile courts in the United States, reflecting what has been referred to as 'the current distrust of altruism and paternalism',[81] have urged the adoption of extremely restrictive definitions of the situations in which the initiation of non-criminal proceedings is justified.[82] The approach advocated by these critics must be considered cautiously. With regard to

78 Wald, 'State Intervention on Behalf of 'Neglected' Children: A Search for Realistic Standards', in Rosenheim (ed.) *Pursuing Justice for the Child,* (1976), 246, 251.

79 Para.304.

80 There exist a number of precedents for legislation requiring that a second condition, of the kind suggested, be satisfied. Under s.1(2) of the Children and Young Persons Act 1969 (U.K.) a person initiating care proceedings must establish not only that the child or young person falls within one of the specified categories, but also that he 'is in need of care and control which he is unlikely to receive unless the court makes an order.' Similarly, in Scotland, before he is brought before a hearing, a child must not only come within one of the definitions listed in s.32(2) of the Social Work (Scotland) Act 1968, he must also be 'in need of compulsory measures of care.' (id., s.39(3)). See also the definition of children and young persons in need of care proposed in the N.S.W. Green Paper. In addition to listing various categories of need, this definition requires that it be established that 'it is unlikely that [the child or young person] will receive proper care, control or protection, as the case may be, unless the matter is dealt with pursuant to [the] Act.' (*Green Paper,* 32). The English formula has been the subject of some discussion. See Report of the ABAFA Legal Group working party, *Care Proceedings,* (1979), 9—10 and 14—16, (hereafter *ABAFA Report*) See also *Re DJMS (a minor)* [1977] 3 All ER 582. The A.C.T. Council of Social Service recommended safeguards against 'well meaning intervention.' The Council suggested that potentially coercive intervention should be allowed only 'where it can be shown that a child is put into a less detrimental position by intervention than by non-intervention.' *Submission,* 3.

81 Dembitz, Review of Juvenile Justice Standards Project, 91 *Harvard LR,* 1940, (1978).

82 The clearest example of this approach is to be found in the definitions proposed in the Juvenile Justice Standards Project, *Standards Relating to Abuse and Neglect,* (1977), 48 f. See also Wald. Note, however, that the debate in the U.S.A. is complicated by the implications of constitutional due process requirements, particularly as they apply to the need for specificity in rules affecting personal freedom.

the situation in the United States it has been argued that, though the use of broad, loose definitions may sometimes have led to intervention when this was not justified, in the majority of cases intervention could be justified. Reliance on untypical cases is 'a precarious footing for a recommendation of a severe curtailment of a court's jurisdiction'.[83] Those who adopt this view warn against a rush to reduce the jurisdiction of the juvenile court. Their concern is that certain categories of children might be left unprotected.[84] These warnings should not be ignored. Attention should be paid to the danger that very narrow definitions will fail to cover disturbing situations and so prevent necessary intervention. Nevertheless, the definitions of the primary grounds for care proceedings should display clarity and precision. The first step towards the achievement of this goal is to identify the basis for intervention. The Commission is in broad agreement with the conclusion reached by the Juvenile Justice Standards Project that it is actual or potential harm to the child which should, in general, provide the basis for coercive state intervention.[85] The importance of the adoption of this principle is that it leads to a rejection of definitions concerned with parental conduct or the child's environment, and focuses attention on the impact on the child. Definitions which refer to parental competence or to situations considered to be inherently undesirable should be rejected not only because they are vague, but also because they suggest that society's concern is with the child's situation rather than with the harm which it is doing, or might do, to the child. Recognition that the prevention of specific forms of harm should be the objective of intervention clarifies and simplifies the task of defining the primary grounds for care proceedings. There still remains the problem of just how narrow those definitions should be. A series of suggested definitions was included in the Commission's Discussion Paper, *Child Abuse and Day Care.* These endeavoured to give effect to a restrictive approach by limiting intervention to situations involving 'serious' harm. The incorporation into the proposed definitions of adjectives such as 'serious' and 'substantial' attracted criticism.[86] The Commission agrees with some of the criticisms. Use of words such as these could give rise to difficulties and, in some situations, engender doubts as to whether a court has jurisdiction. For example, the distinction between a physical injury and a 'serious' physical injury might not always be easy to make. Pre-occupation with whether a particular injury is sufficiently 'serious' might not only lead a court to decline jurisdiction in circumstances when a child needs protection, but it might also cause police or welfare personnel to hesitate about bringing a case to official notice. Nevertheless, although adjectives such as 'serious' and 'substantial' need not form part of the definitions of the primary grounds for care proceedings, it is important that the Youth Advocate and the court should be required to consider whether a situation is sufficiently serious to warrant court action. The proposed Child Welfare Ordinance should therefore include a general clause indicating that the degree of harm or risk to which a child is exposed should be a factor which the court, and hence also the Youth Advocate, should take into account when determining whether coercive intervention is required.

295. ***Physical or Mental Harm*** In seeking to define the situations in which society is justified in intervening coercively in the life of a child who has not committed a criminal offence, the Commission believes that it is clear that intervention must be permitted when the child's health or development is threatened. The possibility of taking court proceedings must be open when a child has been assaulted, is sexually abused, or is likely to be the victim of an assault or of sexual abuse. It has been suggested to the Commission that the term 'sexual abuse' requires definition.[87] The Commission acknowledges that the argument has some merit, but does not believe it is desirable or even possible to define all the actions which might be classified as sexual abuse. Whether, in an individual case, actions can be classified as sexual abuse is a matter appropriately left for the court. The primary grounds for care proceedings should include situations in which:

83 Dembitz, 1945.

84 The Department of the Capital Territory has drawn attention to the danger that removal of certain categories of children from the jurisdiction of the court will mean that there is no adequate means of dealing with their problems. *Submission,* 30.

85 Juvenile Justice Standards Project, *Standards Relating to Abuse and Neglect,* (1977), 38-39.

86 Mr A.J. Johnson, S.M., Childrens Court, Victoria, and Mr R.J. Bartley, S.M., Chairman of the Licensing Court, N.S.W., *Submissions.*

87 Department of the Capital Territory, *Submission on D.P. 12,* 1.

- a child has been physically injured (otherwise than by accident) or has been sexually abused, by one of his parents or by a member of the household in which he lives or there is a likelihood that he will so suffer such physical injury or sexual abuse.

Definitions formulated in this way indicate that the harms against which it is intended to protect children are those encountered in their domestic environment. If, for example, a child is assaulted in a park by a stranger, this is not normally the type of situation which should lead to the initiation of care proceedings. The definition proposed by the Commission is intended to make this clear. The specificity of the recommended definitions does, however, give rise to a major problem. Injury to, or sexual abuse of, a child may occur in his domestic environment, but it may be committed by a person who does not fit the description of a 'parent', or 'member of the household'. For example, a regular visitor to a child's home may sexually abuse him. In general, Australian child welfare legislation makes provision for situations of this kind by means of very broad definitions. Many enactments include within the definition of a 'neglected child' or of a 'child in need of care and protection' one who is 'exposed to moral danger'.[88] Such a formula is wide enough to cover a range of situations, wherever they occur and whether or not the person responsible is a member of the child's household. If, as has been recommended, such definitions should be replaced by ones which focus more precisely on the type of harm against which a child is to be safeguarded, it is necessary to consider the possibility that certain classes of child might be left unprotected. What is needed is a further definition which will offer protection when the injury or abuse is not caused by the child's parent or a member of his household, but which will not be unacceptably broad and vague. The essential feature of such a definition should be that it focuses on actual or potential harm produced by the failure of the child's parents or guardians to protect the child.[89] The introduction of such a concept would make it clear that the decision to institute care proceedings should be made with reference to the child's domestic environment. It would not, however, limit intervention to cases in which harm had occurred in that environment. If, for example, the parents of a child permitted him to visit his uncle, knowing that the uncle had sexually assaulted the boy in the past, it might be appropriate for care proceedings to be undertaken. If, on the other hand, the child were to be the random victim of a criminal assault, he should not be made the subject of such proceedings unless parental failure contributed to the harm which he suffered. The need to have regard to the conduct and attitudes of the parents or guardians would ensure that a child who was the victim of an assault of this kind would not automatically be liable to care proceedings. The Commission accordingly recommends the addition of a further ground for intervention when injury or sexual abuse has occurred. The definitions of a child in need of care should include one who:

- has been physically injured (otherwise than by accident) or has been sexually abused, by a person other than a parent or a member of his household, or there is a likelihood that he will so suffer such physical injury or be sexually abused, and his parents are unable or unwilling to protect him from the injury or abuse.

In addition to cases involving physical injury or sexual abuse, intervention should also take place when a child is so seriously neglected that his physical development is impaired. A child who is not being properly fed or clothed, or who is not receiving proper medical treatment would fall within this category.[90] These are situations involving specific forms of harm or the risk of such harm. Provision must also be made for the child who has been abandoned or who, for any other reason, has no one to care for him. To these situations must be added those involving mental or emotional harm. The primary grounds for care proceedings should also include situations in which:

[88] Child Welfare Ordinance 1957 (A.C.T.), s.5; Child Welfare Act 1939 (N.S.W.), s.72; Children's Services Act 1965 (Qld.), s.46 (1)(a)(ii); Child Welfare Act (N.T.), s.5. Cf. Children's Protection and Young Offenders Act 1979 (S.A.), s.12(1)(a) which limits the Childrens Court's jurisdiction in cases of neglect and maltreatment to neglect and maltreatment by a parent or guardian.

[89] Cf. Wald, 258.

[90] It is not intended that care proceedings should be employed to secure urgent medical treatment for a child. The nature of care proceedings and the types of order available to a court in such proceedings mean that these proceedings do not provide an appropriate method of ensuring that a child receives urgent medical treatment. There are other ways of dealing with a child's need for treatment in an emergency. For provisions relating to the administration of a blood transfusion to a child when the child's parent has refused to give consent, see Transplantation and Anatomy Ordinance 1978 (A.C.T.), s.23.

- by reason of the circumstances in which the child is living or in which he is found –
  - the health of the child has been impaired or there is a likelihood that it will be impaired; or
  - the child has suffered, or is likely to suffer, psychological damage of such a kind that his emotional or intellectual development is or will be endangered; or
- there is no appropriate person to care for the child because –
  - he has been abandoned by his parents or by his guardian;
  - his parents or his guardian cannot, after reasonable inquiries have been made, be found; or
  - his parents are dead and he has no guardian.

The definitions relating to physical or mental impairment deliberately make no reference to the role of the child's parent or guardian. A child's health might, for example, be impaired or put at risk in a day care centre, and protective intervention should not be made dependent on whether the person responsible comes within the definition of a parent or guardian. It should also be noted that the proposed definitions relating to physical injury, sexual abuse, physical or psychological impairment are not limited to harm which has already occurred. If harm is likely, intervention should be possible to protect the child. It should not be necessary to wait for it to be inflicted.

296. ***Poor Home Environment*** None of the above definitions is broad enough to cover situations in which it might be felt that the care which the child is receiving is unsatisfactory or the home environment is undesirable. Police and welfare workers often visit homes which are dirty, run down, or chaotic, or where the parents are constantly bickering, have an alcohol or other drug problem, or are mentally retarded. In others they encounter lifestyles which many would consider aberrant. The inclusion of a broad definition designed to permit court intervention in situations of this kind is not warranted. Although many children have unmet needs and live in homes which are less than perfect, court proceedings are an inappropriate means by which to attempt to improve the general quality of family life. What can a court do when faced with an unsatisfactory home? The measures available to it are limited. It can order that the family accept supervision and counselling, but these are unlikely to ameliorate the family's situation unless they are voluntarily accepted. Or it can remove the child from home. This, however, provides only a temporary solution, for the child is likely to want to return home as soon as possible and the family's situation will remain as it was. Rather than assuming the role of substitute parent whenever it considers that a child is receiving atypical or unsatisfactory care, society should, as a general rule, concentrate on the provision of welfare services designed to support and assist the family. If these are rejected, court proceedings should not be possible unless the child is suffering, or is likely to suffer, harm of the kind referred to in the proposed definitions listed in the above paragraph. A further reason which led the Commission to the view that any new legislation should not contain a definition broad enough to encompass a range of unsatisfactory home situations is that such a definition would be inherently objectionable. Intervention should not be based on definitions which require highly subjective judgements. The Commission disapproves of terminology such as 'living in conditions that indicate that the child or young person is lapsing or likely to lapse into a life of vice or crime', 'under incompetent or improper guardianship', having 'unfit' parents, and 'falling into bad associations or ... exposed to moral danger'. Under the present Ordinance all of these situations can form the basis for the initiation of neglect proceedings.[91] Descriptions of this kind should not be retained in any revised legislation. A system which requires the making of judgments of the kind required by these definitions is also open to criticism on the ground that it is not adapted to diverse child-rearing patterns. What to one group is a manifestly unsuitable environment to another is normal. The danger is that a dominant group will endeavour to enforce its lifestyle on others and will use the courts to do so. This danger is best avoided by rejecting definitions which invite the court to consider whether a child's situation is one which excites disapproval. Instead the relevant legislation should focus attention on the discernible impact on the child and so indicate that the purpose of intervention is to protect the child from harm.

297. ***'Uncontrollable' Children*** The most difficult and controversial question raised by any attempt to re-define the grounds for non-criminal proceedings against children is whether provision should

[91] See Child Welfare Ordinance 1957 (A.C.T.), s.5.

be made for youthful misbehaviour which the adult world considers undesirable, but which does not amount to a criminal offence.[92] The most important examples of such misbehaviour are:

- implacably rebellious behaviour towards parents;
- sexual promiscuity;
- running away from home; and
- persistent truancy.

A number of arguments have been put forward to support the view that court jurisdiction over non-criminal misbehaviour by children should be abolished.

- *Double standards.* It is unfair to make children liable to coercive intervention by the courts for conduct in which adults may and frequently do indulge with impunity. Generalised appeals to the characteristics of 'the young' are not in themselves adequate as a justification for intervention.[93] The changes which are occurring in industrialised societies make this argument particularly persuasive. Children are demanding and being granted freedom.[94] Although there are many who deplore these developments, it is not feasible for the Childrens Court to attempt to reverse them by assuming a paternalistic role.
- *Problems of prediction.* Questionable assumptions underlie the court's assertion of jurisdiction over such behaviour. Among these are the assumptions that we can accurately predict how a child will develop in the future without court intervention, and that we can also predict that, following intervention, his development will follow a different and more desirable path. It has been argued that the available evidence does not suggest that either type of prediction should be confidently made.[95]
- *Unsuitable response.* A court does not, and cannot, respond sensitively to the problems underlying truancy, promiscuity and unruly behaviour. Complex personal, family and social factors are likely to be involved, factors which are far beyond the reach of a court order. The uncontrollability cases described earlier in this report[96] illustrate this point. It is unrealistic to imagine that the problems which these cases reveal can be solved by a court order. Comments on United States experience are equally applicable to the situations confronting Australian courts:

> PINS cases[97] present problems of the maturation of adolescent youths which are far more complicated than those usually considered justiciable. For instance, they typically involve not only the youth but an entire parent-child relationship. This relationship is of greater duration, intimacy, and emotional intensity than most other legally ordered relationships and attains a heightened complexity during the adolescent period as individual youths undergo physical and emotional changes and transfer their dependencies from parents to age-peers . . . The fact that the persons concerned are young people makes it especially difficult to deal with such complex problems. Judges share the common propensity to assume that youths are less complicated than they really are and to create a 'mythology of childhood'[98]

[92] This matter is one which has attracted a great deal of attention in the United States. Much has been written about the juvenile courts' jurisdiction over 'status offenders' and whether this jurisdiction should be abolished. See, for example, Teitelbaum and Gough; Andrews and Cohn, 'Ungovernability: The Unjustifiable Jurisdiction,' 83 *Yale LJ,* 1383, (1974); Smoot, 'Parens Patriae and Statutory Vagueness in the Juvenile Court,' 82 *Yale LJ,* 745, (1973); McNulty, 'The Right to be Left Alone,' 11 *American Crim L Rev,* 141, (1972); *Task Force Report,* 25–27; Juvenile Justice Standards Project, *Standards Relating to Noncriminal Misbehavior,* (1977); National Advisory Committee on Criminal Justice Standards and Goals, *Juvenile Justice and Delinquency Prevention,* (1976) Ch.10.

[93] Tribe, 'Childhood, Suspect Classifications, and Conclusive Presumptions: Three Linked Riddles', 39 *Law and Contemporary Problems,* 8, 12, (1975).

[94] See Empey, 565–568.

[95] Andrews and Cohn, (1977), 85–88.

[96] Para.273, 276 (Case 4).

[97] 'PINS' stands for 'person in need of supervision,' a recently created category over which juvenile courts in some States of the United States have jurisdiction. The categories of juveniles dealt with as persons in need of supervision are very similar to those dealt with as uncontrollable in the A.C.T. Childrens Court. For an explanation of New York's PINS statute and of other similar legislation, see Andrews and Cohn, (1977), 45–46.

[98] A phrase used by A. and J. Skolnick, *Family in Transition,* (1971), 310.

> that minimizes the competence and independence achievable by children and youths and maximizes their dependency, incapacity, and need for control and guidance. Such a view further reduces the chance for accurate court understanding and response. And, like all adults, judges are prone to act contradictorily in response to their own ambivalent feelings as to whether youths' needs should predominate over those of adults.[99]

- *Exacerbating family problems.* Many 'uncontrollability' cases exhibit a pattern of unsatisfactory parent-child relationships. Court proceedings can exacerbate existing hostilities and can weaken or destroy tenuous family links. In addition, intervention 'undermines family autonomy, isolates the child, polarizes parents and children, [and] encourages parents to abdicate their functions and roles to the court'.[100]
- *'Hands off' approach.* Current doubts about the capabilities of courts for children are particularly relevant when non-criminal misbehaviour is being considered. When these courts were created it was believed that the law should make benevolent intervention easy, so that the young could be saved from undesirable situations and from themselves. Today scepticism and a 'hands off' approach prevail[101], and the reasons for intervening when a child has not committed a criminal offence, and is not suffering or in danger of suffering harm, seem less convincing. Much of the scepticism stems from the evidence on the effectiveness of available treatment measures.[102] Although techniques might improve or in the future be more successfully pursued, in the present state of knowledge intervention for therapeutic purposes may not be justified.
- *Stigma.* The gains to be made from intervention in the lives of uncontrollable children are uncertain, and in some cases it may do as much harm as good. No matter how successful our efforts to create separate systems for dealing with offenders and non-offenders, inevitably some of the stigma attaching to the former will adhere to the latter. This stigma is likely to have an adverse effect on future behaviour.
- *Danger of overreaching.* Doubts can also be raised about the services which are needed when juvenile misbehaviour becomes a serious problem.

> It is easy to overreach. In many cases it is more a matter of coping with the short-term crisis rather than attempting some fundamental re-shaping of personality. In general, our capacity to tide families over crises is greater than our capacity to engage in more fundamental and long-term change of personality or behaviour.[103]

It is not a court's role to act as a vehicle for short-term crisis intervention. Its procedures and the resources available to it are not well suited to the performance of such a function. Also, there are other situations in which the solution is not of a kind which a court can fashion. Some situations require a response to the wider problem as well as to the presenting one. If, for example, a parent keeps a child home to help with the new baby, the response should possibly be to help the parent to find assistance elsewhere, not merely to make an order directed towards the prevention of further truancy.[104] Such a response is not of a kind which is within the power or capabilities of a court. Further, an effort to provide assistance and advice should be made at the onset of the problem, when the family confronts a crisis.[105] Yet, by their nature, court proceedings frequently involve delay. Adjournments are often needed while reports are obtained. The process does not facilitate the provision of immediate help. On the contrary it may impede or even prevent help being given when it is needed.

- *Discrimination.* Uncontrollability laws are open to the objection that they encourage sexual

[99] Andrews and Cohn, (1977), 85–86.

[100] Gough, 277.

[101] See the discussion of the child saving movement, para.110f.

[102] With regard to juveniles dealt with for non-criminal misbehaviour a Californian committee was emphatic: 'Not a single shred of evidence exists to indicate that any significant number of [beyond control children] have benefited [by juvenile court intervention]. In fact, what evidence does exist points to the contrary.' *Report of the California Assembly Interim Committee on Criminal Procedure: Juvenile Court Processes, 7,* (1971). Cited by Gough, 272. For a fuller discussion of doubts as to the efficacy of therapeutic techniques, see para.113, 117.

[103] Chisholm, Submission on the N.S.W. Green Paper, (1979), 6.

[104] id., 6.

[105] Gough, 283.

discrimination. Comparable laws in the United States are sometimes used against girls in respect of conduct which, if exhibited by boys, would be overlooked.[106] Although the available evidence does not indicate whether this is occurring in the A.C.T., the possibility of similar discrimination does exist, and provides a further ground for rejecting the concept of uncontrollability. There is also the possibility of discrimination against those at the lower end of the socio-economic scale. A New York attorney, interviewed during the course of a study of the operation of the PINS laws in that State, remarked, 'If you're poor your main problem isn't lack of money, it's all the people who know what's best for you.'[107]

- *Effect on informal services.* The court's retention of jurisdiction over non-criminal misbehaviour may impede the provision of effective help. This may happen in two ways. First, community agencies may be wary of children who have been before the court and so unwilling to accept such children. Secondly, the fact that the court has jurisdiction may provide an unfortunate incentive for schools and other community agencies to avoid developing services for troubled families.[108]

298. ***Arguments for Intervention*** The arguments in favour of retention of jurisdiction over behaviour which is proscribed only for children are:

- *State as parens patriae.* Because of their youth, rebellious or promiscuous children, truants and runaways are unable to appreciate the harm which they are doing to themselves. It is hard to contemplate a child damaging his life when a sufficiently firm hand might help him through a difficult period with no permanent blight.[109] It is up to the community to provide this firm hand when the parents are unable or unwilling to do so.
- *Preventive aspect.* State intervention may validly be viewed as preventive action. It is undeniable that some of the unruly children at present dealt with as neglected or uncontrollable are likely to drift into criminal behaviour. In some cases the argument that we cannot predict a child's future is unconvincing. The outlook for a 14-year-old prostitute may be bleak unless intervention is undertaken.
- *A holding operation.* Even if it is conceded that the measures available to the court do not often 'reform' rebellious children, at least society can undertake a holding operation which may give the child a breathing space while maturation does its work.
- *The need for improved court measures.* While it is true that the way in which courts for children deal with non-criminal misbehaviour is open to criticism, the answer lies not in removing such behaviour from the courts, but in improving the measures which they may employ. We should therefore concentrate on the provision of more adequate and appropriate services and facilities.
- *Effect on legal relationships.* The total abolition of jurisdiction over non-criminal misbehaviour would raise many problems. Such a change would radically alter the underlying legal relationships in the family. What would be the implications for runaways? Would a police officer have no authority to return a child to his home? In effect abolition of the jurisdiction would greatly reduce the age at which a child becomes a free agent. The concern here is that abolition would affect a number of aspects of the legal relationship between parent and child, and that these changes would occur without consideration of the issues involved.[110]

299. ***The Commission's View*** The arguments against the retention of the Childrens Court's existing jurisdiction over non-criminal misbehaviour are strong. Generally the community should not assume an intrusive role with regard to so-called 'uncontrollable' children. The behaviour of these children is none of the state's business (provided they do not break the law), and coercive intervention is often likely to do more harm than good, however well intentioned. Attention should therefore be given to the development of less harmful and more appropriate methods of dealing with the kinds of problem that are all too readily brought within the ambit of uncontrollability proceedings. While impressed by these arguments and conceding that the Childrens Court's existing jurisdiction over non-criminal misbehaviour has many questionable features, the Commission is not convinced that the court should completely abandon the field. The Commission does not favour the abrogation of *all* legal control in this area and recommends the retention of a minimal level of control. The Youth Advocate, as the applicant in care proceedings, should be in a position to minimise intervention in respect of non-criminal misbehaviour. Jurisdiction over such behaviour should be invoked with restraint, and only by a person who is fully aware of the objections to unnecessary and premature court action, and who appreciates the limitations of the court process. The Youth Advocate should display this restraint and should ensure that care proceedings in respect of non-criminal misbehaviour should be a last resort. As with all grounds for care proceedings, the Youth Advocate should have to satisfy the court that the child's situation is such as can be met only by way of court action. Further, although the Commission has decided in favour of the retention of the possibility of court action in respect of non-criminal misbehaviour, it has concluded that the definitions of the relevant grounds should be more specific than any of those at present embodied in the Child Welfare Ordinance. Also, these definitions should not embody the concept of uncontrollability. This concept is objectionable. To describe a child as 'uncontrollable' is pejorative because it suggests that the child is always at fault.[111] In addition, the term is far too broad. Use of such an adjective is inconsistent with the principle that society's concern in care proceedings should be to protect the child, not to curb non-criminal behaviour which excites disapproval. The aim should be the prevention of harm to the child. Nor can the objection to the notion of an 'uncontrollable' child be met by the substitution of a description such as 'uncontrolled'.[112] A formulation of this kind focuses on the behaviour and child-rearing practices of the *parents* and not on the behaviour of the child. The parents may be extremely conscientious and do their best to control a child, but whether his behaviour does or does not stem from a failure or absence of control should not, under the principles proposed by the Commission, be the sole determinant of whether intervention should occur. The existing definition of an 'uncontrollable' child should be replaced by a definition which clearly indicates that it is the actual or potentially harmful nature of the child's non-criminal behaviour which should provide the ground for intervention. However, a definition which did no more than refer to the harmful nature of the child's behaviour would be open to criticism on the grounds that it was imprecise and conferred too much power on the Youth Advocate. If the sole criterion for intervention were the occurrence of harmful behaviour, it would be possible for the Youth Advocate to initiate care proceedings without reference to the child's parents or guardians. Clearly this would be undesirable. The new definition must require the Youth Advocate to determine whether the harmful behaviour stems from a home situation which indicates that the child's parents or guardians are unable or unwilling to protect the child from harm. Such a requirement would not lead to the reintroduction of the concept of lack of control, since the definition would indicate that it is the harmful behaviour which justifies intervention, but that it must be viewed in the context of the child's home situation. The Commission therefore recommends that care proceedings should be possible if a child:

> is engaging in behaviour that is, or is likely to be, harmful to him and his parents or his guardian are unable or unwilling to prevent him from engaging in that behaviour.

The aim has been to formulate a definition which is clear and restrictive and yet which allows a reasonable degree of flexibility. It is not a net in which the police and welfare services may catch anyone of whose behaviour they disapprove or whose behaviour or mode of living does not conform

---

106 Sussman, 'Sex-Based Discrimination and PINS Jurisdiction,' in Teitelbaum and Gough, 179– 199; and Mann, 'The Differential Treatment Between Runaway Boys and Girls in Juvenile Court,' *Juvenile and Family Court Journal*, 30(2), 37, (1979).

107 Quoted by Andrews and Cohn, (1977), 57.

108 Gough, 277.

109 *Task Force Report*, 27.

110 Feeney, 'The PINS Problem – A "No Fault" Approach,' in Teitelbaum and Gough, 249, 255– 257. See also the following comment on the movement in the United States to reduce the jurisdiction of the juvenile court: 'This is not simply a reallocation of power from the state to the child, but also a significant reduction in the power of schools, parents, and other adults to regulate such behavior by threatening resort to the police or to the court.' Zimring, 'Review of Juvenile Justice Standards Project,' 91 *Harvard LR*, 1934, 1937 (1978).

111 'Broadly speaking, it seems that "uncontrollability" is very close in spirit to the criminal law,' Commission of Inquiry into Poverty, 293.

112 The substitution of 'uncontrolled' for 'uncontrollable' was recommended by the Standing Committee on Housing and Welfare of the A.C.T. Legislative Assembly, *Report No.8: Child Welfare*, (1978), 57. See also the N.S.W. *Green Paper*, 32. Included in the paper's proposed definitions of children in need of care is a child who, for whatever reason, is 'not being adequately controlled by his parent, guardian or other person having his care.'

to all the current norms. Nor is the definition so stringent as to prevent action in seriously disturbing situations. The behaviour to which reference is made in the proposed definition is deliberately limited to behaviour which is harmful to the child. It is not intended that care proceedings under the recommended definition should be used as an alternative to a prosecution when a child has allegedly committed an offence. As far as possible a distinction should be made between criminal and non-criminal matters. If this is not done, the result, as has been noted, will be procedures marred by ambiguity and confusion of purposes.[113] The system's objectives should be clear. Earlier in this report, consideration was given to the possibility of employing non-criminal proceedings to deal with criminal behaviour by children under the age of criminal responsibility.[114] This possibility was rejected, as it would produce inherently artifical and unsatisfactory procedures. Further, the use of such procedures would deprive a child of the protections which the criminal justice system is designed to provide. Exactly the same objections could be raised to the use of care proceedings in respect of offences by children over the age of criminal responsibility. If a child has allegedly committed a criminal offence he should be dealt with under the criminal law. Hence the Commission rejects the view that the proposed definition should refer not only to behaviour harmful to the child but also to behaviour harmful to society.[115] If a child's conduct does not amount to a criminal offence, he should be made the subject of care proceedings if these are necessary for his protection. If proceedings are not necessary to protect the child from harm, reliance should not be placed on discriminatory laws designed to control behaviour in which adults may engage with impunity.

300. ***Truancy*** Under the present Ordinance truancy is a ground for neglect proceedings.[116] A child's failure to attend school is a clear and particularly troubling example of misbehaviour which the law seeks to control by way of non-criminal proceedings. The question to be decided is whether truancy as such should be retained as a ground for the proposed care proceedings. The Commission was initially attracted to the idea that it should not. It has been argued that school attendance is

> properly the business of the schools, not the courts. Judicial coercion can at best (and that very seldom, short of twenty-four-hour confinement) dragoon the physical presence of the youth's body, with strong indications that the 'heart and mind' will not only not follow, but will be strongly repelled. Truancy represents a highly complex set of problems.[117]

Such arguments do not represent a rejection of the importance of an adequate education or an inability to recognise the devastating effect on a child of a failure to obtain such an education. What is being asserted is that coercive intervention is not an appropriate means of ensuring that a child receives a satisfactory education.[118] The Department of the Capital Territory has expressed reservations about the inclusion of truancy in the definition of the grounds for care proceedings.[119] Further, a decision not to include truancy as such in the list of grounds for care proceedings would not be incompatible with the maintenance of a system of compulsory education. There are other means of promoting compulsory school attendance. In particular, the possibility of prosecuting parents -- for failing to ensure that their children go to school -- remains.[120] Although the Commission accepts the view that, in general, it is the schools, in co-operation with the parents, which should deal with truancy, the complete abandonment of legal controls in this area is not recommended.[121] Further, notwithstanding the fact that the proposed definition relating to behaviour harmful to the child might be appropriate to cover the more serious cases of truancy, the law has a part to play in explicitly reinforcing children's obligation to attend school until they attain the school-leaving age.[122] However, truancy alone should not, as it is at present, be sufficient to justify the initiation of

---

113 Para.118.
114 Para.66.
115 The view that a definition such as that proposed by the Commission should also refer to behaviour harmful to society was put forward by Foreman, (1980) 4 *Crim LJ*, 256, 258.
116 See Child Welfare Ordinance, s.5 -- definition of 'neglected child'.
117 Gough, 284.
118 id., 285.
119 Department of the Capital Territory, *Submission*, 37.
120 See Education Ordinance 1937 (A.C.T.), s.9.
121 The N.S.W. *Green Paper*, 32, also concluded that truancy should be retained as a specific ground for care proceedings. See also Children's Protection and Young Offenders Act 1979 (S.A.), s.33.
122 In the A.C.T. the school-leaving age is 15. See Education Ordinance 1937 (A.C.T.), s.5 and 8.

care proceedings. Before coercive intervention is warranted, it should be necessary to establish that the child's truancy is persistent and that it is likely to harm the child. In practice the former requirement is already observed in the A.C.T. Neglect proceedings are not instituted unless the truancy is long-standing. Hence the requirement that the truancy be persistent would bring the law into line with current practice. The requirement that the truancy be likely to be harmful to the child is consistent with the principles on which the Commission has based its recommendations relating to care proceedings. Although cases in which persistent truancy is not harmful to a child will probably be few, situations may arise where a child is clearly unable to benefit from further attendance at school. In such a situation the initiation of care proceedings might not be warranted. The new Ordinance should be formulated in such a way as to make provision for cases of this kind. It is therefore recommended that care proceedings should be possible if a child:

> is required by law to attend school and is persistently failing to do so and the failure is, or is likely to be, harmful to the child.

The aim has been to formulate a definition which retains the possibility of coercive intervention when a child is a persistent truant, but which indicates with reasonable precision the situations in which this intervention should occur.

301. ***Serious Family Conflict*** None of the Commission's recommended definitions applies to a type of situation in respect of which uncontrollability proceedings are regularly employed. This is that which occurs when there are continuing conflicts between a child and his parents. A situation of this kind is characterised by rebellious behaviour on the part of the child and by the parents' inability to understand or to cope with this behaviour. The result is that home-life becomes intolerable, both for the child and his parents. It is necessary to keep open the possibility of intervention in cases of this kind. In formulating the relevant definition, it is important to avoid the criminal connotations of 'uncontrollability'. What is needed is a ground for care proceedings analagous to the concept of irretrievable break-down in divorce law.[123] When necessary, intervention should be undertaken because there is serious incompatibility between parents and child, not because the parents have 'failed' or because the child is 'uncontrollable.' Further, in the case of older teenagers, the law should recognise the child's right to be consulted and to take the initiative when such an incompatibility has occurred. A procedure which requires that it be established that the child is 'uncontrollable' treats the child as a passive object and not as a party to a family relationship. A definition which incorporates the concept of incompatibility would recognise that the child, like his parents, would be entitled to approach the Youth Advocate to discuss the initiation of care proceedings. It is therefore recommended that a further ground for care proceedings should arise if:

> there is an incompatibility between the child and one of his parents or between the child and his guardian.[124]

It should be noted that the definition has been drafted in such a way as to apply to incompatibility between a child and one of his parents. Frequently situations of family conflict are of this kind.

302. ***Older Children*** When exercising his discretion with regard to non-criminal misbehaviour, it will be necessary for the Youth Advocate to pay particular attention to a child's age. As has been explained in Chapter 3, the Commission rejected the possibility of maintaining a distinction between 'children' and 'young persons'.[125] One of the strongest arguments in favour of the maintenance of such a distinction is that certain forms of non-criminal misbehaviour by 'young persons' might be tolerated, while similar misbehaviour by 'children' might be the subject of intervention. For example, society might be so disturbed if a 13-year-old child runs away that it wishes to take court action, but may resolve to let a 17-year-old run. Although it has been decided that it would be artificial and unsatisfactory to seek to achieve this result by the maintenance of arbitrary age-lines, the Youth Advocate should, when confronted by youthful misbehaviour, make distinctions on the basis of age. Given the need to be cautious about the value of any court proceedings when such

---

123 See Family Law Act 1975 (Cwlth), s.48(1).
124 Cf. s.34(1) of the Community Welfare Services Act 1970 (Vic.). (This provision has yet to come into operation. It will do so on a date proclaimed in the Victorian *Government Gazette:* Community Welfare Services Act 1978 (Vic.), s.1(3)). See also the Canadian recommendation regarding the introduction of 'serious and irreconcilable conflict' between parents and child as a ground for non-criminal proceedings. British Columbia, *Fifth Report of the Royal Commission on Family and Children's Law, 'Children and the Law'*, (1975), Part V, 61.
125 Para.64.

behaviour is brought to his notice, it is to be hoped that when, for example, the case of a 17-year-old runaway whose behaviour is harmful to himself is brought to the notice of the Youth Advocate, a decision that the behaviour can best be ignored or dealt with without resort to court proceedings, will be virtually inevitable.[126] The Department of the Capital Territory has expressed the view that only in exceptional circumstances should a 'child' aged between 16 and 18 be the subject of care proceedings and that a proviso to this effect might be included in the new legislation.[127] Although the Commission agrees with the view that normally care proceedings should not be initiated in respect of older children, it is felt that each case is best dealt with on its merits and that it should be left to the Youth Advocate to take into account age as one of several factors to be considered when the initiation of care proceedings is being contemplated. The system should make provision for the rare case of a 17-year-old whose immaturity might make him a suitable subject for care proceedings. In every case which comes to his notice, the Youth Advocate would be obliged to determine whether the matter is one which can be dealt with only by way of a court order. It is therefore unnecessary to add a specific proviso regarding the child's age.

303. ***Application of the Proposed Definitions*** The proposed definitions are based on principles which the Commission believes should be reflected in laws governing coercive intervention in the lives of children in need of care. However, any reforms of the non-criminal jurisdiction of courts for children should be based not only on abstract principles, but also on an analysis of the types of case which might not be covered by proposed definitions.[128] One of the Commission's recommendations regarding the primary grounds for care proceedings is that the fact that a child is allegedly under 'incompetent or improper guardianship' should not, in itself, justify intervention.[129] This proposal is based on the principle that new definitions should be drafted not in terms of the behaviour of the parents but in terms of the observable impact on the child. But are there dangers that adherence to this principle will leave unprotected certain categories of children whose situation demands intervention? An imaginary example will make the problem clear.

> A single mother is caring for a young baby. The mother is a prostitute and a long-term heroin addict. She lives with other prostitutes and drug addicts in a run-down, cold and dirty flat. She has no family to provide any kind of support. The baby is, however, reasonably well fed and healthy and is adequately clothed.

The definitions proposed by the Commission would not ensure intervention in every situation of this kind, since the mother's undesirable lifestyle would not in itself be a ground for initiating care proceedings. Action would be possible under the recommended definitions only if there were evidence of physical or psychological harm or the likelihood of such harm. Another hypothetical case, perhaps more difficult than the first, is as follows:

> A child is placed by his parents in a children's home, where he is well cared for. However, the parents display little interest in him, do not write, visit rarely and do not take him home at the weekends or on school holidays. They refuse to consent to his placement in a foster home.

Behaviour of this kind would be regarded by many as an indication that the parents are 'unfit' guardians. Nevertheless, in the view of the Commission, their alleged unfitness should not in itself constitute a ground for intervention. In the absence of proof of the specified types of harm, or the likelihood of such harm, intervention in the situation described might, however, be possible on the grounds that the situation discloses incompatibility between the child and his parents. The proposed definitions should also be applied to the detailed case studies quoted in Chapter 7. The most relevant

---

126 Special mention must be made of intervention directed towards sexual activity. It is to be hoped that the suggested definitions would discourage such intervention. In particular, it must be pointed out that, though care proceedings would be possible until a child attains the age of 18, the current age of consent for females in respect of sexual intercourse is 16 in the A.C.T. (See para.62) It is only in the most exceptional situations that care proceedings should be initiated in respect of sexual activity of those over 16.

127 Department of the Capital Territory, *Submission on DP 12,* 1. See also that Department's *Submission,* 37–39.

128 Dembitz, 1944. Note the types of situation which she claims would not be covered by the definitions proposed by the Juvenile Justice Standards Project.

129 The N.S.W. *Green Paper,* 32, recommended the retention of an equivalent formula. Under its proposed definitions a child would be in need of care if 'there is inadequate provision for his proper care.' Cf. the definition in the South Australian Act which requires harm or the risk of harm. See Children's Protection and Young Offenders Act 1979 (S.A.), s.12(1)(a).

for present purposes is Case 5, involving Grant and Margaret.[130] These children were seriously neglected, the father was chronically unemployed and neither parent would co-operate with welfare or health services. The Commission's suggested definitions are drafted in such a way as to permit intervention in a situation of the kind which arose in that case. The evidence clearly showed that the children's physical health was being impaired. It is also possible that actual or potential psychological damage could have been established. The difference between neglect proceedings under the present Ordinance and the procedure recommended by the Commission is that, in circumstances of the kind which arose in Case 5, both the Youth Advocate and the court would be required to concentrate on the impact of the parents' behaviour on the two children. Both Cases 1 and 2[131] (involving Gordon and Michael) were instances of physical injury or the risk of such injury. Gordon, it will be remembered, was the boy whose mother was killed and who subsequently suffered at the hands of his violent father. Michael was the child whose mother had difficulty coping with him and who was seriously injured in a fall. Because both cases involved injury or the risk of injury they would be explicitly covered by the proposed definitions. However, in the absence of demonstrable physical or psychological impairment, or the risk of such impairment, David and Barry, described in Case 3[132] could not be made the subject of care proceedings. The boys' mother was suffering from a serious psychiatric illness. They exhibited disturbed, erratic behaviour. The case was marked by the involvement, at the pre-court stage, of a very large number of persons and agencies. Intractable as the family's problems were, they were probably best handled without resort to court proceedings. In fact, though the matter was finally taken to court, it was decided that it should be disposed of without a finding of neglect being made. The proposed definitions are drafted in such a way as to produce what the Commission considers to be a desirable result in a case of this kind, namely a solution without resort to court action. Table 13 sets out details of further A.C.T. neglect cases.[133] These do not require additional comment, since the issues which they raise have already been discussed. Comment must be made on the various cases of uncontrollability outlined in Chapter 7. Case 4[134], involving Judith, who ran away from home and several times tried to commit suicide, was the most dramatic of these. The definition proposed by the Commission to replace the existing definition of an uncontrollable child requires that it be established that the child has engaged in behaviour which is harmful to himself. The facts disclosed in Case 4 would permit intervention under such a definition. This definition might not, however, allow intervention in all of the uncontrollability cases summarised in Tables 11 and 12.[135] The brief facts of these cases suggest that they did not all involve behaviour harmful to the child. If this is so, it is undesirable for intervention to occur: in general, rebellious behaviour not amounting to a criminal offence should not result in care proceedings. It must not be overlooked that in some instances behaviour of this kind will be a manifestation of incompatibility between a child and his parents. The Commission's proposed definition makes specific provision for this type of situation. It is intended that this provision, together with the revised definition relating to behaviour harmful to the child, should cover the more disturbing situations at present dealt with by way of uncontrollability proceedings. The remainder should be diverted from the court.

304. ***A Suggested Definition*** The Commission accordingly recommends that the existing categories of neglected and uncontrollable children and young persons should be replaced by a set of definitions of children in need of care. A child is in need of care if:

- the child has been physically injured (otherwise than by accident) or has been sexually abused, by one of his parents or by a member of the household in which he lives or there is a likelihood that he will so suffer such physical injury or sexual abuse;
- the child has been physically injured (otherwise than by accident) or has been sexually abused, by a person other than a parent or a member of his household, or there is a likelihood that he will so suffer such physical injury or be sexually abused, and his parents are unable or unwilling to protect him from the injury or abuse;

---

130 See para.276.
131 See para.276.
132 See para.276.
133 See para.274.
134 See para.276.
135 See para.273.

- by reason of the circumstances in which the child is living or in which he is found –
  - the health of the child has been impaired or there is a likelihood that it will be impaired; or
  - the child has suffered, or is likely to suffer, psychological damage of such a kind that his emotional or intellectual development is or will be endangered;
- the child is engaging in behaviour that is, or is likely to be, harmful to him and his parents or his guardian are unable or unwilling to prevent him from engaging in that behaviour;
- there is no appropriate person to care for the child because –
  - he has been abandoned by his parents or by his guardian;
  - his parents or his guardian cannot, after reasonable inquiries have been made, be found; or
  - his parents are dead and he has no guardian;
- there is incompatibility between the child and one of his parents or between the child and his guardian; or
- the child is required by law to attend school and is persistently failing to do so and the failure is, or is likely to be, harmful to the child.

If a child falls within one of these definitions *and* his situation is such as can be met only by a court order, then the court should be empowered to make a declaration that the child is in need of care.

305. ***Cases Requiring Immediate Action*** The proposed definitions of the various categories of children in need of care and the procedures for bringing them before the Childrens Court have been designed with a view to limiting court intervention and to ensuring that court action is a last resort. Procedures of this kind, which require that informal methods be fully explored before a decision to initiate care proceedings is taken, will obviously usually involve certain delays. The question naturally arises as to what action should be taken to protect children while the decision as to the initiation of care proceedings is made. Clearly special provision should be made for cases where immediate action is required and a child must be taken into custody at once. A decision to take action of this kind should, however, be quite separate from a decision to initiate care proceedings. Placing a child in custody should not inevitably lead to the initiation of care proceedings. In the majority of cases it will do so, but the system should be designed in such a way as to permit the Youth Advocate, notwithstanding the fact that a child is in custody, to explore the possibility of reaching an informal solution. The system should not operate in such a way that his hand is forced by a decision to remove a child from his home. Nevertheless, as has been noted, the decision-making process envisaged by the Commission should not operate in such a way as to prevent immediate action being taken where this is necessary to protect a child. For example, a member of the police might be called to a domestic dispute and form the opinion that a child's situation is so serious that he must be taken out of the home immediately. The police officer should have the power to take the child into custody and, as at present, to place him temporarily in a hospital or a home such as Marymead. An authorised member of the Welfare Division should have similar powers, as should authorised hospital personnel. When a person has exercised the power to place a child in custody he should be obliged to take all reasonable steps to notify the child's parents. The power to place a child in custody must be strictly defined by legislation. Both the pre-conditions for taking a child into custody and the duration of custody should be carefully prescribed. Only if a police officer or other authorised person has reasonable cause to believe that a child is in need of care and that his situation is such as to require that he be urgently taken into custody to safeguard his welfare, should the power be exercisable. Having placed the child in custody, the officer or authorised person should be required to notify the Youth Advocate as soon as reasonably practicable. This will normally be done by telephone. The Youth Advocate should be empowered to direct the child's immediate release. It has been suggested to the Commission that it is inappropriate for the Youth Advocate to be permitted to exercise this power, since it is only a court which should make decisions affecting liberty. In answer to this criticism it should be noted that the Youth Advocate would be empowered to make decisions favourable to the child. He would be authorised to release him, but would have to seek a court order if he wished to secure his continued detention. Further, a power of release is necessary if the Youth Advocate is to perform his screening function satisfactorily. Central to the Commission's proposals is the view that every case should be carefully scrutinised by the Youth Advocate before formal procedures are instituted. The Youth Advocate would be less effective in the performance of his role if police, welfare or health personnel could circumvent him by the simple expedient of taking a child into custody. Finally, as is pointed out later in this report, the proposed

Youth Advocate would have much in common with the Scottish reporter.[136] A reporter is able to exercise a power of release similar to that envisaged for the Youth Advocate.[137] If the Youth Advocate considers that a child who has been detained should remain in custody, an application for an interim order to this effect should be made to the Childrens Court or to a magistrate as soon as practicable and in any case within 48 hours of the commencement of the child's detention. If no court order is made within 48 hours of the commencement of the child's detention the child should be released. It is not intended that a child should routinely be held for 48 hours before an application for an interim holding order is made. In every case the application should be made as soon as practicable. If the application is granted the order by the court should initially remain in force for no more than 72 hours. During this time the Youth Advocate should be empowered to seek an extension of the holding order. This hearing should deal only with the question of the child's continuing detention. It should not be necessary for the child to be present, but he should be entitled to be legally represented. Normally one parent or guardian should be present, although there will be occasions when this is impossible (e.g. where the child's situation has come to notice because of a parent's illness or arrest). During the detention hearing the court should be able to obtain information in any manner it thinks fit (e.g. it can decide to call additional witnesses). The court should be able to release the child or to make an order authorising his continued detention in custody. If such a custodial order is made, the court should specify the length of the period in custody. In no case should the extension be longer than seven days. During this period the Youth Advocate should make preliminary inquiries to determine whether to file an application for a declaration that the child is in need of care. If he does not do so the child should be released to his parents or guardians. If he does make such an application he may require further time to assemble the necessary evidence. In such a case the procedure should be the same as that described below.[138]

306. ***Other Methods of Protecting Children*** The Commission's recommendations relating to care proceedings reflect certain views about the nature and purpose of these proceedings. The reasons for restricting the use made of care proceedings have been explained. It must not be thought, however, that if a child's case is not covered by one of the proposed definitions, the law is unable to offer protection. Though it should be used sparingly, the criminal law may provide protection in situations which do not warrant the use of care proceedings. Reference has already been made to the possibility of employing the criminal law if parents fail to ensure that their children attend school.[139] The Child Welfare Ordinance contains a general provision designed to prevent persons neglecting or ill-treating children in their care. Section 98(1) states:

> A person shall not fail to provide adequate and proper food, nursing, clothing, medical aid or lodging for a child or young person in his care.

Section 98(2) deals with the ill-treatment of a ward, and with removing a ward from his proper custody. Section 99 deals with assaulting, ill-treating or exposing a child. It can be argued that s.98 and 99 of the Child Welfare Ordinance should be repealed because such penal provisions are not appropriate to legislation dealing with the welfare of children. This view is misconceived. Criminal provisions have a legitimate, though limited, part to play in the protection of children. Further, the two provisions are not inconsistent with the Ordinance as a whole, since it also deals with offences by children and thus has penal aspects. Section 98(1) does not cover cases in which children are left unattended, in situations involving a risk to their life or health (for example, when a child is left in a car on a hot day or in a house or caravan in which heaters are burning). Mention must also be made of a situation to which attention has been drawn by the Capital Territory Health Commission. It has been pointed out that, on occasions, parents unlawfully administer drugs to their children.[140] The Health Commission recommended that the administration of a dangerous drug without a phys-

---

136 Para.318, 319.
137 Social Work (Scotland) Act 1968 (U.K.), s.37(3).
138 See para.322.
139 Para.300.
140 *Submission on DP 12*, 1. The submission cited cases in which children were, with harmful effects, given drugs over a long period by a parent or guardian. An example quoted was the giving of anti-epileptic drugs over many weeks to keep a child quiet.

CONTINUED

3 OF 6

ician's order be made a specific ground for care proceedings. Although it is agreed that the law should make provision for situations of this type, it is not necessary to add a special ground to the provisions dealing with care proceedings. If the administration of a drug results, or is likely to result, in injury to a child or the impairment of a child's health, care proceedings should be possible under the relevant definitions proposed by the Commission.[141] If there is no possibility of such injury or impairment, or if care proceedings are not appropriate, the Commission believes that the situation is best dealt with by prosecuting the parent. However, the Commission agrees that provision should be made for behaviour of this kind. The new Ordinance should contain general offences of neglecting or ill-treating a child[142]. If it is felt that a general provision relating to ill-treatment is not sufficiently specific to include the unlawful administration of drugs, the proper course would be to amend the appropriate legislation dealing with the misuse of drugs.[143] The existing provisions of s.98(1) should be retained, with the addition of a specific offence of leaving a child unsupervised in a dangerous situation. Provision should be made for a police officer or other authorised person to take reasonable steps to safeguard a child who is the victim of any of these offences. With the exception of the provisions relating to the removal of a ward from his proper custody, it is not recommended that s.98(2) be re-enacted. There is no need for a special provision dealing with the ill-treatment of wards, since the protective provisions relating to children will apply equally to them. The provisions of the Crimes Act 1900 (N.S.W.) in its application to the Territory deal with the criminal liability of those guilty of assaults against children. It is not intended to suggest that criminal proceedings are likely to provide a particularly appropriate means of dealing with persons who neglect or ill-treat children. In some cases the invocation of the criminal law will almost certainly exacerbate the situation. In the circumstances decribed in Case 5[144], for example, the prosecution of the father of Grant and Margaret would probably have achieved little, and could have made matters worse. In Chapter 10 recommendations regarding procedures to discourage inappropriate resort to the criminal law in cases of child abuse are outlined.[145] The same procedures should be employed before prosecutions are initiated under the provisions outlined in this paragraph.

Care Proceedings: The Appropriate Court

307. ***Use of the Family Court of Australia*** Consideration must now be given to the court in which care proceedings should be heard. The arguments advanced in Chapter 5 as to the nature of the decisions which a court must make when an offence has been established are equally applicable to care proceedings.[146] The grounds for intervention must be carefully proved, rulings made on disputed questions of fact, the rights and interests of parents and child must be respected, and, in some cases, coercive intervention sanctioned. In short, the legal aspects of the proceedings must be fully recognised. It is therefore recommended that the tribunal to which an application for a declaration that a child is in need of care is made should consist of a single legally qualified person. However, having reached this conclusion, and being committed to the two principles that care proceedings should be separate from those involving alleged offenders, and that care applications should be dealt with in a tribunal whose atmosphere and procedure are altogether different from those of a criminal court, the Commission was faced with the task of selecting the most appropriate type of court. Four models were considered:

- The Family Court of Australia, presided over by a judge of that Court.
- The Family Court of Australia, presided over by a magistrate exercising jurisdiction over care proceedings and over a range of Family Court matters.
- The Family Court of Australia, presided over by the specialist Childrens Court magistrate. This magistrate would exercise jurisdiction over care proceedings and over offenders dealt with by the Childrens Court.
- The Childrens Court.

141 Para.295.
142 Cf. Community Welfare Act 1972 (S.A.), s.82e (1).
143 The relevant legislation appears to be the Poisons and Narcotic Drugs Ordinance 1978 (A.C.T.). Note s.7.
144 See para.276.
145 See para.403.
146 See para.159.

308. ***Arguments for Use of the Family Court of Australia*** At first sight, the Family Court of Australia offers an attractive and apparently appropriate setting in which to develop new methods for dealing with care matters. The Commission's Discussion Paper, *Children in Trouble*, suggested that the jurisdiction of the Family Court of Australia might, in the A.C.T., be extended to include some child welfare matters.[147] In a later Discussion Paper, *Child Abuse and Day Care*, reference was made to the possibility of creating a special Division of that court to deal with care proceedings.[148] A number of arguments can be advanced to support the view that care proceedings should be dealt with in the Family Court of Australia.

- *Counselling.* The Family Court has special procedures which make it well fitted to the resolution of problems involving troubled children. Particularly noteworthy is the court counselling service. The fact that court counsellors are an integral part of the Family Court means that this court provides a model for a system requiring close co-operation between the bench and trained welfare staff. The proposed Youth Advocate has much in common with Family Court counsellors.
- *Special procedures and children's participation.* The Family Law Act 1975 (Cwlth) contains provisions designed to achieve objectives which should also be pursued in care proceedings. It provides for children's participation in court proceedings and for the exploration of informal alternatives to court action. Section 64(1)(b) of the Act confers on a child aged 14 or over a right to be heard in custody, guardianship or access proceedings[149], while s.14(6) makes provision for the use of conciliation procedures before the Court will hear an application for dissolution of a marriage filed by parties who have been married for less than two years. Further, by virtue of s.62(1) the Court may, in any proceedings in which the welfare of a child is relevant, order the parties to the proceedings to attend a conference with a court counsellor or a welfare officer to discuss the welfare of the child. Also concerned with children's welfare is s.64(5), which allows the Court, when making an order on custody, guardianship or access, to require that the order be supervised by a court counsellor or welfare officer. Finally, there is the requirement, in s.97(3), that the court must proceed without undue formality.
- *Experience with family problems.* The Family Court is experienced in making decisions affecting children's welfare, and the techniques and procedures which it employs could well be extended to the types of problem dealt with in care proceedings. Further, the situations arising in care proceedings are frequently the result of marital breakdown.
- *Appropriate setting.* If, as has been recommended, the aim with regard to care proceedings should be the creation of procedures entirely free of criminal connotations, then the Family Court should provide a particularly suitable venue. An appearance before this court is much less stigmatising than an appearance before a Magistrates' Court or a Court of Petty Sessions. Further, quite apart from questions of stigma, the Family Court offers a much more appropriate setting for the development of innovative procedures for children in need of care.
- *Creation of a unified Family Court.* If the Family Court in the A.C.T. were given jurisdiction over care proceedings, the result could be a valuable social experiment which would provide a model for the rest of Australia This model might be the forerunner of a unified court able to deal with all a family's legal problems. Some would regard this as preferable to a system in which, for example, different courts deal with maintenance, family property rights, divorce

147 ALRC DP 9, para.10.
148 ALRC DP 9, para.2.
149 Late in 1980 it was announced by the Commonwealth Attorney-General that it was proposed to remove the age limit of 14 and so permit the wishes of children of all ages to be taken into account. *Press Release*, 11 December, 1980.

and child welfare.[150] Further, quite independently of the Commission's child welfare inquiry, consideration is being given to the possibility of extending the jurisdiction of the Family Court in the A.C.T. In 1978 the Commonwealth Attorney-General appointed a committee to examine the steps needed to enable the Family Court to exercise a comprehensive jurisdiction in family matters in the A.C.T. Although child welfare matters were not included in the committee's terms of reference, the committee's report, which was released in 1980, made recommendations regarding a number of areas which could be brought within the jurisdiction of the Family Court of the A.C.T.[151] The addition of jurisdiction over care proceedings would thus be consistent with the interest already being shown in the creation of an extended jurisdiction for the Family Court in the A.C.T.

- *Experience with custody matters.* In respect of children of a marriage, the Family Court is responsible for making custody decisions between the parties to the marriage. It is appropriate that the court should assume the task of making similar decisions between the parents and the welfare authorities.

309. ***Arguments against the Use of the Family Court of Australia*** Some of the arguments against the use of the Family Court draw attention to the general character of the court, while others are directed towards the proposal that a magistrate should exercise jurisdiction in the Family Court. Arguments in the former category will be considered first.

- *Formality and procedure.* The way the Family Court has developed makes it an inappropriate forum for care proceedings. It is a superior court. It is typically conducted in a rather formal manner. It does not generally offer a setting conducive to the creation of new procedures for dealing with children in trouble. It is unlikely that an atmosphere suited to the hearing of care proceedings could be established in such a court. To understand the development of the Family Court it is necessary to appreciate the constitutional constraints under which it operates. Under s.71 of the Constitution, a judge of a federal court, which includes the Family Court, must discharge his duty judicially. This has been made clear by the High Court which has held that normally traditional adversary procedure should be followed in the Family Court.[152] In the view of the majority in Watson's case, the provisions of s.97(3) of the Family Law Act 1975 (Cwlth), which require a judge of the Family Court to proceed without undue formality, 'do not authorise him to convert proceedings between parties into an inquiry which he conducts as he chooses'.

150 For a discussion of the characteristics of the 'ideal' unified family court, see Wade, 'The Family Court of Australia and Informality in Court Procedure', (1978) 27 *International and Comparative Law Quarterly,* 820, 820–821. Also Foreman has advocated the creation of a family court exercising jurisdiction over young offenders (except traffic offenders), neglected, maltreated and uncontrolled children, adoption, the granting of consent to the marriage or employment of a minor, affiliation proceedings, commitment of a mentally defective or mentally ill minor, custody, maintenance and other property disputes not covered by the Family Law Act 1975 (Cwlth), offences against children committed by a parent, guardian or other caretaker, and violence between spouses or persons in a *de facto* relationship. *Submission,* 20. See also the Family Law Council's suggestion regarding the possibility of developing a model family court in the A.C.T.: *Second Annual Report* (1978), para. 178.

151 Included in the committee's report were recommendations that the Family Court in the A.C.T. should exercise exclusive jurisdiction in adoption matters, should exercise jurisdiction concurrently with the A.C.T. Court of Petty Sessions in maintenance matters, should exercise exclusive jurisdiction in guardianship and custody matters at present covered by the Infants' Custody and Settlements Ordinance 1956 (A.C.T.), should exercise exclusive jurisdiction in respect of property disputes between a husband and wife, and should exercise exclusive jurisdiction under the proposed Birth (Equality of Status) Ordinance. It was also recommended that the jurisdiction of the A.C.T. Court of Petty Sessions under Part VII of the Family Law Act 1975 (Cwlth) and under s.78, 79, 79A and 87 of that Act be terminated, and that the Family Court should exercise exclusive jurisdiction under these provisions in the A.C.T. Further, there was a recommendation that the Family Court should have adequate power to draw proceedings to the attention of the Director of Child Welfare, and that the Director should have the right to intervene in proceedings where he thought he should do so. See 'Report to the Attorney-General of the Commonwealth of Australia by the Committee Appointed by Him to Examine the Steps Necessary to Enable the Family Court to Exercise Certain Additional Jurisdiction in the Australian Capital Territory,' (1980) (hereafter *Ellis Committee Report).*

152 *Re Watson; Ex parte Armstrong* (1976) 50 ALJR 778, 783. See also *In the Marriage of Lonard* (1976) 11 ALR 618, and *In the Marriage of Wood* (1976) 11 ALR 657.

A judge can neither deprive a party of the right to present a proper case nor absolve a party who bears the onus of proof from the necessity of discharging it. These remarks are not intended to fetter a judge of the Family Court in the exercise of a proper discretion or to insist upon the observance of unnecessary formality; they are designed to make it clear that a judge of the Family Court exercises judicial power and must discharge his duty judicially.[153]

- *Role of legal representative.* A series of Family Court decisions suggests that the role which the legal representative of a child is permitted to play in that court is narrower than that which would be desirable in the proposed care proceedings.[154] It has been held that, in the Family Court, the legal representative may not:
  - act as an independent factfinder who is empowered to provide a confidential report of the kind prepared in England by the Official Solicitor in wardship cases;[155]
  - act as a witness;[156]
  - communicate with court counsellors and welfare officers except through very formal channels;[157]
  - make unlimited contacts with other relevant parties to the case;[158]
  - act as a conciliator;[159]
  - conduct direct interviews with other parties;[160]
  - take special steps to develop a close relationship with the child going beyond what is necessary to gain his confidence.[161]

  Thus certain restrictions have been placed on the role which the legal representative of a child may play in the Family Court. Although the roles of those involved in care proceedings should be clearly differentiated and it is important that a child's legal representative should not usurp the function of the Youth Advocate, it is undesirable that the child's legal representative in care proceedings should be prevented from playing a broader role than is permitted in strictly adversary procedures. In particular he should not be prevented from undertaking his own investigations in order to ensure that all the relevant facts, including all the available dispositional options, are placed before the court.[162] The constraints imposed by the various decisions relating to the role of the legal representative in the Family Court, and by those relating to the nature of proceedings in that court, suggest that it is not a suitable tribunal in which to undertake the development of flexible and imaginative procedures for dealing with children in trouble.
- *Constitutional difficulties?* When the Commonwealth Parliament legislates for a Territory its legislative authority is derived from s.122 of the Constitution.[163] Although there are strong arguments to the contrary, the view has been advanced that neither the High Court nor a

153 (1976) 50 ALJR 778, 783.

154 It should be noted that an analysis of reported decisions on the role of the child's legal representative in the Family Court reveals that the Court's approach has undergone considerable changes. In *Todd and Todd (No. 1)* (1976) FLC 90–001, the *amicus curiae* role was favoured. A number of decisions suggested that the proper role is that of guardian of the best interests of the child, but paying proper regard to the expressed views of the child: *Demetriou and Demetriou* (1976) FLC 90–102, 75,468; *Harris and Harris* (1977) FLC 90–276, 76,475–6. Recently, however, there has been more support for the view that (at least in the case of the older child) there should be a presumption in favour of the legal representative adopting a normal advocacy role based on 'instructions' from the child: *Lyons and Boseley* (1978) FLC 90–423, 77,137; *Waghorne and Dempster* (1979) FLC 90–700, 78,735.

155 *Demetriou and Demetriou* (1976) FLC 90–102, 75,468; *Sampson and Sampson* (1977) FLC 90–253, 76,363.

156 *E and E* (1979) FLC 90–645, 78,373–4; *Waghorne and Dempster* (1979) FLC 90–700, 78,734.

157 *Waghorne and Dempster* (1979) FLC 90–700, 78,734. Note in particular *Demetriou and Demetriou* (1976) FLC 90–102, 75,469–70: '[The Welfare Officer] is an officer of the Court and responsible only to the Court . . . His complete independence and impartiality is vital to the administration of the Act . . . Counsel [should] . . . in no circumstances . . . make a direct or even indirect approach to the Welfare Officer. These observations apply equally to the child's representative.'

158 *Sampson and Sampson* (1977) FLC 90–253, 76,363.

159 *Lyons and Boseley* (1978) FLC 90–423, 77,137.

160 ibid.

161 *Waghorne and Dempster* (1979) FLC 90–700, 78,734.

162 See Fraser, 'Independent Representation for the Abused and Neglected Child: the Guardian ad Litem,' *California Western LR,* 16, 33 (1976–77).

163 *Spratt* v. *Hermes* (1965) 114 CLR 226.

federal court can have original jurisdiction conferred on them by a law made by the Parliament pursuant to s.122.[164] Hence the proposal to confer on the Family Court, which is a federal court, the exercise of original jurisdiction in care proceedings in the A.C.T. could give rise to complex legal questions, if reliance is placed solely on the Territory power. Uncertainty might surround any attempt to confer such jurisdiction on the Family Court in the A.C.T.

- *Experience with children.* Although at first sight the Family Court has certain features which make it an appropriate venue for care proceedings (such as the availability of counselling services and the use of conciliation procedures) in fact neither the Family Court judges nor the court counsellors are specially skilled or experienced in working with children. The court does not possess special knowledge regarding welfare services and residential facilities for children. Though often stemming from family dysfunction, the types of problems likely to arise in care proceedings are different from those with which the Family Court is accustomed to deal.
- *Effect on the Court.* The Family Court is a national court, serving the whole of Australia in appeals under the Family Law Act, and all but two jurisdictions in trial work. It is undesirable to distort its role in order to meet the needs of the A.C.T. If the Family Court in the A.C.T. were given jurisdiction over care proceedings it would be different from all other branches of the court in Australia. This would cause difficulties if other judges were required to sit in Canberra.
- *Small number of cases.* The number of children at present dealt with by the A.C.T. Childrens Court as allegedly neglected or uncontrollable is small[165], and the number made the subject of the proposed care proceedings is likely to be smaller still. The numbers are too small to justify the making of the substantial and complex changes to the Family Court which would be required to permit it to exercise jurisdiction in care proceedings.
- *Court's workload.* The two judges who at present preside in the Family Court of the A.C.T. are already extremely busy with the discharge of their current duties. According to this view they should not be burdened with the additional work of dealing with care proceedings. Yet the number of care matters likely to arise would not alone warrant the appointment of an additional judge.
- *Separation of offenders from non-offenders.* Although it is desirable to separate offenders from non-offenders, and the transfer of care proceedings to the Family Court would help to underline this separation, a complete separation of the two groups is not feasible. Frequently children in need of care commit offences. Frequently offenders and non-offenders are the same type of children, and require the same sort of handling, welfare services and facilities. If membership of the two categories overlaps, it is more convenient for them both to be dealt with in the one court. Further, if both groups are so dealt with, it is still possible to make significant distinctions between them without creating a special care jurisdiction in the Family Court. A distinction between the two categories could be made reasonably effectively by means of the adoption, in care proceedings, of special procedures and rules of evidence, special dispositions, and separate hearing times. The last-mentioned, though a simple reform, is an obvious way of making a distinction between offenders and those the subject of care proceedings. A special sitting time for these cases could be set aside each week.

310. ***Appointment of a Magistrate to the Family Court?*** A number of objections to the Family Court's exercise of jurisdiction in care proceedings could be met if a magistrate were appointed to the court to deal with these proceedings. A magistrate could preside over a specially created Children's Division of the Family Court of Australia. Also, if the magistrate appointed to a Children's Division of the Family Court were the specialist magistrate from the Childrens Court, objections based on the Family Court's lack of expertise in dealing with children would be overcome. Further, in the past, neglect and uncontrollability matters have been dealt with at magisterial level, and there is no reason for suggesting that the new care proceedings should not be heard at this level. Support for the proposition that a magistrate might exercise jurisdiction in the Family Court in the A.C.T in respect

[164] See Lumb, '"The Commonwealth of Australia" – Constitutional Implications' (1979) 10 *Federal LR*, 287, 303–4.

[165] Between 1 June 1978 and 31 May 1979 the A.C.T. Childrens Court dealt with 19 neglected children and 44 uncontrollable children.

of specified matters is to be found in the Ellis Committee Report. There it is recommended that a magistrate with specialist knowledge of family law should hear maintenance matters in Canberra's new Family Court building.[166] A stipendiary magistrate may exercise jurisdiction under the Western Australian Family Court Act 1975.[167] The Western Australian Family Court is a State Court. It exercises both federal and non-federal jurisdiction[168], and thus there is a precedent in Australia for a Family Court in which both judges and a magistrate exercise jurisdiction in respect of federal and non-federal matters. Further, the Family Law Council is considering whether a new class of judicial officers might be appointed to the Family Court.[169] The time seems ripe for making a magisterial appointment to the Family Court in the A.C.T. If such an appointment were made this magistrate would be ideally placed to exercise jurisdiction in care proceedings as well as in a range of family court matters. There are, however, some arguments against the proposal that a magistrate should deal with care proceedings in the Family Court.

- *Importance of care proceedings.* The creation of a court in which a magistrate presided over care proceedings might mean that the magistrate would be seen as an inferior member of the court and that consequently the work which he did with children in need of care could be regarded as far less important than that done by the judges. It might also attract fewer resources. A court in which such a danger exists is hardly the setting in which to attempt to fashion imaginative solutions to the demanding problems posed by children in need of care.
- *Constitutional problems.* There might be some constitutional obstacles to the direct appointment of a magistrate to the Family Court of Australia. Section 79 of the Constitution requires the federal jurisdiction of any court to be exercised 'by such number of *judges* as the Parliament prescribes.' This can be taken to mean that a federal court can be constituted only by a judge and not by a magistrate. Whether or not this interpretation is correct, it is clear than an attempt to appoint a magistrate to the Family Court might be challenged. This problem could, however, be avoided by authorising a person who already holds an appointment as a magistrate to preside in the Family Court building. He would not be appointed to the Family Court. His appointment would be to the Court of Petty Sessions. This is the course recommended in the Ellis Committee Report as part of its proposals relating to jurisdiction in maintenance matters.[170] The recommendation that a magistrate from the A.C.T. Court of Petty Sessions should sit in the Family Court premises to exercise the maintenance jurisdiction of the A.C.T. Court of Petty Sessions thus involves no more than an administrative arrangement about the premises in which the magistrate presides. A similar solution has been adopted in Western Australia. The Registrar of the Family Court of Western Australia has been appointed a stipendiary magistrate under the Stipendiary Magistrates Act 1975 (W.A.).[171] Sitting as a court of summary jurisdiction he may exercise the federal and non-federal jurisdiction invested in that court by the Family Court Act 1975 (W.A.).[172]

311. ***The Commission's View*** Although at first sight the proposal to transfer care proceedings to the Family Court of Australia is an attractive one, and such a change might well be a desirable reform in the future, it is not recommended that this course be adopted in the A.C.T. at this time. It is a possible change which should not be completely rejected. The transfer of responsibility for dealing with care proceedings initiated under State child welfare legislation might at some stage become the subject of a reference of power under s.51 (xxxvii) of the Constitution. Another possible development of the Family Court would be the appointment of a new class of judicial officers to that court. If changes are made to the constitution and jurisdiction of the Family Court throughout Australia, or if the recommendations of the Ellis Committee lead to changes in the Family Court in the A.C.T., further consideration should be given to transferring jurisdiction over A.C.T. care proceedings to the Family Court. If the court were to be reconstituted it might prove an appropriate venue in which to deal with these proceedings. In the absence of changes which would lay the foundations for a court

[166] *Ellis Committee Report*, para. 24.

[167] See Family Court Act 1975 (W.A.), s.74 and 75.

[168] Family Court Act 1975 (W.A.), s.27.

[169] Family Law Council, *Annual Report 1979–80*, para. 210.

[170] *Ellis Committee Report*, para. 24.

[171] Such an appointment is specifically authorised by s.23(1) of the Family Court Act 1975 (W.A.).

[172] Family Court Act 1975 (W.A.), s.74 and 75.

which could exercise jurisdiction over a range of family problems and provide an atmosphere and procedures suited to the determination of care proceedings, the A.C.T. Childrens Court should deal with these proceedings. The arguments which carried most weight with the Commission were those relating to the small number of care cases likely to be dealt with in the A.C.T. each year and to the expertise necessary in a court for children. The complex changes which the transfer of care proceedings to the Family Court would require are not justified by such small numbers. The Childrens Court proposed by the Commission should be presided over by a magistrate with specialist knowledge of children and of the services available for them. Although allowing such a magistrate to deal with both offenders and non-offenders to some extent blurs the distinction between the two categories, it does mean that members of both groups are dealt with by a special court for children. The most important characteristic which young offenders and non-offenders have in common is that they are children, and, in the absence of any other court whose powers and procedures are specifically adapted to dealing with the young, the existing system, under which the Childrens Court deals with both groups, should be retained.

312. ***Appeal Rights*** In Chapter 7 it was concluded that neither the Child Welfare Ordinance nor the Court of Petty Sessions Ordinance makes provision for the Supreme Court of the A.C.T. to hear appeals in neglect or uncontrollability cases decided in the Childrens Court.[173] There is, therefore, an urgent need to create specific appeal rights for children who are the subject of non-criminal proceedings. The new legislation should provide as follows:

- Appeals from decisions of the Childrens Court in its non-criminal jurisdiction should be heard by the Supreme Court of the A.C.T.
- The provisions of Part XI of the Court of Petty Sessions Ordinance 1930 (A.C.T.), appropriately amended, should provide the framework for these appeals, for the reasons set out earlier in this report in relation to criminal appeals.[174]
- The appeals should be instituted only by the child himself, the child's parent or guardian or the Youth Advocate, or by one of the following persons on the child's behalf and in the child's name:[175]
  - a next friend appointed by the Childrens Magistrate in respect of the child[176]; or
  - the Officer-in-Charge of the Childrens Court[177] (where the child is not legally represented, and where a next friend has not been appointed in respect of the child, and with the express consent of the child).
- The Supreme Court should be empowered to entertain the following:
  - an appeal against a declaration of the Childrens Court that a child is in need of care (or against any refusal to make such a declaration); or
  - an appeal against an order for disposition (or against any refusal to make such an order).
- The Supreme Court should, in non-criminal matters, be invested with the same powers of review as have been recommended earlier in relation to criminal appeals.[178]
- There should be no provision in the new Ordinance for a child to be under an obligation to provide a security for the costs of an appeal, for the reasons set out earlier in this report in relation to criminal appeals.[179]
- Special arrangements should be made to cover the case where a child, who has been committed and sent to a N.S.W. institution following a declaration that the child is in need of care, wishes to appeal against the declaration. In these cases similar duties should be imposed as are recommended earlier in this report in relation to criminal appeals.[180]

---

173 See para.269.
174 See para.182.
175 There is an obvious potential for conflict between a child and the child's parent when the parent appeals on behalf of the child in care proceedings: see *B and Another* v. *Gloucestershire County Council* [1980] 2 AllER 746.
176 The role of the next friend is discussed later in this report, para331.
177 At present, the 'Officer-in-Charge' of the Childrens Court is a Deputy Clerk of the Court of Petty Sessions.
178 See para.182.
179 See para.182.
180 See para.182.

The Role of the Youth Advocate in Care Proceedings

313. ***The Problem*** Under the present Child Welfare Ordinance either a member of the police or an officer authorised by the Minister for the Capital Territory may initiate non-criminal proceedings.[181] In future neither type of official should normally exercise this power. The Youth Advocate should normally be the sole person responsible for making an application for a declaration that a child is a child in need of care. Such an application should be made only when he is satisfied that the matter cannot be handled informally. Any person should be permitted to notify the Youth Advocate of a case involving a child in respect of whom care proceedings might be appropriate.[182] The recommendation that the Youth Advocate should assume responsibility for the initiation of care proceedings reflects a desire to remove specific deficiencies in existing procedures and a belief that proposals to remedy these deficiencies should be based on clearly articulated principles. Both the problems which have been identified and the principles proposed must be discussed in turn. The problems stem from the use of inappropriate procedures and from the absence of mechanisms which will ensure that cases which might warrant the initiation of non-criminal proceedings in the Childrens Court are considered by a person or agency able and willing to take the necessary action. Reference has already been made to the inappropriateness of 'charging' neglected or uncontrollable children.[183] If care proceedings are to be free of all criminal connotations, it is important that the police should not be responsible for their initiation. In our society the major function of a police force is the prevention of crime and the detection and apprehension of offenders. Wherever possible the police should be left free to concentrate on these important tasks[184]. A further reason for recommending that the police should not initiate care proceedings is that these proceedings should be initiated only after an inquiry into the child's background. The inquiry should be designed to ensure that all informal alternatives have been explored. This is not the type of work which the police are trained to undertake. It is not suggested that the police should lose the power to act in emergencies in order to protect the child. The Commission's recommendation, it should be emphasised, relates to the *initiation in court* of care proceedings. The way the police should exercise their power in an emergency has already been discussed.[185] The second major failing in the present system is that it is possible for a number of agencies to work with a family in an unco-ordinated manner. In such a situation no agency has clear responsibility for making the painful decision about the initiation of court proceedings. Some cases are so difficult that, understandably, each agency feels it must leave the decision to another. For example, a child abuse matter which comes to the notice of a Health Commission worker may be referred to the Commission's Child Abuse Committee and then referred to the Welfare Branch Child Abuse Committee.[186] The latter Committee may recommend that the police charge the child as a neglected child. The police, believing that there is insufficient evidence and having the responsibility of justifying their actions in court, may refuse to initiate proceedings. The Commission has been concerned about a number of cases which have come to its notice. In some cases, action has been taken when further efforts could have been made to avoid court proceedings. In other cases there has been a strong feeling among some of the agencies involved that immediate action is needed to protect a child, yet no one has the clear responsibility for ensuring that this action is taken. Meanwhile, children remain in dangerous or seriously unsatisfactory situations. Many of the reasons for the lack of co-ordination and the absence of effective decision-making procedures

---

181 See para.253.
182 Cf. the following Scottish provision regarding the reporter (whose functions regarding children in need of care are similar to those proposed for the Youth Advocate). Section 37(1) of the Social Work (Scotland) Act 1968 (UK) states: 'Where any person has reasonable cause to believe that a child may be in need of compulsory measures of care he may give to the reporter such information about the child as he may have been able to discover.'
183 Para.280.
184 Cf. the following comment by the Norgard Committee: 'We consider that it is inappropriate in today's society for the Police to continue as the major organisation initiating child welfare proceedings ... We ... see their role as being concerned more with offences than with cases where care is the main point at issue.' *Norgard Report,* 79. The Department of the Capital Territory has expressed the view that, as far as practicable, care proceedings should not be initiated by the police. *Submission,* 36.
185 Para.305.
186 For a discussion of the work of these committees, see para.377.

are to be found in the way in which the welfare services in the A.C.T. have been permitted to develop. The organisation of these services is discussed in greater detail in Chapter 13. At this stage it is sufficient to point out that, because the A.C.T. welfare services have grown in an unplanned manner, no one agency is legislatively identified as being responsible for ensuring that the needs of children in trouble are met. The result has been that the A.C.T. lacks an agency which has the status and credibility to act as a focus for child welfare services in the Territory. For the reasons explained in Chapter 13, the long-term goal should be the creation of a single government agency with overall responsibility for A.C.T. welfare services. The creation of such an agency would be a slow and complex process and any proposals for immediate reform should be based on the assumption that a number of welfare agencies will continue to operate in the A.C.T. in a relatively independent manner. The need is for institutions and procedures which will harness and make the most effective use of the services provided by the Welfare Branch, the Capital Territory Health Commission and other government and voluntary agencies. The transfer of responsibility for the initiation of care proceedings to the Youth Advocate would contribute towards the achievement of this goal. This recommendation should not however be seen as a short-term solution pending the reorganisation of the Territory's welfare services. Regardless of the particular problems facing these services, the arguments in favour of the creation of an independent official responsible for making the decision to initiate care proceedings are strong. The Youth Advocate should occupy a key role. If he is confronted by a request to initiate court action, and he believes that this is inappropriate because insufficient efforts have been made to reach an informal solution, he should be able to refuse to take action. If he is confronted by a case in which he believes that a failure to initiate court proceedings is jeopardising a child's welfare, he should be able to apply for a declaration that the child is in need of care. The Youth Advocate should act as a buffer between the agencies handling a case and the court. If any person is worried about the way a case is being dealt with, that person should be able to notify the Youth Advocate. The Youth Advocate and his staff should be an expert resource to which the police, welfare agencies, troubled children and parents, and concerned members of the public may turn when services are not functioning as they should.

314. ***Guiding Principles*** A number of considerations led to the conclusion that the Youth Advocate should be responsibile for the initiation of care proceedings.

- The need for a focus. Although the existence of a range of welfare agencies in the A.C.T. gives rise to some difficulties, the resulting variety of services is not in itself undesirable. The system displays diversity and vitality, and these qualities are to be encouraged. What is needed is an official standing apart from, but at the centre of, this range of services. This official would be clearly identified as being responsible for the initiation of court proceedings if the child's situation seemed to demand it. It would be this official's duty to ensure that a case did not remain poised uncertainly between a number of agencies, the concern of all but the responsibility of none. In order to perform this task as effectively as possible he should not be identified with any of the service-delivery agencies. He should have a detailed knowledge of their operation but should stand apart from them. The Youth Advocate would have both of these qualities. He should be an independent official and his work with the Childrens Court will give him a detailed knowledge of the services available in the A.C.T.
- *The importance of independence.* It is desirable that the official responsible for the initiation of care proceedings should be completely independent of those whose task it is to provide welfare services. An independent official would be in the best position to challenge and question those working with a child and his family. A welfare agency might be too willing to hand over a difficult case or, conversely, reluctant to 'let go'. The Youth Advocate would be able to look at a case objectively and hence be in a position to request the agency to persevere. Alternatively, if he concluded that the efforts being made were ineffective and that firm action was needed, he would be able to step in and make an application for a declaration that the child was in need of care. Such decisions can best be made by a person who stands apart from those whose responsibility it is to provide the services. Someone who is independent is in the best position to ensure the provision of the protection and assistance which the child needs. An independent person should be free to concentrate on what is in the best interests of the child. If the decision is made by a person whose agency is also responsible for the provision of services, it is always possible that, consciously or unconsciously, the decision-maker will be affected by such considerations as staff caseloads. The decision-maker might be influenced by the knowledge that court proceedings will result in further work for an already over-burdened staff. Or conversely the agency responsible for the delivery of services might have a vested interest in keeping a matter out of court if proceedings might bring to notice the agency's failure to provide the services which a family plainly needed. Another possibility is that an agency which has failed to provide appropriate services will be all too ready to conclude that court proceedings are necessary. The necessity of providing protection for children and families caught up in the welfare system makes it particularly inappropriate for an agency such as the Welfare Division to assume responsibility for the initiation of court proceedings. An imaginary case study should make this plain.

> A single mother is having difficulties coping with her child and a Welfare Division field worker reaches the conclusion that, as a result of the care which she is providing, the child's health is likely to be impaired. The worker persuades the mother to attend homecraft classes and to place the child in a day care centre for several days a week. This arrangement continues satisfactorily for several weeks, and the mother then decides that she no longer needs help and wants to keep the child at home with her.

If the Welfare Division were able to initiate care proceedings, it would in such a case be in a position to wield too much power. It would not only be able to manage the case at the pre-court stage, but would also be able to initiate potentially coercive proceedings should the client fail to co-operate. Further, once the matter did go to court, it would normally be the Welfare Division which would provide a background report and would almost certainly implement any order made by the court.[187] The creation of an independent official with control over the initiation of care proceedings would be a small but significant step away from a system in which one agency is able to exercise a disproportionate amount of control over the outcome of a case and the provision of services. Reliance on an independent official at the initiation stage would thus reflect the view that checks and balances are vital in any system which permits the exercise of coercive state powers. No matter how benevolent society's objectives, these objectives should be pursued within a framework of fundamentally fair procedures if coercive intervention is a possible outcome. The proposal regarding the Youth Advocate is advanced as a contribution towards the creation of fairer procedures. With regard to the advantages to be derived from having an independent official make the decision to initiate care proceedings, reference can also be made to experience in Scotland. The similarities between the procedures proposed by the Commission and those already in operation in Scotland are discussed below.[188] At this stage it should be noted that an official known as a reporter is responsible for making the decision whether a child alleged to be in need of care should be made the subject of formal proceedings. A commentary on the way the Scottish system functions in respect of non-offenders notes that the reporter is better placed to make the decision than a social worker 'who may well be torn between the interests of the child and the interests of the parents'.[189] By reason of his independence the reporter is in a position to concentrate on the needs of the child. Attention is also drawn to the protection which welfare and health workers can derive from the existence of an official who is responsible for taking the necessary action. In Britain, certain cases, notably that of Maria Colwell[190], have attracted a substantial amount of publicity. The commentary points out that, in the event of any untoward happening to the child, a referral to the reporter constitutes an insurance for a health or social worker, no matter what decision the reporter makes. The writer concedes that receipt of referrals and the need to make decisions about the appropriate action

---

187 The following comment gives an indication of the potential dangers of placing too much power in the hands of one welfare agency. It was made during the course of an analysis of the processing of PINS cases in Rockland County, New York State. 'Once a case is in court, probation's dominant role comes from its control over information . . . [B]ecause probation sees itself as very knowledgeable on the subject of PINS youths, it tends to minimize its need for outside information. Officers admit, for example, that they routinely ignore the reports of the court psychiatrist. Probation officers view the court process as a means to an end: placing a youth back in their guiding hands where they can correct his deficiencies.' Andrews and Cohn, (1977), 65–66.

188 Para.318, 319.

189 Finlayson, 'Cases referred to the Reporter for grounds other than that a child has committed an offence,' (unpublished) (1976), 2.

190 See the Report of the Committee of Inquiry, *Care and Supervision Provided in Relation to Maria Colwell,* (Field-Fisher Report) (1974).

constitute a heavy responsibility, but notes that it is a responsibility which reporters accept when they undertake their appointments.[191]

- *Special expertise and help for court.* By virtue of his training and his association with the Childrens Court, the Youth Advocate would have a detailed knowledge of A.C.T. welfare services and a sound understanding of welfare problems. This knowledge and understanding would enable him to ensure that all appropriate informal solutions have been explored in a particular case and to make an informed decision on the need to initiate care proceedings. Part of the evidence necessary to support a successful application for a declaration that a child is in need of care should consist of information indicating that informal solutions have been tried and failed or are manifestly inappropriate. An official with the training and experience of the Youth Advocate would be well suited to the task of preparing and presenting such evidence.

315. ***Criticisms*** The recommendation regarding the Youth Advocate's role in care proceedings was outlined in the Commission's Discussion Paper, *Child Abuse and Day Care.* The proposal aroused considerable interest and was criticised by some commentators. The criticisms must be examined in turn.

- An unnecessary development. It was said that it was unnecessary to transfer the initiating role to the Youth Advocate. A number of points were made by critics who adopted this view. It was claimed that the need for this new official had not been demonstrated, and that the transfer of the initiating role to him was an unwarranted alternative to the reorganisation and improvement of the welfare services in the A.C.T.[192] In the view of the A.C.T. Branch of the Australian Social Welfare Union, the Commission's recommendation by-passed the more fundamental questions about the changes needed to enable child welfare services in the Territory to function more effectively.[193] Further, two submissions regarded the proposal as a bureaucratic change which would complicate the system by adding yet another agency to the list of organisations concerned with welfare in the A.C.T.[194] In practical terms the most important question raised by criticisms of this kind is why, instead of putting forward the proposal relating to the Youth Advocate, the Commission has not concentrated instead on means of strengthening and upgrading the Welfare Branch and on ensuring that the Director of that Branch or its successor has the powers and resources to enable him to assume responsibility for the initiation of care proceedings.[195] There are a number of answers to this question. The Welfare Branch has adopted a policy of not exercising the power, made available to it under the present Child Welfare Ordinance, to initiate non-criminal proceedings. It has preferred to leave this task to the police. Obviously it could be argued that the new Child Welfare Ordinance should be drafted in such a way as to make clear the Director of Welfare's responsibility for the initiation of care proceedings. There could be appointed to the Division a new staff member who would have the knowledge and experience to prepare cases and to present them in court. These arguments fail to take into account the complexity of the problem. The welfare agencies in the A.C.T. are fragmented and a number of them fulfil ill-defined and overlapping functions. Given the complexity of welfare services in the Territory and the way they have developed, the Commission is not convinced that it is realistic, certainly in the short term, to expect radical changes to the Welfare Branch even if upgraded to a Division, or to the

191 Finlayson, 2.
192 Capital Territory Health Commission, *Submission on DP 12,* 2; Rosemary Nairn (on behalf of the A.C.T Branch of the Australian Social Welfare Union), Oral Submission, Public Hearing, 5 May 1980, *Transcript,* 25.
193 Public Hearing, 5 May 1980, Exhibit C, para. 2.
194 Department of the Capital Territory, *Submission on DP 12,* 3; Kevin McGuire (on behalf of the Australian Association for the Mentally Retarded Inc.), *Public Hearing,* 5 May 1980, Exhibit D.
195 The Capital Territory Health Commission favoured a system in which the Director of Welfare is responsible for the initiation of care proceedings: *Submission on DP 12,* 3. The Department of the Capital Territory also favoured such a system, and suggested that the initiating role should be performed by the Minister or the Director of Welfare. *Submission,* 36. In a later submission, however, the Department suggested that an agency similar to Victoria's Children's Protection Society might also be empowered to initiate care proceedings. See *Submission on DP 12,* 3–4.

organisation of government welfare services in the A.C.T. The confusion, ambiguities and inter-agency tensions are likely to continue for some time. It does not appear adequate to suggest that the existing problems could be solved by requiring the Director of Welfare to exercise the powers envisaged for the Youth Advocate. No matter how sensitive and capable the person who occupies the position of Director of Welfare, the problems are fundamentally institutional. Accordingly they should be met by an institutional solution. It would not be satisfactory to create a system which depends on the personal abilities of a particular Director. To do this would simply mean that the institutional problems would remain and might recur. The present inquiry offers an opportunity to tackle these problems once and for all. The opportunity should not be missed. Finally, reference must be made to the attitude which the Welfare Branch has, in the past, displayed to the initiation of non-criminal proceedings. This attitude is well entrenched. Respectable arguments can be advanced to support it. There are some who believe that it is inappropriate for an agency such as the Welfare Branch to combine coercive functions with the provision of helping services. It can be argued that these two functions are incompatible and that resort to legal proceedings destroys the relationship on which successful casework must rest. A submission prepared by the Welfare Branch conceded that the Branch has left to the police the task of initiating non-criminal proceedings. The submission specifically drew attention to the belief 'that the action of charging a juvenile seriously prejudices the Branch's rehabilitative and preventive roles'.[196] Although this view can be criticised, it should not be ignored. In discussions with the Commission, for example, a number of members of the Welfare Branch expressed approval for the Youth Advocate proposal on the grounds that it was undesirable for the Branch to take cases to court. In their view the Branch should perform a helping role and performance of this role with a family is rendered more difficult if it is the Branch which is responsible for taking them to court. Thus there are a number of inter-related factors. These are the Welfare Branch's failure to exercise its powers under the present Child Welfare Ordinance, the attitudes underlying this failure, and the Commission's assessment of the possibility, in the immediate future, of making radical changes to the organisation of the Territory's welfare services. The second major reason for rejecting the proposition that it is the Director of Welfare rather than the Youth Advocate who should assume responsibility for the initiation of care proceedings is that it is important that the person bearing this responsibility be independent of the agencies whose task it is to deliver welfare services. The Commission's reasons for adopting this view have already been explained.[197] If the Director of Welfare were to combine the initiating role with all his other functions under the new Child Welfare Ordinance, the result would be a system which did not contain those checks and balances on which emphasis has been placed throughout this report.

316. ***Other Criticisms***

- *Too powerful.* It was suggested that the Youth Advocate would be too powerful.[198] With regard to the powers that it is proposed that the Youth Advocate should exercise, it should be noted that the Commission envisages that the post would be filled by an experienced and well qualified person. As to the suggestion that the Youth Advocate would exercise too much power, it is necessary to consider the present situation and the obvious alternative to the Commission's recommendation. This alternative is that the Director of Welfare, in addition to the significant powers which it is contemplated he should exercise under the new Ordinance, should also exercise the powers of the Youth Advocate. In the Commission's view the acceptance of this alternative would result in an unacceptable concentration of power and responsibility in one person. It should also be noted that, under the Commission's proposals, the Director of Welfare would be given extensive powers. These powers would far exceed those exercisable by the proposed Youth Advocate. The Commission's recommendations envisage the diversion of certain limited powers to the Youth Advocate. Far from creating a statutory official with too much power, the Commission's scheme is designed to divide powers in a thoroughly relevant way. The Director of Welfare will concentrate on the organisation and

196 Department of the Capital Territory, *Submission,* 66.
197 See para.314.
198 See, for example, Capital Territory Health Commission, *Submission on DP 12,* 3.

delivery of welfare services. The Youth Advocate will act as a filter between the health and welfare services and the Childrens Court, and make an independent decision on the initiation of care proceedings. Finally, in addition to noting that the powers envisaged for the Youth Advocate are much more limited than those to be exercised by the Director of Welfare, attention should be drawn to certain specific checks on the Youth Advocate's use of his power to control the initiation of care proceedings. These are described in greater detail later in this report, but they may usefully be outlined at this stage. Reference has already been made to the proposed Standing Committee of the Childrens Services Council.[199] It should be obligatory for the Youth Advocate to consult this committee before initiating care proceedings.[200] Thus it is not envisaged that decisions would be made by the Youth Advocate acting alone. The second safeguard should be a special procedure whereby any person dissatisfied with the Youth Advocate's decision not to initiate care proceedings should be permitted to seek special leave from the Childrens Court to apply for a declaration that a child is a child in need of care.

- *Responsibility.* It was suggested that, not only would the Youth Advocate have extensive powers, but he would also have limited responsibility. This is incorrect. The Youth Advocate would be subject to the scrutiny of the Childrens Court, the Childrens Services Council and the Standing Committee. Further, the Commission proposes that, as a formal method of ensuring that the Youth Advocate is answerable for the manner in which he exercises his powers, he should be obliged to report annually to the Childrens Services Council. The Council should be made up of representatives of welfare agencies and should therefore be well placed to monitor the Youth Advocate's exercise of his powers.
- *Lack of power.* In contrast to those who have expressed reservations about the power which the Youth Advocate would be able to exercise are those who believe that he would be powerless.[201] Their argument is that as the Youth Advocate would be independent of all service delivery agencies he would be unable to ensure that a child and his family receives the help which they need. A fundamental principle underlying the new care proceedings is that they should be instituted only when informal methods have failed or are clearly inappropriate. The decision to institute these proceedings must therefore be preceded by a thorough exploration of informal alternatives. It would be the responsibility of the Youth Advocate to ensure that this exploration is undertaken. Critics of the Commission's proposal have claimed that he would be ill-equipped to perform this task.[202] He would not be in a position to compel a reluctant agency to provide service. Nor would he be able to compel the various agencies to co-ordinate their activities. Throughout this report the independence of the Youth Advocate has been stressed as his most important characteristic, yet this very independence means that he would not have any legal authority within the Territory's welfare organisations. The points made by the critics in this regard are to this extent valid. As is explained in Chapter 13, the structure of government in the A.C.T. is such that no person or instrumentality is able to control and co-ordinate the numerous welfare agencies in the Territory. This is one of the most fundamental problems faced by the A.C.T. welfare services, and the Youth Advocate proposal is not being offered as a total solution to this problem. In the absence of a radical re-organisation of government welfare services in the A.C.T.[203] it is not possible to create an agency which could co-ordinate and control the activities of the welfare system. The Commission's proposal regarding the Standing Committee of the Childrens Services Council is aimed at creating a structure to facilitate co-operation and, where appropriate, co-ordination. It is the committee, and not the Youth Advocate, which would endeavour to perform a co-ordinating role. It is not intended that the Youth Advocate should be in a position to exercise control over those who provide welfare services. He would be able to ensure the exploration of informal alternatives to court action only to the extent that the representatives of welfare agencies were willing to co-operate with him. His only legal power would be to initiate care proceedings and so remove a case from the agency or agencies responsible for it. If he were dissatisfied with the handling of a case but decided not to initiate these proceedings, he would have to rely on persuasion. If he were faced with a total refusal to co-operate, the only course open to him would be to refer the matter to the Childrens Services Council.
- *Access to information.* Related to doubts about the powers of the Youth Advocate are doubts about his power to obtain information regarding cases being handled by the welfare agencies. If he is to examine the handling of a case, make suggestions about further avenues which might be explored, make the decision on the initiation of care proceedings, and to present evidence in court in support of an application for a declaration that a child is in need of care, then the Youth Advocate must have access to all information available to the agencies responsible for the handling of the case. This must include access to files. The new Child Welfare Ordinance should make it clear that those involved in the provision of welfare services to children have an obligation to make available information relating to a case. Special provision should be made to authorise the Youth Advocate to obtain information, from the proposed Welfare Division, the Capital Territory Health Commission, and other agencies and individuals, about cases which have come to his notice.[204] Such a provision would allow the Youth Advocate to receive information on the basis of which he could decide whether to initiate care proceedings. A question arises as to whether this power should be exercisable only with the consent of the parents and the child (if he is of sufficient age). On the one hand it can be argued that welfare and health files are confidential, and that, if the Youth Advocate could gain access to them without the clients' consent, welfare and health personnel could feel inhibited in what they record or obliged to inform clients of the Youth Advocate's ultimate right of access. This might make clients unwilling to seek further help. On the other hand is the view that a child in conflict with his parents will not always receive the protection he needs if a parent is able to prevent the release of information to the Youth Advocate. It is the protection of the child, rather than the preservation of confidentiality, which should be the dominant consideration. The new Child Welfare Ordinance should therefore contain a provision requiring members of the proposed Welfare Division and the Capital Territory Health Commission to provide reports to the Youth Advocate when requested to do so. Clients' consent to the release of information to the Youth Advocate should not be required. If the Youth Advocate were not able to gain access to details regarding a case he would not be in a position to make an informed decision as to the initiation of care proceedings. The result could be that he would initiate proceedings when this course was undesirable. Such a result would not be in the best interests of the child. It is to be hoped, however, that the Youth Advocate would not have to resort to legal powers to obtain this information. It is desirable that the system work on a co-operative basis and that information be freely shared at meetings of the Standing Committee. The Youth Advocate should be obliged to ensure that confidential documents relating to a child are adequately safeguarded against third parties. Another more fundamental problem relating to the Youth Advocate's access to information could arise if field workers simply refused to tell him or the Standing Committee about difficult cases. If this occurred the procedures for reviewing the handling of these cases, and for ensuring that the desirability of instituting care proceedings was considered, would not come into operation. The Commission's proposals reflect the view that the present system fails to promote the best interests of children at risk, and that the most appropriate remedy lies in the creation of a single identified official with the power and responsibility to take resolute action when this is needed. Considerations other than those related to children's best interests should not determine the actions of welfare agencies. Members of these agencies should not regard cases as their

199 See para.282 for a description of the Standing Committee.

200 As has been pointed out, this requirement would apply only to the decision regarding the initiation of court proceedings. Special procedures are recommended for dealing with emergencies. See para.305.

201 See, for example, Carney, who has suggested that the Youth Advocate might prove to be a 'paper tiger'. Carney, 'The Youth Advocate: A Case for Further Refinement?' (1980) 5 *Legal Service Bulletin*, 244, 245.

202 See Capital Territory Health Commission, *Submission on DP 12*, 2, and Department of the Capital Territory, *Submission on DP 12*, 3.

203 For a discussion of the need for such a reorganisation, see Chapter 13.

204 Cf. Victoria's provision regarding the procedure to be employed following an application for the administrative admission of a child to the care of the Department of Community Welfare Services. Under s.35(2)(b) of the Community Welfare Services Act 1970 (Vic.), the Director-General of Community Welfare Services may, with the consent of the applicant, require any person to provide a confidential report on any matter relevant to the application. Penalties are provided for a failure to comply and for the wilful making of statements which are untrue.

exclusive preserve. If a member of a welfare agency refused to bring a difficult case to the notice of the Standing Committee or the Youth Advocate (so that the desirability of initiating care proceedings could be explored) that person would bear a heavy responsibility should the child subsequently suffer as a result of the ill-treatment he received. Nevertheless, although it is to be hoped that field workers would not adopt an obstructionist attitude, it must be conceded that, with one major exception, the proposed procedures would rely on the co-operation of those involved in working with children in trouble. The exception relates to child abuse cases. Later in this report the Commission recommends in favour of mandatory reporting, by certain categories of persons, of cases of child abuse.[205] It is recommended that the Youth Advocate be the recipient of such reports. Members of governmental welfare agencies in the A.C.T. should be among those required to report cases of child abuse and thus they would be in breach of the law if they failed to bring cases of this kind to the notice of the Youth Advocate. With regard to other potential care cases (i.e., those which do not fall within the proposed definitions of child abuse) it should also be noted that it should be open to any person to bring a matter to the attention of the Youth Advocate. Further, field officers in the Welfare Branch and the Capital Territory Health Commission work under the supervision of more senior officers, and these officers would be unlikely to countenance a refusal to bring a difficult case to the notice of the Standing Committee (and hence to the notice of the Youth Advocate).

- *Duplication.* Reservations have been expressed that the Youth Advocate would duplicate services provided by welfare agencies. This is not correct. The Youth Advocate would not compete with the Territory's welfare organisations. He would not provide welfare services. The provision of welfare services would remain the responsibility of existing agencies. The mechanisms proposed in this chapter are designed to harness existing services, not to replace or duplicate them. When a member of the Welfare Division or of the Capital Territory Health Commission encounters a case of a child potentially in need of care, he should continue to use the methods and procedures at present employed. Similarly, when a member of the Juvenile Aid Bureau is asked to deal with such a case he should, after preliminary investigation, refer it to the Welfare Division and not to the Youth Advocate. If the members of the police are concerned about a case, they may wish to make the Youth Advocate aware of it, but it is to the existing health and welfare agencies that the police should refer the case.
- *Conflict of roles.* The Youth Advocate's combination of roles has been criticised. Although it is proposed that the Youth Advocate be an independent official, it is said that he would inevitably be identified with the Childrens Court, since he would be able to advise the court as to disposition and would monitor the implementation of court orders. These tasks would be performed both with regard to children who had been found guilty of offences and with regard to children who had been declared to be in need of care. A number of problems arise from the combination of these responsibilities with responsibility for the initiation of care proceedings. These problems are unavoidable in the A.C.T. Ideally, two separate officials should be appointed, one responsible for initiating care proceedings and the other with responsibilities at the post-adjudication stage. The small number of children in need of care likely to be dealt with each year in the A.C.T. Childrens Court makes such a solution impracticable in the Territory. Problems of role conflict are inevitable in any system which deals with small numbers. Therefore the difficulties arising from the Youth Advocate's combination of conflicting roles must be confronted. On one view of the matter it is undesirable for the Youth Advocate, who would be closely associated with the Childrens Court, to exercise control over the selection of cases to be brought before the court. This could give the impression that the court is able to determine which cases are to be heard.[206] Further, it might be argued that the Youth Advocate would have a vested interest in the outcome of the process which he controls. It might be in his interests to create work for himself or, alternatively, to avoid work. Several points must be borne in mind in assessing these criticisms. The Youth Advocate, though closely associated with the Childrens Court, should be an independent official. He should not be part of the court system. Further, the way he exercises his discretion to institute care

[205] Para.396.
[206] For an analysis of possible role conflicts of this kind, see Carney, 245.

proceedings would be the subject of scrutiny. The need to consult the Standing Committee before instituting proceedings, and the possibility that the Childrens Court magistrate would comment adversely or refuse to grant an application for a declaration, should provide some check on any tendency to be too ready to take a matter to court. On the other hand, if the Youth Advocate were unduly reluctant to institute care proceedings, any other person should be permitted to seek the court's leave to do so, and the Youth Advocate's failure to act would thus be subject to comment from the bench. Also, the Childrens Services Council should be empowered to review and comment on his decisions in individual cases. The Council should not fulfil an appellate role, but should be entitled to comment on the policies which the Youth Advocate's decisions reveal. Consideration must also be given to the Youth Advocate's combination of roles at the initiation stage and dispositional stage of the process. With regard to this combination, it must not be overlooked that it is the specialist magistrate and not the Youth Advocate who would make the dispositional decision. Further, it is to be hoped that the magistrate would exercise his discretion on the part which the Youth Advocate would be permitted to play at the dispositional stage in care proceedings. Although the Youth Advocate would be available at this stage to make comments and offer advice, the court could minimise his role and, in reaching its decision, rely mainly on reports submitted by the Welfare Division or by other interested agencies or individuals. Also, if it were thought that the Youth Advocate's combination of roles were a threat to the child and his family, it must not be overlooked that the system of legal representation proposed by the Commission is designed to ensure that protection would be provided during court proceedings.[207] It is not intended that the Youth Advocate should usurp or diminish the role of the legal representative. It has been argued that, in a court for children, it is a serious mistake to jettison the advantages of role differentiation. Distinctions should be preserved between the informant/prosecutor, the social science fact-gatherer, the defence lawyer and the adjudicator.[208] The Youth Advocate's proposed combination of functions in care proceedings does not completely conform to this requirement, since he would be both the informant/prosecutor and a social science fact-gatherer. The combination does not, however, represent a total rejection of the requisite role differentiation, since provision would also be made for other social science fact-gatherers (such as members of the Welfare Division or the Capital Territory Health Commission) who would be available to provide background reports and reports making recommendations about disposition. Finally, and most important, whatever reservations might be expressed about the Youth Advocate's proposed combination of roles, it should be noted that the obvious alternative to the Commission's recommendation is to invest the Director of Welfare with responsibility for the initiation of care proceedings. Such a solution would produce a far more disturbing concentration of potentially conflicting roles. As has been noted, acceptance of the Commission's proposals would give the Director of Welfare extensive powers. These powers would far exceed those exercisable by the Youth Advocate.

317. ***Access to Court by Other Persons*** Implementation of the Commission's proposals would lead to the creation of an official occupying an important position. It is envisaged that the Youth Advocate, by being responsible for the initiation of care proceedings, should be able to control access to the court in certain matters. If the Youth Advocate refuses to make an application for a declaration that a child is in need of care it should be possible for a person dissatisfied with his decision to approach the court to seek leave to have the matter brought before the court.[209] This should be a special procedure, quite distinct from the making of an application for a declaration that a child is a child in need of care, and should be employed only after consultation with the Youth Advocate. Such action might, for example, be taken by a social worker or a police officer who feels that a child has been

[207] See para.330.
[208] Handler, 'The Juvenile Court and the Adversary System: Problems of Function and Form', *Wisconsin Law Review*, 7, 43 (1965).
[209] Cf. the English procedure. Under s.1(1) of the Children and Young Persons Act 1969 (U.K.) any local authority, constable or authorised person may initiate care proceedings. A parent or guardian may not bring care proceedings, but may request the local authority to do so. If the authority refuses or fails to act on the request within 28 days the parent or guardian may apply to the juvenile court for an order directing the authority to bring care proceedings. (Children and Young Persons Act 1963 (U.K.), s.3).

placed at risk by the Youth Advocate's decision to persevere with informal measures. Or it might be taken by or on behalf of a child who feels that too much pressure has been put on him in an attempt to secure compliance with a treatment program. In such a case the applicant would, in effect, be able to ask the court either to instruct the Youth Advocate to establish before the court that the child is a child in need of care or to direct the welfare authorities to desist from interference in his life. An older child who is in conflict with his parents and who wishes to leave home might employ the procedure if the Youth Advocate has not taken care proceedings. A parent might also seek leave to initiate care proceedings. Under s.53(1) of the Child Welfare Ordinance a person having the care of a child or young person may apply to the Childrens Court to have him dealt with as an uncontrollable child or young person. This is an undesirable procedure as it can result in a parent laying what looks like a charge against his own child. It also involves a stark and public abdication of responsibility for the child. Nevertheless, when uncontrollability charges have been replaced by care proceedings, there will still be cases in which parents will wish to approach the welfare authorities for help. Having done so they may be dissatisfied if care proceedings are not initiated. Such a parent should be permitted to ask the court to review the matter.

318. ***A Scottish Precedent*** Although the appointment of the Youth Advocate would represent an innovation in Australia, officials of the kind envisaged by the Commission have been appointed in Scotland. The similarities between the proposed Youth Advocate and these officials, known as reporters, are particularly close. Further, in a submission to the Commission, the Department of the Capital Territory suggested that the appointment of an officer with functions similar to those of the Scottish reporter might be considered. The submission continued:

> It is agreed that there is value in the concept of having a central point for 'screening' cases to be presented to the Court.[210]

The Commission's proposals are designed to provide just such a central 'screening' point. The Department's submission[211] added that the reporter's role should be much narrower than that suggested by the Commission in its Discussion Paper, *Child Abuse and Day Care.* In the light of comments and criticisms received, the Commission's proposals have been further refined since the publication of the Discussion Paper. The limited range of functions recommended for the Youth Advocate have been explained earlier in this report.

319. ***The Scottish Reporter*** The close similarity between the role envisaged for the Youth Advocate in care proceedings and that fulfilled by a reporter can be illustrated by reference to the following points:

- A reporter is an independent official. Although appointed by a local authority[212], he is not a member of the staff of the local authority's Social Work Department.
- Any person may refer to him a case involving a child thought to be in need of compulsory measures of care.[213] Special obligations are imposed on a local authority.[214] In practice, reports come to the reporter from the local Social Work Department, doctors and health workers, and members of voluntary organisations.
- When notification of a case is received he may make his own inquiries.[215] It is common for him to communicate personally with welfare and health personnel in order to obtain information which will assist him in making a decision on the most appropriate course of action.
- If he considers that assistance can appropriately be given on an informal basis he can arrange for this to be provided by the local authority Social Work Department.[216]

---

210 Department of the Capital Territory, *Submission on DP 12*, 4.
211 ibid.
212 Social Work (Scotland) Act 1968 (U.K.), s.36(1). Note also s.36(4) which states that a reporter may not be removed from office by a local authority or be required to resign except with the consent of the Secretary of State.
213 id., s.37(1).
214 id., s.37(1A). This provides that where a local authority receives information suggesting that a child may be in need of compulsory measures of care, they shall cause inquiries to be made if these are necessary, and, if it appears that the child may be in need of compulsory measures of care, give the reporter such information as they have been able to discover.
215 id., s.38(1).
216 id., s.39(2).

- He is able to fulfil his functions notwithstanding the fact that he is not a member of an agency responsible for the provision of welfare or health services. Although he is not in a position to direct a member of such an agency to provide a particular type of service or to take a specified course of action, much can be achieved on the basis of a relationship of trust existing between him and members of welfare and health agencies.
- When information on a case has been received, he decides whether care proceedings should be instituted.[217] There is no right of appeal against his decision. A reporter's decision is final even if that decision is not to refer a case to a Hearing when the local Social Work Department believes that the child is in need of compulsory measures of care.
- The local authority performs its duties independently of the reporter. It is, for example, responsible for providing a hearing with background reports and for implementing such orders as supervision orders.
- Where a child has been taken into custody and detained in a place of safety, a reporter may decide to release him without taking him before a Hearing.[218]
- When a hearing in the Sheriff Court is necessary[219], the reporter prepares and conducts the case, and examines and cross-examines witnesses.
- A reporter, in addition to fulfilling the functions outlined above, has a number of administrative responsibilities. These include:
  - the maintenance of records;
  - arranging for Hearing members to receive the various background reports and papers relating to each case;
  - attendance at each session of a Children's Hearing and advising members; and
  - making arrangements for appeals.

Thus procedures substantially of the kind recommended by the Commission are already in operation in Scotland. Attention must, however, be drawn to two important differences. In certain significant respects the powers exercisable by a reporter are more extensive than those proposed for the Youth Advocate. A reporter's screening functions are not only exercisable with respect to proceedings involving non-offenders. They are also exercisable with respect to the great majority of cases involving allegations of criminal conduct by those under 16. When an alleged offence by a child under 16 is brought to a reporter's attention by the police, it is the reporter who is responsible for deciding whether formal proceedings should be instituted. The contrast between this power and the more limited powers of the Youth Advocate is striking. The Youth Advocate would have no jurisdiction in criminal matters. Further, unlike the legislation prepared by the Commission, the Social Work (Scotland) Act 1968 contains no provision allowing a person aggrieved by a reporter's failure to institute proceedings to bring a matter before a Children's Hearing. It is clear that any suggestion that the Commission's proposals are unworkable is simply misconceived. Scottish reporters are already performing a wide range of the functions which it is envisaged that the Youth Advocate will undertake. In certain important respects the powers which the Youth Advocate would exercise would be less than those exercised by a reporter.

320. ***The Office of the Youth Advocate*** Although later in this report there is a further discussion of the role of the Youth Advocate[220], it is appropriate at this stage to bring together all his functions and to discuss the organisation and staffing of his office. It is proposed that the Youth Advocate should perform duties with regard to offenders as well as non-offenders. In respect of children in the latter category he should, after consultation with the Standing Committee, be responsible for the initiation of care proceedings. He should be responsible for reaching a decision as to whether an application should be made for a declaration that a child is in need of care. When it is decided to make such an application, he should act as informant, ensure that the necessary evidence is assembled, and present the case in the Childrens Court. With regard to children declared to be in need of care, as with those

---

217 id., s.39(3).
218 id., s.37(3).
219 Under s.42 of the Social Work (Scotland) Act 1968 (U.K.), if the parties appearing before a Children's Hearing dispute, or do not understand, the grounds of referral, the reporter must make application to the sheriff for a finding as to whether the grounds are established.
220 Para.362f.

found to have committed offences, the Youth Advocate should play an important role at the dispositional stage. He should comment on background reports furnished by other agencies and provide advice on an appropriate disposition. On occasions he should assist in the formulation of the details of a dispositional order. If a child who has been declared to be in need of care, or who has been found to have committed an offence, is made the subject of a residential order or an order involving supervision, the Youth Advocate should be responsible for monitoring his progress under the court's order. He should also chair the Standing Committee of the Childrens Services Council, be a member of that Council and, on the Council's behalf, prepare statistics on the operation of the Childrens Court. Reference has been made to the Youth Advocate's obligation to prepare statistics on young offenders in the A.C.T.[221] He should perform a similar task with regard to children who are the subject of care proceedings. Finally, he should receive reports on suspected cases of child abuse, and compile a register of those reports. The Youth Advocate should be a statutory officer, appointed by the Governor-General. He should desirably have social work or behavioural science qualifications, but, ideally, he should combine these with a qualification in law. Although it is a little difficult to predict his workload, it is recommended that he should have a staff of two, and that his staff requirements should be kept under review. His staff should initially consist of an assistant and a clerk–typist. The Youth Advocate's major tasks should be to maintain regular contacts with welfare agencies so that he accumulates a detailed knowledge of the services available, to chair the Standing Committee, and to make decisions on the initiation of care proceedings. When the Youth Advocate is not available (by reason of illness or during a period of leave), his assistant should be empowered to assume his duties. The major role of the assistant, however, should be to act as the Youth Advocate's court officer. For this reason he should desirably have a qualification in law, but he should combine this with social work experience. When the Childrens Court is dealing with offenders, the assistant should be available in court to advise the magistrate on the need for background reports and on other matters relating to disposition. When care proceedings are brought before the court, it should be the assistant's task to act as the applicant. He would thus perform a role analagous to that performed in criminal matters by an officer of the Deputy Crown Solicitor's office. At present the Childrens Court sits for approximately five mornings each week. If this pattern continues it will mean that the assistant would spend most mornings in court. In the afternoons he would normally be free to monitor the progress of children who are subject to probation, attendance centre, supervision or residential orders. When the assistant is unavailable the Youth Advocate should appear in court and should undertake the above-described duties. The clerk–typist should be responsible for clerical duties, the collection of progress reports on children who have appeared before the court and the compilation of statistics under the direction of the Youth Advocate. It is vital that the Youth Advocate should have sufficient staff to ensure the performance of his various duties. Any structural reform is doomed if the necessary resources are not made available. If an agency troubled by a case were to report it to the Youth Advocate and then discover that the Youth Advocate and his staff were too busy to give it proper attention, the result would be damaging disillusionment and an unwillingness to report further cases.

321. ***Alternative Models*** The Commission's recommendation regarding the Youth Advocate represents what it believes to be the best solution to the problem posed by the unsatisfactory situation regarding the initiation of non-criminal proceedings in the A.C.T.[222] If this solution were to be regarded as unacceptable, two other courses could be considered, but neither seems likely to overcome the difficulties which have been identified in this report. Further, the Commission believes that the creation of the Youth Advocate would be an important innovation. Such an official would be in a position to make a significant contribution to the development of child welfare procedures in Australia. The alternative models which could be considered are as follows:

- *Major responsibility vested in the Director of Welfare.* The objections to a system in which the Director of Welfare has responsibility for the initiation of care proceedings have already been outlined[223], but they can be conveniently summarised here:

[221] Para.146.
[222] For illustrations of the problems, see the case studies outlined in para.276.
[223] Para.314–316.

  - Under the present Ordinance there are procedures which could be invoked by members of the Welfare Branch to initiate non-criminal proceedings, but the powers conferred by the Ordinance are not used. The practice is to leave the initiation of these proceedings to the police. If the Commission were to do no more than recommend that the new legislation should provide that the Director of Welfare should be authorised to exercise powers which have existed in the past, but which have not been used, there would be no guarantee that children would receive the protection they need.
  - As a matter of principle it is desirable that the decision to initiate care proceedings should be made by someone independent of those responsible for the delivery of welfare services. Checks and balances are necessary in any system which permits the exercise of coercive state powers. Desirable checks and balances would not exist in a system which permitted the Director of Welfare to control the provision of informal welfare services, make the decision as to the initiation of court proceedings, furnish background reports and implement the court's orders. From the point of view of the welfare workers there are also certain clear advantages in a system which requires the decision to initiate formal proceedings to be made by an independent official.
  - If, in addition to all his other duties, the Director of Welfare were to assume responsibility for the initiation of care proceedings, this would result in an unacceptable concentration of power in one person. It is to avoid this concentration of power that the Commission proposes that certain limited functions be performed by the Youth Advocate.

  If, notwithstanding these arguments, it is decided that the Director of Welfare should assume responsibility for the initiation of care proceedings, the new Ordinance should make clear his responsibility for this task. In order to permit the Director to fulfil this function it would be necessary to appoint to his staff a person with the training and experience to prepare cases and present them in court.
- *The Standing Committee.* The second alternative would be to empower the Standing Committee of the Childrens Services Council to function as a screening panel. It would thus have decision-making powers rather than a purely advisory role. Its members could review difficult cases and, by majority, decide whether care proceedings should be instituted. The Commission rejects this model because members of the Standing Committee would not all be independent of the service-delivery agencies. Further, a committee would not provide such an obvious and clear focus as would a single official. Such an official is more likely than a committee to take decisive and resolute action, and when a decision has been made it will be plain where responsibility lies. By its nature a committee could tend to reach compromise 'wait and see' decisions.

Care Proceedings: Procedural Aspects

322. ***Outline of Procedure*** As applicant in proceedings for a declaration that a child is in need of care, the Youth Advocate or his assistant would have the task of leading evidence that the child falls within one or more of the definitions of children in need of care and that an informal solution is inappropriate. As a party to the proceedings the Youth Advocate would have the power to summon witnesses and to require the production of files. On occasions the Youth Advocate may find that, though he believes that court action is necessary, he has insufficient evidence to establish that a child is a child in need of care. In such a case he should be able to request an assessment of the child's situation. If the court grants this request it should be able to order a member of the proposed Welfare Division or a member of the Capital Territory Health Commission to prepare a report on the child. It is not envisaged that the Youth Advocate should have the power to order reports. Only a court should be permitted to authorise the intrusion into a family's life which the preparation of a report involves. The subject of court reports in care proceedings is discussed in greater detail below.[224] Provided they can be located, the child's parents or guardians should be made parties to an application for a declaration that the child is in need of care. It should be possible for the court to order the parents' attendance at the hearing if the magistrate considers this reasonable. The child himself should also be a party to the proceedings[225]. If the child has attained the age of 10 years a copy of the

[224] Para.328.
[225] Cf. Children's Protection and Young Offenders Act 1979 (S.A.), s.12(2).

application should be served on him, although this should be done by a member of the Youth Advocate's staff and not by the police.[226] Very young children involved in care proceedings should not have to appear in court. Under the existing system, magistrates occasionally deal with neglect cases without requiring the young child's attendance in court. In such matters they visit the child to ascertain his condition. This is a practice which should be encouraged with regard to children who are too young to understand the proceedings. As far as possible, the hearing should proceed in two stages. First, the court should determine whether there is sufficient evidence to warrant the making of a declaration that the child is in need of care. It must decide whether his situation is such as to bring him within one of the legislative definitions set out above[227], and it must decide whether the situation is one which can be met only by way of a court order. Secondly, if the court makes a declaration that the child is in need of care, it should reach a conclusion on the order which it should make. At each stage the child and his parents should be given an opportunity to express their views, to cross-examine witnesses and to call evidence. The separation of the two stages cannot always be as complete as in criminal proceedings, since evidence relating to the child's background and to the search for an informal solution will often be relevant to the disposition decision as well as to the making of the declaration. Much will depend on the grounds on which the proceedings have been brought. If the application for a declaration that a child is in need of care is based on the allegation that a specific act or series of acts has been committed, either by a parent or a child, the commission of these acts should be established before evidence relevant to the dispositional decision is heard. For example, if allegations of physical or sexual abuse have led to the making of the application, or if it is alleged that the child has engaged in behaviour harmful to himself, a clear distinction can and should be made between the adjudication stage and the dispositional stage. The allegation should first be proved. Only after this has been done should evidence relating to the child's background be introduced. However, if the application is based on the ground that the circumstances in which the child is living are likely to impair his health, the court must of necessity undertake a broad-ranging inquiry into the child's situation. In such proceedings it is impossible to draw a clear line between evidence which relates to the adjudication decision and that which relates to the dispositional decision.

323. ***Importance of Informality*** The court should place special emphasis on informality, on making the proceedings comprehensible to the child and his parents, and on giving the child an opportunity to participate and to express his views. In conversations with members of the Commission, children who had been dealt with as neglected or uncontrollable expressed bitter criticisms of the procedures to which they had been subjected. A common feeling was that no one had listened to their view and that it was only the adults who were heard. Some of the comments made were as follows:

- 'I just sat there and everyone else was talking.'
- 'How can you talk to someone sitting up there looking so big and tough.'
- 'I suppose I was scared of him.'
- 'All [the magistrate] does is scare the kids – they don't want to talk.'
- 'I've never spoken in the Childrens Court.'
- 'They treat you as if you'd robbed a bank.'

These comments probably reflect a fairly typical perception of courts by children, afraid of the law and inexperienced in its ways. In seeking to reform existing procedures, attention should also be paid to the possibility that a hearing in chambers will frequently be more suitable than a hearing in a formal court-room. There will be some care applications which lend themselves to round-table informality. This will not, however, be the case with all such matters. If the application is hard-fought, court-room formality might be desirable. The care jurisdiction is one in which particular emphasis should be placed on flexibility. Informality is the best means of encouraging children to participate in the proceedings. However, the objective should also be given legislative recognition by conferring on the child a right to be heard. A precedent for this already exists in s.64(1)(b) of the Family Law Act 1975 (Cwlth), although the right is confined to children 14 and over. The legislation creating care proceedings should make it clear that the child who is the subject of the proceedings

[226] Cf. Children's Protection and Young Offenders Act 1979 (S.A.), s.13(1), which requires service if the child is over the age of 10.

[227] Para.304.

must be consulted by the court if he is old enough to express an opinion. This consultation should include an opportunity to comment on the evidence presented in support of the application and, when a declaration has been made, on the order which the court proposes to make.[228] No minimum age should be specified, and it should be left to the court's discretion to decide when a child is too young to be consulted and what weight should be attached to the views of a young child.[229] Children's participation could also be encouraged by making it possible to exclude the parents or guardians from the hearing, where this is considered appropriate by the court.[230] Achievement of the objective of making the proceedings as comprehensible as possible would be assisted by imposing on the court a duty to explain, in simple language, to the parents and to the child (if he is old enough) the nature of the proceedings and the grounds on which they have been brought.[231] Finally, in order to emphasise the distinction between criminal proceedings and care proceedings, special sitting times should be set aside for the latter. The time allocated for each case must be adequate and any suggestion of a hasty, mechanical hearing avoided.

324. ***Standard of Proof*** The Commission is at present conducting an inquiry into the law of evidence as it applies in federal and territorial courts. In this report, therefore, only a limited number of issues relevant to the reform of the law of evidence are addressed. Throughout this chapter emphasis has been placed on the need to 'decriminalise' care proceedings and on the importance of creating procedures quite different from those used in respect of young offenders. If care proceedings are to be civil in nature, this suggests that the civil standard of proof should be adopted. The present Child Welfare Ordinance does not deal with the standard of proof required in neglect and uncontrollability matters, and the question of the appropriate standard in proceedings of this kind has attracted a good deal of attention. The N.S.W. Green Paper favoured the adoption of the civil standard (i.e., that the court must be satisfied on the balance of probabilities).[232] This standard has been adopted for care proceedings in South Australia.[233] On the other hand in N.S.W. the Muir Report recommended that the allegations should be proved beyond reasonable doubt because a finding that a child is neglected or uncontrollable could well result in an order that he be removed from the care of his parents.[234] It must be remembered that the civil standard of proof requires the court to be *satisfied* on the balance of probabilities. As has been pointed out many times by the High Court of Australia the court or the tribunal should act with much care and caution before finding that a serious allegation is established.[235] In *Briginshaw* v. *Briginshaw*[236] Mr Justice Dixon (as he then was) explained the standard of proof of an allegation of adultery in a matrimonial cause as follows:

[228] Cf. r.21 Magistrates' Courts (Children and Young Persons) Rules 1970 (U.K.).

[229] The Commission's recommendation that no minimum age should be specified is in line with proposed amendments to the Family Law Act 1975 (Cwlth). Late in 1980 the Commonwealth Attorney-General, Senator Durack, announced that s.64(1)(b) would be repealed and replaced by 'a provision enabling the wishes of children of all ages to be taken into account to the extent appropriate.' *Press Release,* 11 December 1980.

[230] Where a parent is asked to withdraw, he should subsequently be told the substance of any statement made by the child and be given an opportunity to comment and to call evidence. Cf. r. 18(2) Magistrates' Courts (Children and Young Persons) Rules 1970 (U.K.).

[231] Cf. r.16(1) Magistrates' Courts (Children and Young Persons) Rules 1970 (U.K.).

[232] *Green Paper,* 34.

[233] Children's Protection and Young Offenders Act 1979 (S.A.), s.17(2). See also *Poole and Poole* v. *Hunt* (1979) 22 SASR 293. This decision dealt with the State's previous legislation, the Juvenile Courts Act 1971 (S.A.). The South Australian Supreme Court discussed the relevant principles and decided in favour of the civil standard of proof.

[234] *Muir Report,* 82. But cf. the report's recommendations regarding a new form of procedure to be employed in respect of alleged offences by children aged 10 and under 14. It was proposed that such children be dealt with as being in need of care and control. It was recommended that a two-stage procedure be employed and that the commission of an offence be proved beyond reasonable doubt. It was further recommended that the need for care, protection or control be determined on the balance of probabilities. id., 44.

[235] *Helton* v. *Allen* (1940) 63 CLR 691; *Rejfek* v. *McElroy* (1965) 112 CLR 517; *Briginshaw* v. *Briginshaw* (1938) 60 CLR 336; *Watts* v. *Watts* (1953) 89 CLR 200; *Mann* v. *Mann* (1957) 97 CLR 433; *Locke* v. *Locke* (1956) 95 CLR 165; *Murray* v. *Murray* (1960) 33 ALJR 521.

[236] (1938) 60 CLR 336.

> The truth is that, when the rule requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of mere mechanical comparison of probabilities independently of any belief in its reality ... Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. Reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.[237]

In the later case of *Murray* v. *Murray*, the matter is referred to in the following terms:

> What the civil standard of proof requires is that the tribunal of fact, in this case the judge, shall be 'satisfied' or 'reasonably satisfied'. The two expressions do not mean different things but as in other parts of the law the word 'reasonably', which in origin was concerned with the use of reason, makes its appearance without contributing much in meaning. However, its use as a qualifying adjective seems to relieve lawyers of a fear that too much unyielding logic may be employed.... On civil issues there is one standard, that of persuasion to the reasonable satisfaction of the tribunal but a sensible tribunal will not ignore the nature of the issue in arriving at its conclusion and that of course applies to a charge of adultery.[238]

In applying the standard of balance of probabilities in neglect and uncontrollability matters, a court would and should be influenced by the seriousness of the proceedings and of the allegations raised. It is recommended that, in care proceedings, the civil standard of proof be adopted and a provision to that effect be incorporated into the new Child Welfare Ordinance. The criminal standard of proof beyond reasonable doubt is not appropriate in care proceedings, in which a concern for children's welfare must be combined with a concern for their rights and liberty and for the rights of their parents. If the criminal standard were adopted, a failure to meet this standard might result in a failure to give children the protection they need. Further, the adoption of the criminal standard would be incompatible with the principle that care proceedings should manifestly be civil proceedings. As has been pointed out in *Poole and Poole* v. *Hunt*, non-criminal proceedings before a Childrens Court have much in common with custody proceedings in matrimonial disputes.[239] The recommendation that the civil standard of proof should be adopted reflects this similarity. It is logical that the same evidential rule should apply to a custody argument between parents as to a custody argument between the state and a child's parents. Indeed, although the judgment of Mr Justice Zelling in Poole's case did not cite *Briginshaw*, it echoes the principle stated by Mr Justice Dixon. After stating that, in neglect proceedings, the case must be proved on the balance of probabilities, the Judge added:

> Nevertheless questions such as these are of importance both for the child and its parents and his siblings and they can only be decided bearing in mind the serious consequences of making or refusing an order.[240]

325. ***Other Rules of Evidence*** In considering the nature of care proceedings brought under s.1 of the Children and Young Persons Act 1969 (UK), Lord Widgery described these proceedings as 'essentially non-adversary, non-party'[241] and characterised them as 'an objective examination of the position of the child'[242] in which parents and others concerned in the child's care must take part.

> Section 1 is not set up in such a form as to provoke a contest between the [applicant] and the parent or, even more, the child and the parent.[243]

---

237 id., 361–362.
238 (1960) 33 ALJR, 521, 524–525.
239 (1979) 22 SASR 293, 299. There Zelling J stated: 'The provisions as to the care and custody of a neglected child are merely a species of the wider genus custody. A custody argument between parents is an argument to which the civil onus applies. No different considerations apply where the contest in custody is between an infant and an institution.' (He cited the judgment of Cussen J in *The King* v. *Dunkin; Ex parte De Vries* [1917] VLR 655.).
240 (1979) 22 SASR 293, 300.
241 *Humberside County Council* v. *DPR (an infant)* [1977] 3 All ER 964, 967.
242 id., 966.
243 id., 966.

These comments raise questions about the nature of the new procedure proposed by the Commission. Although the special nature of care proceedings requires some relaxation of formal courtroom procedures, it is not recommended that the adversarial framework be wholly rejected. As an English report has noted, Lord Widgery's remarks bring into the open the essential ambiguity of care proceedings.[244] On the one hand the aim is to look after the interests of the child concerned, but, on the other, there will be occasions when the application is contested, and it must be recognised that the court's primary task is to decide, on the basis of the evidence presented by the parties, whether the applicant has made out his case. It is therefore unhelpful to describe the proceedings as 'non-adversary'. Nevertheless, while the adversarial framework should not be rejected, provision should be made for the use of modified procedures when these are appropriate. There are a number of precedents for provisions designed to permit departures from formal evidential rules. These allow the relevant court to proceed in an informal manner[245], to inform itself on any matter in such manner as it thinks fit and not be bound by the rules of evidence[246], and to act on any statement or document which may assist it, whether or not this statement or document would be admissible in evidence.[247] The new Child Welfare Ordinance should provide that, when hearing an application for a declaration that a child is in need of care, the Childrens Court:

- shall not be bound by the rules of evidence;
- may inform itself on any matter relating to the proceedings in such manner as it thinks fit;
- is not bound to act in a formal manner; and
- may act upon any statement or document whether or not that statement or document would be admissible in evidence.

The Commission acknowledges that such statutory injunctions are not always observed, particularly in tribunals constituted of lawyers accustomed to the traditional laws of evidence. However, the appointment of a specialist magistrate and the Youth Advocate, together with the provisions of the new Ordinance, may ensure that there is a greater chance of the legislative instructions being obeyed in the Childrens Court. The Commission's recommendations are designed to permit the Childrens Court to adopt a flexible approach when dealing with care proceedings. However, there is one principle which should be preserved.[248] The proposed provision should not derogate from the parties' right to be informed of the evidence placed before the court and, in appropriate cases, to test or contradict it.

326. ***Admitting the Case*** As a report on care proceedings in England points out, in theory it should be possible for the child to make a formal admission in respect of the allegations made by the applicant.[249] If this were to occur, the court could make an order without hearing evidence on the child's situation and needs. The Commission agrees with the report's conclusion that admissions of the whole case on the part of the child are generally inappropriate in care proceedings.[250] The same

---

244 *ABAFA Report*, 22.
245 For example, Conciliation and Arbitration Act 1904 (Cwlth), s.40(1)(b); Children's Court Act 1973 (Vic), s.20(2), and Family Law Act 1975 (Cwlth), s.97(3).
246 For example, Conciliation and Arbitration Act 1904 (Cwlth), s.40(1)(b); Administrative Appeals Tribunal Act 1975 (Cwlth), s.33(1)(c); and Children's Protection and Young Offenders Act 1979 (S.A.), s.17(1). The A.C.T. Police also drew attention to the Coroners Ordinance 1956 (A.C.T.). This states that: 'The Coroner shall not be bound to observe the rules of procedure and evidence applicable to proceedings before a court of law.' It was the police view that the flexibility which a provision of this kind permits should be available in non-criminal proceedings involving children. *Submission*, 8.
247 For example, Juvenile Courts Act 1971 (S.A.), s.58(2); and Child Welfare Act 1939 (N.S.W.), s.81B. The latter section is confined to cases involving children who have allegedly been ill-treated or exposed, but it has been proposed that it should be amended to apply to all care proceedings. (See *Green Paper*, 36). For a discussion of the deficiencies of s.81B, see Lucas, '"Evidence" and the Child Welfare Act,' (1979) *Law Society Journal*, 81, 82–83.
248 Lucas, 85.
249 *ABAFA Report*, 30.
250 id., 31. The working party did, however, recommend that it should be possible for a legally represented child to admit the primary ground (i.e., that he came within one of the categories of children in need of care as defined in s.1(2) of the Children and Young Persons Act 1969 (UK)) but not that he was in need of care or control which he was unlikely to receive unless the court made an order. In the Commission's view it is preferable for the court to hear the applicant's evidence on both aspects of the case.

comment could be made about possible admissions by the parents. In dealing with an application for a declaration that a child is in need of care, the court's task should be to assess the child's situation and to determine whether it is such as to necessitate court intervention. It cannot do this if it is deprived, by a formal admission, of the opportunity to hear the applicant's evidence. The law should therefore make it clear that it is not open to the child or parents to make such an admission.

327. ***Interim Orders*** The law governing the remanding of children at present dealt with as neglected or uncontrollable is unclear.[251] It is recommended that it be amended to indicate precisely the courses open to the court when it wishes to adjourn care proceedings. The court should exercise close and direct control over any remand in custody, and therefore the existing practice of adjourning matters on condition that a child live where directed by the Director of Welfare should be abolished. Because care proceedings should be quite distinct from criminal proceedings there should be no possibility of releasing the child on bail. The courses open to the court when it wishes to adjourn a case should be as follows:

- *Live at home.* To permit the child to return home or to continue to live at home.
- *Live with a suitable person.* To direct that the child be placed, or remain, in the care of a suitable person. By this means it will be possible for the child to be placed with a relative or other person who is willing to care for him. It is not intended that this power be used to place a child in the care of the Director of Welfare. If the power were so used, the result would be the revival of the live where directed order.
- *Approved home or shelter.* To direct that the child be placed, or remain, in an approved home or shelter. Certain homes should be designated by the Director of Welfare as approved homes for remand purposes. Among the homes which could be so designated are Marymead Children's Home, and homes run by Dr Barnardo's and the Richmond Fellowship. As at present, the homes run by voluntary organisations should not be compelled to accept a child on remand. Only if they are willing to accept a child should the court place him in the care of such an organisation. Quamby Children's Shelter should continue to perform a residual function, but it is only in exceptional circumstances, when no other suitable placement is available, that a child who is the subject of care proceedings should be placed in this shelter. The holding of such children in the same premises as children alleged or found to be offenders is thoroughly objectionable, and must be tolerated only because the number of non-criminal children coming to notice in the A.C.T. is probably too small to warrant the operation, by the proposed Welfare Division, of a separate receiving home for children in need of care. In each case the court should specify the home in which a child is to be held.
- *Hospital.* To direct that the child be placed, or remain, in a hospital. This power is necessary to allow the holding of a victim of child abuse in hospital. However, on occasions it may also be used to permit a placement in a psychiatric ward. In practice the power to place the child in a hospital can be exercised only with the agreement of the hospital superintendent or other person authorised to control admissions.

It is recommended that, except in exceptional circumstances, no period of adjournment exceed 21 days. It is further recommended that, if no order is made by the court within six months of the making of an application for a declaration that a child is in need of care, the proceedings should lapse. As has been noted in the description of existing procedures with regard to neglected and uncontrollable children, a feature of these proceedings is the frequent use of adjournments while further inquiries are made and possible solutions explored.[252] Although this is understandable, protracted proceedings are undesirable. The recommendations for time limits are intended to lead to the speedier disposition of non-criminal matters. If adjournments were no longer than 21 days, the court would be able to take a close interest in each case and would be able to curb any tendency for those involved to handle a case in an aimless and irresolute manner. The disadvantage of short periods of adjournment is that children are continually brought back to court for what to them seems a pointless procedure, since the result is no more than another adjournment. Repeated formal appearances at which nothing is decided other than the need for a further adjournment are disturbing and incomprehensible to a child. This problem can be avoided by empowering the court to dispense with the child's attendance when it is reasonable to do so.

[251] See para.42, 43.
[252] See para.266.

328. ***Reports to Assist the Court*** When dealing with an application for a declaration that a child is in need of care, the court may derive benefit from written reports containing two types of information. On the one hand are reports (referred to here as 'social inquiry reports') the purpose of which is to give information and opinions on the personality of the child and his parents, their health, the family's social situation, and the child's problems and needs. On the other hand are reports (referred to as 'disposition reports') the purpose of which is to present a recommendation as to the most appropriate order to be made in respect of the child. A consideration of the use which should be made of social inquiry reports raises difficult problems. As has been pointed out in Chapter 5, when the court requires background information regarding a young offender, it should be permitted to request a social inquiry report, but it should be permitted to do so only after the offence has been admitted or proved.[253] Preparation of a social inquiry report requires serious intrusion into a family's privacy and may produce prejudicial information. Hence the compilation of the report should be undertaken only after society's right to intervene in the life of the child and his family has been established to the satisfaction of the court. At first sight a similar principle should always be applied in care proceedings, and a social inquiry report should be requested only after the court has declared the child to be in need of care. Such a principle is not, however, appropriate to proceedings of this kind, since it is only by understanding the child's background and needs that the court may decide whether the child is in need of care. Yet, as an English analysis of the problem has noted, objection can be taken to the inclusion, in a social inquiry report, of information relevant to the court's decision whether it has jurisdiction to make an order.[254] This analysis puts forward the view that report writers should confine themselves to the presentation of material designed to assist the court to decide what type of order to make.[255] This solution does not take into account the contribution which the provision of background information can make at the adjudication stage of the process. It should be possible for social inquiry reports to be submitted before a child has been declared to be in need of care. The information which such reports contain can be directly relevant to the jurisdictional decision which the court must make. A similar view was adopted in *Porter* v. *Sinnott*, a decision of the South Australian Supreme Court.[256] There Mr Justice Walters held that the complainant in proceedings alleging a child to be in need of care and control was permitted to tender a social background report in order to make out the allegation. The Judge relied on the wording of s.42(1)(d) of the Juvenile Courts Act 1971 (S.A.) This stated that a court hearing an allegation that a child is in need of care and control shall not be bound by the laws of evidence and may admit any evidence which will assist in determining the allegation in the best interests of the child. The Judge commented:

> I also think that the antecedents of the child — his conduct and past history — can become a very relevant consideration in determining whether his best interests will be served by securing adequate care and control for him. Without a knowledge of his antecedents, I scarcely think that the court would ordinarily be in a position to decide where his best interests lie.[257]

Nevertheless, the power of the court to order the preparation of a social inquiry report before a declaration has been made should be carefully limited. The approach suggested by the United States Juvenile Justice Standards Project offers an attractive compromise, since it reflected both a recognition of the importance of background information at the adjudication stage, and the need to protect the family against intrusive and inappropriate collection of background information. The Project's recommendation was that the court should authorise the preparation of social inquiry and other reports only after it has determined, on the basis of the evidence presented, that there is probable cause to believe that the child comes within the court's non-criminal jurisdiction.[258]

> Because of the intrusive character of the proposed investigation, the proceeding to authorize an investigation should be conceptually similar to judicial authorization of search warrants in criminal cases, and the substan-

[253] See para.169.
[254] *ABAFA Report*, 36–37.
[255] id., 37.
[256] (1975) 13 SASR 500.
[257] id., 504.
[258] Juvenile Justice Standards Project, *Standards Relating to Abuse and Neglect*, (1977), 101.

> tive standard is drawn from the criminal law norm of 'probable cause'. The court should determine there is good reason to believe the petition will ultimately prevail . . . [259]

Further, the Project recommended that the court should exercise close control over the inquiries undertaken, and should be satisfied that they are necessary 'for developing reasonably adequate information.'[260] The types of inquiry which the court should be able to authorise a member of the proposed Welfare Division or the Capital Territory Health Commission to undertake before adjudication are:

- interviews with the child and his parents
- home visits
- psychiatric, psychological or physical assessments of the child;
- interviews with school personnel; and
- interviews with doctors, psychologists and representatives of other agencies which have dealt with the child.

In the proposed care proceedings the procedure envisaged is that the Youth Advocate should present the evidence which led him to file the application for a declaration that the child is in need of care. If the evidence satisfies the court, it will make a declaration. If the evidence leads the court to the conclusion that there is probable cause to believe that the child is in need of care, but that it requires further information, it may call additional witnesses, or order the preparation of a social inquiry report. On occasions the Youth Advocate may request the court to order the preparation of such a report. In contrast to social inquiry reports, consideration of the preparation and use of disposition reports does not raise difficulties. Clearly the court is justified in ordering such reports only after a declaration that the child is in need of care has been made. These reports should contain recommendations as to the order which the court should make. They should be detailed and specific and present a case plan indicating precisely what forms of assistance and support are thought to be needed. Finally, with regard to both types of report, an important comment made in a report of the Juvenile Justice Standards Project should be noted. This report pointed out that unless welfare personnel and others who write reports are adequately trained and educated, the opinions expressed in their reports may not qualify as expert opinions, and the courts should weigh their views accordingly.[261]

329. ***Access to Court Reports*** This subject has been dealt with in Chapter 5[262], and the recommendations for access, by parents and child, to any reports tendered to the court, apply equally to care proceedings. However, because care proceedings sometimes involve very young children, there will be cases in which the child is obviously too young to be informed of the contents of the reports. It should be left to the court's discretion to decide when a case comes into this category. Whenever a child or a parent is represented by counsel, his legal representative should be given access to any reports tendered.

Legal Representation[263]

330. ***The Need*** Some might argue that in care proceedings there is no need for a lawyer to represent the child. It might be thought that the child's interests are protected by the magistrate, the proposed Youth Advocate and the welfare or health worker who makes the principal report to the court. A lawyer representing the child could be seen as hindering the court. A lawyer might insist on adversarial procedures and might utilise technicalities to prevent the child obtaining the help he needs. Such arguments confuse the roles of the principal participants in the proceedings. These roles are as follows:

---

259 id., 101.
260 id., 102.
261 Juvenile Justice Standards Project, *Standards Relating to Abuse and Neglect,* (1977), 116.
262 Para.170.
263 See generally the discussion and recommendations in relation to legal representation in criminal proceedings (para.183f.). Note particularly the discussion of the current law and practice, and the recommendations relating to access to legal representation, servicing of legal aid and continuing legal education, which apply equally to care proceedings.

- *Magistrate.* The magistrate's role is to make the decision upon the basis of the evidence and arguments put to him. He must determine what is in the best interests of the child, in all the circumstances of the case, having regard to the child's wishes, the parents' wishes, background reports and the submissions of the Youth Advocate. Where the child is sufficiently mature to express a wish, his wishes are one element to be considered by the court.
- *Youth Advocate.* The Youth Advocate initiates care proceedings, rather than defends them. He presents evidence to the court in relation to the exploration of alternatives to court proceedings and welfare reports received from government and voluntary agencies.
- *Welfare worker.* The welfare or health worker's role is, as in criminal proceedings, to present to the court a factual report as evidence upon which the magistrate may base his decision.
- *Lawyer.* The presence of a legal representative of the child in care proceedings leaves the adjudicator free to concentrate on the performance of his judicial functions. The legal representative assists the court in the performance of its role by ensuring that the child's wishes and interests are presented to it. The lawyer helps to alleviate the special disadvantages which a child faces when he appears before a court.

Thus the lawyer in care proceedings plays a role quite separate from that played by other members of the court. His presence does not obstruct the court's functioning. Legal representation of the child is not incompatible with the purposes of care proceedings. A distinctive argument in favour of the representation of children in these proceedings is that it enables children to be independent of their parents.[264] If the child is unrepresented it may be only the views of the parents which are effectively presented to the court. Representation ensures that the child is not forced to rely on his parents (with whom he may be in conflict or whose fitness may be challenged) to express his views. Further, the work of the Youth Advocate should ensure that only the most difficult and serious care cases come before the Childrens Court. These are the cases which will have a greater potential impact on the child and will therefore exhibit a correspondingly greater need for representation. In short, the introduction of the new care proceedings would not make legal representation unnecessary. There will be cases where the evidence is disputed and requires testing by cross-examination. In all matters the possibly far reaching consequences of a declaration that a child is in need of care require that an opportunity be provided for the child's views to be put before the court. The role of the legal representative is to ensure that the child's views are presented to the court and so to safeguard the child's interests.

331. ***Next Friend*** As in criminal proceedings, the primary function of the child's representative is to express the wishes of his client and to seek to influence the decision of the court accordingly. There are obvious difficulties in performing this function in cases involving very young children, or children otherwise unable to express their views to their representative. As has been noted, parents cannot always be relied upon to protect the child's interests in care proceedings. The solution favoured by the Commission is to empower the Childrens Magistrate to appoint a 'next friend' of a child, where he thinks it to be in the interests of the child to do so. Such a person would be able to speak for the child in court proceedings and, more particularly, give instructions to the child's legal representative. Such a solution has found favour in the legislation of other jurisdictions[265] and in recent reports.[266] The appointment of a next friend would enable the child's representative to carry out his primary duty where the child is not sufficiently mature to express his views. The new Ordinance should accordingly state that:

- the magistrate may appoint a 'next friend' to act for the child, and
- the next friend may, on behalf of the child, bring any proceedings under or in relation to the Ordinance that the child might have brought, and defend, on behalf of the child, any proceedings brought against the child, whether under the Ordinance or otherwise.

---

264 The need for provision to be made for children to be separately represented has been strongly advocated in recent reports. See, for example, Commission of Inquiry into Poverty, 307 (Recommendation 2); *Justice Report* 24–5; *Juvenile Justice and Delinquency Prevention,* 559–61. A similar view has been expressed by the Department of the Capital Territory. *Submission,* 51.
265 For an example of a provision allowing the appointment of a guardian ad litem see: Children and Young Persons Act 1969 (U.K.), s.32B (inserted by the Children Act 1975 (U.K.), s.64). The guardian ad litem performs functions similar to those proposed for the next friend.
266 Standing Committee on Housing and Welfare of the A.C.T. Legislative Assembly, *Report No 8: Child Welfare,* (1978), 63; *Juvenile Justice and Delinquency Prevention,* 555; *Green Paper,* 34.

9. Children in Need of Care: Dispositional Orders

The Dispositional Process

332. ***Principles*** In the previous chapter emphasis was placed on the need to avoid resort to court proceedings in non-criminal matters. Attention was paid to the importance of developing preventive services[1] and of filling certain gaps in existing welfare services in the A.C.T.[2] The use of child care agreements[3] and case conferences[4] was recommended in order to facilitate a search for informal solutions to children's problems. In addition, the conditions to be satisfied before a child could be declared to be in need of care were formulated with a view to discouraging unnecessary coercive intervention. The importance of narrow, restrictive definitions was stressed, as was the need for the applicant to establish, in every case, that non-coercive measures have proved unsatisfactory or are inappropriate.[5] This chapter deals with the powers of the Childrens Court when informal solutions have failed and it is necessary for an order to be made consequent upon a declaration that a child is in need of care. In care proceedings the avoidance of criminal connotations must be reflected not only in the procedures employed but also in the dispositional orders available to the Childrens Court. Quite apart from questions of stigma, a system which makes little distinction between measures appropriate for difficult and needy children and those appropriate for children guilty of serious crime is inept and unfair.[6] Further, the use of such measures is likely to be resented by the children involved and to create a sense of injustice.[7] However, the conclusion that the dispositional orders should be different from those available for offenders does not answer difficult questions regarding the principles which should underlie the use of coercive measures. It is not enough to assert that these measures should reflect a desire to protect children and promote their welfare. Benevolence, as has been noted[8], has its own dangers. Once it has been established that the aim is to further a child's welfare, there is a risk that both the child and his family will be subjected to sustained measures whose scope and duration may exceed what the child's situation requires. In Chapter 5 it was pointed out that, when an offence is proved, the principle of 'just deserts' can, by setting upper limits to intervention, provide a rough framework for a dispositional system. No such limits are implicit in non-criminal procedures. There is, therefore, a need to formulate principles on which to base dispositional decisions in the lives of children declared to be in need of care. Before this task is attempted, it is necessary to broadly classify such children into the abused, the neglected, the abandoned, those whose behaviour is harmful to themselves and those in conflict with their parents. Although for members of each group the overall aim of intervention is the furtherance of the child's welfare, the way that this objective is pursued will vary from group to group. For some, the aim will be to do something to the child in the hope of effecting some sort of change. For others the aim will be the creation of a normal, caring environment. This may be achieved either by providing services to assist the family or by finding a new placement for the child. In short, a distinction must be made between intervention designed to provide individual therapy, and intervention designed to ameliorate the situation in which the child is living. On occasions both types of intervention may be needed. A child who has been physically abused by one of his parents may require surgical treatment and psychiatric care, together with removal from the custody of the parent who inflicted the injuries. Nevertheless, in seeking to formulate principles relevant to the dispositional process, the reformer should bear in mind the distinction between therapeutic intervention and protective intervention. For example, the argument that 'nothing works'[9] might engender caution if individual therapy is the aim. However, it is irrelevant if the aim is to remove a child to a more normal environment because the home situation is intolerable. Accepting that benevolent intervention may take different forms, what principles should be reflected in the procedures and measures employed once a child has been declared to be in need of care?

- *The need for caution.* Society should display the utmost caution before sanctioning coercive intervention. There are several reasons for adopting this position. By definition the children in respect of whom the court must make its decisions are not being dealt with because they have committed an offence. The justification for intervening against the wishes of a child and his family is less obvious than when an offence has been proved. Further, in addition to general doubts about the benefits to be derived from any form of intervention, particular reservations must be expressed about measures employed for therapeutic purposes. Finally, the ability to predict what will happen to a child in future without court intervention is limited, as is the ability to predict how this intervention will affect his future development and behaviour.[10]
- *Preservation of family autonomy.*[11] Wherever possible, the autonomy of the family should be respected and, when it is necessary to intervene, it is important not to lose sight of the need if at all possible to preserve family links and to encourage parents to retain or resume responsibility for their children. A Canadian report has pointed out that older child welfare theories facilitated the supplanting of parents by the state. Now more emphasis is being placed on the need for them to retain responsibility or at least to retain part of it and share it with the state.[12]
- *Combination of flexibility and independent review.* Children's needs and their family circumstances can change quickly, and it is therefore necessary for the measures employed to be flexible enough to accommodate these changes. Under the present Ordinance the court may make orders such as a committal as a ward or a live where directed order. These orders permit a great deal of flexibility, since those who administer them are able to vary the conditions of supervision or placement and, within legislatively or judicially prescribed limits, to determine the nature and duration of intervention. In Chapter 6 objections have been raised to the use of orders which confer such broad discretionary powers.[13] The arguments put forward in that chapter are just as applicable to children in need of care as to offenders. Although, when children in need of care are involved, society's purposes are solely benevolent, it is important not to lose sight of the reality of the intervention and the interference and restraints which result. In view of this, and because it is desirable both to exercise caution with regard to intervention and to preserve family autonomy, society should be compelled, from time to time, to re-examine the justification for the continuance of the measures imposed by the court. If the interests of the child and the family are to be protected, this scrutiny should be undertaken by an agency independent of those responsible for providing the necessary services. The aim must be to combine this protection with procedures which avoid rigidity and permit society to respond to changes in the child's needs and in the family's situation.

333. ***Implications*** When the Childrens Court has declared a child to be in need of care, careful limitations and controls should be imposed on the dispositional process. Both the nature and duration of compulsory intervention in the lives of children and their families should be kept to a minimum. The means by which this should be achieved at the dispositional stage are as follows.

- *Guidelines.* The new legislation should embody guidelines designed to assist the court in the selection of the appropriate measure. In every case in which intervention is required the court should employ the least intrusive measure necessary to protect the child or to promote his welfare. This criterion is designed to underline the need for caution regarding the value of any form of intervention and a commitment to the preservation of family autonomy. It follows that the physical separation of a parent and child or the removal of guardianship from the

1 Para.287.
2 Para.288–290.
3 Para.286.
4 Para.291.
5 Para.294f.
6 Gough, 'Beyond Control Youth in the Juvenile Court – the Climate for Change', in Teitelbaum and Gough, 271, 273.
7 id., 283.
8 Para.109, 110, 113, 118.
9 Para.113.
10 Andrews and Cohn, (1977), 85–88.
11 For a discussion of this principle, see Juvenile Justice Standards Project, *Abuse and Neglect,* (1977), 37–38.
12 *Admittance Restricted,* 14.
13 Para.197.

parents should be a last resort. Before making an order in respect of a child declared to be in need of care, the court should, as far as possible, have regard to the desirability of preserving and strengthening the relationship between the child and his parents and other members of his family. A child should not be removed from home, or his parents deprived of his guardianship, unless the child's welfare cannot be adequately safeguarded otherwise than by such an order being made.[14] The use of general directives such as these seems preferable to the more cumbersome method of attempting to spell out the conditions which must be satisfied before a particular type of measure may be employed.[15]

- *Upper limits.* The need to display caution before intervening in the lives of a child and his family, and the lack of any in-built controls such as are provided by tariff principles, mean that the duration of coercive measures employed in care proceedings should be carefully limited. Apart from reliance on the suggested guidelines, there are two methods of seeking to achieve this aim. Upper limits may be legislatively prescribed. For example, the new Child Welfare Ordinance could provide that, when a child has been declared to be in need of care, any supervision or residential order should have a maximum term of one or two years. Such an approach is objectionable for two reasons. First, limits of this kind would be totally arbitrary. The setting of one upper limit rather than another could not be justified by principle. Arbitrary upper limits are particularly inappropriate in view of the fact that the range of situations which will come before the court in care proceedings will be great. Care proceedings might involve a one-year-old victim of child abuse or a 16-year-old victim of incest, a seven-year-old whose parents are seriously neglecting him or a 15-year-old at odds with over-strict parents. An upper limit which might be justified for one type of case would have no relevance to another. Secondly, if the court is constrained by a legislatively fixed maximum term, children whose homes are unsatisfactory may not receive the protection they need. When a fixed-term order expires, it is necessary to return a child to his home. The home situation might still be the same as it was when the original order was made. The termination of the order could place the child at risk. Although in such a situation it would be possible for the Youth Advocate to institute new care proceedings, this would be a cumbersome and uncertain way of ensuring that the child is protected. The second method by which controls may be placed on the duration of intervention in the lives of child and parents is by regular independent review. The Commission prefers this approach. Orders made in care proceedings should be open-ended, but they should be reviewed annually. No order made in respect of a child in need of care should remain in force after the child attains the age of 18. Such a system offers protection against the continuation of unjustified intervention, but it also avoids the dangers to which the expiry of an arbitrarily fixed term can expose the child. The Childrens Court should assume responsibility for the annual review of all orders made in care proceedings. This conclusion accords with the Commission's view that the review process should be undertaken by an agency independent of the persons and organisations responsible for providing welfare services. It also accords with the conclusion that the proposed specialist Childrens Court should exercise more control over the nature and duration of dispositional measures, and that it should take a close and continuing interest in the progress of children subject to these measures. Further, in addition to arguments relating to the role of the court, it must not be overlooked that the number of children in need of care who will appear before the A.C.T. Childrens Court will be small.[16] The creation of a special board of review is therefore not warranted.[17] There are, however, dangers in a system which employs open-ended orders. There is always the possibility that an existing order will be continued without the submission of evidence justifying this course. The new Child Welfare Ordinance should make it clear that, at any review hearing, the Childrens Court may order the continuance of an order only if it is satisfied that it is not possible to meet the child's needs other than by a continuance of the order.[18] Further, as is explained below, in addition to the proposed review procedure, provision should also be made for the Childrens Court, at any time during the currency of an order, to hear an application for the variation or revocation of an order. This procedure would provide a further protection against the dangers of orders which do not specify a term. Finally, though it has been proposed that provision be made for open-ended orders, it is not intended that orders should necessarily take this form. The court should be empowered to specify a particular term when this is appropriate. In this way the court will be able to fashion its own controls over coercive intervention. Review procedures will be discussed below.[19]
- *Variation and revocation.* Regardless of the nature of the order or of any term specified by the court, there should be provision for application to be made to the court for a variation or revocation of the order. In this way substantial protection can be given to the family, since any change in the situation of the child or family can be brought to the court's attention, and the necessity for the continuance of the order scrutinised. The procedures to be employed to secure a variation or revocation of an order will be discussed below.[20]

334. ***Outline of Proposed Measures*** Once a child has been declared to be in need of care, the following measures should be available to the A.C.T. Childrens Court:

- supervision order;
- residential order;
- order making the child a ward of the Director of Welfare; and
- order committing the child to an institution run by the N.S.W. Department for Youth and Community Services.

This range of measures is proposed with the object of creating a distinctive system for non-offenders. However, the complete separation of children in need of care from offenders is not practicable. Residential and committal orders will be available for children in both categories. Nevertheless, the aim has been, as far as possible, to design a system free of criminal connotations. Accordingly two of the measures at present available to the Childrens Court under s.55 of the existing Child Welfare Ordinance should not be re-enacted. These are an admonition and discharge, and a probation order. Neither of these is appropriate in the non-criminal jurisdiction of the Childrens Court. Under the procedure proposed by the Commission, a child can be declared to be in need of care only if the court is satisfied that he is unlikely to receive suitable care unless the court makes an order. Hence the power to admonish or counsel a child would not be required, since, by definition, a child whose case can be dealt with in this way would not be a child in need of care. The making of a probation order in respect of a non-offender is particularly inappropriate. Attention has been drawn to the Childrens Court's need, under the present Ordinance, to place very young neglected children on probation.[21] In the public mind probation is associated with the punishment and control of offenders. Interviews by members of the Commission with children dealt with as uncontrollable revealed that some of them shared this perception. Some of those who had been placed on probation were resentful that they had been treated in the same way as offenders. In the case of very young probationers the unsuitability of the measure is obvious. What the court needs in such a situation is an order which will acknowledge that it is the parents who need assistance. By its nature a probation order is directed against the child. The Commission's recommendation that the supervision order

---

14 Cf. Juvenile Courts Act 1971 (S.A.), s.3 and Children's Protection and Young Offenders Act 1979 (S.A.), s.7. Quebec's Youth Protection Act 1977 contains particularly interesting directives. Section 3 states: 'Respect for the rights of the child must be the determining consideration in making any decision in his regard under this act.' Section 4 states: 'Such decision must contemplate the child's remaining in his natural environment. Where the child has no family or must be removed from it, such decision must contemplate his being provided with conditions of life and development as nearly similar to those of a normal family environment as possible.' See also the recommendation in a Victorian report that, with regard to maltreated children, provisions should be written into the legislation requiring the present environment of the child to be balanced against available alternatives before a decision to intervene is taken. See *Report of the Child Maltreatment Workshop,* (1976), 38.

15 For an example of this approach, see Juvenile Justice Standards Project, *Abuse and Neglect,* (1977), 119—120.

16 Between 1 June 1978 and 31 May 1979 the A.C.T. Childrens Court dealt with 63 neglect and uncontrollability matters.

17 Cf. *Green Paper,* 25.

18 This test is similar to that which must be applied before the court declares a child to be in need of care.

19 Para.362f.

20 Para.364f.

21 Para.268.

replace the probation order is designed to produce a measure which is less stigmatising than a probation order and which is explicitly concerned with the child's total situation. Like the probation order, however, the supervision order should include conditions directed towards the child. The proposed supervision order would have much in common with a probation order. A supervision order should be designed to provide support and assistance for the child in the community. Where appropriate the order should apply to the child's parents as well as to the child, and the law should make it clear that, when a child has been declared to be in need of care, the Childrens Court has the authority to impose obligations on the parents.[22]

Supervision Orders

335. ***Nature and Purpose*** A supervision order should permit the child to remain in his parents' custody. Support and assistance should be offered to the child and the parents. Responsibility for seeing that the necessary support and assistance are provided should be placed on a supervisor. In selecting this supervisor, the court should have two possibilities open to it. The court should be permitted to place the child under the supervision of the Director of Welfare. Such an order would permit the Director to nominate an officer of the Welfare Division to act as the supervisor. Alternatively, the court should be empowered to nominate any other person to act as the supervisor. The purpose of this second type of order would be to permit the appointment of any person — whether in a government agency or not - to provide supervision and advice. Someone known to the family, for example, or a member of a voluntary agency, might be an appropriate supervisor. Thus it would be open to the court to fashion various types of order and, in so doing, to make imaginative use of community resources. The new Ordinance should make it clear that, when making a supervision order, the court should be empowered to impose obligations on the parents of the child. The support and assistance provided within the framework of a supervision order may take a number of forms. The court may direct the supervisor to endeavour to arrange the provision of specific services, such as advice on budgeting or home management. Help with health matters or child-rearing problems might be provided by a community health nurse. Normally the supervisor would provide counselling for the parent and the child. In all cases he should make periodic checks of the child's well-being. In addition, there will sometimes be situations in which the child might benefit from psychological or psychiatric treatment. Although care must be taken to avoid making the compulsory provision of such treatment a condition of a supervision order[23], the order can provide a setting in which reasonable psychiatric or psychological treatment might be provided on a voluntary basis. Finally, a requirement that a child attend a day-care centre can appropriately be made a condition of a supervision order.[24] This could be employed when the parents are unable to cope with a child, but the situation is not such as to require the child's complete removal from home. Like all conditions of supervision orders, such a requirement should be designed to support and preserve the family, while at the same time ensuring that the child receives the assistance and protection he needs. As with probation orders, supervision orders should embody precise conditions and directions, so that the obligations of all parties are made clear. The writer of the background report, the Youth Advocate, the child and his parents, and, where appropriate, the supervisor, should assist the court in formulating a specific plan in each case. Where it is not practicable to do this at the dispositional hearing, a detailed plan should be prepared as soon as possible and submitted to the court for incorporation into the order. Parents and child should be fully consulted in the development of a plan. This should indicate to them that the proceedings are intended to be helpful, not punitive. It is envisaged that the specialist magistrate should be closely involved in the formulation of the order and that, as a result, supervision orders should be the antithesis of the present probation orders which leave a good deal to the discretion of the supervising officer. Too often orders involving a child's supervision at home embody vague plans and ill-defined goals. If objectives are not clearly identified sound evaluation of the intervention is prevented and the child's situation may continue unchanged. Alternatively, casework might continue for a long period, at great public cost, with little

[22] For examples of supervision orders under which conditions may be imposed on parents, see Childrens Court Act 1973 (Vic.), s.41(1), and Children and Young Persons Act 1974 (N.Z.), s.31(1)(h).

[23] See discussion in para.218.

[24] For a similar proposal and discussion, see Juvenile Justice Standards Project, *Abuse and Neglect,* (1977), 118–119.

benefit to the children and a substantial invasion of family privacy.[25] If clear goals are set this will assist the supervisor, the Youth Advocate and the court to determine when supervision is no longer necessary. It should be open to the court to make an open-ended supervision order, or to specify a set term.

Residential Orders

336. ***Form of Orders*** The Commission's recommendations regarding the types of residential order which should be available for young offenders are equally applicable to children in need of care. Reference should be made to the discussion of these orders in Chapter 6.[26] Such an order may be open-ended or may specify a set term. When the court decides that a child in need of care should be removed from home it should have a choice between a flexible order (under which the child must live where directed by the Director of Welfare) and an order making a specific placement. The former order permits the Director of Welfare to determine the most appropriate placement and to change it if it proves unsuitable. The second type of order should be used when the court decides that the child's needs are clear, that there is no need for Welfare Division involvement, and that flexibility is unnecessary. An order of this kind - which would be similar to the existing 'fit person' order — would be available when a person or agency is willing to accept full responsibility for a child and does not feel the need for decision-making powers to be vested in the Welfare Division. An example of a situation in which a specific placement might be made is when the court is faced with an older child in conflict with his parents, and the matter has been brought to court because of the parents' refusal to let him leave home. In such a case the child might have arranged suitable alternative accommodation — with a married sister, for example — and the court might decide to place the child in the sister's care. An order of this kind might be made without any need for the Welfare Division to play a continuing role. In Chapter 6 it is recommended that it should be possible for the court to combine a residential order with a probation order.[27] The same type of combination should be possible in respect of a child found to be in need of care. When placing such a child under a residential order it should be open to the court also to make a supervision order. In each case separate decisions should be made as to the need for a residential placement and the need for any additional support such as can be provided by way of a supervision order. There will be cases in which it is appropriate for a child to be removed from home without the need for any further assistance to be offered, and there will be other cases in which such assistance is needed. The above example of a child in conflict with his parents might be a situation in which there is no need for the specific placement order to be combined with a supervision order. The making of a residential order should in no case involve the removal of the child's guardianship from his parents.

337. ***Range of Placements*** There should be a wide range of choices for the placement, under a residential order, of children declared to be in need of care. The facilities provided by Marymead Children's Centre, Dr Barnardos, Richmond Fellowship, the Lions and Salvation Army hostel, the Y.M.C.A. and the Y.W.C.A., and by other organisations should continue to be utilised. In special cases, as at present, placements should be made in homes run by voluntary organisations in N.S.W. Particular emphasis should be placed on the use of foster homes.[28]

338. ***After Care*** When a child has been the subject of a residential order, every effort should be made to see that he and his family receive assistance and support when he returns home. In some cases it will be appropriate to seek to achieve this by making a supervision order which takes effect at the expiration of the residential order. In others, the legislation should make it clear that the Welfare Division has a responsibility to offer after care services. A Canadian report points to the dangers of failing to provide such services when a neglected child is returned home. The comment is made that

[25] id., 131.

[26] Para.225.

[27] Para.225.

[28] However, the difficulties attending the development of foster home programs should not be underestimated. It is not easy to obtain the services of suitable foster parents who have the skills and patience necessary to deal with difficult children. For a brief account of a professional fostering scheme developed in Reading, England, see National Association for the Care and Resettlement of Offenders, *Children and Young Persons in Custody,* (1977), 43.

the child neglect cases which attract the greatest public outcry are often those where the child has been killed or injured after having been returned to the parents.[29] The provision of follow-up and support could reduce the incidence of such cases. Some older children who are in conflict with their parents will not return home when a residential order expires. Such children will also often need support and assistance when they return to live in a less controlled environment such as a flat or with relatives.

Wardship

339. ***The Form of the Order*** An order making a child a ward permits the maximum degree of flexibility with regard to the treatment of the child. The existing clumsy terminology should be abolished[30], and the new legislation should simply refer to the court's power to place the child under the guardianship of the Director of Welfare. The term 'ward' should continue to be used to describe such a child. The recommendation that guardianship should be entrusted to the Director of Welfare, rather than (as at present) to the Minister for the Capital Territory, reflects the Commission's view, explained elsewhere in this report[31], that it is the person with immediate responsibility for the Territory's child welfare system who should exercise statutory powers and duties under the new legislation. Under existing procedures, the practice is for the Assistant Secretary, Welfare and senior staff of the Branch to make all day-to-day decisions affecting wards. Of necessity the Minister is remote from such matters. The new legislation should recognise this fact and directly confer on the Director of Welfare all powers and duties exercisable in respect of wards. The recommendation that the court's power to make a child a ward be retained does not, however, mean that the Commission believes that the existing law in this area should remain as it is. The new Ordinance should make it clear that a wardship order should be made only if no other order would be in the interests of the child. In addition, the proposed procedures regarding court review of children's progress should be available in respect of wardship orders, as for all other orders made in care proceedings. These procedures should ensure the regular review of the status of wards and of the Director's exercise of powers with regard to wards.

340. ***Legislative Pre-requisites*** The removal of a parent's guardianship rights is a particularly drastic and intrusive course of action. For this reason alone its use should be carefully limited. In addition, there is the important principle that wherever possible parents should be encouraged to retain responsibility for their children.[32] A parent should not be deprived of guardianship rights unless no other measure is appropriate to the needs of the child. Before making a wardship order, the court should be satisfied that, in order to safeguard the child's welfare, it is necessary to invest the Director of Welfare with the wide-ranging powers and duties which the measure entails.[33] Consideration was also given to recommending that it be legislatively prescribed that the court should not make a child aged 16 or over a ward unless there are exceptional circumstances. This course was suggested in N.S.W.[34] The Commission has decided not to make such a proposal. It would involve the arbitrary creation of an additional age limit, and would be inconsistent with the adoption of 18 as the upper limit of the Childrens Court's protective jurisdiction. If it is accepted that children are subject to the control of their parents until they attain the age of 18, and that the court should be permitted to intervene in the parent–child relationship, then the court's power to remove guardianship from the parents should be exercisable until that age. Nevertheless, the Commission accepts that it is only in

---

29 *Admittance Restricted,* 85. See also the case studies cited by Goldstein, Freud and Solnit, *Before the Best Interests of the Child,* (1979), 141–144.

30 Under the existing law (e.g. s.55(d)) a child or young person is committed by the court 'to the care of the Minister to be dealt with as a ward admitted to government control.' The phrase 'admission to government control' has unpleasant connotations, and has been described as 'cumbersome verbiage' (Law Reform Commission of the A.C.T., *Report on the Law of Guardianship and Custody of Infants,* (1974), 14).

31 Para.512. The notion that the head of the appropriate government welfare agency, rather than the relevant Minister, should act as the legal guardian of a child who is made a ward by a Childrens Court is widely accepted in Australia. Only in N.S.W. and South Australia does the law require that the relevant Minister assume the child's guardianship. See Child Welfare Act 1939 (N.S.W.), s.9(1), and Children's Protection and Young Offenders Act 1979 (S.A.), s.14(1).

32 Para.332.

33 See *Norgard Report,* 85.

34 See *Green Paper,* 32.

exceptional circumstances that a child approaching the age of 18 should be made a ward. Such a child is rapidly approaching the time when the legal controls exercisable by a guardian will be removed.[35] The substitution of one guardian for another at this stage of his life is, in normal circumstances, likely to achieve little. However, the exercise of the power to make an older child a ward should be left to the court's discretion. In exercising this discretion the court should have regard to the child's age and maturity.

341. ***Termination of Wardship*** As has been explained in Chapter 2[36], the Child Welfare Ordinance 1957 (A.C.T.) contains no provision indicating when wardship expires. Clearly this is a most unsatisfactory situation, given the serious consequences of the status of wardship. Wardship should terminate automatically when the child attains the age of 18 years. Wardship should also be automatically terminated by the marriage of the ward. Further, it is proposed that s.26 of the present Ordinance should be repealed. This section makes provision for the revocation of wardship.[37] Instead of the limited and complicated provisions of that section, there should be two forms of procedure, each serving a different purpose. The first should be a review procedure, and the second should permit the making of an application for the variation or revocation of the order.

Committal to an Institution

342. ***The Problem*** In Chapter 6 the Commission expressed serious reservations about the desirability of the A.C.T. continuing to rely on N.S.W. for the institutional placement of young offenders.[38] Use of N.S.W. facilities suggests that the Territory is unwilling to accept responsibility for its troublesome children. The objections raised apply with particular force to children in need of care. So long as removal to a N.S.W. facility is possible there will be no need for the A.C.T. authorities to seek other solutions. Nevertheless, the Commission has concluded that it is not feasible to bring to a complete end reliance on N.S.W. facilities[39] for the placement of some children found to be in need of care by the A.C.T. Childrens Court. The reasons for this conclusion are as follows:

- *Heterogeneity.* Although the Commission has recommended the establishment of an institution to accommodate a small homogeneous group of young offenders who are at present committed to institutions operated by the N.S.W. Department for Youth and Community Services[40], such a course would not be feasible for children in need of care. It would be neither practicable nor desirable to establish a closed institution in the A.C.T. solely for children in need of care. The heterogeneity of these children and the range of problems which they present are such that they could not be satisfactorily accommodated in one institution. If an effort were made to accommodate them in one institution they would be seriously disadvantaged, since they would be denied the varied range of placements which the N.S.W. system can offer. Further, detention of children in need of care in a closed institution with those found guilty of offences is not an option which should be considered.
- *Children nobody wants.* The alternative to establishing an institution in the A.C.T. would be to rely solely on placement in open homes and hostels in the Territory, and so bring to an end the need to rely on N.S.W. facilities. Clearly a policy of developing and making greater use of these homes and hostels should be pursued. However, the question which must be asked is whether pursuit of this policy would completely end the need to employ N.S.W. placements. As a result of its inquiries the Commission has concluded that it would not. In the view of some of those working with children in the A.C.T. there are a small number of children who

---

35 As Lord Denning has observed (*Hewer* v. *Bryant* [1970] 1 QB 357, 369), the legal right of a parent to a child:

> is a dwindling right which the courts will hesitate to enforce against the wishes of the child, and the more so the older he is. It starts with a right of control and ends with little more than advice.

36 Para.52.

37 The section is discussed in para.52.

38 Para.232.

39 The Commission is aware of N.S.W. proposals to introduce new forms of order — to be known as control orders — to replace orders committing children to institutions. See *Green Paper,* 34. However, for the sake of clarity and because the Child Welfare Agreement Ordinance 1941 (A.C.T.) refers to State institutions, the term 'committal to an institution' has been retained in this report. If the agreement is re-negotiated it will be necessary to change the terminology employed in the Commission's draft Child Welfare Ordinance.

40 Para.235.

cannot be accommodated in open facilities. These are the children whom nobody wants. They engage in seriously disruptive behaviour when placed in open conditions and regularly run away. The court's power to commit children in need of care to a N.S.W. facility cannot be abolished unless it is possible to offer a clear answer to those who have asked what should be done about such children.

- *Interstate placement of wards.* Under the proposed new legislation the powers which the Director of Welfare would be able to exercise with regard to a ward would be extensive. He would be able to select the most appropriate placement for a ward. On occasions he would place a ward interstate. It would be artificial to recommend that, because interstate placements are undesirable, the power to commit a child to a N.S.W. facility should be abolished, while at the same time leaving the Director of Welfare free to make interstate placements in respect of wards. Yet the Director must retain this power of placement if he is to have an adequate range of placements available for A.C.T. children who have been made wards.

343. ***Recommendation: Committal*** Although the Commission recommends that the power to commit a child found to be in need of care to a N.S.W. institution should continue to be available to the A.C.T. Childrens Court, the use of this power should be restricted by the new Ordinance. The Ordinance should provide that the power to commit a child declared to be in need of care to a N.S.W. institution should be exercised only if the court is satisfied that no other order open to it would be in the interests of the child. Further, a policy of relying on open homes and hostels for the accommodation of children found to be in need of care should be vigorously pursued in the A.C.T. The residential orders proposed by the Commission offer a framework for this development.[41] The Childrens Services Council should be expressly required to examine the committal of non-offenders to N.S.W. facilities and to explore the possibility of developing further homes and hostels in the A.C.T. to meet their needs.

The Consequences of Wardship

344. ***The Need for Clarification*** Section 19 of the Child Welfare Ordinance provides that the Minister for the Capital Territory is the guardian of the child who is a ward, to the exclusion of the parent or other guardian. The 'incidents' of guardianship[42], (or the powers and duties of the court-appointed guardian of a child in relation to the child), are usually regarded as being the same as the incidents of the parent-child relationship. The powers and duties of the Minister need not necessarily be as wide as those of a legal guardian: they could be limited by the legislation and court order which are their sources. However, at present the Ordinance does not define the incidents of guardianship. This fact was the subject of comment by the Law Reform Commission of the A.C.T.

> The Ordinance nowhere says that the guardianship of the Minister shall include all the powers and rights which a guardian or parent has in law. We think that in principle the Minister should have these powers, and that as a matter of draftsmanship the point should be made express, since, as the Ordinance now stands, the argument is open that the statutory guardianship of the Minister is entirely the creation of the Ordinance and that no other powers or rights are to be implied.[43]

This criticism is valid. The new Ordinance should make it clear that, unless the court otherwise orders, the Director of Welfare should be authorised to exercise, in respect of a child who has been made a ward, all the powers of the child's parents. Ultimately the law should go further and indicate precisely those powers and duties which together make up the concept of guardianship. At present this concept is a vague one. There is a need for a comprehensive definition of what is meant by

---

41 See discussion in para.225–227.

42 In *Hewer* v. *Bryant* [1970] 1 QB 357, 373 Sachs LJ stated that, '[G]uardianship embraces a "bundle of rights", or to be more exact, "a bundle of powers". It is this bundle of rights or powers to which the term 'incidents of guardianship' is intended to apply.

43 Law Reform Commission of the A.C.T., *Report on the Law of Guardianship and the Custody of Infants,* (1974), 15.

guardianship.[44] The formulation of such a definition would not be an easy task. As Mr Justice Ormrod has remarked:

> If one were asked to define what are the rights of a parent apropos his child or her child I for one would find it very difficult.[45]

In addition to being an extremely difficult one, the task of preparing a legislative definition of the incidents of guardianship is not one which can appropriately be attempted in this report. It should be undertaken in the context of a broad study of family law. The matter might appropriately be made the subject of a future reference to the Commission. The draft Ordinance contained in this report deals only with certain aspects of wardship. However, in order to understand the concept of wardship it is useful to consider a number of the powers exercisable by a parent in respect of a child. When the Childrens Court makes a child a ward, the legal guardian assumes the role of the child's parents. What powers and obligations does he assume? The most important of a parent's spheres of influence which are relevant to a discussion of wardship are as follows:

- custody and control;
- care;
- control over education;
- appointment of a testamentary guardian;
- provision of legal representation;
- consent to the issue of a passport;
- consent to undertaking certain occupations;
- consent to adoption;
- consent to marriage;
- control over religious education;
- administration of property; and
- consent to certain types of medical treatment.[46]

The present Ordinance indicates that the Minister is responsible for the 'care' of a ward and gives some indication of the meaning of this term.[47] In addition it contains specific provisions relating to the religious education of wards[48] and to the management of the land of a ward.[49] There are also two provisions relating to the medical treatment of children.[50] These are not restricted to the treatment of wards. The provisions dealing with religious education and medical treatment will be dealt with separately. First it is necessary to consider parental powers with which the present Ordinance does not explicitly deal.

---

44 The Joint Select Committee on the Family Law Act has drawn attention to the need for precise definitions of terms such as 'guardianship.' 'The Committee recommends that the Family Law Act and other legislation of the Commonwealth and the States should be examined by the appropriate authorities to ensure a consistent use of terms such as guardianship, care and control and custody. Where necessary, terms should be defined so that the nature of the relationship between a child and the person standing in a relationship towards the child are precisely defined.' Report of the Joint Select Committee on the *Family Law Act, Family Law in Australia,* Vol. 1, (1980), 49.

45 *Re N(minors) (parental rights)* [1974] 1 ALL ER 126, 130.

46 See generally, Justice, *Parental Rights and Duties and Custody Suits,* (British Section of the International Commission of Jurists, Chairman of Committee: Gerald Godfrey Q.C.) (1975) (hereafter 'Justice Report'), para.10–56; Eekelaar, 'What are Parental Rights?' (1973), 89 *LQR* 210; and *Hewer* v. *Bryant* [1970] 1 QB 357, 373. The list of parental rights is based on that contained in the *Justice Report,* para.17. The report's list also includes a right to the child's services. Out of the presumed master-servant relationship between parent and child there grew a common law 'right' of the parent to the services of the child. Although the 'right' could not be enforced against the child, an action in tort lay against a person who wrongfully disturbed this relationship. See Bevan, *The Law Relating to Children,* (1973), 451–452, and *Justice Report,* para.52. The right to services is an anachronistic incident of guardianship and it has consequently been omitted from the enumeration. However, the person having the care of the child may reasonably expect the child to give minimal assistance with routine household chores, appropriate to the child's age and health.

47 See Child Welfare Ordinance 1957 (A.C.T.), s.5 (definition of 'care') and s.21(1).

48 id., s.24 and 25.

49 id., s.119.

50 id., s.112 and 120.

345. ***Custody*** The English law makes a distinction between 'actual custody' and 'legal custody.' The former is defined as 'the actual possession of the child's person'[51] and the latter is defined as 'so much of the parental rights and duties as relate to the person of the child (including the place and manner in which his time is spent)'.[52] Sometimes the term 'custody' is used interchangeably with 'guardianship' and means the sum of all the incidents of the parent–child relationship.[53] Although there is terminological confusion both in English law[54] and in Australian law[55], the following distinctions do emerge. Commonly, guardianship is used in the broad sense as the sum of all the incidents of the parent–child relationship. 'Custody' and 'care' are only conceptually distinct in the sense that 'custody' essentially concerns control, whilst 'care' encompasses the day-to-day responsibility for the child's upbringing. Usually custody cannot conveniently be separated from the wider concept of care.[56] In the A.C.T. the law is particularly unclear. Section 18 of the present Ordinance implies that it was intended to make a distinction between care and custody, since it states that a child may be committed to the 'care' of the Minister, or released to the 'custody' of the Minister, to be dealt with as a ward admitted to government control. However, this distinction is not reflected elsewhere in the Ordinance. When the Childrens Court wishes to make a child a ward of the Minister, it commits him to the 'care' of the Minister.[57] 'Care' is defined as including custody and control.[58] Lack of any

---

51 Domestic Proceedings and Magistrates' Courts Act 1978 (U.K.), s.88(1), and Children Act 1975 (U.K.), s.87(1).

52 Children Act 1975 (U.K.), s.86.

53 *Justice Report,* para.18.

54 See the discussion in Eekelaar, *Family Law and Social Policy,* (1978), 220–221, and Eekelaar, 'Children in Care and the Children Act 1975', (1977), 40 *Modern LR,* 121. In *Hewer* v. *Bryant* [1970] 1 QB 357, 371, Sachs LJ said:

> In [child protection] statutes one finds scattered, sometimes with and sometimes without definitions, words and phrases such as 'care, control, custody, actual custody, legal custody, guardian, legal guardian and possession.' In the end, so far as comprehensibility on these matters is concerned, one finds that this voluminous and well-intentioned legislation has created a bureaucrat's paradise and a citizen's nightmare.

See also *Justice Report,* para.18–23.

55 The meaning of custody was considered by the Supreme Court of South Australia in *Wedd* v. *Wedd* [1948] SASR 104, 106–107. The court contrasted custody with guardianship and said:

> It may be 'guardianship' and 'custody' when used in contrast are several aspects of the same relationship. The former can very well be employed in a special context to denote duties concerning the child *ab extra;* that is, a warding off; the defence, protection and guarding of the child, or his property, from danger, harm or loss that may enure from without. Commonly guardianship is used in a wider sense: *Neale* v. *Colquhoun* [1944] SASR 119, 129–130. Custody essentially concerns control, and the preservation and care of the child's person, physically, mentally and morally; responsibility for a child in regard to his needs, food, clothing, instruction and the like.

See also *R.* v. *Lambert; Ex parte Plummer* (1980) 32 ALR 505, 515 (per Stephen J); and *Newbery and Newbery* (1977) FLC 90–205.

56 See *Travnicek* v. *Travnicek* [1966] VR 353. In *Wakeham* v. *Wakeham* [1954] 1 All ER 434 the English Court of Appeal (reversing a decision of Pennycuick J), held that the court could make an order awarding 'custody' to one parent and 'care and control' to the other, as the High Court may do in its inherent jurisdiction. In Travnicek's case, Barber J preferred to follow the long-established practice, recognised in Victorian and N.S.W. authorities, that responsibility for the child's upbringing and the authority to control it should not be separated. He strongly criticised the English courts for making a distinction, in matrimonial cases, between 'custody' and 'care and control.' In *Semple* v. *Semple* [1965] ALR 248, Wallace J said, 'With great respect I find I have some difficulty in appreciating the effect of such an order in that it seems difficult to appreciate where care and control ends and custody begins', and in *Marks* v. *Marks* [1965] ALR 241, 247, Begg J said, 'It seems to me that, except in very rare cases, care and control must accompany the award of legal custody and it seems inappropriate that an endeavour should be made in the ordinary case to dissect the various constituents of such legal custody.' In *Travnicek* Barber J said (356) that the only case where it would be useful or convenient to make an order of the kind made in *Wakeham* would be where the parties are living in different countries, (as in Wakeham's case itself) and it is desired to preserve some legal standing for the party living within the court's jurisdiction.

57 See Child Welfare Ordinance 1957 (A.C.T.), s.55(d), 57(1)(c) and 58(c).

58 id., s.5.

definition of 'custody' or 'control' reduces the usefulness of this definition. It is desirable that the term 'custody' be given a narrow meaning and be restricted to physical control. The term 'care' should signify a concept wider than custody.[59]

346. ***'Care' of the Ward*** 'Care' implies a daily involvement with the physical well-being of the child. Under s.20 of the present Ordinance the Minister, subject to certain exceptions, 'has the care of the person of a ward'.[60] The reference to the 'person' of the ward suggests that the Minister has no power over the property of the ward.[61] Section 21 of the Ordinance states that the Minister shall provide, or arrange for the provision of, accommodation and maintenance for a child admitted to government control. Responsibility for the care of a ward encompasses the following incidents of guardianship:[62]

- custody (i.e. physical control);
- provision of accommodation and food;
- provision of guidance;
- responsibility for leisure activities and outings;
- responsibility for discipline[63]; and
- attention to minor health requirements.

Control over all of these areas of a child's life vests in the legal guardian when the child becomes a ward, without interference from a parent or previous guardian, and he is able to delegate his powers to the person with whom the child is placed. The legal guardian's responsibility for a child's care also includes a power to decide where to place the child and to direct the removal of a child from one placement and transfer to another. The power to approve a transfer, and a number of other powers over a ward, were formerly specified in the Ordinance, but the relevant sections were repealed in 1979.[64]

347. ***Education*** Parents often assert a 'right' to determine the manner in which their child is to be educated.[65] However, any right that a parent might have is limited by s.8(1) of the Education Ordinance 1937 (A.C.T.) which provides for compulsory enrolment by a parent of a child aged not less than six nor more than 15 as a scholar at a school in the A.C.T. maintained by or on behalf of the Commonwealth, or a school registered under the Ordinance. Difficulties may arise in relation to a ward where the legal guardian and the parent differ with respect to the school to be attended by the child or the extra-curricular education of the child. All reasonable steps necessary to ensure continuity of enrolment at the child's usual school should be taken.

348. ***Testamentary Guardianship and Other Powers*** A testamentary guardian is a person appointed by a parent of a child, by deed or by will, to act as guardian of the child after the death of the parent.[66] A report of the Law Reform Commission of the A.C.T. concluded[67] that the father of a

---

59 Cf. the Law Reform Commission of the A.C.T., *Report on the Law of Guardianship and Custody of Infants,* (1974), 2, which recommended that the term 'custody' be used in the wide sense as meaning 'the rights and powers over an infant which a parent is in law entitled to exercise over his child.' This report recognised that the term was used in an inconsistent manner in s.18 of the Child Welfare Ordinance 1957 (A.C.T.).

60 The exceptions listed in s.20 are wards in respect of whom an accommodation and maintenance arrangement has been made under s.21 of the Child Welfare Ordinance 1957 (A.C.T.) and wards who are inmates of an institution.

61 Law Reform Commission of the A.C.T., *Report on the Law of Guardianship and Custody of Infants,* (1974), 12.

62 This list of responsibilities should be compared with that contained in regulation 22 of the Child Welfare Regulations 1957 (A.C.T.). The value of the latter list is reduced by the fact that the responsibilities which it imposes apply equally to a person having the 'care' of a probationer and to a person to whose 'care' a child has been committed. It would seem desirable to make a clear distinction between the responsibilities borne by persons in these two categories.

63 See *Justice Report,* para.40–45, and Eekelaar, (1973), 223–224. For a discussion of corporal punishment, see para.406, 407.

64 The provisions repealed were s.18, and 21–23. The amending Ordinance was the Child Welfare (Amendment) Ordinance 1979. A new s.18 and a new s.21 were substituted, but they do not detail the Minister's powers over a ward.

65 *Justice Report,* para.33.

66 *Halsbury's Laws of England,* Vol. 21, (3rd ed., 1957), 205.

67 Law Reform Commission of the A.C.T., *Report on the Law of Guardianship and Custody of Infants,* (1974), 6–7.

legitimate child has a right, by deed or by will, to appoint a testamentary guardian, pursuant to s.8 and 9 of the Tenures Abolition Act 1660 (Imp), which is still in force in the A.C.T. Detailed recommendations about the powers of testamentary guardians of children generally were made in that report.[68] It suffices here to say that the Commission's view of testamentary guardianship is that it is very much an incident of the parent–child relationship. It is not therefore appropriate for the Director of Welfare, as a court-appointed guardian, to exercise such powers. Other incidents of guardianship are as follows:

- *Legal representation.* It seems to be generally accepted that a parent or guardian may represent a child in legal proceedings.[69]
- *Consent to the issue of a passport.* Under Commonwealth law an unmarried person under the age of 18 who applies for a passport must provide the written consents of 'each person who, under a law of the Commonwealth or of a State or Territory, is entitled to custody or guardianship of, or access to, the applicant.'[70] There are, however, certain provisions which permit this requirement to be relaxed.[71]
- *Consent to employment.* There are some circumstances in which parental consent is required before a child may undertake an occupation. It seems that in the A.C.T. parental consent is generally required before a child begins an apprenticeship.[72] Also, it is the practice of the Commonwealth Defence Department to require the written consent of a parent or guardian before a person under 21 enlists in one of the armed forces.[73]
- *Consent to adoption.* A parent or guardian is normally required to consent to the adoption of a child.[74]
- *Consent to marriage.* In the case of a child under 18 parental consent to that child's marriage is required unless the child has been previously married.[75]

349. ***Religious Faith and Teaching*** Section 24(1) of the Child Welfare Ordinance 1957 (A.C.T.) provides for the religious teaching of a ward by a clergyman of the religious faith of the child's parent or in which the child has been brought up. Provision is made in s.24(2) for the determination of the religious education of a ward if the parents are unknown, their religious faiths are unknown, or they are of different religious faiths and the ward has not been brought up in any religious faith. Under s.25(1) the Minister is required not to arrange for the placement of a ward with a person of a religious faith different from that of the clergyman under whose guidance he is placed under s.24.[76] The N.S.W. legislation contains a much more detailed provision relating to the religious upbringing of wards.[77] The Green Paper agreed with the recommendation of the Child Welfare Legislation Review Committee that the Minister (as an incident of his status as guardian) should determine the religious upbringing which a ward should receive.[78] However, the Green Paper recommended that,

---

68 id., 20.
69 For a discussion of legal representation, see para.183f, 330, 331.
70 Passports Act 1938 (Cwlth), s.7A(2)(a).
71 id., s.7A(1) and (2).
72 Although the Apprenticeship Ordinance 1936 (A.C.T.) does not make it clear that parental consent is required before a person undertakes an apprenticeship, the obtaining of parental consent is clearly envisaged in the Ordinance. See s.25(3) and 28(1).
73 There does not seem to be a general statutory requirement that parental consent must be obtained before a person under the age of 21 enlists in the armed forces. However, by virtue of regulation 176(1)(b) of the Australian Military Regulations, a soldier under the age of 21 may be discharged under s.44 of the Defence Act 1903 (Cwlth) if his father, mother or guardian has requested that he be discharged. The enlistment of a person aged 15 and under 18 as an airman apprentice requires the written consent of a parent or guardian. See regulation 93B(1) of the Air Force Regulations.
74 See Adoption of Children Ordinance 1965 (A.C.T.), s.24. For the power for the court to dispense with parental consent, see s.30.
75 Marriage Act 1961 (Cwlth), s.13(1).
76 This sub-section is subject to sub-section (2) which deals with situations where it is not practicable to arrange for the provision of accommodation and maintenance for a ward by a person of the same religious faith as the clergyman under whose guidance and control the ward has been placed.
77 Child Welfare Act 1939 (N.S.W.), s.140.
78 *Phibbs Report,* 37–38.

though this power should be specifically retained, it should not be embodied in the new Child Welfare statute. It was proposed instead that it be incorporated into regulations.[79] The Commission agrees that detailed requirements relating to the religious upbringing of a ward can more appropriately be included in regulations. However, it is desirable for the new Ordinance to include a broadly worded provision which will guide but not bind the Director in this matter. This provision should avoid inflexibility. The Director should be empowered to make such decisions as he considers to be in the interests of the ward regarding the ward's religious education. In exercising this power the Director should have regard to:

- the wishes of the child's parents or previous guardian;
- the child's religious upbringing, if any, before he became a ward; and
- the child's wishes.[80]

The Director should endeavour to prevent a situation developing where, although neither child nor parent has a strong denominational belief, their stated religion becomes an impediment to the Director's selection of a placement which appears to offer the most advantageous opportunities for the development of the child.[81]

350. ***Property*** Guardianship may relate either to the person or to the estate of the infant or both.[82] However, a guardian appointed by a court is, in the absence of express direction, only a guardian of the infant's person. The court may appoint him, or a separate person, to be guardian of the infant's estate.[83] Section 119 of the Child Welfare Ordinance 1957 (A.C.T.) provides that the Curator of the Estates of Deceased Persons shall have the management and control of land to which a ward is entitled in possession and may apply the income from the land or the proceeds of the realization of the land for the maintenance and benefit of the ward. There is no need to re-enact this provision. In recent years there does not appear to have been a single case in which the powers conferred by the section have been invoked.[84] Consistent with a guardian's traditional powers, and with the recommendation of the Law Reform Commission of the A.C.T.[85], the guardian of a ward should not be automatically entitled to assume rights over the ward's property. The guardian should, however, be empowered to apply to the Childrens Court to be appointed as guardian of the ward's estate. Such a power should only be exercised if there is no other person, such as trustee, to look after the child's interests. In that rare event, the child's interests should be protected and it should be left to the Childrens Court to empower the Director of Welfare to manage the child's estate.

351. ***Consent to Medical and Dental Treatment*** It has not proved possible for the Commission to undertake a detailed examination of the law relating to the medical treatment of children. The subject is one which goes beyond the normal ambit of child welfare law. There is a need for the clarification of the law determining when parental consent to the medical treatment of a child must be obtained and when the child's own consent is sufficient. The Law Reform Commission of Western Australia is presently examining certain aspects of this problem. In the A.C.T. it is the practice for hospitals and medical practitioners to require parental consent before performing certain procedures. If the incidents of wardship are as far as possible to reflect the incidents of the parent–child relationship, the Director of Welfare must be empowered to consent to the medical treatment of wards in those circumstances in which parental consent would be required. The new

---

79 *Green Paper,* 24. The Department of the Capital Territory has expressed support for the view that new provisions should be incorporated into regulations: *Submission,* 83.
80 See *Phibbs Report,* 37.
81 The Department of the Capital Territory has stated that the procedures in s.24 and 25 of the Child Welfare Ordinance are cumbersome and cannot always be followed. In the Department's view new provisions are needed which 'recognize the desirability of placement with foster parents of the same religion as the child, particularly if religious adherence is more than nominal to either the child or the parent, but denomination should not be stated as the dominant factor of placement.' *Submission,* 83.
82 *Halsbury's Laws of England,* Vol. 21, (3rd ed., 1957), 203.
83 id., 203–4.
84 Discussion with the Deputy Curator of the Estates of Deceased Persons, Canberra, August 1980. Section 143 of the Child Welfare Act 1939 (N.S.W.) provides for the land of wards to be administered by the Public Trustee. This provision was described as 'somewhat archaic' by the *Green Paper,* 23, and its retention was not recommended.
85 Law Reform Commission of the A.C.T., *Report on the Law of Guardianship and Custody of Infants,* (1974), 20.

Ordinance should make it clear that the Director's powers over a ward include the general power to give consent to medical treatment. Section 120(2) of the Child Welfare Ordinance 1957 (A.C.T.) provides that the Minister or the Minister's authorised officer may consent to a surgical or other operation which he is advised by a medical practitioner is necessary in the interests of the health or welfare of the ward. In order to avoid any possible doubts in relation to surgery on a ward, a similar provision should be included in the new legislation, although the power to give consent should be vested in the Director of Welfare or his delegate. Further, the new Ordinance should not refer to the child's 'welfare' as a factor to be taken into account. Consent should be given only if the proposed procedure is necessary in the interests of the ward's health. Provision should also be made for the Director of Welfare to give consent to surgical procedures carried out on children held in a shelter or remand centre following a committal to a N.S.W. institution. A similar power should be available in respect of children who have been placed in an A.C.T. institution pursuant to a custodial order. Earlier in this report it was recommended that committal to an institution should no longer be automatically accompanied by removal of guardianship from the child's parents.[86] However, when a child is placed in a shelter, remand centre or institution following the making of a committal or custodial order, the Director assumes certain responsibilities for that child. On occasions it may be necessary for surgical treatment of such a child to be authorised in circumstances in which it is not possible to contact the child's parents. The Director of Welfare should, therefore, be authorised to give the necessary consent.

352. ***Routine Medical Examinations*** The present Ordinance makes provision for a routine medical examination of certain children. Section 120(1) of the Child Welfare Ordinance 1957 (A.C.T.) states that the Minister's authorised officer may at any time order a child admitted to an establishment under the control of the Minister to be examined to determine his 'medical, physical or mental characteristics and defects'. This provision should be re-enacted, but in an amended form. The law should make it clear precisely which categories of children may be medically examined pursuant to such a provision. If it is felt desirable that children remanded to a shelter prior to the making of a dispositional order should be medically examined, the power to authorise such an examination should be specifically conferred either by regulation or in an Ordinance dealing with children's remand in custody.[87] A child temporarily held in an A.C.T. shelter following a committal to a N.S.W. institution may need to be medically examined before making the trip to N.S.W. It is appropriate that the Director of Welfare should, for reasonable cause, be empowered to authorise the medical examination of such a child. It is also appropriate that the Director be authorised to order a general medical examination of a ward, whether the child be admitted to an 'establishment' under his control or not. The Director's responsibility for the 'care' of a ward has already been described as including authority with respect to the ward's daily health requirements. In order that such authority should be properly exercised, the Director should have power at any time for reasonable cause to authorise a general medical examination of a ward. This power should also be exercisable by any person to whom the Director has delegated day-to-day responsibility for the child. Finally, the power to order a medical examination should, for reasonable cause, be exercisable in respect of a young offender who, pursuant to a custodial order, has been placed in an A.C.T. institution.

353. ***Internal Examinations*** Section 112(1) of the present Ordinance permits the Childrens Court, when there is reason to believe that a child is, or may be, suffering from venereal disease, to order the child to be examined by a medical practitioner. This provision is fundamentally objectionable in that it applies to all children, whether or not they are the subject of court proceedings and whether or not a finding has been made in respect of them. If it is decided to retain a provision dealing with internal examinations to detect venereal disease such a provision should certainly not apply to all children, regardless of their status. Before this issue is addressed, however, it is necessary to consider whether it is desirable to retain any provision dealing with examinations of this kind. Normally an internal examination for the purpose of detecting vereal disease could be carried out only with the consent of the child concerned. It could be argued that it is not necessary for the law to single out

[86] Para.238.

[87] The need to make remand procedures the subject of regulations or an Ordinance has been discussed in para.173.

this procedure, as it is adequately covered by the law relating to routine medical examinations. This argument overlooks the need to protect children against examinations which, by their nature, represent an affront to the child's person. Children caught up in the criminal justice and welfare systems are vulnerable and might feel powerless to object to an internal examination. Further, an examination of this nature can be conducted in a brutal and insensitive manner. The law should endeavour to ensure that internal examinations of children are carried out in a regulated way. If it is accepted that the law should deal explicitly with the internal examination of children, and that the existing provision, which applies to all children, is too wide, the first matter to be determined is which categories of children should be liable to be subjected to an examination of this kind. The categories named in the relevant provision should be the same as those named in the provision dealing with the routine medical examination of children. The children liable to be subjected to an internal examination for the purpose of detecting venereal disease should be:

- children held in a shelter or remand centre following committal to a N.S.W. institution;
- children who have been made wards; and
- children who have been placed in an A.C.T. institution pursuant to a custodial order.

Such an examination should be conducted only by a medical practitioner and for good cause. Before the examination is conducted the child should be notified of his right to object. If the child does not object it should be possible for the medical practitioner to carry out the examination after explaining to the child what is involved. If the child objects, a decision must be reached as to who should be empowered to authorise the examination. The choice which must be made is between a procedure involving court control and one which permits the Director of Welfare to authorise the examination. In its report on criminal investigation the Commission recommended that, in the absence of consent, a medical examination should be carried out only pursuant to a court order.[88] That report dealt with procedures for adults suspected of an offence. The question to be determined is whether different procedures are required for children. The Director of Welfare stands in a special relationship to children in the three categories listed above. With regard to wards he explicitly assumes parental responsibilities. With regard to children in institutions he assumes a semi-parental role in that the children are in his care and dependent on him. It would be quite inconsistent for the law to provide that, in fulfilling his obligations to children in the three categories listed, the Director of Welfare is empowered to consent to major surgical procedures, while at the same time requiring a court order before an internal examination can be carried out. It is therefore recommended that, in cases where a child in one of the listed categories refuses to consent to an internal examination, the Director of Welfare should be empowered to authorise the examination if he believes that there are reasonable grounds for carrying it out. Such a procedure would permit the Director of Welfare to play precisely the same role as a parent would play in similar circumstances. A medical practitioner who carries out an examination pursuant to the Director's authorisation should be appropriately protected.

354. ***Powers over Wards: Summary*** When, under the proposed new Ordinance, the Director of Welfare becomes the guardian of a ward, he will assume a number of the powers and responsibilities exercisable by a parent in respect of his child. Among the most important of these spheres of influence are:

- custody and control;
- care;
- education;
- provision of legal representation;
- consent to the issue of a passport;
- consent to undertaking certain occupations;
- consent to adoption; and
- consent to marriage.

It is not necessary for the new Ordinance explicitly to list all these powers. With regard to the powers enumerated, it is sufficient if the Ordinance states that, in respect of a ward, the Director may exercise all the powers of the child's parents. Some of the relevant provisions contained in the present Ordinance can also usefully be retained. Section 21(1) of this Ordinance states that it is the

[88] ALRC 2, *Criminal Investigation*, (1975), para.133.

Minister's obligation to provide for, or to arrange for the provision of, accommodation and maintenance for a ward. This provision not only indicates the basic duty assumed by a person responsible for the 'care' of the ward, but also indicates that this aspect of guardianship may be delegated. A similar provision should be included in the new Ordinance. Although it is not practicable to formulate a comprehensive definition of 'care'[89], the new provision should indicate that the Director's responsibilities in respect of a ward include responsibility for the child's custody and control and for his maintenance, accommodation and day-to-day well-being and upbringing. There is one important respect in which the 'care' provided by the Director of Welfare will differ from that provided by a parent. The Director has the power to determine where a ward shall live and has a range of placements from which to choose. If one proves unsatisfactory he may try another. The power of placement, through which the Director will discharge his responsibility for a child's 'care', should be explicitly conferred in the new Ordinance. Provisions listing the range of placements open to a legal guardian in respect of a ward are included in the relevant legislation in some other Australian jurisdictions.[90] The new Ordinance should permit the Director of Welfare to place a ward:

- with a parent or relative of the child;
- in an approved home;
- in any home or institution;
- with suitable foster parents;
- with some suitable person;
- in any hospital; or
- in any other suitable situation.

Given that the Director will discharge his responsibility for the 'care' of wards by making placements of the kind listed, it is necessary that he and his authorised officers have the power to visit children who are wards. If the Director is to discharge his responsibilities, he must be authorised to ensure that wards are properly cared for. Further, guidelines for the day-to-day care of wards should be prepared and made publicly available. Examples of positive and humane guidelines relating to the treatment of wards are contained in the N.S.W. Phibbs Report.[91]

355. ***Other Powers over Wards*** The Director of Welfare's general powers over a ward are powers in respect of the *person* of the ward. The Director should not automatically assume powers in respect of the ward's property. However, as has been noted, situations may occur when no one else is available to look after a ward's property.[92] In such circumstances it should be possible for the Director to apply to the Childrens Court for authority to manage the ward's estate. The new Ordinance should make specific provision for such an application. Other powers which should be specifically conferred on the Director of Welfare have been noted. These are:

- the power to make decisions affecting a ward's religious education; and
- the power, with regard to
  - wards;
  - children held in a shelter or remand centre following committal to a N.S.W. institution; and
  - children who have been placed in an A.C.T. institution pursuant to a custodial order

  to consent to medical or dental treatment in circumstances where parental consent is normally required, or, for reasonable cause, to authorise a routine medical examination, or, for reasonable cause, to authorise an internal examination.

It is also recommended that the new Ordinance contain a provision designed to maintain parental involvement with a ward. When the Director of Welfare assumes powers of guardianship over a ward pursuant to an order of the Childrens Court he should not necessarily have sole responsibility

89 See discussion in para.368.
90 For example, Community Welfare Services Act 1970 (Vic.), s.40; Community Welfare Act 1972 (S.A.), s.44(1); Child Welfare Act 1960 (Tas.), s.46(2).
91 *Phibbs Report*, 39. See also the regulations made under the Community Welfare Services Act 1970 (Vic.). The guidelines should cover such matters as the receipt of pocket money, the right to privacy, standards of nutrition, and discipline.
92 See para.350.

for the exercise of the powers conferred on him. It is possible for powers over a ward to be divided between the Director and the child's parents. The 'care' of the child and certain other responsibilities might be undertaken by one person while another exercises some or all of the remaining responsibilities of a guardian. The High Court has held on several occasions that (employing the term 'custody' rather than the term 'care' as it is used in this report):

> . . . the existence of guardianship in one person is not a bar to the making of an order for custody in favour of another.[93]

This opens the way for the Childrens Court, when making a child a ward, and so transferring responsibility for his 'care' to the Director of Welfare, to make a decision whether the Director should be the sole person able to exercise the remaining powers and duties of guardianship. What is proposed is that the Director of Welfare should exercise a special statutory kind of guardianship[94], which need not automatically exclude the parent or other guardian from all decision-making powers. When making a child a ward, it should be open to the Childrens Court to order that any one or more of the incidents of guardianship should be exercisable only after consulting the child's parent or other guardian. Parents might, for example, have strong feelings about a child's religious or secular education. In some circumstances it might be appropriate for the Childrens Court to order that the Director of Welfare's decisions affecting these areas of a child's life should be made only after consultation with the child's parents. In the absence of an order of this kind all the incidents of guardianship should be transferred to the Director of Welfare.

356. ***Wardship Powers of the Supreme Court*** By virtue of s.11 of the Australian Capital Territory Supreme Court Act 1933 (Cwlth) the A.C.T. Supreme Court may, on behalf of the Crown as *parens patriae* and guardian of all infants, exercise the paternal jurisdiction of the Court of Equity.[95] Supreme Courts in other parts of Australia exercise a similar jurisdiction. It has been established that child welfare legislation can displace or diminish this jurisdiction only if the legislation contains a clear and unambiguous expression of an intention to do so.[96] The wording of s.19 of the existing Child Welfare Ordinance has been held to be sufficiently clear to displace both the broad paternal jurisdiction of the A.C.T. Supreme Court and its jurisdiction under the Infants' Custody and Settlements Ordinance 1956 (A.C.T.).[97] Section 19(1) of the Ordinance states:

> Notwithstanding any other law of the Territory relating to the guardianship or custody of children or young persons, the Minister is the guardian of a child or young person who is a ward, to the exclusion of the parent or other guardian.

In *Neyens* Chief Justice Barwick (with whom Justices McTiernan and Taylor agreed) placed particular emphasis on the opening words of the section, 'which make the provisions of the section paramount over laws which fall within their description'.[98] For the purposes of this report the practical issue raised by this decision is how the new Ordinance's provisions relating to the powers of the Director of Welfare over a ward should be drafted. Should the relevant provision in the new Ordinance follow the pattern set in s.19(1), so displacing the jurisdiction of the Supreme Court in wardship matters, or should the Supreme Court's powers in respect of wards be revived? The existing situation should be maintained. The new Ordinance should make it clear that, with regard to a child who is made a ward of the Director of Welfare, the Supreme Court's powers should not coexist with those exercisable by the Director. Quite apart from matters of legislative drafting, some members of the High Court have expressed reservations about a system in which both the legal guardian and the Supreme Court could exercise powers of guardianship. In considering the relevant provisions of the existing Child Welfare Ordinance Chief Justice Barwick remarked:

93 *Carseldine* v. *Director of the Department of Children's Services* (1974) 133 CLR 345, 366. See also *Halsbury's Laws of England*, Vol.21, (3rd ed., 1957), 211; *Johnson* v. *Director-General of Social Welfare* (1976) 9 ALR 343, 346.
94 A phrase used by the Law Reform Commission of the A.C.T., *Report on the Law of Guardianship and Custody of Infants*, (1974), 12.
95 See *Minister of State for the Interior of the Commonwealth of Australia* v. *Neyens* (1964) 113 CLR 411, 418.
96 ibid., *Carseldine* v. *Director of the Department of Children's Services* (1974) 133 CLR 345; *Johnson* v. *Director-General of Social Welfare* (1976) 9 ALR 343.
97 *Minister of State for the Interior of the Commonwealth of Australia* v. *Neyens* (1964) 113 CLR 411.
98 (1964) 113 CLR 411, 423.

> It would indeed be anomalous if the Supreme Court, except on appeal from the magistrate, could by making an order for custody displace the corrective action taken by the tribunal to which the Ordinance gave the jurisdiction to order it. . . . It seems to me that the scheme of the Ordinance for dealing with neglected and uncontrollable children is itself quite inconsistent with a power in the Supreme Court to change the custody of a ward.[99]

A similar view was adopted by Mr Justice Menzies in a dissenting judgment in *Carseldine*. The children who were the subject of this case had been administratively admitted to the care and protection of the Director of the Queensland Department of Children's Services under s.47 of the Children's Services Act 1965 (Qld.). Mr Justice Menzies stated:

> [W]hen a child is in the care of the Director pursuant to the Act the Supreme Court cannot order the child to be taken from the custody in which the Director has placed him and award custody to some other person instead. The responsibility for the care of children has been placed by the Act in the Director as guardian of children in care, and I find no warrant for the court interfering with the exercise of the discretions which are comprehended in that care.[100]

The contrary argument is that, although it is not appropriate for the Supreme Court to exercise its inherent powers in such a way as to place it in competition with a guardian appointed by a Childrens Court, it is both appropriate and desirable for the Supreme Court to protect a ward by supervising the way in which the guardian fulfils his statutory responsibilities. This view has also been put forward by members of the High Court.[101] In considering the relevant authorities it should, however, be noted that those Justices who placed emphasis on the need for the Supreme Court's powers to be retained in order to permit it to exercise a supervisory role, did so in the context of the examination of powers over which the Supreme Court could exercise little or no control. Both Mr Justice Mason, in *Carseldine*[102], and Mr Justice Murphy, in *Johnson*[103], stressed the width of the legal guardian's powers under the provisions which the High Court was required to interpret. Their insistence on the importance of the Supreme Court's supervisory role can only be understood in this context. It is not necessary to preserve the Supreme Court's inherent powers if other means are found to permit the review of the legal guardian's actions and to permit the Supreme Court to play a significant part in that review process. The new procedures proposed by the Commission meet these requirements. Procedures to allow the Childrens Court regularly to review all orders made in care proceedings, including wardship orders, are recommended.[104] Procedures to permit applications to the Childrens Court for the revocation or variation of an order made in care proceedings are also recommended.[105] In addition it is proposed that the decisions reached at a review hearing or a hearing to deal with an application for the variation or revocation of an order should be subject to appeal to the Supreme Court. Thus, under the procedures proposed by the Commission, the Supreme Court would be able to perform a significant supervisory role. It is therefore appropriate that the new Child Welfare Ordinance should, like its predecessor, displace the A.C.T. Supreme Court's inherent wardship jurisdiction.

357. ***Access to Wards*** The Child Welfare Ordinance 1957 (A.C.T) does not provide for access by the parents or a previous legal guardian to a ward of the Minister. The Childrens Court should have express power, in any care proceedings in which the child is made a ward of the Director of Welfare, to make such order as it considers proper regarding the right of access to the child by any person, or by either parent of the child, having regard to:

- the welfare of the child;
- the wishes of the child;
- the conduct of the person or parent; and
- the wishes of the parent.

---

[99] id., 424.
[100] (1974) 133 CLR 345, 358.
[101] *Carseldine* v. *Director of the Department of Children's Services (1974)* 133 CLR 345, Mason J; *Johnson* v. *Director-General of Social Welfare* (1976) 9 ALR 343, Murphy J.
[102] (1974) 133 CLR 345, 364.
[103] (1976) 9 ALR 343, 348.
[104] Para.362f.
[105] Para.364f.

It would usually be the case that each parent or the previous guardian would be granted access to the child, unless such an order would not be in the child's interests. Every effort should be made to maintain contact between the child and his parents. An order of the Childrens Court relating to access should be consistent with any order of the Family Court of Australia relating to access to the child.

358. ***Placement in an Interstate Institution*** Problems relating to the incidents of guardianship could arise where a ward is placed in a N.S.W. depot or home established under s.21 of the Child Welfare Act 1939 (N.S.W.). The Second Schedule to the Child Welfare Agreement Ordinance 1941 (A.C.T.) provides[106] that when the Minister for the Capital Territory directs that a child who has been admitted to government control under the Child Welfare Ordinance 1957 (A.C.T) is to be transferred to a N.S.W. depot or home, the child becomes subject to the provisions of the Child Welfare Act 1939 (N.S.W.). The N.S.W. Minister may exercise any powers, discretions, duties and authorities vested in him under the N.S.W. Act with respect to the child as if the child were a ward admitted to State control under the N.S.W. Act. The Commission recommends that negotiations be undertaken with a view to amending the Child Welfare Agreement Ordinance 1941 (A.C.T.) and the reciprocal N.S.W. Act, the Child Welfare (Commonwealth Agreement Ratification) Act 1941 (N.S.W.). The aim should be to make it clear that the N.S.W. Minister may exercise, with respect to the child, only such powers, discretions, duties and authorities vested in him under the N.S.W. Act as are of the same nature as those vested in the A.C.T. Director of Welfare under the new legislation in relation to that child. Thus an A.C.T. court order specifically reserving to the child's parents or previous guardian a right to be consulted regarding the exercise of certain incidents of guardianship (such as the power to determine a child's education or medical treatment) should be respected in the N.S.W. State institution.

359. ***Interstate Movement of Wards*** The N.S.W., South Australia, Victorian and Western Australian child welfare legislation[107] provide for the care of children who are wards in other Australian States and who have entered or are about to enter the State. The appropriate authority of the State may, at the request of the Minister or other appropriate authority in the other State exercising guardianship, declare the child to be under his guardianship. The declaration is deemed to be an order of duration not exceeding the period that the child would have remained under the guardianship of the other State authority. A similar provision should be enacted in the A.C.T. in order that care may be provided for wards of other States who move into the A.C.T.

360. ***Ward Absconding*** Section 118 of the Child Welfare Ordinance 1957 (A.C.T.) provides that a ward who has absconded from his proper custody may be arrested on a warrant, and brought before the court. The ward is guilty of an offence punishable by any of the measures available to the court in respect of an indictable or summary offence or by an order for the ward to be returned to his former custody. This offence should be abolished.[108] A child who runs away from home does not commit a criminal offence and there is no reason why a ward who runs away should be treated as if he has committed a crime. Indeed, the insecurity in family circumstances which a ward may well have experienced suggests that a lenient response to such activity is more appropriate in such a case than in others. It will, however, be necessary to invest an appropriate person with power to apprehend and return an absconding ward to the custody of the Director of Welfare. When a ward cannot be persuaded to return voluntarily, provision should be made for the court to order that the child be apprehended for the purpose of returning him to the custody of the Director. The power to apprehend and return the child should be conferred upon authorised officers of the Welfare Division. A member of the Australian Federal Police should be permitted to accompany and assist the officer of the Welfare Division if the officer requests such assistance. The provision for arrest in s.118 applies not only with respect to cases where the ward absconds, but also where he is illegally removed from his proper custody. Officers of the Welfare Division who are authorised to apprehend and return a ward who absconds should also be authorised to apprehend and return a ward who is illegally

---

[106] Child Welfare Agreement Ordinance 1941 (A.C.T.), Second Schedule, clause 3(1),(2) and (5).
[107] Child Welfare Act 1939 (N.S.W.), s.139A; Community Welfare Act 1972 (S.A.), s.41; Community Welfare Services Act 1978 (Vic), s.45; Child Welfare Act 1947 (W.A.), s.66A.
[108] A similar recommendation was made in the *Green Paper*, 24.

removed. Reference must also be made to s.98(2) of the present Ordinance. This makes it an offence to remove a ward from his proper custody. A similar provision should be contained in the new Ordinance, but it should not be confined to the unlawful removal of wards. It should apply to the unlawful removal of any child from the care or custody of a person with whom he has been placed under the Ordinance.

361. ***Extended Financial Assistance*** It has been recommended that the new legislation should make it clear that wardship terminates when a child attains the age of 18.[109] Adoption of this recommendation would raise questions about the Welfare Division's authority to continue to provide financial assistance for ex-wards after they have attained the age of 18. A child might, for example, wish to remain at school after wardship has terminated or might wish to undertake tertiary education or vocational training. There might be no members of his family who are able or willing to assist him financially. The present Ordinance does not make explicit provision for such a situation. In some Australian jurisdictions provision is made for the appropriate Minister to extend a period of wardship.[110] The N.S.W. Act specifically permits the Minister for Youth and Community Services to authorise continued payments after a ward attains the age of 18. Section 23(8) of the Child Welfare Act 1939 (N.S.W.) states that

> for the purpose of securing education or vocational training on a full-time basis for any person who immediately before his eighteenth birthday was a ward and in respect of whom payment to a foster parent has been extended[111] to that birthday the Minister may ... authorise an extension of such payments as if that person were a ward.[112]

The Department of the Capital Territory has expressed the view that the inclusion of a similar provision in the new Ordinance is desirable.[113] The Commission agrees with this submission. It is necessary for the Director of Welfare to be authorised to provide financial assistance for ex-wards. It is not necessary for wardship to be extended in order to make this assistance available. The N.S.W. provision is, however, rather restrictive. The new Ordinance should confer a broader power on the Director of Welfare. He should be authorised to make payments to or on behalf of an ex-ward for educational or vocational purposes or for any other purpose which seems to him to be appropriate. A broadly worded power would permit the Director to assist an ex-ward in times of hardship.

Review

362. ***The Need*** The necessity for regular, independent review of the measures employed in respect of children in need of care has been stressed.[114] The object of the review process should be to protect the child, to see that the various health and welfare authorities have fulfilled their obligations, and to ensure that the court's expectations are realised. By definition, the orders made by the Childrens Court in its non-criminal jurisdiction are designed to assist the child and to meet needs which cannot otherwise be met. If the required services are not offered, or prove inappropriate, the continuance of an order cannot be justified. It is unwise simply to assume that services will be provided:

> There is ... an abiding belief that any official's failure to do what is best by a child is the exception, not the rule, and is due solely to occasional errors of judgement ... It is presumed that under the circumstances society is doing what is best for the individuals ... The relative powerlessness of children makes them uniquely vulnerable to this rationale.[115]

The system should be designed in such a way as to ensure that the situation of every child who is the subject of a court order is regularly re-assessed. The object must be to avoid the continuance of intervention which a change in the circumstances of the child or his family has rendered unjustifiable or unsuited to the child's needs.

---

[109] Para.341.
[110] For example, Community Welfare Services Act 1970 (Vic.), s.36(1); Child Welfare Act 1947 (W.A.), s.49(1); and Child Welfare Act 1960 (Tas.), s.45(3) and (4).
[111] Provision for the extension of payments to a foster parent of a ward after the ward has attained school leaving age is made in the Child Welfare Act 1939 (N.S.W.), s.23(7).
[112] The *Green Paper*, 23, recommended that this provision be retained.
[113] Department of the Capital Territory, *Submission*, 82.
[114] Para.332.
[115] Rodham, 'Children under the Law', 43 *Harvard Educational Review*, (1973), 487, 493.

363. ***Procedure*** When a supervision order has been made, or a child placed in a home pursuant to a residential order, or placed under the guardianship of the Director of Welfare, the Youth Advocate should, on the court's behalf, monitor the child's progress. Every three months the person appointed to be the child's supervisor under a supervision order should provide the Youth Advocate with a report on the child. For a child who has been placed in the care of a suitable person, a report, prepared by that person, should be furnished every three months. For a child who has been ordered to live where directed by the Director of Welfare, the report should be completed by the officer responsible for the case. Similarly, reports should be prepared in respect of children who have been made wards. If the Youth Advocate is dissatisfied with a child's situation he should be empowered, at his discretion, to bring the case back to court and to seek a variation or revocation of the original order. The procedure to be employed, and the court's powers when dealing with such an application, are described below. In addition to the informal reviews undertaken by the Youth Advocate, the new Ordinance should provide that the Childrens Court should, once a year, review the situation of a child who has been made the subject of a supervision order, a residential order, or a wardship order. The proposed procedure whereby the court is to undertake an annual review of the situation of every child should be a less exacting inquiry than the initial application for a declaration that the child was in need of care, but should nevertheless involve a conscientious and thorough examination of the suitability of the existing order, the interests and welfare of the child, and the interests of the child's parents or previous guardian. The review procedure should not be a rubber stamp. Before permitting an existing order to continue, the court should be satisfied that the child is still a child in need of care, as defined in the legislation, and that his situation is such as to justify continued intervention. The Youth Advocate, as the official with primary responsibility for the monitoring of the orders of the Childrens Court, should be in a position to perform the administrative functions associated with the review procedure, and will in many cases be well acquainted with the cases which arise for review. The decision itself, however, should be a judicial one, for the same reasons as the making of the initial order should be a judicial decision. The procedure envisaged is that, two months before the court's annual review is to be undertaken, the Youth Advocate should prepare a report on the personal circumstances and progress of the child. At that time the Youth Advocate should give written notice of the review to the child (if he has attained the age of 10), to the child's natural parents or previous guardian (whichever is appropriate), and to the foster parents, home or other person or agency having the supervision or care of the child at the time. The notice should indicate the date of the expiration of the 12 month period, the date and place of the review hearing, and should include a brief explanation in simple language of the kind of factors which are relevant to the magistrate's decision. The review hearing should be held in the presence of the Youth Advocate, any person (or that person's representative) who has received notice of the review and wishes to attend, and any other person to whom the magistrate gives leave to attend. The child should be permitted to be present if he wishes, although provision should be made for the magistrate to dispense with his attendance if the child is very young or otherwise for good cause. Any person who opposes the revocation, continuance or variation of the order should have an opportunity to be heard at a review hearing. The courses open to the court at the conclusion of a review hearing should be as follows.

- A revocation of the order.
- Confirmation that the order should remain in force.
- Confirmation that the order should remain in force, but in amended form. The court might decide, for example, that the conditions of a supervision order or a placement under a residential order should be changed. Although all placements of a ward should be at the discretion of the Director of Welfare, there might also be occasions when the court wishes to recommend a change of placement.
- Revocation of the order and the substitution of any other order available in care proceedings.

Revocation or Variation

364. ***Principles*** In Chapter 6, it was recommended that, when a young offender has disobeyed the terms of a probation order, an attendance centre order, or a residential placement order, it should be possible for action to be taken to endeavour to enforce compliance.[116] It was proposed that the child

---

[116] Para.244f.

be dealt with for a breach of the court's order. Such an approach would be inappropriate in the case of a child who has been dealt with as being in need of care. When a child has been declared to be in need of care, the purpose of a court order is to protect him and to promote his welfare. A failure by the parents or child to abide by the terms of the court's order should not be treated as a breach, but as an indication that the order is not working or is not an appropriate one. Indeed, there will be situations in which there has been no 'failure' by those who are the subject of an order. A placement made under a residential order or pursuant to a wardship order may prove unsuitable, or the conditions attached to a supervision order may have been made inappropriate because of a change in the family's circumstances. What is needed is a procedure whereby the Childrens Court may be given an opportunity to re-examine the child's situation and to re-consider the suitability of the initial order. If, as the Commission believes, the Childrens Court should take a close and continuing interest in children who have been declared to be in need of care, it must be given the opportunity to undertake a complete re-assessment of these children's situations.

365. ***Procedure*** Persons directly affected by an order and any other person should be permitted to apply to the Childrens Court for the variation or revocation of a supervision order, a residential order, or a wardship order. In all cases the child, his parent or guardian and the Youth Advocate should be permitted to make an application. When a supervision order has been made, the person responsible fo his supervision (i.e. the actual supervisor when the Welfare Division is not involved, or the Director of Welfare) should have the necessary standing. Similarly, a person responsible for the care of a child the subject of a residential order should be permitted to apply. When a child has been made a ward, the Director of Welfare should be authorised to make an application. In normal circumstances it is the Youth Advocate who should apply for the variation or revocation of a court order, since the performance of his legislative duty to review the progress of every child should make him aware of any problems which have arisen. However, it should not be possible for the Youth Advocate to bar access to the Childrens Court to, for example, the child, his parents, the supervisor nominated under a supervision order, or the person responsible for a child's care under a residential order. If any of these persons feels that the court's order, or any of the conditions attached to it, has subsequently proved inappropriate, he should be permitted to apply to the Childrens Court for a variation or revocation. In addition a person not directly involved should be permitted to make a similar application. Although there is a risk that, if other persons are authorised to apply, applications might be made by 'busy bodies', the procedure will involve cost and effort, and this will probably discourage such persons. Further, it will always be open to the court to refuse to make an order. The advantage of permitting anyone to apply is that a person with a genuine interest in a particular child's welfare might be encouraged to intervene. This recommendation regarding the range of possible applicants should be contrasted with the proposals relating to variation procedures in criminal matters.[117] The latter proposals limit the categories of possible applicants to the Youth Advocate and those directly affected by an order. In criminal matters it is not appropriate for outsiders to intervene. An application for a variation or revocation should not be used as an alternative to an appeal to the Supreme Court. Nor should the making of repeated applications be permitted, or the making of an application immediately prior to a review hearing. However, it can safely be left to the Childrens Court to exercise sufficient control to prevent abuses of its process.[118] As in review proceedings, copies of an application for a variation or revocation should be served on the child (if he has attained the age of 10), the parent or guardian, and the person or persons responsible for the child's supervision or care. The orders available to a court when dealing with an application for variation or revocation should be the same as those available in review proceedings.

366. ***Children Placed Interstate*** Special problems arise regarding the jurisdiction of the Childrens Court to review the progress of wards who have been placed in homes under the control of the N.S.W. Department of Youth and Community Services or children who have been committed to one of these institutions. As has been explained, under the present law, when the Minister for the Capital Territory decides to place an A.C.T. ward in a N.S.W. State home, the N.S.W. Minister for Youth

117 Para.250.

118 For an example of statutory restrictions designed to prevent the abuse of revocation and variation procedures, see the Social Work (Scotland) Act 1968, s.48(4).

and Community Services may deal with the child as if he were a ward admitted to State control under the State Act.[119] If the proposed review and revocation and variation procedures are to be effective, it will be necessary for the Youth Advocate to be able to obtain information about the progress of a ward placed in a N.S.W. State home, and for the A.C.T. Childrens Court to be empowered to terminate a wardship order which has led to an inter-state placement. It would clearly be unjust if an administrative decision to place a ward in a N.S.W. home were to deprive him of the benefit of the recommended monitoring procedures. Similarly it should be possible for the A.C.T. Childrens Court to review, and hear applications for the revocation or variation of, orders which have resulted in the committal of a child to a N.S.W. institution. The existing law does allow the A.C.T. authorities to exercise some control in respect of children who are placed under the control of the N.S.W. Minister. The Child Welfare Agreement Ordinance 1941 (A.C.T.) provides that the Minister for the Capital Territory may require the State authorities to return to the Territory a child who has been placed under their control pursuant to the agreement.[120] However, as Chief Justice Barwick pointed out in *Minister for the Interior* v. *Neyens*[121], there is no power in the court to direct the Minister to act under the Ordinance. If the proposed procedures for regular review and for variation and revocation are to be effective in the case of children placed in N.S.W. State homes and institutions, the Childrens Court should have an ancillary power to direct that the necessary determination be made under the Child Welfare Agreement Ordinance.[122] However, such a recommendation raises jurisdictional problems, for, if the A.C.T. Childrens Court were to issue such a directive, this would involve making an order in respect of children no longer physically within its jurisdiction. The Law Reform Commission of the A.C.T. put forward a possible solution in the form of alternative jurisdictional criteria. That Commission recommended that jurisdiction be exercisable in respect of children present, or ordinarily resident, in the A.C.T. at the time of the institution of proceedings.[123] It is proposed that the jurisdiction of the Childrens Court with respect to the review of the status and placement of children subject to wardship orders, and the variation and revocation of such orders, be based upon the criterion of the child's having been ordinarily resident or present in the Territory at the time the A.C.T. Childrens Court made the wardship order. Similar criteria should be adopted with regard to review and revocation and variation procedures relating to orders under which A.C.T. children have been committed to N.S.W. institutions. The Childrens Court should be empowered to review, and to hear revocation or variation applications relating to, wardship orders which have resulted in interstate placements. It should have similar powers with regard to orders under which a child has been committed to a N.S.W. institution. If the court decides to terminate or vary the relevant order, the court should also have the power to direct the Minister to arrange the child's return to the A.C.T.

367. ***Children the Subject of Residential Orders*** Children who are placed in a home or hostel pursuant to a residential order will remain under their parents' guardianship. The person named in the order, whether it be the Director of Welfare or the person who actually provides the accommodation for the child, should be responsible for the child's 'care'. The types of responsibilities undertaken by a person who has the 'care' of a child have already been discussed.[124] The residential orders proposed by the Commission are similar to orders for which provision is already made under the existing Ordinance. These orders permit a child to be committed to the care of a willing person or ordered to live where directed by the Assistant Secretary, Welfare.[125] The Commission has been informed of certain problems related to orders of the kind mentioned. These have arisen because of uncertainties about who may exercise responsibility for children in residental placements. A child in such a placement remains under the guardianship of his parents, but responsibility for his day-to-day care is tranferred to a foster parent or house parent in a group home or hostel. The situation is further complicated when a child is placed in a home or hostel pursuant to a live where directed order. Such an order confers on the Assistant Secretary, Welfare the power to determine where the

119 Child Welfare Agreement Ordinance 1941 (A.C.T.), Second Schedule, clause 3(1), (2) and (5).

120 Child Welfare Agreement Ordinance 1941 (A.C.T.), First Schedule, clause 3 and Second Schedule, clause 6.

121 (1964) 113 CLR 411, 419.

122 A similar recommendation was made by the Law Reform Commission of the A.C.T., *Report on the Law of Guardianship and Custody of Infants*, (1974), 15.

123 id., 6 and 15.

124 Para.346.

125 See para.48, 50 for a discussion of these orders.

child shall live. Usually such an order also places the child under the supervision of Welfare Branch staff. The responsibilities which a supervising officer assumes pursuant to a live where directed order are ill-defined.[126] The result is a confused situation in which power over, and responsibility for, the child are divided among the child's parents, the supervisor and the person charged with his day-to-day care. Examples of the types of difficulties which have arisen are as follows.

- Pursuant to a live where directed order a 12-year-old girl was placed in a home run by Outreach Inc. She required a minor operation. The parents refused consent and the hospital was unwilling to proceed without parental consent. Neither the house parents, those in charge of Outreach Inc., nor the welfare authorities were in a position to give consent. The operation was not performed.
- The house parents of a home run by Dr Barnardo's decided to take the children living in the home on a weekend outing. The father of one of the boys (who was subject to a live where directed order) refused to give consent to the boy's participation in the outing. The house parents felt that they could not ignore the parent's view and the Assistant Secretary, Welfare had no authority to give consent. The boy was left behind.
- A young child was resident in Marymead Children's Centre pursuant to a live where directed order. The parents regularly and at inconvenient hours visited the home and demanded access to the child. Staff considered that these visits had an upsetting effect on the child. Yet neither they nor the Assistant Secretary, Welfare had the authority to prevent the visits, since the parents were still the child's legal guardians.
- A 15-year-old girl the subject of a live where directed order asked the house parent of the home in which she had been placed to arrange a doctor's appointment so that she could obtain a prescription for the contraceptive pill. The house parent agreed and the girl was given the prescription. The girl's Welfare Branch supervisor was informed and strongly objected to the course which had been taken. It was far from clear that the supervisor had the authority to object. When the parents were contacted they displayed little interest and told the supervisor that she should do as she thought best.

In such situations it is understandable for house parents to turn to the Welfare Branch for guidance and for senior members of the Branch to act as authority figures. Yet the limits of the authority of welfare staff are far from clear. In some cases of the type described it is perhaps appropriate for the child's parents to be approached to make the necessary decisions. However, this is not always practicable with regard to day-to-day problems. Further, parents might feel that decisions should be made by persons actually responsible for the child's care.

368. ***Children in Residential Care: A Suggested Solution*** In considering difficulties of the type described, the Commission was initially attracted to seeking a solution by way of a comprehensive legislative definition of 'care'. If the law could make clear the precise responsibilities which a person assumes when he accepts the 'care' of a child pursuant to a residential order, the problems noted in the previous paragraph would be solved. However, the Commission has concluded that it is not possible to produce a legislative definition which would be sufficiently clear and all-encompassing. Reference to some of the examples quoted above should make the difficulties plain. In the earlier discussion of the meaning of 'care' it was suggested that it should include a responsibility for attention to a child's minor health requirements.[127] If terminology of this kind were included in a legislative definition of 'care' it would probably be clear that a person responsible for a child's 'care' would not be authorised to consent to an operation. But where would responsibility lie for permitting or forbidding the taking of contraceptives? The prescription of contraceptives for children is an issue on which there is much disagreement. If the suggested definition were adopted it is extremely likely that some would argue that the control of children's use of contraceptives amounted to a 'minor' health matter, and hence was the responsibility of the person to whom the child's 'care' had been entrusted. Others would argue that the control of chilren's use of contraceptives is so important that it should be the responsibility of the child's parents. Clearly reliance on a legislative definition of 'care' would not solve problems of this kind. A more practical approach would be for the

[126] See, however, regulation 22 of the Child Welfare Regulations 1957 (A.C.T.).
[127] Para.346.

Childrens Court, when making a residential order, to be empowered to give directions designed to indicate who may exercise various responsibilities relating to the child. This would be consistent with the Commission's view that in future the Childrens Court should be closely involved in formulating detailed orders rather than making broad orders which leave much to the discretion of those administering them. The types of directions accompanying a residential order would vary from case to case. It would be up to the Youth Advocate, the child, his parents, the writer of the background report and others who had been associated with the child to bring to the court's attention difficulties which might arise under a residential order. For example, it might be clear in a particular case that problems relating to parental access are likely. Or a child might need continuing medical treatment, and it might be desirable at the outset to establish who is responsible for ensuring that this treatment is provided. In each instance the court should be authorised to give an appropriate direction. Further, when a residential order is made, it will not always be apparent that specific directions are required. Unexpected difficulties may arise during the currency of the order. It should, therefore, be open to the Youth Advocate, the child, his parents and any person responsible for implementing a residential order to apply to the Childrens Court for an order for directions about the exercise of defined responsibilities in relation to a child who is the subject of such an order.

10. Child Abuse

Nature of the Problem

369. ***Special Features of Child Abuse*** Although child abuse is an extreme form of failure to provide adequate care, it is a problem characterised by certain special features which justify its being examined separately. The following case studies illustrate the presence of such features:

> *Baby with fractured skull.* A case involving a four-month-old baby came to the notice of the Parent Support Service.[1] The baby had a fractured skull. The matter was referred to a general practitioner and then to a local hospital. After proffering a number of clearly untrue and impossible explanations of the fracture, the mother admitted that she had regularly beaten the baby. The hospital social worker informed the Welfare Branch and, after a meeting of the Child Abuse Committee[2], the police became involved and the child was charged with being a neglected child. The Childrens Court remanded the matter for one month while a psychiatric assessment of both parents was obtained. The child was temporarily placed in foster care.
>
> *Boy with cigarette burns.* A two-year-old boy with severe bruising and cigarette burns was brought by his father to the casualty department of a local hospital. In addition to his injuries the child was seriously withdrawn and would not respond to any of the hospital staff. He showed no response to painful stimuli. Casualty staff were suspicious when the father claimed that the boy's injuries were the result of 'falling off a swing'. The father was reluctant to leave the boy in hospital, but was persuaded to do so. The police were unsure whether they had enough evidence either to charge the father with assault or to charge the child with being a neglected child. During the child's stay in hospital the staff there were most anxious as they feared that the parents would return and demand that the child be discharged. At one stage they resorted to hiding the child when they knew that the father was planning to visit the hospital.

A case of child abuse involves the possibility of prosecution of a parent or guardian in respect of a serious offence, such as the infliction of grievous bodily harm. Where both the criminal law and matters of child welfare are involved, there arise questions as to the appropriateness of charging parents and the confidentiality of potentially incriminating information given to welfare workers. A case of child abuse may also reveal a pattern of parenting which, if continued, involves serious risk to the child. The element of risk may justify the use of urgent preventive measures, such as an order for the detention of the child in a hospital or place of safety away from his parents.

370. ***Conflicting Principles*** Two conflicting objectives, each in itself desirable, are involved in any response to the problem of child abuse.[3]

- Society should normally respect family autonomy and privacy. Such respect requires that there should be as little interference as possible with the liberty of parents or guardians to raise their children as they think best.
- Society should accept the ultimate obligation to protect children from harm.

The goals of prevention of child abuse and ensuring utilisation of helpful supporting services are pursued only at a certain cost to liberty. A balance must be struck between family autonomy and community intervention to protect the child.

371. ***Social Problem, Community Treatment***

> . . . the incidence of 'child maltreatment' is an index of the total social disharmony within a society, and perhaps in the long run the true solution will only be found in fundamental improvement in the nature of our society.[4]

The concept of child abuse is relatively recent[5]. Even in the past decade it has changed in two respects. In the early 1970s child abuse was characterised as a problem of individual deviancy and as an occasion for the imposition of severe criminal sanctions. Towards the end of the decade there was a change in the orientation of the community's concern. Parents who maltreated their children were viewed not as isolated deviants but as members of a society subject to pressures to which many

---

1 See para.258.
2 See para.377.
3 See generally, Wald, 246; Juvenile Justice Standards Project, *Abuse and Neglect* (1977), 38–44.
4 Neal, 'The Health Needs of the Australian Child' (1974) (Paper delivered at the Rights of the Child Conference, Canberra).
5 Kempe, who together with his colleagues at the Colarado School of Medicine coined the term 'battered child syndrome' in 1962, is credited with being the first person to focus attention on cases of child abuse. (See Kempe et al., 'The Battered Child Syndrome', 181 *Journal of the American Medical Association*, 17 (1962)).

individuals could succumb. It was recognised that Australian society, like other Western industrial urban societies, provides an environment which can lead to child abuse. Child abuse came to be viewed rather as a problem of the family and society than of the individual. A concurrent change resulted in less emphasis being placed on severe criminal sanctions. The change was reflected in the growth of supportive services, first in the United States and, later, in some Australian States. The retributive theories of punishment associated with the prosecution of abusive parents were recognised as a hindrance to the achievement of protection and maximum assistance for the child. In the nature of things the child will normally continue his association with the abusing parent, since that association cannot readily be terminated, whatever courts might order.

372. ***The Myth of Classlessness?***[6] It is generally agreed that the cases which are recognised and labelled as cases of child abuse are only 'the tip of the iceberg', there being a much greater incidence of maltreatment that is either not brought to the attention of agencies or seen and not recognised.[7] In the United States, there is evidence that the preponderance of cases which come to notice involve families from the lowest socio-economic levels.[8] It is sometimes argued that child abuse is broadly distributed throughout the community, irrespective of the income, level of education, race, nationality or religion of the family concerned.[9] The family lives of poor people are, however, generally more open to public scrutiny as, for example, in the casualty department of a hospital. Therefore, it is claimed that the socio-economic distribution of the cases coming to notice does not reflect that of all cases. It is argued that there are proportionately more *unreported* cases among the more privileged classes of Australian society. There is an alternative contention to the effect that the statistics of cases coming to notice do not present a distorted picture. Studies in the United States suggest a relationship between poverty and child abuse.[10] The Royal Commission on Human Relationships found that poverty, unemployment, lack of social services, isolation, unwanted pregnancy, poor health, alcohol abuse, certain attitudes to violence, to parenthood, children and family roles are factors having a high relationship with violence in the home.[11] The Royal Commission reported:

> Poor people have fewer alternatives and fewer escapes from dealing with their aggressive impulses than those who are not poor.[12]

Impressionistic evidence gathered by the Commission in the A.C.T. suggests that the greater number of cases which do come to notice there occur in the under-privileged sector of the community. The number of cases of child abuse which come to notice in the A.C.T. is very low.[13] This could be due to the predominantly middle-class character of the A.C.T. On the other hand it could also be due to other factors such as inadequate co-ordination of supportive services or the absence of reporting legislation.

---

6 Pelton, 'Child Abuse and Neglect: The Myth of Classlessness', 48 *Amer J. Orthopsychiat*, 608 (October 1978).
7 Royal Commission on Human Relationships, *Final Report, Volume 4, Part V, The Family* (1977), 161–2 (hereafter *'Royal Commission on Human Relationships'*).
8 *American Humane Association, Statistics for 1975; American Humane Association, 1978* (National Analysis of Official Child Neglect and Abuse Reporting); Young, *Wednesday's Children: A Study of Child Neglect & Abuse* (1971); *Royal Commission on Human Relationships*, 164.
9 *Royal Commission on Human Relationships*, 164.
10 Gil, *Violence Against Children: Physical Child Abuse in the United States* (1970).
11 *Royal Commission on Human Relationships*, 163–170.
12 id., 164.
13 The number of cases of child abuse which have come to the notice of the Welfare Branch Child Abuse Committee since 1975 are:

1976	13
1977	13
1978	11
1979	27

Other less serious cases which have come to the notice of the Welfare Branch, but have not been referred to the committee, could on a broader definition of 'child abuse' increase the figures. In 1980–1 the Child Life Protection Unit (see para.378) received 56 complaints, of which 26 were dealt with by the Unit. In 1978, 26 cases of real or suspected child abuse were discussed by the Health Commission Child Abuse Committee. Some of these cases may be included in the Welfare Branch figures. It is probable that many incidents of maltreatment never come to the notice of either committee.

Current Law and Practice: Australian Capital Territory

373. ***Child Welfare Ordinance*** The Child Welfare Ordinance 1957 (A.C.T.) does not deal specifically with child abuse. It does not provide for the reporting of suspected cases of child abuse or for special support services or the protection of children whose cases have come to notice. The child who has suffered abuse may be brought before the Childrens Court charged with being a neglected child. The definition of 'neglected child' in s.5 of the Ordinance includes a child who, without reasonable excuse, is not provided with sufficient and proper food, nursing, clothing, medical aid or lodging or who is ill-treated or exposed. Although the Ordinance suggests that the neglected child may be either apprehended or a summons issued for his appearance, the police usually elect to proceed by way of arrest.[14] In serious cases the child is immediately removed from the custody of his parents or guardian and placed in an institution such as Marymead Children's Centre. The only other provisions in the Ordinance dealing with the maltreatment of children appear in Part XII. Section 98(1) provides that a person shall not fail to provide adequate or proper food, nursing, clothing, medical aid or lodging for a child in his care. Section 98(2)(a) provides that a person shall not ill-treat, terrorise, overwork or injure a ward. It is to be noted that while s.98(1) imposes a general duty of care upon all persons caring for a child, s.98(2)(a) imposes upon all persons a duty akin to a general duty not to maltreat, but limits its application to wards. Under s.98(2)(d) a person shall not neglect a ward of whom he has the care. Section 99 creates an offence where a person assaults, ill-treats or exposes a child or causes or procures a child to be assaulted, ill-treated or exposed and the assault, ill-treatment or exposure has resulted, or appears likely to result, in bodily suffering or permanent or serious injury to the health of the child. The penalty for the various offences created by s.98 and 99 is a fine not exceeding $200 or imprisonment for a term not exceeding six months, or both.[15] Section 124 states that nothing in the Ordinance takes away or affects the right of a parent, teacher or other person having the lawful care of a child to administer punishment to the child. A prosecution of a person responsible for maltreating a child may be brought for a criminal offence under Division III of the Crimes Act 1900 (N.S.W.) as it applies in the A.C.T. The relevant offences include murder, manslaughter, wounding or inflicting grievous bodily harm, assault, carnal knowledge and incest.[16]

374. ***The Handling of Child Abuse Cases*** Cases of suspected child abuse may come to notice in a number of ways. A concerned neighbour may telephone the Welfare Branch or the police, or the child may be brought to a local health centre, hospital or voluntary agency. Where the case is brought to the notice of the Welfare Branch, the first step is to check the information as thoroughly as possible and the background of the informant and the relationship between the informant and the suspected abuser. Anonymous calls pose obvious problems for investigation. The Commission received a confidential submission from a couple who had been visited by a member of the Welfare Branch following an anonymous complaint. No action was taken by the Branch following the interview. The couple complained to the Welfare Branch whose spokesman — a senior officer — in due course replied:

> I appreciate that anonymous calls must be treated with some suspicion and it would be quite unwise to accept an anonymous report as being accurate without verification. On the other hand I am sure that you would agree that any report involving accusations of child neglect or ill treatment must be investigated. Usually the only satisfactory way to do this is to visit the home of the child concerned and interview the parent or parents.

If the Welfare Branch is satisfied that the complaint warrants investigation, a staff member visits the child's home in an endeavour to find out the child's circumstances. If the parents co-operate and the child seems to have been abused, the Branch may offer immediate assistance, in the form of counselling, to the parents. In addition, the Branch may seek to have the child placed, with the parents' consent, with a voluntary agency. If the parents do not co-operate and the Welfare Branch believes the child is at risk or needs medical attention, or if the Branch is of the opinion that the police should be involved, the police are notified and a case conference is held between the Branch and a senior member of the police force. Upon the involvement of the police, previously uncooperative parents may agree to the child being voluntarily placed. In a placement of this kind, which should only be made if the parents consent, the Welfare Branch underwrites the cost of care. If the parents do not agree, the child may be charged with being neglected, and, in a serious case, an assault charge may be laid.

375. ***The Role of the Police: The Child*** A case may come directly to the notice of the police when, for example, they are called to a domestic dispute. In almost every case a detective is allocated to make the initial investigation. Where the parents consent to a placement in a home such as Marymead, the investigating detective usually hands over the case to the Juvenile Aid Bureau. Where there exists a potential risk (as, for example, when there is a recurrence of maltreatment) the case remains with the detective. The Welfare Branch Child Abuse Committee or an individual case conference (if one is held) may recommend that the child be charged. However, where the police feel there is insufficient evidence to lay a charge, they may not follow that recommendation. When a case comes to notice through a source other than the police — for example, the Welfare Branch or the Capital Territory Health Commission — the police may or may not learn of it. It is the policy of the Welfare Branch to inform the police of a case if the child has suffered injury which is so serious that it appears that an assault charge could be laid. Of course, the police member of the Welfare Branch Child Abuse Committee may learn of a case when it is discussed by the Committee. Some staff of the Health Commission regard contacting the police as incompatible with their professional role to help the child and his parents. If they feel that criminal proceedings might need to be instituted, they may notify the Welfare Branch and leave it to members of that Branch to inform the police of the case.

376. ***The Role of the Police: The Parent or Guardian*** The police may charge a parent or guardian with a criminal offence, usually assault or the infliction of grievous bodily harm. The Child Welfare Ordinance does not provide for the co-ordination of the criminal proceedings against the parent and the proceedings against the child in the Childrens Court. Each matter is heard separately, often before different magistrates. When a charge is preferred against an offending parent or guardian an adjournment may be sought until the outcome of the child's medical treatment is known. In some cases time is needed to assess the extent of the child's injuries. It must be noted that, even if the parent or guardian is not charged with a criminal offence, he may be punished as a result of the neglect proceedings by loss of custody and even access to the child.

377. ***The Child Abuse Committees*** There are two child abuse committees in the Australian Capital Territory. One is an inter-agency committee convened within the Welfare Branch of the Department of the Capital Territory. The other is a co-ordinating committee consisting solely of members of the Capital Territory Health Commission.

- *The Welfare Branch Child Abuse Committee.* A monthly meeting of a multi-disciplinary Child Abuse Committee ('the Welfare Branch Committee') has been convened by the Assistant Secretary, Welfare since September 1975. This committee consists of representatives of the Welfare Branch, the Australian Federal Police, the Mental Health Branch and the Child Health Unit of the Capital Territory Health Commission, Marymead Children's Centre and the Parent Support Service, together with a Family Court counsellor and social workers from the Royal Canberra and Woden Valley hospitals. The functions of the Committee are:
  - to aid the Assistant Secretary, Welfare in the handling of child abuse cases by providing multi-disciplinary advice;
  - to monitor the progress of cases; and
  - to endeavour to ensure rehabilitation of a family involved through the combined action of all agencies.

  Further functions of a broader nature are to provide a forum for education, to determine guidelines and procedures for dealing with cases and to explore the possibility of uniform methods of obtaining specialist medical and legal advice for agency workers.

---

[14] See para.253.

[15] Child Welfare Ordinance 1957 (A.C.T.), s.94(2).

[16] Crimes Act 1900 (N.S.W.): murder (s.19,21), manslaughter (s.23(2)), attempt to murder (s.27, 29, 30), wounding or inflicting (or causing) grievous bodily harm (s.33,35,34), choking, suffocating or poisoning (s.37,38,39,41) and assault (s.59,60,61). Offences specifically against children are child murder (s.20,21), infanticide (s.22A), injury to a child at time of birth (s.42), exposing or abandoning a child under two (s.43) and refusing or neglecting to provide a child with food, clothing or lodging (s.44). Sexual abuse is covered by provisions relating to rape (s.63), carnal knowledge (s.67,68,69,70,71,72), indecent assault (s.76,76A), incest (s.78A,78B), and unnatural offences (s.79,80,81,81A, 81B). The provisions relating to carnal knowledge contain particular reference to the age of the girl, and s.73 and 74 deal with carnal knowledge by a teacher, father or step-father.

- *The Health Commission Child Abuse Committee.* In November 1977 the Capital Territory Health Commission set up its own Child Abuse Committee ('the Health Commission Committee') comprised of the Medical Officer in Charge of Child Health, a child psychiatrist, a paediatrician, and the senior social workers from the Royal Canberra and Woden Valley hospitals. The terms of reference of this committee include:
  - the establishment, throughout the Health Commission's agencies, of principles, guidelines and procedures for dealing with cases of child abuse, child neglect and failure to thrive;
  - the creation of uniform policies and methods of reporting and dealing with cases;
  - the provision of consultation and advice in cases referred to the Committee by the Commission's medical and other practitioners; and
  - the provision of consultation and planning advice in relation to other authorities.

  The main functions of the committee are consultation, the compilation of statistics, (being an internal record of the number of cases discussed by the committee), and the provision of educational programs on child abuse. The committee has produced general guidelines for Capital Territory Health Commission health workers who discover cases of suspected abuse. Health Commission workers in the community who are suspicious that abuse is taking place discuss the case with their supervisor, and a decision is made as to whether the case will be referred to the Health Commission Child Abuse Committee. If a child is brought to the hospital the decision to admit for suspected or actual abuse is made by a paediatrician, who also decides whether or not to involve the committee.

378. ***'Crisis Work': The Child Life Protection Unit*** The Child Life Protection Unit, operating within the Welfare Branch, was formed in 1980 with the specific purpose of investigating and dealing with serious cases of neglect or child abuse. Its staff consists of two full-time social workers and one part-time welfare worker who is also a trained nurse. The Unit does not provide a 24 hour emergency service like 'Montrose' in N.S.W. It does, however, make a point of investigating complaints within 24 hours of receiving them. Possibly because it is a small unit and because it is an 'in-house' Welfare Branch service, it receives few complaints directly from the general public. Most of its referrals are from the police or from senior social workers at hospitals. Increasingly, the Unit is receiving referrals from other members of the Welfare Branch. The justification for the establishment of the Unit was two-fold. First, there was seen to be a need for expertise to be developed in dealing with 'crisis cases'. Secondly, as these cases involve great risk to the child concerned, it was felt that resources should always be immediately available to deal with them. The Unit does not confine itself to immediate assistance. It also has continuing involvement with cases brought to its notice. In handling a case of abuse the Unit conducts counselling with the parties and often seeks part-time care for the abused child and his siblings. In this way an attempt is made to relieve the stresses which may have caused the abuse.

Current Law and Practice: States of Australia

379. ***Reporting Legislation*** In Australia, a great deal of legislation has recently been enacted relating to the reporting of child abuse, definitions of child abuse, specification of the recipients of reports, and emergency hospitalisation and holding provisions. What follows is a summary of the main provisions. There is no reference to criminal offences and penalties incurred in this context. It might be noted that Tasmania is the only State in Australia which has a separate Act dealing with child abuse. In New South Wales, South Australia, Queensland and Tasmania, legislation provides that medical practitioners have a compulsory duty to report where evidence of maltreatment comes to them in the course of their professional duties.[17] In South Australia the classes of persons required to make reports include not only any medical practitioner but also any registered dentist, any registered or enrolled nurse, any registered teacher, any member of the police force and any employee of an agency established to promote child welfare or community welfare.[18] In Tasmania the classes of

[17] Child Welfare Act 1939 (N.S.W.), s.148B; Community Welfare Act 1972 (S.A.), s.82d; Health Act. 1937 (Qld), s.76K; Child Protection Act 1974 (Tas.), s.8(2).

[18] Community Welfare Act 1972 (S.A.), s.82d(2). In addition, it is proposed (A Bill for an Act to amend the Community Welfare Act 1972 (1981), cl. 91(2)) that any registered psychologist, any pharmaceutical chemist, any person employed in a kindergarten, and any social worker employed in a hospital, health centre or medical practice, be under a compulsory duty to notify suspected cases of child abuse.

persons required to make reports are medical practitioners, probation officers, child welfare officers, drug and alcohol welfare officers, holders of boarding home and day nursery licences, school principals, kindergarten teachers and mental health workers (psychiatrists, social workers and welfare officers).[19] In Victoria, the Government has decided to maintain voluntary reporting and evaluate the results of other States' mandatory reporting before giving further consideration to the introduction of mandatory reporting.[20] New South Wales, Victoria, South Australia and Tasmania also provide for voluntary reporting by any person who has reasonable grounds to suspect that child abuse has occurred.[21] Where compulsory or voluntary reporting legislation exists there is extended to the person making the report legal immunity from civil liability for breach of professional ethics, defamation, malicious prosecution, or conspiracy. In Western Australia[22] and the Northern Territory there is no reporting legislation.

380. ***Reportable Conditions: Defining Abuse*** Child abuse as a condition requiring compulsory reporting is defined differently in each State law. In New South Wales notification must be made where there is a reasonable suspicion that a child has been 'assaulted, ill-treated or exposed'.[23] In South Australia the duty arises where there is a suspicion upon reasonable grounds that the child has been maltreated or neglected or caused to be maltreated or neglected 'in a manner likely to subject the child to unnecessary injury or danger'.[24] In Queensland the duty arises where there is a suspicion on reasonable grounds that a child has been maltreated or neglected 'in a manner . . . likely to subject the child to unnecessary injury, suffering or danger'.[25] In Tasmania the legislation requires reporting where a child 'has suffered injury through cruel treatment', a child being regarded as having suffered cruel treatment notwithstanding that the treatment was not intended to be cruel or was not intended to result in injury to the child. 'Cruel treatment' may be constituted by neglect or failure to perform any act required for the welfare of the child.[26] In Victoria a voluntary report may be made where a person believes on reasonable grounds that a child is in need of care for any of the reasons specified in the legisation. The reasons include the child's being ill-treated, exposed or neglected, inadequately supervised or controlled, or the child's guardians being dead or incapacitated or jeopardising the child's physical or emotional development or abandoning the child.[27]

381. ***Recipient of the Report*** With one exception, no Australian legislation nominates the police as a recipient of the report, probably because it is thought that such a provision would discourage reporting in some cases through fear that a parent would be likely to be prosecuted. In New South Wales the report is to be made to the Director of the Department of Youth and Community Services who is finally responsible for appropriate action in all notified cases including the making of a decision as to the involvement of the police.[28] Upon the introduction of compulsory reporting, the 'Montrose' Child Life Protection Unit was set up by the Department.[29] 'Montrose' receives notifications upon behalf of the Director of the Department of Youth and Community Services. In Victoria the report may be made to a member of the police force or to any person who, or children's protection agency which, is authorised in that behalf by the Minister for Community Welfare

[19] The Child Protection Act 1974 (Tas.), s.8(2), provides for the introduction by statutory rule of compulsory reporting by persons following specified professions, callings or vocations. The provision was implemented by r.275 of the Statutory Rules 1975 (Tas.). Note that there has been no implementation by regulation of the provision in the Child Welfare Act 1939 (N.S.W.), s.148B(1), for the extension of compulsory reporting to 'prescribed persons', being persons who follow a prescribed profession (other than that of a solicitor or barrister), calling or vocation or who hold a prescribed office.

[20] Minister for Community Welfare Services, Victoria, *Press Release,* 27 May 1980.

[21] Child Welfare Act 1939 (N.S.W.), s.148B(2); Community Welfare Services Act 1978 (Vic.), s.31(3); Community Welfare Act 1972 (S.A.), s.82d(1); Child Protection Act 1974 (Tas.), s.8(1).

[22] There are in Western Australia specialised support services for child abuse cases. See para.381.

[23] Child Welfare Act 1939 (N.S.W.), s.148B(3).

[24] Community Welfare Act 1972 (S.A.), s.82d(1), 82e(1).

[25] Health Act 1937 (Qld), s.76K(1).

[26] Child Protection Act 1974 (Tas.), s.2(3), 8(1).

[27] Community Welfare Services Act 1978 (Vic.), s.31(1).

[28] Child Welfare Act 1939 (N.S.W.), s.148B(2), (3).

[29] A voluntary support service, 'Prevention', had been operating since 1974.

Services.[30] In 1980 there commenced a Government funded program, enabling the Children's Protection Society to develop child protection units in ten regions of Victoria. In South Australia notification is to be made to an officer of the Department of Community Welfare[31], who reports the matter to the appropriate regional panel.[32] In Tasmania notifications are made to the Child Protection Assessment Board.[33] The South Australian panel and the Tasmanian board are small multi-disciplinary bodies which have power to decide upon appropriate action in each case.[34] In Queensland the report is made to the Director-General of Health and Medical Services.[35] In Western Australia, a Child Welfare Protection Unit, established in 1970, receives reports on an informal basis. The Unit is part of the Department of Community Welfare and has been operating a Parent Help Centre since January 1976. The Centre offers a 24 hour crisis counselling service.

382. ***Hospitalisation and Holding Orders*** In New South Wales the Director of the Department of Youth and Community Services or a police constable may serve a notice upon parents requiring presentation of a child to a medical practitioner.[36] Upon a failure to comply, a constable may enter and remove the child, if need be by force. The Director is deemed to have custody of the child during the medical examination for up to 72 hours. In South Australia a child who has been admitted to hospital or a prescribed institution and whom the Director suspects upon reasonable grounds to have been the subject of maltreatment or neglect, may be lawfully detained for 96 hours against the will of a parent, guardian or person entitled to custody.[37] There are similar provisions in Queensland[38] and Western Australia[39], but the period of detention in the latter State is limited to 48 hours. In Tasmania an authorised officer of the Child Protection Assessment Board may require a parent or caretaker to take an abused child to a hospital for the purpose of his being examined by a paediatrician, or where it is not reasonably practicable for the parent to do so, may take the child himself. Where such a requirement is not complied with or there are reasonable grounds for believing that if such a requirement were made it would not be complied with, a justice may issue a warrant authorising a police officer to remove the child and take him to a place of safety. In any case the child may be detained for 72 hours following admission to the hospital or place of safety.[40] The Board may apply to a magistrate for a child protection order, which allows a child to be taken to and kept in a place of safety for a period of up to 30 days. The order may be extended for a further 30 days and may be revoked. The Board's application may be heard *ex parte*.[41] A police officer (who may be accompanied by a doctor or authorised person) may by warrant enter premises, if need be by force, to remove the child. In the Northern Territory, a child may be taken to a 'place of safety', which includes a hospital, until he can be brought before the court or until a period of 14 days has elapsed, whichever first occurs.[42] The section seems to assume that court proceedings would follow the detention. In Victoria there is no specific provision for a hospital or prescribed institution to detain a child.

Problems in the A.C.T.

383. ***Lack of Statistics*** It is virtually impossible to ascertain the true incidence of child maltreatment in any community, including the A.C.T. At present no statistics concerning child abuse are collected

30 Community Welfare Services Act 1978 (Vic.), s.31(3).
31 Community Welfare Act 1972 (S.A.), s.82d(1).
32 id., s.82d(4).
33 Child Protection Act 1974 (Tas.), s.8(1), (2).
34 Community Welfare Act 1972 (S.A.), s.82a(2), 82c; Child Protection Act 1974 (Tas.), s. 3A, 6.
35 Health Act 1937 (Qld), s.76K.
36 Child Welfare Act 1939 (N.S.W.), s.148C(1).
37 Community Welfare Act 1972 (S.A.), s.82f.
38 Health Act 1937 (Qld), s.76L.
39 Child Welfare Act 1947 (W.A.), s.29 (3a).
40 Child Protection Act 1974 (Tas.), s.9.
41 id., s.10.
42 Child Welfare Act (N.T.), s.72.

at a Commonwealth level.[43] Before a national assessment of the problem can be made, a common or at least generally comparable definition of child abuse must be agreed upon. The survey conducted by the Enquiry into Non-Accidental Physical Injury to Children in South Australia, 1974–75, showed a wide discrepancy between the number of cases officially reported and the number of cases the survey revealed.[44] Upon the basis of those figures the Royal Commission on Human Relationships estimated in 1977 that the incidence of non-accidental physical injury to children under 15 in Australia could well be as high as 13 500 cases a year or 37 children injured every day.[45] The Royal Commission emphasised the grave nature of many of the injuries received by children.[46] The South Australian survey showed a mortality rate of 5–10%.[47] The number of cases of child abuse which come to notice in the A.C.T. is very low.[48] However, as has been mentioned,[49] the cases which are actually recognised and labelled may well be only 'the tip of the iceberg'.[50] As has been said, 'there is no connection whatsoever between the statistics and reality of this particular issue'.[51]

384. ***Roles of the Child Abuse Committees*** The value of the Welfare Branch Child Abuse Committee as a consultative body is well established. It has achieved a significant level of co-operation and co-ordination between agencies in child abuse cases. Similarly, the Health Commission's Committee – although confined to Health Commission members – is able to co-ordinate the services which the child receives within that organisation. Generally the roles of the two committees do not overlap. The Health Commission's committee regards its role as complementary to that of the Welfare Branch Committee. Nevertheless, there are some ambiguities and sources of tension. No one agency has clear responsibility for the handling of child abuse cases in the A.C.T. For example, at the Welfare Branch committee all Welfare Branch cases are discussed and hence made known to other agencies. However, members of the Health Commission committee may or may not choose to bring cases before the Welfare Branch committee. When a case is brought before the latter committee this does not necessarily mean that case management will be transferred to the Welfare Branch. A Health Commission social worker may continue case management. The case conferences of representatives of the Welfare Branch, Health Commission, police and sometimes a voluntary agency take place upon an *ad hoc* basis. Further, though the Welfare Branch was at one stage the focus for child welfare matters, a significant imbalance of resources between the Health Commission and the Welfare Branch has made it impossible for the Branch to sustain the role of the primary child-caring agency.[52] It is clear that the situation has simply evolved without any clear decisions being taken as to where the primary responsibility for child welfare services should lie.

385. ***Immunity from Civil Liability*** The absence in the A.C.T. of legislation conferring immunity from civil and professional liability on persons who report suspected child abuse in good faith has been one factor obstructing the development of smooth relationships between the voluntary and statutory agencies working in the field. This problem is not confined to medical practitioners who wish to avoid a breach of professional ethics or a departure from accepted standards of professional conduct. Other professionals, such as teachers and child care workers, also fear or are uncertain

43 Senator Guilfoyle, *Commonwealth Parliamentary Debates (Senate)*, 30 May 1979, 2309. At the 1979 annual meeting of the Council of Social Welfare Ministers of Australia, New Zealand and Papua New Guinea, Senator Guilfoyle in her capacity as Minister for Social Security agreed to move towards a common definition of child abuse to enable national assessment of the problem to be made (ibid). See also *Royal Commission on Human Relationships*, 162–3.
44 Community Welfare Advisory Committee (S.A.), *Report of the Enquiry into Non-Accidental Physical Injury to Children in South Australia* (1976), 16.
45 *Royal Commission on Human Relationships*, 163.
46 ibid.
47 Community Welfare Advisory Committee, 16.
48 Para.372, n.13.
49 Para.372.
50 In an article in the *Canberra Times* (30 October 1980, 3) Dr M. Maloney, a member of a panel on child sexual abuse in the A.C.T., is reported as saying that 'it was impossible to obtain figures on [child sexual] abuse, but some estimates placed it at one in three Australian women having suffered such interference before they reached the age of 21'.
51 U.S. Congress Senate Committee on Labour and Public Welfare, Subcommittee on Children and Youth, *American Families: Trends and Pressures* (1974).
52 See para.494–9.

about liability for defamation, malicious prosecution or conspiracy or for breach of professional discipline.[53] Any compulsory or voluntary reporting legislation should include provisions protecting persons who notify in good faith. This view is strongly supported by the Department of the Capital Territory.[54] The need for protective provisions was emphasised by the United States Juvenile Justice Standards Project.[55]

386. ***Confidentiality*** One problem encountered by the child abuse committees and other agencies engaged in work with children in the A.C.T. is the difficulty of keeping information confidential. Canberra is a small community. Frequently members of the committees have previously had contact with or received information about a family involved in a case of child abuse either upon a personal basis or through the work of the agency which the member represents. Resolutions of the Welfare Branch Committee to deal with cases by way of a number and year quickly broke down. Committee members accustomed, within a particular agency, to dealing with a case by reference to the name of the family, are prone to do so at a multi-agency meeting as well. Moreover, reference by name, rather than by number, naturally facilitates recall of the details of one particular case amongst many. The sharing of information as well as specialist experience increases the effectiveness of the committee. However, a person may refrain from consulting either an agency or the committee for fear that a particular member of the committee representing another agency (such as the Australian Federal Police or the Welfare Branch) will receive the information and take action in the name of that agency. Moreover, a committee member may be under a legal duty not to disclose information received in the course of his agency work (e.g. a Family Court counsellor).[56] Such a legal duty must inhibit effective contribution to the work of the committee. Some members may find their legal or professional duty of confidentiality so ill-defined that it is impossible confidently to assess when the duty not to disclose arises and when it ceases. Inevitably, such people tend to err on the side of caution.

387. ***Lack of Authority in Emergency Cases*** Sometimes the police feel compelled to remove a child without parental consent and without charging the child with being a neglected child. In these cases the child is usually placed in Marymead Children's Centre. The home lacks legal authority to detain the child in safety against the wishes of a violent parent. Nor does the home have the authority to provide for his medical needs. There is also a need for hospital and some other institutional authorities to have power to detain a child who requires medical examination or simply protection, free of the threat that the parent may remove the child.[57] The Child Welfare Ordinance 1957 (A.C.T.) does not make provision for a holding order to facilitate emergency hospitalisation of the child or detention in a place of safety for a limited period upon the authority of the police or welfare or health personnel. This is part of a broader deficiency of the present Child Welfare Ordinance, for it totally fails to deal with the pre-trial detention of children in trouble.[58]

Child Abuse: Compulsory Reporting

388. ***Arguments for Compulsory Reporting*** The following are the arguments in favour of the enactment of legislation for compulsory reporting of cases of child abuse:

- *Role of the law in protecting the child.* Children need special protection by the law because they have fewer means to help themselves. Moreover, the child's right to preservation of his health and life outweighs the right of a family to freedom from interference. Compulsory reporting, therefore, underlines the law's commitment to the protection of children.

[53] Cf. the protection afforded by the Child Welfare Act 1939 (N.S.W.), s.148B (6).

[54] 'It seems to be generally accepted that legislative protection is needed for persons who report cases of neglect, including abuse, if they have acted in good faith . . . The need for such a provision is as great in the A.C.T. as elsewhere.' Department of the Capital Territory, *Submission,* 61.

[55] Juvenile Justice Standards Project, *Standards Relating to Abuse and Neglect* (1977), 68.

[56] Family Law Act 1975 (Cwlth), s.18,19. Note, however, that at common law it is a misdemeanour to fail to notify the authorities that a treason or a felony has been, or is being, or is about to be committed. See authorities and references cited in Howard, *Criminal Law* (3rd ed., 1977), 284, n.90.

[57] For comment upon the need for a power to hold the child, see *Report of the Child Maltreatment Workshop* (1976), para 6.15–6.26.

[58] See para.261.

- *Facilitating reports.* The introduction of comprehensive compulsory reporting legislation is invariably accompanied by an increase in the number of cases coming to notice.[59] It may be because of the sanction attaching to a failure to report, or because of an improved community awareness of the problem due to publicity surrounding enactment of the legislation. Alternatively, the increase might be the result of the establishment of crisis centres or new procedures for access to supporting services, introduced simultaneously with the legislation. It would, however be erroneous to suggest that any increase in the number of cases coming to notice may be interpreted as an indication of an increase in the *incidence* of child abuse.[60] There is no apparent reason why reporting legislation in the A.C.T., together with improved access to supporting services and an increased community awareness of the problem, should not be accompanied by an increase in the number of reported cases of child abuse.
- *Research, statistics and prediction.* There is a need to know the incidence and location of child maltreatment. The indirect benefit of compulsory reporting legislation is the development of statistics which would assist in the identification of social and geographical areas where child abuse is more prevalent. Once identified, such areas would gain priority in the establishment of crisis centres or nurseries for the care of children for periods of a few hours or days. Further, compulsory reporting makes possible the establishment of a central register of cases. Because children who have been abused may be presented at any of several hospitals, or to different medical practitioners, upon different occasions, a register assists in the detection of child abuse and assessment of the risk of re-occurrence in any particular case.
- *Advantage in loss of choice.* The position of the medical practitioner and other helping professional is made easier in his relationship with parents as he is able to explain that he is compelled by law to notify the appropriate authority. The trust between medical practitioner or other professional and patient is not lost because the former clearly has no choice in the matter.
- *Multi-disciplinary decision.* Some professions display an unwarranted scepticism about involving those in other fields. With compulsory reporting a professional is relieved of sole responsibility for exercising a discretion as to the action to be taken and the benefit of multi-disciplinary training and experience is brought to bear. Child abuse is too complex a problem for any professional to deal with alone.
- *Public commitment.* Legislation represents a public commitment to protecting abused children and enables the community to become involved in achieving that end. It should compel the generation of adequate services.

389. ***Arguments Against Compulsory Reporting*** The following are usually advanced as the arguments against compulsory reporting of suspected cases of child abuse:

- *Discouragement from seeking help.* Parents and caretakers may be discouraged from seeking help, especially medical attention, for children they have injured, in the knowledge that reporting may result.

[59] The experience of N.S.W. and the States of Florida and Iowa in the U.S.A. suggests that comprehensive compulsory reporting provisions increase the number of cases brought to official notice. Compulsory reporting was introduced in N.S.W. by the Child Welfare (Amendment) Act 1977, on 30 June of that year. In the next year, 887 new cases were notified to the Department of Youth and Community Services. This compared with an average of about 64 cases per annum in the ten years before 1977. (Source: Department of Youth and Community Services (N.S.W.), *Annual Report* 1977–8, 28.) In Florida, a centralised system of notification was set up in 1971. Within three years, over 90,000 complaints had been notified (Source: Schuchter, *Prescriptive Package—Child Abuse Intervention* (1976), 9, cited in Boss, *On the Side of the Child* (1980), 102). In Iowa, the response to the introduction of compulsory reporting legislation in that State has been analysed. The analysis concluded that 'it appears that the legislative goal of encouraging reporting of *all* cases of *suspected* abuse has been achieved to a large extent' ('Iowa Professionals and the Child Abuse Reporting Statute — A Case of Success', 65 *Iowa LR,* 1273, 1342 (1980)).

[60] In N.S.W. there was a dramatic increase in reported cases after the implementation of the mandatory reporting legislation, but this was accompanied by a sudden decrease during publicity surrounding a conference which advocated strong police action against abusive parents (Source: Lightfoot, 'Specialist Units in the Identification and Management of Child Abuse — A Social Policy Approach', in Scutt (ed.), *Violence in the Family* (1980), 157, 167.)

- *Breach of confidentiality.*[61] A doctor who discloses to a third party the details of a patient's condition is in breach of his duty of confidentiality to the patient. The requirement of strict confidentiality in the doctor–patient relationship is an element of professional medical ethics which is at least as ancient as the Hippocratic oath.[62] It is reflected in the common law[63] and in the Australian Medical Association's *Code of Ethics*.[64] An A.M.A. member who breaches the ethical code could be subjected to internal disciplinary measures by the Association, being censure or even exclusion from membership. Moreover, especially in a relatively small community such as the A.C.T., it would be virtually impossible to keep reports confidential. The fact of notification might soon become public, forcing other cases 'underground'[65], and (especially if not subsequently upheld by a court or other authorities) might do real harm to a private medical practice.[66]
- *Further violence.* There is no proof that compulsory reporting does not put as many children at risk as those whom it assists. A report may precipitate a further incident of physical abuse or prolonged emotional maltreatment and withdrawal of the family from neighbours and other persons who may otherwise have provided assistance.
- *Unenforceable obligation.* Provisions for compulsory reporting are virtually unenforceable. The community is generally averse to prosecuting medical or other helping professionals who act in good faith. If a charge were laid, it would have to be proved beyond reasonable doubt. The practitioner would in many cases be in a strong position to argue that he did not know the abuse had occurred. Moreover there are evidentiary limitations on the acceptance of uncorroborated testimony by children.[67] One practising A.C.T. medical practitioner appeared before the Commission's public hearing. His view was that medical practitioners would not report if compulsory reporting was introduced.[68] In these circumstances he suggested that every effort should be directed at facilitating voluntary reporting rather than passing a law which would not be observed.
- *No simple solution.* Reporting legislation does not guarantee effective services and there is danger in the adoption of the belief that legislation solves the problem. There is a grave danger that cases may be reported and yet prompt action may not result because of lack of staff in over-extended services.[69] The emphasis should be on making services available and acceptable, rather than on the imposition of legal obligations.
- *Professional's discretion.* It is preferable to leave to the medical practitioner or other professional the discretion to decide whether, taking into account any particular or unusual circumstances, a case should be reported. The professional is in the best position to assess the desirability of jeopardising the relationship of trust and also bears the financial and emotional consequences of any breach of professional confidentiality.
- *Problem of definition.* There is great difficulty involved in defining child abuse, not only with regard to the inclusion or otherwise of emotional or sexual abuse, but also with regard to distinguishing such cases from cases of neglect. The area is too vague to allow for legislative definitions of the circumstances in which a duty to report arises. Confusion as to whether a case comes within the definition will probably lead to a failure to report.

---

61 The Commission is presently examining the subject of the confidentiality of doctors' records in its reference on privacy. See Australian Law Reform Commission, *Privacy and Personal Information* (ALRC DP 14, 1980).

62 The ethical rule was formulated in the 4th century B.C. by Hippocrates. It stated: 'I swear . . . whatever, in connexion with my professional practice, or not in connexion with it, I see or hear, in the life of men, which ought not to be spoken of abroad, I will not divulge . . .'. See *Hippocratic Works,* (1939), tr. by Francis Adams, 779–80.

63 *Furniss* v. *Fitchett* [1958] NZLR 396, 400–1. See also Bates, 'Medical Confidentiality and Privacy', (1978) 3 *Legal Service Bulletin* 189, 191.

64 Australian Medical Association, *Code of Ethics* (1975 ed.), cl.6.2.1–6.2.8.

65 Capital Territory Health Commission, *Submission on DP 12,* 1.

66 Statement of Dr E. Stack during consultation by the Chairman of the Commission with the National Women's Advisory Council.

67 See Gobbo, Byrne and Heydon (eds.), *Cross on Evidence* (2nd Aust ed., 1979), 198–9.

68 Dr. W.R. Atkinson, Oral submission, Public Hearing, 5 May 1980, *Transcript,* 56. Cf. 'Iowa Professionals and the Child Abuse Reporting Statute – A Case of Success'.

69 Capital Territory Health Commission, *Submission on DP 12,* 1.

390. ***Confidentiality: The Commission's View*** The principle of strict confidentiality in the relationship between the medical practitioner or other professional and the patient or client is one which is uncertain in its formulation, rarely enforced and increasingly outweighed by other more crucial considerations.[70] The Australian Medical Association's formulation of the rule is confused and appears to allow for legislative diminution of the principle.[71] Disciplinary measures by the Association rarely occur in matters such as child abuse.[72] Furthermore, not all medical practitioners in Australia are members of the Association and therefore subject to its code of ethics. An ethical code is not a legally binding code of conduct but is merely 'evidence of the general professional standards to which a reasonably careful, skilled and informed practitioner would conform'.[73] It is not to the point to draw attention to common law principles relating to confidentiality when there is ample precedent, apart from child abuse legislation, for statutory exceptions to these principles. These include legislation relating to venereal disease, freedom of information and health.[74] In addition, the medical practitioner or other professional's confidential relationship is a relationship with the child, who is his patient, not with the parent. It is fair to assume that the child properly instructed would usually think it in his best interests to consent to disclosure to some helpful person of information relating to his medical condition. It could be argued that the medical practitioner or other professional has an additional confidential relationship with the parent, who is secretly or indirectly also seeking treatment for his emotional condition. Whilst it is true that a good medical practitioner will be sensitive to such needs and will endeavour to counsel the parent, it must be conceded that most are very busy people, and have had little opportunity in their training to acquire the particular

---

70 Dr M. Maloney is reported in the *Canberra Times* (30 October 1980, 3) as having said, on the subject of the ethical dilemma of confidentiality, that 'he would not see any children sacrificed to this sacred cow.'

71 Australian Medical Association, *Code of Ethics,* cl.6.2.1. The principal clause is as follows:

> It is the practitioner's obligation to observe strictly the rule of professional secrecy by refraining from disclosing voluntarily without the consent of the patient (save with statutory sanction) to any third party information which he has learnt in his professional relationship with the patient.

Clauses 6.2.2–6.2.8 appear to allow some relaxation of the rule stated in cl.6.2.1:

> The complications of modern life sometimes create difficulties for the doctor in the application of the principle (of confidentiality), and on certain occasions it may be necessary to acquiesce in some modification. Always, however, the overriding consideration must be the adoption of a line of conduct that will benefit the patient or protect his interests.

The following occasions for modification are mentioned: husband and wife (6.2.3); court evidence (6.2.4); statutory requirements (6.2.5); government departments, hospital boards and many other bodies (6.2.6.); employers, insurance companies, solicitors (6.2.7). However, 6.2.8 states that in such cases the doctor should 'refuse to give any information in the absence of the consent of the patient or the nearest relative'. That qualification appears to amount to a modification to the principal rule in 6.2.1, that information may be disclosed without consent if there is a statutory sanction. The rules are poorly drafted: they suggest exceptions to the principal rule protecting confidentiality and at the same time refuse to allow such exceptions. It must be noted that mandatory reporting legislation is not a 'voluntary' disclosure, within the meaning of 6.2.1 by the doctor of information learnt in his professional relationship with the patient. Moreover, voluntary reporting legislation need only include a provision deeming the consent of the child patient or his parent or guardian as unnecessary, with respect to the doctor's disclosure of a case to the proper recipient. Both voluntary and mandatory reporting provisions would then be consistent with the A.M.A.'s principal clause formulating the rule of confidentiality.

72 Webster, 'Regulators of Medical Practice', (1978) 3 *Legal Service Bulletin* 209, 210.

73 See *Furniss* v. *Fitchett* [1958] NZLR 396, 405. The code in question was that of the British Medical Association.

74 *Venereal diseases legislation.* Doctors in N.S.W. were once *required* to notify parents or guardians of a diagnosis of venereal disease in a child under 16 years, but are now *permitted* to notify them. Venereal Diseases (Amendment) Act 1977 (N.S.W.), s.2. In Victoria medical practitioners are required to notify parents or guardians. Venereal Diseases Act 1958 (Vic), s.10(4), and Venereal Diseases Regulations 1931 (Vic.), regulation 3 and 11. In the Northern Territory the Chief Health Officer *may* make such notification compulsory if he wishes. Venereal Diseases Act (N.T.), s.15(2).
Freedom of information. The Freedom of Information Bill 1981 (Cwlth), cl.41(3), provides for access to information of a medical or psychiatric nature by a nominated medical practitioner, where direct access to the information by the patient concerned would be damaging to him.
Health. The Medical Act 1939 (Qld), s.35(ix) and (x), provides that a medical practitioner is guilty of misconduct in a professional respect if he does not notify the police of certain illegal operations or wounds from weapons. See also Health Act 1958 (Vic.), s.137f (infectious and special notifiable diseases), s.158f (notification of birth); Registration of Births, Deaths and Marriages Act 1959 (Vic), s.19 (notification of death).

skills of a social worker. Most are not fully conversant with the full range of available welfare facilities. In many cases the parent who regularly maltreats his child consults a different practitioner on every occasion in order to avoid suspicion, precluding the development of an ongoing relationship conducive to effective counselling. Notification can, therefore, result in the provision of assistance by persons who do have the appropriate skills and experience to treat the emotional condition of the parent.

391. ***Assessment and Conclusion*** Child abuse is more common that most people believe. It is imperative that we do not condemn children to neglect and indifference. Compulsory reporting makes possible the provision of care and protection. Compulsory reporting legislation should be enacted in the A.C.T. The following reasons underlie the Commission's conclusion:

- *Accompanying increase in reported cases.* It is doubtful whether it could ever be conclusively proved that compulsory reporting causes more cases of abuse to come to notice. On the other hand, neither has the claim that compulsory reporting legislation deters parents from seeking medical help been statistically proven. Clearly, other factors, such as publicity or the provision of services, may be relevant to any change in the number of cases reported or in the response of parents. The Commission favours the view that the introduction of compulsory reporting is likely, on the evidence[75], to be accompanied by a significant increase in reported cases of abuse.
- *Basis for commitment.* Legislation is an essential element in establishing a public commitment to the protection of children.
- *Breaking the chain.* Re-occurrence of abuse following a notification need not be the result of a retributive reaction on the part of the parent. It may have been likely to occur in any case in the context of the continuation of pressures which precipitated the first incident. At least if notification has been made there exists a real possibility of prevention through the provision of supporting services. Maltreatment is often a continuing activity and even at the cost of the parents blaming the child the chain should be broken: abuse can result in serious injury to, and sometimes the death of, the child.
- *Reluctance overcome.* At present the reluctance of many professionals to break well-entrenched and long established habits of professional confidence and unwillingness to become involved in legal proceedings, which expose them to professional discipline and criticism by their peers and which take them away from their work, may contribute to a disinclination to report. Legislation would overcome this reluctance to become personally involved and would impose a public duty to do so.
- *Value of sanction.* It is conceded that where compulsory reporting legislation attaches a sanction for breach of the duty to report, prosecutions may rarely be commenced or be successful. Some jurisdictions have in fact opted to attach no criminal sanctions, as in the case, for example, in Ontario.[76] However, the Commission believes that the existence of the sanction is more important than its enforcement: it can purposefully be used to educate, to direct and to reinforce good intentions rather than to provide a basis for prosecutions. The occasional prosecution serves the additional purpose of alerting professionals to their legal duties.
- *Paramount consideration.* The need for express child abuse reporting laws is not avoided by arguments which rest upon any general civic and moral duty to disclose knowledge of crime and wrongdoing.[77] The purpose of legislation is to make plain where the duty lies. Furthermore, a compulsory reporting law emphasises that the paramount consideration is the safety of the child.

---

75 See n.59.

76 Child Welfare Act 1978 (Ontario), s.49(1). See generally Dickens, *Legal Issues in Child Abuse* (1976), chapters I, II.

77 The existence of a common law duty to notify the authorities that a felony has been committed has been the subject of much academic debate. See n.56. The Supreme Court of N.S.W. has recently shown a reluctance to entertain prosecutions for misprision of felony: *R* v. *Jeffers and Stephens* (unreported, Supreme Court of N.S.W., 2 May 1975).

Defining Child Abuse

392. ***A Separate Definition*** As has been explained in Chapter 8[78], where a child abuse case requires intervention by the court, the procedure should be by way of an application for a declaration that the child is in need of care. This application should be heard by the Childrens Court. An abused child may fall into one or more of the categories of children in need of care.[79] However, only three of the seven categories of children in need of care are categories which would include cases of child abuse. These are the categories where:

- the child has been physically injured (otherwise than by accident) or has been sexually abused, by one of his parents or by a member of the household in which he lives or there is a likelihood that he will so suffer such physical injury or sexual abuse;
- the child has been physically injured (otherwise than by accident) or has been sexually abused, by a person other than a parent or a member of his household, or there is a likelihood that he will so suffer such physical injury or be sexually abused, and his parents are unable or unwilling to protect him from the injury or abuse; or
- by reason of the circumstances in which the child is living –
  - the health of the child has been impaired or there is a likelihood that it will be impaired; or
  - the child has suffered, or is likely to suffer, psychological damage of such a kind that his emotional or intellectual development is or will be endangered.

These three categories should be utilised not only with respect to care proceedings but also to define the circumstances in which suspected cases of child abuse may be voluntarily reported. It should be possible to make a protected voluntary notification if a person suspects on reasonable grounds that the child has been abused, or that there is a likelihood that he will be abused, in any of the circumstances described above.

393. However, the Commission is not prepared to adopt these three categories for the purposes of compulsory notification provisions. If the descriptions were adopted without amendment, the compulsory duty to notify would arise not only when abuse had occurred but also when there was a likelihood of abuse. The N.S.W. Green Paper has recommended[80] that the compulsory reporting provisions in N.S.W. be extended to cases where a child 'is in danger of' being assaulted, ill-treated or exposed. The extension of the compulsory notification requirement to apply not only in cases of reasonable suspicion that abuse has occurred but also in cases of reasonable suspicion that there is a likelihood that abuse will occur in the future, could impede the preventive role of welfare agencies and individuals.[81] That preventive role depends upon the availability of friendly, accessible facilities which a parent may approach in trust, rather than in fear. It might be argued that, if reporting legislation is to be effective, it should be designed to guarantee that notification occurs, and that the provision of support services is thereby ensured in every case *before* the child is abused. On the other hand, the argument that the family may be discouraged from seeking help must be taken into account.[82] The Commission is of the view that notification legislation should, so far as possible, not be allowed to discourage a parent who, fearing he will maltreat his child, voluntarily contacts a health, welfare or child care agency. The provision for compulsory notification should not be extended to cases of potential abuse. Furthermore, the obligation imposed by the reporting provisions should attach to established events, not to speculation about what might or might not occur in the future. The new Child Welfare Ordinance should therefore impose on specified categories of persons an obligation to notify the Youth Advocate if, on reasonable grounds, it is suspected that a child has been physically injured (otherwise than by accident) or has been sexually abused. Two comments should be made about this obligation. First, the obligation to report would not extend to all types of abuse. Ill-treatment which does not cause physical injury, but which results in impairment to the child's health, is not included in the proposed definition. At the present time the subject of compulsory reporting is a controversial one. In the Commission's view, therefore, the circumst-

---

78 Para.292.

79 See para.304.

80 *Green Paper*, 37.

81 See Sister M. Morrissey, Oral submission, Public Hearing, 5 May 1980, *Transcript*, 77.

82 *Report of the Child Maltreatment Workshop* (1976), para.7.5.

ances in which the obligation to report arises should be narrowly defined. At this stage it is preferable to err on the side of caution. Once compulsory reporting becomes accepted in the A.C.T., it will always be possible to expand the definition of the situations which must be reported. Secondly, the proposed definition of the circumstances in which the obligation would arise makes no reference to the seriousness of the injury or abuse. Consideration was given to limiting the obligation to report to cases in which the injury or abuse was 'serious'. This was rejected because a definition framed in this manner could produce uncertainty. Persons required to report could legitimately argue that they did not consider the injury or abuse sufficiently 'serious' to come within the definition. An obligation to report all forms of injury or sexual abuse would be clear and simple. Further, as in all matters involving the possibility of care proceedings, it would be up to the Youth Advocate to determine whether the matter was sufficiently serious to warrant court action to protect the child. Before authorising the initiation of care proceedings the Youth Advocate would be obliged to ensure that all informal alternatives had been explored.[83]

394. *Age* Reporting legislation is often limited in its application by reference to the age of the abused child. Such age limitations often differ from those fixed for a 'child', or 'young person' in the general definition sections of child welfare legislation. The age limits with regard to reporting are 16 in New South Wales, 18 in South Australia, 17 in Queensland and 12 in Tasmania.[84] In the United States and Canada the trend has been to extend protection by raising the age to 16 or 18 years. It is envisaged that the procedures outlined in this report should be available for those who have not attained the age of 18 years.[85] It might be thought that a child over the age of 16 has no need of protection by way of reporting legislation because he is physically mature and has sufficient access of his own to medical and other assistance. Yet common experience teaches that children mature at different ages. Also, it must be remembered that because a child who has not yet attained 18 years is legally a minor, and often experiences difficulty in gaining employment, he may not be able to remove himself from a family situation where he is suffering maltreatment. A child under 18 years is also still vulnerable to sexual abuse. The protection afforded by the notification provisions should be available for all children who have not attained the age of 18 years.

Who is to Report?

395. ***Voluntary Notification*** In addition to compulsory notification by certain defined professionals, provision should be made for voluntary notification on reasonable grounds by any person who forms the suspicion that a child has been abused. Legal immunity against criminal or civil liability (for example, in respect of defamation, malicious prosecution or conspiracy), or for breach of professional ethics, should be extended to every person who makes a notification in good faith, whether the notification be made pursuant to the voluntary or the compulsory notification provision.

396. ***Compulsory Notification: Specification of Notifiers*** Both medical practitioners and other professional persons should be required to notify cases of child abuse. The other professional persons required to notify should be those who fall within specified categories of persons who come into contact with children in the course of practising their profession. As the National Women's Advisory Council pointed out[86], professionals such as school teachers, kindergarten and pre-school teachers and child care workers are, through their regular day-to-day contact with children, often aware of child abuse long before it is brought to the attention of a medical practitioner. It can be argued that a vague formulation of the category of persons required to notify should be adopted, rather than a detailed list set out in the legislation and possibly by oversight failing to include classes of persons who ought to be compulsorily required to notify. The formula could be applicable, for instance, to all persons having reasonable cause to suspect that a child encountered in the course of professional or official activities has been abused. That course has not been adopted in any Australian reporting legislation. It is desirable that a duty should be formulated in such a way that the delineation of classes of persons who bear the duty is not blurred and does not require clarification

83 See para.294.
84 Child Welfare Act 1939 (N.S.W.), s.40, 148B; Community Welfare Act 1972 (S.A.), s. 6, 82d; Health Act 1937 (Qld), s.76M; Child Protection Act 1974 (Tas.), s.8(1).
85 Para.63, 64.
86 National Women's Advisory Council, *Submission*, 1.

by judicial interpretation, statements of administrative policy or the ethical rulings of professional organisations. The following classes of persons should be under a duty to make a notification if, in the course of practising their profession, or carrying on their calling they suspect, on reasonable grounds, that a child has been abused:

- medical practitioners;
- dentists;
- nurses;
- police officers;
- teachers and persons employed to counsel children in a school;
- persons employed in the Department of the Capital Territory or by the Capital Territory Health Commission whose duties include matters relating to children's welfare; and
- persons for the time being in charge of licensed child-minding centres.

A requirement to notify places a serious responsibility upon the professional concerned to identify cases of child abuse and to fulfil the notification requirement whilst marshalling all the sensitivity and skill with which such a professional should be equipped by training and experience. Close attention has been paid to the responses of professional organisations to the proposal that their members should be required to notify cases of child abuse. The Australian Medical Association has not yet formulated a national position in relation to the question of compulsory notification. The Australian Dental Association Incorporated in a written submission[87] indicated that, broadly, it favoured compulsory notification under the conditions outlined in the Commission's discussion paper.[88] On the other hand, the Australian Dental Association, N.S.W. Branch, took the view that it was not able to assist in evaluating the case for and against compulsory notification.[89] The Royal Australian Nursing Federation supported compulsory notification as a constructive way of initiating helpful moves and of identifying the range of problems within Australian society.[90] Whilst the Australian Association of Social Workers was unable to give its view, the President of that body expressed personal opposition to compulsory notification.[91] The Department of the Capital Territory supported the proposal for compulsory notification.[92] The Capital Territory Health Commission did not, however, support compulsory notification.[93] The A.C.T. Teachers' Federation favoured compulsory notification upon the basis that the protection of children placed in the care of its members is of paramount importance.[94] The report of the A.C.T. Police to the Standing Committee on Housing and Welfare of the A.C.T. Legislative Assembly indicated general support for compulsory notification on the part of medical practitioners, dentists, psychologists and psychiatrists. A representative of the Australian Federal Police has now expressed support for compulsory notification by fellow members of that police force.[95] Because the requirement to notify would not arise unless the professional concerned had a suspicion based upon 'reasonable grounds', a person would not be expected to exercise greater expertise in assessing a case than the expertise common to his own profession. Consider, for example, the case of a nurse. There are traditional constraints recognised by nurses on actions which could be construed as the making of a medical diagnosis. However, nurses can often observe patterns of family behaviour which are significant in identifying children at risk. There should be no need for a nurse to be required to inform a medical practitioner before making a notification. Internal referral systems within health, welfare or other agencies

87 Australian Dental Association, Inc., *Submission*, 1.
88 ALRC DP 12 (1980).
89 Australian Dental Association, N.S.W. Branch, *Submission*, 1.
90 Royal Australian Nursing Federation, *Submission*, 2.
91 The Social Work Action Group (W.A.) in its submission said that compulsory notification should be required only where there were maintained certain safeguards relating to definitions of abuse and provisions relating to the inclusion of names on the child abuse register. *Submission*, 3.
92 Department of the Capital Territory, *Submission on DP 12*, 6. See also 'Call for action against child sexual abuse' (The *Canberra Times*, 30 October 1980, 3), where a senior member of the Welfare Branch of the Department of the Capital Territory, Mrs Ethel McGuire, is reported as having supported the compulsory reporting of suspected cases of sexual abuse of children.
93 Capital Territory Health Commission, *Submission on DP 12*, 1.
94 A.C.T. Teachers Federation, *Submission*, 1.
95 Chief Superintendent A.H. Bird, Australian Federal Police.

would produce the very dangers of delay and indecision which notification legislation and the central receipt of notifications is designed to remove.

Recipient of Notifications

397. ***Youth Advocate*** There should be one recipient of notifications of child abuse cases. At present there is confusion about the proper recipient of such notifications. A notification given by a health worker to the Health Commission Committee may not reach the Welfare Branch Committee, the police, or the voluntary agency which has had some contact with the family concerned. Kindergarten teachers, child care workers and others may be uncertain as to whether the Welfare Branch, the Health Commission or the police force is the appropriate agency to notify. The office of the Youth Advocate should provide the focus for the receipt of notifications.[96] He should be responsible for the initiation, where necessary, of proceedings for an application for a declaration that the child is a child in need of care. Notification would most conveniently be made to the Youth Advocate who would bear the formal responsibility for delaying too precipitous action by one agency or ensuring that the dilatoriness of any agency involved did not impede quick action where this was necessary. In some cases no harm is done by the delay. In others harm may be done. At present a case of possible child abuse may continue to be discussed by the Welfare Branch Committee at a number of monthly meetings, without any one person or agency being clearly responsible for the taking of a decision as to appropriate action. Nor do the members of the Welfare Branch Committee have formal authority to ensure that the agencies represented on the Committee comply with the Committee's majority resolutions. The easy identifiability, which the office of the Youth Advocate would possess, is essential for a recipient of notifications. Administrative arrangments should be made for receipt of telephone calls directed to the Youth Advocate outside working hours. An appropriate entry should be included in the service section of the A.C.T. telephone directory, as is already done in N.S.W. and other States.

398. ***Standing Committee*** At present there are two child abuse committees which operate in the A.C.T. Their respective roles are unclear and liaison is uncertain. There should be one legislatively recognised committee with legislatively recognised membership. This is the Standing Committee described in Chapter 8.[97] It should give advice with regard to difficult child abuse cases, when the Youth Advocate in the exercise of his discretion convenes a meeting of the committee. If the Welfare Division, the Health Commission or the police become aware of a difficult case, each should have power to convene a meeting. When the Youth Advocate consults with the committee he will gain the benefit of multi-disciplinary professional advice from representatives of the major agencies concerned with cases of child abuse. The committee should take over the functions of the Welfare Branch Child Abuse Committee and the Health Commission Child Abuse Committee. There should be no further need for either committee. The interests of the Welfare Division and the Health Commission would be formally represented on the Standing Committee. It is desirable that the efforts of the Welfare Division and the Health Commission should be directed towards the successful operation of the proposed statutory committee rather than duplicating the demands on the time of busy professionals through involvement in a number of committees. The efficient functioning of a system designed to achieve rapid multi-disciplinary assessment of a case requires the mature cooperation of representatives of the Welfare Division and of the Health Commission, rather than devotion to personal interests in maintaining existing powers within separate agencies.

399. ***Records*** In many cases where there is recurring maltreatment of a child, it has been found that the family visits a different medical practitioner or hospital for assistance on each occasion, partly to avoid suspicion of child abuse. Because the medical practitioner has no record of similar injury to the child and insufficient time to pursue inquiries at local hospitals, he may fail to diagnose the case as maltreatment rather than accident and refrain from making a notification. The office of the Youth Advocate should assume responsibility for the collection and secure control of confidential records relating to child abuse cases. The office of the Youth Advocate should compile statistics of child abuse cases. He should co-operate with other register-keepers in Australia, collecting anonymous data on the incidence and variety of child abuse and its consequences.

400. ***Confidentiality*** Reporting legislation and the keeping of a register poses the problem of maintenance of the confidentiality of records. The Youth Advocate and the members of the Standing Committee should be under a legal duty to maintain in strict confidence the information they receive. This duty should be imposed upon these persons by provisions of the new Child Welfare Ordinance. The Youth Advocate and the committee should be authorised under the new Ordinance to give information on a 'need-to-know' basis to administrators of a home, foster home or child-minding centre to which a child is referred. The legislation should also authorise the making available of information on a case to a Welfare Division or Health Commission worker who undertakes case management. Case information in an anonymous form should be made available to the proposed Childrens Services Council for the purposes of research, clarification of inadequacies in services and long-term policy planning. The potential hazards of the collection and dissemination of information have been recognised in the United States. The Federal Child Abuse Prevention and Treatment Act denies Federal funding to a State child abuse program unless a procedure for the preservation of the confidentiality of all records is maintained.[98] There arise a number of questions relating to the operation of the register:

- the grounds upon which information on the register should be released to the child, the child's parents, medical practitioners and other professionals, and the nature of the information; and
- whether a case should be expunged from the register after a certain period of time.

In relation to the first question, the Commission has formed the view that the child and his parents should normally be informed of the existence and contents of the entry in the register concerning them, unless disclosure would do harm (as it could in the case of a child's complaint about parental conduct). Information should be provided on a 'need-to-know' basis[99] to medical practitioners and other professionals and an explanation given to the child, if old enough to understand, concerning the release of personal data about him to a professional. Written restrictions relating to confidentiality should accompany the information and cover its further use by recipients, if any, from the professional concerned. With regard to the question of expungement, procedures similar to those already followed in N.S.W. should be adopted. In the register of 'Montrose' there is no classification of cases as being based upon a suspicious, false or confirmed diagnosis. Nor is any provision made for expungement of cases from the register. Expunging the record of a case suggests that in the expunged case, the alleged perpetrator is to be regarded as innocent while those involved in the remaining cases are guilty. The recorded recurrence of child abuse over several generations of a family points to the usefulness of maintaining records over very long periods, so long as strict conditions of security are maintained.

Holding Order

401. The holding order has been discussed earlier.[100] A holding order for children generally in need of care has the same features and the same limits as in a case of child abuse. Strong support has been registered[101] for a holding order to be available for suspected cases of abuse. It remains to illustrate the particular application of a holding order to a case of abuse:

> A parent brings a badly bruised child to the casualty department of a public hospital, alleging that the child 'fell down stairs'. Under the Commission's proposals, where a person at the hospital, authorised to detain a

---

96 The Department of the Capital Territory expressed the view that there should be one authority with responsibility for legal action concerning abused children. However, the authority, they argued, should be the Director of Welfare. (Department of the Capital Territory, *Submission,* 64). See also The *Canberra Times,* 30 October 1980, 3, where Dr M. Maloney is reported as having said that to ensure continuity of care 'one statutory authority or government department, supplemented by voluntary agencies, should be the centre for reporting and action'.

97 Para.282f.

98 42 USC, s.5103(b)(2)(E). In Australia, the Childrens Services Program which is the responsibility of the Minister for Social Security, and which funds a limited number of child care projects, could also be used as a vehicle for Commonwealth protection for the privacy of such records.

99 See Australian Law Reform Commission, *Privacy and Personal Information,* (ALRC DP 14, 1980), para. 63, 67, 69. In its final report on privacy, the Commission will be addressing the issues of protection of personal information such as medical information and procedures such as culling and destruction and records security.

100 See para.305.

101 Department of the Capital Territory, *Submission on DP 12,* 7; Capital Territory Health Commission, *Submission on DP 12,* 2.

child under a holding order, suspects the child to have been abused and believes that urgent action is needed, he would be able to detain the child in the hospital for up to 48 hours, against the will of the parent. When the authorised person makes the decision to detain the child, he should, as soon as practicable, notify the Youth Advocate of the case and of his decision. It is the Youth Advocate who should apply within the 48 hour period to the court (or a duty Magistrate if the case occurs during a weekend) for a holding order. The holding order should initially be for a maximum duration of 72 hours. Before the expiration of the 72 hours, the Youth Advocate should be empowered to approach the court for an extension of the holding order, but the extension should not be for longer than a further seven days.

Voluntary Placement in a Home

402. In many cases a parent seeking to alleviate family tension and to avoid hurting the child may wish to place the child for a short period in an institution such as Marymead. In such cases, provided the situation is not such as to give rise to a compulsory duty to report[102], reception should, as far as possible, be on a 'no-questions-asked' basis. The person in charge of the institution should not be under a duty to notify the Youth Advocate if there is simply a suspicion that the child is at risk of abuse. However, in such a case the person in charge of the institution may choose to make a voluntary notification. The discretion to notify voluntarily should be exercised in such a manner as to ensure that the element of trust, which is so important in dealing with the family concerned, is preserved, provided it is not done at the cost of the safety of the child. The parents should be informed of the role of the Youth Advocate, the procedure for consultation with the Standing Committee of the Childrens Services Council and the services provided by the Welfare Division, Health Commission and voluntary agencies which may be helpful to them. The parents should be encouraged to participate in counselling and educative programs.

Prosecution of Parents

403. ***The Decision to Prosecute*** When a prosecution is brought, it is usually a prosecution for assault or the infliction of grievous bodily harm. The offences specified in s.98 and 99 of the Child Welfare Ordinance have already been mentioned in this Chapter.[103] The Commission's view in relation to these offences has been discussed earlier in this report in relation to children generally in need of care.[104] When an alleged case of child abuse comes to notice, it is the police alone who in practice make a decision to prosecute the parent or caretaker. Yet the initiation of criminal proceedings can have a devastating effect on parent and child and on their relationship. Criminal laws are rarely invoked against parents in child abuse cases. A prosecution appears sometimes to be triggered by the extent of the newspaper coverage and consequent public interest in a particular case. Although prosecutions are rare, in every case the possibility of criminal proceedings occupies the mind of the parent and of the health or welfare personnel who are attempting to build a trusting relationship with the parent in the future interests of the child. The following case illustrates the problems which can be caused:

> A single parent father seriously assaulted one of his two young sons. He was prosecuted for assault and imprisoned for two years. The household effects of the family's rented home were sold. The elder child ran away to Sydney and remained unemployed and without housing. The younger child went to live with a married sister who found it difficult to cope with the needs of her own children. On the father's discharge from prison the children returned to live with him, but he was deeply resentful of the imprisonment and blamed the son.

The imprisonment of the parent may work against the child's interests by removing the parent's physical presence (a deleterious consequence for the child despite the parent's abusive conduct), by adding to the child's burden of guilt and by fanning the parent's already smouldering anger at the child.[105] The possibility of such an outcome suggests that prosecutions should be initiated only after specially careful deliberation. Administrative procedures should be devised which recognise the

---

[102] Para.393 specifies the circumstances in which certain professionals should be required to report cases of abuse.

[103] Para.373.

[104] Para.306.

[105] See the discussion in (1979) 3 *Crim LJ* 45. See also Department of the Capital Territory, *Submission on DP 12*, 7.

need for such deliberation.[106] In formulating these procedures, it must be borne in mind that the police decision to prosecute a parent or caretaker may or may not have to be made as a matter of urgency. The police may elect to gather the available evidence with a view to initiating proceedings by way of summons, or they may arrest and charge. Whenever the former procedure is employed, the police should consult with the Standing Committee before the decision to prosecute is taken. A member of the police force who is acquainted with the case should present to the committee the intention of the police with respect to the prosecution. The committee should, in accordance with its normal decision-making procedures, advise the police on the course it considers appropriate. Whilst the decision whether to prosecute or not ultimately rests with the police, the police should in practice be encouraged to respect the advice of the Standing Committee. The combined expertise of the members of the committee, and the information held by the agencies which each member represents, should be available to the police to assist in the decision-making process. There should be a different procedure when the police have already made the initial decision and a charge has been laid. The withdrawal of a prosecution should be considered, when this is desirable. The laying of a charge should not constitute an irrevocable step which cannot be retracted when it emerges that a prosecution will cause disproportionate harm to the child and the relationship between the parties. Hence, the police should consider, even after a charge has been laid and the matter taken to court, the desirability of proceeding with the prosecution. Unless the parent or guardian pleads guilty at the first hearing, the police should consult the Standing Committee as soon as possible. If this meeting reveals that it is clearly inappropriate to proceed with the prosecution, the police should be encouraged to seek the court's leave to withdraw the prosecution.[107] When leave to withdraw is sought, the police should clearly state to the court the grounds upon which it is considered undesirable to proceed further. What are proposed are procedures which will require consultation *before* proceedings are initiated, and which will facilitate their withdrawal *after* the matter has reached the court. Procedures such as these may be ineffective where a parent is arrested and charged and pleads guilty at the first hearing. This will typically be what happens unless the court postpones the matter of its own initiative or refuses to accept the plea at that stage. In such a case there will be no time for consultation either before or after initiation of proceedings. However, in the case of a plea of guilty, there will be an opportunity for the parent's special circumstances to be taken into account before sentence is imposed. The parent's circumstances can be brought to the court's notice in a report from the Welfare Division or from some other agency.

404. ***Parallel Hearings*** When criminal proceedings against a parent are being heard in one court, and care proceedings are being heard in another, unsatisfactory results can be achieved if there is no liaison between the two courts. There is, for example, no point in the magistrate in the Childrens Court striving, during care proceedings, to find a solution which will keep the family intact, if the magistrate in the Court of Petty Sessions decides that the only possible sentence for the offending parent is imprisonment. The Childrens Magistrate should be empowered, in his discretion[108], to adjourn the care proceedings pending the outcome of the criminal trial of the parent, provided the delay would not cause undue injury to the child.[109] The Commission believes that a procedure should be devised to secure liaison with regard to related proceedings in the Childrens Court and the

---

[106] The Department of the Capital Territory favours the introduction of procedures which would allow for consultation before a parent is prosecuted. *Submission on DP 12*, 7.

[107] ibid.

[108] The legal working party of the Association of British Adoption and Fostering Agencies recommended (*ABAFA Report*, para.2.13–2.14) that guidance should be given to courts and social services departments on the circumstances in which care proceedings should continue to be heard without awaiting the outcome of proceedings against a parent. The Minister of State for the Home Department (U.K.) has advised (Home Office Circular No. 88/1972) clerks to the justices that the Crown Court should be notified if it was decided that care proceedings should be adjourned pending the outcome of the criminal trial of a parent, so that any delays might be minimised. See Murray, 'Care Proceedings – Delays by Criminal Trials', (1980) 144 *Justice of the Peace* 88.

[109] It must be remembered that different standards of proof apply in care proceedings and criminal proceedings. Whilst the criminal trial of a parent may properly result in an acquittal, there may be adequate evidence to sustain care proceedings arising from the same or similar facts. Thus, in a case where adjournment would cause undue injury to the child the Magistrate should, in his discretion, be permitted to proceed. See *ABAFA Report*, para 2.13–2.14.

Court of Petty Sessions. Such liaison should not depend, as it presently does, upon informal intelligence or 'the grapevine', but should be achieved by way of a formal, routine exchange of information by the registries of the courts.

Institutional Abuse

405. ***Child Abuse in Other Contexts***

> On sports day (April 1980) Darryl was without a sports uniform because his mother had not yet purchased one. As punishment, the sports teacher ordered Darryl to run eight laps of the school ground. After three laps, Darryl could not continue because of severe chest pains. He told the teacher that he couldn't run any more, that his asthma was bothering him. The teacher told him to keep on running. He ran two more laps and then stopped, unnoticed by the teacher. Immediately following this incident, Mrs H. [his mother] wrote a letter to the teacher informing him of Darryl's condition and pointing out the danger of overexertion. Shortly afterward, in a second such incident, the teacher repeated the same punishment. He told Darryl, at the time, (words to the effect) 'I don't care what your parents say at home. When you're at school you'll do as I say.'[110]

Child abuse is often thought of as only occurring in the child's home or as a result of conduct of the child's parent or guardian. This conception has dangerous implications for the fight to counter child abuse, for it ignores other sources of abuse, notably 'institutional' abuse.[111] As one submission to the Commission pointed out[112], the fact that abuse can occur at the hands of the government or a government agency highlights the need for an independent officer, such as the proposed Youth Advocate, to institute and co-ordinate action in child abuse cases. Children in institutions should have ready access to the Youth Advocate. The Youth Advocate would then have the opportunity of deciding whether or not to seek a discharge or variation of the order by which the child was placed in the institution.

406. ***The Right to Administer Punishment: Current Law and Practice*** Section 124 of the Child Welfare Ordinance 1957 (A.C.T.) provides that nothing in the Ordinance takes away or affects the right of a parent, teacher or other person having the lawful care of a child to administer punishment to the child.[113] Quite apart from statute, at common law a parent or person in *loco parentis* has a right to discipline a child in his care for the purpose of correcting the child.[114] There is also a duty on the part of a parent to control his child. At common law there are strict limits to the right of a parent to inflict corporal punishment for the purpose of correcting the child. Where the act amounts to a criminal offence, the accused cannot rely upon a right to administer punishment as severe as he deems necessary. In *R* v. *Terry*[115] the Supreme Court of Victoria held that the limits are:

- the punishment must be moderate and reasonable;
- it must have a proper relation to the age, physique and mentality of the child[116]; and
- it must be carried out with a reasonable means or instrument.[117]

Under present law it may be that a child may sue his parent for assault and battery.[118] The parent is not guilty of an assault if he used force by way of correction, and the force was reasonable in terms of the limits mentioned above. A school teacher is also entitled at common law to administer

---

110 Report of an actual case submitted to the Commission by Jordan Riak, on behalf of Parents and Teachers Against Violence in Education.

111 Boss, 19-20; *Report of the Child Maltreatment Workshop* (1976), para 3.55.

112 David Cruickshank, *Submission*, 2.

113 See also the Criminal Codes of Qld (s.280), Western Australia (s.257) and Tasmania (s.50).

114 See generally Eekelaar, 'What are Parental Rights?', (1973) 89 *LQR* 210, 223-4; *Justice Report*, para.40–5.

115 [1955] VLR 114. (The accused, who was living with the child's mother and who was regarded as being in *loco parentis* to the child, had administered blows which constituted excessive correction). In another case it was held that it was not within the bounds of parental authority to point a loaded pistol at a child. *R* v. *Hamilton* (1891) 12 L.R. (N.S.W.) 111 (F.C.). See generally cases cited in Howard, 144f.

116 See also *R* v. *Griffin* (1869) 11 Cox CC 402.

117 See also *Smith* v. *O'Byrne; Ex parte O'Byrne* (1894) 5 QLJ 126 (F.C.)

118 *Ash* v. *Lady Ash* [1696] Comb. 357 (a daughter recovered damages against her mother for assault, battery and false imprisonment); *Roberts* v. *Roberts* [1657] Hard. 96 (an infant, a remainderman, obtained an injunction against her father to prevent waste); *Young* v. *Rankin* [1934] SC 499 (a child passenger in a car driven by his father was held to be able to sue his father for injuries received consequent upon his father's negligent driving).

reasonable chastisement to a child.[119] The basis of this principle was once thought to be that the parent delegated his powers to the teacher, who thus stood in *loco parentis* to the child.[120] However, the modern view is that the school master has an independent authority to act for the welfare of the child.[121] If the latter view is correct, arrangements between the delegating parent and the teacher would not affect the child's cause of action for assault. However, the rules of the school or teacher's association would be relevant to the extent of the teacher's power.[122] Even if the theory of delegated authority were valid, it is difficult to apply to children who are compelled by law to attend school, whether their parents wish them to or not. If the basis of the principle is the need to maintain order in and about the school, then school rules and parental instructions are factors which should be taken into consideration when deciding what is reasonable.[123] According to Fleming[124], internal school regulations which forbid corporal punishment do not deprive a teacher in a public school of his defence provided the correction is otherwise reasonable.

407. ***The Right to Administer Punishment: The Commission's View*** The right of a parent to administer punishment to his child is linked with the duty on the part of the parent to control his child. Failure to do so may, under the present Ordinance, result in the child's being charged.[125] However, in the case of parent and teacher, a duty to society to keep a child under control obviously does not amount to a right to beat the child into submission. If children are to be treated as persons rather than the property of their parents, there should be no legislative warrant for the use of excessive force in the name of discipline. Section 124 of the present Child Welfare Ordinance seems to sanction the use of force of this kind. Moreover, although a child may, in theory, sue his parent or teacher, such cases are exceptionally rare. The right to sue is an indequate remedy in cases of abuse of this nature. Clearly, the discipline must be excessive if the case is to be sufficiently serious to give rise to a voluntary or compulsory notification to the Youth Advocate or the initiation of proceedings for a declaration that the child is a child in need of care. The Commission has received submissions from concerned community groups[126] with respect to the physical and emotional abuse of children by school teachers. The A.C.T. Teachers Federation has stated:

> This Federation believes that corporal punishment should be considered as being out of sympathy with modern educational principles and practice and that it should be replaced as soon as possible by more acceptable counselling resources and administrative procedures.[127]

---

119 *Fitzgerald* v. *Northcote* (1865) 4 F. & F. 656 (headmaster of a boarding school); *Ryan* v. *Fildes* [1938] 3 All ER 517 (assistant mistress of a day school); *Mansell* v. *Griffin* [1908] 1 KB 160; *Smith* v. *O'Bryne* (1894) 5 QLJ 126; *Byrne* v. *Hebden* [1913] QSR 233; *Hansen* v. *Cole* (1890) 9 NZLR 272; *Murdock* v. *Richards* [1954] 1 DLR 766. Chastisement may be administered for acts done outside school affecting school discipline. *Cleary* v. *Booth* [1893] 1 QB 465 (fighting on the way to school); *R* v. *Newport (Salop) Justices; Ex parte Wright* [1929] 2 KB 416 (smoking in street after school in defiance of express prohibition).

120 See the discussion in Rogers (ed.), *Winfield and Jolowicz on Tort* (11th ed., 1979), 654.

121 *Ramsay* v. *Larsen* (1964) 111 CLR 16.

122 See the discussion in Street, *The Law of Torts* (6th ed., 1976), 86–88; Fleming *The Law of Torts* (5th ed. 1977), 96–7 (the theory of delegation of parental authority 'has become threadbare since the advent of compulsory schooling') and Higgins, *Elements of Torts in Australia* (1970), 143–4. If there is no contract between the parents and the school there would not appear to be any delegation of disciplinary powers. If parents *voluntarily* placed their children in the care of school teachers, the contract between parent and school could expressly exclude such delegated authority, but in the absence of any express term, would impliedly authorise the delegation, *Mansell* v. *Griffin* [1908] 1 KB 160, 167.

123 This view is expressed in Street, 88, and the authority cited is *Craig* v. *Frost* (1936) 30 QJP 140 (since the teacher's order that a child should not gallop his horse to and from school was reasonable in the interests of the child's safety, the teacher's disciplinary powers overrode parental instructions that the child was permitted to gallop).

124 Fleming 97, citing *King* v. *Nichols* (1939) 33 QJP 171.

125 Para.252 (definition of 'uncontrollable child').

126 For example, submissions of Jordan Riak (on behalf of Parents and Teachers against Violence in Education), Ian Foster (member Executive, A.C.T. Teachers Federation), Sister M. Morrissey (Marymead Children's Centre), Lynette Inde (Canberra Women's Refuge), Jean Gifford and Judy White (Parent Support Service), Maria Byron (Canberra College of Technical and Further Education, child care workers' course), Osmund Iversen (Regional Director, Dr Barnado's in Canberra). Oral submissions, Public Hearing, 5 May 1980, *Transcript*, 2–14, 61–4, 82, 89, 103, 123, 126–7.

127 A.C.T. Teachers Federation, *Submission*, 2.

Corporal punishment in schools is unlawful in all European countries except the United Kingdom and Eire.[128] Its abolition began 300 years ago in Poland and has gradually spread to other Continental countries. It is also forbidden in several States of the United States. Overseas experience has shown that it is possible to secure adequate discipline in schools without resort to physical punishment. There should be no need for the use of corporal punishment as a disciplinary tool in schools where sufficient and appropriate counselling assistance is provided and classes are not too large.[129] This view is supported by several recent governmental reports, all of which are critical of the use of corporal punishment.[130] The majority view of the Committee of Inquiry into Public Behaviour and Discipline in Schools (N.S.W.), for example, was opposed to corporal punishment on the following grounds.

- Corporal punishment is founded on the false premise that members of our society respond to force and not to reason; a premise that is alien to the values embedded in the idea of education for individual development.
- The fact that it is only the young who are placed in a position where force can be substituted for reason.
- Corporal punishment can teach a child that he lives in a violent world and that if he wishes to control someone else or to solve a problem between himself and another person he should use or threaten force.
- Corporal punishment can be psychologically damaging and does not contribute to learning.[131]

It was also strongly submitted to the Commission that corporal punishment prevents its practitioner from searching for humane and effective means of discipline.[132] The Commission proposes, therefore, that s.124 of the Child Welfare Ordinance 1957 (A.C.T.) should not be re-enacted in the new Ordinance. The result would not be that parents and teachers would be left without any lawful means of chastisement of children in their charge. The common law rule that discipline be reasonable would apply in the A.C.T. The Commission acknowledges that repeal of s.124 would, in effect, be of symbolic value only. Nevertheless, this reflects the Commission's view, on the one hand, that specific statutory provisions sanctioning corporal punishment should not be re-enacted, and, on the other hand, the Commission's recognition that it is still a matter of great controversy in the community.[133] The common law rule (which can either be removed, modified or strengthened by Parliament) should, therefore, be the subject of inquiry by the proposed Childrens Services Council.

Supporting Services

408. In this report it is not possible or appropriate to discuss fully the services which should be made available in the A.C.T. to combat and prevent child abuse. In any case, a comprehensive investigation and formulation of the optimal services has already been made. Precisely written and broadly-based, the Victorian Report of the Child Maltreatment Workshop[134] should be carefully considered and its recommendations, where appropriate to a community of the size of the A.C.T., should be implemented forthwith. As the United States Juvenile Justice Standards Project has stated:

---

128 Brochure of Society of Teachers Opposed to Physical Punishment (1978). See also *The Times,* 14 October 1980, where it was reported that Britain had been found by the European Commission on Human Rights to be in breach of Article 2 of the European Convention on Human Rights, over the use of the strap in Scottish schools.

129 A.C.T. Teachers Federation, *Submission,* 2.

130 *Phibbs Report,* 30 (in respect of wards); *Green Paper,* 65 (in respect of training schools and remand centres); N.S.W. Anti-Discrimination Board, *Discrimination and Age* (1980), 42; Committee of Inquiry into Pupil Behaviour and Discipline (N.S.W.), *Self Discipline and Pastoral Care (1980),* 66.

131 Committee of Inquiry into Pupil Behaviour and Discipline, 66.

132 Victorian Teachers' Union, *Submission,* 3.

133 The extent of the divisiveness of corporal punishment amongst members of the community is illustrated in the survey of attitudes on corporal punishment conducted by the Committee of Inquiry into Pupil Behaviour and Discipline in Schools (65).

134 *Report of the Child Maltreatment Workshop* (1976).

> it is a basic judgment ... that intervention is not justified unless there are adequate resources available of sufficient quality to make the intervention beneficial to the child, and to the maximum degree possible, to his/her family. It is pure hypocrisy for legislatures to authorise intervention, not provide resources, and still believe that children are being protected by neglect laws.[135]

Although there is an undoubted need for services specifically to combat and prevent child abuse, there has been little attention to their provision. The reasons are complex but, according to one recent commentator, involve:

- the lack of knowledge of the causes of child abuse, which can result in concerned professionals 'dealing only with symptoms or even refraining from doing anything, on the principle that when in doubt, do nothing'; and
- the sporadic intervention of government in social welfare, supported by the large number of people in Australia who consider such intervention to be undesirable and a public burden.[136]

Despite these problems, action should be taken because there is much to be learnt by experimenting with various preventive approaches to the provision of services, and, in an allocation of priorities for social provisions, children as a group should come high.[137] By way of example, the following services should be provided:

- *Research and policy-making.* A national body should be established to develop, co-ordinate and oversee programs dealing with the child abuse problem.[138]
- *Publicity.* It is likely that many A.C.T. residents have not heard of the present range of services (for example, the Canberra Homemaker Service or the Parent Support Service). This could be remedied by the display of short television advertisements, and by the publication of a relevant booklet which should be freely distributed to professionals and to the public, including all new mothers.[139]
- *Prevention.* There is a world-wide trend to supplement the treatment of child abuse with services aimed at its prevention. One writer has explained the movement as:

  > a shift in the frame of reference ... from the medical model, which sought for a disease or illness to be treated in a classical medical form, to a frame of reference which took in social dimensions in the environment where child abuse took place.[140]

  The movement developed, for one fairly typical voluntary agency, from their recognition 'that before the breakdown of the families concerned there had been a time of severe physical, financial and/or emotional stress during which reliable, accessible support may have averted a permanent breakdown.'[141] The Victorian Report of the Child Maltreatment Workshop considered a range of preventive services.[142] It recognised the necessity to provide practical short term measures, such as educational programs for parents.[143] A more basic concern, fundamental to all preventive approaches[144], is the making of a commitment to the creation of a social climate which minimises the likelihood of child abuse.[145] Another writer has elaborated on the need for this commitment:

---

135 Juvenile Justice Standards Project, *Standards Relating to Abuse and Neglect* (1977), 116.

136 Boss, 143, 154.

137 id., 154-5.

138 In the Liberal Party's policy speech for the 1980 General Election, the Prime Minister undertook that the Government would 'with the States and voluntary organisations ... establish a National Children's Foundation to help tackle the problems of child abuse' (*Policy Speech* (1980), 10).

139 John Livi, *Submission,* 1–2.

140 Boss, 129.

141 'St Anthony's, An Alternative Service', (1977) 1 *Australian Child and Family Welfare,* 38.

142 *Report of the Child Maltreatment Workshop* (1976), chapters 3, 4, 5.

143 id., para 3.33.

144 See Renvoize, *Children in Danger: The Causes and Prevention of Baby Battering* (1975), 213.

145 ibid.

> In the end, not only an abhorrence of cases of child abuse reported in the media is required but a positive attitude towards how one wants to see provisions made to enable all people to live in conditions in which child abuse is unlikely to flourish. A positive attitude includes tolerance, understanding, willingness to allow resources to be devoted ... and a determination to reduce child abuse to the smallest proportions possible.[146]

- *Administration.* There is a need to rationalise the present overlapping roles of the Welfare Branch and the Capital Territory Health Commission in the handling of child abuse cases.[147]
- *Self-Help.* At least one self-help group, Parents Anonymous, has been operating in Australia since 1973.[148] The American counterpart, Mothers Anonymous, has had considerable success[149] in preventing parents hitting their babies.[150] These groups should be supported because they offer an essential, alternative service for those who abuse children. Self-help groups enable child abusers to gain the self-esteem needed willingly to approach professional supporting services.

---

146 Boss, 155.
147 See chapter 13.
148 Parents Anonymous, *Ripple — Community Child Care Quarterly,* 17 August 1979, 31.
149 Kempe and Helfer, *Helping the Battered Child and his Family* (1972).
150 Renvoize, 209.

11. Child Care Services in the A.C.T.

Child Care in the A.C.T.: Current Law and Practice

409. ***Children in Child Care*** This chapter deals with the temporary care of young children outside their own homes. The essential feature of this care is that it is of relatively short duration and the parents or guardians continue to be involved with the children and to exercise primary responsibility for them. Hence the care discussed here must be contrasted with full care provided for children in residential homes, institutions or foster homes. The distinguishing characteristic of full residential care is that those in authority in the homes or institutions assume complete responsibility for the child's day-to-day care and thus provide substitute care. A consideration of the desirability of introducing legal controls over persons and agencies who provide full residential care is important, but the problems associated with this form of care are quite different from those associated with the temporary minding of children. The two forms of care should be dealt with separately. Limitations of time have prevented the Commission from examining the issues raised by full residential care. They should be considered by the proposed Childrens Services Council. Much of the temporary care which is the subject of this chapter can accurately be described as 'day care', but on occasions parents or guardians place children in the care of others overnight. Hence the general term 'child care' is used throughout the chapter. Although there are differing views about the desirability of facilitating the provision of child care, it is undeniable that the demand for child care services in the A.C.T. is substantial.[1] This demand is unlikely to decline in the foreseeable future. One factor in the widespread use of child care facilities in the A.C.T. is undoubtedly the number of women in the workforce.[2] Another is the relatively high proportion of single parent households.[3] However, it would be quite wrong to view these facilities as being provided solely to meet the needs of working mothers or single parents. A special feature of the A.C.T. is that fewer than 20% of its population were born in the Territory.[4] Hence traditional sources of child care, such as friends and relatives, are less readily available. Child care services cater for a wide variety of needs. Examples of the types of children accommodated by the various agencies and individuals involved include:

- Children whose parents work full time or part time.
- Children of a parent who wishes to attend lectures or classes.
- Children who need care in an emergency, such as the illness or hospitalisation of a parent.
- Children of mentally ill parents or of parents who, for whatever reason, are unable to cope with them full time.
- Children or parents who need a break from the demands made by young children.
- Handicapped children and children presenting special problems.
- Children whose parents need assistance for a short time (for example, to keep an appointment, go shopping, or engage in some form of recreation).
- Migrants' children who are placed in child care facilities while their parents attend English classes.
- Children whose parents are working and who are unsupervised before or after school and during holidays.

---

1 The percentage of the A.C.T. population under the age of five was, in June 1979, 10.2. Only the Northern Territory had a higher percentage (11.9). The national average for children under the age of five was 7.9 percent. As at 18 December 1980 the ratio of pre-school and day care services to the total A.C.T. population under the age of five was 1:181. The ratio nationally was 1:200. Four Australian jurisdictions had a higher ratio of services for this age group. (Northern Territory — 1:93; Tasmania — 1:115; Western Australia — 1:133; and Queensland 1:166) Figures supplied by the Office of Child Care, Commonwealth Department of Social Security.
2 As was pointed out in para.25, a study carried out in July 1980 found that 53% of married women in the A.C.T. worked, and the figure for Australia was 43%.
3 The 1976 Census revealed that the proportion of single parent households in the A.C.T. was 4.3% of families, compared with an Australian figure of 3.8% See para. 25.
4 See para. 25.

- Abused or neglected children and those who are receiving inadequate care or are living in unsatisfactory conditions. (Often a health or welfare agency will locate such a case and refer it to an appropriate child care facility so that full or part-time care can be arranged).
- Children in playgroups and play schools. These groups are intended to bring together pre-school children in a stimulating environment and to give the children an opportunity to interact with others of their own age.

410. ***Classification of Services*** Child care might be regular and continuous, or occasional and of limited duration. Thus a child might be placed in a private home or centre five days a week if both parents are working, or the placement might be short and for a single specific purpose, for example, to permit the mother to go shopping or to keep an appointment. A distinction can be made between:

- occasional care;
- part-time care; and
- full day care.

'Occasional care' is short term, such as two or three hours. 'Full day care' means non residential care for a full day. 'Part-time care' is regular care, for example, a certain number of mornings each week, to give a parent a break or to permit attendance at a class, or for other purposes. In looking at the way in which these types of care are provided, it is possible to distinguish between centre-based services and home-based services. These two categories can be further sub-divided. Centre-based services consist of:

- commercially operated centres;
- centres operated by the Department of the Capital Territory;
- centres operated by community or parent groups; and
- adjunct centres.

Home-based services consist of:

- independent minders; and
- minders within a family day care scheme.

All of these types of care are to be found in the A.C.T. Each will now be described.

411. ***Centre-based Services*** The various types of centres in the A.C.T. may be classified as follows:

- *Commercially operated centres.* These are run by private individuals for profit. There are seven such centres in the A.C.T., all of which are licensed under Part VII of the Child Welfare Ordinance 1957. They provide occasional and part-time care.
- *Centres operated by the Department of the Capital Territory.* There are two such centres, run by the Department's Welfare Branch. One is at Civic and the other at Manuka. Both centres were taken over in 1973 from the Canberra Mothercraft Society. Their primary function is to provide occasional care, although part-time care is provided, and, in some cases, full day care over a short period (for example, for a week while a parent is in hospital). However, although the centres will give assistance in such an emergency, they are not designed to provide care all day every day. Most parents pay for the service, but it may be provided free if they are unable to do so. These two centres are, by virtue of an exemption contained in s.42 of the Ordinance, not required to be licensed.
- *Centres operated by community or parent groups.* In many parts of the A.C.T. voluntary, non-profit groups have been formed to provide child care services in their areas. Examples are the Spence Children's Cottage, the Duffy Children's Centre and the Australian National University Pre-School and Child Care Centre. Centres in this category are licensed under the Child Welfare Ordinance and provide occasional, part-time and full day care. The University Centre caters for children of staff members, but there are also university and college facilities for the children of students. The facilities include the Parents on Campus Child Care Centre, the Canberra College of Advanced Education Child Development Centre and the Canberra Technical College Students Child Care Centre. Centres of this kind normally provide regular part-time care (while parents attend classes) and occasional care. They are licensed. A third category of community centres provides occasional care. These are operated by groups such as the Belconnen Community Service, the Woden Community Service and Tuggeranong Family Action. These centres are not licensed. There is also the service provided by the Marymead Children's Centre. Although this is primarily a residential institution, one of the cottages and the recreation hall are run as day care centres, and provide occasional, part-time and full day care. The cottage and hall are licensed under Part VII of the Ordinance. In addition to services of the kind described, some community groups operate special purpose centres. For example Tuggeranong Family Action runs playgroups for mentally and physically handicapped children and for other children with special needs and also provides a school holiday program. Woden Community Service runs three centres which provide care for children after school. Mention must also be made of the assistance offered to migrants learning English. Some centres provide occasional care for migrants' children while their parents attend classes. Tuggeranong Family Action makes such care available in a community centre and it has been found that, by so doing, migrant women (who might be reluctant to use child care facilities) are introduced to the services available. Most of the centres operated by community or parent groups receive some form of financial support. For example, the premises may be provided free or a grant may be made by the Office of Child Care of the Commonwealth Department of Social Security.[5] Most employ some paid staff, and, in some, staff are assisted by voluntary helpers. Parents using any of these community facilities may pay for the services received or, when the parents are unable to do so, subsidies may be available if the centre is government funded. Some centres are run as co-operatives, which means that the amount of time contributed by parents is related to the number of hours that their children are able to attend.
- *Adjunct centres.* This category consists of a miscellaneous range of centres attached to other organisations. Child care services might be provided at a person's place of work. An example is the Royal Canberra Hospital Child Care Centre in which hospital staff may place children. The Capital Territory Health Commission pays the wages of those who run the centre and provides the premises. Such a centre offers part-time and full day care. Another type of centre is that attached to a commercial sporting facility (such as a bowling alley or squash courts); a service of this kind is provided by the operator of the facility as an inducement to parents to patronise it. Similarly, a shopping centre may have a child-minding service attached. At the Kippax Fair Shopping Centre, for instance, the proprietors of the centre make premises available, and the child care is provided by the Y.M.C.A. Other types of adjunct centres are those provided by churches (for use while parents are attending services) and that attached to the Women's Refuge. Many adjunct centres make a charge and none is licensed. Most provide occasional care only. There are some who believe that adjunct centres are quite different from the other types of centre described. Their argument is that these centres are distinctive, as the parent is within call, and thus those running the centres are not asked to accept full responsibility for the children. Although this may be true of a centre operated by a church during a service, the argument is less convincing when applied to a centre attached to a large shopping mall. Staff of a centre of the latter kind might have considerable difficulty in locating a parent.

412. ***Home-based Services*** Home-based services are provided by private persons who take children into their own homes. They are not licensed. Full day care, occasional and part-time care are provided. A distinction must be drawn between those who operate independently and those who operate within a supervised family day care scheme. Independent minders care for children for profit and are paid by the parents. Minders within a family day care scheme operate under the umbrella of local community groups such as the Belconnen Community Service, the Woden Community Service and Tuggeranong Family Action. Each of the community agencies has co-ordinators whose task it is to interview prospective minders and to assign children to them if they and their homes are considered suitable. Parents wishing to place a child with a minder may approach a community agency and allow the co-ordinator to arrange the placement. In most cases parents pay the minder for the service. It they are experiencing financial difficulties they may be assisted by a subsidy. Family day care schemes receive funds from the Office of Child Care. This assistance includes money for subsidies to parents. The co-ordinator's role and that of her field staff does not cease once a placement has been arranged. Staff offer advice and support to the minders within their scheme. They can, for example, advise on services — such as a toy library — available to minders. They also exercise supervision over minders. In selecting them, the co-ordinators try to exclude

[5] The role of the Office of Child Care is described in para.415.

those considered unsuitable, and field staff visit minders to check on the quality of care provided. Community groups combine their responsibility for family day care schemes with the performance of a number of other functions. For example, as has been indicated, Tuggeranong Family Action also operates occasional care centres, playgroups, school holiday programs and provides care for children of migrants. Similarly the Woden Community Service, in addition to running two family day care schemes, operates an occasional care centre and three centres providing after school care. Both groups provide general support and assistance to parents.

413. ***The Present Legal Framework*** Part VII of the Child Welfare Ordinance 1957 deals with the licensing of places for the reception and care of children and of day nurseries and kindergartens. The most important provision is s.30, for this indicates which child care premises must be licensed. The section states:

> 30. (1) A person shall not use a place for –
> (a) the reception and care of children under the age of seven years, apart from the mother or other parent of each of the children, or of one such child; or
> (b) a day nursery or kindergarten,
> unless there is in force a licence granted to that person by the Minister under [Part VII of the Ordinance] in respect of that place.
>
> (2) Sub-section (1) does not apply to a person who uses a place for the reception and care of not more than four children (including children of whom that person is a parent).[6]

The meaning of this provision is far from clear. It is not apparent why a distinction was made between a place for 'the reception and care of children under the age of seven years' and 'a day nursery or kindergarten'. The former seems broad enough to include the latter. Of the terms used, only 'care' is defined in the Ordinance,[7] but not in such a way as to limit its broad natural meaning. Three interpretations of s.30 seem possible.

- *Residential and child care distinguished.* The phrase 'a place for the reception and care of children' could be taken as applying to premises in which full residential care is provided, in contrast with 'a day nursery or kindergarten' which provide care during the day. This interpretation is supported by the fact that several provisions in Part VII of the Ordinance refer specifically to places licensed under that Part and 'used for a purpose specified in paragraph (a) of section thirty'.[8] These references suggest that it was intended to make a distinction between premises licensed under paragraph (a) and those licensed under paragraph (b). Further, a number of the sections which refer to premises licensed under paragraph (a) seem clearly intended to apply to residential premises. For example, under s.36, when a child is removed from a place licensed under paragraph (a) the person in charge is required to notify the Minister of the child's removal. It is unlikely that it was intended to impose this obligation on those who provide care only during the day. Finally, the term 'reception' employed in paragraph (a) suggests that the draftsman had in mind a 'receiving home', which was the term often used to describe homes which provided residential care for children in time of emergency.[9] It should be noted that, if s.30(1) is interpreted as distinguishing between residential and other forms of care, the age limit of seven applies only to premises in which residential care is provided. This would imply that all day nurseries and kindergartens should be licensed, regardless of the ages of the children cared for. A further corollary of this interpretation is that the only form of day care which requires a licence is day care provided in 'a day nursery or kindergarten'.

[6] Details of licence application procedures are set out in regulation 17 of the Child Welfare Regulations 1957. Part VII of the Child Welfare Ordinance does not deal specifically with the operation of unlicensed premises. Failure to comply with s.30 would be dealt with under s.94(2), which creates a general penalty for a breach of a provision of the Ordinance. This penalty is a fine not exceeding $200 or imprisonment for a maximum of six months, or both. Jurisdiction is vested in the Childrens Court: Child Welfare Ordinance 1957 (A.C.T.), s.12 and 13(1).

[7] The Ordinance states that 'care' includes custody and control (s.5).

[8] See Child Welfare Ordinance 1957 (A.C.T.), s.33(1), 34(4), 35, 36, 38, 39 and 40(1).

[9] Section 21(1)(b) of the Child Welfare Act 1939 (N.S.W.) refers to homes used for the 'reception' of certain categories of children. It is clear from the context that these homes provide residential accommodation.

- *Private care and centre care distinguished.* It is possible that paragraph (a) was intended to apply to private homes, in contrast to paragraph (b), which, by its reference to 'a day nursery or kindergarten' was intended to apply to centres specially established for the purpose of child care. Such an interpretation is questionable since, as has been noted, paragraph (a) seems broad enough to apply to all types of care. As with the previous interpretation, an acceptance of the interpretation considered here implies that no age limit has been set in respect of children cared for in centres which fit the description of a 'day nursery or kindergarten'.
- *No distinction.* The third interpretation is that it was not intended for paragraph (a) and paragraph (b) to be mutually exclusive. While the latter seems to apply only to care provided during the day, the former seems to cover all forms of care: residential and non-residential care as well as private and centre-based care. Under this interpretation paragraph (b) merely serves as an embellishment or illustration and underlines the fact that day nurseries and kindergartens are required to be licensed. The main argument for this interpretation is that the breadth of the wording in paragraph (a) cannot be ignored, whatever may have been the draftsman's intention. Further support for this view is provided by s.30(2). This subsection refers to a person who uses a place for the 'reception and care' of children. It applies to all forms of care to which reference is made in s.30(1), and does not make a distinction between paragraph (a) and paragraph (b). This suggests that the words 'reception and care' were intended as an all-encompassing formula. It could be argued that, under the Ordinance, any person who cares for another's young children and who, as a result, is responsible for more than four children, should have a licence. Suppose a mother of three young children once a week cares for another woman's two infants for a period of three hours. Does a strict interpretation of s.30 indicate that the caretaker requires a licence? Such an interpretation would seem surprising, but the drafting of the section is not such as to preclude the possibility.

Whatever decision is reached on the nature of the premises referred to in s.30, the licensing requirement seems to apply to all types of care, from full day care to limited occasional care, to care freely provided as well as that for which a charge is made. After having inquiries made, the Minister may grant a licence, subject to any conditions and requirements, or he may refuse to do so.[10] The licence must specify the purpose for which it is granted, and the maximum number of children who may be received and cared for at the place to which the licence applies.[11] The provision about the maximum number may be subsequently varied by the Minister.[12] He may later cancel the licence if he is satisfied that the place to which the licence applies is no longer a fit and proper place to be licensed, or if the person holding the licence has failed to comply with its conditions and requirements.[13] In addition to providing cancellation procedures by administrative action, the Ordinance makes provision for the Childrens Court to cancel a licence. Under s.32, an officer appointed by the Minister may, in order to prepare a report under s.31 or to ensure that the conditions of a licence are complied with, at any time enter a place used for a purpose specified in s.30 and inspect it and the children being cared for there. If necessary, he may be accompanied by a medical practitioner or a police officer, or both.[14] If, following an inspection by an authorised officer, it appears to the Director of Child Welfare[15] that any of the conditions or requirements of the licence are not being obeyed, he may give directions to ensure compliance.[16] Failure to comply with a direction given under s.34(1) is an offence under the Child Welfare Ordinance[17], and is punishable with a fine of $200 or imprisonment for a term not exceeding six months, or both.[18] Jurisdiction in this matter is

[10] Section 31(1) and (2). The Minister's powers with regard to licensing have been delegated to the City Manager, the Assistant Secretary, Welfare, and to four other members or the Welfare Branch of the Department of the Capital Territory. (The City Manager heads a Division of the Department of the Capital Territory; the Welfare Branch is part of that Division. See para.487).

[11] Section 31(3).

[12] Section 31(5).

[13] Section 31(4).

[14] Section 32(3).

[15] The Secretary of the Department of the Capital Territory holds the office of the Director of Child Welfare. See Child Welfare Ordinance 1957, (A.C.T.) s.7(1).

[16] Section 34(1).

[17] Section 34(2) and 94(1).

[18] Section 94(2).

exercised by the Childrens Court[19], which may also cancel a licence.[20] When the Childrens Court does cancel a licence in respect of a place used for the reception and care of children under seven (but not one used as a day nursery or kindergarten) it may restore any child who is an inmate of the place to the custody of a parent.[21] However, the court's powers do not end there. In addition, the court is given the extraordinary power to release such a child to the custody of the Minister to be dealt with as a ward admitted to government control, or to release him to the care of any other person.[22] It is not necessary for the court to find that the child is neglected or uncontrollable before exercising these powers. The Ordinance does not make it clear whether the child needs to appear in court before an order can be made under s.34(4). If an appearance is required, there is no indication of the procedure to be employed to bring the child before the court. Specific provision is also made for the welfare of children found in unlicensed premises. Although Part VII of the Ordinance does not deal with the matter, there is a general provision authorising entry on to premises in which it is suspected that an offence against the Ordinance is being committed.[23] When a person uses unlicensed premises for the reception and care of children under seven, the Director of Child Welfare may authorise a child to be removed from the premises and placed in a shelter.[24] The child may be kept there until the Childrens Court orders him to be restored to the custody of a parent, released to the custody of the Minister to be dealt with as a ward admitted to government control, or released to the care of any other person.[25] As is the case when a licence is cancelled, it seems that the court may exercise these wide powers regardless of the child's circumstances. No specific finding need be made. It is enough that the child is on the premises. Similarly, as with the cancellation provisions, there is no indication whether the child or his parent or guardian need appear in court before such an order is made or as to the procedure to be employed to bring such a child before the court. Nor is there any provision authorising the police or any member of the Welfare Branch to take a child into custody. Further there are no limits on the period during which a child may be kept in a shelter before the court must consider his case. By virtue of s.42, the provisions of Part VII do not apply to:

- the 'Canberra Community Hospital';[26]
- a place controlled by the Department of the Capital Territory;
- a private hospital registered under the Public Health (Private Hospitals) Regulations;[27]
- a person having care of a child where that person —
  - is a relation by blood of the child,
  - is a person to whom the custody of the child has been given by a court or by deed or will, or
  - is a person in whose care a ward has been placed by the Minister pursuant to Part V of the Ordinance.[28]

The Ordinance imposes some controls on the receipt of money in return for the provision of care. No person shall, without a court order, receive into his care a child under the age of seven, to 'rear, nurse, or otherwise maintain', in return for payment except by way of periodical instalments.[29] Further, no instalment may be received more than four weeks in advance, or at a rate in excess of the prescribed rate, unless the Director of Child Welfare so orders.[30] Provision is made for a person

19 Section 12 and 13(1).
20 Section 34(3).
21 Section 34(4)(a).
22 Section 34(4)(b) and (c).
23 Section 121. Under this section, where there is reason to believe that on any premises an offence against the Ordinance has been committed, or any of the provisions of the Ordinance infringed, a magistrate may issue his warrant authorising any member of the police or an officer named in the warrant to enter the premises.
24 Section 35(1).
25 ibid.
26 Now the Royal Canberra Hospital. The exemption of this hospital could be considered anomalous. The original intention seems to have been to exempt the nursery attached to the obstetrics unit. However, as has been pointed out, the hospital now has a child care centre for the children of hospital employees, and there seems no reason who such a centre should not be subject to general licensing provisions.
27 The only such hospital in the A.C.T. is the John James Memorial Hospital.
28 The reference in s.42 to children dealt with under Part V of the Ordinance exempts from the Ordinance's licensing provisions premises accommodating children who have been admitted or committed to wardship.
29 Section 37(1).
30 Section 37(3). The rate is prescribed in regulation 19 of the Child Welfare Regulations 1957.

wishing to place a child under the age of seven in premises licensed under Part VII to require the Director to receive a sum of money from which he shall make the permitted periodical payments.[31] Section 37 does not apply to premises approved by the Director of Child Welfare and supported wholly or partly by public subscription or by private charity where the place is open to inspection by the Department of the Capital Territory or controlled by the Department. Nor does it apply to a day nursery or kindergarten.[32] Thus approved organisations are permitted to receive lump-sum grants rather than being reliant on periodical payments in respect of individual children.

414. ***The Welfare Branch Child Care Unit*** The Welfare Branch of the Department of the Capital Territory includes a Child Care Unit. This unit, consisting of three child care advisers, administers the licensing system and provides an advisory service for parents and for persons and organisations involved in child care. The unit runs training courses and seminars, and assists individuals and groups in the development of new services. Members of the unit will, for example, discuss plans for proposed centres, and will advise on charges. In addition, the unit produces a newsletter, *Child Care in Action,* and has prepared three brochures, *A Guide for Home Child Minders, Family Day Care for Children: A Guide for Parents* and *Day-Care Facilities for Children in the A.C.T.* Further, as has been indicated, the Branch operates two occasional care centres, and these are the responsibility of the Child Care Unit. The unit maintains good liaison with the community organisations. For example, if a complaint is received about a private minder, the usual practice is for a member of the Child Care Unit to check with the co-ordinator of the appropriate family day care scheme to see whether the minder is part of that scheme.

415. ***The Role of the Office of Child Care*** Primary responsibility for the regulation of child care in Australia lies with State and local authorities. However, the Commonwealth Government also has a role to play. It supplements the activities of those who are working at a State or local level with special groups of children[33] and encourages particular services which it regards as of national importance.[34] The Childrens Services Program is administered by the Office of Child Care[35] which is part of the Commonwealth Department of Social Security. This office makes available funds for a very wide range of services in the A.C.T.[36] These include centres offering occasional, part-time and full-time care, family day care schemes, youth refuges, women's refuges and child care for children after school and during school holidays. Much of the funding is at the discretion of the Minister for Social Security, who must make decisions on a variety of proposals. The funding of child care centres and research in child care and related matters is specifically authorised by the Child Care Act 1972 (Cwlth).[37] In the A.C.T. it is not the normal practice for the Office of Child Care to fund capital works. The view taken by the Department of Social Security is that, as government premises (particularly those belonging to the Department of the Capital Territory) are readily available in the Territory, groups requiring assistance should be able to find premises before seeking financial assistance. In this regard departmental policy differs from that pursued in the States, where the making of capital grants is much more common. Once a child care facility has been established, the

31 Section 37(4).
32 Section 37(5).
33 For example, the Commonwealth pays particular attention to services for Aboriginal children, handicapped children and children living in isolated areas.
34 For example, the Family Support Services Program and the Youth Services Program.
35 The Office of Child Care was established in 1976 as part of the Commonwealth Department of Social Security. The Office subsumed the functions of the Interim Committee for the Children's Commission. This Committee had been set up as the forerunner of a Children's Commission which the Whitlam Labor Government had decided to establish. Although legislation to set up a Children's Commission was enacted (Children's Commission Act 1975 (Cwlth)) the greater part of the Act was never proclaimed. For a discussion of child care policies, see Australian Pre-School Committee, *Care and Education of Young Children,* (1973); Australia, Priorities Review Staff, *Early Childhood Services,* (1974); Social Welfare Commission, *Project Care: Children Parents Community,* (1974).
36 As at 31 December 1980, 57 approved projects were being funded in the A.C.T. under the Childrens Services Program. These included 17 day care centres, two multi-purpose centres, seven family day care schemes and six out-of-school-hours programs. Figures supplied by the Office of Child Care, Commonwealth Department for Social Security.
37 For provisions relating to capital grants, see Child Care Act 1972 (Cwlth), s.5–10, and for those dealing with recurrent grants, see s.11 and 12. Research grants are provided for in s.13.

Office of Child Care can make both recurrent grants (to cover rent and salaries) and special grants (for equipment and to subsidise needy parents). Of particular interest is the Office's role with regard to family day care schemes. Operational assistance can be provided, in the form of salaries for the co-ordinator and field staff, and also special needs subsidies, for parents who cannot afford to pay the full fees. With regard to the latter, a certain sum (based on the number of children in the scheme) is advanced to the co-ordinator, and she may use her discretion to make payments to minders on behalf of parents in financial difficulties. Although co-ordinators must apply a means test, this test allows for the exercise of a good deal of discretion, and may result in a lack of uniformity. Also, there is some doubt whether the power to make financial assistance available should reside with the community organisation controlling the scheme, rather than with the co-ordinator. In its capacity as a funding agency the Office of Child Care offers advice and is able to exercise some control over standards. For example, if it is approached by a new organisation wishing to develop a family day care scheme, staff of the Office question members of the sponsoring organisation and scrutinise its plans. It is the usual practice to set an upper limit on the number of children who may be cared for within a scheme. In the case of a new organisation this number might be increased when the group develops experience and proves its competence. The Office also works closely with the Welfare Branch's Child Care Unit. If a proposal relates to a facility which must be licensed, the Office of Child Care informs an intending applicant for assistance that no application can be entertained until Welfare Branch requirements have been met and the necessary licence obtained. If the facility is one which will be permitted to operate without a licence, the Office of Child Care can often set conditions which members of the Child Care Unit believe to be desirable, but have no power to impose. If, for example, a group wishes to open an occasional care centre, the Welfare Branch will not impose any conditions, since, as is explained below, centres of this kind are allowed to operate without a licence. Welfare Branch staff advise on standards (and sometimes by bluff seek to persuade centres to adopt certain standards), but will not invoke the licensing provisions of the Ordinance. The Office of Child Care, on the other hand, can exert some control, for it can make its offer of financial assistance conditional on the meeting of certain standards. A simple illustration will make the point clear. If approached by a community group wishing to provide occasional care, the Child Care Unit may conclude that the proposed premises should house only 20 children, but be powerless to enforce this decision. The Office of Child Care can virtually ensure that this limit is observed by offering to provide funds such as will support no more than 20 children. Thus the two agencies can to some extent work together to secure the observance of certain standards which are not enforced under the provisions of the existing Ordinance. Another way in which the Commonwealth sets standards is by paying salaries only if a certain ratio of staff to children is maintained.

416. ***The Application of the Licensing Provisions*** Staff of the Child Care Unit make certain distinctions. In general it can be said that centres providing part-time and full day care are required by the Welfare Branch to be licensed, while other forms of child care are not.[38] Occasional care centres, no matter how large, are not required by the Branch to hold a licence. It seems that, in the past, the view has been taken that, as the Child Welfare Ordinance was drafted before the use of occasional care services had become widespread, the relevant provisions of the Ordinance were not intended to apply to occasional care. Nor are private minders or those who operate within the framework of a family day care scheme required by the Welfare Branch to be licensed. The making of distinctions on the basis of the duration of the care, and in particular the exemption of occasional care from the licensing provisions, does not seem to be warranted by the wording of s.30 of the Child Welfare Ordinance. As has been noted, the law regarding licensing requirements in the A.C.T. is confused.[39] One interpretation of the Ordinance is that its reference to places used for the 'reception and care' of children was intended to apply to premises in which residential care is provided. If this interpretation is accepted, it is possible to argue that the only form of child care which requires a licence is that provided in premises which can be described as 'a day nursery or kindergarten'. Staff of the Welfare Branch seem unsure whether this is the interpretation to adopt. An annual report of the Branch states that 'there is no requirement to license persons minding children in their own homes'.[40] Yet in

[38] As at 30 June 1980 seven private and 14 community operated child care centres were licensed under the Child Welfare Ordinance: Welfare Branch, Department of the Capital Territory, *Annual Report 1979–80,* 7.

[39] See para.413.

[40] Welfare Branch, Department of the Capital Territory, *Annual Report 1979–80,* 7.

the Branch's pamphlet *Family Day Care for Children: A Guide for Parents* it is stated that, 'No more than four children of any age may be lawfully minded in a private home'. Further, the view that it is only centre-based child care which is required to be licensed reflects an adoption of the argument that paragraph (a) of s.30(1) applies to residential care. However, A.C.T. facilities providing residential care for children under the age of seven are not required to be licensed. Although the Ordinance is silent on the subject of the period of a licence, the Welfare Branch grants annual licences. Since the Branch assumed responsibility for the administration of the licensing system, no licences have been cancelled. When, as sometimes happens, a member of the Child Care Unit is disturbed by conditions at a licensed centre, she may require that the physical facilities be improved, but the view taken by the Unit is that a licence cannot be cancelled because of reservations about intangible matters such as the quality of the care provided. Those who issue the licences exercise discretion on the conditions attached to them, and different conditions have been set for different types of child care facility. The argument put forward in support of this differentiation is that, as some centres are built specially for the purpose of child care, it is reasonable to require them to maintain certain standards. On the other hand, organisations which function in centres used for other purposes cannot be expected to provide the same standard of physical conditions.

Developing a Regulatory Framework

417. ***The Problems*** The Commission's analysis of the law relating to child care in the A.C.T. and the way the system operates revealed a number of problems requiring solution.

- *Lack of clarity in the law.* The relevant part of the Child Welfare Ordinance is lacking in clarity and precision. It is not clear which forms of child care should be licensed and which should not. As a result, those whose task it is to implement the licensing provisions have felt compelled to make arbitrary distinctions between facilities which require a licence and those which do not. Persons providing care in a centre are regarded as needing a licence, while those providing care in a private home are not. Centres offering full and part-time care are regarded as needing a licence, but those providing occasional care are not. Yet the language of s.30(1) of the Child Welfare Ordinance seems broad enough to cover all forms of child care, wherever it is provided. The result is a confused situation in which a fundamentally unsatisfactory law is applied in an unsatisfactory manner.
- *Potential for discrimination.* The application of the law can create the impression that some groups in the community are more favourably treated than others. If some persons who provide child care facilities are required to hold a licence and others are not, this can lead to resentment unless the distinctions made are seen to be authorised by the legislation. Further, under s.31(2) of the Child Welfare Ordinance, the Minister may grant a licence 'subject to such conditions and requirements (if any) as he specifies in the licence'. This gives the Minister and his delegate unfettered discretion. It is possible for stringent conditions to be imposed on one licensee and far less demanding conditions to be imposed on another.
- *An outmoded law.* Not only is the law unclear, but it is also ill-adapted to the varied range of child care services which have developed in the A.C.T. Some are provided by government agencies and others by voluntary groups. These services meet a variety of needs, from occasional to full day care, from the care of young babies to the care of older children after school and during school holidays. Sometimes a number of different services are combined at one multi-purpose centre. The Ordinance, with its references to 'places for the reception and care of children under the age of seven years' and to 'day nurseries' and 'kindergartens' is not adapted to this range of services. Further, child care is likely to take increasingly varied forms in the future. What is needed in the new Ordinance is flexible terminology capable of accommodating a varied range of child care services.
- *Need for tighter controls.* In submissions to the Commission and elsewhere a number of persons expressed their anxiety about the quality of care provided in some A.C.T. child care facilities. The Standing Committee on Housing and Welfare of the A.C.T. Legislative Assembly noted the expressions of concern which it had heard about the standards of these facilities.[41] At the Commission's second Public Hearing reference was made to poor quality

[41] A.C.T. Legislative Assembly Standing Committee on Housing and Welfare, *Report No. 8, Child Welfare,* (1978), 45.

care in some centres[42] and to private minders who had been rejected as unsuitable by Family Day Care Schemes and who subsequently undertook the care of up to 20 children after school.[43] Two witnesses drew attention to the need for certain adjunct centres attached to shopping centres and sporting facilities to be controlled.[44] One of these witnesses stated:

> [W]ith the adjunct centres, my experience ... is that anything goes because the parents are on the premises ... I have had experience of [adjunct centres] where children are just 'minded' ... in a room nearby, often with no ... outdoor access or toilet access or materials for them to play with ... And I have seen ... a small room ... in [an adjunct centre] where there were up to 30 children with no access to toys and materials and all the children had to do was pull each other about.[45]

With regard to persons who provide child care for profit, it was suggested at the hearing that careful control is needed, since:

> in some circumstances profit can become the prime concern of a child care service and not the care of the child.[46]

418. ***Methods of Ensuring Observance of Adequate Standards*** Before consideration is given to possible changes in the law governing child care in the A.C.T., a decision must be made on the fundamental question whether licensing procedures should be retained as a method of regulation in this field. Licensing procedures are no more than one of the law's methods of attempting to regulate conduct. As the Commission has noted in its report, *Insurance Agents and Brokers*[47], there are other administrative mechanisms such as certification, accreditation and registration. These are discussed in the next paragraph. As an alternative to these, however, reliance could be placed on the criminal law or on the use of civil law remedies or injunctions. Further, it could be argued that the law should not concern itself with child care at all and that high standards are best pursued through public education. Alternatives to reliance on a licensing system must therefore be examined.

- *Civil and administrative law remedies.* Reliance on the civil process would clearly be unsatisfactory. If it were left to a dissatisfied parent to initiate proceedings in tort or contract it would only be gross and obvious deficiencies (such as negligence producing actual harm to the child) which would result in action being taken. The initiation of such proceedings would be a slow, costly and cumbersome means of attempting to bring pressure to bear on those who provide child care. Proceedings of this kind would occur only 'after the event'. The dissatisfied parent would have to wait until those responsible were in breach of their duty or had broken the terms of the contract before taking action. Finally, the initiative would have to come from the parent. If the child had been placed in unsatisfactory conditions and the parent decided to take no action, the child would not be likely to receive the protection he needed. The conditions in which child care is provided are not open to public scrutiny, and those who are likely to suffer if it is inadequate are not able to take action to protect themselves. In short, reliance on the civil process would not be likely to assure children of the protection they require. Similar comments could be made about resort to an injunction to control the standard of care. Before seeking an injunction, a dissatisfied parent would have to wait until there had been a failure on the part of those responsible for the child's care, the procedure would be costly, and the onus would be entirely on the parent. Nor could the Commonwealth Ombudsman effectively safeguard children in child care. His powers are confined to the public sector, and much child care is provided by private organisations and individuals.
- *Reliance on the criminal law.* An alternative to employing licensing procedures would be to establish certain standards for all who care for other people's children, and to prosecute those who fail to meet these standards. The Commission is not in favour of this approach. The control of child care services is not an area in which resort to the criminal law should be encouraged. The criminal law is a blunt instrument, the use of which should be reserved for seriously harmful conduct. Its procedures are stigmatising and require a high standard of proof before intervention is permitted. Further, the use of criminal sanctions is not an appropriate way in which to seek to regulate child care. When unsatisfactory care is provided it is not generally because of wrong-doing of a criminal kind, but because of a failure to reach acceptable standards. Such a failure is more susceptible to control by a system of licensing than by the criminal law. A major consideration is that much of the child care with which this report is concerned is provided on a commercial basis. Those operating on such a basis are more likely to be effectively controlled by the fear of losing a licence than by the threat of a prosecution which is unlikely to succeed. Most importantly, the criminal law, like the civil law, is invoked 'after the event.' Procedures which require fault or failure before they can be invoked are not the most effective means of protecting children or of ensuring high standards of care.
- *Reliance on public education.* Although education programs have an important role in making parents aware of the need to ensure that their children receive high quality care in child care facilities, it would be unsatisfactory to place total reliance on educational campaigns. The law has a role to play in protecting children whose parents do not respond to such campaigns.

419. ***Varieties of Administrative Control*** The view that some form of administrative control of child care services in the A.C.T. should be retained does not lead inevitably to the conclusion that licensing procedures provide the most appropriate method of regulation. As has been noted, licensing is simply one of a number of administrative mechanisms. Other are registration, certification and accreditation. Indeed, in Victoria and the Northern Territory the relevant legislation refers to 'registration' of child minding facilities, rather than to 'licensing'.[48] It is important to attempt to distinguish between the various forms of administrative control. The Commission has already undertaken this task in the context of its inquiry into insurance agents and brokers.[49] For the purposes of this report the following distinctions can be made:[50]

- *'Accreditation'* is a weak form of control. It usually indicates that a group or organisation has conferred recognition on a member. It may indicate no more than membership of a particular group or organisation. Often members may apply for this recognition without having to meet particular standards. Accreditation denotes that the person has been approved to undertake a particular activity. It does not, however, operate to exclude from the field those who have not been accredited.
- *'Certification'* denotes a procedure by which a person or organisation is accorded a form of official recognition. It is an independent agency which certifies that a person is approved to perform a certain task. Like accreditation it does not exclude unregulated persons from the occupation. Thus a person may be certified as a member of a particular trade or profession, and advertising may encourage members of the public to employ only persons who are so certified. However, such a system does not prevent other persons from offering exactly the same service, provided they do not hold themselves out as being certified. Thus certification merely gives members of the public a means of distinguishing between, on the one hand, those who have official approval and may be subject to standards and discipline and, on the other, those who have no such approval and are not so subject. Members of the public are not assured of protection, but they are provided with a means of distinguishing between those who have and those who lack the official seal of approval.
- *'Registration'* has been defined as:

---

42 Public Hearing, 5 May 1980, *Transcript*, 118 (Maria Byron).
43 id., 35 (Hilary Gunn).
44 id., 65 (Ian Foster) and 120 (Maria Byron). Anxiety about adjunct centres is not limited to the A.C.T. The Early Childhood Services Section of the Western Australian Department for Community Welfare pointed out that adjunct centres are an area of concern in Western Australia. It was stated that it was intended that certain types of adjunct centres should be subjected to licensing provisions. *Submission*, 6.
45 id., 120 (Maria Byron).
46 id., 37 (Hilary Gunn).
47 ALRC 16 (1980), para. 123.
48 Health Act 1958 (Vic.), s.208B(2) and Child Welfare Act (N.T.), s.76B(1).
49 ALRC 16 (1980), para. 123.
50 The meaning of the various terms discussed is not clearly established and the distinctions made in this report are far from being universally accepted. The terminology in this area is used in a confusing manner. One author quotes the Optometrists Registration Act 1958 (Vic) as the 'epitome of confused terminology.' This Act requires 'registration' of 'certified' practitioners but is actually a licensing statute. Duggan, 'Occupational Licensing and the Consumer Interest,' in Duggan and Darvall (eds.) *Consumer Protection Law and Theory*, (1980), 163, 176. For a discussion of certification as an alternative to licensing, see Duggan, 175–178.

an arrangement under which individuals are required to list their names in some official register if they engage in certain kinds of activities. There is no provision for denying the right to engage in the activity to anyone who is willing to list his name.[51]

Before a person is permitted to register it may be necessary for him to meet certain formal requirements. For example, a particular academic qualification may be made a pre-requisite of registration. Registration is an exclusionary system. It operates to inhibit entry upon the regulated occupation by those who are not registered.

- *'Licensing'* also formally inhibits entry upon the regulated occupation. It is a system which requires official approval if a person is to undertake a particular occupation. A licensing authority sets standards and is required to evaluate an applicant's suitability before granting a licence. It is made an offence for a person to carry out a particular occupation without first obtaining a licence. Also, the licence may be withdrawn if the required standards are not maintained. The essential feature of a system of licensing is that it involves, at the point of entry, satisfying the licensing authority that certain standards have been met. Those who do not meet these standards are denied a licence and the result is to exclude them from the field.

420. ***Arguments for Licensing*** The following are the arguments which may be advanced in favour of retaining a system of licensing of child care services in the A.C.T.

- *Well established.* Procedures for licensing child care facilities in the A.C.T. are well established and good cause would have to be shown before abolishing these procedures. None of the submissions received by the Commission suggested that the licensing of child care should cease.
- *Need to protect children.* The importance of good child care, and the need to protect children who cannot protect themselves, justify the use of the intrusive form of regulation which licensing (as opposed to certification or accreditation) represents. If a system of accreditation or certification were substituted for licensing procedures it would not be possible to control the activities of persons who had chosen not to seek the recommended accreditation or certification. Certification or accreditation might be satisfactory when consumers of the service offered are genuinely free to choose and to accept or reject the protections which the regulatory system offers. Children are not in such a position. The law should actively provide protection against inadequate care rather than leaving it to child minders and parents to avail themselves of the benefits of accreditation or certification.
- *Control of standards.* Licensing provides a framework for positive policies. Before granting a licence, a licensing authority can ensure that certain standards are met. Licences can be granted or withheld on the basis of detailed guidelines designed to cover a wide range of factors. Adherence to standards can be regularly checked and therefore a licensing system can seek to promote high standards of care in a way alternative approaches cannot. The system can thus perform a preventive role. It allows for intervention before something goes seriously wrong and the child suffers as a result. Because a licensing system permits regular monitoring it offers the greatest chance of maintaining consistent standards. Their maintenance does not depend on the chance notification of a failure to meet prescribed standards. Nor does a licensing system leave it to the child's parent to display the energy and knowledge necessary to initiate legal proceedings. In addition, licensing procedures combine with these advantages the possibility of using a severe sanction against those who fail to maintain appropriate standards. Such a failure can be dealt with by way of refusal to renew or withdrawal of a licence.
- *Benefits to licensees.* Licensing can bring valuable benefits to licensees. It is wrong to see a licensing system solely as a regulatory device. As well as negative sanctions such as cancellation of, or refusal to grant or renew, a licence, licensing embodies positive sanctions. The grant of a licence entails 'approval, authority to operate the facility as requested, and the protection and support of the licensing authority in the responsibilities undertaken'.[52] Licensing, therefore, offers status to licensees and security and peace of mind for parents.
- *Information and advice.* Licensing can bring positive benefits in the form of advice and assistance to licensees. Those within the system can benefit from the information and advice which members of the licensing authority can provide.
- *Controlled development.* A licensing system allows the development of child care to be controlled and, like a registration system, permits the licensing authority to collect the information necessary for the identification of gaps in child care services and for the planning of an integrated child care system. Further, the licensing authority can compile a register of child care facilities and hence assemble and publish information as to available services. This information is valuable for planning purposes since it enables the authority to identify deficiencies. It is also valuable to parents seeking details of the services offered.

51 Friedman, *Capitalism and Freedom,* (1962), 144.
52 Class, *Licensing of Child Care Facilities by State Welfare Departments,* (1968), 6.

421. ***Arguments against Licensing*** The following are the arguments against the retention of licensing as a method of regulating child care services in the A.C.T.:

- *Infringement of rights.* Licensing is a serious infringement of the rights of individuals to pursue activities of their own choice.[53]
- *Free market forces.* Proponents of a free market philosophy argue that where a substantial demand exists for a service 'the market itself will shake out the unqualified and incompetent practitioner'.[54] On this view, licensing is unnecessary.
- *Denial of choice.* A system of licensing is aimed at improving the quality of the service provided. However, improved quality usually entails higher prices. The consumer should not be denied the freedom to assume a higher risk of incompetence in exchange for the payment of a lower fee.[55]
- *Cost.* Licensing is relatively costly. It requires a bureaucracy to administer it and, to be effective, it requires personnel to police the system. Staff must be available regularly to check on the operation of unlicensed premises and, where premises have been licensed, they must monitor adherence to the required standards.
- *Numbers and types of premises.* Many persons and organisations are involved in the provision of child care in the A.C.T. Child care takes many forms and much of it is provided in private homes. Licensing requirements with regard to a number of forms of child care would be difficult to enforce. It is impossible to police and control all the informal child care arrangements.
- *Licensing is essentially oppressive.* It endeavours to prevent those who do not meet certain standards from operating. One result may be that those who cannot meet the licensing requirements are simply driven underground.
- *Inappropriateness of licensing.* The aim of promoting high standards is, with regard to many forms of child care, best pursued by other means. The major argument for licensing is that it promotes better services. This aim can be achieved by accreditation or certification, for all that is really needed is a means of indicating, to the potential consumer, that certain persons or groups are particularly well qualified to provide the service required.[56]
- *Alienation.* Wherever possible those providing child care should not be alienated by repressive laws which endeavour to prevent them providing a service which the public requires. It is desirable to work with those providing child care rather than to pursue a policy of excluding them from the field if they fail to meet certain requirements.

422. ***Licensing: The Commission's View*** It is desirable to retain a system of licensing as a method of regulating child care in the A.C.T. All other jurisdictions in Australia employ licensing procedures or their equivalent to regulate child care.[57] Licensing requirements are well established in many overseas jurisdictions.[58] Licensing offers a mechanism by which:

53 Friedman, 142.
54 Duggan, 168.
55 ibid.
56 Friedman, 149.
57 See Child Welfare Act 1939 (N.S.W.), Part VII; Health Act 1958 (Vic.), Part XIA; Childrens Services Act 1965 (Qld), Part VII and Childrens Services (Day Care Centres) Regulations 1973 (Qld); Child Welfare Act 1947 (W.A.), s.118A; Community Welfare Act 1972 (S.A.), Part IV; Child Welfare Act 1960 (Tas.), Part VI; and Child Welfare Act (N.T.), Part IXA and Child Welfare (Child Minding) Regulations (N.T.).
58 See para.425.

- standards may be set before a person or agency is authorised to provide child care;
- adherence to required standards can be regularly monitored; and
- those who fail to meet these standards can be compelled to do so or be excluded from the provision of child care.

Thus licensing offers the best hope of controlling the quality of child care services. As has been explained, licensing provides the strictest form of administrative control. The Commission's conclusion that a system of licensing be retained makes unnecessary an extended discussion of alternative, weaker forms of administrative control, such as accreditation, certification or registration. A corollary of the Commission's conclusion is the view that alternative forms of administrative control would be neither appropriate nor effective methods of regulating the majority of child care services in the A.C.T. Later in this report, however, there is a discussion of the appropriateness of certification as a means of regulating family day care schemes.

423. The basic purpose of the licensing system should be to ensure, to the extent that the law can do so, that children in child care are accommodated in satisfactory facilities, that those in charge of these facilities are suitable, and that the programs provided for the children are appropriate to their needs. The essential aim must be to protect children against inadequate care. The community has an interest in the well-being of its children. Children are not in a position to protect themselves if thoughtless or careless parents place them in poor facilities, or if those who provide child care services do not cater for children's needs. It should not be overlooked that child care services are often provided to suit the convenience of parents. If child care were unregulated, parents could use the services best suited to their needs. Licensing is necessary to safeguard children. It is, nevertheless, important to recognise the limitations of licensing procedures. The law can do no more than enforce standards on such matters as the physical conditions in which children are housed, qualifications of staff, and ratios of staff to children. It cannot control intangible matters such as the quality of care, affection and attention which children receive. Significant limitations also arise from the nature of a licensing system. Reference has been made to certain disadvantages of licensing. As a control mechanism it is relatively complex and cumbersome to administer. A properly administered licensing system requires careful scrutiny of the qualifications of those seeking a licence and of the conditions of the premises in which children are to be accommodated. If this scrutiny is not provided the granting of a licence will degenerate into a rubber-stamping of applications and the system will not provide the protection which it purports to offer. Further, once a licence has been granted, adherence to the prescribed conditions should be regularly policed. It is neither practicable nor desirable to apply such intrusive procedures to the whole range of child care arrangements in the A.C.T. Many of these arrangements are casual and informal, and involve neighbours, relatives and friends in caring for each other's children. Much child care in the A.C.T. is on a small scale and is provided in private homes. If the creation of an unacceptably intrusive system is to be avoided it is clear that there are many informal, casual arrangements to which licensing provisions cannot and should not apply. A balance must be struck between, on the one hand, the need to safeguard children against poor and unscrupulous care, and, on the other, the necessity of avoiding excessive, heavy-handed, bureaucratic intrusion into citizens' lives. The Commission believes that the new licensing provisions should reflect an awareness of the practical problems of enforcement. However desirable it is to assure every child of the highest possible standards of care, it is simply not practicable to design a licensing system which will effectively regulate all forms of child care in the A.C.T. Choices must be made as to the types of care which it is feasible to regulate and as to the types of care which must remain beyond the control of the law. Recommendations for the basis on which these choices should be made are set out below.

424. ***Other Australian Jurisdictions*** As has been noted, a system of licensing, or its equivalent, is in operation in each Australian jurisdiction.[59] A consideration of the relevant legislation, both in Australia and overseas, is a necessary background to any proposals for changes in the A.C.T. Ordinance. In this paragraph the more important features of Australian laws relating to child care are examined. There are variations on the types of facility to which licensing requirements apply. In

[59] See para.422.

most jurisdictions the licensing provisions are applicable only if a charge is made.[60] Western Australia[61], like the A.C.T.[62], does not limit its licensing provisions to services in respect of which a monetary payment is made. In N.S.W. the licensing provisions apply to premises in which care is provided 'for fee, gain or reward' and to premises in which care is provided otherwise than for fee gain or reward, if the Minister for Youth and Community Services has ordered that the relevant provisions should apply to those premises.[63] There are also significant variations on the numbers and ages of children whose care requires a licence. In Queensland[64], Tasmania[65] and Western Australia[66] the relevant provisions apply regardless of the number of children accommodated. In N.S.W. a licence is required if two or more children are cared for.[67] In the Northern Territory[68] the figure is three or more, while in South Australia[69] and Victoria[70] the figures are, respectively, four or more and five or more. In the A.C.T. a licence is required where five or more children are being cared for.[71] Greater consistency exists with regard to the age of children in respect of whom licensing requirements apply. In five jurisdictions the relevant provisions relate to children under the age of six[72], and in Tasmania[73] (as in the A.C.T.)[74] the age is seven.[75] In Queensland, however, the day care provisions apply to the reception and care of children under 17.[76] There is considerable diversity among the States and Territories as to whether:

- only the person conducting or controlling a child care centre should be licensed[77];
- only the premises on which the care is provided should be licensed[78];
- one licence should be issued authorising a named person to provide child care only on specified premises[79]; or
- two licences should be granted, one in respect of the responsible person and the other in respect of the premises.[80]

425. ***Overseas Laws*** Before considering overseas legislation relevant to child care, it should be noted that comparisons between overseas and Australian jurisdictions inevitably raise difficulties. The types of child care facilities and the types of problems encountered in these facilities differ from country to country.[81] There is also the problem of referring to a law of another country when there

[60] See Health Act 1958 (Vic), s.208B(1); Childrens Services Act 1965 (Qld.), s.8 (definition of 'day care centre'); Community Welfare Act 1972 (S.A.), s.66(1); Child Welfare Act 1960 (Tas.), s.64(5); Child Welfare Act (N.T.), s.76B(2).
[61] See generally, Child Welfare Act 1947 (W.A.), s.118A.
[62] See generally, Child Welfare Ordinance 1957 (A.C.T.), s.30.
[63] Child Welfare Act 1939 (N.S.W.), s.29(1) (definition of 'child care centre').
[64] Childrens Services Act 1965 (Qld), s.8 (definition of 'day care centre').
[65] Child Welfare Act 1960 (Tas.), s.64(5).
[66] Child Welfare Act 1947 (W.A.), s.118A.
[67] Child Welfare Act 1939 (N.S.W.), s.28(1).
[68] Child Welfare Act (N.T.), s.76B(2).
[69] Community Welfare Act 1972 (S.A.), s.66(1).
[70] Health Act (Vic), s.208B(1).
[71] Child Welfare Ordinance 1957 (A.C.T.), s.30(2).
[72] Child Welfare Act 1939 (N.S.W.), s.28(1); Health Act 1958 (Vic), s.208B(1); Child Welfare Act 1947 (W.A.), s.118A(5); Community Welfare Act 1972 (S.A.), s.66(1); Child Welfare Act (N.T.), s.76B(2)(b).
[73] Child Welfare Act 1960 (Tas), s.64(5).
[74] Child Welfare Ordinance 1957 (A.C.T.), s.30(1)(a).
[75] With regard to the A.C.T., however, this age limit does not apply to day nurseries or kindergartens: ibid., s.30(1).
[76] Childrens Services Act 1965 (Qld), s.8 (definition of 'day care centre').
[77] Childrens Services (Day Care Centres) Regulations 1973 (Qld), regulation 6(2); Child Welfare Act 1947 (W.A.), s.118(2).
[78] Health Act 1957 (Vic), s.208B(2); Child Welfare Act (N.T.), s.76B and Child Welfare (Child Minding) Regulations (N.T.), regulation 4(6).
[79] Community Welfare Act 1972 (S.A.), s.66(1); Child Welfare Act 1960 (Tas.) s.54(2); Child Welfare Ordinance 1957 (A.C.T.), s.30(1).
[80] Child Welfare Act 1939 (N.S.W.), s.29(1).
[81] For a limited analysis of the nature of child care on an international scale, see Jackson and Jackson, *Childminder: A Study in Action Research* (1979), 195-8.

may be a significant divergence between law and practice in that country.[82] In the analysis which follows an effort has been made to identify the most important features of the relevant legislation in selected Canadian and United States jurisdictions and in England.

- *Canada.* Three Provinces were surveyed: Nova Scotia, Ontario and New Brunswick. In each Province the operation of a day care centre or the provision of day care services is prohibited, except under the authority of a licence[83] or with the approval of th Minister.[84] 'Day care' is not clearly defined in the Nova Scotia legislation.[85] The New Brunswick legislation makes provision[86] for the separate licensing of a 'home in which family day care services are provided' and a 'day care centre' but does not define these terms. The Ontario Act limits licensing provisions to a 'day nursery' and a 'private-home day care agency'. A day nursery is defined as 'a premises that receives more than five children ... primarily for the purpose of providing temporary care, or guidance, or both ..., for a continuous period not exceeding twenty four hours ...'[87] The crucial distinction between a day nursery and private-home day care is one of number: the former accommodates more than five children[88], while the latter is limited to the care of five or fewer than five children.[89] Private-home day care is further defined as 'the temporary care for reward or compensation [of children] who are under ten years of age where such care is provided in a private residence for a continuous period not exceeding twenty-four hours.[90] The Act does not require the licensing of the person who actually minds the child in a private home. Instead, it requires the private-home day care agency which placed the child to be licensed. This is seemingly made possible because, according to the definition of private-home day care agency, it is the *agency* which provides the private-home day care.[91]
- *U.S.A.* Five states were surveyed: New York, Massachusetts, Michigan, Georgia and California. Each State has enacted legislation prohibiting various forms of day care, except under the authority of a licence[92] or a permit.[93] The Californian and Michigan laws are the most comprehensive. In California it is an offence to operate a 'community care facility' without a licence. Such a facility is defined[94] as including a 'day care centre' (which cares for children for less than 24 hours at any one time and by implication includes a private home) and a 'homefinding agency', also broadly defined as including an agency responsible for the placement of children for temporary care. Similarly, in Michigan the relevant law prohibits the establishment and maintenance of a 'child care organisation' unless licensed by the department. A child care organisation is defined[95] as including a 'child placing agency' (which places children, *inter alia*, in family day care homes), 'day care centres' and 'day care homes'. Of the remaining three States, two, New York and Massachusetts, exempt from their licensing requirements a family home which is part of a family day care system.[96] The New York law, however, seems to require the licensing of only those who provide day care[97], whereas Massachusetts law[98] requires the licensing of a 'day care centre', a 'family day care home' and a 'family day care system'. The latter State law explicitly defines its terms.[99] A 'day care centre' provides non-residential care for children under seven for all or part of a day, but does not include, *inter alia*, occasional care. A 'family day care home' is a private residence providing temporary custody and care on a regular basis for six or fewer children under the age of seven (including participating children who live at the residence). A 'family day care system' is comprehensively defined as providing support for family day care homes. This support includes the training of operators of family day care homes and the provision of technical assistance to the homes, and the inspection, monitoring and evaluation of, and referral of children to, the homes. Finally, the State of Georgia requires the licensing of all child welfare organisations, which include family day care homes (receiving for reward three or more children for daytime supervision and care) and day care centres (receiving for reward seven or more children for less than 24 hours a day).[100]
- *England.* The relevant law is stated in the Nurseries and Child-Minders Regulation Act 1948 (as amended by the Health Services and Public Health Act 1968). The Act requires every local health authority to keep registers:
  - (a) of premises in their area, other than premises wholly or mainly used as private dwellings, where children are received to be looked after for the day [for a part or parts thereof of a duration, or an aggregate duration, of two hours or longer] or for any longer period not exceeding six days;
  - (b) of persons in their area who for reward receive into their homes children under the age of five to be looked after as aforesaid.[101]

It is an offence to receive a child into the premises referred to in s.4(I)(a) without the premises[102] or the minder[103] being registered. The English legislation does not require family day care schemes to be licensed. It does require day care centres to be licensed. Private minders require a licence only if they care for children under the age of five and the care is provided for reward. An interesting feature of the English provision is that it defines day care as care for a period not exceeding six days.[104] Such a definition provides a flexibility not found in definitions which require the licensing of child care where that care is provided for any continuous period not exceeding 24 hours.[105]

426. ***A Basis for Licensing*** The view that child care services in the A.C.T. should be subject to licensing procedures requires distinctions to be made between the forms of child care which can and should be regulated and those which it is unrealistic and undesirable to seek to control. Before these distinctions are made it is necessary to identify the various bases on which child care services can be classified.

- *Child care for reward.* A distinction which immediately suggests itself is that between services which are voluntarily provided and those for which a charge is made. In all Australian jurisdictions except the A.C.T. and Western Australia, the relevant legislation indicates that one crucial distinction which must be made is between services provided for reward and those for which no charge is made.[106] Except in the two jurisdictions named, it is the provision of child care for reward which brings the services within the licensing provisions. Such an approach reflects the assumption that the law should intervene only when the care is provided on a commercial basis. Further, legislation drafted in this way is clear and easy to administer.
- *Setting a number.* As has been noted, in all jurisdictions except Queensland, Western Australia and Tasmania the relevant provisions permit a certain number of children to be cared for

82 For comment on the English law regulating day care, see Jackson and Jackson, 28–31. As to American law, see Class and Orton, 'Day Care Regulation: The Limits of Licensing', 35 *Young Children,* 12 (September 1980).
83 Day Care Act (Nova Scotia), (1978), s.4; Day Nurseries Act 1978 (Ontario), s.11(1).
84 Child and Family Services and Family Relations Act (New Brunswick), (1980), s.26(2).
85 See Day Care Act (Nova Scotia) (1978), s.2(a).
86 Child and Family Services and Family Relations Act (New Brunswick) (1980), s.23.
87 Day Nurseries Act 1978 (Ontario), s.1(d).
88 ibid.
89 id., s.1(m).
90 ibid.
91 id., s.1(n) (definition of 'private-home day care agency').
92 Massachusetts General Laws Annotated (M.G.L.A.) (Massachusetts), chapter 28A, s.11(a); Community Care Facilities Act (California), s.1508; Children and Youth Act (Georgia), s.99.214 (q); Licensing of Child Care Organizations Act (Michigan), s.25. 358(15).
93 Social Services Law (New York), s.390. 1(a).
94 Community Care Facilities Act (California), s.1502.
95 Licensing of Child Care Organizations Act (Michigan), s.25.358(11).
96 Social Services Law (New York), s.390.2; M.G.L.A. (Massachussetts), chapter 28A, s.11(a).
97 Social Services Law (New York), s.390.1(a).
98 M.G.L.A. (Massachussetts), chapter 28A, s.11(a).
99 id., s.9.
100 Children and Youth Act (Georgia), s.99.203.
101 Nurseries and Child-Minders Regulation Act 1948 (U.K.), s.1(I).
102 id., s.1(I)(a).
103 id., s.1(I)(b).
104 id., s.1(I).
105 A continuous period not exceeding 24 hours as a basis for licensing child care may be found, for example, in Ontario legislation: Day Nurseries Act 1978 (Ontario), s.1(m); in Californian law: Community Care Facilities Act (California), s.1502; and in Georgian law: Children and Youth Act (Georgia), s.99. 203.
106 See para.424.

CONTINUED

4 OF 6

without a licence being required.[107] Government regulation of child care occurs only when this number is exceeded. Although the numbers set vary from jurisdiction to jurisdiction[108], the exemption of small scale child care services appeals to common sense. The argument is that a law which sought to control every child minder, no matter how small the number of children cared for, would be unacceptably intrusive.

- *Premises used.* A distinction can be drawn between care provided in a centre and that provided in a private home. Such a distinction would reflect the view that the two types of care are different in kind. In fact this distinction is not embodied in any of the Australian legislation[109], although, as has been pointed out[110], the Welfare Branch of the Department of the Capital Territory differentiates between care provided in a private home and that offered in a centre. The question of the applicability of licensing provisions to private homes is likely to become increasingly important in view of the growth of family day care schemes.
- *Age of children cared for.* With the exception of Queensland, all the relevant Australian legislation reflects the view that child care services exist to cater for pre-school children. Accordingly, the licensing provisions in all jurisdictions except Queensland apply to care provided for children under six or seven.[111]
- *Types of care.* Finally, distinctions might be made on the basis of the duration of the care provided. Although no such distinctions are embodied in the Australian legislation, the Welfare Branch of the Department of the Capital Territory distinguishes between, on the one hand, full and part-time care, and, on the other, occasional care. The argument for making such a distinction is that the law should generally not concern itself with brief, temporary placements but should confine itself to regulating more sustained forms of child care.

427. ***The Commission's Approach*** In formulating provisions to regulate child care in the A.C.T. the aim should be to devise a system which provides children with protection against unsatisfactory care, but which does not result in the enactment of laws which are either unacceptably intrusive or unenforceable. It is clear that, when child care is provided for reward, it should be regulated by licensing provisions. Reference has already been made to the danger that pursuit of profit can place children at risk.[112] The law has a legitimate role to play in regulating commercial operations in this sensitive area. Further, the regulation of child care facilities operated on a commercial basis is well established in Australia. The crucial question, however, is whether child care services which are provided for reward should be the only form of child care which requires a licence. In the Commission's view they should not. If the purpose is to protect children there is no logical reason for limiting this protection to those who are cared for in facilities operated on a commercial basis. Although no accurate figures are available, the voluntary, non-profit organisations play a substantial part in the provision of child care in the A.C.T. These organisations arrange for the care of large numbers of children.[113] Further, it has been suggested to the Commission that the role of voluntary community agencies in the provision of child care is likely to increase in the A.C.T.[114] The care

[107] See para.424.
[108] See para.424.
[109] Note, however, that in Western Australia a 'day care centre' is defined as 'a creche, public nursery or other public facility . . .': Child Welfare Act 1947 (W.A.), s.118A(5). This provision could be interpreted as applying primarily to public centres. The Commission has been informed that it is not the practice in Western Australia to interfere with private arrangements between friends and relations. The relevant provisions are interpreted as applying to 'any person who offers out a public facility of child minding.' Early Childhood Services Section of the Western Australian Department for Community Welfare, *Submission*, 7.
[110] Para.416.
[111] See para.424.
[112] Para.417.
[113] For example, at the time of the preparation of a submission in 1980, Tuggeranong Family Action Inc. estimated that its 180 minders were caring for 175 children under school age and 45 school children before and after school. *Submission*, 2. Accurate statistics of the number of children cared for within family day care schemes are not available. However, the Department of the Capital Territory estimated that, in May 1980, 1000 full-time child care places existed in A.C.T. family day care schemes, with many more children being minded on a part-time or occasional basis. *Submission on DP 12*, 15.
[114] Gwen Morris, *Submission*, 5.

which voluntary organisations offer is often paid for by the parents, but this is not always the case. A group might, for example, operate on a co-operative basis and the parents might 'pay' by putting in an agreed number of hours caring for children. Also, sometimes voluntary groups waive the payment of fees. If these organisations were exempted from licensing requirements the protections which it is the purpose of a licensing system to provide would be denied to a large number of children. There is also the concern, to which reference has already been made[115], about those centres which have been categorised as 'adjunct centres'. The available evidence suggests that these should be regulated. Adjunct centres do not always make a charge for the services which they provide. If the licensing provisions contained in the new Ordinance were applicable only to services in respect of which a charge is made, some adjunct centres would continue to be unregulated. If a distinction between commercial and non-commercial services does not provide a foundation on which to build a satisfactory regulatory system, nor do distinctions based on the type of care or on the premises on which it is provided. The purpose of a licensing system is to protect children in child care facilities. It is illogical to extend this protection to children in certain types of premises and not in others, or to endeavour to protect those in full day care but not those in occasional care. With regard to occasional care, it must not be overlooked that a child in this form of care can be more difficult to manage than one who has settled into a routine of full day care. Occasional care should not be dismissed as an unimportant aspect of the child care system. Further, the adjunct centres to which reference has been made regularly provide occasional care and the criticisms which the Commission has heard of this care suggest that it should not be left unregulated. Also, if a licensing system were based on the type of care provided difficulties would be encountered in multi-purpose centres which combine different forms of care. It would clearly be impracticable to license one type of care in a multi-purpose centre but not another. The arguments advanced against a licensing system which concerns itself only with commercial services are equally applicable to one which seeks to regulate the provision of care in centres but not in private homes. Child-minding in private homes in the A.C.T. is widespread. If child care services in private homes were excluded from the licensing provisions, the result would be a system which did not apply to a substantial number of children in care.

Child Care Licensing: A Legislative Definition

428. ***Defining Child Care*** On the basis of the approach advocated above, an attempt must now be made to formulate a definition of child care. The purpose of this definition is to identify those forms of child care in the A.C.T. which it is practicable and desirable to license. As has been indicated in the previous paragraph, definitions which focus on particular types of care, the premises in which it is provided, or the receipt of payment are inadequate. A new approach is required to the problem of defining child care for the purposes of the proposed licensing provisions. It is convenient to begin a search for this new approach by referring to a submission received by the Commission.[116] This submission pointed to the need to formulate a definition of child care which is broad enough to cover a wide range of child care services and yet narrow enough to exclude casual, informal arrangements, and arrangements between relatives, friends and neighbours. The submission suggested that the definition of 'child care' should encompass care:

> provided as a business, as a community service, or as an activity incidental to a business or a community service.

The use of the term 'business' indicates that such a definition would apply to care provided on a commercial basis.[117] A definition framed in this manner is preferable to one which refers to monetary payment. A child might, for example, be placed with friends during a holiday, and money, to cover food and expenses, might change hands. The proposed definition clearly indicates that the law should not be concerned with arrangements of this kind. It is thus superior to a definition which, for example, refers to the provision of care for monetary consideration. The proposed definition would also cover care provided as an activity incidental to a business. Thus it is broad enough to cover those adjunct centres which are part of a commercial operation, whether or not a charge is made for the child care. Some centres in this category have, as has been noted, been causing concern. A

[115] Para.417.
[116] Gwen Morris, *Submission*, 14–20.
[117] For a discussion of the characteristics of a business, see Barrett, *Principles of Income Taxation*, (1975), 73–75.

second important element of the proposed definition is that it would include care provided by community groups. As has been indicated in the description of A.C.T. child care services, the provision of child care on an organised basis by voluntary groups is a well established feature of child care in the Territory. Such groups may not be classed as businesses, but their services should come within the scope of licensing provisions since a charitable purpose does not guarantee an adequate standard of child care. The proposed definition explicitly takes care of this kind into account. However, by its use of the term 'community service' the definition indicates that it would aply to services provided in an organised manner and not to informal, *ad hoc* arrangements. Finally, the approach advocated in the submission is new, in that it embodies a broad concept of child care. A definition incorporating this concept would apply to all forms of child care, whether occasional, part-time or full-time. It would also apply whether the care is provided in a private home or in a centre. A definition framed in this manner would reflect the view, adopted by the Commission, that distinctions based on the duration of care or the type of premises in which it is provided should not be made.

429. ***Residential Care Distinguished*** In the opening paragraph of this chapter it was explained that a distinction must be made between child care and residential care. The essential feature of 'child care', as the term is used here, is that it is the temporary care of young children outside their own homes. The fact that 'child care' does not include sustained residential care must be reflected in the legislative definition of the concept. In other Australian jurisdictions the relevant legislation employs different methods of distinguishing between temporary child care and residential care. In N.S.W. a 'child care centre' means premises 'without provision for residential care'.[118] In South Australia it is proposed to amend the law to define a child care centre as one which cares for children 'on a non-residential basis.'[119] In Victoria a child minding centre is one which provides 'custody and care'[120], whereas a registered home or house exists for the purpose of 'rearing, nursing or maintaining' an infant.[121] The task of a day care centre in Queensland is 'educating, caring for or minding' children[122], while care for a period longer than 48 hours involves taking a child into 'charge.'[123] In Western Australia a child care centre provides 'casual or day to day care.'[124] Residential care is defined as being 'other than on a casual or day-time basis.'[125] In the overseas laws analysed earlier[126] emphasis was placed on time limits. In Ontario, for example, the distinguishing feature of child care is that it is care for a 'continuous period not exceeding twenty four hours.'[127] A similar approach has been adopted in California and Georgia. In England the time limit is six days.[128] The Commission's view is that it is unsatisfactory to define child care simply as non-residential care, since facilities of the kind dealt with in this chapter sometimes provide overnight care. Nor are the Victorian and Queensland formulas satisfactory, since residential and non-residential facilities can undertake similar functions with regard to the children they accommodate. The new definition should indicate that the care is provided on a temporary or casual basis, but any attempt to do this by a definition which refers to a maximum number of hours or days is too arbitrary. The solution to the problem of definition lies in the identification of child care as:

- temporary and of limited duration;
- provided in premises other than the child's home or normal place of residence; and
- not including foster care, or residential care provided in residential homes or institutions.

The last point is necessary to make it clear that care provided for a child away from home in such places as a church home or a foster home is not included within the definition.

---

118 Child Welfare Act 1939 (N.S.W.), s.28(1).
119 A Bill for An Act to amend the Community Welfare Act 1972 (S.A.), cl.6 (proposed s.57(1)) (1981).
120 Health Act 1958 (Vic), s.208B(1).
121 Community Welfare Act 1970 (Vic), s.66(1).
122 Childrens Services Act 1965 (Qld), s.8.
123 id., s.74.
124 Child Welfare Act 1947 (W.A.), s.118A.
125 id., s.111.
126 See para.425.
127 Day Nurseries Act 1978 (Ontario), s.1(m).
128 Nurseries and Child-Minders Regulation Act 1948 (U.K.), s.1(I).

430. ***The Setting of Age Limits*** Child care services are provided for young children and the new licensing provisions should continue to reflect this fact. The question to be determined is whether the age of seven, at present embodied in s.30(1) of the Child Welfare Ordinance, should be retained in the new legislation. It seems clear that the licensing provisions in the present Ordinance were designed to apply primarily to child care services provided for pre-school children. However, it is not clear why the age of seven was included in s.30(1) of the Child Welfare Ordinance. In the A.C.T. the age at which children must be enrolled in school is six.[129] The relevant age was six at the time when the Child Welfare Ordinance was drafted.[130] The most likely explanation for the inclusion of the age of seven in s.30(1) is that this was the age originally included in the corresponding section of the Child Welfare Act 1939 (N.S.W.).[131] The A.C.T. provision was clearly based on this section, and it seems probable that the N.S.W. law was simply incorporated into A.C.T. law without consideration being given to the fact that the compulsory school age in the Territory was six. There is no justification for the retention of the age of seven in the new Ordinance. The Commission appreciates the arguments which can be advanced against the setting of any arbitrary chronological age.[132] Schools in the A.C.T. vary in their intake policies and many children in the Territory start school at the age of five. Nevertheless, a law which incorporates a particular age limit is clear and precise. With regard to child care services provided for pre-school children, therefore, it is recommended that six is the age which should be specified in the new Ordinance. The problems surrounding the identification of age limits do not, however, end with a consideration of the appropriate definition of pre-school children. Attention must also be paid to child care services provided for school children before and after school and during school holidays. A number of submissions urged that the new licensing provisions should apply to care of this kind.[133] It is clear that there is concern about the quality of out of school hours care in the A.C.T. Many persons believe that it should be regulated. The Department of the Capital Territory drew attention to a program which had caused it anxiety.

> [O]ne recent holiday program had 40 young school children in attendance with only one twenty-year-old supervisor present. Her program was totally unsuitable for the majority of children present, most of whom were aged five to nine years. Ratios of up to one supervisor to 50 children have been reported in after-school and holiday programs.[134]

The Commission accepts the view that care provided for A.C.T. children before and after school and during school holidays should be brought within the new legislation. This in its turn raises another question. Since child care services are provided for younger children, what upper age limit should be embodied in the new Ordinance with respect to the licensing of care offered out of school hours? The submissions received revealed some disagreement on this point.[135] It is recommended that the new licensing provisions should apply to child care services provided for children under the age of 12.

---

129 Education Ordinance 1937 (A.C.T.), s.8(1).
130 The compulsory school age in the Territory had been lowered from seven to six in 1942: Education Amendment Ordinance 1942 (A.C.T.).
131 Child Welfare Act 1939 (N.S.W.), s.28(1). The age was reduced from seven to six in that State in 1966. See Child Welfare Amendment Act 1966 (N.S.W.), s.2(f).
132 Careful consideration was given to a submission prepared by Tuggeranong Family Action Inc. This expressed the view that the crucial distinction which should be embodied in the new legislation is that between children who have not commenced their primary school education (and who might, therefore, require regular full day care or regular part-time care) and those who are attending primary school. As the submission noted, once children begin formal schooling, they become more independent and demand less individual attention. The setting of an arbitrary age limit obscures the importance of the fact of school attendance. Tuggeranong Family Action Inc., *Submission,* 3—4. Although appreciating the group's point of view, the Commission has concluded that the advantages to be derived from a clear and simple law, which embodies a chronological age, outweigh the arguments advanced.
133 The view of the Department of the Capital Territory was that the new licensing provisions should apply in respect of children under nine: *Submission on DP 12,* 9. Tuggeranong Family Action Inc. submitted that there should be regulation of child care services provided in respect of children under 12: *Submission,* 4. See also the evidence of Hilary Gunn at the Commission's second Public Hearing: *Transcript,* 34—35; and Beverley Cains, M.H.A., id., 49—50. A submission prepared by the Early Childhood Services Section, Western Australian Department for Community Welfare, although not making a firm recommendation on out of school care, stated that this is an area requiring much closer scrutiny: *Submission,* 9.
134 Department of the Capital Territory, *Submission on DP12,* 8.
135 See n.133.

This is the age at which most children in the A.C.T. complete their primary school education. When children begin secondary school they are expected to assume a greater degree of independence and are in a better position to protect their own interests. Generally speaking they are old enough to make choices about the type of facility which they attend before and after school or during school holidays. It is therefore recommended that the new licensing provisions apply to all forms of child care provided in the A.C.T. for children aged under 12.

431. ***Exempting Small Scale Services*** By far the most difficult question raised by an attempt to identify the basis on which a licensing system should be built is whether the new system should apply to all child care services or only to those which cater for a prescribed number of children. The evidence and submissions received by the Commission revealed a substantial degree of support for the view that no such number should be included in the new legislation.[136] It was strongly argued that any figure must inevitably be arbitrary. Even one child in unsatisfactory care deserves protection. According to this view, the setting of a number which must be reached before the licensing provisions are applicable reflects expediency rather than principle. If the law is concerned for the welfare of children it should be just as concerned about the control of persons who care for small numbers as about those who receive larger numbers. The Commission is sympathetic to these views, but it believes that against arguments based on the principle that the law should aim at the provision of the maximum amount of protection, there must be balanced arguments based on a realistic assessment of the law's capacity to provide effective regulation of child care services. A law which purported to regulate all forms of child care would probably not be enforceable, or, if it could be enforced, would require a large inspectorate and an unacceptably high level of intervention in the lives of private citizens. The most likely result of the enactment of a law requiring all child minders to be licensed would be that unlicensed minders would continue to operate but would be driven underground. A realistic policy on which to base a reform of the law relating to child care is that unlicensed care will continue whatever the law provides.[137] Reference has already been made to the fact that s.30(2) of the Child Welfare Ordinance states that the relevant provisions apply only in respect of care provided for more than four children. This provision was enacted in 1973, by way of an amendment to the Ordinance. The amendment represented a recognition of the inevitability of private, unregulated child care arrangements. Prior to 1973 the Ordinance had stated that all child care services should be licensed. A report in the *Canberra Times* on the amendment quoted the then Minister for the Capital Territory as saying that it was a fact of life that Canberra mothers were leaving children with neighbours, and that there was no way that this could be stopped.[138] Thus the 1973 amendment reflected an explicit recognition that it was impracticable to attempt to control small scale private arrangements. The Commission believes that it is preferable to have a law which is realistic and enforceable, rather than one which gives the appearance of offering wider protections but which in fact would be unlikely to be effective. Further, though there are undoubtedly dangers in leaving private, small scale minding unregulated, the Commission believes that the more serious child care problems are likely to arise when larger numbers of children are involved. It is when large numbers are cared for that problems such as shortage of facilities are most likely to be acute. The view that the new legislation should continue to identify those child care facilities which are too small to require a licence naturally raises the question which number should be selected. Further, it has been recommended above that in future the licensing provisions should apply not only to services provided for pre-school children but also to services provided for school children before

136 For example, Early Childhood Services Section of the Western Australian Department for Community Welfare, *Submission,* 9; Child Care Workers' Association, of the A.C.T., *Submission,* 2; Child Care Students, Canberra College of Technical and Further Education, *Submission;* Children's Services Group, Women's Electoral Lobby (A.C.T.), *Submission,* 1; Donald Duck Day Nursery and Kindergarten, Bambi Pre-School and Day Nursery and Christopher Robin Kindergarten and Day Nursery, *Submission,* 5.

137 A submission received by the Commission put forward a different view regarding the licensing of small-scale, private minders. The Early Childhood Services Section of the Western Australian Department for Community Welfare stated: '[W]e are in favour of the licensing of private minders. It is conceded that it can never be fully achieved, nor is it desirable to interfere unduly between friends and relations concerning their child care arrangements. However we consider the right course is to license and to give as much publicity as possible to this requirement.' *Submission,* 11.

138 *Canberra Times,* 14 August 1973.

and after school and during school holidays. If this recommendation is accepted the new Ordinance could well embody one upper limit in respect of pre-school children and another in respect of children of school age. Such a distinction would reflect the view that a less restrictive approach should be adopted when the children cared for are of school age. Although the meaning of the relevant provision is unclear[139], the existing Ordinance seems to permit a person or agency to care for up to four young children without obtaining a licence. It is recommended that this figure be retained in respect of pre-school children. This number is accepted as part of the A.C.T. law. It is also the maximum number of pre-school children which the Australian Pre-Schools Association recommends when these children are being cared for in a private home.[140] However, as has been explained, the new Ordinance should specify the age of six rather than seven. The Commission's recommendation is, therefore, that a person or agency should be permitted, without a licence, to provide child care for not more than four children under the age of six. A separate decision must be made with regard to the care of children over the age of six. It will be remembered that the suggested age limit to be embodied in provisions dealing with care of this kind is 12. The problem to be solved is how many children under the age of 12 may be cared for without the care-giver being required to hold a licence. In this instance an arbitrary decision must be made. None of the legislation analysed by the Commission makes explicit provision for the care of school age children. It is recommended that, when a person provides child care for children under the age of 12, that person should be required to hold a licence if he cares for more than eight children. This recommendation must be read in conjunction with that relating to the care of children under the age of six. If the children under the age of 12 for whom care is provided include children under the age of six, a licence should be required if the number of children under the age of six exceeds four. The suggested formula caters for the problem of the care of children of varying ages.[141] Thus, under the Commission's proposals, a person would be permitted to care for four children under the age of six without obtaining a licence. Similarly, an unlicensed person would be permitted to care for four children under the age of six and up to four more children under the age of 12. Alternatively, an unlicensed person would be permitted to care for eight children aged between six and 12. Although at first sight eight might seem to be a generous maximum, it should not be overlooked that in the past in the A.C.T. there have been no controls over the care of children over the age of seven. It would be undesirable to introduce strict controls into a field which was previously completely unregulated. Further, the suggested maxima are comparable with the numbers of children in large families and do not exceed the numbers of children, within the relevant age groups, who can be reasonably cared for by one person. It should also be noted that support for the Commission's proposals is provided by the Australian Pre-Schools Association's recommendations relating to staff–child ratios in child care. In respect of school-age children under the age of eight the Association has recommended that there be two staff for every 15 children.[142] This supports the view that one adult may care for up to eight children in this age range.[143] Finally, it should not be overlooked that if the application of the provisions recommended by the Commission were to cause difficulties for individual minders, these minders should be able to seek an exemption from the licensing requirements.[144]

432. ***The Minder's Own Children*** Consideration must also be given to whether any of the suggested limits should include the minder's own children. Among the jurisdictions studied, the A.C.T. seems to be unique in its inclusion of the minder's own children in the calculation of the numbers which may be cared for without a licence. It is recommended that this feature of the existing Ordinance be

139 See discussion para.413.

140 Australian Pre-Schools Association, *Children's Services,* General Principles and Guidelines for the Care, Development and Education of Young Children, (1975), 25. Cf. Child Welfare League of America, *Child Welfare League of America Standards for Day Care Service,* (1969), 35–36, 50.

141 With regard to children of varying ages Tuggeranong Family Action Inc., expressed the view that a private minder caring for four pre-school children can, in addition, 'comfortably' care for 'several' five-to-seven-year-olds after school 'without any loss in quality of child care.' *Submission,* 3. The same organisation suggested ratios of one minder to eight children when five-to-seven-year-olds were being cared for, and one to ten for children aged eight to 12. id., 4.

142 Australian Pre-Schools Association, 43.

143 This view was expressed by Tuggeranong Family Action Inc., *Submission,* 4.

144 Exemptions from the suggested licensing requirements are discussed in para.436.

retained. Obviously a minder with a number of children of her own is less able to care adequately for other children than is a person who can devote all her time to the children being minded. In considering a minder's ability to provide child care it is only the minder's own children under the age of 12 who should be taken into account. A distinction should, however, be made between the minder's children who are under six and those who are under 12. The minder's children under the age of six should be taken into account for the purpose of calculating the number of children under the age of six who may be cared for without a licence. The minder's children under the age of 12 should be taken into account for the purpose of calculating the overall total. The new legislation should also make it clear that it is only the minder's children who are being cared for at the same time and place as the other children who should be included.

433. ***Emergency Care*** Provisions which specify a maximum number of children for whom a person may care without a licence can cause difficulties if that person is asked to care for children in an emergency. For example, a private minder may be caring for four children under the age of six. Under the Commission's proposals she would be able to do this without being required to hold a licence. She may be unexpectedly approached to care for the two infant children of a neighbour who has been admitted to a hospital following an accident. If she consents to do so on an informal basis, no problems will arise, since the care given to the additional children will not be provided on a business basis. However, if the care were to be provided on a business basis, she would need to obtain a licence as the number of children being cared for would exceed four. Clearly it would be unsatisfactory if such a person were required to obtain a licence for the short period during which the number of children cared for exceeded the permitted number. It is recommended that situations of this kind be specifically covered in the new Ordinance. This should provide that children who are received at child care premises should not be included in the calculation of the total for licensing purposes if those children are received in an emergency or in unexpected circumstances. In order to prevent this provision being employed as a method of circumventing the proposed licensing requirements, it would be necessary for the new Ordinance also to provide that these requirements would apply to emergency receptions if children received in such circumstances remain at the premises for 10 consecutive days.

434. ***Exclusions*** The licensing provisions contained in the existing Child Welfare Ordinance do not apply to certain specified child care facilities.[145] The relevant statutes in some other Australian jurisdictions adopt the same approach[146], reflecting the view that certain services which would otherwise fall within the definition of those required to be licensed should be specifically excluded from the licensing provisions. It is desirable that certain A.C.T. child care facilities should be legislatively excluded from the licensing requirements contained in the new Ordinance.[147] The most important categories of services which should be legislatively excluded from the new licensing provisions are those provided by a number of government agencies. As will be explained[148], it is recommended that the proposed Welfare Division of the Department of the Capital Territory should be the authority which issues child care licences. It would be inappropriate for the Division to be required to license its own facilities. Further, the Division would be the agency publicly identified as having responsibility for the promotion of high standards of child care in the A.C.T. The fact that it is so identified should provide the necessary control over its activities and ensure the maintenance of the necessary standards. The need for the legislative exclusion of certain other government services arises from the difficulty of defining 'care' satisfactorily.[149] 'Care' is a broad concept. When a child is sick and enters hospital the hospital staff provide 'care'. Similarly those who run schools 'care' for children. Yet the services provided in schools and hospitals are different in kind from the occasional, part-time and full-time care offered in the facilities which are the subject of this chapter. The new Ordinance should reflect this fact by specifically excluding health and educational services from the

[145] See discussion para.413.

[146] Child Welfare Act 1939 (N.S.W.), s.28(2) and (3); Health Act 1958 (Vic), s.208A(2); Childrens Services Act 1965 (Qld), s.8; Community Welfare Act 1972 (S.A.), s.66(5); Child Welfare Act 1960 (Tas), s.64(10).

[147] The following analysis of facilities which should be legislatively exempted from licensing requirements owes a good deal to the proposals presented by Gwen Morris. *Submission,* 19–21.

[148] Para.443.

[149] See discussion para.368.

child care licensing requirements. Not only are these services different from those which are the subject of this chapter, but they also typically have their own regulatory mechanisms. It is the Commission's view that it is only child care services which come within the three categories discussed which should be legislatively excluded from the new licensing requirements. To summarise, the Child Welfare Ordinance should state that 'child care' does not include:

- the provision of child care in a place controlled by the Department of the Capital Territory;
- the provision of education in pre-schools and schools under the control of or accredited by the A.C.T. Schools Authority; or
- the provision of medical services to children in hospital.

It is necessary to compare the proposed legislative exclusions with those listed in s.42 of the present Ordinance. In addition to places controlled by the Department of the Capital Territory the section lists one of Canberra's public hospitals and certain private hospitals. The general exclusion of these hospitals is too broad. When a child is in hospital for medical treatment the hospital should not, as has been noted, fall within the definition of a place providing 'child care.' However, when (as is the case at the Royal Canberra Hospital) a hospital provides a child care centre there is no reason why this centre should be excluded from the licensing provisions. There is no reason to treat such a centre differently from one provided, for example, by a university or a college of technical and further education. The general exclusion, in its present form, of hospitals should not be retained. Two of the remaining exclusions contained in s.42 would be rendered unnecessary by the wording of the Commission's proposed definition. These are those referring to care provided by a blood relation or by a person to whom custody has been given by a court or by deed or will. Neither form of care would be provided as a business or a community service. The existing Ordinance's final exclusion relates to care provided by persons responsible for children who have been made wards under Part V of the Ordinance. There is no need to retain this exclusion. If a ward is placed in full residential care or in a place administered by the Department of the Capital Territory, the proposed definition is drafted in such a way as to exclude the care provided. However, if the ward is placed in some form of occasional, part-time or full-time care not administered by the Department, there is no reason why the place in which the care is provided should not be covered by the new licensing provisions if this place would otherwise fall within the definition of premises which require a licence.

435. ***Recommended Definition*** It is recommended that the new Ordinance's definition of the child care services which are required to be licensed should embody the following elements:

- the care is provided on a business or community service basis;
- the care is provided for more than four children under the age of six or more than eight children under the age of 12;
- in calculating the numbers of children for whom care may be provided without a licence, regard should be had to the minder's own children under the age of 12;
- foster care, residential care, care provided in premises run by the Department of the Capital Territory, and care provided in schools, pre-schools and hospitals should not be included; and
- care provided in an emergency or in unexpected circumstances should not be taken into account until the child has remained on the premises for 10 consecutive days.

436. ***Exemptions*** The new Ordinance should contain a general provision allowing the Director of Welfare to exempt particular child care facilities from the proposed licensing requirements. A general power of exemption is made necessary by the fact that, no matter how much consideration is given to the formulation of a definition of the services which require a licence, there will always be the possibility that certain child care arrangements will inappropriately fall within the legislative definition. An example illustrates the types of problem which could arise from the application of the Commission's proposed definition. Children for whom temporary care is provided in a church hall while their parents attend church might fall within the suggested definition. It could be argued that care of this kind is provided as a 'community service'. Yet there are many who would believe that this type of care should not be regulated, since the children's parents are within easy reach. A submission received by the Commission specifically drew attention to the need to avoid bringing such facilities within the ambit of the new licensing provisions.[150] Further, child care services take a

[150] Chichener Bernie, Oral Submission, Public Hearing, 5 May 1980, *Transcript,* 59–60.

variety of forms and new forms are likely to develop in the future. It is therefore desirable for the licensing system to have some flexibility. Legislation which allowed exemptions from licensing requirements to be granted would achieve this. Provisions permitting certain persons or classes to be exempted from child care licensing laws exist in other jurisdictions.[151] The danger associated with a system which permits the granting of exemptions is that the licensing authority can acquire unfettered discretion to depart from the requirements of the licensing law. This could permit the authority to treat one group favourably and another strictly. In order to minimise the possibility of the capricious exercise of the power to grant exemptions, there should be certain safeguards. It should be possible to exempt from the licensing requirements:

- a particular child care facility; or
- a class of child care facilities.

When an individual facility or a specified class of facilities is exempted, this should be done in writing under the hand of the Director of Welfare. The exemption should be notified in the Gazette. There should be a right of appeal against a decision to refuse to grant an exemption.[152]

437. ***Family Day Care Schemes*** The Commission's proposed definition of the categories of care in respect of which a licence is required excludes persons who offer care in private homes, provided they do not accept more than the prescribed number of children. However, private minders who do care for more than the prescribed number of children would be required to be individually licensed whether or not they are members of a family day care scheme. Separate consideration must, however, be given to the possibility of licensing each family day care *scheme* within which private minders operate. The effect of this would be to allow the law to exercise indirect control over minders within a family day care scheme who, by virtue of the small number of children accepted, are not required to hold a licence. The practice of licensing family day care schemes is well established in the United States.[153] It is likely to be adopted in South Australia[154] and has been recommended in the N.S.W. Green Paper.[155] The arguments for licensing family day care schemes are as follows:

- *Large numbers of children.* In the A.C.T. a large number of children are cared for by private minders operating within family day care schemes.[156] The Department of the Capital Territory has pointed out that in May 1980 there were approximately 200 more full-time places in family day care schemes in the A.C.T. than in the Territory's child care centres.[157] If the schemes were licensed this would provide a simple method of exercising a degree of control over the quality of care received by a large number of children who would otherwise be beyond the reach of the proposed system of regulation. The licensing of schemes would thus extend the protections offered by the proposed licensing system.
- *Status and recognition.* The licensing of schemes would give them status and official recognition. This would benefit both the schemes and the minders who work within them. It would also assist parents, for the licensing of a scheme would indicate to those using child care services that the scheme has been given official approval.
- *Importance of private care.* Care in private homes can be described as having 'a low profile'. Yet it is a very important facet of child care. The licensing of schemes would represent a recognition of this fact. A number of points can be made in support of the view that special encouragement should be given to the development of child care services in private homes. The care given in such homes can be warmer and more intimate than that provided in child care centres. A private home can offer a more secure and normal environment than is possible in a centre. Private home care is convenient, as it can be made available in the child's own neighbourhood. If arguments such as these are accepted, private minding should be encouraged. Licensing of schemes offers a means of doing this while still maintaining some control over the quality of care provided.
- *Effective controls.* Although the licensing of schemes would not permit the licensing authority to exercise as much direct control as is possible when individual minders are licensed, the licensing of schemes would allow their activities to be effectively supervised. For example, when licensing a scheme, the licensing authority could impose requirements for:
  - the selection of homes;
  - the location of homes;
  - the types of equipment and facilities which should be provided; and
  - the supervision and inspection procedures which staff of the family day care schemes should observe.[158]

  Further, the fact that the licensing authority would not exercise direct control over individual minders would not prevent it from monitoring the quality of care provided. This could be done by way of 'spot checks' on individual homes. Also the licensing authority could investigate complaints about particular minders. Thus the authority could exercise some supervision over the care offered by minders within a family day care scheme.

The arguments against the licensing of family day care schemes are as follows:

- *Nature of schemes.* Family day care schemes are not, by their nature, amenable to regulation by licensing procedures. These schemes are large, they perform a varied range of functions and the membership of the responsible bodies changes.
- *Indirect control only.* An essential feature of a licensing system is the requirement that certain standards be met at the point of entry.[159] Whereas clear standards can be imposed on those persons who actually provide child care, the types of conditions which could be imposed on schemes would be more limited. When licensing a scheme the relevant authority would be unable to impose direct controls on the type of care provided by individual minders. This raises questions as to how effective and appropriate the licensing of schemes would be. The degree of control which licensing provisions could exert over the quality of care children receive would seem to be limited. Further, individual minders would be free to operate outside a scheme. Those controls which the introduction of licensing would create would apply only to persons who chose to join a family day care scheme.
- *Inappropriate sanction.* A system of licensing would not be appropriate unless it is possible to envisage situations in which a licence could be suspended or cancelled. Obviously a system of licensing should not be introduced if the major sanction implicit in such a system is inappropriate. Family day care schemes are non-profit, voluntary organisations. Withdrawal of a scheme's licence would usually be a Draconian and thoroughly unsuitable response to a failure by such an organisation to meet the conditions attached to a licence. Further, it would be very difficult for the licensing authority to impute to all those responsible for a scheme the blame which should be established before a licence is withdrawn.
- *Discourages membership.* If the licensing of a scheme did result in real controls being exercised over the nature of the care provided this might discourage persons from joining a scheme. The result might be that more people would wish to operate outside the framework of a family day care scheme. In contrast a less restrictive approach than licensing might ultimately be more successful as it would encourage persons to join schemes and to raise the standard of care offered.
- *Clear justification required.* Any increase in government intervention in citizens' lives should be clearly justified. The need for the licensing of family day care schemes has not been demonstrated. The existing schemes in the A.C.T. have established self-regulating procedures. There is no need for a government authority to duplicate these procedures, at least at this stage.

---

151 Health Act 1958 (Vic.), s.208A(2)(e); Child Welfare Act 1960 (Tas), s.64(10)(h).
152 Review procedures are discussed in para.451.
153 See, for example, Community Care Facilities Act (California), s.1502 ('homefinding agency'); Licensing of Child Care Organizations Act (Michigan), s.25.358 (11) ('child placing agency'); and M.G.L.A. (Massachusetts), chapter 28A, s.11(a), ('family day care system').
154 A Bill for an Act to amend the Community Welfare Act 1972 (S.A.), cl.6 (proposed s.70) (1981).
155 *Green Paper*, 19.
156 See para.427, n.113.
157 Department of the Capital Territory, *Submission on DP 12*, 15.
158 Cf. Child Welfare League of America, 44–52.
159 See discussion para.419.

438. ***Evidence Received*** The evidence received by the Commission regarding the desirability of licensing family day care schemes was conflicting and inconclusive. Submissions made on behalf of community organisations operating family day care schemes in the A.C.T., and by persons associated with those schemes, suggested that these schemes should be permitted to operate without a licence.[160] The major reason advanced was that the procedures employed by these schemes ensured that minders were carefully selected and adequately supervised. Emphasis was placed on the care taken in interviewing potential minders and in assessing the suitability of their homes[161] and on the ability of co-ordinators and field staff to monitor the quality of care provided.[162] It was argued that the imposition of licensing requirements on family day care schemes would simply duplicate the schemes' supervisory procedures.[163] It was further argued that the Office of Child Care also exerts control over the quality of care provided, since that Office must be satisfied that schemes' activities are properly managed before a grant will be made.[164] Submissions in favour of the licensing of family day care schemes cast doubt on the adequacy of the supervision provided.[165] Further, the Department of the Capital Territory expressed the view that family day care schemes should be required to be licensed.[166] One reason advanced by the Department was that some family day care co-ordinators and field staff lack the necessary training and experience and that, as a result, some children have been placed in unsatisfactory or unsuitable homes. It was claimed that it has sometimes been necessary for children's placements to be changed when more careful selection would have avoided this.[167] The Department's submission also stated that some family day care staff have a tendency to form such close relationships with minders in their schemes that they fail to make objective judgments about placements best suited to children's needs.

> For example, family day care staff have been known to place more than the permitted number of children with one minder because of that minder's financial needs. In another instance, a child who was only beginning to talk was placed with a non-English speaking minder because of the desperate need of the minder and her child for company and the need of the minder for something with which to occupy her time.[168]

In short, the Department of the Capital Territory's submission cast doubt on the ability of family day care schemes to exercise adequate supervision over placements and the quality of care provided. Finally, another submission drew attention to the need for the new Ordinance to make provision for commercially operated family day care schemes. It was pointed out that, though the community groups operating such schemes might preserve reasonable standards, there was no guarantee that a commercial operator who set up a family day care scheme would maintain similar standards. This possibility was put forward as indicating the need for the new licensing requirements to apply to family day care schemes.[169]

439. ***Licensing Family Day Care: The Commission's View*** Family day care schemes should not be brought within the new Ordinance's licensing provisions. The arguments about the intrinsic unsuitability of licensing procedures for these schemes and the inappropriateness of cancelling or suspending a licence when a child receives unsatisfactory care from a family day care minder seem unanswerable. Further, the need for governmental intervention in the affairs of family day care schemes in the A.C.T. has not been demonstrated. At present in Australia there are strong moves to limit the role of government and to restrict intervention in citizens' lives. With regard to family day

160 Willa Mauldon, Oral Submission, Public Hearing, 5 May 1980, *Transcript,* 19; Hilary Gunn, id., 37; Betsy Gallaher, id., 72.
161 Betsy Gallaher, id., 68; Willa Mauldon, id., 19; Tuggeranong Family Action Inc., *Submission,* 1. (The latter submission, however, favoured the licensing of family day care schemes: id., 6. No reasons were given.)
162 Willa Mauldon, Oral Submission, Public Hearing, 5 May 1980, *Transcript,* 19, 22. Hilary Gunn, id., 37.
163 Betsy Gallaher, id., 72; Willa Mauldon, id., 20.
164 Hilary Gunn, id., 37.
165 Donald Duck Day Nursery and Kindergarten, Bambi Pre-School and Day Nursery and Christopher Robin Kindergarten and Day Nursery, *Submission,* 1; Children's Services Group, Women's Electoral Lobby (A.C.T.), *Submission,* 1.
166 Department of the Capital Territory, *Submission on DP 12,* 14.
167 id., 13.
168 ibid.
169 Maria Byron, Oral Submission, Public Hearing, 5 May 1980, *Transcript,* 119. This submission also favoured the licensing of family day care schemes operated by community groups: id., 120.

care schemes, the onus is on those who seek to introduce licensing procedures to demonstrate that these procedures are needed and will be effective. The major reasons for the Commission's conclusion are as follows:

- *Control of standards.* The fundamental purpose of a licensing system for child care is to ensure, to the extent that the law can do so, that the care which children receive from a person holding a licence meets the prescribed standards. This purpose would not be achieved by the licensing of schemes. By definition a licence granted to a scheme would regulate the activities of the scheme's supervisory body, not the activities of those actually providing the care. The introduction of licensing of family day care schemes would give the illusion of protection and regulation without being able to provide it. A parent who learned that a particular scheme had been licensed might be justified in assuming that the licensing authority was, by granting a licence, giving some guarantee for the quality of the care which would be provided by those working within it. In fact the authority would not be in a position to give any such guarantee. It could give that guarantee only by setting standards to be observed by each of the minders within the scheme and by regularly visiting the minders' homes to ensure that these standards were observed. It is important to face up to the fact that the introduction of a requirement that family day care schemes be licensed would not make good any deficiencies in the quality of care provided in private homes. The licensing of schemes would have no impact on those who choose to operate outside these schemes. The Commission has already expressed the view that the effective policing of small-scale private minding is impracticable. However, if this view is rejected, the proper course would be to grant individual licences to each private minder rather than to give the illusion of regulating them by licensing family day care schemes. The essential feature of such a scheme is that the monitoring of the standards of the individual minders is performed by co-ordinators and field staff answerable to the community group which runs the scheme. To superimpose a licensing requirement would give the impression that responsibility for the quality of care given to children within the scheme had been assumed by the licensing authority, whereas in reality the responsibility would remain where it has been in the past, i.e. with the family day care co-ordinators and field staff.
- *Need not demonstrated.* Existing family day care schemes in the A.C.T. have established a system of self-regulation. The Commission has no means of assessing the effectiveness of this system. No doubt cases occur in which family day care minders provide unsatisfactory care. Reference has been made to the Department of the Capital Territory's reservations about the suitability of some minders within the schemes.[170] However, the licensing of schemes would not guarantee that problems such as these would be overcome. Even if schemes were licensed, the selection of individual minders would, as at present, remain the responsibility of family day care staff, and not of the licensing authority. Licensing of schemes would not significantly increase the level of control at present imposed on minders within these schemes. It should also not be overlooked that the Office of Child Care of the Commonwealth Department of Social Security exercises a limited amount of control over schemes. Before making a grant to a scheme, staff of the Office interview the scheme's co-ordinators and thereafter regularly review the operation of the scheme. In short, family day care schemes already have their own internal controls and are subject to some government supervision. The introduction of licensing would, in the main, simply duplicate existing regulatory mechanisms.
- *Inappropriateness of cancellation or suspension.* A licensing authority is justified in cancelling or suspending a licence only if there has been a clear breach of its conditions. Yet if a licence were granted to a scheme, it is difficult to imagine a breach of the conditions of this licence resulting in its cancellation or suspension. An example should make the point clear. Suppose a child in the care of a family day care minder is seriously injured as a result of the unsafe conditions of the minder's premises. Investigation reveals that the co-ordinator had been careless in selecting the minder, had never spoken to her and in fact had accepted her on the basis of a friend's recommendation. Such a situation could provide a ground for the suspension or cancellation of the scheme's licence if it were a condition of that licence that the co-ordinators should exercise care in the selection of minders and ensure that the homes in which

170 Para.438.

children are minded are safe. This example presents an extreme illustration of the type of situation which might occur in a poorly run family day care scheme and which should, if the licensing system were to be effective, result in the cancellation or suspension of the scheme's licence. But would such a course be practicable? In the Commission's view it would not. The cancellation or suspension of the scheme's licence would result in all the scheme's child care activities coming to an end. If it did not there would be no point in licensing the scheme as such. Yet such a course would not be an appropriate means of dealing with a failure by one minder to meet the required standards. The Commission's view is that if it is not possible to envisage the use of suspension or cancellation – the ultimate sanction in a licensing system – then the introduction of the licensing of family day care schemes cannot be justified.

440. ***Family Day Care Schemes: An Alternative Approach?*** The view that family day care schemes should not be required to be licensed need not imply that no form of regulation is appropriate. Reference has already been made to alternative forms of administrative control.[171] These are accreditation, certification and registration. Of these it is only certification to which serious consideration should be given, since it is the only alternative form of control which permits an independent authority to require that certain standards are met before approval is given. Other forms of administrative control do not involve standard setting by an independent agency and hence do not offer the same assurance regarding the quality of the service provided. Certification does assist members of the public by providing them with a means of distinguishing between approved organisations or individuals and those who lack this approval. It does not, however, exclude from the field those who have not secured the approval which certification entails. With regard to family day care the advantages of certification would be as follows:

- *Status and recognition.* Like licensing, certification would give family day care schemes status and official recognition. Minders would benefit from knowing that their services had official approval. Parents requiring child care services would be assisted by a system which indicated that certain schemes had satisfied an independent authority and that therefore those working within it were likely to provide satisfactory care.
- *Effect of withdrawal.* The effect of the withdrawal of certification is less drastic than the suspension or cancellation of a licence. A system of certification is therefore better suited to family day care schemes. If the care provided by a minder within a scheme fell below an acceptable level, the certification could be withdrawn without the scheme's activities coming to an end. The scheme could continue. All that would happen is that the seal of approval implied by the certification would be removed.
- *Less intrusive.* Certification is less intrusive and less restrictive than licensing. It would be left to the family day care schemes to apply for certification. Those running a scheme would be free to operate without seeking certification.
- *Less stringent standards.* Whereas a system of licensing suggests that the activities to which it applies will be closely regulated, certification allows for the setting of less stringent standards. The imposition of standards of this kind is more appropriate to voluntary organisations which may take a number of forms and which may perform a range of functions.
- *Encourages higher standards.* Licensing seeks to enforce certain standards, but the aim of a system of certification is to promote desirable standards in child care. Those operating family day care schemes could be encouraged to have their schemes certified and to improve their standards to do so. However, they would not be compelled to seek certification. It can be argued that a system which relies on encouragement rather than regulation and prohibition is more likely to result in the achievement of high standards of care.
- *Minimal controls.* The certification of family day care schemes would bring them within the ambit of the new Ordinance without making them subject to unacceptable bureaucratic controls. Although a system of certification would not exclude from the field those who chose to operate independently, certification would allow *some* regulation of organisations which play a major part in child care in the A.C.T.

Against these arguments in favour of a system of certification of family day care schemes must be set the following:

[171] Para.419.

- *Information available to consumers.* Such a system rests on the assumption that consumers will be sufficiently well informed to seek out certified practitioners rather than non-certified practitioners, and that they will have access to information which permits them to identify certified practitioners.[172] In other words it assumes that a parent seeking child care will know of the certification process and will readily be able to discover which schemes have been certified. No doubt those who understand the system would have this information or know how to get access to it. However, many parents would not have this knowledge and it must be asked what protections the introduction of certification would confer on them. Conversely, if a parent is sufficiently well informed to make choices between certified and non-certified practitioners, it is questionable whether certification is necessary at all.
- *Misleading.* The certification of family day care schemes, like their licensing, would be misleading. It is the scheme which would be certified, not the quality of care provided by individual minders. A parent who selected a minder working within a family day care scheme might assume that the authority which had issued the certification had, by so doing, given a guarantee on the standard of care which would be offered. Certification would give the illusion of protecting children and controlling those who provide care without in fact doing either.

As with licensing, the Commission is not convinced that the introduction of a system of certifying family day care schemes would produce clearly identifiable benefits. The maintenance or extension of the existing regulatory system is justifiable only if it results in the provision of an assured standard of care for children in child care facilities.

441. ***Restrictions on Advertising?*** One of the arguments against certification is that it is a procedure which does not exclude non-certified persons from the field. Those who choose to operate outside a certified scheme would be permitted to do so. One method of overcoming this problem would be for the law to prohibit advertising by persons who are not members of a certified scheme. Such an approach, in combination with a system of licensing, could seek to ensure that only holders of a licence or members of a certified scheme are permitted to advertise child care services. This course has recently been adopted in South Australia[173], and was recommended in a submission prepared by an A.C.T. organisation running two family day care schemes.[174] Such a change is not recommended. A prohibition on advertising would require the creation of a new offence – advertising by a non-approved person – and might also require the creation of a second offence committed by a person or organisation who accepts or publishes such an advertisement. Reliance on punitive measures in such a situation seems clumsy and repressive. Consideration must also be given to the difficulties of policing a prohibition on advertising. Newspaper advertising could be controlled relatively easily. But what of advertising on public boards at local shopping centres? Further, it seems highly unlikely that private minding by non-approved persons can ever be wholly eliminated. A prohibition on advertising might simply drive this activity underground. As long as minders do advertise it is possible to identify them, and concerned persons can at least alert members of the Child Care Unit to the need to visit them. Finally, approaching the problem by way of a prohibition on advertising can be seen as discriminatory. It is the poorer members of the community who are likely to be forced to rely on non-approved services because they are cheaper. A successful prohibition on advertising which prevents their access to such services might have a disproportionate effect on an already disadvantaged group.

[172] Cf.Duggan, 176–177.

[173] Section 75a of the Community Welfare Act 1972 (S.A.) (inserted by s.15 of the Community Welfare Act Amendment Act 1976) states that:

> No person shall by public advertisement represent that he is prepared, for monetary or other consideration, to mind, look after or care for children under the age of six years away from their ordinary homes unless the premises that he proposes to use for the purpose are licensed or approved under this Act.
>
> Penalty: Two hundred dollars.

Under the South Australian Act only licensed child care centres may lawfully accept more than three children under the age of six (s.66(1)), but not more than three children under that age may be cared for in premises approved under s.71(1). Hence the Act makes provision for licensed child care centres and approved 'family day-care premises', and endeavours, by means of the prohibition on advertising, to ensure that only premises in these two categories are used. For another approach to the control of advertising, see Child Welfare Act 1947 (W.A.), s.119(2).

[174] Tuggeranong Family Action Inc., *Submission*, 7.

442. ***Need for Continuing Review*** The Commission's conclusion that the need to license family day care schemes had not been demonstrated was based on the information made available to it during its inquiry. The Commission was not convinced that substantial problems have arisen in the operation of these schemes or that those problems which have occurred would be solved by the introduction of licensing requirements. However, in view of the important role performed by family day care schemes and of the likelihood that the importance of these schemes will increase, their operation should be kept under review. The desirability of introducing licensing or certification requirements should be re-assessed from time to time. Particular attention should be paid to the standards maintained by commercially operated family day care schemes. Those operating such schemes might not display the same concern about the quality of care as do persons who do not seek to make a profit. The Childrens Services Council should regularly review the operation of family day care schemes with a view to determining the desirability of introducing regulatory procedures such as licensing or certification. It is important to see the Commission's conclusions in the context of its views on the feasibility of licensing small scale private child care. The belief that there are certain types of child care which are not the law's business does not mean that efforts should not be made to promote the highest possible standards. What it does mean is that this objective is best pursued by public education — both of parents whose children are cared for, and of those who care for them — so that there will be greater awareness of the importance of good quality facilities for the care of the young. The family day care schemes have a significant role to play in fostering this awareness. They should continue to perform the function of promoting high standards among private minders.

The Proposed Licensing System

443. ***The Licensing Authority*** Nothing which the Commission has learned during its inquiry suggests that the Department of the Capital Territory should not continue to be responsible for the licensing of child care services in the A.C.T. The Child Care Unit of the Welfare Branch of that Department is well established and its child care advisers are known to those involved in the provision of child care services in the Territory. One submission received by the Commission suggested that the Unit should be upgraded to ensure that the Unit has the capacity to formulate policy relating to the provision of child care services.[175] This course should be considered in the context of a reorganisation of the Territory's welfare services. The need for such a reorganisation is discussed in Chapter 13. In that chapter it is recommended that the Welfare Branch should be upgraded to become the Welfare Division of the Department of the Capital Territory. It is also recommended that the new Ordinance should make provision for the creation of the position of Director of Welfare. The occupant of this position should be the head of the new Welfare Division. One consequence of the legislative creation of this post should be that the powers and duties which are at present vested in the Minister for the Capital Territory should, under the new Ordinance, be explicitly vested in the Director of Welfare. This would be consistent with most of the other Australian jurisdictions, where the relevant senior departmental official acts as the licensing authority.[176] It is therefore recommended that the licensing system described in the following paragraphs should be administered by a special unit in the new Welfare Division, and that the licensing authority be the Director of Welfare.

444. ***Period of Licence*** The existing Ordinance is unsatisfactory in that it neither specifies the term for which a licence should be issued under Part VII nor does it require inspections of licensed premises to be carried out at stated intervals. Procedures which allow for the granting of indefinite licences without making regular inspections mandatory do not provide the most appropriate foundation for a system of effective regulation. The current practice of the Welfare Branch is to grant annual licences. The relevant statutes in a number of Australian jurisdictions make provision for the granting of annual licences.[177] This is the term of licence for which provision should be made in the new Ordinance. Such a term would ensure that the standards maintained in licensed premises would

[175] Gwen Morris, *Submission,* 10–11.

[176] See Child Welfare Act 1960 (Tas), s.54(1); Child Welfare Act 1947 (W.A.), s.118A(1); Health Act 1958 (Vic), s.208C; Child Welfare (Child Minding) Regulations (N.T.), regulation 4; Community Welfare Act 1972 (S.A.), s.66(2).

[177] Childrens Services (Day Care Centres) Regulations 1973, regulation 6(1); Child Welfare Act 1947 (W.A.), s.118A(2); Community Welfare Act 1972 (S.A.), s.66(3); Child Welfare Act 1960 (Tas), s.54(3).

be regularly monitored. Provision should also be made for the variation of the existing conditions or the addition of new conditions. Such a provision would allow the system to accommodate changes in child care standards and changes in the method of operation of the premises. If the conditions attached to a licence were immutably fixed when the licence was granted, a long established centre would not be required to meet higher standards imposed on a newer centre. Similarly, a subsequent variation might be required if, for example, it was decided that the premises could accommodate more children than had originally been permitted.

445. ***One Licence or Two?*** As was noted in the analysis of the law in force in other Australian jurisdictions[178], there are differences as to whether a child care licence should be granted to a person, whether the licence should be granted in respect of the premises, or whether both forms of licence are required. Under the existing A.C.T. law the Minister grants a licence to a person in respect of a particular place.[179] When conducting its inquiry into child welfare, the Standing Committee on Housing and Welfare of the A.C.T. Legislative Assembly received several submissions which suggested that the law should be amended and that two separate licences should be required.[180] One of these should apply to the premises and the other should be granted to the person or organisation operating those premises. In the view of its proponents, such a system would make a clear distinction between regulations directed towards the physical conditions in which a child may be cared for, and regulations on the qualifications which the responsible persons must possess. Obviously a child could be exposed to inadequate care in good premises if the caretaker were incompetent, just as he could in poor premises under the control of a well qualified person. However, some submissions received by the Commission expressed doubts about the granting of dual licences.[181] Although such a system would have the merit of offering a high degree of control, it would be administratively cumbersome. A system of this kind is in force in N.S.W. but the Green Paper recommended that it be replaced by a simpler procedure whereby one licence would be issued for each facility in respect of the premises.

> The licence will only be issued if the premises themselves, the controller and the person conducting the facility on a day to day basis are all considered suitable for the purpose for which the facility is to be operated.[182]

The Commission favours a system relying on a single licence, but prefers a procedure under which the licence is clearly granted to a particular person. The simplicity of a single licence is appealing. A licence which does no more than give approval to particular premises is open to the objection that the management of the premises may change. Premises run by one person may offer adequate care, but, in the hands of another, standards may decline. If a licence is granted to a particular person this indicates that this person is responsible. Yet a personal licence can also nominate certain premises. The new Ordinance should provide that a child care licence is to be granted to a named person, but that a condition of the licence is that the licensee provides child care at a specified address. Such a system would reflect a recognition of the importance both of the nature of the premises and of the suitability of the operator.

446. ***Conditions of Licences*** Clearly licences must be subject to certain conditions if the required standards are to be maintained. As has been pointed out in the description of A.C.T. child care services, these services take a variety of forms. It is necessary for the licensing system to be flexible. The Director of Welfare must be free to impose conditions adapted to every type of licensed child care facility. All conditions must, however, be specific so that the licensee's obligations are precisely delineated. The new Ordinance should indicate the types of matter to which the Director should give consideration when formulating the conditions of a licence. These include:

[178] See para.424.

[179] Child Welfare Ordinance 1957 (A.C.T.), s.30(1).

[180] For example, submissions to the A.C.T. Legislative Assembly's Standing Committee on Housing and Welfare by Maria Byron and Sylvia Cullen, 4–5; Marie Pender, 1–2; A.C.T. Association of Early Childhood Development, 1; and by the A.C.T. Teachers' Federation, Attachment No. 1, 1.

[181] For example, Department of the Capital Territory, *Submission on DP 12,* 12, and Early Childhood Services Section of the Western Australian Department for Community Welfare, *Submission,* 10.

[182] *Green Paper,* 19.

- the number and qualifications of staff[183];
- the facilities available and the condition of the premises;
- health and safety requirements; and
- management and type of program.

In addition to conferring on the Director of Welfare a general power to impose appropriate conditions when a licence is granted, the new Ordinance should require the Director to specify the premises on which the licensee may provide child care and to specify the maximum number and age of children who may be accommodated on the designated premises. Each of these matters should be made a condition of the licence. The present provisions regarding conditions are defective in that they do not permit the variation of a condition of a licence or an appeal against the imposition or variation of a condition. Both of these matters should be covered in the new Ordinance. The subject of appeals against decisions of the Director is dealt with below.[184]

447. ***Control of Licensees*** The responsibilities of the Director of Welfare and the Welfare Division should not end once a licence has been granted. The licensee's compliance with the licence should be monitored. The present Ordinance, so far as it relates to the enforcement of the terms of a licence that has been issued, appears unnecessarily complex and unwieldy. The Ordinance provides for administrative and judicial cancellation procedures. Both the Minister and the Childrens Court are empowered to cancel a licence issued under Part VII.[185] There are a number of matters which are essential to ensure that the licensing system operates effectively:

- The Director should be given the power, in cases of emergency, to cancel a licence quickly.
- Where the licensee is not complying with his obligations under the licence the Director should be able to take relatively rapid steps to cancel or suspend the licence. He should also have the power to impose new conditions, if changed circumstances warrant this.
- The exercise by the Director of the powers of cancellation, variation or suspension should be subject to appeal in all cases other than those where the Director exercised the power at the request of the licensee.

These powers should not be capable of being exercised arbitrarily. It may be that the person or organisation providing the child care services requests that the licence be cancelled or suspended, or that the conditions of the licence be varied. One case where this might be necessary would be if the premises in which the child care is being provided change. On the other hand, where the initiative for the cancellation, suspension or variation does not come from the licensee, the Director should not be able to exercise his powers unless he has given the licensee an adequate opportunity to make representations to him about the proposed action. It may be that, after the representations have been made, the apparent need for the Director to act will no longer exist. The requirement to give an opportunity to make representations would afford a chance for the Director and the licensee to consult in an effort to resolve the particular problem.

---

183 A number of submissions received by the Commission dealt with the subject of the qualifications which persons providing child care should have. In the view of the Child Care Workers Association of the A.C.T. all persons providing child care should receive some initial training before being granted a licence. *Submission,* 1. The Child Care Students of the Canberra College of Technical and Further Education also stressed the need for persons involved in child care to have formal qualifications. Particular attention was drawn to the College's Child Care Certificate. *Submission.* Similarly, Maria Byron argued that child care centres should be run only by appropriately qualified persons. Oral Submission, Public Hearing, 5 May 1980, *Transcript,* 117–118. Although the Commission agrees that the possession of appropriate qualifications by persons involved in child care is important, it does not believe that rigid requirements should be incorporated into the law. Child care takes so many different forms that it would not be practicable to attempt to lay down training requirements applicable to all persons who provide child care in the A.C.T. The Commission does, however, agree with the view that persons with formal qualifications should become involved in running short training courses for persons who provide child care. See Gwen Morris, *Submission,* 11–12. For a good example of a regulation embodying a general statement of desirable qualifications for persons providing child care services, see Child Welfare Regulations 1940 (N.S.W.), regulation 39(1)(h).

184 Para.451.

185 Child Welfare Ordinance 1957 (A.C.T.), s.31(4), 34(3).

448. ***Provisional Licences*** It is desirable for the system to make provision for newly formed centres and organisations which will take time to develop. In particular, the system should be adapted to community self-help groups. Enthusiastic groups of this kind might establish a service in a community centre and develop their facilities slowly. They might not at first be able to meet all licensing requirements. What such a group needs is an initial period of lenience and support. This should be made possible by the issue of a provisional licence. Such a licence should be granted for a maximum period of six months and could be issued on condition that, if certain requirements were not met within that period, a full licence would not be issued. Provisions authorising the granting of provisional licences to accommodate developing centres already exist in other Australian jurisdictions.[186]

449. ***Regulations or Guidelines?*** The aim of the licensing system is to regulate the quality of child care services. If this aim is to be fulfilled it is necessary for the standards to be met in licensed premises to be clearly articulated. These standards should apply both to the staffing and operation of licensed services, to the physical condition of the premises and to the amenities which should be provided. The issue to be decided is whether a statement of the required standards should be incorporated into regulations made under the Ordinance or whether they should take the form of guidelines prepared by the Welfare Division. Although regulations have been made under the Child Welfare Ordinance[187], and some of these regulations apply to child care[188], none of the relevant regulations lays down any conditions or requirements with which a licensee must comply.[189] The Welfare Branch has drawn up guidelines. These indicate the types of matters which will be taken into account before a licence will be granted. Included in the matters listed are the number and age range of children cared for at a centre, number and qualifications of staff, equipment used, the management and program, amenities, play areas, and attention to health, nutrition and safety. The A.C.T.'s reliance on informal guidelines contrasts with procedures used in other Australian jurisdictions. The majority of these have incorporated child care standards into regulations made under the relevant statutes.[190] The arguments for reliance on regulations rather than less formal guidelines are as follows:

- Regulations can establish standards which are clear, certain and ascertainable.
- Regulations are fairer than guidelines, since they are explicit and apply equally to all persons, so reducing the possibility that the licensing authority will give more favourable treatment to one type of service than to another.
- Regulations are more easily enforceable than guidelines, since the former have the force of law.

The arguments for incorporating standards into guidelines are as follows:

- The incorporation into regulations of standards which are detailed enough to provide effective control is difficult. If this task is achieved the result can be rigid, highly specific rules[191] which are likely to require constant amendment to meet changes in child care practices. Conversely, if this danger is avoided, the result is likely to be regulations which are so broad and general as to provide little real guidance as to standards.

---

186 Child Welfare Act 1939 (N.S.W.), s.32; Child Welfare Act 1947 (W.A.), s.118A(3). The Department of the Capital Territory favoured the introduction of provisional licences. The Department suggested that such licences should be issued for a maximum of six months. *Submission on DP 12,* 11.

187 Child Welfare Regulations 1957 (A.C.T.).

188 Child Welfare Regulations 1957 (A.C.T.), regulations 17–20.

189 The only regulation relevant to standard setting is regulation 17(b) which indicates matters to be covered in a medical practitioner's report on child care premises.

190 For example, Child Minding Centres (Health Act) Regulations 1965 (Vic.); Child Welfare Regulations 1940 (N.S.W.), and Child Welfare (Care Centres) Regulations 1968 (W.A.).

191 Two examples of highly specific regulations can be quoted. Schedule I of the Child Minding Centres (Health Act) Regulation 1965 (Vic.) lists as part of the minimum equipment required in centres for children aged 2–5 'wooden blocks 5½ in. x 2¾ in. x 1⅜ in.' Regulation 47(j)(iv) of the Child Welfare Regulations 1940 (N.S.W.) requires 'coat hooks sufficient for all children attending the child care centre spaced 30 cm apart and 90 cm above floor level, or open lockers providing equivalent storage space and similarly accessible, having each coat hook or locker marked with an individual nursery symbol.'

- By their nature guidelines permit flexibility. Flexibility is desirable in a system which attempts to regulate a diverse range of services.

In the Commission's view the need for flexibility in standard setting is the most important consideration. Child care in the A.C.T. takes many different forms and is organised in a number of different ways. Regulations designed for one type of service would be quite unsuited to another. For example, detailed requirements relating to physical facilities and amenities might be appropriate for a centre which had been designed and built for child care, but quite inappropriate for a centre run two days a week by a voluntary organisation in a local hall. If arbitrary uniform standards were set, many of the services provided by voluntary groups would be compelled to close or substantially increase their charges. Over-strict legislative provisions amount to the prohibition of child care rather than to its regulation.[192] Further, if regulations were enacted which attempted to deal separately with all forms of child care, the result would be complex and unwieldy, and regular amendments would be needed to accommodate new forms of child care. The Commission therefore favours continued reliance on guidelines, rather than the making of regulations. The Commission's view accords with that adopted in a Victorian report:

> We do not favour the introduction of fixed codes of standards. Codified, general standards tend to be inflexible and may hinder the development of individualised, innovative, programs. As a basis for licensing agreements, we recommend that mutually acceptable general guidelines for types and qualities of service be developed. . . . These guidelines should be used to assess organisations' suitability for licenses and to indicate levels below which their standards of service must not fall.[193]

It was suggested to the Commission that new guidelines for child care in the A.C.T. should be drawn up by the Child Care Unit of the Welfare Division in consultation with providers and users of child care services.[194] This view is endorsed. The importance of consultation must be stressed. The proposed Childrens Services Council would provide an organisation within which this process could be undertaken. It might prove appropriate for the Council to establish a sub-committee to deal with the formulation of guidelines and other matters relevant to child care in the A.C.T. Use of the structure provided by the Council would allow the co-ordination of child care services in the A.C.T.

450. ***Director's Special Powers*** If the licensing system is to be effective, clearly the Director of Welfare or the person nominated by him must have the power to enter premises to check their suitability before a licence is granted. He must also have the power, at any reasonable time, to enter licensed premises to check that the conditions of the licence are being observed. Provisions in the existing Ordinance confer these powers[195] and should be retained. With regard to unlicensed premises on which there is reason to believe that child care services are being provided in contravention of the Ordinance, there is a general provision which confers a power of entry.[196] However, the power should be more clearly stated. The new Ordinance should explicitly provide for the Director of Welfare or the person nominated by him to apply to a magistrate for a warrant to enter premises on which it is reasonably suspected that child care is being provided in contravention of the licensing provisions. Comment has already been made on the extraordinary breadth of the powers exercisable by the Childrens Court under the present Ordinance after the child has been removed from licensed or unlicensed premises.[197] The provisions conferring these powers should not be re-enacted. Instead the new Ordinance should simply state that the Director of Welfare may remove children found on unlicensed child care premises, or children found on premises in respect of which the licence has been cancelled. Thereafter, his only power should be to restore the children to their parent or guardian, or to place them with some suitable person. If no parent or other suitable person can be located, the Youth Advocate should be informed and consideration given to the initiation of care proceedings.[198]

---

192 Gwen Morris, *Submission*, 46.
193 *Norgard Report*, 58.
194 Gwen Morris, *Submission*, 50.
195 Child Welfare Ordinance 1957 (A.C.T.), s.32.
196 id., s.121.
197 Para.413.
198 Care proceedings are discussed in Chapter 8.

451. ***Review by the Administrative Appeals Tribunal*** The licensing system outlined in this chapter confers extensive powers on the Director of Welfare. It is desirable that the exercise of these powers should be subject to review. The existing Ordinance does not confer appeal rights in respect of administrative decisions made under Part VII. The new Ordinance should make provision for the Administrative Appeals Tribunal to review any decision of the Director, other than a decision cancelling, suspending or varying a licence at the request of the licensee. A right of review is unnecessary in these circumstances. The Administrative Appeals Tribunal Act 1975 (Cwlth) provides that an application for a review of a decision may be made 'by or on behalf of any person or persons . . . whose interests are affected by the decision'.[199]

---

199 Administrative Appeals Tribunal Act 1975 (Cwlth), s.27(1).

12. Employment of Children

Nature of the Problem

452. ***The Reference*** The Commission's Reference required it to inquire into and report upon the regulation of the employment of children in the A.C.T. Parts XI and XIA of the Child Welfare Ordinance 1957 (A.C.T.) regulate the employment of children in street trading, the entertainment industry and newspaper selling. The provisions have roughly similar counterparts in the child welfare legislation of all but one of the other jurisdictions of Australia.[1] If the Commission were to confine itself to piecemeal recommendations relating to the amendment of Parts XI and XIA of the Ordinance, important industrial issues relating to the employment of children would be ignored. The law relating to the minimum age for employment, hazardous occupations, and hours of work in the A.C.T. is either obscure or non-existent.[2] It is necessary to conduct a general review of the legislative regulation of the employment of children in the A.C.T.[3] Proposals for the regulation of employment of young people in the A.C.T. also face special problems in the present conditions of higher than normal unemployment in the A.C.T.[4] The recommendations which follow are designed to incorporate sufficient flexibility to allow the promotion of reasonable youth employment opportunities and at the same time to provide adequate protection from abuse and exploitation.[5]

453. ***Context*** The child labour legislation of the late 19th Century was directed at ensuring the welfare of children by defending them from economic exploitation. Out of the process of industrialisation developed a concern to preserve the family, to minimise the most serious, avoidable deleterious effects of growing up in an urbanised industrial environment, and to utilise childhood years in educational preparation for later life.[6] There were humanitarian calls to prevent children from engaging in hazardous occupations, from sustaining injury through their own inexperience and heedlessness, and from overworking during stages of their physical and mental development. Movements to protect children from exploitation were often accompanied by the support of unions representing adult males who resisted the competition for jobs presented by weak, lowpaid, child labour.[7] Although nearly every country in the world now has laws to control child labour[8], the number of children at work in various parts of the world is growing. It was estimated in 1979 by the International Labour Organisation to amount to about 52 million children under 15 years. Only 1 million of these were in the developed countries.[9] During the 20th Century, economic and employment practices in the Western world changed. Minimum wage and compulsory school attendance

1 See n.64–70.
2 See para.459–60.
3 See Standing Committee on Housing and Welfare of the A.C.T. Legislative Assembly, *Report No.8: Child Welfare* (1978), para.91 and 92, which drew attention to the submission of the Welfare Branch of the Department of the Capital Territory (12 September 1977). The submission enumerated the wide-ranging issues raised by a general review of legislative regulation of the employment of children in the A.C.T. The Committee recommended (para.93) that those matters should be investigated further and steps taken to amend the legislation accordingly.
4 See n.21.
5 See para.454.
6 See generally Marks, 'Detours on the Road to Maturity: A View of the Legal Conception of Growing up and Letting Go', 39 *Law and Contemporary Problems* 78, 87 (1975).
7 See 'Child Labor Laws – Time to Grow Up', 59 *Minnesota LR*, 575, 576–7 (1975); Stern, Smith and Doolittle, 'How Children Used to Work', 39 *Law and Contemporary Problems* 93, 102–4, 116–7 (1975).
8 Background paper for 'UNICEF/ILO collaboration in the field of child labour protection' prepared by the ILO Conditions of Work and Life Branch for the Fifth UNICEF/ILO Inter-Secretariat Meeting (Geneva, 7–8 February 1977); International Labour Office, *Children at Work* (Internal document, International Labour Office, Working Conditions and Environment Department, Conditions of Work and Life Branch, Geneva) (1979), 1, included in *ILO Children and Work* (Discussion Papers on Themes Related to International Year of the Child 1979).
9 International Labour Organisation, Bureau of Statistics, cited in United Nations Economic and Social Council, *Report of the Secretary-General on the Exploitation of Child Labour* (1979), 8. See also International Labour Office, *Children and Work: ILO Policy Framework for the International Year of the Child*, 1979 (February 1978), 5 and Annexe 1; International Labour Office, *Children at Work*, 1.

laws had the effect of reducing child labour.[10] In Australia, State and Federal legislation and industrial awards and agreements regulate the employment of all persons, irrespective of their age. The restrictions imposed by child labour laws therefore often now exist beside labour laws which provide more adequate protection for both adult and child workers than was the case in the past.[11] Against this background of protection and the changing concept of childhood[12], however, there has emerged an exaggerated dichotomy between the role of the productive adult and the role of the dependent child.[13] The view can be taken that many existing protections for children are arbitrary or no longer necessary.[14] The protections may be a paternalistic remnant of a past social and economic climate, where a fussy and over-zealous approach to child labour was understandable. In addition, there are the following factors:

- *Child development.* There is evidence that children mature, at least physically, at an earlier age.[15] Moreover, as one United States commentator has stated recently, 'the concept of adolescence suggests that the status of childhood may constitute a constitutionally invalid suspect or semi-suspect classification'.[16] That commentator was referring to the law's assumption that adulthood occurs suddenly at 18 years of age.[17] Yet such an assumption seems to contradict the evidence[18] of developmental psychology and of historical experience – that rational capacity or the ability to make competent decisions, such as in relation to one's employment, often develops well before the age of 18. Growing acceptance in the community that a child is not a 'small adult'[19] or an inferior being is reflected in the recent enactment of laws, and in proposals for change, which aim to give effect to changing community attitudes towards children.[20]
- *Unemployment.* The need to protect children in employment has recently assumed less importance beside the emergence of the larger problem of finding employment for children who have left school. The problem of the growth of unemployment is particularly acute in the A.C.T.[21] Cumbersome and restrictive child labour laws may exacerbate the problem of youth unemployment without securing effective protection.

454. ***Principles*** The child labour legislation in the A.C.T. should provide a framework which reflects an appropriate balance between the need to secure the protection of children from exploitation, and the desirability of preserving the right of children in appropriate circumstances to engage in employ-

10 'Child Labour Laws – Time to Grow Up', 578–82; Stern, Smith and Doolittle, 103–4; Marks, 86–8. See also Edgar, 'The Changing Face of Childhood', in *Interdisciplinary Conference on Child Neglect and Abuse, 24 to 28 September 1980: Conference Papers* (1981), 13.
11 'Child Labour Laws – Time to Grow Up', 582.
12 See Aries, *Centuries of Childhood: A Social History of Family Life* (1965).
13 Stern, Smith and Doolittle, 116–7.
14 'Child Labour Laws – Time To Grow Up', 580–3.
15 A memorandum from the British Medical Association to the Committee on the Age of Majority (U.K.) concluded that '[i]n this document the Council of the B.M.A. has shown that, certainly from the physical aspect and very probably from the psychological aspect, the adolescent of today matures earlier than in previous generations'. *Report of the Committee on the Age of Majority*, Cmnd. 3342 (1967), para. 73–4.
16 Richards, 'The Individual, the Family, and the Constitution: A Jurisprudential Perspective', 55 *New York Univ LR*, 1, 25–6 (1980).
17 id., 26.
18 ibid.
19 International Labour Organisation, *Declaration by the Director-General of the ILO concerning the International Year of the Child* (endorsed by the ILO Governing Body at its 209th Session, February – March 1979).
20 See, e.g. the legislation which lowered the age of majority from 21 to 18 years in the A.C.T. (Age of Majority Ordinance 1974 (A.C.T.)); the status of children legislation, which aimed to remove the legal disablities of children born out of wedlock, e.g. Children (Equality of Status) Act 1976 (N.S.W.); and the recent proposals to oblige the Family Court of Australia to take account of the wishes of *all* children the subject to custody proceedings (Commonwealth Attorney-General, *Press Release*, 11 December 1980).
21 In February 1981 the unemployment rate for persons 15 to 19 years of age was 29.7% in A.C.T. This figure was almost double the rate in some of the States of Australia and well above the national rate for that age group (18.6%). In the same month the rate for all ages in the A.C.T. was 6.7%, against the national figure for all ages of 6.3%. *Source:* Australian Bureau of Statistics, *Unemployment, Australia, February 1981 Preliminary Estimates*, (13 March 1981), 3–4.

ment. The landmark statement in this area is the United Nations Declaration of the Rights of the Child 1959, Principle 9, which states that:

> The child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic, in any form.
> The child shall not be admitted to employment before an appropriate minimum age; he shall in no case be caused or permitted to engage in any occupation or employment which would prejudice his health or education, or interfere with his physical, mental, or moral development.[22]

From this declaration may be extracted the basic principle of non-criminal intervention (including intervention in employment) in the life of a child: the principle that a child's liberty should not be interfered with unless he has suffered, or is likely to suffer, some form of harm.[23] Other principles which are relevant in the framing of laws governing the employment of children are:

- *Family autonomy.* The principle that it is desirable for a child to be part of an integrated and prosperous family.[24] This principle has a special impact where a parent or guardian of a child is the employer of the child. Such employment must be separately and specially considered, given the expectation of protection which a family naturally affords to its members.
- *Child autonomy.* The principle that a child is entitled to respect as an individual. This principle operates against over-regulation of children in employment, in particular, the automatic or universal regulation of certain types of employment.
- *Practical considerations.* The fact that a high level of intervention is costly.[25] It is also unrealistic to expect that universal laws would be universally obeyed, especially in the case of employment in the family business.

The effect of these principles, on the basic objective of protecting children from harm, is that intervention should be limited to that necessary to prevent specific harm. A child should be prohibited from engaging in employment only where the employment is, or is likely to be, prejudicial to:

- the health or safety of the child;
- his personal or social development; or
- his ability to benefit from his education or training.

The first category, health or safety, constitutes a fundamental preserve of an individual and is, therefore, a necessary criterion for intervention. It should be construed broadly to include all facets of physical, mental and emotional health. Cases where intervention could be justified under this heading might include employment on a milk run, which causes excessive tiredness; employment as a newspaper seller on median strips or in heavy traffic; or employment which is unduly stressful by reason of too much exertion or the acceptance of too much responsibility. The second category, employment detrimental to personal or social development, recognises that employment may unduly impede a child's opportunities to meet and interreact with people (peer group, family and others), to engage in important recreational or play activities, or to learn valuable cognitive skills outside the classroom. It may also negatively affect the child's self-concept. A child might appropriately be prohibited from engaging in employment in a family business which left no time outside school hours to play with friends, practise a sport or learn a musical instrument. Intervention might also be justified where the employment causes the child to feel inadequate or depressed by perceived failure. The third category, ability to benefit from education or training, reflects the present community consensus as to the importance of a formal education during childhood. Yet a child's schooling is not so fragile that it cannot suffer any interference. Thus, the Commission has chosen the word 'prejudicial' to indicate that there must be harm, actual or apprehended, to his ability to benefit from his education or training, from the employment. Whereas employment in the entertainment industry for a limited season may not be prejudicial to a child's education or training, a position which caused a child to be continually tired and inattentive in the school classroom may constitute a ground for intervention.

---

22 United Nations, General Assembly Resolution 1386 (XIV), 20 November 1959, published in the *Official Records of the General Assembly, Fourteenth Session, Supplement No 16* (1960), 19.
23 See para.294.
24 See para.332.
25 See generally the discussion of the disadvantages of licensing procedures: para.421.

Child Labour Law in the A.C.T.

455. ***Commonwealth Power and A.C.T. Laws*** The Commonwealth Parliament is not limited to the conciliation and arbitration power[26] in legislating on labour regulation in the A.C.T. Section 122 of the Constitution vests in the Commonwealth Parliament power over a Commonwealth Territory. This power is both plenary and unlimited by reference to subject matter. It is a complete power to make laws 'for the government of the Territory'. Despite its unfettered legislative power, the Commonwealth Parliament has been satisfied until now to treat the Territories in substantially the same way as the rest of the Commonwealth. The Conciliation and Arbitration Act 1904 (Cwlth) has been applied in the A.C.T. by the Seat of Government (Administration) Act 1910 (Cwlth).[27] However, the Commonwealth Parliament has taken advantage of its wide powers with respect to the government of the A.C.T. to enact legislation giving the Australian Conciliation and Arbitration Commission wider powers in the Territories than it can normally possess pursuant to the arbitration power alone.[28] The Seat of Government (Administration) Act provides that the Conciliation and Arbitration Act applies to an industrial dispute in the Territory even though the dispute does not extend beyond the limits of any one State.[29] Moreover, a person employed for the performance of work wholly or mainly in the Territory is deemed to be employed in an industry for the purposes of the Act.[30] Section 49 of the Conciliation and Arbitration Act empowers the Conciliation and Arbitration Commission to declare any term of an award to be, in the A.C.T. a 'common rule'[31] of any industry in connection with which the dispute arose. Federal and A.C.T. awards regulate employment in the A.C.T. The Deputy Industrial Registrar of the A.C.T. (an office within the Commonwealth Department of Industrial Relations)[32], hears and determines applications relating to registration and rules of organisations, control of financial and membership returns and determination of applications for the conduct of elections. The Industrial Board Ordinance 1936 (A.C.T.) contains provisions relating to determinations of the A.C.T. Industrial Board affecting Commonwealth and private employees within the Territory. Within the Department of the Capital Territory there is an Industrial Relations Section which deals only with industrial matters affecting Departmental authorities and employees. The only Ordinance of the A.C.T. which regulates the employment of children is the Child Welfare Ordinance 1957 (A.C.T.), Parts XI and XIA of which regulate the employment of children in street trading, the entertainment industry and newspaper selling. Those provisions are administered by the Welfare Branch of the Department of the Capital Territory. A number of International Labour Organisation Conventions ratified by Australia establish minimum ages for admission to various categories of employment throughout Australia.[33]

456. ***N.S.W. Acts in Force in the A.C.T.*** Section 6(1) of the Seat of Government Acceptance Act 1909 (Cwlth) provides that all laws in force in the Territory immediately before the proclaimed day[34] of surrender of the Territory to the Commonwealth ('pre-1911 Acts'), 'shall, so far as applicable, continue in force until other provision is made'. Some N.S.W. industrial laws, described in the Schedule to the Seat of Government (Administration) Act 1910 (Cwlth), are specifically excepted from application in the A.C.T.[35] Where any N.S.W. law continues in force in the Territory by virtue of s.6 of the Seat of Government Acceptance Act 1909 (Cwlth), it has, subject to any Ordinance

---

26 The Constitution, s.51(xxxv).
27 Seat of Government (Administration) Act 1910 (Cwlth), s.5.
28 See generally Macken, *Australian Industrial Laws* (1974), 25–6, 112–3.
29 Seat of Government (Administration) Act 1910 (Cwlth), s.5(1)(a).
30 id., s.5(2).
31 Pursuant to the conciliation and arbitration power under s.51(xxxv) of the Constitution, the Commonwealth Parliament does not have power to confer jurisdiction to declare an award a common rule: *Australian Boot Trade Employees' Federation* v. *Whybrow & Co* (1910) 11 CLR 311.
32 Conciliation and Arbitration Act 1904 (Cwlth), s.127.
33 See para.459.
34 The proclaimed day was 1 January 1911. ((1910) *Gazette* 1851).
35 See Seat of Government (Administration) Act 1910 (Cwlth), s.3.

made by the Governor-General, effect in the Territory as if it were a law of the Territory.[36] The Factories and Shops Act 1896 (N.S.W.), the Factories and Shops (Amendment) Act, 1909 (N.S.W.)[37], and the Minimum Wage Act 1908 (N.S.W.)), were laws of the State of N.S.W. on the date on which the A.C.T. was surrendered to the Commonwealth. However, the first two Acts, so far as they were in force in the Territory, were repealed in 1955 by the Boilers and Pressure Vessels Regulations[38] in force under the Machinery Ordinance 1949 (A.C.T.). The Minimum Wage Act 1908 (N.S.W.) makes special provision with respect to the payment of minimum overtime pay to children, meal allowances and maintenance of a record of overtime worked.[39] These provisions, so far as they are applicable, continue to apply in the A.C.T.[40] The Minimum Wage Act is not excepted from application in the A.C.T., nor is there any A.C.T. Ordinance containing inconsistent provisions.[41] There is not simply an absence in the A.C.T. of special laws governing the employment of children in work other than street trading, the entertainment industry or newspaper selling. There is uncertainty whether anachronistic laws long forgotten in their jurisdiction of origin still have effect in the A.C.T.

---

36 Seat of Government (Administration) Act 1910 (Cwlth), s.4. In *Pitcher* v. *The Federal Capital Commission* (1928) 41 CLR 385, 390, Knox CJ and Powers J said of the application of N.S.W. laws in the A.C.T. pursuant to s.6(1) of the Seat of Government Acceptance Act 1909 (Cwlth):

> The question must be dealt with as if there were a law of the Territory — whether a Federal statute or an ordinance made by the Governor-General under s.12 of the Act No 25 of 1910 [the Seat of Government (Administration) Act 1910] -- in words identical with those of the [pre-1911 Act].

See the Law Reform Commission of the A.C.T., *Report on the Review of the New South Wales Acts in Force in the Australian Capital Territory* (1974), 3–4, on the difficulties arising from the wording of the proviso in s.4 of the Seat of Government (Administration) Act 1910 (Cwlth).

37 Note that the Factories and Shops Act 1896 (N.S.W.), the Minimum Wage Act 1908 (N.S.W.) and the Factories and Shops (Amendment) Act 1909 (N.S.W.) were consolidated in N.S.W. in the Factories and Shops Act 1912 (N.S.W.), which was later replaced by the Factories, Shops and Industries Act 1962 (N.S.W.). The Factories and Shops Act 1896 (N.S.W.) (as amended by the Factories and Shops (Amendment) Act 1909 (N.S.W.)), s.36, 37, 40 and 43, regulated employment in connection with dangerous machinery, the hours worked per week and per day, the overtime, records of overtime, night work and meal breaks with respect to males or females under 16 or 18, or females generally, employed in factories and shops. The Factories and Shops Act 1896 (N.S.W.), s.32, prohibited the employment of females and of males under 16 in the management of an elevator or lift in a factory or shop. The section also prohibited the employment of males under 18 or females in cleaning mill gearing machinery whilst in motion or working between the traversing parts of certain machinery whilst in motion. Section 38 of the Act and the First Schedule established a variety of minimum ages for males and females with respect to work involving the silvering of mirrors, the making of white-lead, melting or annealing glass making bricks, tiles or salt, dry grinding in the metal trade, dipping of lucifer matches and casting from molten lead in a printing establishment. Section 35A provided for prohibition by order of the Minister of the employment of females or of males under 16 in any factory in connection with dangerous machinery.

38 The Boilers and Pressure Vessels Regulations commenced with Regulation No. 12 of 1954 on 15 March 1955 (*Gazette*, 24 February 1955, 510). Note that the Machinery Ordinance 1949 (A.C.T.), s.5(3)(b), provides that Regulations under the Ordinance may repeal or amend any law of N.S.W. in force in the A.C.T. dealing with a matter which may be dealt with by regulations under the Ordinance.

39 The Minimum Wage Act 1908 (N.S.W.), s.6(2), provides for the fixing of minimum wages for workmen and shop assistants, unless the Minister exempts a particular trade or employment with regard to males under 16 years by reason of the customs or exigencies of the trade. Section 7 of the Act amends the Factories and Shops Act of 1896 (N.S.W.) with respect to the payment of overtime rates to males under 16 and to females. The Act makes provision for the payment of tea money of the princely sum of six pence to such persons and for the keeping of a record by the employer of overtime worked by such persons (s.8, 9).

40 See the Law Reform Commission of the A.C.T., *Report on the Review of the New South Wales Acts in Force in the Australian Capital Territory* (1974), 52.

41 In this context there is no difficulty in applying the words, 'shall continue in force until other provision is made', in s.6(1) of the Seat of Government Acceptance Act. No A.C.T. Ordinance expressly repeals, or deals with the same subject matter as the Minimum Wage Act 1908 (N.S.W.). The provisions of the Inspection of Machinery Regulations (with respect to employment of children under 16 years in connection with certain machinery) commenced in 1951, four years before the repeal of the Factories and Shops Act 1896 (N.S.W.) as it applied in the A.C.T. These provisions may have constituted 'other provision' repealing s.35A and 39 of the N.S.W. Act as it applied in the A.C.T. See n. 36. Difficulties in applying the words in s.6(1) do arise in many cases. See the Law Reform Commission of the A.C.T., *Report on the Review of the New South Wales Acts in Force in the Australian Capital Territory* (1974).

by way of the general adoption of pre-1911 laws of N.S.W.If this is the legal position, such laws do not appear to have been recognised by the appropriate authorities as part of the law of the A.C.T.; nor are they enforced in connection with the employment of children.

457. ***Compulsory Attendance at School*** The school leaving age in the A.C.T. is 15 years.[42] Part II of the Education Ordinance 1937 (A.C.T.) provides for compulsory attendance at school by children in the A.C.T. The parent or guardian of a child who is not less than six years and no more than the school leaving age has a duty to cause the child to attend the school at which the child is enrolled.[43] Section 9A of the Education Ordinance prohibits the employment of a child during school hours, where the child is under school leaving age and required to attend school under the Ordinance.[44] Any child who without lawful excuse does not attend school regularly may be charged with being a 'neglected child' under the Child Welfare Ordinance 1957 (A.C.T.).[45] The employer or the person who permits the employment is liable to a penalty of $10 for the first offence and $40 for any subsequent offence. A certificate may be granted under s.16 exempting a child from attendance at school as required by Part II in certain circumstances. It is a good defence to a prosecution under s.9A that a certificate under s.16 is in force in respect of the child or that the defendant had reasonable grounds for believing that the child was not of school going age.[46] For example, a child may receive sufficient instruction at home or elsewhere, or a child who has attained 14 years may have been educated to a sufficient standard and his home conditions may warrant an exemption.[47] The Secretary of the Department of Education[48] or an authorised person may also grant a certificate of exemption upon the completely discretionary ground that such conditions exist as make it necessary or desirable that the certificate should be granted.[49]

458. ***Co-existing Administrative Procedures*** Parts XI and XIA of the Child Welfare Ordinance 1957 (A.C.T.) contain no reference to the Education Ordinance 1937 (A.C.T.). The requirement of the consent of the Director of Child Welfare or of the Minister to the employment of newspaper boys and the issue of street trading licences in the Child Welfare Ordinance may not in some cases co-exist comfortably with the provisions of the Education Ordinance.[50] For example, it is not sufficient for a child under 15 who engages in street trading during school hours to obtain a licence issued by the Minister for the Capital Territory. The separate and additional requirement of an exemption certificate from the Secretary of the Department of Education must also be satisfied.[51] A licence for street trading is not usually issued by the Welfare Branch if such employment is likely to interfere with the child's education. The co-existence of overlapping certification provisions in the Child Welfare Ordinance 1957 (A.C.T.)[52] and the Education Ordinance 1937 (A.C.T.)[53] is more anomalous in the case of employment of children during school hours in the entertainment industry. Although the Minister for the Capital Territory is not empowered to issue a licence unless proper provision

---

42 Education Ordinance 1937 (A.C.T.), s.5 (definition of 'the school leaving age'). See also Child Welfare Ordinance 1957 (A.C.T.), s.5 (definition of 'the school leaving age').

43 Education Ordinance 1937 (A.C.T.), s.9.

44 Note the provisions of the Community Welfare Services Act 1978 (Vic.), s.74G(1) and (2), conferring upon the Minister for Community Welfare Services the power to exempt a child of compulsory school age from attendance at school for the purpose of employment.

45 Child Welfare Ordinance 1957 (A.C.T.), s.5 (paragraph (o) of definition of 'neglected child') and Part IX.

46 Education Ordinance 1937 (A.C.T.), s.9A(2). See also the defences available under s.10 of the Ordinance to a parent or guardian who is prosecuted under s.8 or 9 for failure to enrol a child or cause the child to attend school.

47 id., s.16(1)(a) and (d).

48 id., s.5, the Permanent Head of the Commonwealth Department of Education.

49 id., s.16(1)(b).

50 Child Welfare Ordinance 1957 (A.C.T.), s.88, 89, 93B and 93C; Education Ordinance 1937 (A.C.T.), s.9A and 16.

51 Child Welfare Ordinance 1957 (A.C.T.), s.88 and 89; Education Ordinance 1937 (A.C.T.), s.9A and 16. Similarly, where a boy under 15 wishes to sell newspapers during school hours, his employer must notify the Director of Child Welfare and also obtain an exemption certificate from the Secretary of the Department of Education.

52 Child Welfare Ordinance 1957 (A.C.T.), s.90 and 92.

53 Education Ordinance 1937 (A.C.T.), s.9A and 16.

has been made to safeguard the health, welfare and education of the child[54], an exemption certificate from the Secretary or an authorised person in the Department of Education must be obtained in addition. Thus, in the case of employment in the entertainment industry the assessment not only of matters relating to health and welfare but also of the adequacy of the educational instruction received by the child, is entrusted to the discretion of the Minister of one Department whilst the Secretary of another Department concurrently exercises his discretion with respect to one of the three matters to be taken into account. A requirement that the child or employer should seek a consent, licence or certificate from the two government departments is a cumbersome procedure. There is no need for two administrative procedures to be retained.

Minimum Age

459. ***Current Law*** In the A.C.T. there is no general minimum age for employment. However, by providing for compulsory school attendance for children who have attained six years of age and have not passed the school leaving age of 15 years,[55] the Education Ordinance 1937 (A.C.T.) places a general restriction upon the employment of all children. The provisions of Parts XI and XIA of the Child Welfare Ordinance 1957 (A.C.T.) also apply to children who have not attained 16 years of age.[56] They establish several minimum age limits in three limited areas of child employment. The Ordinance prohibits the employment of children (ie those under 16) in street trading other than street trading carried on in accordance with a licence.[57] As there is no provision for the issue of a licence to a female child, the minimum age for the employment of females is effectively 16 years. The minimum age at which a street trading licence may be issued to a male child is 14 years.[58] The Ordinance prohibits absolutely the employment of children who have not attained seven years in a public entertainment, as defined in the Ordinance.[59] The employment of a child who is more than seven and less than 16 years of age in a public entertainment is prohibited unless the employment is in accordance with a licence.[60] There is an absolute prohibition upon the employment of any child who has not attained 16 years of age in a public exhibition or performance by which the life or limbs of the child are endangered.[61] The employment of a child to sell, deliver or distribute newspapers otherwise than in accordance with the provisions of Part XIA of the Ordinance is prohibited.[62] The minimum age at which a male child may be employed in the sale, delivery or distribution of newspapers, the employer having notified the Director of Child Welfare, (who may impose conditions upon the employment), is 12 years.[63] As there is no provision for notification to the Director of the employment of female children under Part XIA, the minimum age for the employment of females in the sale, distribution or delivery of newspapers is 16 years. The provisions of Part XI relating to the employment of children in street trading and the entertainment industry have roughly

54 Child Welfare Ordinance 1957 (A.C.T.), s.90(2).

55 Section 9 of the Education Ordinance 1937 (A.C.T.) requires a parent to cause a child 'who is not less than six years of age nor more than the school leaving age' (15 years), to attend school. See also s.9A, which prohibits the employment of a child 'under the school leaving age' during any time the child is required to attend school (unless a certificate under s.16 is in force in respect of the child).

56 The prohibitions upon employment in s.89 (street trading), s.92(1) (the entertainment industry), s.93(1) (dangerous exhibition or performance) and s.93B (selling, delivering or distributing newspapers) of the Child Welfare Ordinance 1957 (A.C.T.) are expressed to apply to any 'child'. 'Child' is defined in s.5 of the Ordinance to mean a person under the age of 16 years.

57 Child Welfare Ordinance 1957 (A.C.T.), s.89.

58 id., s.5 (definition of 'child') and s.88(1), 89. Note that under s.88(1) 15 years is the usual minimum age for a male child. A licence may be issued to a male child of 14 years 'where the Minister is satisfied that special circumstances exist which make the issue of the licence necessary or desirable'.

59 Child Welfare Ordinance 1957 (A.C.T.), s.90(1) and 92(1).

60 id., s.92(1).

61 id., s.93(1).

62 id., s.93B.

63 id., s.93C(2)(c).

similar counterparts in the child welfare legislation of N.S.W.[64], Victoria[65], Tasmania[66], Queensland[67], Western Australia[68] and the Northern Territory.[69] South Australian provisions regulating begging, employment of children in the sale of obscene publications and in public entertainment were repealed in 1972.[70] The provisions of Part XIA of the Child Welfare Ordinance 1957 (A.C.T.) relating to the employment of children in newspaper selling, delivery and distribution are found only in the A.C.T. Australia has ratified several International Labour Organisation Conventions establishing minimum ages with respect to the employment of children at sea, in agriculture, as trimmers and stokers, fishermen and underground workers.[71] The provisions of these Conventions must be complied with throughout Australia in relation to admission to those categories of employment. For example, in accordance with the provisions of Convention No.7 — Minimum Age (Sea) Convention 1920, the Navigation Act 1912 (Cwlth), s.40A(1), provides that a child under 16 years shall not be engaged for service at sea in any capacity. In accordance with Convention No.15 — Minimum Age (Trimmers and Stokers) 1921, the Navigation Act 1912 (Cwlth), s.40A(2), provides that a child under 18 years shall not be employed for service at sea in the stoke hold of a steamship, in the capacity of a fireman or trimmer. Similarly, Convention No.112 — Minimum Age (Fishermen) 1959, provides that children under 15 years of age shall not be employed on fishing vessels and that persons under 18 years of age shall not be employed on coal-burning vessels as trimmers and stokers. Convention No. 10 Minimum Age (Agriculture) 1921, prohibits the employment of children under 14 years of age in agriculture during school hours, unless the work is not detrimental either to their health or school attendance.

460. ***Gaps in the Law in the A.C.T.*** The provisions of the Child Welfare Ordinance 1957 (A.C.T.), the Education Ordinance 1937 (A.C.T.) and the Conventions ratified by Australia do not remove the need for comprehensive principled laws regulating the minimum age for employment in the A.C.T. The control of the employment of children has been one of the basic concerns of the International Labour Organisation since its creation.[72] A number of Conventions relating to minimum age in particular industries have been adopted by the International Labour Conference[73], culminating in the Convention Concerning Minimum Age for Admission to Employment (No. 138) which was adopted by the Conference in 1973. Convention No. 138 established an overall minimum age of not

64 Child Welfare Act 1939 (N.S.W.), Part XII.

65 Community Welfare Services Act 1978 (Vic.), Part II, Division 9. Note that the Community Welfare Services Act 1978 (Vic.), s.75 (definition of 'employment'), s.76 and 77 extend the licensing provisions to employment in the nature of assisting in any business, trade or occupation carried on for profit.

66 Child Welfare Act 1960 (Tas.), Part VII.

67 Children's Services Act 1965 (Qld), Part XI. Note that although there is a permit system with respect to television, circuses and other public entertainments, there is in Queensland an absolute prohibition upon the employment of children in any work in or about racing stables, in connection with the training of any quadruped for racing (except where betting is not permitted), as a jockey in any horse or pony race (except where betting is not permitted) or in any dangerous or indecent performance.

68 Child Welfare Act 1947 (W.A.), Part VII.

69 Child Welfare Act (N.T.), Part IX.

70 The Children's Protection Act 1936 (S.A.), the Children's Protection Amendment Act 1961 (S.A.) and the Children's Protection Amendment Act 1969 (S.A.) were repealed by the Community Welfare Act 1972 (S.A.)

71 Australia ratified the Minimum Age (Sea) Convention 1920 (No.7) in 1935; Minimum Age (Agriculture) Convention 1921 (No.10) in 1957; Minimum Age (Trimmers and Stokers) Convention 1921 (No.15) in 1935; Medical Examination of Young Persons (Sea) Convention, 1921 (No 16) in 1935; Minimum Age (Fishermen) Convention 1959 (No.112) in 1971; Minimum Age (Underground Work) Convention 1965 (No.123) in 1971.

72 At the first session of the International Labour Conference in 1919, the Minimum Age (Industry) Convention (No.5) was adopted. The Convention prohibits in principle the admission to industrial employment of children under 14.

73 Minimum Age (Sea) Convention 1920 (No.7); Minimum Age (Agriculture) Convention 1921 (No. 10); Minimum Age (Trimmers and Stokers) Convention, 1921 (No. 15); Minimum Age (Non-Industrial Employment) Convention 1932 (No. 33); Minimum Age (Non-Industrial Employment) Recommendation 1932 (No. 41); Minimum Age (Sea) Convention (Revised) 1936 (No. 58); Minimum Age (Industry) Convention (Revised) 1937 (No.59); Minimum Age (Non-Industrial Employment) Convention (Revised) 1937 (No. 60); Minimum Age (Coal Mines) Recommendation 1953 (No. 96); Minimum Age (Fishermen) Convention 1959 (No. 112); Minimum Age (Underground Work) Convention 1965 (No. 123).

less than the age of compulsory schooling and, in any case, not less than 15 years.[74] By October 1979 the Convention had been ratified by 20 countries[75], of which 12 were European member states. Australia has not yet ratified the Convention. The Commonwealth/State industrial relations departments' consultative machinery on unratified ILO conventions has described Convention No. 138 as dealing with matters of 'important intrinsic principle'[76] and accorded its highest priority. The Convention and its supplementary Recommendation are the basis of a special law and practice report to the International Labour Organisation in 1980.[77]

461. ***The Commission's View*** There is a need for a comprehensive and general prescription of the minimum age for admission to employment in the A.C.T. Although laws providing for compulsory school attendance offer much protection, there is a considerable amount of time outside school hours and in school holidays during which children in employment are liable to be exploited. The age of 15 should be the general minimum age as it coincides with the school leaving age. Certain exceptions to this rule are warranted in respect of employment which, *prima facie,* should not harm the child concerned. Such employment may in fact contribute to his development by instilling a financial responsibility, by broadening his experiences or even by providing experience relevant to future full-time employment. It may also, in the case of a family business, contribute to the family well-being. The types of employment which should be allowed below the age of 15 are those that fall within the categories of light work or of employment in the family business, described below.[78] In addition, the minimum age of 15 years should not apply to employment in or in connection with a school[79], provided that the employment complies with conditions prescribed by a law of the A.C.T., an industrial award or an agreement regulating the relevant industry.[80]

Light Work: Current Law and Practice

462. ***Street Trading*** Part XI of the Child Welfare Ordinance 1957 (A.C.T.) is titled 'Employment of Children' and deals with the employment of children in street trading and in the entertainment industry. 'Street trading'[81] is defined as including the hawking of matches, flowers and other articles, shoe blacking and similar occupations carried on in a public place, (with the exception of the selling, delivering or distribution of newspapers). The Minister for the Capital Territory may, pursuant to s.88, issue a licence to engage in street trading to a male child who has attained 15 years. A licence may also be issued to a male child who has attained 14 years where the Minister is satisfied that

74 Article 2(3). A minimum age of 14 may be adopted as an initial step by countries whose economy and educational facilities are insufficiently developed. The Convention has since been supplemented by Article 2(4) and Recommendation No. 146 of 1973.

75 Byelorussian SSR, Costa Rica, Cuba, Finland, German Democratic Republic, Federal Republic of Germany, Ireland, Israel, Kenya, Libyan Arab Jamahiriya, Luxembourg, Netherlands, Niger, Poland, Romania, Spain, Ukrainian SSR, USSR, Uruguay, Zambia.

76 Senator Guilfoyle, *Commonwealth Parliamentary Debates (Senate),* 21 April 1980, 1612.

77 The *Resolution concerning the International Year of the Child and the Progressive Elimination of Child Labour and Transitional Measures* adopted by the International Labour Conference at its 65th Session recalls the decision of the Governing Body of the International Labour Office, taken at its 208th Session (November 1978), to request the member States to supply a report in 1980 under Article 19 of the Constitution on the extent to which effect has been given or is proposed to be given to the Minimum Age Convention (No.138) and Recommendation (No.146) of 1973. Pursuant to established practice, before Australia proceeds to ratification, the competent authorities of the Commonwealth and of each State and Territory jurisdiction negotiate about ratification. Typically, ratification does not occur until such authorities are satisfied that the law and practice in their respective jurisdictions comply with the provisions of the Convention.

78 See para.467–469.

79 This qualification is in accordance with Article 6 of Convention No. 138 which excludes from the application of the Convention work done by children in schools for general, vocational or technical education. In the A.C.T. the minimum age for entry into an apprenticeship is 15 years – Apprenticeship Ordinance 1936 (A.C.T.), s.19. Over the last few years work experience programs have been in operation for secondary school students who are handicapped. The ILO Conventions which have been ratified by Australia should continue to govern such work, but a general minimum age provision of 15 years should not be allowed to exclude such programs.

80 See Article 6, Convention No. 138.

81 Child Welfare Ordinance 1957 (A.C.T.), s.87(2) and (3).

special circumstances exist which make the issue of the licence necessary or desirable.[82] The licence is delivered to the child together with a badge to be worn by the child while he is engaged in street trading.[83] The licence remains in force until the succeeding 30th day of June unless cancelled by the Minister.[84] The licence may be renewed.[85] Section 89 prohibits the employment of a child in street trading in the absence of a licence issued under s.88. No penalty is mentioned in that section, but s.94 provides generally in cases of breach of provisions in the Ordinance for a fine not exceeding $200, or for imprisonment for a term not exceeding six months, or both. The employment of a child in street trading otherwise than in accordance with a licence under Part XI is one of the bases upon which a child may be charged with being a 'neglected child'.[86]

463. It is only rarely that a case of unlicensed street trading or other child employment comes to the notice of the Welfare Branch. A case may arise in the following way:

- A Welfare Branch worker on a routine visit in relation to a juvenile probation case at the Kingston Markets in Canberra comes across a number of unlicensed children selling fruit and vegetables at the family's stall.
- A school counsellor notices that two children from one family are continually falling asleep in class and unable to do their work, for no apparent medical reason. The Welfare Branch discovers that the children are working with their father on a milk run every morning.
- A neglect case comes to the notice of Welfare Branch and it is found that one of the factors involved is street-trading, in the form of working long hours selling fast foods. The child may be charged with being a 'neglected child'.

The Welfare Branch does not engage in widespread policing activities which would generate applications for licences. In recent years no applications have been made to the Welfare Branch, and the licensing provisions are regarded as a 'deadletter'.[87] As explained to the Commission, the Welfare Branch has refrained from undertaking regular policing activities for the following reasons:

- Such work is burdensome and relatively unrewarding. In view of the current staff levels and work-load of the Welfare Branch, welfare workers are hard-pressed to give adequate attention to urgent casework which has a higher priority.
- The Ordinance does not expressly authorise officers of the Welfare Branch to investigate a possible breach of the street trading provisions of Part XI. In this respect it contrasts with the provision for monitoring compliance with the conditions of a licence to take part in public entertainments.[88]
- Uncertainty about the legal meaning of 'street trading' has caused confusion as to whether in individual cases there has occurred a breach of the provisions of the Ordinance.

464. ***Selling Newspapers*** Part XIA of the Ordinance is titled 'Employment of Newspaper Boys'. Section 93C provides that a boy may be employed to sell, deliver or distribute newspapers where:

- the employer has given notice in writing to the Director of Child Welfare of his intention to employ the boy;
- the parents or parent of the boy have consented;
- the boy has attained 12 years; and
- the employer has made proper provision to safeguard the health and welfare of the boy.

The Minister may, if he is satisfied that it is necessary to safeguard the health and welfare of boys so employed, by notice in writing require the employer to comply with such requirements as the Minister considers necessary.[89] A person who contravenes or fails to comply with a direction in such

82 Child Welfare Ordinance 1957 (A.C.T.), s.88(1)(b).

83 id., s.88(2).

84 id., s.88(3) and (4).

85 id., s.88(3).

86 id., s.5 (para.(f) of definition of 'neglected child').

87 Information supplied by the Welfare Branch, Department of the Capital Territory.

88 Child Welfare Ordinance 1957 (A.C.T.), s.91. See para.465.

89 id., s.93C(4).

a notice is guilty of an offence under the Ordinance.[90] The number of notices of intention to employ a boy in newspaper selling received by the Welfare Branch is negligible.[91]

465. ***The Entertainment Industry*** Part XI of the Child Welfare Act 1957 (A.C.T.) deals not only with the employment of children in street trading but also with the employment of children in the entertainment industry. As in the case of street trading, the employment of children in the entertainment industry is regulated by a licensing system. Sections 90 and 92 of the Ordinance provide that the Minister may issue a licence to a child who has attained the age of seven years authorising his employment:

- in a circus;
- in a place used for broadcasting or television purposes;
- in a place used wholly or in part for providing entertainment or amusement;
- in or nearby a place set apart from spectators at a sports meeting; or
- in a place used for the photographing of scenes to be depicted in a cinematograph film.

The child must be fit to be employed in the place, and proper provision made to safeguard his health, welfare and education.[92] A licence may not be issued authorising a child to be employed between ten o'clock at night and six o'clock in the morning, or on a Sunday.[93] An exception is made to the requirement for a licence in the case of an occasional entertainment (where the proceeds are applied for the benefit of a school or charity) or, in defined circumstances, a community singing concert.[94] Section 91 provides for the appointment by the Minister of an officer to ensure that the restrictions and conditions specified in a licence issued under s.90 are observed. The officer has authority to enter and inspect premises.[95] Section 92(1) prohibits the employment of a child in the entertainment industry otherwise than in accordance with a licence issued under s.90. As in the case of street trading, the penalty for breach of the licensing provisions is found in s.94. This provides for a fine not exceeding $200, or for imprisonment for a term not exceeding six months, or both. Section 93 of the Ordinance also creates an offence of employing a child in a public exhibition or performance by which the life or limbs of the child are endangered and in which an accident occurs causing actual bodily harm to the child.[96] The court may award as compensation a sum not exceeding $200 to be paid by the employer to the child.[97] As in the case of street trading and newspaper selling, the provisions relating to employment in the entertainment industry are invoked only when an application is made to the Welfare Branch. In the year November 1979 to October 1980, 30 applications were made.[98] The major concern of the Welfare Branch is that the child should not lose time at school and the Welfare Branch often seeks the approval of a school headmaster to an application. It is to be noted that the facility provided in s.91 for policing the licensing provisions is not utilised, apparently because that would involve the use of the limited staff resources of the Welfare Branch.

Light Work: The Commission's View

466. ***Present System*** A number of substantial criticisms may be levelled at the provisions in the Child Welfare Ordinance which regulate light work.

- *Unnecessary distinctions.* There is no reason to treat differently newspaper selling, street trading and employment in the entertainment industry. Fundamentally, in terms of the nature of the employment and the evils to be prevented, they do not differ.

90 id., s.93C(5) and 94.
91 Information supplied by the Welfare Branch, Department of the Capital Territory.
92 Child Welfare Ordinance 1957 (A.C.T.), s.90(2).
93 id., s.90(4).
94 id., s.92(4).
95 id., s.91(2).
96 The employment of children in a dangerous activity will be dealt with below. See para.481.
97 Child Welfare Ordinance 1957 (A.C.T.), s.93(4).
98 Applications for licences pursuant to s.90 and 92 of the Ordinance in recent years were as follows:
November 1977 – October 1978: 53
November 1978 – October 1979: 30
November 1979 – October 1980: 30
Information supplied by the Welfare Branch, Department of the Capital Territory.

- *Cumbersome regulation.* The requirement of a licence for street trading or employment in the entertainment industry is an unnecessarily cumbersome procedure for regulating employment which is usually of a casual, irregular nature, and which has a high turnover of employees.
- *Arbitrary age barriers.* In the case of street trading it seems difficult to justify a system which licenses only children who have attained 15 (the school leaving age) and leaves unmet the needs of responsible, capable children less than 15 years of age. Similarly, in the case of the entertainment industry, a blanket prohibition of the employment of children under seven years of age is difficult to justify. Such employment would in many cases be completely harmless and may contribute to family well-being. Many instances of employment would be for a single engagement only, which can hardly have a detrimental effect on the child concerned.
- *Discrimination.* There is no reason in principle for allowing wider employment opportunities for boys than for girls in street trading and newspaper selling. The distinctions are based upon historical factors and a stereotyped assessment of occupations appropriate for boys and girls in disregard of individual capacities, preferences and skills.
- *Lack of principle.* Such a varied approach to the same problem – regulating light work – emphasises the lack of common purpose underlining the provisions.
- *Lack of coverage.* The Child Welfare Ordinance specifically regulates only street trading and employment as a newspaper boy or in the entertainment industry. Other light work, such as baby sitting, going on errands, casual labour in or around private homes, golf caddying, gardening and clerical work, is not governed by any special laws.

467. ***A Uniform Approach*** The Commission has earlier[99] recommended a minimum age of 15 years for admission into employment. There is, however, a need to relax that rule in certain cases. The first category of exception should be known as 'light work', because it is work that, *prima facie,* should not harm the child concerned. The types of employment which constitute light work should be made clear in the new Ordinance. It should include only the following:

- selling, delivering or distributing newspapers or advertising matter;
- employment in the entertainment industry;
- baby-sitting;
- going on errands;
- casual work in or around a private home;
- golf-caddying;
- clerical work;
- gardening; or
- any other prescribed work.

468. ***Basis for Regulation*** Light work should be specifically regulated on the following basis.

- *No minimum age.* There should be no minimum age for admission to employment in light work. This recommendation is supported, in part, by both the Phibbs Report[100] and the Green Paper[101], which have recommended that children under seven years of age should no longer be prohibited absolutely from being employed in the entertainment industry. In the same vein, the Convention Concerning Minimum Age for Admission to Employment (No.138) provides for the regulation of employment of children in 'artistic performances' by a system of permits in individual cases[102], each permit operating as an exception to the overall minimum age established by the Convention. A relaxation of the minimum age for employment in any light work would not create a dangerous situation in the A.C.T. It would remove arbitrary barriers to employment. In any case, general powers of protection, discussed later[103], offer reserve protection to any child being harmed by employment.

99 Para.461.
100 *Phibbs Report,* 25.
101 *Green Paper,* 31.
102 ILO Convention No. 138, Article 8.
103 Para.482.

- *Minimum intervention.* The issue of whether a licensing system should be retained in the case of certain types of child employment requires consideration of the proper balance to be struck between the goal of protection from exploitation and the goal of minimisation of needless hindrance to employment opportunities. Should the licensing system be abolished and replaced by some other procedure which, whilst encouraging the growth and development of youth by facilitating job opportunities, nevertheless safeguards the child from exploitation as efficiently as the licensing system? The Commission is of the view that the system of licensing applying to street trading and to employment in the entertainment industry is unnecessarily cumbersome and inappropriate to the casual employment of children. It should be abolished and replaced by a system of notification. Such a system should be introduced on the following basis:
  - It should be the duty of the child's employer to notify the Director of Welfare of the proposed employment.
  - The system should apply only in respect of children who are less than 15 years of age (the school leaving age).
  - A universal system of notification would be too cumbersome to administer, would not be universally observed and would be incapable of universal policing. It is proposed, therefore, to limit the duty to notify to cases of employment where it is proposed to employ a child for more than 10 hours in any one week. Employment of a child for a lesser period does not raise expectations of harm to the child and should not be the subject of needless but expensive administrative procedures.
  - The notification should set out the name, address and date of birth of the child, the nature and place of the proposed employment, the name and address of a parent or guardian of the child, the name and address of the proposed employer, the proposed hours and days of work, the proposed duration of the employment, the name of the school attended by the proposed employee, and the reasons it is proposed to employ the child.
  - Upon being notified, the Director may exercise his general power of protection and prohibit or restrict the proposed employment.[104]
  - Where the Director of Welfare does not prohibit the proposed employment, he should record the child's name, relevant details of the employment and any conditions imposed by him with respect to the employment in an employment register. The Director should also be required to notify the Secretary of the Department of Education of the relevant details.
  - Finally, it is necessary to create certain additional offences to ensure compliance with the notification requirements. It should be an offence for an employer to fail to notify the Director of Welfare in a proper case, or to employ a child in breach of any prohibition or conditions imposed by the Director in pursuance of his general protective powers.

Employment in the Family Business

469. The second exception to the prohibition of the employment of children under the age of 15 is where the child is employed in a business owned by a parent of the child concerned. Employment of a child in a family business should be defined as 'employment in a business, trade, occupation or calling carried on by a parent of the child or by a company of which a parent of the child is a director'. Several reasons may be advanced for excluding this kind of employment from specific regulation under the new Ordinance:

- the expectation that, where the parent is the employer, the child should continue to receive, while being employed, the natural protection which a family affords to its members;
- the child's contribution may well contribute significantly to the running of the business, which may promote his family's cohesion and well-being; and
- participation by children in family businesses is a well established, well accepted, cultural phenomenon in Australian society; as such, any specific regulation would be likely to meet stiff resistance.

[104] See para.482.

Ensuring Health and Safety

470. ***Current Law: The A.C.T.*** The employment of children in dangerous or hazardous occupations in the A.C.T. is regulated by Federal Acts, awards and industrial agreements, ILO Conventions, A.C.T. Ordinances and Regulations and some pre-1911 N.S.W. Acts. The power of the Commonwealth Parliament to legislate with respect to occupational health and safety is, broadly, limited to its own employees.[105] It also has a general law-making power in relation to the Territories. Certain Federal awards are also relevant. In making an award in settlement of an industrial dispute, the Conciliation and Arbitration Commission is limited to matters within the industrial relationship of the parties.[106] An occupational health or safety matter may fall within the scope of 'management prerogatives'[107] and so be held to be outside the lawful ambit of an award. However, the possibility of 'management prerogatives' taking a subject beyond the reach of ind ustrial tribunals has diminished in recent years and is still subject to change. Some awards do establish a special minimum age with respect to a certain type of work. For example, the Federal Metal Trades Award, 1952, places a prohibition on persons under 16 years from work associated with oil and gas burners, fires used for heating small articles, or using an oxy-acetylene blow pipe. The same award prohibits persons under 18 years from dye setting on power presses or being employed as furnacemen, assistant furnacemen or as operators of power-driven guillotines. The Federal Timber Workers' Consolidated Award, 1970, prohibits the employment of children under 18 years as levermen or on pulling out on saw benches. Some awards in force in the A.C.T. contain occupational health and safety provisions relating to protective devices and clothing, first aid equipment and other facilities. However, such provisions are usually loosely framed and of little practical use. Furthermore, award provisions often substitute the payment of money for dangerous, unhealthy, unpleasant or otherwise undesirable working conditions rather than removal of the source of danger, health risk, or the like. Whilst protective provisions in awards are to be welcomed, in principle the occupational health and safety of children is not a matter which should be left to the Conciliation and Arbitration system in its dispute settling role. This system leaves open the introduction of variable standards which depend more on union claims, market factors, and the interest and enthusiasm of union officials, than what is in the best interests of young people. There should be no danger that the occupational health and safety of young employees is regarded as a benefit which can be bargained away or replaced by monetary rewards.[108] The increasing tendency for awards to permit the payment of a disability allowance in lieu of the provision even of limited entitlements to the supply of protective devices, appropriate clothing or first aid equipment, is a strong argument for at least minimum legislative standards to protect young persons generally in employment.[109]

471. Section 93 of the Child Welfare Ordinance 1957 (A.C.T.) prohibits the employment of children in public exhibitions or performances which endanger the life or limbs of the child. Other Ordinances establish special minimum ages for employment in certain types of work.[110] Under the Machinery Ordinance 1949 (A.C.T.), s.5(2)(e), the Minister for the Capital Territory may make regulations prohibiting the employment of any person of less than the prescribed age in connection with any prescribed machinery. The Inspection of Machinery Regulations[111], in force under the Machinery Ordinance, prohibit the employment of a male under 16 years or a female in connection with any mill-gearing machinery whilst in motion by mechanical power[112], and also prevent a male under 18 years or a female from being employed in charge of an engine, or attending to an engine

[105] See para.455.
[106] *Caledonian Collieries Ltd* v. *Australian Coal and Shale Employees Federation* (1929) 42 CLR 527.
[107] See, e.g., *R* v. *Portus; Ex parte A.N.Z. Bank Limited* (1972) 127 CLR 353; *A.T. & A.E.A; re Dendy Theatre* [1974] AILR 172 (F); *Public Hospitals (Medical Officers) Award* [1975] AILR 990.
[108] See comments of Toovey in Keon-Cohen et al. (ed.), *Health and Safety at Work: a Review of Current Issues* (1980), 120.
[109] *Re Wool and Basil Workers' Federation of Australia* (1962) 101 CAR 42. For a recent example of disability allowance for work in chemical fumes, see *ASE* v. *CSR Chemicals Ltd* [1975] AILR 1006 (F). See generally, Kirby, 'Prevention, Compensation and Law Reform', in Keon-Cohen, et. al., 92, 101.
[110] See para.459.
[111] Regulations, 1950 No. 7 notified in the *Gazette* on 30 November 1950 and commenced on 15 January 1951 (*Gazette* 21 December 1950, 3256). See also n. 41.
[112] Regulation 15(6).

unless supervised by a competent person.[113] The Boilers and Pressure Vessels Regulations, in force under the Machinery Ordinance, restrict the issue of a boiler attendant's certificate (entitling the holder to act as a boiler attendant) to applicants who are over the age of 18 years.[114] The Apprenticeship Ordinance 1936 (A.C.T.)[115] establishes an Apprenticeship Board exercising broad functions of general supervision over the theoretical and practical training of apprentices.

472. ***N.S.W. Laws*** Certain pre-1911 N.S.W. Acts regulating employment still apply in the A.C.T.[116] Although the Mining Ordinance 1930 (A.C.T.) provides for miners' rights, mining leases and other matters, some pre-1911 N.S.W. Acts dealing with employment in the coal mining industry[117] are still in force in the A.C.T. These laws are anachronistic.[118] The International Labour Organisation Convention No. 123, Minimum Age (Underground Work), establishes a minimum age for admission to mining and underground work. Apart from one quarry, there is no mining in the A.C.T. within the scope of the Convention. In practice, no persons under the age of 16 years are engaged in underground work in the A.C.T.

473. ***Principles*** The factories and shops laws in the States of Australia have from the 19th Century reflected the theory that young workers are also usually inexperienced, and therefore need special protection from exposure to dangerous machinery and industrial hazards.[119] Existing restrictions upon the employment of children in hazardous occupations ought not to be removed without rigorous inquiry and serious deliberation. Special dangers involved in industrial processes and new chemicals continue to be revealed. Although awards, industrial agreements and legislation regulating particular industries generally have resulted in improved health and safety conditions, children, who are usually less experienced and of lesser physical capacity and emotional experience than adults and who are still developing mentally and physically, are in need of special protection. However, laws providing for special protection may have the effect, in current economic conditions, of placing excessive limitations upon the employment opportunities of a group which already suffers the handicap of inexperience.[120] Laws restricting the employment of children in occupations which are hazardous or dangerous to them should therefore be simple, precise and regularly reviewed to avoid the risk that employers will adopt a general policy of not employing young people for fear of violating the law unintentionally.

474. ***A Federal and Uniform Approach*** In discussing the subject of occupational safety, as part of its report on compensation and rehabilitation in Australia, the Committee of Inquiry into National Compensation and Rehabilitation (the Woodhouse Committee) said in 1974:

> We recommended . . . that a determined effort be made to revise, harmonise and up-date the large body of existing laws in Australia relating to safety and accident prevention. Uniformity in State and Federal law is a high priority. Accordingly an energetic attempt should be made to co-ordinate the endeavours of State and Federal authorities concerned with safety. The National Safety Office[121] should actively encourage a concerted and co-ordinated legislative attack on the accident problem; and thereafter legislation at all levels should be used as a rapier and rarely as a broadsword.[122]

Constitutional limitations hamper the development throughout Australia of a single national law on occupational health and safety.[123] There are disadvantages in including occupational health and safety provisions in Federal industrial awards.[124] Through the Department of Labour Advisory Committee (DOLAC), arrangements for meetings of State Ministers for Labour resulted in 1975 in agreement by the States on a model uniform Act and regulations concerning safety, health and welfare. However, since then progress has been slow. Meetings now occur no more frequently than annually. No further developments are expected in the near future with the model uniform Act. In any case the draft does not contain special provisions relating to the employment of children.[125]

475. ***The Commission's View*** The occupational health and safety of children in the A.C.T. should be provided for by comprehensive legislation. The Commonwealth Parliament has plenary power with respect to the Territories. The present A.C.T. provisions regulating the employment of children in hazardous occupations are piecemeal and fragmentary. Since the repeal of the Factories and Shops Act 1896 (N.S.W.), as it applied in the A.C.T.[126], there has been no occupational health and safety legislation in the A.C.T. of the same order as the legislation in the other Australian jurisdictions. Factories and shops legislation which includes special provisions relating to child employment exists in N.S.W.[127], Victoria[128], Queensland[129], and Western Australia.[130] In South Australia[131] and Tasmania[132], more modern legislation has been introduced, modelled upon the Health and Safety at Work etc. Act 1974 (U.K.) which resulted from the report of the Robens Committee in the United Kingdom.[133] The South Australian and Tasmanian Industrial Safety, Health and Welfare Acts make provision generally with respect to the duties of employers and workers, the election of employees' safety representatives, industrial safety inspectors, registration of industrial premises and safe machinery. The Acts impose general statutory duties on employers and occupiers to take reasonable precautions to ensure the safety and health of employees.[134] Particular detailed provisions such as those relating to health, safety and minimum ages for the employment of children are made by regulation under the Acts.[135] In 1978 a Victorian Committee[136] recommended that similar legislation be introduced in Victoria. In N.S.W. an interdepartmental committee has been set up to review the N.S.W. occupational health and safety legislation.[137] The public hearings for the inquiry have been completed. It is expected that the committee will report soon.

476. It would be appropriate that special provisions regulating the employment of children in hazardous occupations should be contained in regulations made under legislation which establishes general obligations, rights and facilities relating to occupational health and safety both for adults and children. The Commission's reference is however limited to an inquiry with respect to the

---

113 Regulation 15(7). Regulation 15(10) also prohibits the employment of a female at or near machinery while her hair is not covered or while she is wearing flowing articles of clothing.

114 Regulation 39(1)(d). However there is provision in regulation 37(1)(b) and (3) for written permission by the Chief Inspector for a person to act for a specified period in the absence of a certificate.

115 Apprenticeship Ordinance 1936 (A.C.T.), s.8 and 12.

116 The Minimum Wage Act 1908 (N.S.W.) is a pre-1911 N.S.W. Act applying in the A.C.T. See para.456.

117 Coal Lumpers' Baskets Act 1900 (N.S.W.); Coal Mines Regulation Act 1902 (N.S.W.); Coal Mines Regulation (Amending) Act 1905 (N.S.W.); Coal Mines Regulation (Amending) Act 1908 (N.S.W.); Coal Mines Regulation (Ventilation) Act 1910 (N.S.W.); Miners' Accident Relief Act 1900 (N.S.W.); Miners' Accident Relief (Amendment) Act 1901 (N.S.W.); Miners' Accident Relief (Validating) Act 1904 (N.S.W.); Miners' Accident Relief (Amendment) Act 1910 (N.S.W.); Mines Inspection Act 1904 (N.S.W.).

118 The Law Reform Commission of the A.C.T. has recommended that all of these Acts be repealed in so far as they apply in the A.C.T.: Law Reform Commission of the A.C.T., *Report on the Review of New South Wales Acts in Force in the A.C.T.* (1974), 69, 81–2.

119 On the piecemeal development of the 19th Century law, see generally Gunningham, 'Prevention or Punishment?' (1979) *Legal Service Bulletin* (special issue), 19.

120 See 'Child Labour Laws – Time to Grow Up', 589–92.

121 The report of the National Committee of Inquiry, *Compensation and Rehabilitation in Australia* (1974) ('The Woodhouse Report') proposed the establishment of a new National Safety Office to co-ordinate and fund safety projects, to research the definition of standards, to deal with the accident problem as a whole and to co-ordinate activity to harmonise or unify Australia's State and Territory safety laws.

122 The Woodhouse Report, Vol 1, para.435.

123 See para.470.

124 ibid.

125 See Kirby, 99–101, and Toovey, 121.

126 See para.456.

127 Factories, Shops and Industries Act 1912 (N.S.W.), s.49, 51, 54 and 55.

128 Labour and Industry Act 1958 (Vic), s.72 and 73.

129 Factories and Shops Act 1960 (Qld), s.45, 46, 47, 48, 49, 50 and 52.

130 Factories and Shops Act 1963 (W.A.), s.49, 50 51, 53 and 54.

131 Industrial Safety, Health and Welfare Act 1972 (S.A.).

132 Industrial Safety, Health and Welfare Act 1977 (Tas.). The Act took effect on 1 January 1979. See generally, Gunningham, 'The Industrial Safety, Health and Welfare Act 1977 – A New Approach?', (1978) 6 *Univ Tas. LR*, 1.

133 Report of the Committee of Inquiry, *Safety and Health at Work* (Lord Robens, Chairman), 1972 Cmnd. 5034.

134 Industrial Safety, Health and Welfare Act 1972 (S.A.), s.29; Industrial Safety, Health and Welfare Act 1977 (Tas.), s.32.

135 Industrial Safety, Health and Welfare Act 1972 (S.A.), s.39, Schedule, clause 26; Industrial Safety, Health and Welfare Act 1977 (Tas), s.49, Schedule II, clause 32.

136 *Committee for Review of the Labour and Industry Act 1958.* The Committee presented four reports of which the most relevant to occupational health and safety are the Third Report (16 December 1976) and Fourth Report (31 March 1978).

137 Inquiry into Industrial and Occupational Safety and Health. (Mr T.G. Williams, Chairman).

regulation of the employment of children in the A.C.T. The Commission cannot therefore recommend a general regime of the law relating to occupational health and safety in the A.C.T. It should not do so in any case without due inquiry including consultation with State authorities to ensure maximum uniformity. Nonetheless, there should be provision for certain special protections of children employed in industry, construction or building work, in connection with certain machinery, or on premises where such work is carried on. The new Child Welfare Ordinance should impose upon every employer a duty to:

- do all such things as are reasonably necessary to ensure the health and safety of a child employed by him; and
- without limiting the effect of this requirement, comply with the provisions of any relevant law or of any relevant industrial award, order, determination or agreement.

A child who is so employed should also be under a duty:

- not to render less effective anything done by his employer for the purpose of ensuring the child's health and safety.[138]

477. ***Regulations*** The Minister for the Capital Territory should be empowered to make regulations as he may consider necessary for the purpose of securing the health, safety and welfare of child employees in work places. The regulations might appropriately apply to industry or work places generally in the A.C.T., or to a specified industry or work place, or to an industry or work place of a class or kind. They should not be made until there has been consultation with employer and worker organisations.[139] The regulations might appropriately provide for special minimum ages, medical examinations and restrictions upon hours of work, in relation to specified work.

478. ***Special Minimum Ages*** The International Labour Organisation Convention No. 138 establishes a minimum age of not less than 18 years in the case of employment which by its nature or in the circumstances in which it is carried out is likely to jeopardise the health, safety or morals of the child.[140] The types of employment to which the restriction applies are to be determined by the laws or regulations of the member country after consultation with employer and worker organisations.[141] As a result of such consultation, the competent authority may in certain conditions authorise the employment of children who have attained the age of 16 years.[142] Although this Convention has not yet been ratified by Australia it does state generally appropriate and internationally agreed standards. The regulations made under the new Child Welfare Ordinance might establish a minimum age of 18 years to protect the health and safety of children employed in certain hazardous occupations. Thus, where employment is, by its nature or in the circumstances in which it is carried out, likely to jeopardise the health or safety of a child, the Minister should be empowered by regulation to determine the special minimum age for employment in any class of factory or type of industry.[143] It is envisaged that before doing so the Minister would consult employer and employee organisations. Because of the relatively small amount of industry in the Territory there is no necessity to recommend the immediate enactment of detailed regulations covering every form of hazardous occupation. Regulations should be made as the need arises. The need for regulation in relation to

138 Cf. Industrial Safety, Health and Welfare Act 1972 (S.A.), s.30; Industrial Safety, Health and Welfare Act 1977 (Tas.), s.33.

139 Note the provisions of Article 3 of ILO Convention No. 138.

140 Article 3(1).

141 Article 3(2). See also the earlier minimum age Conventions, para.459.

142 See Convention No. 138, Article 3(3). The Convention requires that such authorisation satisfy the condition that the health, safety and morals of the young persons concerned are fully protected and that the young persons have received adequate specific instruction or vocational training in the relevant activity. The Commission does not believe that it is necessary to have regard to the protection of morals in the context of occupational health and safety.

143 The general duty cast upon employers to ensure the safety and health of employee children (para.476) should provide protection in cases where regulations have not yet been made to cover the particular industry. Examples of the provisions which may be included in the regulations are found in the South Australian regulations and in the provisions of the Factories, Shops and Industries Act 1962 (N.S.W.), s.51(2) and (3) prohibiting the employment of persons under 18 in connection with transmission machinery in motion or self-acting machinery in motion, together with the Minister's power to prohibit the employment of persons under 16 in connection with dangerous machinery (s.(1)).

employment in a particular industry or workplace may be brought to the attention of the Minister by the Director of Welfare, by the Childrens Services Council or by any employer or worker organisation. A worthwhile example of the type of regulations which might be made is provided by the regulations made pursuant to the Industrial Safety, Health and Welfare Act 1972 (S.A.) The regulations prohibit the employment of a person under 18 years as a scaffolder, a fork lift truck driver, an overhead cab controlled crane driver, or an explosive powered tool operator.[144] There are also regulations which limit the maximum loads to be lifted or carried by hand by persons under 16 and between 16 and 18.[145]

479. ***Medical Examinations*** In certain specified cases it may be appropriate to provide by regulation that the special minimum age of 18 years may be made subject to an exception whereby the employment of a person of 16 years or more in a particular hazardous occupation may be authorised.[146] The prospective employer should in such circumstances be required to arrange for the medical examination of any such young person entering his employment. A young person should not be permitted to engage in the work unless he is found fit to do so as a result of the medical examination. The medical examination should be carried out by a qualified medical practitioner, be certified, be carried out at the expense of the employer, and be repeated at intervals of not more than one year.

480. ***Hours of Work*** A consistent recognition of the need for special protections for children at work implies not only regulations relating to safety and health generally, to special minimum ages and to medical examinations, but also to other conditions of work such as weekly working hours, weekly rest and annual holidays.[147] However, such matters should for the present continue to be governed by statutes[148], regulations, industrial awards and agreements governing workers generally in the industry concerned. Where possible, provision should be made in such awards to provide special protection for children. The Minister for the Capital Territory should be empowered to make regulations with respect to the employment of children at night. There is a marked need for broad regulation only in the case of employment of children in industrial undertakings. The relevant standards based upon the International Labour Convention No.138[149] may be suitable precedents for the making of such regulations.

481. ***Prohibition on Employing Young Children in a Dangerous Activity in the Entertainment Industry*** The provisions in the Child Welfare Ordinance[150], relating to the employment of a child in a performance or exhibition which endangers the life or limbs of the child[151], should be repealed. A person who employs a child under 15 years of age in work of such a nature would be in breach of the

144 Construction Safety Regulations 1974 (S.A.), regulation 219A; Industrial Safety Code Regulations 1975 (S.A.), regulation 23A(1)(a); Industrial Safety Code Regulations 1975 (S.A.), regulation 18(1)(a).

145 Industrial Safety Code Regulations 1975 (S.A.), regulation 28(2).

146 Cf. The Factories, Shops and Industries Act 1962 (N.S.W.), s.49(2)(3) and (4) and 49(6) of which provide for a certification system. See International Labour Organisation instruments: Medical Examination of Young Persons (Sea) Convention 1921 (No. 16); Medical Examination of Young Persons (Industry) Convention 1946 (No.77); Medical Examination of Young Persons (Non-Industrial Occupations) Convention 1946 (No.78); Medical Examination of Young Persons Recommendation 1946 (No. 79); Medical Examination (Fishermen) Convention 1959 (No. 13); and Medical Examination of Young Persons (Underground Work) Convention 1965 (No. 124).

147 ILO Recommendations relating to such conditions of work are : Utilisation of Spare Time Recommendation 1924 (No.21); Holidays with Pay Recommendation 1936 (No.47); Apprenticeship Recommendation 1939 (No 60); Holidays with Pay (Agriculture) Recommendation 1952 (No.93); Holidays with Pay Recommendation 1954 (No.98); Weekly Rest (Commerce and Offices) Recommendation 1957 (No.103); Reduction of Hours of Work Recommendation 1962 (No.116).

148 However, the provision in the Child Welfare Ordinance 1957 (A.C.T.), s.90(4), that a licence to take part in a public entertainment shall not authorise the employment of a child on any day between 10 pm and 6am or on a Sunday, should not be re-enacted. The Minimum Wage Act 1908 (N.S.W.), so far as it applies in the A.C.T., should be repealed. See Law Reform Commission of the A.C.T., *Report on the Review of the New South Wales Acts in Force in the A.C.T.* (1974), 52.

149 See ILO Night Work of Young Persons (Non-Industrial Occupations) Convention 1946 (No.79).

150 Child Welfare Ordinance 1957 (A.C.T.), s.93.

151 See para.465.

proposed legislation relating to the employer's duty to ensure the health and safety of child employees and particular provisions are not necessary. The immense variety of activities and conditions of employment in the entertainment industry precludes any precise definition of those which are dangerous. It would not be possible or desirable to identify by way of regulation the types of activities which are dangerous or which, upon certain conditions, may be an authorised form of employment for young children. Nevertheless, an employer of a child under the age of 15 years should not, without the consent of the Director of Welfare, employ the child where the employment involves the child engaging in activity dangerous to the child. The Director should be empowered to refuse his consent, or to give his consent subject to certain conditions, if he has reasonable cause to believe that the employment is likely to be prejudicial to the health or safety of the child. The penalty for failure to obtain the consent of the Director or for breach of any condition should be higher where the employment involves a performance endangering the life or limbs of the child, than in other cases.

General Powers of Protection

482. In accordance with the principles referred to earlier[152], the Commission has so far recommended a regime based on limited intervention in the employment of children. Children in light work employed for not more than 10 hours in any week, children employed in the family business and children aged 15 to 17 years are not subject to any specific regulation. Even children employed in light work who are the subject of a notification are not prevented from being so employed. Clearly, there is a need for general supervisory powers to be vested in the Director of Welfare in relation to the employment of any child. He should be empowered to prohibit the employment of any child or to impose conditions on the employment. He should be able to exercise these powers only if he has reasonable cause to believe that the employment is, or is likely to be, prejudicial to the health, safety or personal or social development of the child or the ability of the child to benefit from his education or training. These general powers of the Director of Welfare should help to achieve the objective of prevention from exploitation, without resort to procedures which might hinder employment opportunities. The powers should be used sparingly, particularly with 15 to 17 year olds; this group of children are nearing adulthood and many of them have already entered the adult workforce. The proposed protection is deliberately skeletal to enable children to engage freely in employment, but with some limited benevolent, bureaucratic oversight.

Appeals to the Administrative Appeals Tribunal

483. Earlier in this Chapter, the Commission has proposed that the Director should have a discretion in the making of certain decisions.[153] If the Director were to exercise his discretion in breach of the rules of natural justice, or in relation to a matter or in a manner not authorised by the Ordinance, or for an irrelevant or improper purpose, or for want of reasonable cause, the common law remedies of administrative law or proceedings under the Administration Decisions (Judicial Review) Act 1977 (Cwlth), would be available to the disappointed applicant. However, it is appropriate that there should be available to the prospective employer of a child a speedy and inexpensive procedure for reviewing the Director's exercise of discretion. The Administrative Appeals Tribunal is an existing review body which, in structure and procedure, would be appropriate for the exercise of jurisdiction to review such decisions. The Tribunal already has jurisdiction to review on the merits administrative decisions of a similar nature. These are decisions made pursuant to the Hawkers Ordinance 1936 (A.C.T.)[154], the Lakes Ordinance 1976 (A.C.T.)[155], the Motor Traffic Ordinance 1936 (A.C.T.)[156], the Roads and Public Places Ordinance 1937 (A.C.T.)[157], the Gun Licence Ordinance 1937 (A.C.T.)[158], and the Sale of Motor Vehicles Ordinance 1977 (A.C.T.).[159] Jurisdiction should be

[152] Para.454.
[153] See para.481, 482.
[154] Section 27A.
[155] Sections 14(2), 26 and 34.
[156] Section 164G.
[157] Sections 15D, 15E and 15F.
[158] Section 7P.
[159] Sections 13, 45 and 48(2).

conferred upon the Administrative Appeals Tribunal to review on the merits the decisions of the Director of Welfare in relation to the employment of children. Such jurisdiction should complement the proposed jurisdiction of the Tribunal to review administrative decisions relating to the licensing of child care facilities, as recommended in Chapter 11 of this report.[160]

Recapitulation

484. The employment of children is a facet of child welfare specifically referred to in the reference the subject of this report.[161] Children are a vulnerable group in society and are particularly liable to exploitation in employment. There arises a need to enact laws protecting children in employment from harm. Initially, this chapter focused on the context today of the law relating to child employment.[162] A fussy and over-zealous approach to child employment denoted, for example, by systems of licensing, may in the past have been understandable. Now, community attitudes towards children are different. There is also the problem of acute youth unemployment in the A.C.T. Strict laws regulating employment may only exacerbate the problem. Principles on which to base legislation, common to other areas of child welfare and applied elsewhere in this report, were considered in relation to employment.[163] The basic principle should be that a child's liberty is not to be interfered with unless he has suffered, or is likely to suffer, some form of harm. Other matters relevant in the framing of laws governing the employment of children are:

- family autonomy;
- child autonomy; and
- practical considerations.

The harms which the law should seek to prevent are those which arise where the employment is, or is likely to be, prejudicial to the health, safety or personal or social development of the child or the ability of the child to benefit from his education or training.[164] The law relating to the employment of children in the A.C.T. has been reviewed in this chapter and found to be both fragmentary and conflicting. Areas in need of legislative attention included:

- *Minimum age of employment.* There is no general minimum age for employment in the A.C.T. The Commission recommended[165] the school leaving age as the general minimum age. The only exceptions should be employment which comes within the categories of 'light work' or 'employment in the family business'.
- *Light work.* A survey of the law relating to the employment of childen in light work revealed many inconsistencies and deficiencies. A uniform approach to the regulation of the employment of children under the age of 15 years engaged in light work was proposed[166] on the following basis:
  - No minimum age for entitlement to engage in light work.
  - A system of notification in certain cases to the Director of Welfare.
- *Employment in the family business.* Several reasons were advanced for excluding this category of employment from specific regulation.[167]
- *Ensuring health and safety.* The present A.C.T. provisions regulating the employment of children in hazardous occupations are piecemeal and fragmentary. It is an area needing comprehensive legislation applying to both adults and children. As such it is beyond the scope of the present reference. Nevertheless, the new Ordinance should in the meantime impose upon every employer of a child a duty to take all reasonable precautions to ensure the health and safety of the child.[168] It should also be an offence for an employer to engage a young child in

[160] Para.451.
[161] Para.452.
[162] Para.453.
[163] Para.454.
[164] ibid.
[165] Para.461.
[166] Para.467, 468.
[167] Para.469.
[168] Para.476.

employment involving a dangerous activity, without the consent of the Director of Welfare.[169]

- *General powers of protection.* There should be vested in the Director a reserve or saving power to enable him to make orders protecting *any* child in employment. He should be able to prohibit or restrict the employment if it is causing or is likely to cause a specified harm to the child.[170]

169 Para.481.
170 Para.482.

13. The Organisation of Welfare Services in the A.C.T.

Background

485. ***Importance of Supporting Services*** The changes suggested in this report will not be fully effective unless adequate supporting services exist. New legislation can provide no more than a framework. The policies embodied in the new Child Welfare Ordinance cannot be implemented unless attention is paid to the role, staffing, co-ordination and organisation of the various agencies involved in the provision of services for children. The Commission was explicitly directed to consider this aspect of the child welfare system. The terms of reference drew attention to the need to examine the roles of welfare, education and health authorities, police, courts and corrective services in relation to children. This chapter deals with the organisation of welfare services in the A.C.T.

486. ***Machinery of Government in the A.C.T.*** The A.C.T. is a federal Territory governed directly by the Commonwealth. The department responsible is the Department of the Capital Territory. Until late in 1972 the Territory was administered by the Department of the Interior. There has been a strong movement over the years to establish a form of self-government for the A.C.T. This matter was given considerable attention during the seventies.[1] However, in 1978 the matter was put to the test in a referendum when residents of the A.C.T. were asked to decide among various options for self-government or the *status quo.* The vote was overwhelmingly for the *status quo.*[2] It may be assumed, therefore, that for some years at least the Commonwealth will continue to make and administer laws for the A.C.T. The only institution representative of the community at the political level is the A.C.T. House of Assembly.[3] This is an advisory body to which proposed Ordinances[4] may be referred by the responsible Minister for advice. Ministers, however, are under no obligation to refer Ordinances to the Assembly or to accept any advice which may be tendered. The Assembly is, in other words, an institution with certain functions but no law-making powers. Special arrangements have been created in the A.C.T. in respect of functions of government which elsewhere in the Commonwealth are the responsibility of State and local government. Many of these functions, including welfare, fall within the administrative responsibility of the Minister for the Capital Territory and his Department. Through its Welfare Branch this Department fulfils the role which, in the Australian States, would be performed by welfare departments such as the N.S.W. Department of Youth and Community Services or Victoria's Department of Community Welfare Services.

487. ***Functions of Government Administered by the D.C.T.*** Municipal functions, i.e., those which in the States are the responsibility of local government, have been grouped within a division of the Department of the Capital Territory. This division is called the City Manager's Office. The Welfare Branch forms part of the City Manager's Office. Also part of this Office are the Rates Branch (responsible for such matters as rates, consumer protection, rent control and small business advisory service), the Technical Services Branch (responsible for sanitation, garbage collection, industrial safety, building control, pollution control and a number of other areas of government), and the Recreation and Tourism Branch (responsible, for example, for the management of public parks, gardens and sportsgrounds, the provision of services for tourists and the management of recreational and cultural facilities). Within the Department of the Capital Territory other functions such as

1 Atkins, *The Government of the Australian Capital Territory,* (1978), chapters 7 and 8. See also *Self Government and Public Finance in the A.C.T.: Report from the Joint Committee on the A.C.T.,* (1975).
2 Department of the Capital Territory, *Annual Report 1978–79, 86–87.*
3 id., 89.
4 A.C.T. Ordinances are made pursuant to s.12 of the Seat of Government (Administration) Act 1910 (Cwlth). The proposed law, sponsored by the federal Minister responsible for the branches of government to which the law relates, comes into effect upon promulgation by Federal Executive Council. It takes effect immediately, but is subject to disallowance by the House of Representatives or the Senate. The procedure is by way of motion for disallowance which any member of either House may move within 15 sitting days of the Ordinance being tabled.

lands, transport and housing, and management services have their own separate divisions.[5] The Welfare Branch is headed by the Assistant Secretary, Welfare. Under normal circumstances he has no direct line of communication with the Minister or with the Secretary of the Department of the Capital Territory. The Assistant Secretary, Welfare, is subordinate to the City Manager. The importance of these arrangements in Canberra Public Service terms is that welfare as a function of government in the A.C.T. is seen to have a low status. The position of the Assistant Secretary, Welfare, contrasts, for example, with that of the N.S.W. Director of the Department of Youth and Community Services, who is directly responsible to the N.S.W. Minister for Youth and Community Services.

488. ***Statutory Bodies*** With regard to functions of government in the A.C.T. other than those under the Minister for the Capital Territory there has been a trend for the Commonwealth to create special purpose statutory authorities.[6] The Capital Territory Health Commission[7] and the A.C.T. Schools Authority[8] are examples of statutory authorities performing functions particularly relevant to this inquiry. Reliance on quasi-independent statutory bodies providing a range of services is a distinctive feature of A.C.T. government. These bodies look directly to the Commonwealth for their funding. Each is responsible only to a federal Minister for its policies and to Parliament for its expenditures. Each statutory body is funded directly by vote of the Parliament in the annual appropriation of the responsible Minister. For example, the appropriation for the Capital Territory Health Commission is part of the appropriation for the Commonwealth Department of Health. The estimates upon which appropriations are made derive from an institutional view of what services are required. The usual political process does not occur in the A.C.T. whereby, from a fixed fund or budget, a government allocates finance between various competing claimants and is directly accountable to the community for its decisions. Rather, the desires of the community are conveyed to government through an institutional filter as the various government departments and authorities convey to the Commonwealth their perception of the people's needs.

489. ***Criticisms of Statutory Bodies*** The argument for creating statutory bodies in the A.C.T. is that they enable the Commonwealth to separate its responsibilities in respect of the Territory from national responsibilities under the relevant portfolio. Authorities can be created specifically for the A.C.T. However, the trend to a form of administration based on statutory authorities has not escaped criticism. Supporters of self-government for the A.C.T. have pointed out that the creation of independent bodies financed directly from a superior level of government is not compatible with the principle that matters affecting the community should be controlled at the local level. The establishment of authorites to administer functions such as health and education can be criticised as being incompatible with the Westminister system of government. According to this view, principles of accountability require Ministers of State to take full responsibility for the actions of officials in regard to policies and expenditures. The Minister, as a member of the government, is accountable to Parliament and thereby to the electors at large for these policies and expenditures. If responsibility is vested in an authority which is independent or partially independent of government control, then officials cannot be held effectively accountable to the public for the discharge of their responsibilities. Further, the existence of a number of semi-autonomous statutory authorities answerable to different Ministers creates problems of co-ordination. While there are Ministers and Departments or authorities responsible for the administration of particular functions of government, there is no central controlling body or cabinet with the power to allocate resources between competing claimants or to make overall policy decisions. Lack of co-ordination and integration of

---

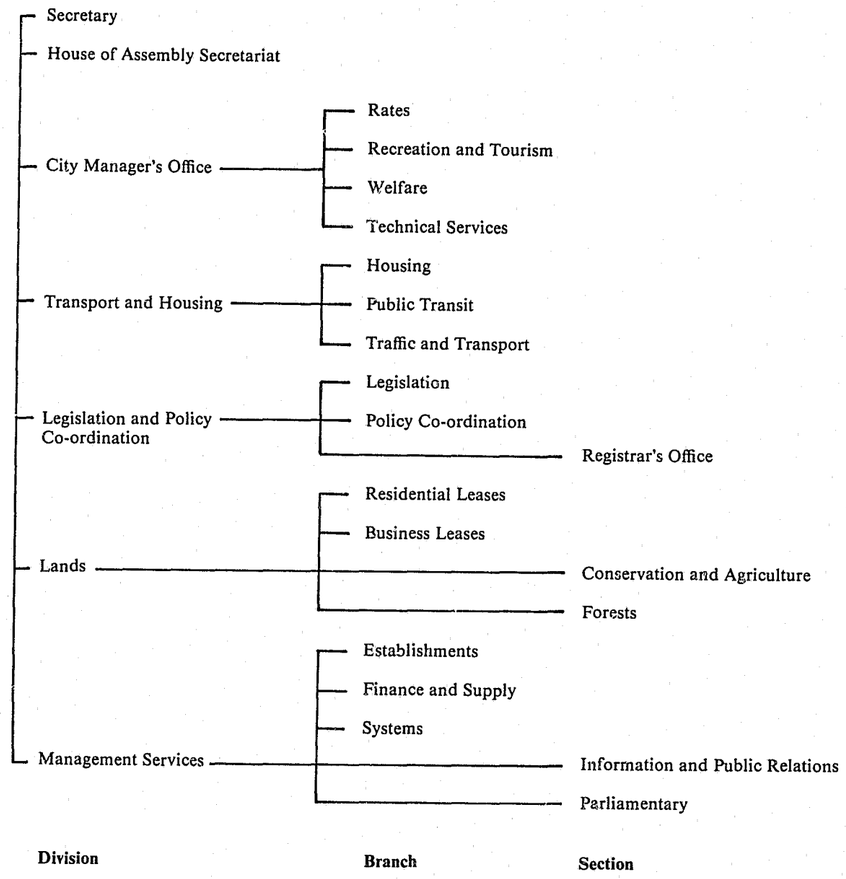
[5] See Table 14, and for further details of the administrative structure of the Department of the Capital Territory see the organisational chart contained in the Department's *Annual Report 1979– 80.*

[6] For an extended critical discussion of this trend, see Atkins, 144–150. An example of a recent proposal to create another such authority was the recommendation relating to the creation of a Tourism Commission to manage the tourist industry in the A.C.T. See Joint Committee on the A.C.T., *Tourism in the A.C.T.: Report* (1980). For a discussion of statutory bodies and the arguments for and against their creation, see Royal Commission on Australian Government Administration, *Report,* (1976), 81–86, and Senate Standing Committee on Finance and Government Operations, *Statutory Authorities of the Commonwealth, First Report,* (1978).

[7] Established under the Health Commission Ordinance 1975 (A.C.T.).

[8] Established under the Schools Authority Ordinance 1976 (A.C.T.).

Table 14: Organisational structure of the Department of the Capital Territory 30 June 1980



Source: Department of the Capital Territory, *Annual Report* 1979–80

services is particularly apparent in the health–welfare field. Determination of priorities occurs largely within the framework of a specific organisation. With regard to the creation of a range of statutory authorities in the A.C.T. it has been observed that:

> Whatever the virtues or defects of such arrangements, they make it very likely that separate groups of experts will concentrate on the claims of separate functions and agencies, and that the adjustment of competing demands will be a continuing problem.[9]

It has also been noted that:

> A.C.T. administration has been characterized increasingly by functional separatism, with ad hoc agencies responsible to different ministers, with no single co-ordinating authority and no budget process clearly allocating resources . . . [F]or Canberra's varied governmental agencies no firm answer has yet been given to the question, 'Who knocks their heads together?'[10]

Suggestions have been made for the establishment of a cabinet committee or Ministerial group with A.C.T. responsibilities to co-ordinate policy-making and funding between the various competing agencies. In an address to the Royal Australian Planning Institute in June 1979, the Chairman of the Parliamentary Joint Committee on the A.C.T., the late Senator John Knight said:

> Something the government might consider, for example, is a Cabinet Sub-Committee of Ministers with direct responsibilities in the Territory. This would include the Ministers responsible for Education, the Public Service, Social Security, as well as non-Cabinet portfolios such as the Capital Territory, Health, Construction and Administrative Services. There is also a good case for a Standing Inter-Departmental Committee along the same lines. These could co-ordinate policy formulation and decision-making on the A.C.T. and this is now basic to more effective planning for our future as a community and as a national capital.

In 1981 the Minister for the Capital Territory drew attention to the newly formed A.C.T. Joint Co-ordination Committee which, he was reported as saying, would 'improve and enhance co-ordination, liaison and co-operation within the Territory'. He was also reported as saying that ultimately the Committee might evolve into a 'more formal decision-making body'.[11]

Welfare Services in the A.C.T.

490. ***Welfare Branch: Development and Functions***[12] In the A.C.T. from 1957 to 1968 most of the services required to implement the Child Welfare Ordinance were provided by the N.S.W. Department of Child Welfare through field officers stationed in Canberra. In 1968 the Commonwealth government assumed responsibility for these tasks by extending the welfare work then being carried out by the Welfare Section of the Department of the Interior. In 1972 this Section was given Branch status. Late in 1972, under new administrative arrangements, the Department of the Interior was disbanded and functions relating to the A.C.T. placed under the administration of a new Minister, the Minister for the Capital Territory. The Welfare Branch of the Department of the Capital Territory is not a legal entity. Nowhere is it referred to in the Child Welfare Ordinance. Although the Ordinance makes provision for the appointment of a Director of Child Welfare, this position is held by the Secretary of the Department of the Capital Territory.[13] Few powers are vested in the Director of Child Welfare.[14] Most of the powers and obligations created by the Ordinance are exercisable by the Minister. Many of the child welfare services provided by the Welfare Branch have already been described in the course of this report. However, in order to indicate the scope of the Welfare Branch's responsibilities, it is necessary to list these and the other functions which the Branch undertakes. The Welfare Branch is responsible for the following:

- Services for the Childrens Court including the operation of the Quamby Children's Shelter, the preparation of background reports, the supervision of children released on probation or on a recognizance, the placement of children who are the subject of residential orders, the care of wards, and the provision of after care for children released from N.S.W. institutions.
- Arrangement of adoptions under the Adoption of Children Ordinance 1965 (A.C.T.).
- Assistance to A.C.T. schools with cases of truancy.
- Licensing of child care centres, the operation of two child care centres, and the provision of an advisory and consultancy service to organisations and individuals concerned with various forms of child care.
- The issuing of licences for the employment of children and granting approvals for children to take part in public performances.
- The making of payments towards the upkeep of children cared for by voluntary organisations and payments to needy families and individuals, and the provision of cash benefits and material benefits under a Social Welfare Benefits scheme.
- General counselling and casework with children, families and individuals with a variety of personal problems.
- The provision of court reports in respect of adult offenders, the supervision of adults on probation or parole, and the operation of the Belconnen Remand Centre.
- Administration of welfare grants under the Community Development Fund scheme.
- Provision of advice to the Department of the Capital Territory and to the Minister on welfare matters generally.

The responsibilities of the Branch are thus wide and varied, and to meet them the Branch must work closely with the police, the courts, the Capital Territory Health Commission, the A.C.T. Schools Authority, the Commonwealth Department of Social Security, and a number of non-government agencies and community groups.

491. ***Organisation of the Welfare Branch*** The Branch is made up of a number of sections:

- *Early childhood services.* Responsible for the licensing of child care centres, the operation of the Department's occasional care centres and the provision of an advisory service.
- *Agency services.* Responsible for providing departmental services under the A.C.T. Disaster Plan, research and evaluation, policy and advice and maintenance of statistics.
- *Committee services.* Responsible for servicing the A.C.T. Childrens Advisory Committee and other committees and for supervising Branch representation on committees generally.
- *Administration.* Responsible for the preparation of estimates, control of the provision or Social Welfare Benefits, staffing and other administrative matters.
- *Corrective services.* Responsible for the administration of the Belconnen Remand Centre and Quamby Children's Shelter, supervision of the preparation of pre-sentence and other court reports, liaison with the courts, and the provision of supervision under court orders.
- *Child care.* Responsible for adoption, the development of foster care and the supervision of the care of wards.
- *Child life protection unit.* Responsible for the provision of services for the Child Abuse Committee and an emergency service in cases of child abuse and neglect.

In addition, the Branch operates a number of regional offices. These were created following the adoption, in 1969, of a policy of regionalisation. Regional offices have been set up in Civic, in central Canberra, and in the Canberra suburbs of Woden and Belconnen. Staff of these offices carry the primary responsibility for field work in their areas.

492. ***Organisation of the Capital Territory Health Commission***[15] The other major government provider of personal social services in the area of child and family welfare is the Capital Territory Health Commission. The Commission is a statutory authority established pursuant to the Health Commission Ordinance 1975 (A.C.T.). The Commission is responsible to the Commonwealth Minister for Health and is funded by an annual appropriation of the Commonwealth Department of Health. The Health Commission's organisation is complex. It operates two hospitals, the Royal Canberra Hospital and the Woden Valley Hospital. Each of these has its own social work staff, made up of social workers and social work assistants (the equivalent of the Welfare Branch's welfare

---

9 Atkins, 8.
10 Atkins, 144 and 145.
11 *Canberra Times,* 10 January 1981.
12 For a description of the Branch's functions, see Welfare Branch, Department of the Capital Territory, *Annual Report 1979–80.* See also Family Services Committee, *Families and Social Services in Australia, A Report to the Minister for Social Security,* (Two Vols., 1978) (hereafter *Family Services Committee Report),* Vol. 2, Appendix S, 527–531. Note that the material contained in the latter report relates to 1975.
13 Child Welfare Ordinance 1957 (A.C.T.), s. 7(1).
14 See, for example, the powers conferred in provisions relating to the licensing of day care centres (s. 34, 35, 37–41) and to the operation of lying-in homes (s. 44 and 46). See also s. 63(1), 70(1) and 93C.
15 For a description of the Health Commission's functions, see Capital Territory Health Commission, *Annual Report 1979–80.*

officers). There is a Community Health Branch the functions of which include the operation of child health clinics and community health clinics. The former provide medical services and advice on child care, and the latter offer medical treatment and a range of community and welfare services. Social workers from the two hospitals are attached to the community health centres. In addition, community health nurses form part of the Community Health Branch. They are all trained nurses. From time to time they become involved with social workers in dealing with social problems. Services specifically for children include an infant welfare service, the medical examination of children under school age, the operation of immunisation clinics and of a centre providing therapy for handicapped children, and a child abuse committee. The Mental Health Branch has its own social workers and social health visitors (also the equivalent of Welfare Branch welfare officers). The Branch runs six regional child and family guidance clinics and its Child and Adolescent Unit is a specialised unit dealing with the more disturbed children and adolescents in the A.C.T. The cases dealt with by this unit are usually referred to it after initial assessment by other agencies such as regional mental health teams, the Welfare Branch or the A.C.T. Schools Authority. A service in relation to alcohol and drug dependence is provided. The Health Commission also makes available many services to the community which might be regarded as preventive, such as counselling by social work personnel located either in the Commission hospitals or in the community health centres. The Commission runs classes and group activities directed towards such subjects as 'parent effectiveness' training.

493. ***Other Agencies*** Reference has been made elsewhere in this report to the services provided by other government agencies, and the details need not be repeated here. In the child welfare field the most important of these agencies in the A.C.T. are the A.C.T. Schools Authority which provides counselling and other forms of special assistance[16], the Family Court of Australia counselling service[17], Legal Aid Commission (A.C.T.)[18], and the Commonwealth Department of Social Security (which has responsibility for the Family Support Program and for funding of child care).[19] Details of the work undertaken by voluntary organisations are also contained elsewhere in this report.[20] The number of non-government agencies in the A.C.T. is large and the range of services which they provide is wide.

The Problems Facing A.C.T. Welfare Services

494. ***The Welfare Branch*** Before examining the problems in the welfare system as a whole, it is necessary to identify the special difficulties faced by the Welfare Branch. The Commission has been made aware of a number of criticisms of the Branch. Given the wide range of services provided by the Branch, and the variety of professional and other groups who come into contact with it, criticism is not surprising. Social workers, police, lawyers, administrators, psychiatrists and psychologists, welfare workers, and those in voluntary agencies and community groups, have different perspectives, standards and expectations. As a result they are likely to place different interpretations on the activities of an organisation such as the Welfare Branch. It should also be pointed out that, as the Commission's inquiry extended over a two-year period, some of the difficulties to which its attention was drawn may have been overcome. The Commission has been informed that recently vigorous efforts have been made to re-organise the Welfare Branch and to improve its delivery of services. It is to be hoped that these changes will prove substantial and enduring. Nevertheless, some of the problems outlined below were long-standing. A number of them appear to be institutional and unlikely to respond to short-term measures. Any account of the Territory's welfare system would be incomplete if reference were not made to the more important matters brought to the Commission's attention.

495. ***Place of the Branch in the Structure of Government*** Reference has already been made to the fact that the status of the Branch is relatively low. The Branch is grouped with a heterogeneous range of local government services under the City Manager's Office, and its head is not assured of direct

16 See para.255.
17 See para.257.
18 See para.183 f..
19 See para.415.
20 See para.58–60, 258.

access to the Secretary of the Department of the Capital Territory. The contrast between the Branch's position and that occupied by the Capital Territory Health Commission and the A.C.T. Schools Authority is striking. These two bodies have an identity and a status which the Welfare Branch does not possess. Also, the location of health and educational services within the relevant Commonwealth departments can be seen as providing a more appropriate environment than is offered by the non-specialist Department of the Capital Territory. The significance of the Branch's lack of status was the subject of comment by a representative of the A.C.T. Branch of the Australian Social Welfare Union. The Branch was described as a very small part of a multi-purpose department. It was asserted that, within that department, the needs of the Branch were given very low priority. Reference was made to the 'poor relation' aspect of the Branch's situation.[21]

496. ***Staffing of the Branch*** The total number of Welfare Branch field staff declined over the period 1975–79. Further, from 1970 to 1975 the number of social workers (i.e., those with professional social work qualifications) exceeded the number of welfare officers (i.e., those who do not necessarily have formal qualifications). In 1973 there were more than twice as many social workers as welfare officers on the field staff. However, after 1973 the number of social workers decreased and the number of welfare officers increased. In 1976 the numbers in each category were the same, and over the next few years the number of social workers steadily declined. In 1979 there were fewer than half the number of social workers there were in 1973, and more welfare officers than social workers.[22] It is not clear whether these changes were the result of deliberate policy. It seems that recently the Branch has placed particular emphasis on the recruitment of social workers[23] and that an effort has been made to reduce the imbalance. Nevertheless, the Branch's long-standing staffing problems raise questions about its capacity to provide the services of professionally trained, experienced fieldstaff. Again the contrast between the Welfare Branch and the Capital Territory Health Commission is noteworthy. A comparison of the Health Commission's social work staff as at 31 October 1980 and the social work staff of the Welfare Branch at the same date, revealed that the Health Commission had a much larger social work staff than the Branch and that a very substantial proportion of that staff were social workers.[24] Finally, there is the problem of recruitment procedures. The Commission was informed that these are such that, when a suitable person is selected, it takes a considerable time for the Department of the Capital Territory to appoint that person. A number of those interviewed in the course of the child welfare inquiry drew unfavourable comparisons between the recruitment and appointment procedures employed by the Department of the Capital Territory and those employed by the Health Commission. It has been suggested to the Commission that some of the staffing problems encountered by the Welfare Branch are related to its standing in the community at large and among other professional workers. Comments made to the Commission by individual members of the Branch revealed feelings of frustration and dissatisfaction. Under these circumstances recruitment of trained and experienced staff is likely to be made more difficult.

497. ***Branch's Lack of Policy and Research*** Another criticism expressed to members of the Commission is that the Branch has not been able to undertake the research necessary to evaluate its own performance or that of other welfare agencies in the Territory, and that it has not been able to embark on research designed to identify social trends, the needs of the A.C.T community and the characteristics of the people using the Branch's services. Properly conducted research can identify particular needs which are not being met, for example, the need for temporary placements for children of all ages. Alternatively it can lead to a more specialised study of a particular problem. It

21 Rosemary Nairn (on behalf of the A.C.T. Branch of the Australian Social Welfare Union), Oral Submission, Public Hearing, 5 May 1980, *Transcript*, 25.
22 These figures are based on staff levels reported in the Annual Reports of the Welfare Branch for the years 1970–71 to 1978–79.
23 As at 30 June 1980 the field services staff of the Branch consisted of 17 social workers and 17 welfare officers. See Department of the Capital Territory, Welfare Branch, *Annual Report 1979–80*, 26.
24 As at 31 October 1980 the Capital Territory Health Commission employed 29 full-time social workers, 12 part-time social workers, and 16 social health visitors and social work assistants. Although it was subsequently announced that the number of Health Commission staff was to be reduced by 51 before the end of June 1981 (*Canberra Times*, 11 November 1980), the contrast between Health Commission social work resources and those available to the Welfare Branch as at 31 October was striking. At that date the Welfare Branch employed 14 full-time social workers, one part-time social worker, and 17 welfare officers.

was claimed that the Branch lacks the information on which to build general policies or to develop major initiatives in the delivery of welfare services. As a result, it has been forced simply to respond to needs as they have been presented to it. The Branch lacks the necessary resources with which to undertake a creative role with regard to welfare policies. A submission by the Department also drew attention to the responsibilities of other Commonwealth departments in the welfare field as a factor inhibiting the Welfare Branch's assumption of the planning and co-ordinating role performed by social welfare departments in some States.[25]

498. ***Illustration*** A simple example should illustrate the types of problems referred to by those critics who believe that the Welfare Branch has been unable to assume a policy-making role. Reference has already been made to the need to provide more appropriate forms of accommodation for young children who are at present dealt with as neglected or uncontrollable.[26] In the absence of Welfare Branch facilities for these children a heavy burden is placed on the voluntary organisation which runs Marymead Children's Centre. This Centre is not designed to provide for certain categories of children such as very disturbed young children. The Commission has been informed that often great difficulties are experienced in finding emergency placements for such children. Yet the Welfare Branch has not taken positive action to ensure that suitable forms of accommodation are available for these difficult young children. Consideration of the need for residential facilities for difficult young children raises certain questions which should be confronted. Should the Welfare Branch assume responsibility for the operation of an appropriate reception centre? Should the task be explicitly delegated to a voluntary organisation? If so, the duties and responsibilities of government and the voluntary organisation should be made clear. There is an obvious need for the formulation of policies regarding the placement of difficult young children.

499. ***The Welfare Role of the Capital Territory Health Commission*** Certain contrasts, particularly in staffing and status, have been noted between the Welfare Branch and the Capital Territory Health Commission. Probably the most important single feature of the welfare system in the A.C.T. is that in the last few years the Health Commission has greatly expanded its social work role. The services provided by its social work staff are not confined to the meeting of immediate needs resulting from illness. For example, in a recent annual report, the Health Commission referred to assistance provided to unemployed persons, migrants and divorcing parents with children.[27] Some of the services offered by the Commission are indistinguishable from those provided by the Welfare Branch. It is clear that the Health Commission has had the resources and the power to develop extensive social work services. It has been able to initiate and implement new policies in a way which the Welfare Branch has not. The result is that a capacity to provide welfare services has been developed by an agency with no direct statutory responsibility for their provision, while the Department of the Capital Territory (whose Minister has a number of duties and functions imposed on him by the Child Welfare Ordinance) has limited resources to fulfil its functions. It is not intended to suggest that the Capital Territory Health Commission should not perform the social work functions which it at present undertakes. The Health Commission is providing services to meet the needs of the A.C.T. community. It should not be criticised for doing so. All of the social work services which it offers can be justified on the basis that the Health Commission has broad responsibilities for community health. However, the existence of two government agencies operating independently and performing overlapping functions clearly raises questions about the organisation of welfare services in the A.C.T. The result of the expansion of the Health Commission's activities is that it has become increasingly difficult to delineate the special role of the Welfare Branch. When the work of the two agencies is compared, the general picture is one of fragmentation, overlapping of responsibilities and action, and artificial demarcation of roles. The problems are particularly evident in certain aspects of the child welfare system. In particular, overlapping and duplication of effort occur in the field of child abuse. On occasions it is not clear whether Health Commission or Welfare Branch staff are responsible for a particular case.

25 Department of the Capital Territory, *Submission,* 11.
26 Para.173.
27 Capital Territory Health Commission, *Annual Report 1978–79,* 32.

500. ***Differences Between Welfare Branch and Health Commission Roles*** Although both the Health Commission and the Welfare Branch can accurately be described as performing social work functions, it is important to appreciate that there is a significant difference between their roles. An agency such as the Welfare Branch is often referred to as performing 'residual' social work. This means that, by its very nature, the Branch must accept responsibility for matters which other agencies have been unable or unwilling to handle. For example, a child might be regularly truanting. His teachers and the school counselling service might attempt to deal with the problem. If they fail they might refer the matter to the Health Commission, so that a psychiatric assessment of the child can be made. If the problem continues it might then be passed on to the Welfare Branch. It is the Welfare Branch which must accept responsibility when other services fail. It thus fulfils a residual function. Further, the Welfare Branch differs from other welfare agencies in that it works within a potentially coercive framework. Often those with whom it deals are the unwilling recipients of the services which it offers. The Branch's association with the courts and its work with disadvantaged people marks it off from an agency such as the Capital Territory Health Commission. It is commonly believed that the populations served by the two organisations are significantly different.

501. ***The Need for Co-ordination and Rationalisation of Welfare Services***[28] The A.C.T. has a wide and varied range of welfare services. In Chapter 7 certain case-studies were presented which illustrated the way in which a number of agencies can operate in an unco-ordinated fashion. If the perspective is altered and the problems considered on the basis of the administrative arrangements described earlier in this chapter, the reasons for this lack of co-ordination become obvious. They lie in the way that welfare services have developed in the Territory and the absence of any framework within which they can be brought together and their policies rationalised and integrated. A number of different and self-contained agencies have developed independently without any stated overall plan and without any one body being in a position to make decisions on their functions and their interrelationship. The organisation of welfare services in the A.C.T has recently been the subject of public debate and much adverse criticism has been made.[29] The problems are long standing. In 1978 the Family Services Committee drew attention to the proliferation of welfare services in the A.C.T., the lack of co-ordination among them, and the difficulty of achieving this in the absence of any one controlling authority.[30] The use of the word 'proliferation' is open to criticism. The Council of Social Service of the A.C.T. has drawn attention to the Canberra community's need for a range of child care services. Diversity of services allows people to choose the most appropriate service for their children.[31] Far from criticising the 'proliferation' of welfare services in the A.C.T., the Council commented that the Territory 'is fortunate in having a wide range of child care facilities'.[32] The problem to be solved is how to harness and make the most effective use of the network of services. The Task Force on Co-ordination in Welfare and Health in 1978 made the following comments on welfare services in the A.C.T and the Northern Territory:

> The first impression is of excessive administration. Although the present populations of the Territories are small, there is a suprisingly large number of government agencies involved with program administration ... There has been no overall consideration of the most satisfactory way of arranging Territory-oriented functions, and certainly there has been no uniformity in approach (though uniformity is not necessarily desirable as between departments). It is this multiplicity of ad hoc arrangements, many no doubt the most sensible in themselves, which seems to be at the root of many of the problems described to us by those active in the field in the Territories.... We have been advised by many people that the unco-ordinated pattern of administration in each Territory, particularly with regard to social welfare programs, is a source of constant fustration, both to clients and to voluntary organisations attempting to provide services in the Territories. We are convinced ...

28 For a review of Australian proposals relating to consultation among, and co-ordination of, welfare services, see Gorman, 'Existing Consultation and Other Processes for Community Involvement in Discussion of Family Policy,' Australian Background Paper No.2, The Council of Social Welfare Ministers of Australia, New Zealand and Papua-New Guinea, *Towards an Australian Family Policy,* Conference held at Macquarie University, Sydney 8–12 May 1980.
29 See, for example, the editorial in the *Canberra Times,* 14 February 1981. This referred to the 'shambles which is the welfare scene in [the] Territory.'
30 *Family Services Committee Report,* Vol. 2, 548.
31 Letter to the Chairman of the Commission, 24 May 1979.
32 Council of Social Service of the A.C.T., *Submission,* 7.

> that services need to be better co-ordinated . . . Furthermore, the rationalisation of intra-Territory *consultative mechanisms* on health, welfare and community development issues needs to be explored.[33]

One danger of fragmentation is that, although a wide range of services may be available, no agency is able to take responsibility for all the needs of an individual or a family. 'Client overlap' (i.e., a number of agencies dealing with particular aspects of the problems of an individual or family) can occur. Speaking of this problem in the A.C.T., the Family Services Committee stated:

> It is important to note that overlap of services can be seen legitimately as the provision of consumer alternatives. It does become significant, however, where a proliferation of services exists in one service area against gaps in another. Thus, for example, a number of agencies are formulating plans in the child care field but services designed to strengthen the family and enable it to retain its unity and functions within its own environment appear to be neglected.[34]

A police submission to the Commission observed:

> . . . help groups of various kinds – such as school counsellors, child and family guidance workers and so on – exist at present, in abundance, yet they operate incoherently, seemingly without any formal relationship between themselves and other help groups.[35]

Similarly, the Health Commission commented:

> One of the main problems for workers in Welfare and Health dealing with child abuse is the similarity of their roles. Thus social workers working with parents who are or may be abusing a child may come from either department, usually depending on where the case was first picked up. When a case proceeds to court the original social worker usually continues casework to avoid duplication of services and if this happens to be a Health Worker there may be confusion as to whether Health or Welfare is responsible for the case.[36]

In its submission the Childrens Services Sub-Committee of the A.C.T. Consultative Committee on Social Welfare stated:

> Family and children's services have, in the main, developed on an ad hoc basis over the years in the A.C.T. . . . [T]here has been a proliferation of government and voluntary agencies providing services and this, together with a lack of adequate data, and effective consultation or at times a refusal to co-operate, has made co-ordination increasingly difficult.[37]

The Sub-Committee cited the following example of lack of co-ordination:

> At a recent seminar it was clear that officers of the Department of Social Security and the Capital Territory Health Commission know very little about the Voluntary Youth Community Support Scheme. At the same seminar the Chairman of the Capital Territory Health Commission suggested that the Commission will be looking at assisting family support programs. If not co-ordinated this could overlap with the pilot Family Support program currently being run by the Department of Social Security.[38]

The Sub-Committee also pointed to 'the seemingly arbitrary division of responsibilities between government Departments', and, as an illustration, noted that women's refuges are funded by the Department of Health for running costs and by the Department of Social Security for child care costs.[39] Problems caused by the fragmentation of services and the lack of co-ordination are relevant not only to the types of service provided in an individual case, but also to the system's ability to facilitate policy-making and rational planning. The absence of a central controlling authority means that no agency is in a position to compile comprehensive statistics or to assess the system as a whole. This means that there is no mechanism by which to identify gaps in existing services or the duplication of services. Nor is there any mechanism for defining and rationalising the functions performed by each of the diverse segments in the system.

---

33 Task Force on Co-ordination in Welfare and Health, *Consultative Arrangements and the Co-ordination of Social Policy Development,* (1978), (Second Report), (hereafter *Task Force on Co-ordination),* para. 248–253. (Emphasis in original).

34 *Family Services Committee Report,* Vol. 2, 550.

35 A.C.T. Police, *Submission,* 16. Another example of the fragmentation in the A.C.T. child welfare system is provided by the fact that, when a Youth Affairs Co-ordinator was appointed in 1981, he was placed in the Recreation and Tourism Branch of the Department of the Capital Territory.

36 Capital Territory Health Commission, *Submission on DP 12,* 3.

37 A.C.T. Consultative Committee on Social Welfare, Children's Services Sub-Committee, *Submission,* 3.

38 id., 5.

39 id., 4.

502. ***Problems of Integration*** Many of the issues raised by a consideration of the operation of fragmented, unco-ordinated welfare services were examined by the Victorian Council of Social Service in a report prepared for the Australian Government Commission of Inquiry into Poverty.[40] Among the problems identified were the following:

- Lack of overall view necessary for effective policy making. The report commented:

  > The large number of participants in the welfare field make concerted action and agreement on policy or objectives almost impossible to achieve. Intervention on an *ad hoc* basis by a multiplicity of welfare organisations results in alleviation of symptoms rather than the solution of social problems.[41]

- Gaps in social services. Lack of co-ordination can produce situations in which welfare organisations are more anxious to define the limits to their activities than to provide a comprehensive service. When responsibilities are divided a welfare agency may create as many problems as it solves.
- Service overlap and inefficient use of resources.
- Complex methods of financing services.[42]

The effective delivery of welfare services requires organisations to be:

- focused upon the people who need and use the services;
- adaptable to change and flexible in operation;
- accountable not only to the taxpaying public, but also to the consumer of the service;
- accessible to people needing assistance;
- clear in their stated goals and objectives in publicly providing full information about the service;
- evaluated regularly in terms of efficiency and effectiveness in achieving those stated goals; and
- designed to allow consumers to obtain information on the effectiveness and fairness of the service.[43]

Unplanned, fragmented services mean that the client is the person most likely to suffer, with each organisation providing its own incomplete and isolated form of service, and the consumer receiving a service which meets only a small part of his total needs. Fragmentation leads not only to a waste of scarce resources, but to an inefficient, incomplete service.[44] Further, the multiplicity of services can cause the client to become confused. He may not be aware of what services are available or where they are to be found, and he may not have a clear view of his rights in relation to those services.[45]

503. ***Family and Community Welfare*** In addition to identifying problems such as lack of co-ordination and planning, consideration must be given to the deeper implications of a fragmented approach. A system which relies on a series of unco-ordinated responses after the event is ill suited to the promotion of family and community welfare. Child welfare policies must be seen as part of a broader policy designed to meet the needs of the family and the community as a whole. After referring to the problem of fragmentation of services, to which it applied the term 'segmentation', the Victorian Council of Social Service Report commented:

> This segmentation is part of modern urban life and it can have serious effects on the health and well-being of the person. Welfare services should not simply reflect that segmentation, but should work actively to break it down by providing a more total approach to human need. A good example of this lies in the realm of family services. The community pays lip service to the importance of maintaining the family as a viable social unit. There are various organisations and services which use the term 'family' to describe what they are doing, yet closer scrutiny reveals that they are usually serving only one segment of family needs or indeed one part of the total family. Segmented services may not do any serious harm to the individual. However, they do represent lost opportunities to enhance the health and welfare of the total person or family.[46]

---

40 Benjamin and Morton, *A Model for Welfare Service Planning and Delivery,* (1975) (hereafter *Victorian Council of Social Service Report).*

41 id., 3.

42 id., 3–4.

43 *Victorian Council of Social Service Report,* 27–28.

44 id., 26.

45 ibid.

46 id., 26.

A submission by the Department of the Capital Territory observed:

> The view that enforceable intervention should normally occur 'after the event' remains widely accepted, but this type of crisis intervention is no longer considered to be desirable. It is now accepted that the financial and community costs of social dysfunction are too great. The trend is towards wider provision of family and community welfare programs to ensure that supports are available at times of individual or family stress and to assist in averting or at least minimising effects of breakdown.[47]

The N.S.W. Green Paper advocated a concept of welfare 'which addresses the total needs of the individual and the community as a whole'.

> Thus 'welfare' in the final analysis does not become the exclusive province of any one Department, nor can any element of 'welfare' be satisfactorily isolated within a single administration. Hence all organisations, whether Governmental or not, and community members generally, should recognise their potential contribution to the well being of individuals, groups, and the community at large, and should plan and act accordingly.
>
> It is not sufficient that there be merely a structure, the principal role of which is seen as that of a traditional residual welfare authority. There must rather emerge a structure which can effectively take responsiblity for overviewing and co-ordinating all aspects of social welfare, however provided.[48]

Speaking specifically of the situation in the A.C.T., the Family Services Committee referred to the lack of services which might serve to support the family as a unit in its own environment[49], and a report on the A.C.T. prepared for that Committee concluded that the concept of a welfare service to families did not appear to exist.[50] It is important that the contributions made by organisations such as the Welfare Branch and the Health Commission be seen in a broader context of policies designed to enhance family and community welfare. The existing fragmentation of services renders the adoption of this perspective difficult if not impossible. Further, the provision of services by specialist agencies means that each operates on the basis of a model peculiar to its own discipline. Welfare services provided by the Health Commission will, for example, be affected by a clinical or medical approach to the problem in respect of which help is provided.

Possible Changes

504. ***The Problem in Summary*** To reiterate, the major difficulties facing the welfare services in the A.C.T. are as follows:

- *Fragmentation.* The services are fragmented and unco-ordinated. A comment made in a Victorian report is equally applicable to the situation in the A.C.T.:

  > [I]n their pre-occupation with building up more efficient and more extensive services, our governments and their bureaucracies have failed to resolve problems such as scale, growth, fragmentation of effort and overlap with other bureaucracies. Each has been allowed to develop as if the others did not exist so that specialisation has been at the expense of integration.[51]

- *Two major agencies.* In particular, the services provided by the two major government agencies, the Welfare Branch and the Capital Territory Health Commission, are unco-ordinated. The Health Commission's welfare role has expanded without consideration being given to an overall welfare policy in the Territory. Indeed, given the structure of government in the A.C.T., no agency has been in a position to formulate the necessary policies or to implement them.
- *Lack of accountability.* The structure within which the various government agencies operate does not allow for direct accountability to the community which they serve. Nor does it permit ready responsiveness to community needs.
- *Welfare Branch difficulties.* The Welfare Branch has experienced particular difficulties. These relate to:
  - the Branch's place in the structure of government: it lacks appropriate status, identity and autonomy,
  - staffing, and
  - lack of clearly formulated policies and absence of research.

47 Department of the Capital Territory, *Submission*, 10.
48 *Green Paper*, 7.
49 *Family Services Committee Report*, Vol. 2, 548.
50 id., 550.
51 *Victorian Council of Social Service Report*, 24.

The remainder of this chapter is devoted to a consideration of possible administrative changes which could be made to overcome these difficulties.

505. ***An Integrated Government Agency?*** In practical terms the creation of an integrated government agency would require the establishment of a new authority which would combine the roles at present played by the Welfare Branch and the Capital Territory Health Commission. The main arguments in favour of the establishment of an amalgamated Health–Welfare Commission are as follows:

- *Integrated approach.* The establishment of a generic service would foster an integrated approach to human and social problems, and put an end to artificial distinctions which the existing system makes between health and welfare needs. In so doing it would help to end the overlap between the present health and welfare systems and would facilitate the co-ordination of services. If there was 'one door on which to knock' the system would be more efficient and less confusing for the client.
- *More appropriate setting.* Amalgamation would make the Welfare Branch part of an organisation which is explicitly geared to the provision of human services. Such an organisation contrasts with the administrative structure within which the Branch operates at present.
- *Economy.* Amalgamation would permit the more efficient and economic use of resources.
- *Rationalisation.* The rationalisation of service delivery which the creation of an amalgamated agency would foster would have particular benefits in the field of child abuse. This is an area in which responsibility is artificially divided between the Welfare Branch and the Health Commission. Amalgamation would also be advantageous for those children who come to Welfare Branch notice and who require psychiatric assistance. If the two agencies were integrated, access to child guidance and mental health services would be facilitated.
- *An appropriate model for the A.C.T.* If it is accepted that the Territory's welfare agency needs greater identity, autonomy and status, but that, in view of the A.C.T.'s small population, these goals should not be pursued by way of the creation of a completely independent welfare organisation, then a Health–Welfare Commission is an attractive model. Within such a Commission the welfare component would be able to achieve identity and status and yet an existing framework would be employed. There would be no need to create a new and independent agency solely for the purpose of providing welfare services.

The chief arguments against a Health–Welfare Commission are as follows:

- *Incompatibility.* Notwithstanding the attractions of an integrated agency, it can be argued that the establishment of a Health–Welfare Commission in the A.C.T. would be impracticable. It might not produce an integrated approach to health and welfare problems in the Territory. The differences in outlook between those accustomed to working with a medical model and those trained in the social welfare field might persist. The yoking together of health and welfare workers might be viewed as more likely to produce an uneasy cohabitation than a successful marriage.
- *Organisational difficulties.* The organisation of the Health Commission social work services is not such as would readily lend itself to the creation of a genuinely integrated social work agency within a Health–Welfare Commission. The Health Commission's social workers and social health visitors are attached to distinct units within the Commission. For example, Woden Valley Hospital has its own social workers, as does the Mental Health Branch. Any attempt to put an end to existing divisions and specialisations would be likely to be resisted. In particular, the distinction at present made between court-related social work and other forms of social work is likely to persist.
- *Unequal partnership.* The Health Commission's structure is already complex, and it would become more so if the successor to the Welfare Branch were grafted on to it. The task of creating a Health–Welfare Commission which would produce a genuinely equal partnership would be difficult. Equality would have to be achieved not only in the staffing structure but also in the appointment of Commissioners.
- *Different clientele.* Although the Welfare Branch and the Health Commission provide similar types of social work services and there is some client overlap, in general, the populations with

whom they deal are not identical. In general terms it can be said that Health Commission social work staff are accustomed to working with persons who voluntarily accept counselling and assistance. On the other hand, members of the Welfare Branch, by reason of their links with the court, frequently work within a coercive framework.

- *Welfare disadvantaged.* In the competition for staff and resources it is possible that a welfare agency would be at a greater disadvantage than the present Welfare Branch if this agency were made part of a large and powerful medical administration.

Further, it must not be overlooked that, in order to achieve genuinely integrated welfare services in the A.C.T., more would be required than an amalgamation of the functions at present performed by the Welfare Branch and the Capital Territory Health Commission. Although this would remove a number of the most unsatisfactory features of the existing system, it would be necessary to invest a new Health—Welfare Commission with a co-ordinating function. Ideally such a Commission would not only work with other government departments (such as the Commonwealth Departments of the Capital Territory, Social Security and Education), but would also co-ordinate their activities and the activities of the numerous voluntary agencies. In short then, it can be said that the creation of a Health—Welfare Commission might offer advantages, but such a proposal would raise complex problems of government and public administration which would require careful examination. This Commission has neither the resources nor the expertise to undertake a detailed consideration of these problems.

506. ***Upgrading of the Welfare Branch*** If the creation of a Health—Welfare Commission is thought to be undesirable or not a realistic possibility in the near future, then it is clear that any successor to the Branch must continue to perform the functions at present undertaken by the Branch and that it must continue to co-exist with a large and powerful Health Commission which performs a substantial amount of welfare work. This being the case, it is vital that the Welfare Branch be upgraded. The serious problems resulting from its lack of status must be solved. Three courses suggest themselves:

- upgrading the Branch to a Division within the Department of the Capital Territory;
- creation of an independent welfare agency; or
- upgrading and transfer to another department.

507. ***A Welfare Division of the Department of the Capital Territory*** In summary the arguments in favour of the creation of a Welfare Division to replace the Welfare Branch are:

- *Minimal change.* Minimal administrative change would be required. A Welfare Division would readily fit into the existing structure of the Department of the Capital Terrritory.
- *Increased status.* A Division would have greater visibility, autonomy and status than a Branch. It would operate at the same level as those sections of the Department of the Capital Territory which are responsible for other major areas of the Territory's government. The provision of welfare services would no longer be one of a heterogeneous range of responsibilities undertaken by the City Manager's Office.
- *Direct access to Secretary.* Direct access by the head of a Welfare Division to the Secretary for the Department of the Capital Territory would be facilitated.

Summarised, the arguments against this course of action are:

- *Partial solution.* Although the creation of a Division would bring some increase in autonomy and status, the result would be, at best, only a partial solution to the Branch's problems. It is doubtful whether a Welfare Division would have a clearer identity than a Welfare Branch.
- *Lower status than Health Commission.* A Welfare Division would not have the same status as the Capital Territory Health Commission or the A.C.T. Schools Authority.
- *Position of Director.* The officer in charge of a Welfare Division would be in a far less satisfactory position than the permanent head of the equivalent State Department, since the latter has direct access to the relevant Minister.

508. ***An Independent Welfare Agency*** An independent welfare agency would be a statutory body and could take the form, for example, of a Welfare Commission, Authority or Bureau. Earlier in this chapter there is a discussion of statutory bodies.[52] In addition to the general comments there, a

[52] See para.488—489.

number of further points can be made. The main advantages of creating an independent welfare agency for the A.C.T. would be:

- *Identity.* It would be identifiable and have autonomy and status.
- *Independence.* It would be independent from some departmental procedures and controls and thus be able to channel advice and separate evaluation of policies to the Minister. It would be well placed to respond quickly to community needs in accordance with its own policies developed to meet the peculiarities of the A.C.T. community. It would be able to develop its own styles and methods.
- *Status.* It would have status and prestige similar to those of other bodies in the A.C.T. with whom it has to relate. This is particularly important with regard to the Capital Territory Health Commission and the A.C.T. Schools Authority.
- *Accountability.* It would be accountable to the public as well as to the Minister partly because of its increased visibility in the community arising from its being more identifiable, but it could also have a non-departmental governing body which would provide skills and insights from outside departmental structures.
- *Control of appointments.* It would relieve the Minister and the department of responsibility for day-to-day administration including, for example,
  - appointment of professional staff, and
  - financial administration.

  Control over its own staff appointments would enable an independent welfare agency to meet the criticisms of Welfare Branch appointment policies outlined above.[53]

The chief disadvantages of creating an independent welfare agency would be:

- *Extra expense.* Additional financial, staff and other resources would be required to enable it to function effectively. There would thus be an increase in public expenditure.
- *Overlap.* There may emerge considerable overlap both in services provided by, and supporting administrative resources allocated to, an independent welfare agency and the Capital Territory Health Commission. It is possible that two agencies of similar status would confuse the client public.
- *Yet another authority.* The creation of yet another statutory authority would add to the problems of fragmentation in the welfare services unless this new authority absorbed all Capital Territory Health Commission functions relevant to child welfare.
- *Inflexibility.* An independent welfare agency could well become more and more inflexible as it discovered and asserted its independence.[54]
- *Not justified by population.* The population of the A.C.T. is comparatively small, and hence the creation of a completely independent agency analagous to a State community welfare department might not be justified.

509. ***Transfer to Another Department*** Whether a Welfare Division or a completely independent agency is created, consideration must be given to the possibility of transferring responsibility for the provision of the Territory's welfare services to another Commonwealth Department. The argument for the retention of this responsibility within the Department of the Capital Territory is that this department has the specific task of serving the Canberra community and, by reason of its knowledge of, and long experience in dealing with, that community, is the department best placed to administer the Territory's welfare services. While the Department of the Capital Territory is well attuned to the needs of the A.C.T. community, the local concerns of the Territory would either 'get lost' in the mass of broader responsibilities which another Commonwealth Department (such as Health or Social Security) must exercise, or attempts would be made to meet A.C.T. needs within rigid guidelines and procedures unsuited to local conditions.

[53] Para.496.

[54] See the comment by the Royal Commission on Australian Government Administration: 'For all the variety of form among statutory bodies and the relative flexibility of their structures to meet given objectives, their legislative basis sometimes causes them and others to regard their objectives as unchanging, and makes the adjustment of their functions to meet evolving circumstances relatively difficult', 82.

Recommendations

510. ***The Need for Further Review*** In the long term the only completely satisfactory solution to the problems facing the A.C.T. welfare services lies in a rationalisation of government welfare services, particularly those at present provided by the Welfare Branch and the Capital Territory Health Commission. The integration of the services offered by these two agencies is a necessary first step towards the creation of a welfare system based on comprehensive policies directed towards the most effective utilisation and co-ordination of the work of the diverse agencies operating in the Territory. Only if there is created a single government agency, bringing to an end the ambiguities inherent in the existing division of responsiblities between the Capital Territory Health Commission and the Welfare Branch, will it be possible to create a government instrumentality which is clearly identified as being responsible for the planning and integration of health and welfare services in the A.C.T. It is on the foundation provided by such an agency that a rationalisation of welfare services in the Territory must be built. The planning of welfare services raises difficult and complex questions, some of which have already been outlined.[55] Examination of these issues is beyond the available expertise and resources of the Commission. A public inquiry into A.C.T. welfare services should be set up[56] and the terms of reference of this inquiry should include:

- a comprehensive review of welfare services in the A.C.T. with a view to putting forward proposals for an integrated community welfare system in the A.C.T.;
- in particular, an examination of the roles of the Capital Territory Health Commission and the Welfare Branch with a view to formulating proposals on the structure and functions of an integrated health—welfare authority with responsibility for policy-making, delivery of welfare and health services and co-ordination of the work of other welfare agencies (both government and non-government) in the Territory; and
- a thorough review of the operation of the Welfare Branch; the Branch's performance of its functions should be assessed and consideration should be given to all the matters relating to the Branch which have been identified in this chapter.

The organisation and delivery of welfare services in Australia has recently been the subject of a number of Commonwealth inquiries.[57] There exits a substantial body of Australian information relevant to the review recommended by the Commission. With regard to the task of designing an integrated community welfare system, attention has already been drawn to the need to see child welfare policies as part of a broader policy designed to meet the needs of the family and the community as a whole.[58] The legal framework for an integrated community welfare system in the A.C.T. should be provided by community or social welfare legislation of the kind which already exists in States such as Victoria[59], Western Australia[60] and South Australia.[61] The Family Services Committee explained the nature of the statutes in the two last-named States:

> [I]n some States, notably South Australia and Western Australia, there has been a development in recent years towards a more 'community'-oriented approach to service delivery. The Western Australian Community Welfare Act, which came into effect on 1 July 1972, gives the Department for Community Welfare a broad mandate to enable the development of additional services, not solely in the field of child welfare. Thus whilst the Department in the main continues to be particularly oriented to the care of the child there is scope for developing other 'community welfare' services. . . .
> Also in 1972, in South Australia, what had been known as the Department of Social Welfare and of Aboriginal Affairs became the Department for Community Welfare under the Community Welfare Act, 1972. Broadly speaking this was a move towards a total concern for the welfare of the whole community. This included the development of services at the local level, the increase of staff available to use facilities and the increased involvement of local communities through Community Welfare Consultative Councils and as voluntary community aides.[62]

In N.S.W. the Community Welfare Bill 1981 has been tabled, and in Queensland a new family welfare statute has been proposed.[63] The Department of the Capital Territory has drawn attention to legislation of this kind.[64] It also referred to some of the difficulties which would be involved in developing such legislation:

> [T]here are practical constraints inhibiting the development of community welfare legislation in the A.C.T. . . . Certainly present stringencies do not encourage departmental recommendation of legislation requiring new departmental initiatives at a time when additional resources are not available.
>
> There are other more general factors which may inhibit such a recommendation. In the A.C.T. there is a strong awareness of community welfare needs, and a number of Departments provide services to meet these needs. Ideally, a community welfare ordinance would draw together a wide range of health, welfare, educational and recreational provisions. At present this could be unrealistic. However, in view of the overlapping and interrelation of responsibilities that occur in the A.C.T. this proposal should be given serious consideration.[65]

The submission also noted that, though the Welfare Branch has adopted 'a family oriented approach to child welfare', lack of resources and the responsibilities of other Commonwealth departments for service provision in the A.C.T. have tended to limit the Branch's range of services.[66] As with the problems posed by a health—welfare authority, the issues to be considered in the design of a community welfare system for the A.C.T. are beyond the scope of the Commission. Nevertheless, this matter should be further examined, with a view to introducing a Family or Community Welfare Ordinance in the A.C.T. On no account, however, should a consideration of the broader issues of community welfare in the A.C.T. or the setting up of the proposed inquiry into welfare services be allowed to delay urgently needed reforms in the Territory's child welfare system.

511. ***Immediate Solutions*** The nature of government in the A.C.T. and the way that the Territory's welfare services have developed would inevitably mean that the recommended review of these services and the creation of an integrated government welfare agency would be a slow and complex process. The Commission has therefore proceeded on the basis that, though the establishment of a central government welfare agency is a desirable long-term goal, the structure of the welfare system in the A.C.T. is likely to remain substantially unchanged for some time. Accordingly attention has been focused on making recommendations designed to overcome the more immediate problems which its inquiries have revealed. New structures and arrangements are proposed to harness and to make more effective the existing services.

512. ***The Welfare Branch*** The Welfare Branch should be upgraded to a Division of the Department of the Capital Territory. Of the three possibilities outlined above[67] it is this which seems the most realistic. The arguments against the creation of yet another independent authority in the Territory seem overwhelming, in view of the fact that some of the difficulties now faced in the A.C.T. welfare system stem from the growth of autonomous authorities. The arguments for a transfer to another Commonwealth department are not compelling. The Department of the Capital Territory is specifically concerned with the Territory's needs and, in default of a radical re-organisation of welfare services in the A.C.T., is the department best placed to administer the Territory's welfare services.

---

55 See para.501—503.

56 A similar recommendation was made by the Task Force on Co-ordination: '[W]e recommend that at an early date a review, in which the non-government organisations should be involved, be made of the situation and needs of the Territories in relation to health, welfare and community development.' (para. 256). Early in 1981 the House of Assembly was reported as having resolved that a 'broadly based inquiry' be instituted into welfare services in the A.C.T. *(Canberra Times,* 11 February 1981). The Minister for the Capital Territory has indicated that he is carefully considering this resolution.

57 In addition to the reports to which reference has already been made *(Family Services Committee Report, Task Force on Co-ordination,* and *Victorian Council of Social Service Report),* mention can also be made of the Australian Government Commission of Inquiry into Poverty, *Poverty in Australia,* (1975), and *Law and Poverty in Australia,* (1975), and the Report from the Senate Standing Committee on Social Welfare, *Through a Glass, Darkly, Evaluation in Australian Health and Welfare Services,* (1979).

58 See para.4, n.21.

59 Community Welfare Services Act 1978 (Vic.).

60 Community Welfare Act 1972 (W.A.).

61 Community Welfare Act 1972 (S.A.).

62 *Family Services Committee Report,* Vol. 1, 124.

63 Minister for Welfare, *Proposed Family Welfare Legislation: Discussion Paper,* (1979).

64 Department of the Capital Territory, *Submission,* 12 and 13.

65 id., 12. In discussing the possibility of a new Family Welfare Ordinance the Submission noted that 'legislation with this title might impinge too greatly on the functions of other authorities such as the Capital Territory Health Commission'. (13).

66 id., 11.

67 Para.506.

The agency responsible for these services must, however, be given greater status. A separate Division, the Welfare Division, should be created immediately. If the officer responsible for welfare services were a divisional head, this would facilitate his access to the Secretary for the Capital Territory. His position should be further enhanced by giving it legislative recognition. The new Child Welfare Ordinance should make provision for the appointment of a Director of Welfare. The position of Director of Child Welfare (at present held by the Secretary for the Department of the Capital Territory) should be abolished and the powers and duties conferred by the present Child Welfare Ordinance on the Director of Child Welfare and on the Minister for the Capital Territory should be conferred on the Director of Welfare. Under the present Ordinance, the powers conferred on the Director of Child Welfare and on the Minister are delegated to the Assistant Secretary, Welfare. The changes proposed would not only enhance the status and importance of the Director of Welfare, but would also result in the legal powers being given to the person who in practice exercises them. It is, however, important to emphasise that a simple administrative change cannot be expected to solve all the problems facing the Welfare Branch. The danger with changes of this kind is that they can prove to be cosmetic only. The creation of a new administrative structure must be combined with changes which will enable the new Welfare Division to deliver welfare services more effectively. The making of more fundamental changes must await the outcome of the inquiry recommended earlier in this chapter.[68]

513. ***The Youth Advocate*** It will be recalled that the Youth Advocate will have a number of roles. In relation to offenders he will, at the dispositional stage, advise and assist the Childrens Court.[69] He will have a similar role in care proceedings and will, in addition, be responsible for the initiation of these proceedings.[70] It is the last-mentioned function which is particularly relevant to the problems discussed in this chapter. In individual cases involving children in need of care he will provide a single, clearly identified official who will have the power and responsibility to take resolute action when this is needed. He will thus stand at the centre of the range of fragmented welfare services. In situations when a case is being dealt with by a number of agencies and it is not clear which agency has the primary responsibility for the case, he will be able to make the decision on the initiation of care proceedings. Thus the Youth Advocate proposal is offered as a partial solution to the problems posed by the fragmentation and lack of co-ordination noted in the A.C.T. welfare services. In particular, he will be able to act in situations in which responsiblity for a case of child abuse or neglect is presently divided among a number of agencies. Although the creation of a central government welfare agency seen to be responsible for welfare services in the A.C.T. would do much to solve the problems stemming from lack of co-ordination, it would not obviate the need for the Youth Advocate. As has been explained[71], the Commission sees considerable merit in transferring responsibility for the initiation of care proceedings to an official independent of all service-delivery agencies. Further, no matter what re-organisation of the A.C.T. welfare services occurs, the Youth Advocate should retain the roles of advising the Childrens Court on disposition and monitoring the implementation of dispositional orders.

514. ***The Standing Committee of the Childrens Services Council*** As it seems likely that a number of independent welfare agencies will continue to operate in the Territory, no one person or agency will be in a position to ensure that efforts in a particular case will be co-ordinated. In default of a single controlling authority, the Standing Committee of the Childrens Services Council has been put forward as a means by which those involved in handling a particular case can be brought together to discuss the roles played by the agencies which they represent. The Committee would have no authority to compel an agency to provide a particular service or to transfer a case to another agency. The only course open to a member of the Standing Committee who is dissatisfied with the handling of a particular case would be to refer it to the Childrens Services Council, where the policy implications can be discussed. If, for example, two agencies are performing a similar role with regard to a particular family, discussion at Council level might clarify the problem. Or if the problem stems from staff shortages being experienced by a particular agency, the Council will be able to publicise the matter and bring pressure to bear to secure further staff for the agency.

[68] See para.510.
[69] See para.163f.
[70] See para.313f.
[71] See para.313f.

515. ***Funding*** The subject of funding of welfare services in the A.C.T. has attracted a considerable amount of attention in the Territory and has generated a substantial amount of controversy.[72] As has been explained earlier in this report[73], the Welfare Branch underwrites the cost of care of children informally placed in homes run by voluntary agencies. It also makes payments towards the upkeep of children placed in such homes pursuant to orders of the Childrens Court. The Child Welfare Ordinance makes specific provision for the Minister of the Capital Territory to make payments in respect of the accommodation of wards.[74] The Ordinance also provides for the Minister to reimburse Dr Barnardo's or Marymead Children's Centre in respect of the costs of the care and upkeep of children placed with either of these organisations.[75] In the course of its inquiry, the Commission heard a substantial amount of criticism of existing funding arrangements. From the point of view of some voluntary agencies these arrangements are unsatisfactory. When, with the approval or at the request of the Welfare Branch, a voluntary agency provides care for a child, it receives a certain sum in respect of that child. Under the existing system it is extremely difficult for voluntary agencies to plan ahead or to develop their own programs. Unless these programs are of a kind which the Branch is authorised to fund, an agency has no guarantee that it will receive the necessary funding. Further, problems can arise when children voluntarily seek admission to a non-government home. Although the Branch does underwrite the cost of care of such children, the agency cannot be sure that, in a particular case, it will do so. If an agency independently accepts a child there may be some uncertainty as to whether it will be reimbursed in respect of that child. It is most important to avoid a situation in which it is felt that a matter must be taken before a court in order to secure an authorisation of the expenditure of government funds for the child's maintenance. Also the existing arrangements can create pressure on a voluntary agency to accept children referred by the Welfare Branch rather than those in other categories. The present system places the Branch in a very powerful position. If it chooses to place children with an agency, funds follow and the agency has an assured income. If the Branch does not choose to place children with it, the agency might suffer financially. The income which a voluntary agency receives can vary significantly according to the number of Welfare Branch children which it has in its care. A further objection to the present arrangements is that they can operate in such a way as to make those running children's homes reluctant to discharge children from their care. As a Canadian report has noted, under such a system child care agencies get money for every day a child remains in care. They lose funds the moment a child is discharged from their care.[76] The making of detailed recommendations regarding the financing of welfare services in the A.C.T. is beyond the expertise of the Commission. With the exception of one provision relating to the financing of arrangements made under child care agreements[77], the proposed Child Welfare Ordinance does not deal with financial matters. Clearly, however, it is necessary for the new Ordinance to deal with this important subject. It is a matter on which the Department of the Capital Territory, in consultation with the relevant voluntary organisations, will be able to formulate proposals which can be incorporated into the new Ordinance. What is needed is a much more flexible system which will permit the Welfare Division to enter into a variety of arrangements with voluntary agencies[78] and which will permit these agencies to develop their own programs without the constraints which accompany a system of per capita funding. The Childrens Services Council should give specific consideration to the subject of the funding of welfare services in the A.C.T. Two further matters require attention. Earlier in this report it has been recommended

[72] See, for example, a report of a meeting of the House of Assembly at which it was recommended that there be an urgent review of departmental procedures for the allocation of welfare and community grants. *Canberra Times*, 1 November 1980. See also editorial, *Canberra Times*, 14 February 1981.
[73] Para.271.
[74] Child Welfare Ordinance 1957 (A.C.T.), s.21(2).
[75] id., s.27A – s.27C. These provisions apply to 'approved organisations'. For the purposes of these provisions Dr Barnardo's and the Trustees of the Franciscan Missionaries of Mary are 'approved organisations'. Note that the rate of reimbursement is, in s.27B, the same as that payable under s.18(1)(c) of the Ordinance. This has been rendered meaningless by the fact that s.18(1)(c) has been repealed.
[76] *Admittance Restricted*, 89.
[77] See para.286.
[78] The Department of the Capital Territory drew attention to the need for flexible arrangements to permit the Department to purchase services from non-government organisations. *Submissions*, 24.

that the Childrens Court have the power to make specific residential placements.[79] If this is to be a realistic possibility, it must be clear that, when such a placement is made, the necessary financial arrangements will be made to permit the person or agency named in the court's order to accept the care of the child. Provision should also be made for the Childrens Court to order that a person responsible for a child should contribute to his upkeep while he is in a residential placement. Cases have been brought to the Commission's notice in which children of relatively affluent parents have been admitted to homes run by voluntary organisations. The Child Welfare Ordinance contains no general provision empowering the Childrens Court to order that a person responsible for a child should contribute to his maintenance while that child is in a residential placement.[80] The new Ordinance should embody such a provision.

516. ***Childrens Services Council*** The proposals relating to the Youth Advocate and the Standing Committee are designed to provide solutions to problems arising in the course of the day-to-day handling of individual cases. The Childrens Service Council, in contrast, is intended as a policy-making body whose primary purpose would be to harness existing services and to make them into a co-ordinated, integrated system. The Commission's recommendations on this body are thus directly relevant to the organisational and administrative issues which have been the subject of this chapter. The Council should assume an important role in the development of welfare policies in the Territory. Under the Child Welfare Ordinance, provision is made for the establishment of a Child Welfare Committee[81], but, though this committee did function at one time, it has not met for some years. The relevant provisions of the Ordinance are unsatisfactory in that they merely empower the Minister to establish the Committee, confer no powers on it, and fail to give a clear indication of its functions. Although this Committee no longer meets, there are two child welfare committees at present meeting in the Territory. First, there is the A.C.T. Children's Advisory Committee, established by the Minister for the Capital Territory in 1980. Its membership consists of representatives of voluntary agencies, the Childrens Services Sub-Committee, the House of Assembly, the Australian Federal Police, the A.C.T. Schools Authority, the Office of Child Care of the Commonwealth Department of Social Security, the Capital Territory Health Commission, and the Welfare Branch of the Department of the Capital Territory. The second committee is the A.C.T. Consulative Committee on Social Welfare Sub-Committee on Childrens Services. This committee is concerned mainly with child care facilities and consists of persons with a special interest in child care and family welfare programs. It advises the Office of Child Care of the Commonwealth Department of Social Security. The proposed Childrens Services Council would differ from these two committees in important respects. It would not be merely advisory and would have powers and functions which are clearly defined in the new Child Welfare Ordinance. It would be required to meet regularly. It is recommended that, when the Childrens Services Council is established, the A.C.T. Children's Advisory Committee and the Sub-Committee on Children's Services be abolished.

517. ***Functions of the Council*** The functions of the Childrens Services Council should include:[82]

- the review of existing services and the identification of overlaps and deficiencies;
- the making of recommendations for the improvement of current practices and for the provision of new services;
- the better co-ordination of existing services;
- the investigation of matters referred to it by a member of the Council or by the Minister for the Capital Territory;
- the formulation of welfare policies and objectives;
- the monitoring of current welfare policies and programs and the commissioning of research into the causes, extent and treatment of youth problems in the A.C.T.;
- examination of the funding of voluntary organisations;

79 Para.225.
80 But see the limited power conferred by the Child Welfare Ordinance 1957 (A.C.T.), s.27C.
81 Child Welfare Ordinance 1957 (A.C.T.), s.8–10.
82 This list of suggested functions owes something to the recommendations put forward in the *Norgard Report* with regard to the proposed Victorian Family Welfare Council (33–34). See also the Community Welfare Services Act 1978 (Vic.), s.12 regarding the structure and functions of the Child Development and Family Services Council.

- the initiation and organisation of meetings or seminars, and the issuing of information or discussion papers; and
- the presentation of an annual report to the Minister for the Capital Territory, to be tabled in the Parliament and the A.C.T. House of Assembly.

Most of these functions do not require comment or explanation, since the above list has been formulated to overcome the problems identified in this chapter. However, mention must be made of the Council's responsibility for the preparation of an annual report. In addition to analysing and publicising problems in the planning and delivery of welfare services, the report should contain detailed statistics on to the operation of the child welfare system in the A.C.T. One of the results of fragmentation in the system is fragmented record keeping. No agency is in a position to compile comprehensive statistics since no agency has access to all the relevant data. The Childrens Services Council should be well placed to compile comprehensive statistics. The types of statistics which it should compile have already been discussed.[83] The precise form and content of the statistics should be decided by the Council, since its members will be well qualified to determine the type of information which they require in order to assess the operation of the system and to formulate proposals for change. Voluntary organisations, for example, should be required to furnish information on the children cared for, the nature of the difficulties which brought them to notice, the type of service provided, and, in the case of agencies providing residential care, the children's length of stay. Secretarial and clerical support for the Council should be provided by the proposed Welfare Division. The present Welfare Branch already provides such services for its inter-agency Child Abuse Committee.[84]

518. ***Membership of the Council*** The Council should be made up of the following *ex officio* members:

- the Childrens Magistrate;
- the Youth Advocate;
- the Director of Welfare;
- a representative of the Capital Territory Health Commission;
- a representative of the Australian Federal Police;
- a court counsellor attached to the Family Court of Australia in the A.C.T.;
- a representative of the A.C.T. Schools Authority;
- a representative of the Office of Child Care of the Commonwealth Department of Social Security; and
- a member of the House of Assembly.

In addition, the Minister for the Capital Territory should be empowered to appoint representatives of voluntary organisations, including those responsible for the care of mentally ill and handicapped children and children of migrants, and those who provide residential and child care facilities and general welfare and counselling services. Adequate representation of voluntary organisations is particularly important in view of the substantial contribution which these organisations make to the provision of services in the A.C.T. With regard to these groups, the Childrens Services Council should consider problems relating to co-ordination, the definition of their respective roles, and funding arrangements.[85] The presence of a member of the House of Assembly is designed, within the limits imposed by the structure of government in the Territory, to bring to the welfare system a degree of accountability to the community which it serves. The objective of the Council would be to bring together the various elements in the A.C.T. welfare system. Only if this is done will it be possible to move towards an integrated and properly planned range of services. In moving towards this goal, the aim must be to preserve the healthy diversity which at present characterises the Territory's services. Wherever possible clients should not be deprived of the opportunity to choose

83 Para.16.
84 See para.377.
85 The Commission is aware of the existence of the Community Development Fund and of the system for determining the making of grants under that fund. Obviously duplication of effort should be avoided, but it is considered that the Childrens Services Council could play a useful role by examining the child welfare implications of funding policies.

between statutory and voluntary agencies. This aim can be achieved, and the existing range of choice retained, only within the framework of a Council which is genuinely representative of the numerous welfare agencies. There would, of course, be no reason why the Council should not form subcommittees (for example, on child care) to deal with specific aspects of the system. Finally, although the function of the Childrens Services Council is to bring together the various elements in the A.C.T. welfare network, it should be noted that co-operation and co-ordination cannot be arbitrarily imposed. The Commission agrees with the emphasis which the Council of Social Service in the A.C.T. placed on agencies' voluntary participation in procedures designed to achieve co-ordination. Ultimately the welfare system must rely on the various agencies' commitment to the provision of effective and responsive services.[86]

519. ***Cost*** The Commission has elsewhere laid stress on the need for close attention to be paid to the cost of implementing law reform proposals.[87] In formulating its proposals for the reform of child welfare laws in the A.C.T., the Commission has given careful consideration to the cost of the proposed reforms and to the need to ensure that any increases in personnel are kept to a minimum. Although some of the proposals in this report involve the creation of new bodies, their establishment should result in little or no extra cost to the Commonwealth. Most of the proposed members of the Childrens Services Council and the Standing Committee of that Council are already serving members of the Commonwealth. So far as new positions are concerned, there are two which must be mentioned. These are the Childrens Magistrate and the Youth Advocate. It is contemplated that the Youth Advocate will have an assistant and a staff of no more than two. It is the Commission's view that the advantages to be derived from the appointment of the Childrens Magistrate and the Youth Advocate would amply justify the modest expenditure involved in the implementation of the recommendations contained in this report.

---

[86] Council of Social Service of the A.C.T., *Submission,* 10.
[87] ALRC 16 (1980), para.129.

Appendix A

DRAFT LEGISLATION

Note on Draft Legislation

Relationship with Commonwealth Laws

1. ***Inconsistent Commonwealth Laws*** The Commission has prepared draft legislation to give effect to its report. The present child welfare law of the A.C.T. is the Child Welfare Ordinance 1957, but it should be completely replaced by another Ordinance. There is, however, a problem in that the new Ordinance, to be fully effective, must override or have effect notwithstanding several Commonwealth Acts, including the Crimes Act 1914 and the Family Law Act 1975. The provisions proposed for dealing with young offenders convicted in the Territory of offences against Commonwealth laws are entirely different from the penalties provided by those laws. Sub-section 20C(1) of the Crimes Act 1914 provides that a 'child or young person' who, in a Territory, is charged with or convicted of an offence against a law of the Commonwealth (as distinct from a law of the Territory) *may* be dealt with as if the offence were an offence against a law of the Territory. Apart from anything else, the uncertainties of this section, which does not define 'child or young person', should not be allowed to continue and section 4 of the draft Ordinance provides that sub-section 20C(1) of the Crimes Act 1914 is not to have effect with respect to a child who, in the Territory, is charged with or convicted of an offence against a law of the Commonwealth.

2. ***A Commonwealth Act Necessary*** An Ordinance under the Seat of Government (Administration) Act 1910 cannot have effect in so far as it is inconsistent with, or affects the operation of, an Act. The Commission therefore proposes that the new Child Welfare Ordinance should not come into operation until Parliament has passed an Act providing that the Ordinance is to have effect notwithstanding anything in an Act. A similar provision may be required for any Ordinance that amends the new Child Welfare Ordinance.

3. ***Possible Inconsistent Proceedings*** It has been suggested to the Commission that legislation will be needed to ensure collaboration between the Family Court and the Childrens Court where there are proceedings in each court affecting the child, e.g. custody proceedings in the Family Court and care proceedings in the Childrens Court. Insofar as a problem does or might exist, the Commission is not convinced that legislation is the appropriate solution, but if it is, the proper legislation would not be an Ordinance of the A.C.T. but an amendment to the Family Law Act 1975.

Court of Petty Sessions Ordinance 1930

4. This Appendix also contains an Ordinance to amend the Court of Petty Sessions Ordinance 1930 so as to increase the number of Stipendiary Magistrates by one, thus allowing for the appointment of the recommended Childrens Magistrate.

Extra-territoriality

5. The Australian Capital Territory and the Jervis Bay Territory are comparatively small areas surrounded by or adjacent to the State of New South Wales. It is by no means unlikely that a child whose home is in New South Wales will be found, for example, in the A.C.T. and to be in need of care. Converse circumstances are also possible. The power of the Commonwealth Parliament under s.122 of the Constitution to make laws for the government of a Territory authorises laws having effect outside the Territory in those cases where there is some adequate connection with the Territory, as for example, where a child whose home is outside the Territory is found in the Territory in need of care. The test is whether the law is 'for the government of the Territory', not whether it operates extra-territorially.[1]

6. The Child Welfare Ordinance attached to the report, therefore, is made to have effect, in appropriate and relevant circumstances, outside the Australian Capital Territory and the Jervis Bay Territory. The Commission is aware that there may be a difficulty, in some cases, in enforcing the provisions of the Ordinance that have extra-territorial effect.

---

[1] *The Trustees, Executors and Agency Company Ltd* v. *Commissioner of Taxation* (1933) 49 CLR 220; *Ffrost* v. *Stevenson* (1937) 58 CLR 528; *Lamshed* v. *Lake* (1957) 99 CLR 132; *Spratt* v. *Hermes* (1965) 114 CLR 226.

Transitional Provisions

7. It is obvious that elaborate transitional provisions will be needed because of the repeal of the present Ordinance. The Commission is unable to determine what form these transitional provisions should take, chiefly because it does not know the date when the new Ordinance will come into force, what proceedings or other matters will be pending at that date and what stage they will have reached. Nevertheless, the Commission has set out certain limited transitional provisions in sub-sections 3(3), (4), (5) and (6). The Commission has also set out in sub-sections 3(7) and (8) a provision adapted from s.300 of the Bankruptcy Act 1966, which was designed to operate in somewhat similar circumstances. The Commission believes it to have been a useful provision and is prepared to accept its constitutional validity. *Re Marc*[2] and *re McDonald*[3] give some idea of the problems that can arise when comprehensive legislation is repealed and replaced.

---

[2] (1968) 12 FLR 48
[3] (1969) 14 FLR 262

AUSTRALIAN CAPITAL TERRITORY

CHILD WELFARE ORDINANCE 1981

TABLE OF PROVISIONS

Clause

Preceding page blank

AUSTRALIAN CAPITAL TERRITORY

CHILD WELFARE ORDINANCE 1981

An Ordinance relating to the welfare of children

PART I – PRELIMINARY

Short title

1. This Ordinance may be cited as the *Child Welfare Ordinance* 1981.

Commencement

2. (1) This Ordinance shall come into operation on a date fixed by the Minister by notice published in the *Gazette.*

(2) The notice shall not be published until an Act is in force providing that this Ordinance is to have effect notwithstanding anything in any other Act.

Repeal and savings

3. (1) The Ordinances specified in the Schedule are repealed.

(2) Sub-section (1) does not have the effect of reviving an enactment specified in sub-section 3(1) of the *Child Welfare Ordinance* 1957.

(3) A proceeding instituted before the commencement of this Ordinance under the Ordinances repealed by sub-section (1), or a proceeding instituted before the commencement of this Ordinance in relation to which the Ordinances so repealed would have had effect, may, subject to sub-section (5), be continued and dealt with as if those Ordinances had not been repealed.

(4) The provisions of sub-section (3) are in addition to the provisions of section 38 of the *Interpretation Ordinance* 1967.

(5) In any proceedings continued as provided by sub-section (3), the Court may make such orders in the proceedings or in relation to the child as it would have been empowered to make if the like proceedings had been instituted under this Ordinance.

(6) Where, immediately before the commencement of this Ordinance, a child was, by virtue of the repealed Ordinances, a ward, there shall be deemed to have been made, on the day on which this Ordinance commences, an order under paragraph 87(1)(e) that the child be made a ward of the Director.

(7) Where, by reason of the operation of the preceding provisions of this section, a difficulty arises in the application to a particular matter of the provisions of this Ordinance or of the repealed Ordinances, the Court may, on the application of an interested person, make such order as it thinks proper to resolve the difficulty.

(8) An order so made has effect notwithstanding anything contained in this Ordinance or in the repealed Ordinances.

Modification of Crimes Act

4. This Ordinance applies to a child within the meaning of this Ordinance who, in the Territory, is charged with, found guilty or convicted of an offence against a law of the Commonwealth to the exclusion of sub-section 20C(1) of the *Crimes Act* 1914.

Modification of Coroners Ordinance

5. Sub-sections 33(3), (4), (5), (6) and (7) of the *Coroners Ordinance* 1956 do not apply to or in relation to a person who, at the time of the offence, had not attained the age of 18 years.

Interpretation

6. (1) In this Ordinance, unless the contrary intention appears –

"action" includes a suit or an original proceeding between parties but does not include a criminal proceeding;

"adopting parent" means –

(a) a person who has adopted another person by an order of adoption under the *Adoption of Children Ordinance* 1965 or by a deed of adoption and where –

(i) such an order has been made in favour of a husband and wife on their joint application; or

(ii) a husband and wife have, by deed, jointly adopted a child,

includes both the husband and wife; or

(b) a person whose adoption of another person has effect under Part V of that Ordinance;

"Agreement" means the Agreement a copy of which is set out in the First Schedule to the *Child Welfare Agreement Ordinance* 1941;

"approved home" means a home approved by the Director for the purposes of this Ordinance;

"attendance centre" means an attendance centre established by the Minister under section 147;

"child" means a person who has not attained the age of 18 years;

"Childrens Magistrate" means the Stipendiary Magistrate for the time being designated under Part III as the Childrens Magistrate;

"childrens welfare" means the welfare of children in the Territory;

"Council" means the Childrens Services Council constituted by Part II;

"Court" means the Court of Petty Sessions;

"Court of Petty Sessions Ordinance" means the *Court of Petty Sessions Ordinance* 1930;

"custody", in relation to a child, means the physical control of the child;

"dentist" means a person registered as a dentist under the *Dentists Registration Ordinance* 1931;

"Department" means the Department of the Capital Territory;

"Director" means the Director of Welfare holding office under Part II;

"Health Commission" means the Capital Territory Health Commission;

"institution" means an institution established by the Minister under section 147;

"lawyer" means –

(a) a person who has been admitted as a barrister or solicitor, or as both, in a State or Territory;

(b) a person employed by a person who is referred to in paragraph (a) to give legal advice; or

(c) a person who is a member of, or is a person included in a prescribed class of persons employed by, a prescribed body, being a body that provides legal assistance to members of the public or to a class of members of the public;

"medical practitioner" means a person registered as a medical practitioner under the *Medical Practitioners Registration Ordinance* 1930;

"offence" includes an offence against a law of the Commonwealth;

"officer" means a person appointed by the Minister or by the Director to be an officer for the purposes of this Ordinance;

"parent", in relation to a child, includes a step-parent, adopting parent or guardian of the child and also includes a person who is by law liable to maintain the child;

"place of safety" means a police station, a hospital or a place the occupier of which is prepared to receive and care for a child temporarily;

"police officer" means a member of the Australian Federal Police;

"remand centre" has the same meaning as in the *Remand Centres Ordinance* 1976;

"repealed Ordinances" means the Ordinances repealed by this Ordinance;

"school" includes any place of education or training;

"shelter" means a shelter established by the Minister under section 147;

"Standing Committee" means the Standing Committee of the Council;

"State institution" has the same meaning as in the Agreement;

"Stipendiary Magistrate", "Chief Magistrate" and "Special Magistrate" have the same respective meanings as in the Court of Petty Sessions Ordinance;

"Supplemental Agreement" means the Supplemental Agreement a copy of which is set out in the Second Schedule to the *Child Welfare Agreement Ordinance* 1941;

"the school-leaving age" has the meaning given to it by the *Education Ordinance* 1937;

"the Territory" means the Australian Capital Territory and includes the Jervis Bay Territory;

"ward" means a child who is a ward of the Director by reason of an order or declaration made under this Ordinance and includes a child who becomes a ward of the Director by reason of the operation of sub-section 3(6).

(2) A reference in this Ordinance to the parents of a child or to 1 of the parents of a child is, where the child has only 1 parent, a reference to that parent.

(3) A reference in this Ordinance to the person in charge of a hospital includes a reference to a medical practitioner having authority to act on behalf of the person so in charge.

(4) A reference in this Ordinance to the person in charge of an approved home includes a reference to a person having authority to act on behalf of the person so in charge.

(5) A provision of this Ordinance referring to a shelter shall, in relation to the Jervis Bay Territory, be read as including a reference to a place of safety.

Matters to be considered concerning children

7. (1) In any proceedings in a court having jurisdiction in or in relation to the Territory, whether the proceedings are under this Ordinance or under some other law, being proceedings against or concerning or affecting a child, the court, shall, in the exercise of its jurisdiction or powers, seek to procure for the child such care, protection, control or guidance as will best lead to the proper development of the personality of the child and to his becoming a responsible and useful member of the community.

(2) In the exercise of a power, whether under this Ordinance or under some other law, by a body, authority or person, being a power the exercise of which affects or concerns a child, the body, authority or person shall seek to procure for the child the matters referred to in sub-section (1).

(3) For the purpose of sub-sections (1) and (2), the court, body, authority or person shall have regard to such matters as seem to it or him to be appropriate and, in particular, to such of the following as are appropriate:

(a) the need to strengthen and preserve the relationship between the child and his parents and other members of his family;
(b) the desirability of leaving the child in his own home;
(c) the desirability of allowing the education, training or lawful employment of the child to be continued without interruption or disturbance;
(d) the desirability of ensuring that the child is aware that he must bear responsibility for anything that he does that is contrary to law; and
(e) the need to protect the community or a particular person from the violent or other unlawful acts of the child.

(4) This section does not apply to proceedings under the *Family Law Act* 1975.

Courts to see that child understands proceedings

8. (1) In any proceedings in a court having jurisdiction in or in relation to the Territory, being proceedings to which a child is a party, and whether the proceedings are under this Ordinance or under some other law, the court shall endeavour to ensure that the child and any other parties present at the hearing understand the nature and purpose of the proceedings and of any order that the court proposes to make or has made.

(2) This section does not apply to proceedings under the *Family Law Act* 1975.

PART II – ADMINISTRATION

Director of Welfare

9. (1) For the purposes of this Ordinance there shall be a Director of Welfare, who shall be appointed by the Minister.

(2) A person shall not be so appointed unless he is a person appointed or employed under the *Public Service Act* 1922 or is otherwise in the service of the Commonwealth.

Director to provide assistance

10. (1) For the purpose of assisting the parents of children, and others, to discharge their duties and responsibilities to children adequately, it is the duty of the Director to do such things as he may properly do, or is required by law to do, for the purpose of promoting the physical, mental, moral, spiritual and social development of children in a normal and healthy manner.

(2) Without limiting the generality of sub-section (1), the Director may –

(a) make advice and guidance available to the parents of children and to others concerned with childrens welfare; and
(b) arrange for the provision of financial or other assistance to –
  (i) the parents of children, and others, for or in connection with childrens welfare and, as required, the welfare of particular children;
  (ii) organizations whose objects include the promotion of childrens welfare; and
  (iii) any person for the purpose of lessening the need to bring children before a court.

Youth Advocate

11. (1) For the purposes of this Ordinance there shall be a Youth Advocate, who shall be appointed by the Governor-General.

(2) A person shall not be so appointed unless he is a person appointed or employed under the *Public Service Act* 1922 or is otherwise in the service of the Commonwealth.

(3) The functions of the Youth Advocate are –

(a) the functions conferred on him by this Ordinance or by any other law; and
(b) such other functions, if any, relating to childrens welfare as are specified in the instrument of his appointment.

Acting appointments

12. (1) The Minister shall appoint a person to act as Director or Youth Advocate –

(a) during a vacancy in the office of Director or Youth Advocate, respectively, whether or not an appointment has been previously made to the office; or
(b) during any period, or during all periods, when the Director or Youth Advocate, respectively, is absent from duty or from the Territory or is, for any other reason, unable to perform the functions of his office, but a person appointed to act during a vacancy shall not continue so to act for more than 12 months.

(2) An appointment of a person under sub-section (1) may be expressed to have effect only in circumstances specified in the instrument of appointment.

(3) Where a person is acting as Director or Youth Advocate in accordance with paragraph (1)(b) and the office of Director or Youth Advocate, respectively, becomes vacant while that person is so acting, then, subject to sub-section (2), that person may continue so to act until the Minister otherwise directs, the vacancy is filled or a period of 12 months from the date on which the vacancy occurred expires, whichever first happens.

(4) The appointment of a person to act as Director or Youth Advocate ceases to have effect if he resigns from the appointment by writing signed by him and delivered to the Minister.

(5) While a person is acting as Director or Youth Advocate, he has and may exercise all the powers, and shall perform all the functions, of the Director or Youth Advocate, respectively, under this Ordinance or under any other law.

(6) The validity of anything done by a person purporting to act under the preceeding provisions of this section shall not be called into question on the ground that the occasion for his appointment had not arisen, that there is a defect or irregularity in or in connection with his appointment, that the appointment had ceased to have effect or that the occasion for him to act had not arisen or had ceased.

(7) This section does not affect the operation of section 8 of the *Interpretation Ordinance* 1967.

Advice and assistance by Director and Youth Advocate

13. The Director and the Youth Advocate shall give to the Council and to the Standing Committee such advice or assistance as the Council or Standing Committee reasonably requests.

Childrens Services Council

14. (1) For the purposes of this Ordinance there is constituted a body to be known as the Childrens Services Council.

(2) The Council consists of —

(a) the Director;
(b) the Childrens Magistrate;
(c) the Youth Advocate;
(d) a person appointed by the Health Commission;
(e) a police officer appointed by the Commissioner of Police holding office under the *Australian Federal Police Act* 1979;
(f) a member of the Australian Capital Territory House of Assembly elected by that Assembly;
(g) a court counsellor within the meaning of the *Family Law Act* 1975 appointed by the Principal Director of Court Counselling referred to in section 37 of that Act;
(h) a person appointed by the Australian Capital Territory Schools Authority; and
(i) such other persons as the Minister appoints.

(3) The persons referred to in paragraph (2)(i) shall be persons concerned with, or persons associated with bodies, authorities or agencies concerned with, childrens welfare.

(4) The Director shall be the Chairman of the Council and shall preside at all meetings at which he is present.

(5) Meetings of the Council shall be summoned by the Chairman or, in his absence, by the Youth Advocate.

(6) Meetings of the Council shall be so summoned that a period of not more than 3 months elapses between a meeting of the Council and the next meeting.

(7) If the Chairman is unable to attend a meeting of the Council, the members present shall elect one of their number to preside at that meeting.

(8) Five members of the Council form a quorum.

(9) Questions arising at a meeting of the Council shall be decided by the votes of a majority of the members present and voting.

(10) If the voting is equal, the Chairman or other person presiding has a casting vote.

(11) If a member of the Council other than the Chairman or the Youth Advocate is unable to attend a meeting of the Council, a person nominated for the purpose by the member may attend in his place and shall, in respect of that meeting, be regarded as a member of the Council, may vote and shall be taken into account in determining a quorum.

(12) The proceedings and decisions of the Council are not affected by reason of any failure to comply with a provision of this section.

Functions of Council

15. The functions of the Council are —

(a) to consider matters related to childrens welfare referred to it by the Minister;
(b) to consider any other matter related to childrens welfare;
(c) to make recommendations or suggestions concerning childrens welfare to the appropriate Minister, Department, body, authority or agency;
(d) to make recommendations to the Minister with respect to the granting of money, or the furnishing of other assistance, to a body, authority or agency concerned with childrens welfare;
(e) to inform itself concerning matters related to childrens welfare;
(f) to arrange meetings for the discussion of matters related to childrens welfare;
(g) to prepare and issue papers related to childrens welfare; and
(h) to arrange for the preparation of statistics with respect to any matter dealt with under this Ordinance or otherwise with respect to childrens welfare.

Annual reports

16. (1) The Youth Advocate shall, as soon as practicable after each 30 June, furnish to the Council a report as to the exercise of his powers and the performance of his duties and functions during the previous 12 months.

(2) The Council shall, as soon as practicable after each 30 June but not later than each 30 September, furnish to the Minister a report as to the operation of this Ordinance, and as to childrens welfare in the Territory, during the previous 12 months.

(3) The Minister shall cause a copy of each report furnished under sub-section (2) to be laid before each House of the Parliament within 15 sitting days of that House after its receipt by the Minister and shall also cause a copy of each such report to be laid before the Australian Capital Territory House of Assembly.

Standing Committee of Council

17. (1) For the purposes of this Ordinance, there is to be a Standing Committee of the Council consisting of the members of the Council referred to in paragraphs 14(2)(a), (c), (d) and (e).

(2) The Youth Advocate may invite other persons to attend a meeting of the Standing Committee but a person so invited is not entitled to vote.

(3) The Youth Advocate shall be the Chairman of the Standing Committee.

(4) If the Youth Advocate is unable to attend a meeting of the Standing Committee, the members present shall elect a person to preside at that meeting.

(5) Three members of the Standing Committee form a quorum.

(6) The Youth Advocate may and shall, if a member of the Standing Committee so requests, summon a meeting of the Standing Committee.

(7) Questions arising at a meeting of the Standing Committee shall be decided by the votes of a majority of the members present and voting.

(8) If the voting is equal, the person presiding has a casting vote.

(9) If a member of the Council appointed under paragraph 14(2)(d) or (e) is unable to attend a meeting of the Standing Committee, the person appointing him may appoint another person to attend that meeting and the person so appointed may attend and vote and shall be taken into account in determining a quorum.

Functions of Standing Committee

18. The functions of the Standing Committee are to make proposals, recommendations or suggestions as to the welfare of a particular child, including a recommendation or suggestion to the Youth Advocate whether he should, or should not, make an application to the Court for a declaration that the child is in need of care.

Provision of facilities and staff

19. The Permanent Head of the Department –

(a) shall provide such assistance or facilities as are reasonably necessary for the performance of the functions or the exercise of the powers of the Director, the Youth Advocate, the Council or the Standing Committee; and

(b) shall make available to the Director, the Youth Advocate, the Council or the Standing Committee the services of such officers of the Department, or of persons employed in the Department, as are reasonably necessary to assist the Director, the Youth Advocate, the Council or the Standing Committee in the performance of his or its functions or the exercise of his or its powers.

Assistance by Departments, &c.

20. (1) A Department of State of the Commonwealth or an authority or agency of the Commonwealth or of the Territory established by law shall, so far as it is within its capacity to do so –

(a) assist in giving effect to an order of a court with respect to a child;

(b) make available to the Director or the Youth Advocate such information, advice, guidance, assistance, documents, facilities or services as are reasonably necessary or desirable in connection with childrens welfare, or as to the welfare of a particular child; and

(c) furnish to the Council or to the Standing Committee such information, advice, assistance or documents with respect to childrens welfare, or as to the welfare of a particular child, as the Council or the Standing Committee reasonably requests.

(2) Nothing in any law prevents the disclosure of any information or the furnishing of information or any document as required by or under sub-section (1).

Delegation

21. (1) The Director may, either generally or in relation to a particular matter or to the matters included in a class of matters, by writing under his hand, delegate all or any of his powers or functions under this Ordinance or the regulations, except this power of delegation, to an officer of the Department or to a person employed in the Department.

(2) A power so delegated may be exercised or a function so delegated may be performed by the delegate in accordance with the instrument of delegation.

(3) A delegation under this section is revocable at will and does not prevent the exercise of a power or the performance of a function by the Director.

(4) A delegation under this section ceases to have effect if the person to whom the delegation was given ceases to be an officer of the Department or a person employed in the Department.

(5) This section does not extend to a power or function of the Director as a member of the Council or of the Standing Committee.

PART III – THE CHILDRENS COURT

Childrens Magistrate

22. (1) The Governor-General may, by instrument in writing, designate a Stipendiary Magistrate as the Childrens Magistrate.

(2) Unless sooner revoked, the designation has effect for a period of 5 years or until the person sooner ceases to hold office as a Stipendiary Magistrate.

(3) Upon the expiration of the period in respect of which a Stipendiary Magistrate is designated as the Childrens Magistrate, he may, if he is still a Stipendiary Magistrate, be again designated as the Childrens Magistrate.

(4) The Governor-General shall not designate a Stipendiary Magistrate as the Childrens Magistrate unless the Governor-General is satisfied that the person, by reason of training, experience and personal qualifications, is a suitable person to deal with matters concerning children.

Where Childrens Magistrate not available

23. If, for any reason, the Childrens Magistrate is not available, or if no person is for the time being designated as the Childrens Magistrate –

(a) a notification required by this Ordinance to be given to the Childrens Magistrate may be given to the Chief Magistrate, to a Stipendiary Magistrate or to a Special Magistrate; and

(b) anything required or authorised by this Ordinance to be done by the Childrens Magistrate may be done by the Chief Magistrate, by a Stipendiary Magistrate or by a Special Magistrate.

The Childrens Court

24. (1) The jurisdiction of the Court –

(a) when hearing and determining, whether under the Court of Petty Sessions Ordinance or otherwise, an information or complaint against a child;

(b) at the preliminary examination in respect of an indictable offence alleged to have been committed by a child; or

(c) when hearing and determining an application or other proceeding under this Ordinance with respect to a child,

shall be exercised, subject to section 28, by the Childrens Magistrate.

(2) The Court (however constituted) shall, in respect of the exercise of jurisdiction referred to in sub-section (1), be known as the Childrens Court.

Determination of jurisdiction by reference to age

25. For the purpose of determining the application of sub-section 24(1) with respect to proceedings concerning a person (not being proceedings in relation to which section 28 applies), regard shall be had to the age of the person at the time of the commencement of the proceedings.

Procedure of Childrens Court

26. (1) The Court of Petty Sessions Ordinance and the rules and regulations in force under that Ordinance apply, subject to this Ordinance and to the regulations under this Ordinance and to any other relevant Ordinance or regulations, to and in relation to the Court in the exercise of its jurisdiction referred to in sub-section 24(1).

(2) The power of the Attorney-General under the Court of Petty Sessions Ordinance to make regulations extends to the making of regulations, not inconsistent with this Ordinance, providing for the modification of any provision of the Court of Petty Sessions Ordinance or of any rule or regulation under that Ordinance in its application to or in relation to the Court or to or in relation to proceedings before the Court in connection with the exercise of its jurisdiction referred to in sub-section 24(1).

(3) In sub-section (2), "modification" includes the omission or addition of a provision and the substitution of a provision for another provision.

PART IV – CHILD OFFENDERS

Division I – General

Saving of other laws

27. Except as otherwise expressly provided by this Ordinance, this Part does not affect the operation of the common law or of any other law.

Determination of criminal jurisdiction by reference to age

28. (1) For the purpose of determining whether an information or complaint alleging an offence by a person should be heard or determined by the Childrens Court, regard shall be had to the age of the person at the time of the alleged offence.

(2) If, at the time of the first hearing of an information or complaint, the person charged has attained the age of 18 years and 6 months, sub-section 24(1) does not apply with respect to the first and any subsequent hearing of the information or complaint.

(3) A reference in this Part, other than in sections 46 to 52 (inclusive), to a child includes a reference to a person who has attained the age of 18 years but had not attained that age at the time of the offence or alleged offence.

Proceedings where child jointly charged with adult

29. (1) Where a child and a person who is not a child are jointly charged with an offence, sub-section 24(1) applies to and in relation to proceedings against the child arising out of that charge as though the child had been charged separately.

(2) Sub-section 24(1) does not apply in relation to the preliminary examination in respect of an indictable offence alleged to have been committed jointly by a child and a person who is not a child if the Chief Magistrate, having regard to the nature of the alleged offence and the time and expense involved in carrying out the preliminary examinations separately, so directs.

Transfer of proceedings

30. If it appears to a court when hearing an information or complaint against a child that the circumstances are such that the child should be dealt with under Part V, the court may direct that a copy of the papers, together with any report that the court thinks fit to make, be furnished to the Youth Advocate.

Age of criminal responsibility

31. (1) A child who has not attained the age of 8 years is incapable of committing in the Territory an offence against a law in force in the Territory.

(2) There is a rebuttable presumption that a child who has attained the age of 8 years but has not attained the age of 14 years is incapable of committing in the Territory an offence against a law in force in the Territory by reason that the child did not have the capacity to know that the act or omission concerned was wrong.

Power to apprehend under-age children

32. (1) Where a police officer has reasonable grounds to believe that a person is a child who has not attained the age of 8 years and has done or is doing an act which, but for sub-section 31(1), would constitute an offence, the police officer may apprehend the child, and for that purpose may use such force as is reasonably necessary.

(2) For the purpose of exercising the power conferred upon him by sub-section (1), the police officer may enter upon any private or other property and may enter any building.

(3) Upon apprehending a child under sub-section (1), the police officer shall –

(a) take the child to one of his parents; or

(b) if it is not practicable to do so, place the child with a suitable person who is prepared to care for him and notify the Youth Advocate that he has done so.

Division II — Criminal Proceedings against Children

Interpretation

33. (1) In this Division, unless the contrary intention appears —

"authorised officer" means —

(a) the Commissioner of Police or a Deputy Commissioner of Police holding office under the *Australian Federal Police Act* 1979 or a police officer authorised by either of those officers to act under this Division; or

(b) a person, not being a police officer, authorised by the Minister to act under this Division;

"to interview" includes to ask questions;

"police officer", in addition to having the meaning given to that expression by sub-section 6(1), includes a person holding office under an Act, under an Ordinance or under regulations under an Act or Ordinance and having power by virtue of an Act, Ordinance or regulations to arrest or detain a person or to take a person into his custody;

"serious offence" means an offence punishable by imprisonment for a period exceeding 6 months.

(2) For the purposes of this Division, a child is under restraint if he is under restraint —

(a) as a result of his having been lawfully arrested or detained; or

(b) in respect of an offence and a police officer believes on reasonable grounds that —

(i) the child has committed the offence; or

(ii) he would be authorised under a law in force in the Territory to arrest the child for the offence.

(3) If a child is in the company of a police officer for a purpose connected with the investigation of an offence or a possible offence and the police officer would not allow the child to leave if he wished to do so, whether or not the police officer has reasonable grounds for believing that the child has committed an offence and whether or not the child is in lawful custody in respect of the offence, the child is, for the purposes of this Division, under restraint.

(4) For the purposes of this Division, a child is not under restraint if he is in the company of a police officer by the roadside, whether or not he is in a motor vehicle, for a purpose connected with the investigation of an offence, not being a serious offence, arising out of the use of a motor vehicle.

(5) For the purposes of this Division, a child is in the company of a police officer for a purpose connected with the investigation of an offence if the child is waiting at a place at the request of a police officer for such a purpose.

(6) For the purposes of this Division, a reference to a child who has committed an offence includes a reference to a child who has committed an offence with another person or other persons.

Children not to be interviewed in certain circumstances

34. (1) Where a police officer —

(a) suspects that a child may have committed a serious offence or an offence against the person or property;

(b) believes, on reasonable grounds, that a child may be implicated in the commission of such an offence; or

(c) is holding a child under restraint,

the police officer shall not interview the child in respect of an offence or cause the child to do anything in connection with an offence —

(d) unless a person who is not a child or a police officer but is —

(i) a parent of the child;

(ii) a relative or friend of the child acceptable to the child; or

(iii) a lawyer acting for the child or some other appropriate person acceptable to the child,

is present while the police officer interviews the child or the child does the act, as the case may be; or

(e) unless —

(i) the police officer has taken reasonable steps to secure the presence of a person referred to in paragraph (d);

(ii) it was not practicable for such a person to be present within 2 hours after he was requested to be present; and

(iii) another person (who may be a police officer) who has not been concerned in the investigation of the offence is present during the interview or while the act is done, as the case may be.

(2) Sub-section (1) does not require a police officer —

(a) to permit a person whom the police officer believes to be an accomplice of the child in respect of the offence to be present while the child is being interviewed, or is doing anything, in connection with the investigation of the offence; or

(b) to take steps to procure the presence of a person referred to in paragraph (1)(d) whom he believes to be an accomplice of the child in respect of the offence.

(3) The references in sub-section (2) to an accomplice include references to a person whom the police officer believes, on reasonable grounds, to be likely to lose, destroy or fabricate evidence relating to the offence.

Limitations in respect of arrest of children

35. (1) A police officer shall not, except in pursuance of a warrant, arrest a child for an offence unless he believes on reasonable grounds that —

(a) the child has committed, or is committing, the offence;

(b) the arrest is necessary or appropriate for 1 or more of the following purposes:

(i) ensuring the appearance of the child before a court of competent jurisdiction in respect of the offence;

(ii) preventing a continuance of, or a repetition of, the offence;

(iii) preventing the loss or destruction of evidence relating to the offence; and

(c) proceedings by summons would not effectively achieve a purpose specified in paragraph (b).

(2) Nothing in this section affects the operation of the *Service and Execution of Process Act* 1901, the *Extradition (Commonwealth Countries) Act* 1966 or the *Extradition (Foreign States) Act* 1966.

Notification of arrest, &c.

36. Where a police officer places a child under restraint, he shall forthwith —

(a) take all reasonable steps to cause a parent of the child to be notified, whether the parent resides in the Territory or not; and

(b) if he is not an authorised officer, notify an authorised officer.

Certain arrests not unlawful

37. Where a police officer who arrested a child in respect of an offence otherwise than in pursuance of a warrant had the belief referred to in sub-section 35(1), the arrest is not unlawful by reason only that an authorised officer did not consent to a prosecution or it subsequently appears, or it is found by a court or a jury, that the child did not commit the offence.

Limitations in respect of criminal proceedings against children

38. (1) A police officer shall not institute a prosecution against a child for an offence unless an authorised officer has consented in writing to the institution of the prosecution and the consent has not been revoked.

(2) Sub-section (1) does not affect any requirement under some other law to obtain consent to a prosecution.

(3) For the purpose of determining whether he should consent to the prosecution of a child, an authorised officer shall have regard to such matters as seem to him to be relevant and, in particular, to each of the following:

(a) the seriousness of the offence;

(b) the evidence available as to the commission of the offence;

(c) the circumstances in which the offence is alleged to have been committed;

(d) whether the child has previously been found guilty or convicted of an offence, whether against a law in force in the Territory or elsewhere, and the seriousness or otherwise of that offence;

(e) the age of the child;

(f) the apparent maturity of the child;

(g) the apparent mental capacity of the child;

(h) whether the parents of the child appear able and prepared to exercise effective discipline and control over the child;

(i) whether it would be sufficient to warn the child, at a police station, at home or otherwise, against the commission of the same or similar offences;

(j) the prevalence of the same or similar offences;

(k) whether the prosecution would be likely to be harmful to the child, or to be inappropriate, having regard to the personality of the child, the circumstances of living of the child or any other circumstances that the authorised officer considers should be taken into account.

(4) The authorised officer shall not consent to the prosecution unless he is satisfied, after having considered the matters referred to in sub-section (3), that a prosecution is justified.

(5) If an authorised officer consents to the prosecution of a child who he knows or believes has not previously been convicted of an offence, whether against a law in force in the Territory or elsewhere, he shall record in writing his reasons for giving consent.

(6) Where a child is under restraint, an authorised officer shall, as soon as practicable and in any case within 48 hours after the child was placed under restraint, decide whether he will consent to a prosecution of the child and, if he does not so consent, the child shall forthwith be released.

Procedure by summons

39. (1) A police officer shall not charge a child at a police station with an offence unless he is satisfied that proceedings by summons would not be effective.

(2) For that purpose, the police officer shall have regard to the matters mentioned in sub-paragraphs 35(1)(b)(i), (ii) and (iii).

Parent to be informed of charge against child

40. Where a child is charged at a police station with an offence, the person who so charged him shall forthwith take all reasonable steps to cause a parent of the child to be notified of the charge and of the time and place when the child will be brought before the Court, whether the parent resides in the Territory or not.

Identifying material

41. (1) In this section, "identifying material", in relation to a child, means prints of the hands, fingers, feet or toes of the child, recordings of the voice of the child, photographs of the child, samples of the handwriting of the child or material from the body of the child.

(2) An authorised officer or a police officer for the time being in charge of a police station may take, or cause to be taken, identifying material of a child if —

(a) the child, being a child who appears to the authorised officer or police officer to have attained the age of 14 years, is in lawful custody in respect of an offence and the authorised officer or police officer believes, on reasonable grounds, that —

(i) it is necessary to take the identifying material for the purpose of identifying the child as the person who committed the offence or of providing evidence relating to the offence; or

(ii) the child has committed another offence and it is necessary to take the identifying material for the purpose of identifying the child as the person who committed the other offence; or

(b) the Childrens Magistrate has, under sub-section (4), approved the taking of the identifying material.

(3) An authorised officer or a police officer referred to in sub-section (2) may —

(a) make application to the Childrens Magistrate in person; or

(b) if it is not practicable for him to do so, make application to the Childrens Magistrate by telephone,

for approval to take identifying material of a child who is in lawful custody in respect of an offence or of a child against whom proceedings have been instituted by summons in respect of an offence.

(4) The Childrens Magistrate may, if he thinks it proper in the circumstances, give his approval, in writing, for the taking of specified identifying material and shall send the writing to the applicant.

(5) The Childrens Magistrate may inform the applicant by telephone of his approval and in that case the applicant may proceed under the approval notwithstanding that he has not yet received the writing giving approval.

Criteria for bail

42. In determining whether a child who has been charged with an offence should be admitted to bail, there shall be taken into account, in addition to any other matters that may lawfully be taken into account, the matters specified in subparagraphs 35(1)(b)(i), (ii) and (iii).

Detention of children

43. (1) Subject to this section, a child who has been charged with an offence and is not admitted to bail shall, as soon as practicable, be taken to a shelter, and shall be detained there.

(2) In the case of the actual or apprehended violent behaviour of the child (whether in the shelter or elsewhere) or by reason of the seriousness of the offence with which the child is charged, an escape, or attempted escape, by the child from lawful detention, or for other good cause, the child may be taken to a remand centre and shall be detained there.

(3) If the child requires medical attention, instead of being taken to a shelter or remand centre, he may be taken to a hospital and, if the person in charge of the hospital consents, be detained there.

(4) Upon being discharged from hospital, the child may be taken to a shelter or remand centre as mentioned in sub-section (1) or (2).

(5) Where it is necessary to take the child from the place at which the child is detained to a court, or from a court to that place, he shall not, unless it is impracticable, be so taken in company with a person under detention who is not a child and shall not be placed at the court in a room in which another person under detention who is not a child is placed.

Arrested children to be promptly brought before the Court

44. (1) Where a child has been charged with an offence and has not been released from custody, a police officer shall bring the child before the Court as soon as practicable and in any case within 48 hours after the arrest.

(2) If the child is not so brought before the Court, the child shall forthwith be released from custody.

Exclusion of evidence unlawfully obtained

45. (1) Where, in proceedings against a child in respect of an offence, upon objection being taken to the admission of evidence on the ground that the evidence was obtained in contravention of, or in consequence of a contravention of or a failure to comply with, a provision of this Ordinance in relation to the child, the court is satisfied, on the balance of probabilities, that the evidence was so obtained, the court shall not admit the evidence unless it is also satisfied, on the balance of probabilities, that admission of the evidence would specifically and substantially benefit the public interest without unduly prejudicing the rights and freedom of any person.

(2) The matters that a court may have regard to in deciding whether it is satisfied as required by sub-section (1) include –

(a) the seriousness of the offence in the course of the investigation of which the provision was contravened or was not complied with, the difficulty of detecting the offender, the need to apprehend the offender urgently and the need to preserve evidence of the facts;

(b) the nature and seriousness of the contravention or failure; and

(c) the extent to which the evidence that was obtained in contravention of, or in consequence of the contravention of or the failure to comply with, the provision might have been lawfully obtained.

(3) The burden of satisfying the court that evidence was obtained in contravention of, or in consequence of a contravention of or a failure to comply with, a provision of this Ordinance in relation to the child, lies on the person who alleges that the evidence was so obtained.

(4) The burden of satisfying the court that evidence obtained in contravention of, or in consequence of a contravention of or a failure to comply with, a provision of this Ordinance should be admitted in proceedings lies on the party who seeks to have the evidence admitted.

(5) This section is in addition to, and not in substitution for, any other law or rule under which a court may refuse to admit evidence.

Indictable offences to be triable summarily

46. (1) Subject to sections 47 and 48, where a child is charged before the Court with an indictable offence, the Court may hear and determine the matter in a summary manner.

(2) Sub-section (1) does not apply to an offence that may be punished by imprisonment for life.

Committal for trial in certain cases

47. Where a child is charged before the Court with an offence and –

(a) the Court is not empowered to hear and determine the matter in a summary manner; or

(b) the Court is so empowered but decides not to hear and determine the matter in a summary manner,

the Court shall, subject to this Ordinance, deal with the charge in accordance with the provisions of the Court of Petty Sessions Ordinance relating to indictable offences.

Child may elect to be committed for trial

48. (1) Where a child is charged before the Court with an indictable offence and the offence is such that, if the child were not a child, the Court would not be empowered to deal with it in a summary manner without the consent of the accused, the Court shall not so deal with it except with the consent of the child.

(2) At the appropriate time, the Court shall inform the child, and any parent of the child who is present, of the provisions of sub-section (1).

(3) If a parent is not present, the Court may adjourn the hearing so as to enable a parent to be present.

(4) If a parent is not present at the adjourned hearing, the Court may nevertheless continue the hearing.

(5) The Court may also adjourn the hearing to enable the child or his parent to obtain advice.

Childrens Court may decline jurisdiction

49. (1) Where a child is charged before the Court with an indictable offence that the Court is empowered to deal with in a summary manner, the Court may, of its own motion or on application by or on behalf of the informant, if it is of the opinion that the evidence has established a *prima facie* case against the accused child in respect of an indictable offence, decline to deal with the charge in a summary manner and, in that case, shall, subject to this Ordinance, deal with the charge in accordance with the provisions of the Court of Petty Sessions Ordinance relating to indictable offences.

(2) Before so declining to deal with a charge, the Court shall have regard to such matters as seem to it to be relevant and, in particular, to each of the following:

(a) the nature of the facts;
(b) the seriousness of the offence;
(c) the circumstances in which the offence is alleged to have been committed;
(d) the age of the child;
(e) the apparent maturity of the child;
(f) the apparent mental capacity of the child;
(g) the suitability of the penalties available to the Court; and
(h) the difficulty of any question of law that is likely to arise.

Committal of guilty child to Supreme Court

50. (1) Where the Court finds a child guilty of an indictable offence, the Court may, by order, commit the child to the Supreme Court for sentence and the Supreme Court may deal with the child in any way in which it might have dealt with him if he had been found guilty of the offence before the Supreme Court.

(2) Before the Court makes an order under sub-section (1), the Court shall have regard to —

(a) the matters mentioned in paragraphs 49(2)(a) to (h) (inclusive);
(b) any previous conviction of the child for an offence, whether against a law in force in the Territory or elsewhere; and
(c) any report furnished to the Court under section 151.

Childrens Court to give reasons

51. Where the Court —

(a) commits a child to the Supreme Court as mentioned in sub-section 49(1) or 50(1); or
(b) refuses an application made by or on behalf of the informant as mentioned in sub-section 49(1),

the Court shall furnish to the Attorney-General a statement of its reasons for doing so.

Remission of matter by Supreme Court

52. (1) Where a child is found guilty before the Supreme Court of an offence, the Supreme Court may remit the case to the Childrens Court and that court may deal with the child in any way in which it might have dealt with him if he had been convicted of the offence in that court.

(2) An appeal does not lie against an order of remission made under sub-section (1) but that sub-section does not affect any other right of appeal.

(3) A child may appeal to the Supreme Court against an order made by the Childrens Court under sub-section (1).

(4) Where the Supreme Court remits a case as provided by sub-section (1) —

(a) the Supreme Court may give directions as to the custody of the child or for his release on bail, but the Childrens Court may vary or revoke those directions; and
(b) the Supreme Court shall cause to be transmitted to the Clerk of the Court of Petty Sessions a certificate stating —
  (i) the nature of the offence;
  (ii) that the child has been found guilty of that offence; and
  (iii) that the case has been remitted to be dealt with under this section.

Division III — Disposition of Young Offenders

Disposition of young offenders

53. (1) Where a child has been found guilty or convicted of an offence before or by a court, the court shall, as soon as practicable and, in any case, within 6 months after the finding or conviction, make one or more of the following orders:

(a) an order reprimanding the child;
(b) a conditional discharge order;
(c) an order imposing a penalty provided by law with respect to the offence;
(d) any other order provided by law with respect to the offence;
(e) where a fine is not provided by law with respect to the offence, an order imposing a fine not exceeding $1,000;
(f) where reparation or compensation is not provided for by law with respect to the offence, an order that the child make reparation by way of money payment, or pay compensation, in respect of any loss suffered or expense incurred by reason of the offence, but so that the total amount of reparation or compensation does not exceed $1,000;
(g) a probation order;
(h) an attendance centre order;
(i) an order of any of the kinds mentioned in paragraphs 87(1)(b) and (c) but having effect for a specified period not exceeding 2 years;
(j) an order committing the child to a State institution for such period, not exceeding 2 years, as the court specifies;
(k) an order committing the child to an institution for such period, not exceeding 6 months, as the court specifies.

(2) An order may be made under paragraph (1)(g) to commence to have effect when an order under paragraph (1)(i), (j) or (k) ceases to have effect.

(3) The Court shall not make an order —

(a) for the imprisonment of a child;
(b) discharging and releasing, or discharging or releasing, a child upon the child giving security to be of good behaviour; or
(c) as mentioned in paragraph (1)(h), (i), (j) or (k) —
  (i) in a case where the court is not empowered to sentence an adult to imprisonment;

(ii) unless the court is satisfied that, in the circumstances, no other order that might be made is appropriate; or

(iii) for a period longer than the period of imprisonment that might have been imposed in respect of the offence if committed by an adult.

Disposition without proceeding to conviction

54. Where the Court is satisfied that a charge against a child is proved but, in the circumstances, and having regard to —

(a) the provisions of section 7;
(b) the welfare of the child;
(c) the nature of the facts;
(d) the seriousness of the offence;
(e) the circumstances in which the offence was committed; and
(f) the age, maturity, health and mental capacity of the child,

the Court is of the opinion that an order of conviction should not be made, the Court shall, as soon as practicable but, in any case, within 6 months —

(g) dismiss the charge; or
(h) make 1 or more of the orders referred to in paragraphs 53(1)(a) to (g) (inclusive) notwithstanding that an order of conviction has not been made.

Conditional discharge orders

55. For the purposes of this Ordinance, a conditional discharge order is an order discharging the child subject to such conditions as the court specifies, being conditions to be complied with within such period, not exceeding 6 months, as the court specifies.

Breach of conditional discharge orders

56. (1) If a child fails to comply with a condition of a conditional discharge order applicable to him, the court by which the order was made may, at any time, by order served on the child or on one of his parents, direct that the child appear before the court at the time and place specified in the notice.

(2) If the child does not appear before the court as directed, the court may issue a warrant for his apprehension.

(3) The court may make, with respect to the offence with respect to which the conditional discharge order was made, one or more of the orders set out in sub-section 53(1) but not including a further conditional discharge order.

Fines and like orders

57. (1) In this section, "fine" includes pecuniary penalty, costs or other amount of money ordered to be paid.

(2) Before a court makes an order imposing a fine on a child, the court shall have regard to the ability of the child to comply with the order.

(3) A court may, when making an order imposing a fine on a child, of its own motion or on application by or on behalf of the child, by order —

(a) allow time for the payment of the fine; or
(b) direct payment of the fine to be made by instalments.

(4) A child against whom an order referred to in sub-section (2) has been made may, at any time, apply to the court by which the order was made for an order as mentioned in sub-section (3) or for the variation of such an order.

(5) The powers conferred on a court by this section are in addition to any other powers possessed by the court.

Breach of fines or like orders

58. (1) Where a child the subject of an order as mentioned in paragraph 53(1)(e) or (f) fails to obey the order, the court by which the order was made may, at any time, by order served on the child or on one of his parents, direct that the child appear before the court at the time and place specified in the order.

(2) If the child does not appear before the court as directed, the court may issue a warrant for his apprehension.

Enforcement of payment of fines, &c.

59. (1) In this section, "fine" includes pecuniary penalty, costs or other amount of money ordered to be paid.

(2) Subject to this section, an order of a court imposing a fine on a child may be enforced by any means provided by law for the enforcement of the order.

(3) A court shall not make an order for the imprisonment of a child in default of payment of a fine.

(4) A warrant shall not be issued committing a child to prison by reason of any failure of the child to pay a fine.

(5) Subject to sub-section (6), where a child fails to comply with an order imposing a fine, the court by which the order was made may make one or more of the following orders:

(a) an order remitting the fine or reducing the amount of the fine;
(b) an order allowing time, or further time, for the payment of the fine;
(c) an order as mentioned in paragraph 53(1)(a), (b), (c), (d), (g) or (h);
(d) an order that the child be placed in a shelter for such period, not exceeding 30 days, as the court specifies;
(e) an order committing the child to an institution or State institution for such period, not exceeding 30 days, as the court specifies.

(6) The court shall not make an attendance centre order or an order as referred to in paragraph (5)(d) or (e) unless it is satisfied that the failure of the child to comply with the order imposing the fine was both wilful and, in the circumstances, unreasonable.

Probation orders

60. (1) For the purposes of this Ordinance, a probation order is an order placing the child under the supervision of the Director or of some other person specified in the order (in this section called "the supervisor") for the period specified in the order and requiring the child to report to the supervisor at a place and at intervals specified by the supervisor.

(2) A probation order may also contain one or more of the following conditions and provisions:

(a) a condition requiring that the supervisor discuss with the child the welfare of the child, in particular whether the child should receive some form of treatment, or participate in some form of educational, vocational or recreational activity or other activity, having as its object the welfare of the child;

(b) a condition requiring the child to take part in a discussion with the supervisor as mentioned in paragraph (a);

(c) any other condition or any provision that the court considers to be desirable in the interests of the welfare of the child, in particular a condition or provision having as its object the avoidance of a repetition of the offence or of the commission of further offences.

(3) The period specified in the order shall not exceed 1 year or, if the court considers that, because of special circumstances, a longer period is appropriate, 2 years.

(4) The supervisor may, on reasonable grounds and at a reasonable time, enter the premises where the child who is the subject of the probation order resides and inspect the premises and the child, and the occupier of the premises shall not, without lawful excuse, refuse to permit the supervisor to enter the premises and inspect the child and the premises.

Penalty:

Attendance centre orders

61. (1) An attendance centre order as mentioned in paragraph 53(1)(h) is an order that requires the child, during a period specified in the order but not exceeding 12 months, to report at an attendance centre on a specified number of occasions, or on such number of occasions in each week as the Director from time to time specifies, and to place himself in the custody of the Director.

(2) The order shall specify the day on which and the time at which the child is to report on the first occasion.

(3) The duration of each period during which the child is to place himself in the custody of the Director shall be as specified by the Director.

(4) All the periods of custody need not be of the same duration but the periods shall not be longer than 60 hours in the aggregate in a week.

(5) The days on which and the times at which the child is required to report at the attendance centre after the first occasion shall be as the Director determines but the Director shall have regard to any general directions given by the court.

(6) The days on which and the times at which the child is required to report, and the period during which he is to remain in custody, shall be such as, so far as is practicable, to avoid interference with the education or training of the child or of any genuine religious observance.

(7) The Director may, for good cause, excuse a child from attendance on a particular occasion or on all occasions in a particular week.

Duties of child under attendance centre order

62. (1) A child the subject of an attendance centre order is, subject to this Ordinance, subject to the reasonable control, direction and supervision of the Director or of a person acting under the authority of the Director –

(a) while he is attending an attendance centre;

(b) while he is outside the attendance centre in pursuance of a direction of the Director; and

(c) while he is travelling between the attendance centre and a place outside the attendance centre at which he is directed to be.

(2) A child shall, while he is subject to control, direction and supervision as mentioned in sub-section (1) –

(a) engage in such work;

(b) take part in such activities (whether physical or otherwise);

(c) attend such classes or groups of persons; or

(d) undergo such education or training,

as the Director considers to be in the interests of the child.

(3) A child is not entitled to any remuneration in respect of work performed in pursuance of this section.

(4) In exercising his powers under this section, the Director shall take into account any recommendation made by the court when the attendance centre order was made.

Breach of attendance centre orders

63. A person in respect of whom, as a child, an attendance centre order was made and who –

(a) fails to report at an attendance centre or other place as required by the Director;

(b) fails to comply with, or contravenes, any rule governing the attendance centre at which the child is required to report;

(c) fails to comply with, or contravenes, sub-section 62(2);

(d) leaves an attendance centre at a time when he should be there; or

(e) refuses to work or neglects or mismanages his work,

shall be deemed to have failed to comply with the attendance centre order.

Offences in relation to residential orders

64. A person in respect of whom, as a child, an order under paragraph 53(1)(i) was made and who –

(a) where the order is an order that the person be placed in an approved home or that he live at such place as the Director determines – fails to comply with the reasonable directions of the person in charge of the approved home or place;

(b) where the order is an order that the person be placed in the care of a suitable person – fails to comply with the reasonable directions of that person,

shall be deemed to have failed to comply with the order.

Breach of probation, attendance centre or residential orders

65. (1) If a person with respect to whom, as a child, an order of the kind mentioned in paragraph 53(1)(g), (h) or (i) has been made has, wilfully and without reasonable excuse, failed to comply with the order or with any of the conditions of the order, the person is guilty of an offence.

(2) Where a person is convicted of an offence as provided by sub-section(1) or

the Court finds such an offence to be proved but does not proceed to a conviction, the Court may make one or more of the following orders:

(a) an order of the kind provided by law with respect to the offence in relation to which the order mentioned in sub-section (1) was made;

(b) an order –

(i) revoking or varying the order referred to in sub-section (1); or

(ii) directing the person to comply with the order referred to in sub-section (1) in so far as it has not been complied with.

(3) Sub-section 53(2) has effect with respect to an order made against a child under the preceding provisions of this section.

Revocation and variation of certain orders

66. (1) The court by which an order as mentioned in paragraph 53(1)(g), (h), (i), (j) or (k) (in this section referred to as "the previous order") has been made may, of its own motion or upon application, make an order revoking or varying the previous order or making another order in substitution for the previous order.

(2) An application in respect of an order –

(a) under paragraph 53(1)(g) – may be made by the child, a parent of the child, the person who is by virtue of sub-section 60(1) the supervisor or the Youth Advocate;

(b) under paragraph 53(1)(h), (j) or (k) – may be made by the child, a parent of the child, the Youth Advocate or the Director; or

(c) under paragraph 53(1)(i) – may be made by the child, a parent of the child, the Youth Advocate, the Director or –

(i) in the case of an order that the child be placed in an approved home – the person for the time being in charge of that home; or

(ii) in the case of an order that the child be placed in the care of a suitable person – that person.

(3) A copy of an application made by a person referred to in paragraph (2)(a) or (b) or sub-paragraph (2)(c)(i) or (ii) shall be served on the other persons mentioned in the relevant paragraph or sub-paragraph, as the case requires.

(4) Each person so served shall, unless excused by the court, attend the hearing of the application and, if he does not so attend, the court may issue a warrant for his apprehension.

(5) The previous order as varied or the order made in substitution for the previous order shall be an order of the kind mentioned in sub-section 53(1) but the court shall have regard to the circumstances at the time of the hearing.

(6) The court is not bound to make an order as applied for but, subject to sub-section (5), may make any order that appears to the court to be appropriate.

(7) This section has effect notwithstanding that the child is, whether under an order of a court or otherwise, for the time being living outside the Territory.

Division IV – Miscellaneous

Evidence of warnings

67. (1) Where a child has been convicted or found guilty of an offence or a court finds that a charge against a child has been proved, evidence may be given of a warning that has at any time been given in the Territory to the child by a police officer.

(2) Evidence so given is not evidence that the child has committed an offence.

Adjournment of criminal proceedings

68. (1) Where it is necessary to adjourn the hearing of a charge against a child, the adjournment shall not, except in special circumstances, be for a period that exceeds 21 days.

(2) Where the Court adjourns the proceedings, whether to a time later in the same day, to the next day or otherwise, the court may –

(a) release the child if the child and one of his parents give an undertaking satisfactory to the court that the child will be present at the next hearing;

(b) release the child on bail;

(c) place the child in the custody of a suitable person;

(d) order that the child be placed in a shelter or a remand centre; or

(e) if the person in charge of the hospital or approved home consents, order that the child be placed in a hospital or an approved home.

(3) The Court shall not order that a child be placed in a remand centre unless the Court is satisfied that, by reason of the actual or apprehended violent behaviour of the child, the seriousness of the offence, an escape or attempted escape by the child from lawful detention or for other good cause, it is necessary or desirable so to place the child.

Placing in shelter, &c.

69. (1) Where a court, by an order under paragraph 53(1)(j), commits a child to a State institution, the child shall be placed in a shelter or remand centre until he is removed to the institution.

(2) The child shall not be kept in the shelter or remand centre for more than 14 days unless the court so orders or the Director approves in writing.

(3) An order committing a child to a State institution is sufficient authority for an officer or police officer to do one or more of the following:

(a) subject to any contrary provision in the order –

(i) take the child to a shelter or remand centre;

(ii) take the child from one shelter or remand centre to another;

(iii) take the child from a shelter to a remand centre or from a remand centre to a shelter;

(b) take the child to the State institution;

(c) take the child to the State of New South Wales for the purpose of reception into, and detention in, the institution.

Children in remand centres

70. Where a child is in a remand centre under a provision of this Ordinance, the *Remand Centres Ordinance* 1976 applies to and in relation to that person as though he were a detainee within the meaning of that Ordinance.

Remission of time to be spent in institution

71. Where a child has been committed to an institution by an order under paragraph 53(1)(k), the Director may, unless the court otherwise ordered when so committing the child, reduce the period specified by the court under that paragraph by not more than one-third of the period so specified.

CONTINUED

5 OF 6

Director may grant leave for special purposes

72. (1) The Director may, by instrument in writing, on such terms and conditions as he thinks fit, for any reason he thinks fit, including one or more of the following:

(a) the education and training of the child;
(b) the employment of the child;
(c) a compassionate reason;
(d) the health of the child;
(e) the recreation of the child;
(f) the participation by the child in a community project or an attendance centre program,

grant leave of absence to a child who has been committed to an institution by an order under paragraph 53(1)(k).

(2) Where a child is outside an institution in pursuance of leave of absence granted under this section, the period for which he was committed continues to run.

Other rights and freedoms not affected

73. (1) This Part, in so far as it protects a child, is in addition to and not in derogation of any rights and freedoms of the child under some other law in force in the Territory and it is not intended to exclude or limit the operation of such a law in so far as it is capable of having effect concurrently with this Part.

(2) This Part does not affect the powers of the Governor-General in the exercise of the Royal prerogative of mercy.

PART V – CHILD CARE PROCEEDINGS

Division I – Preliminary

Authorised persons

74. For the purposes of this Part, "authorised person" means –

(a) a person for the time being appointed in writing by the Minister to be an authorised person for the purposes of this Part; or
(b) a police officer.

Children in need of care

75. (1) For the purposes of this Part, a child is in need of care if –

(a) the child –
  (i) has been physically injured (otherwise than by accident); or
  (ii) has been sexually abused,

  by 1 of his parents or by a member of the household in which he lives or there is a likelihood that he will so suffer such physical injury or sexual abuse;

(b) the child –
  (i) has been physically injured (otherwise than by accident); or
  (ii) has been sexually abused,

  by a person other than a person mentioned in paragraph (a), or there is a likelihood that he will so suffer such physical injury or sexual abuse, and his parents are unable or unwilling to protect him from the injury or abuse;

(c) by reason of the circumstances in which the child is living or in which he is found –

  (i) the health of the child has been impaired or there is a likelihood that it will be impaired; or
  (ii) the child has suffered, or is likely to suffer, psychological damage of such a kind that his emotional or intellectual development is or will be endangered;

(d) the child is engaging in behaviour that is, or is likely to be, harmful to him and his parents or his guardian are unable or unwilling to prevent him from engaging in that behaviour;
(e) there is no appropriate person to care for the child because –
  (i) he has been abandoned by his parents or by his guardian;
  (ii) his parents or his guardian cannot, after reasonable enquiries have been made, be found; or
  (iii) his parents are dead and he has no guardian;
(f) there is incompatibility between the child and 1 of his parents or between the child and his guardian; or
(g) the child is required by law to attend school and is persistently failing to do so and the failure is, or is likely to be, harmful to the child.

(2) In the application of this Part, an authorised person, the Youth Advocate or a court shall have regard to the degree of injury, abuse, impairment, likelihood, incompatibility or failure and shall disregard any of those things that, in the circumstances, appears to be not sufficiently serious or substantial to justify action under this Part.

Where person apparently a child

76. For the purposes of this Part, a person who appears to an authorised person, to the Youth Advocate or to the Court, as the case may be, to be a child may be dealt with under this Part as if he were a child and the provisions of this Part that refer to a child have effect in relation to the person accordingly, but if it becomes known that the person is not a child –

(a) no further proceedings with respect to the person shall be taken under this Part; and
(b) if, by reason of the application of any provision of this Part, the person is in an approved home, a hospital, a shelter or a State institution or is in the custody of a person, that provision ceases to have effect with respect to the person and the person shall forthwith be released.

Division II – Child Care Proceedings Generally

Proceedings with respect to children in need of care

77. (1) If it appears to an authorised person that a child is in need of care and the circumstances are such that action under this sub-section should be taken immediately to safeguard the welfare of the child, the authorised person may take the child into his custody and place him in a shelter or, if the person in charge of the approved home or hospital consents, an approved home or a hospital.

(2) Sub-section (1) has effect with respect to a child who is in the Territory notwithstanding that the usual place of living of the child is not in the Territory.

(3) The authorised person shall, as soon as is reasonably practicable, notify the Youth Advocate, or cause the Youth Advocate to be notified, of the name and age

of the child, the name of the shelter, approved home or hospital in which he has placed the child, of the time when the child was taken into custody and of any other relevant circumstances.

(4) The Youth Advocate shall record in writing particulars of all notifications under sub-section (3) and of any action that he has taken in relation to them.

(5) The authorised person shall, as soon as is reasonably practicable, take all reasonable steps to cause a parent of the child to be notified, whether the parent is resident in the Territory or not, of the time when the child was taken into custody, the name of the shelter, approved home or hospital in which he has placed the child and of the other relevant circumstances notified to the Youth Advocate under sub-section (3).

Children in hospital

78. (1) If it appears to an authorised person that a child who is in a hospital is in need of care, or would, upon leaving the hospital, be in need of care, and that it is necessary to take urgent action to safeguard the welfare of the child, the authorised person may, by writing under his hand, direct that the child be retained in the hospital and, subject to this Ordinance, the child shall be detained accordingly.

(2) Sub-section (1) has effect with respect to a child who is in a hospital in the Territory and so has effect notwithstanding that the usual place of living of the child is not in the Territory.

(3) The authorised person shall, as soon as is reasonably practicable, notify the Youth Advocate, or cause the Youth Advocate to be notified, of the name and age of the child, of the name of the hospital, of the time at which the direction under sub-section (1) was given and of any other relevant circumstances.

(4) The Youth Advocate shall record in writing particulars of all notifications under sub-section (3) and of any action that he has taken in relation to them.

(5) The authorised person shall, as soon as is reasonably practicable, take all reasonable steps to cause a parent of the child to be notified, whether the parent is resident in the Territory or not, of the name of the hospital, of the time at which the direction under sub-section (1) was given and of the other relevant circumstances notified to the Youth Advocate under sub-section (3).

Youth Advocate may direct release of the child

79. (1) Upon a notification being made as provided by section 77 or 78, the Youth Advocate may direct that the child be immediately released and, if he does not so direct, he shall forthwith notify the Childrens Magistrate of the name and age of the child, of the shelter, approved home or hospital in which the child is and of any other relevant circumstances.

(2) If, at the expiration of 48 hours after the child was taken into custody under sub-section 77(1) or a direction was given under sub-section 78(1), action under this section has not been taken by the Childrens Magistrate, the child shall forthwith be released.

(3) The Childrens Magistrate may authorise the retention of the child in the shelter, approved home or hospital for such period, not exceeding 72 hours reckoned from the time when the Magistrate gives the authority, as the Magistrate specifies or may direct that the child be no longer so retained.

(4) The Childrens Magistrate may act under sub-section (3) without any formal hearing and upon the information given to him by the Youth Advocate and the Childrens Magistrate is not required, before so acting, to hear any person on behalf of the child or his parents.

(5) If –

(a) the Childrens Magistrate directs that the child be no longer retained;
(b) the Youth Advocate directs that the child be released; or
(c) the period of 72 hours referred to in sub-section (3) expires,

the child shall, as soon as is reasonably practicable, be released and reasonable steps taken to return the child to his usual place of living.

Penalty:

Application to Court for retention order

80. (1) If the Childrens Magistrate authorises the retention of the child, the Youth Advocate shall forthwith make appropriate enquiries as to the welfare of the child and may make an application to the Court for an order under sub-section (3).

(2) Where the Youth Advocate makes such an application, the child shall, unless the Childrens Magistrate otherwise directs, continue to be retained in a shelter, approved home or hospital.

(3) The Court shall hear the application and may make an order –

(a) that the child be no longer retained;
(b) authorising the continued retention of the child in the shelter, approved home or hospital or his detention in some other shelter, approved home or hospital; or
(c) placing the child in the custody of a suitable person.

(4) An order under paragraph (3)(b) or (c) remains in force for such period, not exceeding 7 days, as the Court specifies in the order.

(5) The Court may, upon application by the Youth Advocate, make 1 further order extending the period specified in the previous order by not more than 7 days.

Procedure on application

81. (1) Notification of an application under section 80 shall, if practicable, be given to the person having the custody of the child and to at least 1 of his parents, whether the person or parent is resident in the Territory or not.

(2) The child and each person notified under sub-section (1) shall be the respondents to the application.

Application for declaration that a child is in need of care

82. (1) The Youth Advocate may make an application to the Court for a declaration that a child, being a child who is in the Territory or ordinarily resides in the Territory, is in need of care.

(2) Before making such an application, the Youth Advocate shall consult the Standing Committee.

(3) The Youth Advocate shall not make such an application unless he is satisfied that the child is unlikely to receive suitable care unless the Court makes an order as mentioned in sub-section 87(1).

(4) The validity of an application under sub-section (1) shall not be called in question in any proceedings (whether under this Ordinance or otherwise) on the ground of any failure to comply with sub-section (2) or (3) with respect to the application.

Application to be served on parents

83. (1) A copy of the application shall, if reasonably practicable, be served on at least 1 of the child's parents, whether the parent is resident in the Territory or not, and on the child if the child has, or appears to have, attained the age of 10 years.

(2) The child, whether served with a copy of the application or not, and a parent or the parents on whom a copy of the application has been served shall be the respondents to the application.

Hearing and determination of application

84. (1) The Court shall hear the application and –

(a) subject to sub-section (2), may make a declaration that the child is in need of care; and

(b) where the Court makes that declaration, shall make an order with respect to the child as mentioned in sub-section 87(1),

or may dismiss the application.

(2) The Court shall not make a declaration that the child is in need of care unless the Court is satisfied that the child is unlikely to receive suitable care unless the Court makes an order as mentioned in sub-section 87(1).

(3) The question whether a child is in need of care or is unlikely to receive suitable care shall be decided on the balance of probabilities.

(4) If an order is not made under this section within 6 months after the making of the application, the application lapses and the child, if he is detained or retained under this Part, shall forthwith be released.

Adjournment of hearing

85. (1) The Court may adjourn a hearing under section 84 from time to time but so that a period of adjournment does not, except in special circumstances, exceed 21 days.

(2) The Court may, by order, direct that, during the period of an adjournment, the child –

(a) live, or continue to live, at home;

(b) be placed, or remain, in the care of a specified suitable person;

(c) live, or continue to live, if the person in charge of the home consents, in an approved home;

(d) live, or continue to live, in a shelter; or

(e) be detained or retained, if the person in charge of the hospital consents, in a specified hospital.

Child care conference

86. (1) Where the Court adjourns or dismisses an application under section 82,

the Court may direct that the Youth Advocate convene a conference to consider the welfare of the child, to be attended by one or more of the persons referred to in any of the following paragraphs:

(a) if the Court so orders, the child;

(b) a parent of the child;

(c) a person who is or may be concerned with the welfare of the child;

(d) with the leave of the Court, a lawyer acting for a person referred to in paragraph (a), (b) or (c).

(2) The Youth Advocate shall attend and preside at the conference and shall report the result of the conference to the Court.

(3) The Youth Advocate shall keep a record in writing of the proceedings at the conference.

(4) Evidence of anything said or of any admission made at a conference referred to in sub-section (1) is not, except under sub-section (2) or (5) or with the consent of all the persons who participated in the conference, admissible in any court, whether a federal court or a court of a State or Territory.

(5) A person who attends a conference under this section shall not, except as permitted by sub-section (4) or with the leave of the Court, disclose any information furnished to the conference or anything said at the conference.

Penalty:

Care orders

87. (1) The order that may be made under paragraph 84(1)(b) is any of the following:

(a) a supervision order, that is to say, an order as mentioned in section 89;

(b) an order that the child be placed –

(i) in an approved home; or

(ii) in the care of a suitable person, whether the person resides in the Territory or not;

(c) an order directing the child to live at such place, whether within the Territory or not, as the Director determines;

(d) an order committing the child to a State institution for such period as the Court determines;

(e) an order that the child become a ward of the Director.

(2) An order as mentioned in sub-section (1) may specify a period during which the order is to have effect.

(3) An order shall not be made as mentioned in paragraph (1)(d) or (e) unless the Court is satisfied that no other order mentioned in sub-section (1) would be in the interests of the welfare of the child.

(4) An order may be made as mentioned in paragraph (1)(a) to commence to have effect when an order as mentioned in paragraph (1)(b), (c) or (d) ceases to have effect.

(5) An order that the child become a ward of the Director may provide that the Director or another person who has the care of the ward shall not, if it is practicable to consult a parent of the ward, exercise a power in respect of the ward except after consulting a parent of the child.

(6) Where an order is made as mentioned in paragraph (1)(b) or (c), the Director or an officer may, on reasonable grounds and at a reasonable time, enter the premises, whether in the Territory or elsewhere, where the child is living and may inspect the premises and the child.

Access

88. (1) Where the Court makes an order as mentioned in paragraph 87(1)(b), (c), (d) or (e), the Court may, at the same time or at a later time, without application being made to the Court, make an order with respect to access to the child.

(2) Before making an order as mentioned in sub-section (1), the Court shall have regard to such matters as it thinks appropriate and, in particular, shall have regard to the wishes of the child if the child is capable of expressing them and to the conduct and wishes of the parent or of any other person concerned.

Supervision orders

89. (1) A supervision order is an order placing the child under the supervision of the Director or of some other person specified in the order (in this section called "the supervisor") and containing one or more of the following provisions:

(a) a provision requiring the supervisor to discuss the welfare of the child with the child, with one of his parents or with both the child and his parents, in particular whether the child should receive some form of treatment, or participate in some form of educational, vocational or recreational activity or other activity, having as its object the welfare of the child;

(b) a provision requiring the child or his parents or both to report to the supervisor at a place and at intervals specified by the supervisor;

(c) a provision requiring the child or his parents or both to take part in a discussion with the supervisor as mentioned in paragraph (a);

(d) any other provision that the Court considers to be in the interests of the welfare of the child.

(2) The occupier of premises where a child who is the subject of a supervision order resides shall not, without lawful excuse, refuse to permit the supervisor, at a reasonable time, to enter the premises and inspect the child and the premises.

Penalty:

(3) A provision as mentioned in paragraph (1)(d) may be made so as to impose obligations to be complied with by a parent of the child, whether or not the parent resides in the Territory and whether or not the parent was served as mentioned in sub-section 83(1) or was a party to the proceedings.

Placing in shelter, &c.

90. (1) Subject to sub-section (2), a child who has been committed to a State institution by an order under paragraph 84(1)(b) may be placed in an approved home or a shelter until he is removed to the institution.

(2) The child shall not be kept in the approved home or shelter for more than 14 days unless the Court so orders or the Director approves in writing.

(3) An order committing a child to a State institution is sufficient authority for an officer to do one or more of the following:

(a) subject to any contrary provision in the order – take the child to an approved home or a shelter;

(b) subject to any contrary provision in the order – take the child from one approved home or shelter to another;

(c) take the child to the State institution;

(d) take the child to the State of New South Wales for the purpose of reception into, and detention in, a State institution.

Applications by other persons

91. (1) If the Youth Advocate has not made an application under section 82 with respect to a child, a person may, after consultation with the Youth Advocate, seek the leave of the Court to make such an application.

(2) The Court shall hear the person and the Youth Advocate and may make an order granting leave to the person to make the application.

(3) This Part has effect with respect to an application made in pursuance of leave so granted and, in such a case, references in the preceeding provisions of this Part to the Youth Advocate shall, in relation to the application, be read as references to the applicant.

Review of orders on application

92. (1) Where the Court has made an order under paragraph 84(1)(b) (in this section referred to as "the previous order"), the Youth Advocate or any other person may make an application to the Court for an order that the previous order be varied or revoked or that an order be made in substitution for the previous order and the Court shall hear and determine the application accordingly.

(2) It is not necessary for the Youth Advocate to consult the Standing Committee before acting under this section but he may do so if he thinks fit.

(3) The previous order as varied or the order made in substitution for the previous order shall be an order that the Court is empowered to make under paragraph 84(1)(b) but the Court shall have regard to the circumstances as they exist at the time of the hearing.

(4) The Court is not bound to make an order as applied for but, subject to sub-sections (3) and (5), may make any order that appears to the Court to be appropriate.

(5) If the Court considers that the child is no longer in need of care, the Court shall revoke the order.

(6) This section has effect notwithstanding that the child is, whether under an order of a court or otherwise, for the time being living outside the Territory.

(7) The application of this section extends to an order made on appeal from an order of the Court under paragraph 84(1)(b).

Periodical review of orders

93. (1) Where the Court –

(a) makes an order under paragraph 84(1)(b); or

(b) makes an order in substitution for such an order,

the Youth Advocate shall, within 2 months before the expiration of each period of 12 months after the making of the order mentioned in para-

graph (a) or of the making of the order first-mentioned in paragraph (b), as the case may be, apply to the Court for a review of the order, if it is still in force, and the Court shall hear and determine the application accordingly.

(2) The Youth Advocate shall serve with each copy of the application a statement as to any matter that the Youth Advocate considers to be relevant concerning the child.

(3) If the Court considers that the child is no longer in need of care, the Court shall revoke the order.

(4) The Court may, in determining an application under sub-section (1) –

(a) direct that the order continue in force for such period as the Court specifies;

(b) vary the order;

(c) make an order, being an order under paragraph 84(1)(b), in substitution for the order; or

(d) revoke the order.

(5) The Court shall not give a direction or vary or make an order as mentioned in paragraph (4)(a), (b) or (c) unless it is satisfied that the child is unlikely to receive suitable care unless the Court so acts.

(6) This section has effect notwithstanding that the child is, whether under an order of a court or otherwise, for the time being living outside the Territory.

(7) The application of this section extends to orders made on appeal from an order under paragraph 84(1)(b) and, in such a case, the application under sub-section (1) shall be made to the Court.

(8) If the Youth Advocate does not make an application as provided by sub-section (1), the order concerned ceases to have effect at the expiration of the period of 12 months after the making of that order.

Service of applications for review

94. (1) A copy of an application under section 92 or 93 shall be served –

(a) on the Youth Advocate;

(b) if practicable, on at least 1 of the parents of the child concerned, whether the parent is resident in the Territory or not;

(c) if the child has attained the age of 10 years, on the child concerned; and

(d) on any other person that the Court directs.

(2) In the case of an application for the making of an order with respect to an order as mentioned in –

(a) paragraph 87(1)(a) – a copy of the application shall be served on the supervisor;

(b) sub-paragraph 87(1)(b)(i) – a copy of the application shall be served on the person in charge of the approved home;

(c) sub-paragraph 87(1)(b)(ii) – a copy of the application shall be served on the suitable person referred to in that sub-paragraph;

(d) paragraph 87(1)(c) – a copy of the application shall be served on the Director and on the person in charge of the place referred to in that paragraph;

(e) paragraph 87(1)(d) – a copy of the application shall be served on the State Minister within the meaning of the Agreement; or

(f) paragraph 87(1)(e) – a copy of the application shall be served on the Director and on any person in whose custody the ward is for the time being placed.

Application of certain provisions

95. On the hearing of an application under section 92 or 93, the provisions of this Part relating to applications under section 82 apply, so far as applicable, to and in relation to the hearing and as though each reference in the provisions so applicable to the Court were a reference to the court hearing the application.

Order to resolve disagreements

96. (1) Where a disagreement arises between a parent of a child and a person having, under this Ordinance, the care of the child, an application may be made to the Court for an order resolving the disagreement.

(2) The application may be made by the child, by the parent or by the person having the care of the child.

(3) Where an order has been made with respect to the child as mentioned in paragraph 87(1)(c), the application may be made by the Director.

(4) Where the application is made by one person, each other person by whom the application might have been made shall be the respondents to the application and each of them shall be served with a copy of the application.

(5) On the hearing of the application, the provisions of this Part relating to applications under section 82 apply, so far as applicable and subject to any directions of the Court, to and in relation to the hearing.

Procedure at hearing

97. (1) The following provisions of this section have effect with respect to the hearing and determination of an application or other proceeding under this Part, including an appeal from an order made on such an application or in such a proceeding.

(2) The procedure of the court is within the discretion of the court but the court shall not act in a formal manner and is not bound by any rules of evidence but may inform itself in such manner as it thinks fit and may itself call witnesses or require the production of written documents.

(3) It is not competent for a child or a parent of a child to admit that the child is in need of care.

(4) The court may hear submissions that any of the following persons wishes to make:

(a) the Youth Advocate or other applicant;

(b) a parent or other relative of the child concerned;

(c) any person who the court considers is able to inform it on any matter relevant to determining the application, proceeding or appeal.

(5) In particular, the court shall endeavour to ensure that a child concerned who is capable of understanding as mentioned in section 8 does so understand and

shall receive and consider such representations as the child wishes to make to the court in person.

(6) The court may, for good cause, order that a person (including the child concerned or a parent of the child concerned) shall not be present in the room where the court is sitting during the whole or such part of the hearing as the court determines.

(7) The validity of an order under this Part is not affected by reason of any failure to comply with any of the preceding provisions of this section.

Division III — Child Care Agreements

Child care agreements

98. (1) The Director may, at the request of a parent of a child, approve the parent's placing the child under the care and in the custody of a suitable person, whether in the Territory or not.

(2) Before the Director gives his approval, the Director shall —

(a) consider what assistance to the child is possible while the child is in the care of his parent;

(b) endeavour to ensure that a child concerned who is capable of understanding the proposed arrangement does so understand; and

(c) receive and consider such representations as a child who is capable of understanding the proposed arrangement wishes to make to him.

(3) Where the suitable person agrees to receive a child under sub-section (1), a parent of the child and the Director shall make an agreement in writing with respect to the care and custody of the child.

(4) An agreement under sub-section (3) shall be expressed to be in force for a period, not exceeding 3 months, specified in the agreement.

(5) The parties to an agreement under sub-section (3) may agree to extend the period specified in the agreement for 1 or 2 further periods, neither of which shall exceed 6 months.

Agreements not void

99. An agreement under section 98 is not void or voidable because a parent a party to it has not attained the age of 18 years.

Consent of child over the school-leaving age

100. An agreement under section 98 with respect to a child who has attained the school-leaving age shall not be made without the consent of the child, unless the child is incapable of giving consent.

Determination and expiration of agreements

101. (1) A party to an agreement under section 98 may determine the agreement by giving to the other party not less than 21 days' notice in writing.

(2) Where such an agreement expires or is determined, the person having the custody of the child shall, as soon as practicable and in any case within 21 days after the expiration or determination of the agreement, cause the child to be returned —

(a) to the parent or other person in whose custody the child was before the agreement was entered into; or

(b) if there is an order in force placing the child in the custody of some other person — to that other person.

Payments of expenses

102. The Director may, out of moneys made available by the Parliament, pay to a suitable person such amount as he thinks proper in respect of the expenses of that person in caring for a child under an agreement under section 98.

Division IV — Miscellaneous

Orders to be furnished to Director

103. The Court shall cause a copy of an order under this Part to be furnished to the Director and to the Youth Advocate.

Dispensing with service

104. The Court may, by order, dispense with service of a notice, order or other instrument under this Part upon a particular person or may make an order for substituted service of such a notice, order or instrument.

Procedure where child voluntarily enters a place of safety

105. (1) Where a child voluntarily enters a place of safety (not being a police station), the occupier or person in charge of the place shall, as soon as practicable but in any case within 6 hours —

(a) seek the permission of the child to notify a parent of the child that the child is in the place of safety; and

(b) notify the Youth Advocate that the child is in the place of safety and of any relevant circumstances.

Penalty:

(2) The Youth Advocate shall make enquiries as to the welfare of the child and shall consider whether he should make an application to the Court under Division 2.

(3) The Youth Advocate shall, as soon as practicable after being notified as mentioned in sub-section (1), notify a parent of the child that the child is in the place of safety.

Notification of children in need of care and of child abuse

106. (1) Where a person, on reasonable grounds, suspects that there exist, have existed or may come into existence with respect to a child such circumstances as may make it appropriate that proceedings should be taken with respect to the child under this Part, the person may notify the Youth Advocate of those circumstances or may cause the Youth Advocate to be so notified.

(2) Where —

(a) a medical practitioner, dentist, nurse, police officer, teacher or person employed to counsel children in a school, in the course of practising his profession or carrying on his calling in the Territory;

(b) a person employed in the Department or by the Health Commission whose duties include matters relating to childrens welfare, in the course of performing those duties; or

(c) a person providing child care at premises in respect of which a licence under Part VII is in force, in the course of providing that care,

on reasonable grounds, suspects that a child has suffered physical injury (other-

wise than by accident) or has been sexually abused, the person shall notify the Youth Advocate accordingly or cause the Youth Advocate to be so notified.

Penalty:

Record of notifications

107. The Youth Advocate shall keep a record in an appropriate form of each notification made to him under section 106 and shall include in the record particulars of any action that he takes in consequence of the notification.

Protection of persons making notifications

108. (1) Where a person in good faith notifies the Youth Advocate as provided by section 106 –

(a) the notification shall not be held to be a breach of confidence or of professional etiquette or ethics or of a rule of professional conduct;

(b) no civil or criminal liability is incurred by reason only of the making of the notification;

(c) subject to sub-sections (2) and (3), the notification is not admissible in evidence in any proceedings in a court and evidence of its contents is not so admissible; and

(d) subject to sub-section (2), a person shall not be compelled in any proceedings to produce the notification or a copy of, or extract from, the notification or to disclose, or give any evidence of, any of the contents of the notification.

(2) Paragraph (1)(c) or (d) does not apply –

(a) in proceedings before the Court under this Part in relation to the child concerned or before a court hearing an appeal from a decision of the Court in any such proceedings; or

(b) with respect to a charge or allegation made in proceedings referred to in paragraph (1)(c) or (d) against a person in relation to his exercising any of his powers, or performing any of his duties or functions, under this Ordinance.

(3) Paragraph (1)(c) does not apply where a notification is tendered in evidence, or evidence in respect of a notification is given, by the person by whom the notification was, or was caused to be, given.

(4) This section has effect both within and beyond the Territory and references in this section to a court include references to a court of a State or of some other Territory.

Cessation of Part

109. (1) This Part and any order or agreement under this Part cease to have effect with respect to a child upon the child attaining the age of 18 years and, if he is being detained or retained under this Part, the child shall forthwith be released.

(2) Sub-section (1) does not require the release of a person who –

(a) has been found guilty or convicted of an offence and, in relation to the finding or conviction, is detained under an order, determination, direction, declaration or decision of a court, including a court of a State or of some other Territory; or

(b) has been charged with an offence and is so detained in relation to the charge.

(3) If a person who is a ward marries before attaining the age of 18 years, the person ceases to be a ward.

PART VI – WARDS

Director to be guardian of wards

110. (1) Notwithstanding any other law in force in the Territory relating to the guardianship of children (other than the *Immigration (Guardianship of Children) Act* 1946), the Director is the guardian of a child who is a ward to the exclusion of the parent or other guardian of the child.

(2) Sub-section (1) has effect both within and beyond the Territory.

Incidents of wardship

111. (1) While a child is a ward of the Director, the Director has, subject to this Ordinance, the care of the child to the exclusion of the parents or other guardian of the child and has the same rights, powers, duties, obligations and liabilities as has a natural parent of the child.

(2) In particular, the Director –

(a) is entitled to the custody of the ward; and

(b) has the responsibility for providing or arranging for the provision of the necessities and amenities of life of the ward, including –

(i) the maintenance and accommodation of the ward;

(ii) recreation and entertainment for the ward; and

(iii) the well-being generally of the ward.

Wards may be placed in homes, &c.

112. (1) The Director may place a ward in the care of –

(a) a parent or relative of the child or with some other suitable person (whether in the Territory or not);

(b) the person in charge of an approved home;

(c) the person in charge of a hospital (whether in the Territory or not);

(d) the person in charge of a home (whether in the Territory or not) for the accommodation of children; or

(e) the person in charge of some other appropriate place (whether in the Territory or not).

(2) A person who has the care of a child so placed in his care is entitled to the custody and control of the child and has the responsibilities specified in paragraph 111(2)(b).

Religion

113. (1) The Director may make such decisions as he considers to be in the interests of a ward with respect to religious matters concerning the ward.

(2) In making such a decision, the Director shall take into account, so far as they can be ascertained after reasonable enquiry –

(a) any wishes of the ward;

(b) any religious upbringing of the child before he became a ward; and

(c) any wishes of a parent of the ward or of a former guardian of the ward.

Visits to wards

114. (1) The Director or an officer may visit a ward.

(2) A person who has the care of a ward shall permit the Director or an officer to interview the ward apart from the person and to make such inspections and examinations as the Director or officer reasonably considers necessary.

Penalty:

(3) An officer shall, before interviewing a ward or making an inspection or examination as mentioned in sub-section (2), produce to the person who has the care of the ward the instrument of his appointment as an officer.

Wards running away

115. (1) In this section, "authorised officer" means an officer for the time being authorised by the Director to act under this section.

(2) An authorised officer may, with such force as is reasonably necessary for the purpose, apprehend a ward who has run away, or has been unlawfully removed, from his proper custody and shall return the ward to his former custody.

(3) The operation of sub-section (2) extends to a ward who is not for the time being in the Territory.

(4) A police officer may, if the authorised officer so requests, with such force as is reasonably necessary for the purpose, assist an authorised officer in the apprehension of a ward under sub-section (2).

Property of wards

116. (1) The Court may, upon application by the Director, make an order empowering the Director to manage, control or deal with the property of a ward.

(2) An order under sub-section (1) may make such incidental or supplementary provisions as are necessary to give effect to the order.

(3) The Court shall not make an order under sub-section (1) with respect to property if there is some other person, not being the ward, empowered to manage, control or deal with the property.

(4) A copy of an application under this section shall be served on such persons as the Court directs and the procedure upon the hearing of the application shall be as the Court directs.

(5) An order under sub-section (1) is binding on all persons affected by the order and each such person shall take steps to give effect to the order so far as it is binding on him.

Payments to ex-wards

117. Where the Director considers it proper to do so, he may arrange for the provision of financial or other assistance, on such terms and conditions as he thinks fit, to a person who was at any time a ward.

Wards from outside the Territory

118. (1) The Director may, on request by or on behalf of the authority having the custody or control in a State or in a Territory (other than the Australian Capital Territory or the Jervis Bay Territory) of a child who, under a law in force in the State or Territory, is a ward and has entered or is about to enter the

Australian Capital Territory or the Jervis Bay Territory, by writing under his hand, declare the child to be a ward of the Director.

(2) Where the Director makes such a declaration, the child, while in the Australian Capital Territory or the Jervis Bay Territory, shall be deemed to be a ward of the Director as though the child had become a ward of the Director by an order under paragraph 87(1)(e) and this Ordinance applies to and in relation to the child accordingly.

(3) A declaration under sub-section (1) ceases to have effect if the child ceases to be under the custody and control of the authority previously having his custody and control.

(4) The Director may, on behalf of the Commowealth, make financial or other arrangements with an authority referred to in sub-section (1) with respect to the child while he is a ward of the Director.

(5) The Director may make arrangements for the return of a child who has become a ward of the Director under this section to his former custody and, where arrangements are so made –

(a) section 115 has effect as though the ward had run away; and

(b) in the application of section 115 as so having effect, a reference to the former custody of the ward is a reference to his custody by the authority referred to in sub-section (1).

PART VII – CHILD CARE OUTSIDE THE HOME

Interpretation

119. (1) In this Part, unless the contrary intention appears –

"licence" means a licence under this Part;

"licensee" means the holder of a licence;

"service to the community" includes service to a section of the community.

(2) Subject to sub-section (3), for the purposes of this Part a person is providing child care if he provides care for a child or a number of children –

(a) where –

(i) the care is provided on a business basis or on a community service basis; and

(ii) the care is provided at a place which is not the place of living for the time being of any of the children being cared for on that basis; and

(b) of all the children for whom care is being provided at that place (including those not being cared for on a business basis or on a community service basis) –

(i) the number of children who have not attained the age of 6 years exceeds 4; or

(ii) the number of children who have not attained the age of 12 years exceeds 8.

(3) This Part does not apply to or in relation to –

(a) foster care;

(b) care provided in a place under the control of the Department;

(c) care provided, whether during school hours or not, by the Australian Capital Territory Schools Authority;
(d) care provided by a person in the course of conducting a school that is registered under the *Education Ordinance* 1937; or
(e) care provided for children as patients in a hospital.

(4) For the purposes of sub-section (2) –
(a) care is provided for children on a business basis if it is provided in the course of carrying on a business of caring for children or it is provided incidentally to the carrying on of some other business;
(b) care is provided for children on a community service basis if it is provided as a service to the community or it is provided incidentally to providing some other service to the community;
(c) a child who is received at a place in an emergency or in unexpected circumstances shall not be taken into account unless and until the child has been cared for at the premises for 10 consecutive days; and
(d) a child is being cared for at a place notwithstanding a temporary absence from that place.

Licensing of child care

120. Subject to section 121, a person shall not provide child care, whether for reward or otherwise, at any premises unless a licence is in force in respect of those premises and the conditions of the licence are being complied with.

Penalty:

Exemptions

121. (1) The Director may, by instrument in writing under his hand, exempt specified child care or child care of a specified class from the application of this Part where he considers it desirable to do so, having regard to any one or more of the following:
(a) the circumstances in which the child care is being or is to be provided;
(b) the number of children cared for or likely to be cared for;
(c) the nature of the premises at which the child care is being or is to be provided;
(d) the days on which and the times at which the child care is being or is to be provided.

(2) An exemption under sub-section (1) may be for a period specified in the instrument.

(3) The Director shall not revoke or vary an exemption which relates to specified child care unless he has, at least 28 days before doing so, given to the person providing the child care an opportunity of stating reasons why the exemption should not be revoked.

(4) A copy of an instrument under this section shall be published in the *Gazette*.

Licences

122. (1) The Director may, upon application in writing by a person for a licence in respect of premises, by notice in writing served on the applicant –
(a) grant the licence; or
(b) refuse to grant the licence.

(2) A licence shall include conditions as to –
(a) the maximum number of children for whom care may be provided under the licence; and
(b) the ages of the children for whom care may be provided under the licence.

(3) A licence is subject to such other conditions as the Director thinks fit and specifies in the licence, including but not limited to conditions as to:
(a) the number of the persons under whose control the children for whom care is provided will be placed;
(b) the qualifications of the persons mentioned in paragraph (a);
(c) the measures to be taken for the health and safety of the children;
(d) the buildings and facilities to be used;
(e) the insurance of the licensee in respect of any liability of the licensee arising out of or relating to the provision of the care or the premises at which the care is provided;
(f) the activities to be provided for the benefit of the children; and
(g) the management of the premises at which the care is provided.

(4) Subject to this Ordinance, a licence remains in force for a period of 12 months from the date on which it was granted.

(5) At the request of the applicant, the licence may be expressed to be in force for a period of 6 months from the date on which it was granted.

Emergency suspension of licences

123. Where the Director is satisfied that there exists an emergency by reason of which it is desirable to suspend a licence immediately, he may, by notice in writing served on the licensee, suspend the licence for the period specified in the notice.

Direction to comply with conditions

124. (1) Where the Director is satisfied that a condition to which a licence is subject has not been complied with, he may, by notice in writing served on the licensee, inform the licensee that he is so satisfied and that, if the licensee does not forthwith comply with the condition, steps may be taken for the revocation or suspension of the licence.

(2) The Director may, having regard to an explanation so furnished, vary or revoke a condition to which the licence is subject.

Cancellation, &c., of licences

125. (1) The Director may, upon application by a licensee –
(a) cancel the licence;
(b) suspend the licence for the period specified in the application;
(c) vary, in the manner specified in the application, a condition to which the licence is subject; or
(d) revoke a condition to which the licence is subject, being a condition specified in the application.

(2) The Director may, by notice in writing served on a licensee, require the licensee to show cause why –
(a) the licence should not be –

(i) cancelled; or
(ii) suspended for the period specified in the notice;
(b) a condition to which the licence is subject should not be varied in the manner specified in the notice;
(c) the licence should not be made subject to a condition specified in the notice; or
(d) a condition specified in the notice and to which the licence is subject should not be revoked.

(3) The Director may, not less than 28 days after the date of service of a notice under sub-section (2), by notice in writing served on the licensee –
(a) cancel the licence;
(b) suspend the licence for the period specified in the first-mentioned notice or for some other period to which the licensee consents;
(c) vary a condition of the licence in the manner specified in the first-mentioned notice or in some other manner to which the licensee consents;
(d) include in the licence the condition specified in the first-mentioned notice or some other condition to the inclusion of which the licensee consents; or
(e) revoke the condition specified in the first-mentioned notice or some other condition to the revocation of which the licensee consents.

(4) A notice under sub-section (3) has effect from and including the date on which it is served or a later date specified in the notice for the purpose.

Removal of child from unlicensed care

126. (1) If a person is providing child care for a child at premises in respect of which a licence is not, for the time being, in force, the Director or an officer may –
(a) direct a parent of the child to remove the child from the premises; or
(b) remove the child from the premises and –
(i) place the child in the custody of a parent or of a relative of the child; or
(ii) if he considers it more appropriate to do so, deliver the child to a suitable person who is prepared to care for him.

(2) A direction under paragraph (1)(a) may be given by any appropriate means of communication, including by telephone.

(3) Where a parent of a child is given a direction under paragraph (1)(a), the parent shall forthwith comply with the direction.

Penalty:

Inspection of licensed premises

127. The Director or an officer may, at any reasonable time, enter and inspect premises specified in a licence as premises at which child care is provided.

Review of decisions

128. An application may be made to the Administrative Appeals Tribunal for review of a decision of the Director made in exercise of powers conferred by this Part.

PART VIII – EMPLOYMENT OF CHILDREN

Interpretation

129. (1) In this Part, "young child" means a person who has not attained the school-leaving age.

(2) For the purposes of this Part –
(a) if a person causes or permits a child to participate or assist in a business, trade, calling or occupation carried on for private profit, the person shall be deemed to employ the child and shall be so deemed whether or not the child receives payment or other reward for his participation or assistance; and
(b) "employer" and "employment" have corresponding meanings.

Employment of young children

130. (1) Except as provided by this Part, a person shall not employ a young child.

Penalty:

(2) Sub-section (1) does not apply with respect to the employment of a young child in or in connection with a school, provided that any applicable law or any applicable industrial award, order, determination or agreement is complied with.

Light work excepted

131. (1) Subject to this Part, sub-section 130(1) does not apply with respect to the employment of a young child –
(a) on baby-sitting;
(b) on going on errands;
(c) on casual work in or around a private home;
(d) on golf-caddying;
(e) on clerical work;
(f) on gardening;
(g) on selling, delivering or distributing newspapers or advertising matter;
(h) for the purposes of or in relation to entertainment at a place used for providing entertainment or amusement;
(i) for the purpose of entertainment at a place used for sporting activities;
(j) for the purpose of singing, dancing, playing a musical instrument or for some similar purpose;
(k) as a performer in a radio, television or film program or production, or a like program or production, not being in the nature of a news item;
(l) as a model;
(m) as the subject of photography, whether still or moving;
(n) in or in connection with a circus; or
(o) on any other prescribed work.

(2) Sub-section (1) does not have effect with respect to the employment of a young child for more than 10 hours in any 1 week unless the proposed employer has, not less than 7 days before the employment commences, given to the Director a notice setting out –
(a) the name and address, and the date of birth, of the young child;

(b) the nature and place of the proposed employment;
(c) the name and address of a parent of the young child;
(d) the name and address of the proposed employer;
(e) the proposed hours and days of work;
(f) the proposed duration of the employment;
(g) the name of the school, if any, attended by the young child; and
(h) the reasons for proposing to employ the young child.

Family businesses excepted

132. Subject to this Part, sub-section 130(1) does not apply with respect to the employment of a young child in or in connection with a business, trade, occupation or calling carried on by a parent of the young child or by a company of which a parent of the young child is a director.

Employment not to interfere with schooling, &c.

133. Sections 131 and 132 do not have effect with respect to the employment of a young child if the employment –

(a) constitutes a breach of the *Education Ordinance* 1937 by or with respect to the young child; or
(b) is likely to prejudice the health, safety or personal or social development of the young child or the ability of the young child to benefit from his education or training.

Copies of notices to be given

134. The Director shall, forthwith after receiving a notice under this Part, furnish a copy of the notice to the Secretary as defined by section 5 of the *Education Ordinance* 1937.

Dangerous employment

135. (1) A person shall not, except with the consent of the Director, employ a young child where the employment involves the child engaging in activity dangerous to the child.

Penalty:

(2) The Director may refuse consent for the purposes of sub-section (1) where he has reasonable grounds for believing that the proposed employment would be likely to prejudice the health or safety of the young child.

(3) The consent of the Director for the purposes of sub-section (1) may be given subject to compliance with such conditions as the Director thinks fit, being conditions having as their object the preserving of the child from prejudice as mentioned in sub-section (2).

(4) Where an employer employs a young child with the consent of the Director as mentioned in sub-section(1), the employer shall not fail to comply with a condition to which the consent is subject.

Penalty:

(5) The Director shall furnish a copy of his consent given for the purposes of sub-section (1) to the Secretary as defined by section 5 of the *Education Ordinance* 1937.

Regulation of employment of children

136. (1) The Director may, by notice in writing served on an employer –

(a) prohibit the employer from employing or continuing to employ a child specified in the notice if the Director believes, on reasonable grounds, that the employment is, or is likely to be, prejudicial to the health, safety or personal or social development of the child or the ability of the child to benefit from his education or training; or
(b) specify conditions to be complied with by the employer with respect to the employment of a child specified in the notice, being conditions designed to preserve the health, safety or personal or social development of the child or the ability of the child to benefit from his education or training.

(2) A person shall not employ a child in contravention of a notice under sub-section (1) or of a condition to which such a notice is subject.

Penalty:

Duty of employers of children

137. An employer of a child shall do all such things as are reasonably necessary to ensure the health and safety of a child employed by him.

Penalty:

Child not to render certain measures ineffective

138. If the doing of a thing by a child, or the omission or failure of a child to do a thing, renders less effective anything done by his employer for the purpose of complying with section 137 or for the purpose of securing compliance with a condition to which the employment is subject, the child is guilty of an offence.

Part subject to certain provisions of Education Ordinance

139. This Part has effect subject to sections 9 and 16 of the *Education Ordinance* 1937.

Review of decisions

140. An application may be made to the Administrative Appeals Tribunal for review of a decision of the Director made in exercise of powers conferred by this Part.

PART IX – OFFENCES

Presumption of age

141. Where a person is charged with an offence against this Ordinance or the regulations with respect to a person who is alleged in the charge not to have attained a specified age and the second-mentioned person appears to the Court not to have attained that age, that person shall, unless the contrary is proved, be presumed not to have attained that age.

Neglect, &c., of children

142. (1) A person shall not ill-treat, or fail to provide adequate and proper lodging, food, nursing, clothing, medical or dental care or attention for, a child in his custody or under his control.

Penalty:

(2) A person shall not leave a child unattended in such circumstances and for such a time that there is a likelihood that the child will suffer injury, sickness or other physical damage or be in danger.

Penalty:

(3) A police officer, a medical practitioner or an officer may take such steps as appear to him to be reasonably necessary (including entering any building, place or vehicle, with such force as is reasonably necessary) for the immediate safeguarding of a child who has been ill-treated or neglected as mentioned in sub-section (1) or has been left unattended as mentioned in sub-section (2).

(4) An action for damages does not lie against a person who acts under sub-section (3) in good faith and with reasonable care in the circumstances.

(5) Sub-section (3) does not affect the operation of Part V.

Unauthorised removal of children

143. A person shall not, without lawful authority (the burden of proving which lies upon him), remove or cause or procure to be removed a child from the care of a person into whose care or custody the child has been placed under this Ordinance.

Penalty:

False statements

144. A person shall not, for the purposes of, or for a purpose connected with, this Ordinance, make a statement that is false or misleading in a material particular, knowing it to be false or misleading.

Penalty:

Obstruction

145. A person shall not hinder or obstruct a person in the exercise of his powers or the performance of his duties or functions under this Ordinance.

Penalty:

PART X – APPEALS

Appeals generally

146. (1) In this section, "order" includes conviction, finding, sentence, penalty, determination, declaration, direction and decision.

(2) Subject to this section, an appeal lies to the Supreme Court from an order of the Court made or given when exercising jurisdiction as provided by sub-section 24(1).

(3) An appeal so lies whether the order appealed from was made or given under this Ordinance, under the Court of Petty Sessions Ordinance or under some other law in force in the Territory and, where the Court of Petty Sessions Ordinance or some other law so provides, may be by way of order to review.

(4) On an appeal referred to in sub-section (2), the Supreme Court shall not make an order that could not have been made by the Childrens Court.

(5) An appeal under this section by a child against an order may be brought by the child or, on behalf of the child, by –

(a) a parent of the child; or

(b) the Clerk within the meaning of the Court of Petty Sessions Ordinance.

(6) Part XI of the Court of Petty Sessions Ordinance (but not including sections

211, 212 and 213) applies, subject to sub-section (4) and to the prescribed modifications, with respect to an appeal under this section.

(7) Where an order *nisi* to review a decision of the Court, being an order referred to in sub-section (3), has been granted under Division 3 of Part XI of the Court of Petty Sessions Ordinance in its application under this section –

(a) the person obtaining the order *nisi* is not entitled to make any other appeal to the Supreme Court under this section against the decision; and

(b) if the person obtaining the order has, in pursuance of section 209 of the Court of Petty Sessions Ordinance, served a notice of appeal against the decision, the appeal shall not be heard.

(8) Where an appellant or an applicant for an order to review is a child, the Supreme Court may make any order that might be made by the Court under sub-section 68(2) or 85(2).

PART XI – MISCELLANEOUS

Establishment of shelters, attendance centres and institutions

147. The Minister may, for the purposes of this Ordinance, establish shelters, attendance centres and institutions.

Medical examinations and surgical operations

148. (1) This section applies in relation to a child who –

(a) is in an institution in pursuance of an order under paragraph 53(1)(k);

(b) has been placed in an approved home, a shelter or a remand centre until he is removed to a State institution in pursuance of an order under paragraph 53(1)(j) or as mentioned in paragraph 87(1)(d); or

(c) is a ward.

(2) The Director may, on reasonable grounds, arrange that a child in relation to whom this section applies be examined by a medical practitioner or by a dentist.

(3) The Director may consent to a surgical or other operation or to medical or dental treatment that he is advised by a medical practitioner (or, in the case of dental treatment, by a dentist) is in the interests of the health of a child in relation to whom this section applies.

(4) A medical practitioner shall not carry out an internal examination of a child in relation to whom this section applies for the purpose of diagnosing a venereal disease unless –

(a) he has reasonable grounds for making the examination;

(b) other means of diagnosis have first been used; and

(c) the child has consented to the making of the examination or, if the child refuses to consent, the Director has so consented.

Penalty:

(5) Before such an examination takes place, the medical practitioner shall inform the child that the child has the right to refuse to consent to the examination.

Penalty:

(6) This section has effect notwithstanding any objection by or lack of consent of a parent of the child concerned.

Notifications

149. A notification under this Ordinance may be given by any appropriate means, including by telephone or any other form of communication by electronic means.

Court may direct Minister to make certain determinations

150. (1) Where he considers it appropriate to do so, the Youth Advocate or any other person may apply to the Court for an order directing the Minister to make a determination with respect to a child under clause 3 of the Agreement (including that clause as applying under sub-clause 3(6) of the Supplemental Agreement).

(2) The Court shall hear the application and, if it considers it in the interests of the welfare of the child, direct the Minister to make a determination accordingly.

(3) The procedure in connection with an application under this section is as the Court directs.

Powers of courts with respect to reports

151. (1) A court hearing any proceedings in respect of or against a child may order the Director or a person employed by the Health Commission whose duties relate to childrens welfare to furnish to the court a report as to the child and the Director or the person shall, notwithstanding anything in any law, furnish a report accordingly.

(2) A court referred to in sub-section (1) may, for good reason, request a person not referred to in that sub-section, or a body, authority or agency, to furnish a report as to the child.

(3) For the purpose of giving effect to a direction under sub-section (1), the person referred to in that sub-section may do one or more of the following:

(a) visit and interview the child;
(b) interview a parent of the child;
(c) interview a schoolteacher or other person concerned with the education or welfare of the child;
(d) require the child to submit to being interviewed by a medical practitioner or other specified person.

(4) Where a report is furnished in good faith to the court by a medical practitioner or other person following an interview as mentioned in paragraph(3)(d) –

(a) the report shall not be held to constitute a breach of confidence or of professional etiquette or ethics or of a rule of professional conduct; and
(b) liability for defamation is not incurred by reason of the furnishing of the report.

(5) Sub-section (4) has effect both within and beyond the Territory.

Reports to be made available

152. (1) Unless the court otherwise directs, a copy of a report furnished under section 151 shall be made available to the child, a parent of the child and a lawyer acting for the child or for a parent of the child.

(2) The court may, for good cause, direct that a copy of such a report or a specified part of such a report shall not be made available to the child if it would be likely to cause harm to the child.

(3) The person furnishing a report under section 151 may be called as a witness and examined by way of cross-examination and re-examination by a party to the proceedings, by a parent of the child or by the Youth Advocate.

(4) The child or a parent of the child may give evidence, or call witnesses, to rebut any of the contents of the report.

Right of appearance

153. At the hearing in any court –

(a) of an information or complaint against a child; or
(b) of an application, proceeding or matter under this Ordinance or in relation to which this Ordinance applies,

the Director or the Youth Advocate is entitled to appear and be heard and may call witnesses.

Matters before Childrens Court

154. So far as practicable, the sittings of the Court shall be so arranged that the extent to which children are able to associate with each other within the premises of the Court while awaiting hearing, and the extent to which parents and other persons are obliged to be in common waiting rooms pending the hearing of proceedings, are kept to a minimum.

Next friend of child

155. (1) The Childrens Magistrate may, if he thinks it to be in the interests of a child to do so and if the person consents, appoint a person to be the next friend of the child.

(2) The next friend may, on behalf of the child, bring any application or other proceedings in a court under this Ordinance or in relation to which this Ordinance applies that the child might have brought and defend, on behalf of the child, any proceedings brought against the child, whether under this Ordinance or otherwise.

(3) An order for costs may be made in favour of or against a next friend in the same circumstances as the order might have been made with respect to the child.

(4) In this section, "proceedings" includes an appeal and an application for an order to review.

Representation of children

156. (1) Where, in proceedings in a court under this Ordinance or in relation to which this Ordinance applies –

(a) a child is not separately represented by a lawyer; and
(b) it appears to the court that the child should be so represented,

the court may, of its own motion or on the application of any person (including the child), order that the child be separately represented by a lawyer and the court may make such other orders as it thinks necessary to secure that separate representation.

(2) In this section, "proceedings" includes an appeal and an application for an order to review.

Attendance of parents at court

157. (1) Except as otherwise provided by this section, a parent of a child who is the subject of proceedings before the Court shall, if notice of the proceedings has

been served on him or if he is otherwise aware of the proceedings, attend the Court during the hearing and determination of the proceedings.

(2) If notice of the proceedings has been served on a parent who has the guardianship of the child but, without reasonable cause, neither parent attends the Court, the Court may direct a warrant to issue to bring the parent before the Court.

(3) The Court may admit to bail a person in respect of whom a warrant has been so issued on the person's entering into a recognizance with or without a surety or sureties, to attend the Court during the hearing and determination of the proceedings.

(4) The application of this section extends to parents whose place of living is outside the Territory.

Proceedings not open to public

158. A person who is not a person specified in any of the following paragraphs is not entitled to be present at the hearing of proceedings in the Childrens Court except as otherwise provided by this Ordinance or as permitted or required by the Court to be present:

(a) a member or officer of the Court;
(b) the persons immediately concerned with the proceedings, their lawyer or an employee of their lawyer;
(c) a parent or other person having the care of a child in respect of whom the proceedings are taken or any other person whom the court admits as a representative of the child;
(d) the Director;
(e) the Youth Advocate;
(f) a person employed in the Department or by the Health Commission and concerned with the proceedings;
(g) a person who has, or a representative of a body, authority or agency which has, furnished a report under sub-section 151(1); or
(h) a person attending for the purpose of preparing a news report of the proceedings and authorised by his employer so to attend.

Restrictions on publication of reports of proceedings

159. (1) A person shall not print or publish by any means a report or account of any proceedings under this Ordinance or in relation to which this Ordinance applies if the printing or publication discloses the identity of the child concerned or of a member of his family, or enables the identity of the child concerned or of a member of his family to be ascertained.

(2) A person who contravenes sub-section (1) is guilty of an offence punishable, on conviction —

(a) in the case of a first offence, or a second or subsequent offence prosecuted summarily — by a fine not exceeding $ or imprisonment for a period not exceeding 3 months; or
(b) in the case of a second or subsequent offence prosecuted on indictment — by a fine not exceeding $ or imprisonment for a period not exceeding months.

(3) An offence by a person against this section may be prosecuted summarily

and a second or subsequent offence by the same person may be prosecuted summarily or on indictment.

(4) Proceedings for an offence against this section shall not be commenced except by, or with the consent in writing of, the Attorney-General.

(5) This section has effect both within and beyond the Territory.

Protection of children in other courts

160. (1) A court, not being the Childrens Court or the Family Court, may, in relation to proceedings before the court concerning a child, order that sections 158 and 159 apply to and in relation to those proceedings, and those sections thereupon so apply.

(2) The powers conferred upon a court by virtue of sub-section (1) are in addition to any other powers possessed by the court.

Confidentiality

161. (1) A person shall not, otherwise than for the purposes of this Ordinance or as required by law or permitted by the Permanent Head of the Department, make a record of or divulge or communicate to any person any information or document or part of a document, being information or a document that he had acquired under or by virtue of this Ordinance.

Penalty:

(2) This section does not affect the operation of any other law relating to the confidentiality of information or documents.

(3) This section has effect both within and beyond the Territory.

Presumption of authority

162. The authority of the Director, the Youth Advocate, an officer (including an authorised officer) or a police officer to do an act or take proceedings under or for the purposes of this Ordinance shall, in the absence of proof to the contrary, be presumed.

Averments

163. An averment in a complaint or information with respect to an offence against this Ordinance to the effect --

(a) that a person is, or was at a specified time, an officer, an authorised officer, a police officer or the holder of some other office;
(b) that a person is, or was at a specified time, an officer and appointed, authorised, or directed by the Minister as stated in the averment and that the appointment, authority or direction has not been revoked; or
(c) that a person is, or was at a specified time, a ward or has been committed to, or is an inmate of, a shelter, an approved home, an institution or a State institution,

is evidence of the matter averred.

Warrant to search premises

164. (1) For the purposes of this section —

(a) any thing with respect to which an offence has been, or is suspected on reasonable grounds to have been, committed;

(b) any thing as to which there are reasonable grounds for believing that it will afford evidence of the commission of an offence; and

(c) any thing as to which there are reasonable grounds for believing that it is intended to be used for the purpose of committing an offence,

shall be taken to be a thing connected with an offence.

(2) In this section, "authorised officer" means an officer for the time being authorised by the Director to act under this section.

(3) Where an information on oath is laid before a Magistrate within the meaning of the Court of Petty Sessions Ordinance alleging that there are reasonable grounds for believing that —

(a) a person is committing or has committed an offence against this Ordinance or the regulations in any premises, vessel or vehicle or upon any land; or

(b) there is, in any premises, vessel or vehicle or upon any land, any thing connected with such an offence,

the Magistrate may issue a warrant authorising a police officer or an authorised officer to enter the premises, vessel or vehicle or to enter upon the land, with such force as is necessary for the purpose, to search the premises, vessel, vehicle or land and to seize any such thing that he may find in the course of the search.

(4) A warrant under sub-section (3) is sufficient authority for the persons named in the warrant to enter and inspect the premises specified therein.

(5) The Magistrate shall not issue a warrant under sub-section (3) in relation to any information unless —

(a) an affidavit has been furnished to him setting out the grounds on which the issue of the warrant is being sought;

(b) the informant or some other person has given to the Magistrate, either orally or by affidavit, such further information as the Magistrate required concerning the grounds on which the issue of the warrant is being sought; and

(c) the Magistrate is satisfied that there are reasonable grounds for issuing the warrant.

(6) Where a Magistrate issues a warrant under sub-section (3), he shall state on the affidavit furnished to him in accordance with sub-section (5) which of the grounds specified in that affidavit he has relied on to justify the issue of the warrant and particulars of any grounds relied on by him to justify the issue of the warrant.

(7) There shall be stated in a warrant issued under sub-section (3) a date, not being a date later than 7 days after the date of the issue of the warrant, upon which the warrant ceases to have effect.

(8) The powers conferred by this section are in addition to, and not in derogation of, any other powers conferred by law.

(9) The police officer or authorised officer named in the warrant may be accompanied by any one or more of the following:

(a) the Director;

(b) a medical practitioner;

(c) the person giving the information upon which the warrant was issued, if that person so desires and the Childrens Magistrate has not otherwise directed;

(d) such officers or police officers as he thinks necesssary to assist him.

Regulations

165. (1) The Minister may make regulations, not inconsistent with this Ordinance, prescribing all matters that this Ordinance requires or permits to be prescribed or that are necessary or convenient to be prescribed for carrying out or giving effect to this Ordinance.

(2) Without limiting the generality of sub-section (1), the regulations may —

(a) make provision for or with respect to —

(i) the keeping of registers and records by or in relation to; and

(ii) the conditions to be included in licences granted to, persons providing child care to which Part VII applies; and

(b) with respect to attendance centres, make provision for or with respect to

(i) the duties of persons in charge of attendance centres;

(ii) the health and safety of children attending attendance centres;

(iii) travel and transport arrangements for such children; and

(iv) the periods to be taken into account when calculating the time spent in the custody of the Director as mentioned in sub-section 61(3); and

(c) prescribe penalties, not exceeding a fine of $, in respect of offences against the regulations.

SCHEDULE

Section 3

ORDINANCES REPEALED

Child Welfare Ordinance 1957
Child Welfare Ordinance 1962
Child Welfare Ordinance 1968
Child Welfare Ordinance 1969
Child Welfare Ordinance 1971
Child Welfare Ordinance 1973
Child Welfare (Amendment) Ordinance 1979
Child Welfare (Amendment) Ordinance (No.2) 1979

AUSTRALIAN CAPITAL TERRITORY

COURT OF PETTY SESSIONS (AMENDMENT) ORDINANCE 1981

An Ordinance to amend the *Court of Petty Sessions Ordinance* 1930

Short title

1. This Ordinance may be cited as the *Court of Petty Sessions (Amendment) Ordinance* 1981.

Commencement

2. This Ordinance shall come into operation on the same day as the *Child Welfare Ordinance* 1981 comes into operation.

Chief Magistrate, Stipendiary Magistrates

3. Section 7 of the *Court of Petty Sessions Ordinance* 1930 is amended by omitting from paragraph (1)(b) the figure "4" and substituting "5".

Repeal

4. The following provisions of the *Court of Petty Sessions Ordinance* 1930 are repealed:

sub-section 65(3);

section 67.

Preceding page blank

Appendix B

CHILDRENS COURT STATISTICS

Note: The statistics in the tables which follow relate to children who appeared in the A.C.T. Childrens Court, and in respect of whom final orders were made, between 1 June 1978 and 31 May 1979. The totals include children who appeared in court more than once. Four of the tables relating to offenders include details of the offences for which the children came to notice. When a child faced multiple charges the case was classified on the basis of the most serious charge faced.

Table 15: Young Male Offenders Dealt with by the A.C.T. Children's Court 1 June 1978 to 31 May 1979 – Offences and Ages

	Age									
Offence	*9*	*10*	*11*	*12*	*13*	*14*	*15*	*16*	*17*	*Total*
Simple larceny	2	4	3	11	16	24	46	31	49	186
Break and enter	–	1	1	4	7	12	16	18	14	73
Other theft	–	–	1	3	4	9	16	33	25	91
Sexual offence	–	–	–	–	2	1	–	1	3	7
Violence towards others	–	–	–	–	3	3	1	3	11	21
Violence towards property	–	–	–	1	2	1	11	9	11	35
Drug offence	–	–	–	–	–	1	–	1	9	11
Alcohol related offences	–	–	–	–	–	–	1	5	11	17
Other	–	1	1	1	4	5	4	17	30	63
Traffic offence	1	–	1	1	1	4	14	60	293	375
Breach of probation or recognizance	–	–	–	–	–	2	2	1	1	6
Total	3	6	7	21	39	62	111	179	457	885

Table 16: Young Female Offencers Dealt with by the A.C.T. Children's Court 1 June 1978 to 31 May 1979 – Offences and Ages

	Age						
Offence	*12*	*13*	*14*	*15*	*16*	*17*	*Total*
Simple larceny	2	9	15	13	9	8	56
Break and enter	–	1	1	1	1	–	4
Other theft	–	1	1	2	3	3	10
Other	–	1	–	1	1	5	8
Traffic offence	–	–	–	1	1	15	17
Breach of probation or recognizance	–	–	–	1	–	–	1
Total	2	12	17	19	15	31	96

Table 17: Young Male Offenders dealt with by the A.C.T. Children's Court 1 June 1978 to 31 May 1979 — Court Order and Age.

	Age									
Court Order	*9*	*10*	*11*	*12*	*13*	*14*	*15*	*16*	*17*	*Total*
No appearance defendant								1	1	2
No action							1		1	2
Charge dismissed		2	1	1	4	3	7	11	9	38
Admonished and discharged	1			1	4	3	7	9	19	44
Fine	1		1	2	9	8	25	70	301	417
Fine and licence suspended							1	13	38	52
Recognizance under s.59		2	2	6	14	21	30	31	30	136
Recognizance and supervision under s.59		1	1	2	4	3	4	4	5	24
Recognizance and supervision and live where directed under s.59				1		1	2			4
S.19B Cwlth Crimes Act									1	1
S.20 Cwlth Crimes Act									1	1
S.556B Crimes Act (N.S.W.)									2	2
S.556B Crimes Act (N.S.W.) and supervision									2	2
Probation under s.57 or s.58	1			4	1	5	4	6	11	32
Probation under s.57 or s.58 with supervision		1	1	2	2	5	10	5	4	30
Probation under s.57 or s.58 and live where directed								1	1	2
Recognizance under s.57(1)(e)						6	3	3	2	14
Recognizance under s.57(1)(e) and supervision						1	1	1	1	4
Suspended commital				1			2	7	7	17
Suspended Committal and supervision				1	1	3	6	5	9	25
Suspended committal and supervision and live where directed							1	2		3
Committal to Supreme Court for Trial									3	3
Committal (set term)			1				2	4	6	13
General Commital						3	5	6	3	17
Total	3	6	7	21	39	62	111	179	457	885

Table 18: Young Female Offenders dealt with by the A.C.T. Children's Court 1 June 1978 to 31 May 1979 — Court Order and Age.

	Age						
Court Order	*12*	*13*	*14*	*15*	*16*	*17*	*Total*
No action				1			1
Charge dismissed	1	1	1		2		5
Admonished and discharged			2	2	5	3	12
Fine			3	1	1	15	20
Fine and licence suspended						2	2
Recognizance under s.59	1	5	6	9	1	6	28
Recognizance and supervision under s.59		1	1	2	1		5
Recognizance and supervision and live where directed under s.59						1	1
S.556A Crimes Act (N.S.W.)						1	1
Probation under s.57 or s.58.		3	3	1	1	1	9
Probation under s.57 or s.58 with supervision				2			2
Probation under s.57 or s.58 and live where directed		1			1		2
Recognizance under s.57(1)(e)						2	2
Recognizance under s.57(1)(e) and supervision		1					1
Suspended Committal and supervision					3		3
General Committal			1	1			2
Total	2	12	17	19	15	31	96

Table 19: Young Male Offenders dealt with by the A.C.T. Children's Court 1 June 1978 to 31 May 1979 - Court Order and Offence.

Court Order	**Offence**											
	Simple Larceny	*Break & enter*	*Other theft*	*Sexual offence*	*Violence towards others*	*Violence towards property*	*Drug offences*	*Alcohol related offences*	*Other*	*Traffic offences*	*Breach of probation or recog-nizance*	*Total*
No appearance defendant								2				2
No action	9	4	6		3	2					2	2
Charge dismissed	11		2	1					9	5		38
Admonished and discharged	35	3	16	1	7	9	8	10	14	6		44
Fine	65	23	24		5	7		5	27	305	1	417
Fine and licence suspended	13	3	2	2		3			10	52		52
Recognizance under s.59									1	2		136
Recognizance and supervision under s.59	1	1	1		1							24
Recognizance and supervision and live where directed under s.59			1			1						4
S.19 Cwlth Crimes Act	1				1							1
S.20 Cwlth Crimes Act												1
S.556B Crimes Act (N.S.W.)	1						1					2
S.556B Crimes Act (N.S.W.) and supervision	14	2	9		1	3	1			2		32
Probation under s.57 or s.58.	9	8	6			4			1	1	1	30
Probation under s.57 or s.58 with supervision	1		1									2
Probation under s.57 or s.58 and live where directed	5	8			1							14
Recognizance under s.57(1)(e)	1	2								1		4
Recognizance under s.57(1)(e) and supervision	4	4	4			3			1	1		17
Suspended Committal	6	7	9		1	1					1	25
Suspended Committal and supervision		2	1									3
Suspended Committal and live where directed	5	3	2	3								3
Committal to Supreme Court for Trial	5	3	7		1	1	1					13
Committal (set term)						1					1	17
General Committal												
Total	186	73	91	7	21	35	11	17	63	375	6	885

Table 20: Young Female Offenders dealt with by the A.C.T. Children's Court 1 June 1978 to 31 May 1979 — Court Order and Offence.

	Offence						
Court Order	*Simple Larceny*	*Break & enter*	*Other theft*	*Other*	*Traffic offences*	*Breach of probation or recognizance*	*Total*
No action						1	1
Charge dismissed	3	1		1			5
Admonished and discharged	11			1			12
Fine	4		2	1	13		20
Fine and licence suspended					2		2
Recognizance under s.59	20	1	4	2	1		28
Recognizance and supervision under s.59	3		1	1			5
Recognizance and supervision and live where directed under s.59		1					1
S.556A Crimes Act (N.S.W.)					1		1
Probation under s.57 or s.58	7		1	1			9
Probation under s.57 or s.58 with supervision	2						2
Probation under s.57 or s.58 and live where directed	1			1			2
Recognizance under s.57(1)(e)	2						2
Recognizance under s.57(1)(e) and supervision	1						1
Suspended committal and supervision	2		1				3
Generai Committal		1	1				2
Total	56	4	10	8	17	1	96

Table 21: Neglected and Uncontrollable Children Dealt with by the A.C.T. Children's Court between 1 June 1978 and 31 May 1979: Age

Age	*Neglected*	*Uncontrollable*	*Total*
1	1	—	1
2	1	—	1
3	3	—	3
4	1	—	1
5	—	—	—
6	1	—	1
7	2	—	2
8	—	—	—
9	4	4	8
10	1	1	2
11	—	5	5
12	1	1	2
13	—	2	2
14	1	12	13
15	—	12	12
16	2	7	9
17	1	—	1
Total	19	44	63

Table 22: Neglected and Uncontrollable Children Dealt with by the A.C.T. Children's Court between 1 June 1978 and 31 May 1979: Sex

	Neglected	*Uncontrollable*	*Total*
Males	10	22	32
Females	9	22	31
Total	19	44	63

Table 23: Neglected and Uncontrollable Children Dealt with by the A.C.T. Children's Court between 1 June 1978 and 31 May 1979:

Males: Orders Made

	Uncontrollable	*Neglected*	*Total*
Dismissed	4	3	7
Admonished and discharged	–	3	3
Recognizance plus supervision and order to live where directed	3	–	3
Probation	3	–	3
Probation plus supervision	1	–	1
Probation plus supervision and an order to live where directed	2	–	2
Suspended committal plus supervision	1	–	1
Committal to care of fit person	–	2	2
General committal	6	–	6
Made a ward	2	2	4
Total	22	10	32

Table 24: Neglected and Uncontrollable Children Dealt with by the A.C.T. Children's Court between 1 June 1978 and 31 May 1979:

Females: Orders Made

	Uncontrollable	*Neglected*	*Total*
Dismissed	1	5	6
Admonished and discharged	–	2	2
Recognizance plus supervision	1	–	1
Probation	1	–	1
Probation plus supervision	2	–	2
Probation plus supervision and an order to live where directed	3	–	3
Suspended committal plus supervision	3	–	3
General committal	7	–	7
Specific committal	4	–	4
Made a ward	–	2	2
Total	22	9	31

Appendix C

SOCIAL INQUIRY REPORT

Welfare Branch

The Presiding Magistrate
Canberra Children's Court
Law Courts
Canberra, A.C.T. 2601

Welfare Report – Canberra Childrens Court

25 September 1980

Name: John Smith

Date of Birth: ...

Occupation: Labourer

Address: ...

Present Offence: Assault

Previous Offences: – are known and noted by this officer

The information in this report was obtained from John, his parents Mr and Mrs Smith, school reports, probation reports, the Australian Federal Police and departmental records.

Family

Father:	Mr Smith Invalid pensioner	Date of Birth
Mother:	Mrs Smith Home duties	" "
Children:	(Subject child)	" "
	Male	" "
	Female	" "
	Male	" "

Family background

Mr and Mrs Smith were married in 1961 in Sydney NSW and lived in various types of accommodation until 1966 when they were allocated a house in Merrylands, NSW by the Housing Commission of NSW.

At this time the Smith's had three children and it was reported that the family had some difficulties through Mr Smith's series of health problems which stemmed from an accident in 1962.

It was claimed that because of the economic situation, job opportunities in Sydney were limited – in addition to this Mr Smith was suffering from a back injury and ill health.

The family decided that they would make another start in Canberra where Mrs Smith's mother was living – so in December 1974 Mrs Smith and the children arrived in Canberra to live at Mrs Smith's mother's home in Narrabundah. The Smith's applied for emergency housing in April 1975, and when the family's circumstances became known to this Branch, assistance was given in providing accommodation at the above address, where the family continue to reside.

Mr Smith continued in ill health suffering from pain from his back injury but he managed to obtain work as a painter until October 1977, when he found it impossible to continue working and was granted an invalid pension.

Family relationships

The children appear to have a warm relationship towards the parents and each other. The younger children were friendly and related openly. John however volunteered nothing and says little unless directly asked a question.

Mrs Smith has adopted a very protective attitude towards her children and attempts to restrict them by keeping them home as much as possible when they have no organised activities.

Mr Smith admits that he takes little part in the control or discipline of the children, leaving this to his wife. He said he has chastised the boys on occasions but he felt that the guidelines set by his wife for the children were strong enough and they were rarely unruly in the home.

The family home is clean and comfortably furnished and a quarter size billiards table is an incentive to keep the lads at home. The parents seem to be making a great effort to keep the family cohesive but the compulsion used may not be advantageous in achieving this.

Education and employment

School reports indicate that John is of average intelligence but under achieves and tended to be disruptive in classes. Because of this and several reported incidences of bullying and actual assaults on other students John was suspended from . . . High School in October 1977 and later left school to seek employment.

John managed to obtain casual employment but basically he has been without work until his recently acquired employment at . . . .

Sporting activities

John is a keen sportsman and has played both soccer and rugby league with the ... junior team and he is given much encouragement by his parents who are both proud of his achievements in rugby.

The family is keen on football and attends the various competitions as a family group. Mr Smith has been a coach and team manager and Mrs Smith is also closely associated with . . ., a local rugby club as a committee member. Mrs Smith always takes her sons to their various leisure time activities In is involved in two football meetings during the week and she waits for him to take him home at the conclusion of the function. John has indicated his objection to this but his previous offences have been used as an excuse by his parents to maintain closer supervision over him.

Personality

John presents as a rather dull immature young person. He appears to be lacking in verbal skills, making normal conversation with him very difficult. This may be a family defect as his younger sister attends a special class offering speech therapy.

John is now entering into a critical period of his adolescence and may be experiencing difficulties understanding and coping with his sexual maturity. It appears his parents have not discussed sexual matters with him at all and have left this part of his education to his school teachers.

John accepted a referral to the Child and Family Guidance Clinic in May 1976 because of his aggressive and sexual immaturity at that time but the psychologist reported that treatment was unsuccessful because of his inadequate verbal expression and inability to express his feelings. In November 1979 John was again referred to Dr. . . . after his Court appearance of 12.10.80. Dr. . . . saw him on the 14.1.80 and reported that he saw no evidence of any frank psychiatric disorder but as John was denying his 'involvement in this assault I think it would be almost impossible to offer any effective counselling'.

The offence

As on previous occasions John's parents were most concerned about the allegations of sexual misconduct involved in this and other offences and accepted John's denial that he ever acted indecently or had in fact stolen anything. The parents have both stated to John that they would never believe he could behave in such an objectional manner.

Being aware of his parent's feelings John has continued in his denial of involvement. This attitude is reinforced by general community objection to offences of this nature, and his fear engendered by his parents that he could be institutionalised if a finding is made against him.

Evaluation and recommendation

John is currently employed and has, as well, prospects of making a first grade football team. If your worship pleases, therefore, it may be in John's long term interests to give him another chance in the community to realise his potentials in these areas.

John's denial of involvement in this offence and previous offences appears closely related to his family's attitudes towards him. As well, there may be an element in these offences of 'breaking out' from the boundaries (emotional and physical) that his parents place on him, albeit with the best of intentions.

It is necessary that John be encouraged to develop an independent stance in relation to his family. This Branch would be able to offer supervision and counselling especially in relation to his social situation which includes his residence, his relationship with his parents and control of his behaviour.

...
Social Worker

Note: This report is a typical social inquiry report by the Welfare Branch to the Childrens Court. See ch.2, n.52. Identifying material has been removed from the report. The names used in the report are, of course, purely fictitious.

Appendix D

SCHEDULE OF ORGANISATIONS AND PERSONS WHO MADE SUBMISSIONS

Oral Submissions

Canberra Hearing, 10 May 1979

Australian Association of the Mentally Retarded (K. McGuire)
Catholic Family Welfare Bureau (Father T. Wright)
P.M. Coward
B.V. Easteal
T.J. Higgins
P.D. Hughes, Dr
D.K. Lee
P. Mark
Marymead Children's Centre (Sister M. Morrissey)
J. New
N. Radican
M. Worsley

Canberra Hearing, 5 May 1980

A.C.T. Teachers' Federation
W.R. Atkinson, Dr
Australian Association of the Mentally Retarded (K. McGuire)
Australian Social Welfare Union, A.C.T. Branch (R.A. Nairn)
C. Bernie
R. Buckman
M. Byron
Canberra Women's Refuge (L.M. Inde)
Dr Barnardo's (A.C.T.) (O. Iversen)
I. Foster
P. Gajardo
H. Gunn
Marymead Children's Centre (Sister M. Morrissey)
Parent Support Service (J. Gifford and J. White)
Parents and Teachers Against Violence in Education (J. Riak)
Tuggeranong Family Action Inc., A.C.T. (W. Mauldon)
E.R. Ward
J.C. Williamson
R. Wilson
Woden Community Service (D. Procter and B. Gallaher)
Womens Action Alliance (B. Cains, M.H.A.)

Written Submissions

A.C.T. Consultative Committee on Social Welfare
A.C.T. Teachers' Federation
Association for Early Childhood Development (A.C.T.)
Attorney-General's Department (Tas.)
Australian Association for the Mentally Retarded
Australian Capital Territory Police
Australian Dental Association, Inc.

Australian Dental Association, N.S.W. Branch
Australian Institute of Welfare Officers
Australian Social Welfare Union (A.C.T. Branch)
R.J. Bartley, S.M.
R.D. Blackmore, S.M.
M.F. Butler
Capital Territory Health Commission
Catholic Welfare Advisory Committee of the Archdiocese of Canberra and Goulburn
S. Charlesworth
Child Care Students, Canberra College of T.A.F.E.
Child Care Workers' Association of the A.C.T.
Childhood Services Council
C. Clifford
Council of Social Service of the A.C.T.
D. Cruickshank, Professor
Department for Community Welfare (S.A.)
Department of the Capital Territory
Department of Community Welfare (W.A.)
Donald Duck Day Nursery and Kindergarten, Bambi Pre-School and Day Nursery, Christopher Robin Kindergarten and Day Nursery
Dr Barnardo's in Australia
P. Eisen, Associate Professor
J. Ellard
Family Life Education Council (Canty) Inc. (N.Z.)
L. Foreman
L. George
R. Hatch
J.D. Haynes
Health Commission of New South Wales
Health Commission of Victoria
A. Hiller, University of Queensland
M.B. Hoare, Hon. Mr Justice
B.A. Holborow
A.J. Johnson, S.M.
Law Council of Australia
J. Livi
I.R. Matterson, S.M.
F. McGinity
V. McKelvey
G. Morris
K.A. Murray, Hon. Justice
National Women's Advisory Council
P. Opas
Parent Support Service (A.C.T.)
Parents and Teachers Against Violence in Education
W.G.A. Prendergast
Privacy Committee (N.S.W.)
E.L. Ross, S.M.
Royal Australian Nursing Federation
Royal Children's Hospital (Vic.)
H. Schuttler
P.J. Sharkey
Social Welfare Action Group
Sociology Students, University of New South Wales
P. Tapp
G. Vaughan

Victorian Teachers Union
R.P. White, S.M.
M. Williams
Women Lawyers' Association of New South Wales
Women's Electoral Lobby (A.C.T.)
F.W. Wright-Short

Table of Cases

(References are to paragraphs in this Report)

Table of Legislation

Bibliography

Reports

ABAFA Report see Association of British Adoption and Fostering Agencies.

ADMINISTRATIVE REVIEW COUNCIL. *Fourth Annual Report* A.G.P.S., Canberra, 1980.

Admittance Restricted see Canadian Council on Children and Youth.

ALRC see Law Reform Commission, Australia.

AMERICAN BAR ASSOCIATION PROJECT. Standards for Criminal Justice. *Standards Relating to Sentencing Alternatives & Procedures.* A.B.A. New York, 1968.

American Families: Trends and Pressures see United States Congress.

ASSOCIATION OF BRITISH ADOPTION AND FOSTERING AGENCIES. Legal Group Working Party. *Care Proceedings.* A.B.A.F.A., London, 1979.

AUSTRALIAN PRIORITIES REVIEW STAFF. *Early Childhood Services.* A.G.P.S., Canberra, 1974.

AUSTRALIAN BUREAU OF STATISTICS *1976 Census: Characteristics of the Population and Dwellings in Local Government Areas — Australian Capital Territory* A.B.S. Canberra, 1980.

— . *Divorces, Australia, 1978.* at No.3307.

— . *Final Proposals for a National System of Court Statistics for Criminal and Child Welfare Matters.* A.B.S., Canberra, 1980.

— . *Labour Force Australia.* July 1980, A.B.S., Canberra, 1980.

— . *Persons under Guardianship and Children in Substitute Care. June 1979,* A.B.S., Canberra June, 1981.

— . *Unemployment, Australia, February 1981 Preliminary Estimates.* (Final), (13 March 1981). A.B.S., Canberra, 1981.

AUSTRALIAN CAPITAL TERRITORY POLICE, *Annual Report for the Year Ended 30 June 1979,* A.G.P.S., Canberra, 1979.

AUSTRALIAN GOVERNMENT COMMISSION OF INQUIRY INTO POVERTY, *Law and Poverty in Australia Second Main Report,* A.G.P.S., Canberra, 1975.

Australian Law Reform Commission see Law Reform Commission, Australia.

AUSTRALIAN NATIONAL UNIVERSITY CENTRE FOR CONTINUING EDUCATION NATIONAL CONFERENCE. *Living Together: Family Patterns & Lifestyles.* 2–5 July 1979, Canberra.

AUSTRALIAN PRE-SCHOOLS COMMITTEE. *Care and Education of Young Children.* A.G.P.S., Canberra, 1973.

British Columbia Report of the Royal Commission See Royal Commission on Family and Children's Law.

CANADIAN COUNCIL ON CHILDREN AND YOUTH. *Admittance Restricted: The Child as Citizen in Canada.* (Task Force on The Child as Citizen) C.C.C.Y., Ottowa, 1978.

CAPITAL TERRITORY HEALTH COMMISSION. *Annual Report 1978–79.* A.G.P.S., Canberra, 1979.

— . *Annual Report 1979–80,* A.G.P.S., Canberra, 1980.

Children and young persons Scotland see Scottish Home and Health Department.

CHILDREN IN TROUBLE. Cmnd. 3601 HMSO, London, 1968 (Govt. White Paper).

The Child, The Family and The Young Offender see Home Office.

Children and Young Persons Act 1969 see Home Office.

COMMISSION APPOINTED TO INQUIRE INTO AND REPORT UPON THE PUBLIC CHARITIES OF THE COLONY. *Reports.* Govt. Printer, Sydney, 1873–74.

Commission of Inquiry into Poverty see Australian Government Commission of Inquiry into Poverty.

COMMITTEE APPOINTED BY ATTORNEY-GENERAL TO EXAMINE THE STEPS NECESSARY TO ENABLE THE FAMILY COURT TO EXERCISE CERTAIN ADDITIONAL JURISDICTION IN THE A.C.T. *Report.* (Chairman: Mr Justice Ellis). Canberra, 1980.

COMMITTEE FOR REVIEW OF THE LABOUR AND INDUSTRY ACT 1958. *Third Report (16 Dec. 1976) Govt. Printer, Melbourne, 1977.*

— . *Fourth Report* (31 March 1978). Govt. Printer, Melbourne, 1978.

COMMITTEE OF ENQUIRY INTO CHILD CARE SERVICES IN VICTORIA. *Report.* (Chairman: Mr Norgard). Govt. Printer, Melbourne, 1976.

COMMITTEE OF INQUIRY INTO PUBLIC BEHAVIOUR & DISCIPLINE. *Self Discipline & Pastoral Care.* Govt. Printer, Sydney, 1980.

COMMITTEE ON MENTALLY ABNORMAL OFFENDERS. *Report.* Cmnd 6244. (Chairman: Lord Butler) H.M.S.O. London, 1975.

COUNCIL OF SOCIAL WELFARE MINISTERS OF AUSTRALIA, NEW ZEALAND & PAPUA-NEW GUINEA. *Towards an Australian Family Policy.* Conference held at Macquarie Univ. Sydney 8–12 May 1980.

DARTINGTON SOCIAL RESEARCH UNIT. *Give and Take.* Community Service Volunteers, London, 1980.

DEPARTMENTAL COMMITTEE ON THE PROBATION SERVICE. *Report.* Cmnd. 1650. (Chairman: Mr Morison). H.M.S.O., London, 1962.

DEPARTMENT FOR COMMUNITY WELFARE. *Report of the Committee on the Future Development of the Juvenile Judicial System in Western Australia.* Undated.

DEPARTMENT FOR COMMUNITY WELFARE, SOUTH AUSTRALIA. *The Services of the Department.* Govt. Printer, Adelaide, 1979.

DEPARTMENT OF HEALTH AND SOCIAL SECURITY. *Intermediate Treatment: A Guide for the Regional Planning of New Forms of Treatment for Children in Trouble.* H.M.S.O., London, 1972.

DEPARTMENT OF HEALTH AND SOCIAL SECURITY. *Report of the Committee of Inquiry into the Care and Supervision Provided in Relation to Maria Colwell.* (Chairman: T.G. Field–Fisher). H.M.S.O., London, 1974.

DEPARTMENT OF JUSTICE COMMITTEE ON JUVENILE DELINQUENCY. *Juvenile Delinquency in Canada.* Govt. Printer, Ottawa, 1967.

DEPARTMENT OF SOCIAL WELFARE. *Juvenile Crime in New Zealand.* Govt. Printer, Wellington, 1973.

DEPARTMENT OF THE CAPITAL TERRITORY. *Annual Report 1979–80.* A.G.P.S., Canberra, 1980.

— . *Canberra's Community Services.* A.G.P.S., Canberra, 1980.

DEPARTMENT OF THE CAPITAL TERRITORY. *Working Party to Consider Services for Young Offenders, Interim Report.* A.G.P.S., Canberra, 1979.

DEPARTMENT OF YOUTH AND COMMUNITY SERVICES. *Annual Report 1977–78.* Govt. Printer, Sydney, 1979.

DEPARTMENT OF YOUTH AND COMMUNITY SERVICES, CHILD WELFARE LEGISLATION REVIEW. *Recommendations of the Children in Care Project Team.* (Chairman: K.R. Doyle). Govt. Printer, Sydney, 1974.

— . *Recommendation of the Protection of Children Project Team.* (Chairman: N.W. Giddings). Govt. Printer, Sydney, 1974.

— . *Report of Juvenile Offenders Project Team.* (Chairman: W.V. Payne) Govt. Printer, Sydney, 1974.

— . *Report of the Community Services Project Team* (Chairman: Mr. Keir) Govt. Printer, Sydney, 1974.

— . *Review of the Child Welfare Act 1939 — Children's Courts and Associated Procedures.* (Chairman: W.J. Holt). Govt. Printer, Sydney, 1974.

DIRECTOR GENERAL OF COMMUNITY WELFARE, *Report for the Year Ended 30 June 1979,* Govt. Printer, S.A., 1979.

ELEVENTH REPORT FROM THE EXPENDITURE COMMITTEE. *The Children and Young Persons Act 1969.* 2 vols. H.M.S.O., London, 1975.

Ellis Committee Report see Committee appointed by Attorney-General to examine the Steps . . .

FAMILY LAW COUNCIL, *Second Annual Report 1978* A.G.P.S., Canberra, 1979.

— . *Third Annual Report 1979* A.G.P.S., Canberra, 1980.

FAMILY SERVICES COMMITTEE. *Families and Social Services in Australia, A Report to the Minister for Social Security.* 2 Vols. (Chairman: Maria Coleman) A.G.P.S., Canberra, 1978.

Field–Fisher Report see Department of Health and Social Security.

Green Paper see Report by the Minister for Youth and Community Services.

HOME OFFICE. *The Child, the Family and the Young Offender.* Cmnd. 2724 H.M.S.O., London, 1965.

— . *Report of the Commitee on Children and Young Persons.* Cmnd. 1191 (Chairman: Viscount Ingleby). H.M.S.O., London, 1960.

— . Observations on the Eleventh Report from the Expenditure Committee. *Children and Young Persons Act 1969.* Cmnd. 6494. H.M.S.O., London, 1976
— . Research Studies. *Impact: Intensive Matched Probation & After Care Treatment.* 2 Vols. Home Office, London, 1974 & 1976.
HOME OFFICE RESEARCH UNIT. *A Survey of Group Work in the Probation Service.* H.M.S.O., London, 1966,
Holt Report see Department of Youth and Community Services, Child Welfare Legislation Review.
INSTITUTE OF JUDICIAL ADMINISTRATION AND AMERICAN BAR ASSOCIATION. *Juvenile Justice Standards Project.* 24 vols. Ballinger Pub. Co., Tentative Draft, Cambridge Mass., 1977.
Juvenile Justice Standards Project. *Juvenile Justice and Delinquency Prevention,* 1977.
— . *Police handling of Juvenile Problems. 1977.*
— . *Standards Relating to Abuse and Neglect,* 1977.
— . *Standards Relating to Dispositional Procedures,* 1977.
— . *Standards Relating to Juvenile Delinquency and Sanctions.* 1977
— . *Standards Relating to Noncriminal Misbehaviour,* 1977.
— . *Standards Relating to Transfer Between Courts,* 1977.
Interim Report see Department of the Capital Territory
Interdisciplinary Conference on Child Neglect and Abuse, 24 to 28 September 1980: Conference Papers. Dept. of Youth and Community Services, Sydney, 1981.
INTERNATIONAL LABOUR OFFICE. *Children at Work: ILO Policy Framework for the International Year of the Child, 1979.* I.L.O., Geneva, February, 1978.
INTERNATIONAL LABOUR ORGANISATION. *Declaration by the Director-General of the ILO concerning the International Year of the Child.* I.L.O., Geneva, March, 1979.
INTERNATIONAL YEAR OF THE CHILD NATIONAL COMMITTEE OF NON-GOVERNMENT ORGANISATIONS. Comments on Family Law Questions Referred to the Sub-committee on the Law and the Rights of the Child. Unpublished, 1979.
JOINT COMMITTEE ON THE A.C.T. *Self Government and Public Finance in the A.C.T. Report* A.G.P.S., Canberra, 1975.
JOINT COMMITTEE ON THE A.C.T. *Tourism in the A.C.T. Report.* A.G.P.S., Canberra, 1980. (Parliamentary Paper 67/1980).
JOINT SELECT COMMITTEE ON THE FAMILY LAW ACT. *Family Law in Australia,* (2 vols). A.G.P.S., Canberra, 1980.
JUSTICE. *Parental Rights and Duties and Custody Suits.* (British Section of International Commission of Jurists, Chairman: Gerald Godfrey). Justice, London, 1975.
Justice Report see Justice
Juvenile Justice and Delinquency Prevention see National Advisory Committee on Criminal Justice Standards and Goals.
Juvenile Justice Standards Project see Institute of Judicial Administration and American Bar Association.
LAW REFORM COMMISSION, AUSTRALIA. Report No.1, *Complaints Against Police,* A.G.P.S., Canberra, 1975.
— . Report No.2, *Criminal Investigation,* A.G.P.S., Canberra, 1975.
— . Report No.9, *Complaints Against Police — Supplementary Report,* A.G.P.S., Canberra, 1978.
— . Report No.15, *Sentencing of Federal Offenders.* A.G.P.S., Canberra, 1980.
— . Discussion Paper No.4, *Access to the Courts — I Standing: Public Interest Suits,* Sydney, 1978.
— . Discussion Paper No.9, *Child Welfare: Children in Trouble.* Sydney, 1979.
— . Discussion Paper No.10, *Sentencing: Reform Options,* Sydney, 1979.
— . Discussion Paper No.12, *Child Welfare and Child Abuse and Day Care.* Sydney, 1980.
— . Discussion Paper No.14, *Privacy and Personal Information.* Sydney, 1980.
— . Discussion Paper No.17, *Aboriginal Customary Law — Recognition?,* Sydney, 1980.
LAW REFORM COMMISSION, AUSTRALIAN CAPITAL TERRITORY. *Report on the Law of Guardianship & Custody of Infants.* A.G.P.S., Canberra, 1974.
— . *Report on the Review of the New South Wales Acts in Force in the Australian Capital Territory.* A.G.P.S., Canberra, 1974.
LEGAL SERVICES COMMISSION OF N.S.W. *Report of the Legal Services for Children Sub-committee.* Govt. Printer, Sydney, 1980.

MINISTER FOR WELFARE. *Proposed Family Welfare Legislation: Discussion Paper.* Govt. Printer, Brisbane, 1979.
Morison Committee see Departmental Committee on the Probation Service.
Muir Report see Report to the Minister for Youth and Community Services.
NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS. *Juvenile Justice and Delinquency Prevention: Report.* N.A.C.C.J.S.G., Washington D.C., 1976.
NATIONAL ANALYSIS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING. *American Humane Association Statistics for 1975; American Humane Association 1978.* A.H.A., Denver, 1978.
NATIONAL ASSOCIATION FOR THE CARE AND RESETTLEMENT OF OFFENDERS. *Children and Young Persons in Custody.* N.A.C.R.O., London, 1977.
NATIONAL COMMITTEE OF INQUIRY INTO COMPENSATION AND REHABILITATION IN AUSTRALIA. *Compensation and Rehabilitation: Report.* 3 vols. (Chairman: Mr Justice Woodhouse). A.G.P.S., Canberra, 1974.
NEW SOUTH WALES ANTI-DISCRIMINATION BOARD. *Discrimination and Age.* N.S.W. Govt. Printer, Sydney, 1980.
NEW SOUTH WALES PRIVACY COMMITTEE. *Report on the Collection, Storage and Dissemination of Criminal Records by the Police.* Govt. Printer, Sydney, 1979.
NEW ZEALAND JUSTICE DEPARTMENT. *Periodic Detention in New Zealand.* Research Section Department of Justice, Wellington, 1973.
NEW ZEALAND POLICE DEPARTMENT. *Report for the Year Ended 31 March 1980,* Govt. Printer, New Zealand, 1980.
Norgard Report see Committee of Enquiry into Child Care Services in Victoria.
ONTARIO LAW REFORM COMMISSION. *Report on Family Law, PART III — Children.* Govt. Printer, Ontario, 1973.
ONTARIO. Ministry of Community and Social Services. *Consultation Paper on Short Term Legislative Amendments.* Queens Printer, Toronto, 1977.
Phibbs Report see Report of the Child Welfare Legislation Review Committee.
PRESIDENT'S COMMISSION ON LAW ENFORCMENT AND ADMINISTRATION OF JUSTICE. *The Challenge of Crime in a Free Society,* Govt. Printer, Washington D.C., 1967.
— . *Task Force Report: Juvenile Delinquency and Youth Crime.* Govt. Printer, Washington D.C., 1967.
QUEENSLAND POLICE DEPARTMENT, *Annual Report,* Govt. Printer, Brisbane, 1979.
— . *Report and Recommendations of the Commission of Inquiry into the Nature and Extent of the Problems Confronting Youth in Queensland.* (Chairman: Mr Demack). Govt. Printer, Brisbane, 1975.
Report by the Minister for Youth and Community Services on Proposed Child and Community Welfare Legislation. (Green Paper). Govt. Printer, Sydney, 1978.
Report of an Inquiry by the Hon. Sir Henry Fisher into the circumstances leading to the trial of three persons on charges arising out of the death of Maxwell Confait and the fire at 27 Doggett Road, London SE6. H.M.S.O., London, 1977.
A Report of the Board of Inquiry into the Welfare Needs of the Northern Territory Community Mimeo, 1979, (Department of Community Development).
Report of the California Assembly Interim Committee on Criminal Procedure: Juvenile Court Processes. Sacramento, California, 1971.
Report of the Child Maltreatment Workshop. Melbourne, 1976.
Report of the Child Welfare Legislation Review Committee. (Chairman: E.P. Phibbs). Govt. Printer, Sydney, 1975.
Report of the Committee of Inquiry into the Care Supervision ... see Department of Health and Social Security.
REPORT OF THE COMMITTEE OF INQUIRY. *Safety & Health at Work.* Cmnd. 5034. (Chairman: Lord Robens) H.M.S.O., London, 1972.
Report of the Committee on Children and Young Persons see Home Office.
Report of the Committee on Child Welfare Legislation. (Chairman: Mr Dewar) Govt. Printer, Brisbane, 1963.
Report of the Committee on the Age of Majority. Cmnd. 3342. (Chairman: Mr Justice Latey). H.M.S.O., London, 1967.

Report of the Royal Commission into the Administration of the Juvenile Courts Act and other Associated Matters, Part 2. (Chairman: Judge Mohr). Govt. Printer, Adelaide, 1977.
Report of the Committee of Review into the Child Welfare Act 1960 (Tasmania) and State Social Welfare Services. Undated.
Report on the Law of Guardianship and Custody of Infants see Law Reform Commission, Australian Capital Territory.
Report to the Minister for Youth and Community Services on Certain Parts of the Child Welfare Act and Related Matters. (Chairman: A.J. Muir). Govt. Printer, Sydney, 1975.
ROYAL COMMISSION INQUIRY INTO CIVIL RIGHTS. *Report.* 5 Vols. (Chairman: James McRuer). Queen's Printer, Ontario, 1968.
ROYAL COMMISSION ON AUSTRALIAN GOVERNMENT ADMINSTRATION. *Report.* (Chairman: Dr. N. Coombs) A.G.P.S., Canberra, 1976.
ROYAL COMMISSION ON FAMILY AND CHILDREN'S LAW. *Report.* (13 Reports). Govt. Printer, Vancover, 1975.
ROYAL COMMISSION ON HUMAN RELATIONSHIPS. *Report.* 5 vols. A.G.P.S., Canberra, 1977.
SCOTTISH HOME & HEALTH DEPARTMENT AND SCOTTISH EDUCATION DEPARTMENT. *Children and Young Persons Scotland.* Cmnd. 2306 (Chairman: Lord Kilbrandon). H.M.S.O., London, 1964.
SENATE STANDING COMMITTEE ON FINANCE AND GOVERNMENT OPERATIONS. *Statutory Authorities of the Commonwealth; First Report.* A.G.P.S., Canberra, 1978.
SENATE STANDING COMMITTEE ON SOCIAL WELFARE. *Through A Glass Darkly, Evaluation in Australian Health and Welfare Services.* A.G.P.S., Canberra, 1979.
SIXTH UNITED NATIONS CONGRESS ON THE PREVENTION OF CRIME AND THE TREATMENT OF OFFENDERS. *Australian Discussion Paper, Topic 2. Juvenile Justice: Before and After The Onset of Delinquency* (Report of a Working Party convened by John Seymour), A.G.P.S., Canberra, 1979.
SOCIAL WELFARE COMMISSION. *Project Care: Children Parents Community.* A.G.P.S., Canberra, 1974.
SOLICITOR-GENERAL'S COMMITTEE ON PROPOSALS FOR NEW LEGISLATION TO REPLACE THE JUVENILE DELINQUENTS ACT. *Young Persons in Conflict with the Law.* Govt. Printer, Ottawa, 1975.
STANDING COMMITTEE ON HOUSING AND WELFARE OF THE A.C.T. LEGISLATIVE ASSEMBLY. *Report No.8: Child Welfare.* Canberra, 1978.
STATUTE LAW REVISION COMMITTEE, VICTORIA. *Report on the Law Relating to Children's Courts.* Govt. Printer. Melbourne, 1973.
TASK FORCE ON CO-ORDINATION IN WELFARE AND HEALTH. *Consultative Arrangements and The Co-ordination of Social Policy Development.* (Second Report) A.G.P.S., Canberra, 1978.
Task Force Report see President's Commission on Law Enforcement and Administration of Justice.
UNITED NATIONS. A/RES//34/154, *105 Plenary Session,* 17/12/1979. Pub. 30/1/80.
—. *Official Records of the General Assembly, Fouteenth Session, Supplement No.16.* New York, 1960.
—. *United Nations Declaration of the Rights of the Child.* United Nations, New York, 1959.
UNITED STATES CONGRESS. SENATE COMMITTEE ON LABOUR AND PUBLIC WELFARE. Subcommittee on Children and Youth. *American Families: Trends and Pressures.* Govt. Printer, Washington D.C. 1974.
Victorian Council of Social Service Report see Benjamin, C.A. & Morton, J.A.
VICTORIAN POLICE, *Annual Report 1978,* Govt. Printer, Vict., 1979.
WELFARE BRANCH OF THE DEPARTMENT OF THE CAPITAL TERRITORY. *The Procedures at Quamby Children's Shelter.* (Departmental Manual) Canberra.
Young Offenders. Cmnd. 8045, H.M.S.O., London, 1980.
Young Persons in Conflict with the Law see Solicitor-General's Committee.

Books

ADAMS, F. *Hippocratic Works* (Translated from Greek) Williams and Wilkes, Baltimore, 1939.
ALLEN, F.A. *The Borderland of Criminal Justice.* Chicago University Press, Illinois, 1964.
ARCHBOLD, J.F. *Pleading Evidence and Practice in Criminal Cases.* 39th edition, (ed by S. Mitchell) Sweet and Maxwell, London, 1976.
ARIES, P. *Centuries of Childhood: A Social History of Family Life.* Random House, New York, 1965.
ATKINS, R. *The Government of the Australian Capital Territory.* Queensland U.P., Brisbane, 1978.

AUSTRALIAN MEDICAL ASSOCIATION. *Code of Ethics* (1975 ed) Federal A.M.A., Sydney, 1975.
BAKAL, Y. & POLSKY, H.W. *Reforming Corrections for Juvenile Offenders.* Heath Lexington Books, Lexington Mass. 1979.
BARRETT, R.I. *Principles of Income Taxation.* Butterworths, Sydney, 1979.
BECKER, H.S. *Outsiders.* (Studies in the Sociology of Deviance) Free Press, NewYork, 1963.
BENJAMIN, C.A. & MORTON, J.A. *A Model for Welfare Service Planning and Delivery: Research Report* AGPS, Canberra, 1975.
BEVAN, H.K. *The Law Relating to Children.* Butterworths, London, 1973.
BLACKSTONE, W. *Commentaries on the Laws of England.* 4th edition Oxford, 4 vols Claredon Press, 1770.
BOSS, P. *On the Side of the Child,* Fortana/Collins, Melb. 1980.
BRIDGE, J.W. et al (eds). *Fundamental Rights.* London, Sweet and Maxwell, 1973.
CARTER, R.M. & KLEIN, W.M. (eds.) *Back on the Street: The Diversion of Juvenile Offenders.* Prentice-Hall, Englewood N.J., 1976.
CATTON, K. & ERICKSON, P. *The Juvenile's Perception of the Role of Defence Counsel in Juvenile Court: A Pilot Study.* Centre of Criminology, University of Toronto, 1975.
CLASS, N.E. *Licensing of Child Care Facilities by State Welfare Departments: A Conceptual Statement.* U.S. Social Rehabilitation Service, Washington D.C., 1968.
CLEMMER, N. *The Prison Community.* Rinehart, N.Y., 1958.
COATES, R.B. MILLER, A.D. & OHLIN, L.E. *Diversity in a Youth Correctional System: Handling Delinquents in Massachusetts.* Ballinger Publication Cambridge Mass., 1978.
CORNISH, D.B. & CLARKE, R.V.G. *Residential Treatment and Its Effects on Delinquency.* H.M.S.O., London, 1976.
COULTER, J. *Randwick Asylum; an Historial Review of the Society for the Relief of Destitute Children 1852-1915.* Government Printer, Sydney, 1917.
CRAIGHEAD, W.E. KAZDIN, A.E. & MAHONEY, M.J. *Behaviour Modification: Principles Issues and Applications.* Houghton Mifflin, Boston, 1976.
CRESSEY, D.R. (ed). *The Prison: Studies in Institutional Organization and Change.* Holt, Rinehart & Winston, New York, 1961.
CRESSEY, D.R. & MCDERMOTT, R.A. *Diversion from the Juvenile Justice System.* National Institute of Law Enforcement & Criminal Justice, Washington D.C., 1974.
DAUNTON-FEAR, M.W. *Sentencing in Western Australia.* Queensland University Press, Australian Institute of Criminology, 1977.
DAVIS, K.C. *Discretionary Justice.* University of Illinois Press, Chicago, 1969.
DICKENS, B.M. *Legal Issues in Child Abuse.* Centre of Criminology, University of Toronto, Toronto, 1976.
DITCHFIELD, J.A. *Police Cautioning in England and Wales.* H.M.S.O., London, 1976.
DRESSLER, D. *Practice and Theory of Probation and Parole.* 2nd ed. Columbia University Press, New York, 1969.
DUGGAN, A.G. & DARVALL, L.W. (eds). *Consumer Protection Law and Theory.* Law Book Co., Sydney 1980.
EEKELAAR, J.M. *Family Law and Social Policy.* Weidenfeld & Nicholson, London, 1978.
EMPEY, LAM.T. *American Delinquency: Its Meaning and Construction.* Dorsey Press, Homewood Illinois, 1978.
EMPEY, LAM.T. & LUBECK, S.G. *The Silverlake Experiment: Testing Delinquency Theory and Community Intervention.* Heath Lexington Books, Lexington Massachusetts, 1971.
FABIAN SOCIETY. *The Ingleby Report, three Critical Essays.* Fabian Society, London, 1963.
FINLAY, H.A. *Family Law in Australia.* Butterworths, Sydney, 1979.
FLEMING, J.G. *The Law of Torts.* 5th ed. Law Book Co., Sydney, 1977.
FRIEDMAN, M. *Capitalism and Freedom.* Chicago U.P., Chicago, 1962.
GIL, D.G. *Violence Against Children: Physical Child Abuse in the United States.* Harvard U.P., Cambridge Mass, 1970.
GOBBO, A.R.N. BYRNE D.M. & HEYDON J.D. (eds). *Cross on Evidence.* 2nd ed., Butterworths, Sydney, 1979.
GOFFMAN, E. *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates.* Penguin Books, Harmondsworth, 1961.

GOLDSTEIN, J. FREUD, A. & SOLNIT, A.J. *Before the Best Interests of the Child.* Free Press, New York, 1980.
— . *Beyond the Best Interests of the Child.* Free Press, New York, 1979.
HAHN, T.H. *The Juvenile Offender and the Law.* W.H. Aderson Publisher, Cinncinatti, 1971.
HIGGINS, P.F.P. *Elements of Torts in Australia.* Butterworths, Sydney, 1970.
HOWARD, C. *Australian Criminal Law.* 3rd. ed. Law Book Co., Sydney, 1977.
JOHNSTON, N. SAVITZ, L.D. & WOLFGANG, M.E. *The Sociology of Punishment and Correction.* 2nd ed. Wiley, New York, 1970.
KATZ, S.N. *When Parents Fail: The Law's Response to Family Breakdown.* Beacon Press, Boston, 1971.
KEMPE, C.H. & HELFER, R.E. (eds.). *Helping the Battered Child and his Family.* J.B. Lippincott, Philadelphia Penn., 1972.
KEON-COHEN, B. et al. (eds.). *Health and Safety at Work: A Review of Current Issues.* Legal Service Bulletin and CCH, Sydney, 1980.
KITTRIE, N.N. *The Right to be Different: Deviance and Enforced Therapy.* John Hopkins Press, Baltimore, 1976.
KOBETZ, R.W. *The Police Role and Juvenile Delinquency.* International Association of Police, Gaithersburg, Md., 1971.
KRISBERG, B. & AUSTIN, T. (eds.), *The Children of Ishmael, Critical Perspectives on Juvenile Justice.* Mayfield Pub., Palo Alto California, 1978.
LAWSON, C. *The Probation Officer as Prosecutor. A Study of Proceedings for Breach of Requirement in Probation.* Institute of Criminology, University of Cambridge, England, 1978.
LEMERT, E.M. *Human Deviance, Social Problems and Social Control.* 2nd ed., Prentice Hall, Englewood Cliffs, 1972.
LERMAN, P. *Community Treatment and Social Control: A Critical Analysis of Juvenile Correctional Policy.* University of Chicago Press, Chicago, 1975.
LEVIN, M.M. & SARRI, R.C. *Juvenile Delinquency: A Study of Juvenile Codes in the U.S.* National Assessment of Juvenile Corrections, Ann Arbor Michigan, 1974.
LIPTON, D. MARTINSON, R. & WILKS, J. *The Effectiveness of Correctional Treatment.* Praeger, New York, 1975.
LUMB, R.D. & RYAN K.W. *The Constitution of the Commonwealth of Australia Annotated.* 2nd ed., Butterworths, Sydney, 1977.
— . *The Constitution of the Commonwealth of Australia Annotated.* 3rd ed., Butterworths, Sydney, 1981.
MACKEN, J.J. *Australian Industrial Laws.* L.B.C., Sydney, 1974.
MARTIN, F.M. & MURRAY, K. (eds)., *Children's Hearings.* Scottish Academic Press, 1976.
MATZA, D. *Becoming Deviant.* Prentice Hall, Englewood Cliffs, 1969.
MAYERS, M.O. *The Hard Core Delinquent An Experiment in Control and Care in a Community Home with Education.* Saxon House, Westmead Eng., 1980.
MENDELSOHN, R.S. *The Condition of the People: Social Welfare in Australia 1900-1975.* Allen Unwin, Sydney, 1979.
MILLHAM, S. BULLOCK, R. & HOSIE, K. *Locking up Children: Secure Provision within the Child Care System.* Saxon House, Farnborough England, 1978.
MORRIS, N. & HOWARD C. *Studies in Criminal Law.* Clarendon Press, Oxford, 1964.
MORRIS, N. & TONRY, M. (eds). *Crime & Justice: An Annual Review of Research.* Vol 1. University of Chicago Press, Chicago, 1979.
MURRAY, C.A. & COX, L.A. *Beyond Probation: Juvenile Corrections and The Chronic Delinquent.* Sage Pub., Beverly Hills California, 1979.
NORDIN, V.D. (ed.), *Gault: What Now for the Juvenile Court?* Institute of Continuing Legal Education, Anna Arbor, 1968.
OHLIN, L.E. MILLER, A.D. & COATES, R.B. *Juvenile Correctional Reform in Massachusetts; A Preliminary Report of the Centre for Criminal Justice of the Harvard Law School.* National Institute for Juvenile Justice & Delinquency Prevention, Washington D.C., 1977.
OLIVER, I.T. *The Metropolitan Police Approach to the Prosecution of Juvenile Offenders.* The Peel Press, London, 1978.
PACKER, H.L. *The Limits of Criminal Sanction.* Stanford U.P. Stanford California, 1968.

PARSLOE, P. *Juvenile Justice in Britain and the United States.* Routledge & Kegan Paul, London, 1978.
PATERSON, A. *Principles of the Borstal System.* 2nd revised ed. H.M.S.O., London, 1932. (G.B. Prison Commission. The Principles of the Borstal System. unpublished 1925).
PERRY, F.G. *Information for the Court, A New Look at Social Inquiry Reports.* University of Cambridge Institute of Criminology, 1974.
PLATT, A.M. *The Child Savers, The Invention of Delinquency.* 2nd ed. Chicago University Press, Illinois, 1977.
POLSKY, H.W. *Cottage Six: The Social System of Delinquent Boys in Residential Treatment.* Wiley, New York, 1962.
POTAS, I. *The Legal Basis of Probation.* Australian Institute of Criminology, Canberra, 1976.
RENVOIZE, J. *Children in Danger: The Causes and Prevention of Baby Battering.* Routbedge Kegan Paul, London, 1974.
ROGERS, W.V.H. (ed.). *Winfield and Jolowicz on Tort.* 11th ed. Sweet and Maxwell, London, 1979.
ROSENHEIM, M.K. (ed), *Pursuing Justice for the Child.* Chicago University Press, Illinois, 1976.
RUBINGTON, E. & WEINBERG, M.S. *Deviance: The Interactionist Perspective.* MacMillan, New York, 1968.
SCHUR, E.M. *Radical Non-intervention: Rethinking the Delinquency Problem.* Prentice-Hall, Englewood Cliffs, N.J., 1973.
SCUTT, J. *Restoring Victims of Crime.* Australian Institute of Criminology, Canberra, 1980.
— . (ed). *Violence in the Family.* Australian Institute of Criminology, Canberra, 1980.
SKOLNICK, A. & SKOLNICK, J. *Family in Transition: Rethinking Marriage, Sexuality, Child Rearing and Family Organisation.* Little, Waltham M.A., 1971.
STREET, H. *The Law of Torts.* 6th ed. Butterworths, London, 1976.
SYKES, G.M. *The Society of Captives: a Study of Maximum Security Prison.* Princeton U.P., Princeton N.J., 1958.
TAPPAN, P.W. *Juvenile Delinquency.* McGraw-Hill, New York, 1949.
TAYLOR, M. *Study of the Juvenile Liaison Scheme in West Ham 1961-1965.* H.M.S.O., London, 1971.
TEITELBAUM, L.E. & GOUGH, A.R. (eds). *Beyond Control Status Offenders in the Juvenile Court.* Ballinger Pub., Cambridge Mass, 1977.
THORPE, J. *Social Inquiry Reports: A Survey.* Home Office Research Study No.48. H.M.S.O., London, 1979:
WEST, D.J. & FARRINGTON, D.P. *The Delinquent Way of Life.* Heinemann Educ., London, 1977.
— . *Who Becomes Delinquent?* Heinemann Educational, London, 1973.
WILLIAMS, G.I.. *Criminal Law — The General Part.* 2nd ed. Stevens, London, 1961.
YOUNG, L. *Wednesday's Children: A Study of Child Neglect and Abuse.* McGraw-Hill, New York, 1971.

Articles

ANDERSON, D.A. 'Publicity and Children in Queensland Courts'. (1979) *Australian Crimes Prevention Council* 2(4), 9.
ANDREWS, R.H. & COHN, A.H. 'Ungovernability: The Unjustifiable Jurisdiction'. 83 *Yale Law Journal* 1381 (1974).
AUSTIN, P., GOODMAN, L. AND CAVANAGH, W.E. 'Citing Cautions in the Juvenile Court'. (1974) 138 *Justice of the Peace* 661.
BATES, P. 'Medical Confidentiality and Privacy'. (1978) 3 *Legal Service Bulletin* 189.
BLOMBERG, T. 'Diversion and Accelerated Social Control'. 68 *Journal of Criminal Law and Criminology* 274 (1977).
BROUWER, G.E.P. 'Inquisitorial and Adversary Procedures — a Comparative Analysis'. (1981) 55 *Australian Law Journal* 207.
BURT, R.A. 'Developing Constitutional rights of, in, and for Children'. 39 *Law and Contemporary Problems* 118 (1975).
CAIN, M.E. 'Role Conflict among Juvenile Liaison Officers'. (1968) 8 *British Journal of Criminology* 366.
CARNEY, T. 'The Youth Advocate: A Case for Further Refinement?' (1980) 5 *Legal Services Bulletin* 244.

CATTON, K. & LEON, J.S. 'Legal Representation and the Proposed Young Persons in Conflict with the Law Act'. (1977) 15 *Osgoode Hall Law Journal* 107.
'Child Labor-Laws-Time to Grow Up'. 59 *Minnesota Law Review* 575 (1975).
CHISHOLM, R. 'Bail for Children'. (1979) 4 *Legal Service Bulletin* 193.
CLARKE, S.H. 'What is the Purpose of Probation and Why Do we Revoke It?' 25 *Crime and Delinquency* 409 (1979).
CLASS, N. & ORTON, R. 'Day Care Regulation: The Limits of Licensing'. 35 *Young Children* 12 (September 1980).
COHEN, L. & KLUEGEL, J.R. 'Selecting Delinquents for Adjudication: An Analysis of Intake Screening Decisions in Two Metropolitan Juvenile Courts'. 16 *Journal of Research Crime and Delinquency* 143 (1979).
CONNOLLY, P.D. 'The Adversary System – Is It Any Longer Appropriate?' (1975) 49 *Australian Law Journal* 439.
CRUICKSHANK, D. 'Alternatives to the Judicial Process: Court Avoidance in Child Neglect Cases'. (1978) 12 *University of British Columbia Law Review* 248.
DAUNTON-FEAR, M.W. 'Social Inquiry Reports: Comprehensive and Reliable?' (1975) 15 *British Journal of Criminology* 128.
DAVIES, D.T. 'The Pitfalls of Diversion– Criticism of a Modern Development in an Era of Penal Reform'. (1976) 14 *Osgoode Hall Law Journal* 759.
DEMBITZ, N. Book Review of Juvenile Justice Standards Project. 91 *Harvard Law Review* 1940 (1978).
EEKELAAR, J.M. 'Children in Care and the Children Act 1977'. (1977) 40 *Modern Law Review* 121.
—— . 'What are Parental Rights?' (1973) 89 *Law Quarterly Review* 210.
EGGLESTON, R. 'What is Wrong with the Adversary System?' (1975) 49 *Australian Law Journal* 428.
ELLIS, B.J. 'Juvenile Court: The Legal process as a Rehabilitative Tool'. 51 *Washington Law Review* 697 (1975–6).
EWENS, J.Q. 'Where is the Seat of Government?'. (1951) 25 *Australian Law Journal* 532.
FELD, B.C. 'Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions'. 62 *Minnesota Law Review* 515 (1978).
FISCHER, J. 'Does Anything Work?'. 1 *Journal of Social Service Research* 215 (1978).
FOREMAN, L. Book Review. (1980) 4 *Criminal Law Journal* 256.
FORER, L.G. 'Rights of Children: The Legal Vacuum'. 55 *American Bar Association Journal* 1151 (1969).
FOX, S.J. 'Juvenile Justice Reform: An Historical Perspective'. 22 *Stanford Law Review* 1187 (1970).
—— . 'Philosophy and the Principles of Punishment in the Juvenile Court'. 8 *Family Law Quarterley* 373 (1974).
FRASER, B.G. 'Independent Representation for the Abused and Neglected Child: The Guardian ad litem'. *California Western Law Review* 16 (1976–77).
GAMBLE, H. Case and Comment: M (A Minor). (1977) 1 *Criminal Law Journal* 160.
—— . 'Children's Hearing Panels for New South Wales?' (1976) 50 *Australian Law Journal* 68.
GENDREAU, P. & ROSS, B. 'Effective Correctional Treatment: Bibliography for Cynics'. 25 *Crime and Delinquency* 463 (1979).
GIBBONS, D.C. & BLAKE, G.F. 'Evaluating the Impact of Juvenile Diversion Programs'. 22 *Crime and Delinquency* 411 (1976).
GOTTFREDSON, M.R. 'Treatment Destruction Techniques'. 16 *Journal of Research in Crime and Delinquency* 39 (1979).
GUNNINGHAM, N. 'The Industrial Safety, Health and Welfare Act 1977 – A New Approach?'. (1978) 6 *University Tasmanian Law Review* 1.
—— . 'Safe Work Place: Legal Protection from Inquiry: Prevention or Punishment?. (1979 January) *Legal Service Bulletin* (Special Issue) 19.
HANDLER, J.F. 'The Juvenile Court and the Adversary System: Problems of Function and Form'. *Wisconsin Law Review* 7 (1965).
HOEFLER, S.A. & BORNSTEIN, P.H. 'Achievement Place: An Evaluation Review'. 2 *Criminal Justice Behaviour* 146 (1975).
'Home Office Circular 49/1978, 18 April 1978'. (1978) 142 *Justice of the Peace* 271.

'Iowa Professionals and the Child Abuse Reporting Statute – A Case Success'. 65 *Iowa Law Review* 1273 (1980).
ISRALOWITZ, R.E. 'Deinstitutionalisation and the Serious Juvenile Offenders'. *Juvenile and Family Court Journal* 30(3) 21 (1979).
KADISH, S.F. 'Legal Norm and Discretion in the Police and Sentencing Process'. 75 *Harvard Law Review* 904 (1962).
KAHN, A.J. Address to the National Conference of, *Towards an Australian Family Policy*. 8–12 May 1980, Sydney.
KEAN, A.W.G. 'The History of the Criminal Liability of Children'. (1937) 53 *Law Quarterley Review* 364.
KEMPE, C.H. et al. 'The Battered Child Syndrome'. 181 *Journal of the American Medical Association* 17 (1962).
KERSHAW, H.K. et. al. 'Serving Our Clients – The Disadvantaged'. (1979) 53 *Australian Law Journal* 509.
KITSUSE, J.I. 'Societal Reaction to Deviant Behavior'. 9 *Social Problems* 247 (1962).
KRAUS, J. 'A Comparison of Corrective Effects of Probation and Detention on Male Juvenile Offenders'. (1974) 14 *British Journal of Criminology* 49.
—— . 'Do Existing Penal Measures Reform Juvenile Offenders?' (1977) 10 *Australian and New Zealand Journal of Criminology* 217.
LEVENSON, H. 'The Fingerprinting of Children'. [1980] *Criminal Law Review* 698.
LUCAS, B. 'Advocacy in Children's Courts'. (1980) 4 *Criminal Law Journal* 63.
—— . "Evidence" and the Child Welfare Act'. (1979) *Law Society Journal* 81.
LUMB, R.D. 'The Commonwealth of Australia – Constitutional Implications'. (1979) 10 *Federal Law Review* 287.
MCCARTHY, F.B. 'Delinquency Dispositions under the Juvenile Justice Standards: The Consequences of a Change of Rationale'. 52 *New York University Law Review* 1093 (1977).
MACK, J.A. 'Police Juvenile Liaison Schemes'. (1963) 3 *British Journal of Criminology* 361.
MACK, J.W. 'The Juvenile Court'. 23 *Harvard Law Review* 104 (1909).
MCNULTY, J.K. 'The Right to be Left Alone'. 11 *American Criminal Law Review* 141 (1972).
MANN, C.R. 'The Differential Treatment Between Runaway Boys and Girls in Juvenile Court'. *Juvenile and Family Court Journal* 30(2) 37 (1979).
MARKS, F.R. 'Detours on the Road to Maturity: A View of the Legal Conception of Growing Up and Letting Go'. 39 *Law and Contemporary Problems* 93 (1975).
MORRIS, A. & GILLER, H. 'The Juvenile Court – The Client's Perspective'. [1977] *Criminal Law Review* 198.
MORRIS, N. 'The Future of Imprisonment: Toward a Punitive Philosophy'. 72 *Michigan Law Review* 1161 (1974).
MORRIS, T. 'Struggle for the Juvenile Court'. (1966) 7 (176) *New Society* 17.
MURRAY, J.W. 'Care Proceedings – Delays by Criminal Trials'. (1980) 144 *Justice of Peace* 88.
OLIVER, I.T. 'The Metropolitan Police Juvenile Bureau Scheme'. [1973] *Criminal Law Review* 499.
PALMER, T.B. & LEWIS, R.V. 'A Differential Approach to Juvenile Diversion'. 17 *Journal of Research in Crime and Delinquency* 209 (1980).
Parents Anonymous. *Ripple – Community Child Care Quarterly*. 17 August 1979, 31.
PAULSEN, M.G. 'Fairness to the Juvenile Offender'. 41 *Minnesota Law Review* 547 (1957).
PEARCE, I. & WAREHAM, A. 'The Questionable Relevance of Research into Social Enquiry Reports'. (1977) 16 *Howard Journal of Penology and Crime Prevention* 97.
PELTON, L.H. 'Child Abuse and Neglect: The Myth of Classlessness'. 48 *American Journal of Orthopsychiatary* 608 (October 1978)).
PETRIE, S., BERRY, P. & SMITH, R. 'Juvenile Delinquency and the Labyrinth of Services: A Case Study'. (1980) 13 *Australian and New Zealand Journal of Criminology* 52.
'Probation Reports – More Harm than Good?' (1979) 143 *Justice of the Peace* 221.
RICHARDS, D.A.Y. 'The Individual, the Family, and the Constitution: A Jurisprudential Perspective'. 55 *New York University Law Review* 1 (1980).
RICHMAN, J. 'Adults and Juveniles Appearing Before Court'. (1979) 143 *Justice of the Peace* 130.
RINALDI, F. Case and Comment: Griffiths. (1977) 1 *Criminal Law Journal* 333.
—— . Case and Comment: Mathews. (1981) 5 *Criminal Law Journal* 62.

— . Case and Comment: Sukosky. (1980) 4 *Criminal Law Journal* 174.
— . Case and Comment: Taylor. (1980) 4 *Criminal Law Journal* 309.
RODHAM, H. 'Children under the Law'. 43 *Harvard Education Review* 487 (1973).
ROSE, G. & HAMILTON, R.A. 'Effects of a Juvenile Liaison Scheme'. (1970) 10 *British Journal of Criminology* 2.
ROSETT, A. 'Discretion, Severity and Legality in Criminal Justice'. 46 *Southern California Law Review* 12 (1972).
RUBENSTEIN, L.S. 'Procedural Due Process and the Limits of the Adversary System'. 11 *Harvard Civil Rights – Civil Liberties Law Review* 48 (1976).
RUBIN, H.T. 'Retain the Juvenile Court? Legislative Developments, Reform Directions, and the Call for Abolition'. 25 *Crime and Delinquency* 281 (1979).
'St. Anthony's, 'An Alternative Service'. (1977) 1 *Australian Child and Family Welfare* 38.
SANSON-FISHER, R. 'The Case Against Juvenile Corrective Institutions'. (1978) *Australian Social Work* 31(4) 7.
SARRI, R. & BRADLEY, P.W. 'Juvenile Aid Panels: An Alternative to Juvenile Court Processing in South Australia'. 26 *Crime and Delinquency* 42 (1980).
SCHARF, P. 'Towards a Philosophy for the Division of Juvenile Offenders'. *Journal of Juvenile and Family Courts* 13 (February 1978).
SCOTT, P.D. 'Juvenile Courts: The Juvenile's Point of View'. (1959) 9 *British Journal of Delinquency* 200.
SEYMOUR, J. 'Children's Boards in New Zealand: Some Unanswered Questions'. (1977) 10 *Australian and New Zealand Journal of Criminology* 233.
— . 'Periodic Detention in New Zealand'. (1969) 9 *British Journal of Criminology* 182.
SIMPSON, A.L. 'Rehabilitation as the Justification of a Separate Juvenile Justice System'. 64 *California Law Review* 984 (1976).
SMOOT, J.R. Parens, Patriae and Statutory Vagueness in the Juvenile Court'. 82 *Yale Law Journal* 745 (1972–73).
SPARKS, R. 'The Use of Suspended Sentences'. [1971] *Criminal Law Review* 384.
STAMM, M.J. 'Transfer of Jurisdiction in Juvenile Court: An Analysis of the Proceeding, Its Role in the Administration of Justice, and a Proposal for the Reform of Kentucky Law.' 62 *Kentucky Law Journal* 122 (1973–74).
STERN, D., SMITH, S. & DOOLITTLE, F. 'How Children Used to Work'. 39 *Law and Contemporary Problems* 93 (1975).
TRIBE, L.H. 'Childhood, Suspect Classifications and Conclusive Presumptions: Three Linked Riddles'. 39 *Law and Contemporary Problems* 8 (1975).
VORENBERG, J. 'Narrowing the Discretion of Criminal Justice Officials'. 4 *Duke Law Journal* 651 (1976).
WADE, J. 'The Family Court of Australia and Informality in Court Procedure'. (1978) 27 *International and Comparative Law Quarterly* 820.
WAITE, E.F. 'How Far Can Court Proceedings be Socialized without Impairing Individual Rights?' 12 *Journal of Criminal Law, Criminology and Police Science* 339 (1921).
WEBSTER, I.N. 'Regulators of Medical Practice'. (1978) 3 *Legal Service Bulletin* 209.
WEISBERG, D.K. 'Evolution of the Concept of the Rights of the Child in the Western World'. *International Commission of Jurists Review* No.21, December 1978, 43.
WESTBROOK, J.E. 'Mens Rea in the Juvenile Court'. 5 *Journal of Family Law* 121 (1965).
WEXLER, S. 'Discretion: The Unacknowledged Side of Law'. (1975) 25 *University of Toronto Law Journal* 120.
WILLIAMS, G.L. 'The Criminal Responsibility of Children'. [1954] *Criminal Law Review* 493.
WIZNER, S. & KELLER, M.F. 'The Penal Model of Juvenile Justice: Is Juvenile Court Delinquency Jurisdiction Obsolete?'. 52 *New York University Law Review* 1120 (1977).
ZIMRING, F.E. Book Review of the Juvenile Justice Standards Project. 91 *Harvard Law Review* 1934 (1978).

Index

(References are to paragraphs in this Report)

(References are to paragraphs in this Report)

(References are to paragraphs in this Report)

(References are to paragraphs in this Report)

END