PROCEDURAL JUSTICE IN SENTENCING AUSTRALIAN JUVENILES[†]

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INTRODUCTION

In the dying hours of the Autumn 1989 session of the Victorian Parliament, the *Children and Young Persons Act* 1989 (Vic) was passed. This completed a cycle of reform which had commenced in this state, in December 1982, with the establishment of a committee under the chairmanship of Dr. Terry Carney of the Faculty of Law, Monash University, to consider the need to reform Victorian child welfare law and practice.[1] It also marked a decade of change in juvenile criminal justice in Australia. Four of the eight state and territorial jurisdictions in this country have completely rewritten their legislation dealing with child criminality and welfare. The most important alterations on the criminal side related to revised procedural standards and overhauled sentencing powers for children's courts. This article concentrates on the former.

The commencement of the decade of reform can be taken from the passing of the South Australian *Children's Protection and Young Offenders Act* 1979 (S.A.) which itself drew upon recommendations of the Mohr Royal Commission.[2] Next followed the Northern Territory with new legislation in 1983,[3] then the Australian Capital Territory in 1986[4] and afterwards New South Wales, in 1987.[5] Of the remaining jurisdictions, Western Australia has repea-

† This article is based upon a research paper prepared by the authors for the Australian Law Reform Commission and the Commonwealth Youth Bureau published in 1988 entitled *Sentencing Young Offenders*. Funding for the project was wholly provided by the Commonwealth Youth Bureau.

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1 Child Welfare Practice and Legislation Review Committee, *Report: Equity and Social Justice for Children, Families and Communities* (Melbourne, 1984) (hereafter cited Victoria 1984). For a history of legislation relating to children in Victoria see D. Jaggs, *Neglected and Criminal: Foundations of Child Welfare Legislation in Victoria* (Melbourne, Phillip Institute of Technology, 1986).

2 *Report of the Royal Commission into the Administration of the Juvenile Courts Act and Other Associated Matters, Part II* (South Australia, Government Printer, 1977).

3 *Juvenile Justice Act* 1983 (N.T.) drawing upon Australia Law Reform Commission, *Child Welfare* (Report No. 18) (Canberra, A.G.P.S., 1981) (hereafter ALRC, *Child Welfare*). The Act was substantially amended by the *Juvenile Justice Amendment Act* 1987 (N.T.) as a result of a review of the Act undertaken by the now abolished Juvenile Justice Review Committee.

4 *Children's Services Ordinance* 1986 (A.C.T.) also drawing on the ALRC Report on *Child Welfare*.

5 *Children (Criminal Proceedings) Act* 1987 (N.S.W); *Children's Court Act* 1987 (N.S.W); *Children (Detention Centres) Act* 1987 (N.S.W) as amended by the *Children (Detention Centres) Amendment Act* 1988 (N.S.W); *Children (Community Services Orders) Act* 1987

tedly amended its *Child Welfare Act* 1947 (W.A.), but has not undertaken a major revamping of its legislation for young offenders.[6] In 1980, Tasmania undertook a review of its *Child Welfare Act* 1960 (Tas.) and prepared a draft Community Welfare Bill, but this has yet to be introduced into Parliament.[7] Only Queensland has maintained its legislation for young persons essentially unchanged.[8] Because children's courts in Australia have always been located at the magistrates' court level, it was accepted from the start that they would employ simple and expeditious procedures. Yet, for children, there was more involved than the dispatch of summary justice: juvenile criminal justice was based upon a model markedly different from that applicable to adults. The importance of the passing of the new Victorian Act, and the wider Australian developments in the current cycle of reform, is that they denote a significant shift in the nature of that underlying model.

PARADIGMS IN JUVENILE JUSTICE

Conventionally, juvenile justice systems have been divided into two basic paradigms — the "welfare model" and the "justice model". These two models are often thought of as representing the opposite ends of a continuum. Attempts are then made to classify existing juvenile justice systems according to their location along this continuum. If this can be done at all, it can only be done crudely. "Welfare" and "justice" are not uni-dimensional concepts, nor are they "opposites". Even in their extreme forms, each model contains a constellation of different elements, some of which are inconsistent with, and others complementary to, those of the competing model. Attempts to assess where any particular system fits along this "welfare — justice" continuum is difficult because the judgement is subjective and the continuum itself has no scale or units of measurement. Degrees of difference can only be estimated and, ultimately, a judgment has to be made of the whole system according to some rough global assessment of its character.

The "*welfare model*" starts from a largely deterministic position. It treats juvenile deviance as the product of factors outside the control of the offender. It holds that the proper official reaction to that deviance is a range of flexible dispositions tailored to the needs of the individual wrongdoer and oriented toward his or her future behaviour. It accepts that it is society's responsibility

(N.S.W) as amended by the *Children (Community Services Orders) Amendment Act* 1988 (N.S.W).

[6] In August 1987 the Minister for Community Services announced that a Departmental Legislative Review Committee would undertake a full review of the *Community Services Act* 1972 (W.A.), the *Child Welfare Act* 1947 (W.A.) and the *Welfare and Assistance Act* 1961 (W.A.): see Western Australia, Department for Community Services, Legislative Review Committee, *Walking the Tightrope: Rights and Responsibilities in the Welfare System* (1989). In 1988 a Children's Court was established by the *Children's Court of Western Australia Act* (No.2).

[7] K. Warner, "Juveniles in the Criminal Justice System", in G. Zdenkowski, M. Richardson, & C. Ronalds, (eds.), *The Criminal Injustice System: Volume 2* (Sydney, Pluto Press, 1987) 171 at p. 172.

[8] *Children's Services Act* 1965 (Qld). A Family and Community Welfare Bill which ran to 376 clauses was circulated in 1984 but nothing further appears to have been done.

to meet the needs of youth and, in appropriate cases, of their family.[9] Until fully developmentally mature, the juvenile is regarded as the responsibility of the family first and the state second. The model holds that no rigid distinctions need be made between "criminal" and "welfare" dispositions, since both are designed to meet the child's best interests. Appropriate measures may include supervision and discipline, both of the child and his or her parents, and may be continued until the juvenile is habilitated or rehabilitated.

Under the welfare model, the procedures used to determine whether the state should intervene, and in what manner, are to be informal, non-legalistic and personal and conducted away from the public eye. The forum in which this occurs should be separate from that for adults in order to avoid contamination from "real" offenders. The model requires that attempts be made to lessen the impact of any necessary formal intervention upon the juvenile. Juveniles should thus be diverted from the adjudicatory/dispositional stage by formal and informal warning or cautioning systems. When formal decisions are needed to be made they should be entrusted to specialized panels or tribunals staffed by experts in juvenile behaviour. Responding to need rather than guilt, and offering treatment rather than punishment, are the central purposes of the sanctions provided for by this model. The measures taken need not be proportionate to the gravity of the wrongdoing. It follows that non-conviction sanctions are preferred to ones which follow the recording of a formal conviction. In any event, it is desirable that records of formal intervention, particularly convictions be expunged after a short period to minimize stigma. The "justice" which the welfare model offers young offenders is future-oriented, flexible, individual treatment under authorities vested with wide discretionary powers. The control of crime is hoped to be attained under this model by eliminating the structural causes of crime and reforming the personality of the offender. The origins of the welfare model are to be found in the United States and Canada at the turn of the century. It flourished there until the justice model emerged as its competitor in the mid part of this century.

According to the "*justice model*",[10] the young must be seen as rational, responsible and accountable for their actions. Deviance is the result of a free moral choice. The proper legal response to the unacceptable consequences of that choice is the imposition of a penalty commensurate to the gravity of the offence. The concept of personal responsibility is not only the justification of the intervention, it is also its objective. Under this model, adjudicatory forums should be open to the public and where appropriate, because of the gravity of the offence and the age of the offender, they should be the same as that which tries adult offenders. There should be a clear demarcation of welfare and criminal cases with the two being dealt with in separate tribunals

[9] S. H. Reid, "The Juvenile Justice Revolution in Canada: The Creation and Development of New Legislation for Young Offenders" (1986) 8 *Canadian Criminology Forum* 1, 9.

[10] See generally R. A. Rossum, B. J. Koller & C. P. Manfredi, *Juvenile Justice Reform: A Model for the States* (Rose Institute of State and Local Government and the American Legislative Exchange Council, 1987), 8ff.

if possible. The focus in the criminal jurisdiction is primarily on the offence rather than on the offender. Rehabilitation is a subsidiary goal. Other utilitarian goals such as general and specific deterrence can also be pursued under this model as part of the emphasis on individual responsibility, but the prime focus of intervention is upon the allocation of moral blame.

Under the justice model, juveniles are more closely equated with adults. Uniformity of punishment based on an assessment of individual culpability and the gravity of their offence is preferred to individualized and therefore disparate treatment. It follows that sentences should be determinate, specific and proportionate to the offence. The model is not one to invest decision makers with wide discretionary powers and it stresses the accountability of the whole system as well as the need for consistency in decision making by the police, prosecutors, sentencers, and correctional administrators who comprise it. This requires open courts and a system of due process including extensive rights of appeal. The "justice" it offers young offenders caught up in the juvenile justice system is past oriented, proportional, consistent, visible, certain, equal treatment under well defined legal rules. The control of crime is hoped to be attained by the deterrent effect of punishment that is certain, swift and deservedly severe.

These two contrasting models can be seen to contain within them two strands. The first relates to the *substantive* aspects of the model, namely its ideological content — the objectives and values which the system is seeking to promote. These address concepts such as the personal responsibility and accountability of the offender and his or her family, the proportionality of responses to wrongdoing, the degree of equality of treatment required, the measure of indeterminacy in sanctions tolerated, and the stance taken within the model to the purposes of state intervention. The second strand concerns the *procedures* to be employed by the juvenile justice system at each of its enforcement, adjudication and disposition stages to achieve its ends. These have been described as the due process considerations. They include such matters as the extent to which the system recognizes rights to legal representation, reasoned decisions, access to information, participation in the proceedings and appellate review of decisions. The two strands cannot be wholly separated because procedure is affected by substantive goals. The recent Australian developments reveal a shift on both the substantive and procedural fronts, but it is with the latter issues, particular those which relate to the sentencing or dispositional processes of the special courts dealing with children, that the following is concerned.

PROCEDURAL JUSTICE

Trial procedures in adult courts are far better developed than those in the children's court. But at the dispositional or sentencing stage, the children's court procedure shares with that of adult courts a paucity of regulation, statutory or otherwise, of matters such as establishment of the factual basis for sentencing, the proper role of counsel (both prosecution and defence), or the

steps to be taken by judges or magistrates in formulating their sentencing decisions. The trend in recent major Australian enquiries into sentencing confirms the need for greater clarification of these matters.[11] Rules with respect to dispositional procedures in children's courts are even more unsettled.

It is not possible to implement adult procedural rules in the juvenile jurisdiction without confronting the fact that one of the primary justifications for a separate children's court was the hope that a different and more appropriate form of procedure could be developed and applied to young offenders. This was partly generated by a desire to avoid the contaminating effects of association with adult offenders, but more substantially by the wish to reduce procedural rigidities which were seen as inhibiting, or irrelevant to, efforts at responding to youngsters according to their needs. A major consequence of the view that the interests of the child were paramount was a weakening of the idea that the court was an adversary forum. This was fostered by the fact that most juveniles in children's court pleaded guilty[12] and it was rare for substantive or procedural points to be contested. Since the state was determined to protect and save its children from crime, it was presumed that its treatment of them would do no injury. There was therefore no real need to seek procedural safeguards either at the trial proper, or at the dispositional stage. The procedural safeguards provided to adult offenders were to protect them from the punitive impact of the law, but where the law was benign, such protections were immaterial.

One of the main procedural complaints about the welfare model is that it is so paternalistic that the involvement of the children themselves is often relegated to a marginal consideration. It has been said that the child is the object rather than the subject of proceedings.[13] This may be less the product of the omniscience of the welfare model than of organizational factors such as the pressure to process defendants promptly, the characteristics of the physical settings and facilities, and the disadvantages young people face owing to their inexperience, inarticulateness, vulnerability and dependency. The marginalisation and exclusion from involvement of young offenders in the procedures of the court turns the criminal process itself into part of the punishment. The modern "children's rights" call is for young offenders to be given more opportunities to share directly, or through counsel, in the decisions which vitally affect them.[14] If there are demands for young persons to be held more accountable and responsible, there is a corresponding push for the granting of civil rights and safeguards against state power similar to those enjoyed by adult offenders. Most attention has focused upon their claim to

[11] Victorian Sentencing Committee, *Sentencing* (Melbourne, Victorian Attorney-General's Department, 1988), 214, 607; Australian Law Reform Commission, *Sentencing* (Report No. 44) (Canberra, AGPS, 1988), 89, 98–103. See also Australian Law Reform Commission, *Sentencing: Procedure*, (Discussion Paper No. 29) (Sydney ALRC, 1987), 15 (hereafter ALRC, Procedure).

[12] In Australian children's courts roughly 95% of all cases involve a guilty plea.

[13] A. Morris and H. Giller, *Understanding Juvenile Justice* (London, Croom Helm, 1987), 171.

[14] Western Australia, *Department for Community Services, Report on the Review of Departmental Juvenile Justice Systems* (1986) 26.

reasoned decisions, comprehensible procedures, their own participation in the hearing, access to pre-sentence reports and other information about themselves, and their need for effective legal representation. Each of these matters has a special impact at sentencing.

The United States of America is further down the track of defining minimum standards for procedural justice at sentencing in juvenile justice than this country. Commencing in 1977, the Institute of Judicial Administration and the American Bar Association published its 24 volume survey of juvenile justice standards.[15] An entire volume was devoted to dispositional procedures.[16] These standards provide a useful conceptual and practical framework for considering the sentencing process in Australia's children's courts. The IJA:ABA standards suggest that if the adjudication of delinquency is to be moved away from a medical model, there must be a greater concentration on "independent criteria of fairness". It posits that the fact-finding aspect of the dispositional process should be regarded as significant as its counterpart at adjudication since the interest at stake is ultimately the possibility of a "grievous loss" of liberty:

> "The prospect of a grievous loss is a compelling interest, and while the state's interest in efficiency, convenience, and even benevolence may be conceded, those claims are not sufficiently compelling to provide a continuing rationale for procedurally denuding the juvenile, whether or not the disposition is contested, but especially when there is no agreement on disposition."[17]

The IJA:ABA standards emphasize that procedural niceties are not an end in themselves. Though they must be directed to enhancing achievement of the court's ultimate objectives, they must do so fairly.[18] The standards aim to:

- maximize accuracy in dispositional fact-finding;
- maximize the opportunity for meaningful participation by the juvenile, the juvenile's counsel, the parents or guardians, representatives of the state, and, under certain conditions, the victim of the offence;
- minimize the significance attached to hearsay and conclusions, whether or not couched in the language of expertise;
- utilize explicit fact finding and recorded reasons for the selection of particular dispositions;
- encourage broad sharing of relevant information;
- limit dispositional facts to those that are directly relevant to dispositional objectives;
- balance formality with informality and create conditions whereby the dispositional hearing is a fair opportunity to influence an impartial decision-maker's judgment within the allowable limits of discretion;

[15] Institute of Judicial Administration: American Bar Association, *Juvenile Standards Project, Standards for Juvenile Justice*, (Cambridge, Mass, Ballinger Publishing Co, 1977).

[16] Institute of Judicial Administration: American Bar Association, *Juvenile Standards Project, Standards Relating to Dispositional Procedures*, (Cambridge, Mass, Ballinger Publishing Co, 1980).

[17] Id. 12–13.

[18] Id. 13–14.

— give recognition to the important interest at stake — liberty — and treat the prospect of a deprivation of liberty as a grievous loss; and
— within the legislative limits fixed for the underlying offence, provide an opportunity to fashion a disposition responsive to the individual condition or situation of the juvenile.

COMPREHENSIBLE PROCEDURES

Much of the impetus for the new demands for procedural justice in both the United States and Australia has come from observation and survey studies of children's experiences of court. There is considerable evidence that many of the young people appearing in court do not understand the proceedings that are affecting them.[19] This constitutes a significant barrier to their participation in the process by which decisions are made about their future. Even from the state's point of view, the impact of a sanction will be reduced or lost if an offender fails to understand its nature and consequences. Those who conducted the consumer survey of juvenile justice under the auspices of the New South Wales State Council of Youth in 1984 concluded that "confusing" was probably the most apt word to describe the court experience of young offenders. Some 46 out of 50 interviewees who answered the question "what happened to you at court?", indicated that they did not understand what had occurred. Two-thirds of respondents felt that the court processes should be changed, and the main suggestion was for greater clarity and explanation by the court staff, particularly from the presiding magistrate.[20]

The Australian Law Reform Commission, in its report on child welfare, recommended that new legislation "should impose on the magistrate dealing with a child a duty to explain, in simple language, the nature of the charge and the effect of any order made by the court".[21] Indeed, subsequently, the Commission called for such obligations to "attach to sentences of any kind imposed on federal offenders".[22] Like recommendations were made by the Victorian Child Welfare Practice and Legislation Review Committee:

> "The rationale behind such a requirement is twofold. First, it recognizes that, as a matter of principle, young offenders are entitled to full information about their punishment; the reasons for its imposition; and advice about any right of appeal. Secondly, it is designed to improve decision-making. It requires a court to consciously think through why it is making an order in a particular case and to be precise in framing the order."[23]

[19] H. Dillon, *Kids, Courts and Cops* (Sydney, N.C.O.S.S., 1985); Warner, op. cit. 177; New South Wales, State Council of Youth, *The Juvenile Justice System in NSW — A Consumer Survey* (unpublished paper, 1984), 8; Victoria 1984, 420; ALRC, *Child Welfare*, 58–59; New South Wales, Women's Co-ordination Unit, *Girls at Risk: Report of the Girls in Care Project* (Sydney, Premier's Department, 1986), 123.
[20] N.S.W. State Council of Youth, op. cit. 8.
[21] ALRC, *Child Welfare*, 118.
[22] ALRC, *Sentencing*, para. 165
[23] Victoria 1984, 444.

The Committee went further. Because of the complexity of sentencing, it proposed that decision-makers should not only be obliged to explain their orders in plain language, but also duty bound to reduce them to writing.[24] Furthermore it recommended that court liaison officers be appointed with express responsibility for providing written information to children and families about the court, its procedures and possible outcomes prior to the hearing.[25] In the United States, the IJA:ABA standards would add that such information should be given in the language primarily spoken by the juvenile.[26]

Most jurisdictions now have responded to these recommendations and have enacted provisions promoting comprehensibility. The Australian Capital Territory, New South Wales, Northern Territory, South Australia, Western Australia and now Victoria each cast a general responsibility on the children's court to ensure a child understands the nature and purpose of the proceedings in which they are involved.[27] New South Wales, the Northern Territory, South Australia and Western Australia go further to require a specific explanation of the facts or elements required to constitute an offence, the nature of the allegations and their implications.[28] The law in the Australian Capital Territory and in Victoria's new legislation makes specific reference to the need to explain to the child and, if appropriate, the parents the nature and implications of any dispositive order handed down.[29] New South Wales and Western Australia do so with respect to community service orders and South Australia requires an explanation of recognizance orders, including the furnishing of a written notice stating in simple language the conditions that the child is required to observe.[30] In New South Wales the legislation obligates the court to explain, upon request,[31] any aspect of procedure or any decision or ruling.[32] Only Queensland and Tasmania make no allowance in their current law for the need to promote the comprehensibility of proceedings.

[24] Ibid.

[25] Id. 242.

[26] Op. cit. 21, Standard 1.2D.

[27] See s.6 *Children's Services Ordinance* 1986 (A.C.T.); s.12(1) *Children (Criminal Proceedings) Act* 1987 (N.S.W.); s.41(1) *Juvenile Justice Act* 1983 (N.T.); s.91(1) *Children's Protection and Young Offenders Act* (1979) (S.A.); s.34(1) *Children's Court of Western Australia Act (No.2)* 1988 (W.A.); s.18 *Children and Young Persons Act* 1989 (Vic.).

[28] Section 12(1)(a) *Children (Criminal Proceedings) Act* 1987 (N.S.W.); s.41(2) *Juvenile Justice Act* 1983 (N.T.); s.91(2) *Children's Protection and Young Offenders Act* 1979 (S.A.); s.34(2) *Children's Court of Western Australia Act (No.2)* 1988 (W.A.).

[29] Section 6 *Children's Services Ordinance* 1986 (A.C.T.); ss.18(b) and 23 *Children and Young Persons Act* 1989 (Vic.).

[30] Section 6 *Children (Community Service Orders) Act* 1987 (N.S.W.); s.39C(3) *Child Welfare Act* 1947 (W.A.); s.60(1) *Children's Protection and Young Offenders Act* 1979 (S.A.).

[31] The Children (Criminal Proceedings) Amendment Bill 1989 (N.S.W.) proposes to replace the requirement that the court explain on request with one that requires an explanation to be given whenever it is necessary to do so in the opinion of the court.

[32] Section 12(2) *Children (Criminal Proceedings) Act* 1987 (N.S.W.).

PARTICIPATION

This issue is related to that of comprehensibility. The Australian Law Reform Commission stated that one of the distinguishing attributes of a court for children should be that its proceedings are both specially adapted to children's understanding and be conducted so that "the young can feel that they have an opportunity to participate".[33] This was not only put on the basis of equity and fairness to children, but also in the interest of avoiding the counterproductive effect of resentment.[34] If court interaction analyses of sociologists like Carlen[35] and McBarnet[36] found that adult defendants felt helpless, hopeless, manipulated and prevented from telling their stories, except in a very restricted way, when appearing before magistrates,[37] how much more frustrating must it be for minors? The sociological studies are useful because they reveal the gap between the rhetoric of law and the reality of law. It is important to recognize that, however laudable and apparently acceptable are the demands for greater participation by young people as a point of legal rhetoric, in practice this will tend to be resisted as an unnecessary slowing of proceedings.[38]

A survey conducted in New South Wales for the Women's Co-ordination Unit's Girls in Care Project[39] in 1986 reported that of 56 girls who responded to questions about their needs in court, nearly half said they needed more preparation for and knowledge of what was going to take place. They wanted to be able to put their own view to the court and lacked confidence in being represented adequately by others.[40] The same survey found that 36 of 47 respondents believed there were barriers to their participation. Most mentioned intimidating and scary court processes, feelings of powerlessness, lack of voice in the proceedings and an unawareness of their rights and options. A State Council of Youth survey also conducted in New South Wales[41] found that out of 63 respondents who felt that the court process should be changed, 10 suggested the need to be given a chance to be heard. The report concluded that, overall, the picture was of young persons being processed by the court rather than participating in the court hearing.[42] In similar vein was Warner's finding in her observation study of Tasmanian children's courts that children and parents frequently did not get a chance to comment on whether they understood or agreed with the statement of facts presented by the prosecutor. Not all children were shown the list of prior convictions for verification, and,

[33] ALRC, *Child Welfare*, 113.
[34] Ibid.
[35] P. Carlen, *Magistrates' Justice* (London, Robertson, 1976).
[36] D. McBarnet, *Conviction: Law, the State and the Construction of Justice* (London, Macmillan, 1981); see also N. Hutton, "The Sociological Analysis of Courtroom Interaction: A Review Essay", (1987) 20 *Australian and New Zealand Journal of Criminology* 110.
[37] See Hutton, id. 111.
[38] See discussion of two models of the criminal process (due process v. crime control) in H.L. Packer, *The Limits of the Criminal Sanction* (Stanford, University Press, 1968).
[39] N.S.W. Women's Co-Ordination Unit, op. cit. 129; ALRC, *Child Welfare*, 58–59.
[40] N.S.W. Women's Co-Ordination Unit, op. cit. 119.
[41] N.S.W. State Council of Youth, op. cit. 8.
[42] Op. cit. 8.

when it was produced, it was often done so cursorily. It appeared that many children (and parents) were unaware that they had a right to speak in mitigation of penalty. When asked by the court if they wished to do so, they were often unprepared. The putting of specific questions to the child or parent on sentencing considerations was found to be far more likely to result in a useful dialogue between them and the magistrate.[43]

Statutory directions designed to ensure participation by young people in court proceedings are not as common as those relating to improving the comprehensibility of those proceedings. Only New South Wales and Victoria offer a lead in enshrining the principle in legislation. Section 6(a) of the *Children (Criminal Proceedings) Act* (NSW) 1987 specifically states that one of the principles governing the exercise of criminal jurisdiction over children is that they have a right to be heard, and a right to participate in the processes that lead to decisions that affect them. For its contribution, the Victorian *Children and Young Persons Act* 1989 lists as one of its "procedural guidelines" a direction that, as far as practicable, a court must in any proceedings allow the child as well as the child's parents and others with an interest in the proceedings "to participate fully in the proceeding" and to "consider any wishes expressed by the child".[44]

PRE-SENTENCE REPORTS

Children's court magistrates may request reports supplying social background information on an offender to assist in determining the most appropriate means of responding to the young person's criminality. These pre-sentence reports supplement the court's knowledge of the offender's background and the circumstances of the offence. The obtaining of a pre-sentence report usually represents an inquiry into the rehabilitative potential and individual treatment needs of the offender, rather than into matters relevant to retribution and deterrence.

The information base for sentencing in children's courts and for young offenders in adult courts is very much influenced by the contents of pre-sentence reports.[45] The welfare orientation of the children's courts encouraged wide ranging investigations of the personal circumstances, character and social background of the young offender. The former Victorian *Children's Court Act* 1983 called for reports to set out an account of investigations into "the antecedents, home environment (including parental control), companions, education, school attendance, employment, habits, recreation, character, reputation, disposition, medical history and physical or mental defects (if any) of the child and any other relevant matters."[46] The novelty of soliciting and relying upon reports such as this as an aid to sentencing was

[43] Warner, op. cit. 177.
[44] Section 18(c) and (d) *Children and Young Persons Act* 1989 (Vic.).
[45] See also J. Seymour, *Dealing with Young Offenders* (Sydney, Law Book Company, 1988), 309–11; 329–34.
[46] Section 11(1)(b) and s.25(1) *Children's Court Act* 1973 (Vic.).

originally one of the principal distinguishing features of children's courts[47] though less so now with greater use being made of such reports in the adult jurisdiction.[48]

When evidentiary rules are relaxed at the dispositional stage, reports are subject to factual error. Because their proper scope is ill defined and their objectives diffuse, they can also be used to bring before the court information that would have been excluded from the trial proper as irrelevant, or for other non-compliance with minimum evidentiary standards. While the courts accept that the veracity of the contents of pre-sentence reports is not above challenge, the ability of defendants to challenge the truth of adverse statements contained in them may be seriously handicapped by an unwillingness in the court to grant access to the report itself. It has been argued in Australia for some time that the process of sentencing should be subject to the same rules as applicable to the determination of guilt and that the courts should acknowledge that the sentencing hearing is as adversarial as the trial proper.[49] This means that the resolution of disputed factual matters relevant to sentencing should be dealt with with the same care and protections offered as that offered at the adjudicatory stage. At a late stage of its deliberations on its sentencing reference, the Australian Law Reform Commission discussed how far sentencing procedures generally should be tightened to ensure that sufficient accurate information was available to assess the nature of the criminal conduct, the characteristics of the offender and other relevant matters. A discussion paper supported application of higher standards of proof to ensure that the information relied upon at sentencing was reliable, fair, unbiased and relevant to the goals of sentencing.[50] However, in its final report, the Commission baulked at requiring that the establishment of facts at the sentencing stage be subject to the general rules of admissibility of evidence, or the criminal standard of proof.[51]

The new shift from the welfare to the justice model in juvenile justice is reflected in demands for greater accuracy, relevance and accountability in the preparation and use of pre-sentence reports because these are so influential in setting the factual basis for the ultimate court order. All Australian jurisdictions contain provisions for the production of pre-sentence reports.[52]

[47] H. Gamble, *Sentencing Young Offenders in the Children's Courts of Sydney* (LL.M. Thesis, A. N. U. 1974), 64; J. A. Seymour, "Children's Courts in Australia", in A. Borowski, & J. M. Murray, (ed.), *Juvenile Delinquency in Australia* (Sydney, Methuen, 1985), 193.

[48] It is becoming common practice for modern sentencing legislation to require a report on the suitability of an offender and the availability of facilities before making special orders designed to achieve treatment or rehabilitative purposes, e.g. s.13 *Alcoholics and Drug-dependent Persons Act* 1968 (Vic.); ss.28(5) and 48(1) *Penalties and Sentences Act* 1985 (Vic.); s.15(1) and (2) *Mental Health Act* 1986 (Vic.).

[49] R. G. Fox and B. O'Brien, "Fact Finding for Sentencers", (1975) 10 *Melbourne University Law Review* 163.

[50] ALRC, *Procedure*, 23.

[51] ALRC, *Sentencing*, paras. 186–188.

[52] See s.162 *Children's Services Ordinance* 1986 (A.C.T.); s.25(2) *Children (Criminal Proceedings) Act* 1987 (N.S.W.); s.9 *Children (Community Service Orders) Act* 1987 (N.S.W.); ss.47, 48 *Juvenile Justice Act* 1983 (N.T.); ss.62(a), 145(2) *Childrens Services Act* 1965 (Qld); ss.51(1)(a), 51(6a), 68, 71, 88 *Children's Protection and Young Offenders Act* 1979 (S.A.); s.5 *Probation of Offenders* 1973 (Tas.); s.15(2) *Child Welfare Act* 1960

However, there is considerable variation in the extent to which the use of reports is regulated by statute. Generally the need for suitably trained staff to prepare reports is recognized.[53] In its *Child Welfare Report*, the Australian Law Reform Commission did not consider it necessary that responsibility for preparing reports should be taken out of the hands of departmental officers entirely.[54] Instead, it proposed the creation of a new office of "Youth Advocate". Amongst the legislatively prescribed duties of the Youth Advocate would be that of assisting the court obtain background information. The Youth Advocate would not write reports, but make the necessary arrangements for reports to be available for the next hearing, and might suggest whether a report or further reports were desirable. Furthermore, the Youth Advocate would have a role to play at the dispositional stage, one which included the right to call witnesses and address the court, and to negotiate the conditions or place of orders. "In all cases," said the Commission, it should be the responsibility of the Youth Advocate "to ensure that those who are to take charge of a child have formulated an adequate plan for his supervision or placement".[55]

The Victorian Child Welfare Practice and Legislation Review Committee made similar recommendations. The course it proposed was the appointment of "Court Liaison Officers", one of whose functions would be to co-ordinate the provision to the court of pre-sentence reports as well as general advice prior to sentencing on resources available in regions.[56] The recent legislative initiatives in Victoria take up this suggestion,[57] though primary responsibility for the preparation of reports will remain with probation officers.[58]

An important issue, until recently not addressed in Australia, is the extent to which legislation should strive to ensure that those gathering information for a pre-sentence report should warn the offender, or his or her parents, of the use to which the information may be put. Voluntariness is an important consideration in the reception of evidence at the trial stage, but less so at sentencing. The welfare orientation does not understand the idea that information supplied to an officer preparing a pre-sentence report might be prejudicial to the young person's interests. Since the objectives of the intervention are wholly altruistic, it is argued that the child's interests can only be advanced by a full disclosure of his or her background. This is not a view shared by the IJA:ABA in its *Dispositional Procedures* standards.[59] These require information to be given voluntarily, in full knowledge of the adverse dispositional consequences which may ensue and demand that the juvenile be afforded the right to consult with a lawyer prior to questioning. The Victorian *Children and Young Persons Act* 1989 now expressly requires that those

(Tas.); ss.53–56 *Children and Young Persons Act* 1989 (Vic.), s.39C(1)(d) *Child Welfare Act* 1947 (W.A.).

53 ALRC, *Child Welfare*, 122; Victoria 1984, 429.

54 ALRC, *Child Welfare*, 116.

55 Id. 117.

56 Victoria 1984, 422.

57 Section 36(3)(b) *Children and Young Persons Act* 1989 (Vic.).

58 Section 35(1)(a) *Children and Young Persons Act* 1989 (Vic.).

59 Op. cit. 16, Standard 2.2B.

preparing a report under the Act must, when interviewing anyone to gather information for it, inform the interviewee that any information he or she gives may be included in the report.

Access to pre-sentence reports so that their contents might be challenged by cross-examination if inaccurate is another bone of contention.[60] Australian law reform bodies have consistently recommended that access be statutorily recognized as a right, subject only to the withholding from young offenders of those parts of the pre-sentence report which might be seriously harmful or distressing to them. Even then the whole report should be made available to the child's legal representative.[61] Only New South Wales and Queensland make access to pre-sentence reports, at least by legal representatives, mandatory.[62] Legislation in the Australian Capital Territory, Northern Territory and South Australia contain presumptions of access qualified by a discretion to withhold material prejudicial to the child's welfare.[63] Tasmania and Western Australia make no specific allowance for this in their juvenile justice legislation. In Victoria, the new Act contains a separate schedule dealing with preparation and use of pre-sentence reports. It stipulates that the author of a report must send a copy of it to the child, his or her legal advisers and parents or guardians, and any other person designated by the court.[64]

The corollary of a right of access is a right to challenge contents. This also raises questions about the appropriate burden of proof rules. As far as the right to make submissions and to cross-examine persons preparing reports is concerned, the Northern Territory, Queensland and South Australian legislation specifically allow for an opportunity to make submissions,[65] but the Australian Capital Territory and Northern Territory make express provision with respect to examination and cross-examination.[66] The Victorian Act now also provides a mechanism for a child (or, if the child is unrepresented, the child's parents) to require the attendance at court of the author of a pre-sentence report so that the person might be called as a witness to give evidence and be cross-examined upon it.[67] As to quantum of proof, the Victorian Act expressly states that if any matter in a pre-sentence report is disputed by the child who is the subject of the report, the court must not take the disputed matter into consideration when determining sentence unless satisfied beyond reasonable doubt that the matter is true.[68] This sets a higher standard of proof for pre-sentence reports than normal for other dispositional facts under Victorian law.[69] South Australian law also provides for disputes as to contents to

[60] ALRC, *Child Welfare*, 123; Victoria 1984, 471; ALRC, *Procedure*, 59.

[61] ALRC, *Child Welfare*, 123; Victoria 1984, 470–71; ALRC, *Procedure*, 59.

[62] Section 25(2)(b) *Children (Criminal Proceedings) Act* 1987 (N.S.W.); s.145(3) *Children's Services Act* 1965 (Qld).

[63] Section 163 *Children's Services Ordinance* 1986 (A.C.T.); s.49 *Juvenile Justice Act* 1983 (N.T.); s.88(2) *Children's Protection and Young Offenders Act* 1979 (S.A.).

[64] *Children and Young Persons Act* 1989 (Vic.), s.56

[65] Section 49(3) *Juvenile Justice Act* 1983 (N.T.); s.145(2) *Children's Services Act* 1965 (Qld); s.88(1) *Children's Protection and Young Offenders Act* 1979 (S.A.).

[66] Section 163(2) *Children's Services Ordinance* 1986 (A.C.T.); s 49(3) *Juvenile Justice Act* 1983 (N.T.).

[67] Section 41 *Children and Young Persons Act* 1989 (Vic.).

[68] Section 42(1)(b).

[69] *R. v Chamberlain* [1983] 2 V.R. 511.

be resolved according to the criminal standard of proof.[70] The Northern Territory provides the same if the information in the report is being disputed by the juvenile, but only proof on the balance of probabilities if contested by the prosecution.[71] In New South Wales the standard is proof beyond reasonable doubt under the general rules of evidence.[72]

Little legislative guidance is offered regarding what should properly be included in a pre-sentence report. The South Australian provisions refer simply to a report on the child's "personal circumstances and social background".[73] New South Wales and Tasmania refer merely to the "circumstances surrounding the commission of the offence", or "the circumstances of the case".[74] Queensland, Northern Territory and Western Australia offer no direct legislative advice on the matters to be covered in reports. In Victoria, the new Act has been careful to spell out what are legitimate matters to be addressed:

> A pre-sentence report may set out all or any of the following matters but no others:
> (a) The sources of information on which the report is based;
> (b) The circumstances of the offence of which the child has been found guilty;
> (c) Any previous sentencing orders in respect of the child involving the Director-General;
> (d) The family circumstances of the child;
> (e) The education of the child;
> (f) The employment history of the child;
> (g) The recreation and leisure activities of the child;
> (i) Medical and health matters relating to the child.[75]

A further important statutory limitation is that any statement made in a pre-sentence report must be relevant to the offence of which the child has been found guilty and to the sentencing order recommended in the report.[76] This is absent from legislation elsewhere in Australia, but is certainly a requirement at common law.

The question whether it is proper for pre-sentence reports to contain specific recommendations regarding sentence has been a controversial one. Adult courts generally take the view that recommendation of a specific sentence is improper as an usurpation of the sentencer's function.[77] Despite this, in the juvenile jurisdiction, the practice of including a specific recommendation as to disposition appears to be common.[78] This difference would seem

[70] Section 68(4) *Children's Protection and Young Offenders* Act 1979 (S.A.); and see also *Law* v. *Deed* [1970] S.A.S.R. 374;

[71] Section 50(1) and (2) *Juvenile Justice Act* 1983 (N.T.).

[72] Section 25(2)(c) *Children (Criminal Proceedings) Act* 1987 (N.S.W.); *R.* v *Martin* [1981] 2 N.S.W.L.R. 640.

[73] Section 72(a) *Children's Protection and Young Offenders Act* 1979 (S.A.).

[74] Section 25(2)(a) *Children (Criminal Proceedings) Act* 1987 (N.S.W.), s.15(2) *Child Welfare Act* 1960 (Tas).

[75] Section 54(1).

[76] Section 54(2).

[77] See R. Fox & A. Freiberg, *Sentencing: State and Federal Law in Victoria* (Melbourne, Oxford University Press, 1985) paras.2.410–2.412.

[78] Gamble, op. cit. 840.

to turn on the view that where allocation of punishment is at stake, only a judge or magistrate is an expert, but where welfare, treatment and rehabilitative considerations are to the fore, others have expertise and they should be free to make their views known without compelling the court to adopt them. The legislation in South Australia and Tasmania actually invites a recommendation,[79] while the Victorian Act expressly permits a sentencing recommendation to be made.[80]

In no Australian jurisdiction are pre-sentence reports bound to be called for in every case involving a young offender. Obviously to do so would have a serious effect on the allocation of scarce resources. Tasmania's legislation goes close to making pre-sentence reports a general necessity. It provides that the Children's Court must obtain a report or oral evidence from a child welfare officer before an order finally determining the proceedings is made, unless reasonable opportunity for the preparation of a report has been given. However, a report is not required where the matter is trivial, or the Director notifies the court that it is not proposed to furnish a report. Warner noted in Tasmania how reports were often obtained in "many quite trivial cases" which were disposed of by means of admonishment and discharge.[81] Submissions to the Carney Committee pointed out that to call for reports in all cases would not only generate enormous costs and delay, but also would produce routine, stereotyped and worthless information. Furthermore the unnecessary invasion of privacy would produce negative reactions in offenders and their families and, in any event, reports from a variety of professionals who may or may not know the child and family would be of limited use.[82]

It makes more sense to make a report mandatory prior to the imposition of any order for imprisonment or detention. This occurs in South Australia and New South Wales.[83] New South Wales, South Australia, Tasmania and Western Australia also require a report prior to the ordering of a community service or work order.[84] South Australia requires a report prior to a youth project centre order,[85] and Tasmania requires one before a probation order.[86] Only Victoria makes provision of a pre-sentence report discretionary in all cases,[87] although it should be remembered that community based orders, hospital orders, or orders under the *Alcohol and Drug-dependent Persons Act* 1968 (Vic.) all have a pre-requisite that a report on the suitability of the offender and the availability of facilities be obtained.

[79] Section 72(b) *Children's Protection and Young Offenders Act* 1979 (S.A.); s.11(1)(b) *Child Welfare Act* 1960 (Tas.).
[80] Section 54(3) *Children and Young Persons Act* 1989 (Vic.).
[81] Warner op. cit. 181.
[82] Victoria 1984, 469.
[83] Section 25(2) *Children (Criminal Proceedings) Act* 1987 (N.S.W.); s.51(1)(a) *Children's Protection and Young Offenders Act* 1979 (S.A.).
[84] Section 9 *Children (Community Service Orders) Act* 1987 (N.S.W.); s.51(6a) *Children's Protection and Young Offenders Act* 1979 (S.A.); s.5 *Probation of Offenders Act* 1973 (Tas.); s.39C(1)(d) *Child Welfare Act* 1945 (W.A.).
[85] Section 71 *Children's Protection and Young Offenders Act* 1979 (S.A.).
[86] Section 5 *Probation of Offenders Act* 1973 (Tas.).
[87] Section 52 *Children and Young Person's Act* 1989 (Vic.).

Clearly it is in the interests of fairness and consistency that pre-sentence reports should not be tendered to the court until after guilt has been determined and, only as an adjunct to the sentencing process. This issue has been addressed in the new Victorian legislation, as well as that in the Northern Territory and South Australia, by a prohibition on tendering reports before the offence is proven.[88] However, a matter not addressed in the legislation is that of detention of the young offender in custody while a pre-sentence report is being prepared. It is not unknown for a sentencer wishing to give an offender a short sharp taste of imprisonment, without actually ordering a custodial sentence, to remand an offender in custody for the purpose of having a pre-sentence report prepared. This is wholly illegitimate if the sentencer is really not minded to ultimately order some form of detention, but the latter is difficult to prove. The general statutory and common law attitude that incarceration should be used as a last resort applies to pre-sentence incarceration as well as custodial sentences. A young offender should not be subject to detention for the purpose of obtaining a pre-sentence report when that report can be equally well compiled using resources outside a place of detention and the offender is otherwise suitable to be released on bail.

LEGAL REPRESENTATION

Lawyers were long considered unnecessary and undesirable in children's courts. It was the role of the court to advance the best interests of the child and it was thought that there was really nothing that a lawyer trained in the adversary system could add for the benefit of the defendant child.[89] Studies in the 1970s indicated a widespread view that lawyers in fact hindered the work of the court and created conflict with the welfare workers.[90] Increasing recourse to legal representation in children's courts over the last decade has been one of the most significant changes in practice in this jurisdiction. The new Victorian Act continues that move. The Senior Special Magistrate in New South Wales, described that state's introduction of a legal aid scheme for children in 1979 as the "greatest improvement in the children's court in 40 years".[91] It is commonly assumed that more legal representation means greater procedural and substantive justice for young offenders.[92] The two fundamental rationales for legal representation for children are an increasing recognition of the autonomy of young people and concern to control actual or potential abuses of authority. Legal representation advances the former, not only by giving effect to their separate interests,[93] but also by increasing their

[88] Section 11(4) *Children's Court Act* 1973 (Vic.) and ss.52 and 54 *Children and Young Persons Act* 1989; s.48(3) *Juvenile Justice Act* 1983 (N.T.); s.68(1) *Children's Protection and Young Offenders Act* 1979 (S.A.).
[89] See also Seymour, op. cit. 311–15.
[90] D. Challinger, *The Children's Court Hearing* (Melbourne, 1975), 33.
[91] See B. Lucas, "Advocacy in Children's Courts", (1980) 4 *Criminal Law Journal* 63.
[92] *J. v. Lieschke* (1987) 61 A.L.J.R. 143, 145 per Wilson J.
[93] M. Harrison, "Separate Representation of Children", (1977) 51 *Law Institute Journal* 357; T. Nyman, "Kids Counsel: The Separate Representation of Children", (1981) 9 *Law Society Journal* 449.

accountability through their participation in and understanding of the proceedings affecting their future. The control of potential abuse of power requires all the legal protections (and perhaps more) afforded to adults and this includes legal representation. However, as representation increases, it is to be expected that the presence of lawyers will add to the existing tensions between the two models of the court. The welfare workers in court will continue to emphasise needs, treatment, flexibility and discretion, while lawyers in court will concentrate on deeds, rules, rights, guilt and innocence and precedent.[94] Their involvement in proceedings in the traditional adversary role may also add weight to the argument that the more the special courts for children adopt the procedures and style of the adult courts, the less the reason is for their continued separate existence.

Though in Australia there has been much support for the need for legal representation in children's courts,[95] few studies here have systematically pursued the issue. There have been some observation studies[96] and some client surveys.[97] These have brought to light gaps and problems in the provision of legal services to young offenders, but have not analyzed the impact of legal representation in any detailed, sophisticated or comprehensive manner. Work by Gamble showed "no significant relationship between the appearance of a lawyer and the order made by a magistrate except possibly in regard to a dismissal following a denial of guilt".[98] An earlier study of local courts in New South Wales suggested that non-representation increased the chances of incarceration sixfold for certain age groups.[99] Richardson noted that those cases with continuity of legal representation received more favourable outcomes than those with a different solicitor each time. Only 1% of those with the same solicitor received committal orders, whereas 5.2% of those without continuity were committed to care.[100] There is certainly a belief that one does better with representation, although Cashman's study of legal representation

[94] See M. Collison, "Questions of Juvenile Justice", in P. Carlen & M. Collison, *Radical Issues in Criminology* (Oxford, Martin Robertson, 1980), 175.

[95] Report of the Commission of Inquiry into Poverty, *Legal Aid in Australia* (Canberra, A.G.P.S., 1975), 301; Mohr Royal Commission, South Australia, op. cit. Part II para. 25; Australian Capital Territory Legislative Assembly Standing Committee on Housing and Welfare, *Report* (Canberra, A.G.P.S., 1978), 62–3; ALRC, *Child Welfare*, 136–37; New South Wales Anti-Discrimination Board, *Discrimination and Age* (Sydney, Anti-Discrimination Board, 1980), 54–5; Legal Services for Children Sub-Committee of the New South Wales Legal Services Commission, *Report of the Legal Services for Children Sub-Committee* (Sydney, LSC, 1980), 6; Victoria 1984, 27, 430.

[96] Gamble, op. cit.; Challinger, op. cit.; M. Appleby, L. Miller and R. Moss, "Legal Aid for Children", (1979) 4 *Legal Service Bulletin* 195; Warner, op. cit.

[97] M. Richardson, *Report to the Legal Services for Children Sub-Committee* (unpublished paper, 1985); N.S.W. Women's Co-Ordination Unit, op. cit.; A. Hailstones, *Legal Services to Young People: The Role of the Department of Youth and Community Services* (Sydney, New South Wales Department of Youth and Community Services, 1986); I. O'Conner & C. Tilbury, *Legal Aid Needs of Youth* (Canberra, A.G.P.S., 1986); N.S.W. State Council of Youth, op. cit.

[98] Gamble, op. cit. 211.

[99] T. Vinson & R. Hommel, "Legal Representation and Outcome", (1973) 47 *Australian Law Journal* 132.

[100] Richardson, op. cit. Appendix A-5.

in magistrate's courts has called this into question.[101] The opinion responses of young offenders are perhaps more revealing. Surveys of their views indicate that the impact of legal representation is by no means seen as wholeheartedly successful.[102] A State Council of Youth administered "consumer survey" on juvenile justice found that of 38 respondents who had duty solicitors represent them, 29 said they were of little or no use; only 5 said they were good; and 4 described them as neutral.[103]

One of the main difficulties in this area is to define the proper role of lawyers in the children's court. In questioning the assumed beneficial link between representation and procedural and substantive justice, Morris argues that justice needs a much more activist role by legal representatives of young offenders.[104] She would have them actively challenge the court, confront police and departmental witnesses, and question the nature and interpretation of evidence by specialists from the professions. Hostility and confrontation had to be risked, otherwise:

> "the alternative of being silenced by co-option into the dominant ideology of the bench perpetuates the inconsistencies and inefficiencies which currently frustrate and undermine the ability of lawyers to create a truly representational role."[105]

Likewise, when referring to the costs of increased demands on legal aid resources for representation of children in South Australia, Gale and Wundersitz[106] look to measures of "quality and effectiveness" expressed in terms of traditional adversary factors such as "the nature of the plea (i.e. guilty or not guilty), the severity of the penalties imposed for a given offence, or the use of the process of plea bargaining." Yet there is much evidence that not all lawyers see themselves playing this part.[107] Many modify their adversary stance in representing a young person because of a belief that they are not acting for an autonomous adult in pure criminal proceeding and that the court's sanctions may well be in the "best interests" of the offender, irres-

[101] P. Cashman, "Legal Representation in Lower Courts", in G. Zdenkowski, C. Ronalds & M. Richardson, (ed), *The Criminal Injustice System: Volume 2* (Sydney, Pluto Press, 1987), 128. See also B.C. Feld, "The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make", (1989) 17 *Journal of Criminal Law and Criminology* 1185 who found that in Minnesota, it appeared that representation by counsel redounded to the disadvantage of a juvenile, with those being represented being the subject of more severe dispositions than those who were not. Feld speculates on some reasons for this, many of which may not be applicable in the Australian context.

[102] N.S.W. Women's Co-Ordination Unit, op. cit. 1986; N.S.W. State Council of Youth, op. cit.; O'Conner & Tilbury, op. cit; Richardson, op. cit.

[103] Op. cit. 7.

[104] A. Morris, "Legal Representation and Justice", in A. Morris & H. Giller (ed.) *Providing Criminal Justice for Children* (London, Edward Arnold, 1983), 131–133.

[105] Id. 138.

[106] F. Gale & J. Wundersitz, "The Increasing Costs of Legal Representation for Young Offenders", (1985) 15 *Aboriginal Law Bulletin* 4.

[107] I. Dootjes, P.G. Erickson & R.G. Fox, "Defence Counsel in Juvenile Court: A Variety of Roles", (1972) 14 *Canadian Journal of Criminology and Corrections* 132; P. Erickson, "The Defence Lawyer's Role in Juvenile Court: An Empirical Investigation into Judges' and Social Workers' Points of View", (1974) 24 *University of Toronto Law Journal* 126.

pective of the child's own wishes and instructions. To use their advocate's skills to advance the interests of the child in avoiding state imposed restrictions on his or her liberty would be to defeat the purpose of the special tribunal to which they also owe some duty.

Relevant to this ambiguity is the "lack of specific definitions of the role and duties of representatives in any enforceable code".[108] As Hogg and Brown point out, this is left "just as a matter of general rhetorical gestures and personal and ad hoc interpretation on the part of individual solicitors". This is to be contrasted with the "significant body of law, convention and professional rules governing the legal representation of adults, the solicitor/client relationship, and the duties of counsel".[109] The Child Welfare Practice and Legislation Review Committee addressed this issue by recommending statutory provisions expressly directing lawyers to act in accordance with the wishes of their young clients.[110] Likewise, the United States National Advisory Committee on Criminal Justice Standards and Goals Task Force on Juvenile Justice and Delinquency Prevention stipulated that:

> "The principal duty of an attorney . . . is to represent zealously a client's legitimate interests under the law. In doing so, it is appropriate and desirable that the lawyer advise the client of the legal and social consequences of any decision the client might make, as well as to advise the client to seek the counsel of parents or others in making that decision. However, the ultimate responsibility for making any decision that determines the client's interests within the bounds of the law remains with the client."[111]

These client-centred values are endorsed, though not unqualifiedly, in the Victorian *Children and Young Persons Act* 1989, which is unique in Australia in its legislative attempt to tell lawyers appearing in courts for juveniles where their primary loyalties must lie:

> "Counsel or a solicitor representing a child in any proceeding in the Court must act in accordance with any instructions given or wishes expressed by the child so far as it is practicable to do so having regard to the maturity of the child."[112]

REASONED DECISIONS

The demand for reasoned decisions to be given when handing down sentences or other orders is another manifestation of the due process movement. It has been seen as means of overcoming number of deficiencies in the sentencing process for young offenders. These include the low visibility of decision-making, uncertainty as to the basis upon which particular orders have been made, misunderstanding about what the sentence requires of the of-

[108] R. Hogg & D. Brown, *Children's Legal Services: The Question of Independence* (unpublished paper, 1985), 8.
[109] Ibid.
[110] Victoria 1984, 433.
[111] Op. cit. 553: Standard 16.2.
[112] Section 20(9).

fender, failure to develop coherent sentencing philosophies, and inconsistency in the treatment of like cases.

The American standards on the recording and explanation of dispositional decision-making require the sentencer to describe both the principal facts and principal reasons upon which the judgment is based. In 1980, the IJA:ABA *Dispositional Procedures* standards provided that, when imposing sentences, the juvenile court judge should:[113]

1. make specific findings on all controverted issues of fact, and on the weight attached to all significant dispositional facts in arriving at the disposition decision;
2. state for the record, in the presence of the juvenile, the reasons for selecting the particular disposition and the objective or objectives desired to be achieved thereby;
3. when the disposition involves any deprivation of liberty or any form of coercion, indicate for the record those alternative dispositions, including particular places and programs, that were explored and the reason for their rejection;
4. state with particularity the precise terms of the disposition that is imposed, including credit for any time previously spent in custody.

In the United Kingdom, the *Criminal Justice Act* 1982,[114] contains a requirement that reasons be given for a decision when magistrates sentence young offenders to a term of youth custody, or make a detention centre order. This is intended to have a restraining effect on use of custodial sanctions. The court has to expressly decide, and support with reasons, that no other method of dealing with the offender is appropriate. However, under the statute, only three specified heads of justification for that opinion are acceptable. These relate to the inability or unwillingness of the offender to respond to non-custodial penalties, the protection of the public, and the seriousness of the offence. The magistrate must officially record the chosen justification, but does not have to explain why a particular case falls within the criteria. The "reasons" given can thus remain at a meaninglessly high level of generality.[115]

The extent to which this obligation to give reasons actually serves as a restriction on imprisonment is somewhat problematic. Reynolds reported a considerable increase in the use of custodial orders since the passing of the 1982 Act[116] and Barker found that magistrates were transferring cases to Crown Courts for sentence because of the latter's wider power to make custodial orders.[117] In relation to those cases in which magistrates felt that the

[113] Op. cit. 20.
[114] Section 1(4).
[115] J. Pratt, "Dilemmas of the Alternative to Custody Concept: Implications for New Zealand Penal Policy in the Light of International Evidence and Experience", (1987) 20 *Australian and New Zealand Journal of Criminology* 148, 152; National Association for the Care and Resettlement of Offenders, *The Future of the Juvenile Court in England and Wales* (Juvenile Crime Briefing, May 1986), 7.
[116] F. Reynolds, "'Magistrates' Justifications for Making Custodial Orders on Juvenile Offenders", [1985] *Criminal Law Review* 294.
[117] J. M. A. Barker, "Some Problems in Sentencing Juveniles", [1985] *Criminal Law Review* 759.

statutory justifications for use of a custodial sentence had been met, Reynolds concluded that magistrates were imposing custodial orders considerably earlier in an offender's criminal career and starting much lower down the tariff scale than in the past. She discerned that the sentencing aims of the juvenile courts were "shifting quite explicitly towards deterrence and retribution".[118] Pratt has speculated that, because they were ready-made, the reasons became less a restriction than a rationalization:

> "It can be argued that by virtue of providing such ready-made reasons and well-defined justifications for custody, the legislation has the effect of making custodial sentences that much more readily available. Instead of having to fall back on its justification for custody for this particular category of the offender population, the judiciary has that ready-made reason."[119]

The cause of reasoned decisions has been taken up only belatedly in Australia. In 1984, the Victorian Child Welfare Practice and Legislation Review Committee came down in favour of reasoned decisions. It offered various justifications. One was the need to render the court "accountable for the way in which it conducts a case and reaches its final decision".[120] Reference was also made to the complicated nature of the sentencing process and the fact that young offenders "seldom fully understand" the nature, duration and consequences of the order. The other rationales were that, as a "matter of principle", young offenders are entitled to full information about the reasons for the imposition of a punishment; and that the requirement of reasons "is designed to improve decision-making".[121] Reasoned decisions were required only for the more grave class of disposition. The burden of having to give reasons was intended to be a deliberate disincentive to the inflation of punishment by too easy a progression up the sanction ladder:

> "administrative requirements on the court should be progressively more onerous as it moves up the graded hierarchy".[122]

Most recently, the Australian Law Reform Commission recommended that more extensive requirements for the giving and recording of reasons should be introduced. The Commission advised that a distinction should be drawn between the requirements imposed on inferior and superior courts. In the superior ones, reasons for sentence should be given and recorded in all cases. In courts of summary jurisdiction, reasons need not be provided if the only sanction available was a non-custodial one.[123] Reasons should "specify the court's view of the seriousness of the offence, the matters that were taken into account, the weight given to those matters and the court's view of the appropriateness of the type and severity of the sentence imposed."[124]

[118] Reynolds, op. cit. 297.
[119] Pratt, op. cit. 153.
[120] Victoria 1984, 245.
[121] Id. 444.
[122] Id. 445.
[123] *Sentencing*, Report No. 44, Canberra, A.G.P.S., 1988, paras. 165–5.
[124] Id. 164.

These international, national and local recommendations have had only a partial impact. In its *Children (Criminal Proceedings)* Act 1987 (N.S.W.),[125] New South Wales directed that the state's children's courts to record "the reason for which it has dealt with the person" and the reason for rejecting lesser forms of sanction in the sentencing hierarchy.[126] In Western Australia, a Court must not impose a sentence of imprisonment or make a detention order unless written reasons for imposing the sentence of imprisonment or making the detention order are recorded by the court.[127] Most recently, the Victorian *Children and Young Persons Act* 1989 provided that the court must explain the meaning and effect of an order, and immediately after, the appropriate registrar must provide a written copy of the order to the child, the child's parents and other parties to the proceeding.[128] The explanation of an order is not the same as the reasons for an order and in criminal matters under the Act there is no statutory obligation to give reasons,[129] except where an order of detention in some form of custody is involved.[130]

CONCLUSION

All court systems respect some fundamental rights of persons accused of crime, irrespective of their age. When the designers of juvenile justice systems elevated the welfare of the child to paramount importance, they considered that the due process rights of juveniles, if they existed, were secondary to their well-being. Both the failure of the promised benefits of the welfare model and the tendency towards more overtly punitive responses in the justice model have brought a heightened awareness of the need for procedural safeguards to ensure that the state's punitive reaction (whether unintended or not) is not misapplied.

The new recognition of the procedural rights of juvenile offenders is overdue and welcome. Though not going as far as required by the standards set nationally and internationally, the procedural reforms won in this country are centred upon the importance of establishing and acting upon a sound factual basis in making decisions about the disposal of young offenders. Clarification of the standard of proof required at sentencing, better rights of access to influential pre-sentence material and the right to cross-examine those who prepare it, improvements in the comprehensibility of proceedings to those who are the subject of them and better legal aid to assist in the dispositional as well as the substantive stage of the proceedings, are all procedural changes that can be found to some degree in the new legislation.

[125] Section 35.

[126] The Children (Criminal Proceedings) Amendment Bill 1989 (N.S.W.), cl. 14 now proposes to remove the notion of a sanction hierarchy and proposes that, in future, reasons need only be given if a custodial sentence is imposed.

[127] Section 26(b) *Children's Court of Western Australia Act* (No.2) 1988 (WA).

[128] Section 23(1) and (3) *Children and Young Persons Act* 1989 (Vic).

[129] Cf. s.23(5)(a) and 23(10) *Children and Young Persons Act* 1989 (Vic).

[130] Section 186(2) — youth residential orders; s.188(2) youth training centre orders.

Though the initiatives taken in the recent legislation, particularly that of Victoria, are to be applauded, some significant detriments to juveniles may be found in the apparent shift from the welfare to the justice model. There is evidence already that concern with procedural rights, representation, and high standards of proof at sentencing hearings will produce more protracted adjudicatory processes and undermine the present informality of the juvenile courts. There may in fact be reduced participation by juveniles in their own fate as court formality and legal representation increases. Overseas experience indicates that, as the orientation becomes more aligned to that of the adult system, sentence severity increases. As well, gaps are likely to be found between the rhetoric of due process as contained in the legislation, and the reality of what court processes can manage to deliver. Thus, while the obligation to give reasoned decisions for sentences has been advanced as a means of redressing some of the more undesirable and arbitrary features in the sentencing of children, there is a danger that what will be produced in compliance with the statutory requirement for reasons will be little more than ready-made formulaic rationalisations.

The recently passed *Children and Young Persons Act* 1989, and the prior decade of legislative reform in other states, represents an unparalleled opportunity to undertake large scale research to gauge the effect of the new measures and to test whether the legislative goal of providing more procedural justice for Australian juveniles has, in fact, been achieved. Sadly, Australia still lacks any research infrastructure that can provide on-going monitoring of legislative and judicial initiatives, particularly on an interstate comparative basis. Victoria itself has yet to establish a Bureau of Crime Statistics and Research like the one created in 1969 in New South Wales within the Attorney-General's Department, or the similarly modelled South Australian Office of Crime Statistics set up in 1978. Thus, whether the attempts to introduce procedural justice for juveniles through legislation are translated into substantive justice will remain, as in the past, a matter of conjecture and surmise.