# Tasmanian Children's Courts
# Reform promised but forgotten

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***Other States are leaving Tasmania well behind as they move to implement progressive approaches to juvenile justice***

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In late 1991 the Tasmanian Minister for Community Services released a discussion paper on the child welfare/juvenile justice system, which was to be a basis for proposed law reform of that area.[1] The paper considers not only new procedural legislation, but also sentencing options and wider services for young people. With a change of government on 1 February 1992, the status of any reforms is now in doubt.

The legislation covering child welfare and justice in Tasmania is clearly in need of reform, with a variety of reports and recommendations having been made in recent years. In 1977 a report was presented to the then Minister responsible, recommending drastic changes to legislation and court procedures.[2] In 1981 the Australian Law Reform Commission released its report on Child Welfare.[3] A report was prepared in 1986 by consultants to the then Department of Community Welfare who were under instructions to complete the report as a matter of urgency within six months because of 'impending changes to child welfare legislation'.[4] This report recommended an overhaul of Children's Court procedures. The Royal Commission into Aboriginal Deaths in Custody presented a report to the Governor of Tasmania in late 1990 providing a detailed and scathing analysis of a young person's life at the hands of the child welfare authorities in Tasmania.[5] Further, in various decisions of the Supreme Court, comments can be found that are critical of the legislative framework within which the Children's Courts operate.[6]

In short, the area of child welfare and child justice in Tasmania is a continuing embarrassment as successive governments fail to grapple with the issues. At least two draft bills for reform have been circulating over the past 10 years.

The legislative basis for Children's Courts and child welfare in Tasmania is provided for under the *Child Welfare Act* 1960 and the *Child Protection Act* 1974. The philosophy of the legislation in relation to children committing offences is set out in s.4 of the *Child Welfare Act* and declares that:

> The powers and authorities conferred on any court or any person by this Act shall be exercised so as to secure that, as far as is practicable and expedient, each child suspected of having committed, charged with or found guilty of an offence shall be treated, not as a criminal, but as a child who is, or may have been, misdirected or misguided . . .

To what extent is this statement of policy reflected in court and police procedure? Are the child justice and child welfare areas working in the interests of all? Unfortunately, it is impossible to know how our Children's Courts are working because the courts are closed: the mechanism that protects children from public exposure also prohibits public accountability. A further question is whether Tasmania is utilising the latest principles in its dealings with children and young people who are not behaving as we would like?[7] This question is easily answered in the negative.

This article briefly examines some aspects of the operation of Children's Courts in Tasmania, including legal representation of children and police practices. It also briefly considers the latest draft bill and the proposed reforms raised in the Issues Paper.

## The legislation

Virtually unamended since enactment, the *Child Welfare Act* 1960 deals with criminal procedure for children, including their arrest and detention. It also deals with those who are neglected and uncontrollable. It further provides for wardship and other miscellaneous matters such as employment, begging and ill-treatment of children.

The other relevant legislation is the *Child Protection Act* 1974 which sets up the *Child Protection Assessment Board* and authorises it to take certain proceedings for children who have suffered or are at risk of suffering maltreatment. Children's Courts are given various powers to facilitate the Board's investigations and to place a child in the care of the Director of Community Welfare where maltreatment is proved. The Act was substantially amended in 1986.

The *Child Welfare Act* is dependent on parental involvement and responsibility for children. It is based on the

'child as a social problem' view — prominent 20 years ago — that has largely been rejected in other jurisdictions. While the philosophical justification behind the legislation has been rejected, the legislation lingers on. Certainly, some children are responsive to their parents and alter their behaviour after contact with the child justice system, but many young people are simply outside their parents' control. Their homes are either too violent or unhappy, or their relationship with their parents has broken down to a point of despair. Being brought to court for care proceedings or criminal charges means the child is pitted against parents, police, state welfare agencies and a magistrate (or any combination of the foregoing) in an adversarial court system. The child cannot win.

## The child

In Tasmania a child is a person under 17 years for the purposes of the *Child Welfare Act* (although under the *Police Offences Act* 1935 the age for a child is 16 years). This alone demonstrates problems in the Act in relation to criminal justice procedure. Although s.14(2) provides that no charge against a child shall be heard by a court of summary jurisdiction that is not a Children's Court, what of the case where a child commits offences at the age of 16 years and 11 months and is both charged and brought before the court after turning 17? This area has been clarified by the Supreme Court in *Barrenger v Standaloft* [1966] Tas.SR 65, although the Chief Justice in that decision found it necessary to do some creative interpretation of the Act so as to give effect to the intent of Parliament. His Honour said:

> I do not think that the phrase 'charge against a child' necessarily means that the person against whom the charge is laid must answer to the description of a 'child' at the date which the document setting out the charge happens to be brought into existence. [at p.68]

While this clearly accords with the intent of the Act, it potentially presents great difficulties. There is no time limit to the prosecution of a charge under the *Criminal Code Act* 1924. Consequently, the ludicrous situation may present itself where police charge a person for a crime that occurred 25 years ago and so we could see, for example, a person aged 41 years appearing in the Children's Court.[8] Further, police practices in relation to children depend on the definition of 'child' in the Act: it is an open question whether police should accord a person of 17 years (or older) who is alleged to have committed offences while under 17, the same status with respect to interrogation etc. as a person aged under 17 years.

What is necessary is to spell out these criteria in relation to police and criminal justice procedure. It has implications for the way police interview child suspects and for the rights of the child in question, both of which will be considered in this article.

## Police practices

In late May 1990, the Tasmanian Aboriginal Legal Service expressed its outrage that children were being held in police custody for up to three hours without being charged.[9] Police standing orders require a number of procedures to be followed in the arrest, interrogation and charging of juveniles, as does the *Child Welfare Act*. The application of the common law to this area as it has developed in different States has been dealt with in some depth by Margaret Allison.[10] Yet it is commonplace that these procedures are not followed. Unfortunately, the individual police officer has no-one to answer to if the standing orders and rules of law are ignored.

It is not uncommon that police ignore their own Standing Orders, for whatever reason. This area was examined recently in the Supreme Court of Tasmania.[11] The court was reviewing a decision of a Children's Court magistrate to admit police evidence of an interview with a 13-year-old boy who was suspected of having committed a firearms offence. The police officer had begun to interview the child at his home and in the absence of his parent. The magistrate admitted the evidence of the interview, holding that an 'interview' had not then begun and hence there was no need to ensure a parent was present. Neasey J held:

> I do not accept the distinction that an 'interview' had not yet commenced. If that distinction were to be made, it would be a simple matter to by-pass the protections of the standing order. The rule should be, in my view, that if a police officer intends to ask any investigatory questions of a child, he should first ensure that the accompanying presence of a parent or substitute adult is obtained. [at p.15]

In making these comments, Neasey J held the evidence ought to have been rejected in the exercise of the magistrate's discretion on the ground that the evidence was obtained by improper means. He also adopted the remarks of Yeldham J in *Dixon v McCarthy* [1975] NSWLR 617, at 639, and added:

> ... in my opinion courts should be reluctant in ordinary circumstances to receive in evidence an admissional statement allegedly made by a child if the prescription of the standing order has not been observed. This should be so for the following reasons additional to those stated by Yeldham J:
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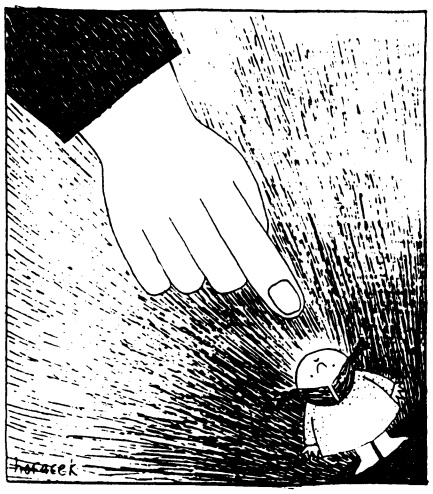
> 1. The presence of a police officer asking investigatory questions of a child in the absence of a parent or other responsible adult is always likely to be intimidatory and unsettling to the child.
> 2. If the child's version of the conversation differs from that of the police officer, the child's chance of having his version accepted is, according to the ordinary patterns of human conduct, very slight even if the child happens to be telling the truth.
> 3. The police officer, knowing his version is likely to be accepted, may be tempted to invent an admissional statement if he does not receive one. It is unfair to police officers to be placed in this position. [at p.14]

Given the delicate nature of an interview with a young person, common sense would appear to dictate that the rules for treating child suspects be given legislative recognition.[12] In the course of his decision, Neasey J had said: 'Of course, the police standing order has no particular status in this court, but its content is symptomatic of the standard of fairness which ought to be observed during questioning by a police officer of a child' (at p.13).

Given these comments of Neasey J referred to above, the continuance of an 'across the board' judicial discretion in a Children's Court magistrate to admit evidence that is obtained in improper or unlawful circumstances must be examined closely. Two alternative approaches are apparent. The first is to provide in the Act that even if a magistrate is satisfied that there has been compliance with all relevant standing orders, there should remain a judicial discretion to exclude the evidence. Alternatively, the discretion should only apply to serious offences, where the consequences of conviction are significant. On minor offences, if there is no compliance the evidence must be rejected.[13] If police ignore their standing orders in other than the most serious cases, then the evidence ought to be considered fatally tainted: this approach accords with com-



ments made by the judiciary in a number of cases.[14] The best way to protect our young people is to accord legislative recognition to this rule.

## Legal representation

Of course, even with an extensive range of safeguards for police interviews and detention, a young person is at a disadvantage when appearing before a magistrate, especially when evidence is contested. In Tasmania there is no mandatory legal representation of children in courts. The majority of children are admonished and discharged.[15] That means that they receive a 'talking to' from the magistrate about the seriousness of the offence they have committed and are free to go. In principle there is no conviction recorded. In practice, an admonishment and discharge is shown on their criminal record. This means that if a person comes before a court as an adult, the court is well aware that they have had previous matters before the Children's Court. This is another reason for concern for children going through the courts unrepresented, in that they could be convicted of an offence for which they well may have a defence.

Given that there are an average of 2500 appearances of children in courts each year in Tasmania, the question of legal representation is contentious. In 1988 only 24.7% of defendants in the Children's Court were legally represented. This compares with 42.4% in the Court of Petty Sessions and 93.4% in the Supreme Court.[16] That children receive 'light' sentences on conviction is no justification for a lack of representation. Expediency should not override justice.

Mandatory representation for every child appearing in the court is impractical. The writer proposes that the court's jurisdiction be greatly reduced, so that petty offences (such as licensing, driving, shoplifting and victimless offences) are dealt with by way of police cautions. It is for the remainder of more serious offences that mandatory representation should be maintained. It is most necessary to ensure that a child is not convicted (or does not plead guilty) on a charge for which there is a defence. The problem could be tackled by the provision of a duty solicitor to at least advise each child about the availability of a defence. Further, if mandatory representation is unacceptable, at the very least a child ought to be represented where he or she is defending the charge.

## The Judicial Proceedings Bill

In Tasmania there is no longer any need to make out a case for reform of our child justice and child welfare laws; it is now accepted as being inevitable by academics, officers of the Department for Community Services and members of the legal profession.

Currently circulating within the Department of Community Services is the draft *Judicial Proceedings (Children) Bill* to reform the child welfare area. Unfortunately, it is to be put on the back burner while the discussion paper is released and circulated.

Part 2 of the Bill aims to establish a Children's Division of the Magistrates Court with a specially appointed children's magistrate in line with the recommendations of Briscoe and Warner and the situation in New South Wales and Victoria.[17] A 'child' is to be defined as a person who has not attained the age of 18 years. It appears incongruous to be calling an 18-year-old a child.

Proceedings are to be commenced by summons except in defined circumstances (cl.9), while other procedures relating to arrest, bail and detention are virtually copied from the *Justices Act* 1959 and the *Child Welfare Act* with some minor changes. Clause 11 provides that 'where a defendant is brought before a justice for bail pursuant to s.10(1) they shall ask the child if they wish to apply for bail . . . ' Why the child is suddenly referred to as a defendant, and why there is no presumption or compulsion to grant bail is a mystery. Asking a child 'do you want bail?' is not in accord with the principles of the proposed legislation as set out in cl.4 and presumes a higher level of comprehension of the court process than could be realistically expected. It can mean different things to different people; in the writer's experience the word 'bail' is equated by adults with bail in the USA where a surety is lodged with police for release from their custody.

Other commendable proposals are a prohibition against the admission into evidence of confessions to police without corroboration (cl.13) and an obligation on the judicial officer to explain the nature of the proceedings to the child (cl.20) which accords with recommendations of Briscoe and Warner.

Notable omissions are that there is no provision for mandatory representation of children, though the children's magistrate may appoint a legal representative if it is seen to be desirable (cl.17); police standing orders in relation to interviewing and detention of children are not given legislative recognition; and there is no provision for the hearing of charges against a person who is over 18 years at the time of the court appearance.

## The issues paper

Released simultaneously with a number of other volumes, this paper commences with a discussion of the 'welfare' approach as against the 'justice' model. It is unquestionably comprehensive in the range of issues with which it deals, though in some areas it is short on detail. It will serve well as a basis for legislation. Commendable proposals are:

- an increase in the minimum age of the Children's Court jurisdiction to 12 — 14 years and the maximum age to 18 years;
- a police cautioning scheme, though this is inadequately developed;
- the introduction of family group conferences in an attempt to resolve the matter before court proceedings are commenced;
- the appointment of a judge to preside over Children's Courts, so as to give the court greater status and to ensure consistency in sentencing;
- the destruction of criminal records for all but those convicted of serious offences and sexual offences;
- the introduction of new sentencing options such as community service orders and detention orders for more serious offenders. Further, the concept of wardship is also being questioned, with the proposal that a Children's Court have power to make a care order for a specified period;
- the inclusion in the legislation of a statement of principle drawn from the Beijing Rules.[18]

However, this appears to be where the Department's resolve to protect children from police ends. No proposal is made to incorporate into legislation a code of police practices when dealing

with young offenders, apart from a requirement that a parent or sympathetic person be present during an interview. Motherhood statements are simply insufficient to protect children's rights.

Other omissions are:

- dealing with young offenders who are over 18 years when charged for an offence that occurred when they were under 18.
- a recognition that the jurisdiction of the Children's Court be reduced drastically (though this is inferred in the context of the proposal for police cautions).
- any proposal for mandatory representation for, at least, those facing a hearing.

## The future of the Children's Court jurisdiction

If the draft Bill and discussion paper are any guide, the Government will be failing to provide what is most needed: a complete re-appraisal of the system. A number of questions must be answered, for example:

- Why do we retain the formality of the court?
- Why do we process large numbers of children through courts?[19]
- What are the benefits and costs of this in court and police time?
- What is the benefit to the child?

The writer suggests that one approach is for the Children's Court to have its jurisdiction confined to indictible offences under the *Criminal Code* 1924 and other legislation. In respect of summary public, driving, drugs, licensing and dishonesty offences there is no justification for the continuation of the court's jurisdiction in these areas. That children are committing offences is largely either a social and/or parental problem: it is not one that is entirely referable to the child.

Nor is it solvable within the confines of an adversarial court system. The younger the child, the more true this is. Support for this can be found in a recent study of juvenile offending in the USA referred to by John Seymour in his book *Dealing With Young Offenders*. That study found that most juvenile crime 'is not serious, not repetitive and not predictive of future criminal careers'. That much is certainly consistent with the writer's experience in the area and comments in the issues paper (at p.2) which reveal 60% of defendants are admonished and discharged, 10% receive fines of less than $20 and 6% are made wards of the state.

The argument to maintain the Children's Court in its present form is put on the basis that a taste of the court will show the children that what they are doing is wrong. The writer rejects this. Some young people are destined to commit offences; they quickly become accustomed to the court procedure. By the time they reach adult courts they have little fear of it as an institution. As to the other group of people who are unlikely to offend again, this speaks for itself. Further, because police know that children are likely to be admonished and discharged when they do appear in court, police compliance with their standing orders is less than strict.

Why subject all offending children to the court process? Some explanation for their offending is related to a lack of respect for (or to a resentment of) authority. To take them through the court process on minor charges can only increase (though not in all cases) their resentment. The writer does accept that the court process will frighten some children from re-offending; yet, there is no evidence that an admonishment from a police officer will not have the same effect on those children.

A procedure for such cautions is already set down in Tasmanian police standing orders,[20] though it is underutilised. Whether police cautions are adopted or not, some action must be taken to reduce the flow of our young people through the courts.

## Conclusion

The 1960s and 1970s saw a move to reform child welfare and justice throughout Australia with the introduction of a number of procedural and administrative reforms. While progressive reforms have continued in other States and Territories, things have come to a grinding halt in Tasmania. There is no shortage of reports guiding the Tasmanian Government in the reform of the child justice/welfare area. Political motivation appears to be the key element in short supply. Other States are leaving Tasmania well behind as they move to implement more progressive approaches. While Tasmania could benefit, at the very least, from a redrafting of the current legislation, a fresh look at the whole child justice and child welfare areas would be most welcome.

## References


1. 'Corrective Services Legislation for Young Offenders', Issues Paper No.2, Department of Community Services Tasmania.
2. *Report of the Committee of Review into the Child Welfare Act 1960 (Tas.) and State Social Welfare Services* (Roe Report).
3. ALRC Report No.18, *Child Welfare*, 1981.
4. Briscoe, Wayne and Warner, Kate, *Children's Courts in Tasmania*, Tasmanian Law Reform Commission and the University of Tasmania, 1986; Ms Kate Warner, personal communication; see the covering letter to the report.
5. *Report of the Inquiry into the Death of Glenn Allan Clark* by Commissioner J.H. Wootten, AGPS, 1991.
6. For example, in *Re P (Infants)* Tas. Unreported, 52/1982, Everett J stated, in relation to the *Child Welfare Act* 1960, that it was 'a statute which, now in its third decade, may well be considered inadequate in respect of the legal procedures which it provides'. See also the comments of Wright J in *In The Matter of the Child Protection Act, 1974, s.10(1) and In The Matter of MJ, PJ and TJ*, Tas. Unreported, B29/1991.
7. Where the word 'child' is used in this article, it is used simply to conform with the wording of the legislation. The writer finds it absurd to call a teenager a 'child'.
8. This question has been resolved in other jurisdictions by imposing an upper limit on the age of a defendant in a Children's Court. See Seymour, John, *Dealing With Young Offenders*, Law Book Co., 1988, p.290.
9. See also Sculthorpe, Heather, 'Aboriginal Police Relations in Tasmania — Recent Incidents' in (1990) 2(45) *Aboriginal Law Bulletin* p.12.
10. Allison, Margaret, 'Interrogation for Juveniles: Rules for Police', (1984) 9(3) *LSB* 113.
11. *M v. AJ* Tas. Unreported, No.53/1989.
12. See for example s.81C(3) of the *Child Welfare Act* 1939 (NSW), considered in *Bullock v Kennedy* (1988) 36 A Crim R 155.
13. In *McKellar v Smith* [1982] 2 NSWLR 950 Miles J held at p. 961 that where evidence is obtained by 'unlawful or improper conduct' it should be almost automatically excluded in trials for minor offences.
14. See ref.13 above and the cases referred to by Miles J.
15. Section 7(1) *Probation of Offenders Act* 1973. It should be noted that while this provision allows a magistrate to 'dismiss' a complaint, the parlance used in Children's Courts is an 'admonishment and discharge'. The implication of this distinction is discussed by John Seymour in *Dealing with Young Offenders* at p.35. Further, it is doubtful that magistrates even have any jurisdiction to dismiss a complaint where the child is under 15 years. This point is discussed by Kate Warner in her book *Sentencing in Tasmania* at p.151.
16. ABS — Court Statistics: Tasmania — 1988.
17. See 2.7(2) of the *Children's Court Act* 1987 (NSW) and ss.8, 11, and 12 of the *Children and Young Person's Act Act* 1973 (Vic.).
18. The United Nations Minimum Rules for Juvenile Justice.
19. Statistics released in the Issues Paper reveal 26.3% of defendants were licensing cases and 10.5% were motor vehicle or traffic cases.
20. Order 109.6 states, in effect, that a child may be cautioned so as to give effect to the principles of proper child treatment as set out in the *Child Welfare Act* and provides for a range of circumstances to be taken into account by the officer exercising her/his discretion.