CHAPTER 8

ADEQUACY OF ADMINISTRATIVE, LEGISLATIVE AND LEGAL INFRASTRUCTURE IN ADDRESSING THE NEEDS OF CHILDREN

Children and the law

8.1 Many of these issues have been dealt with in great detail in the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission Report entitled *Seen and Heard: priority for children in the legal process*.[1] Much of the evidence to this Inquiry is similar to that presented in that Report which is currently under consideration by the Government. These matters will not, therefore, be repeated here except where the Committee wishes to make a particular comment.

8.2 Juvenile justice falls mainly within the jurisdiction of the States and Territories. The Commonwealth's role is one of funding and its obligations under a number of international treaties including the *Convention on the Rights of the Child*. The Federal Government has established five State Children and Youth Legal Services to provide legal advice and representation for young people. In 1994-95 legal assistance for children represented 12 per cent of all applications with 93.6 per cent approval including representation in the Family Court, welfare and criminal matters.[2]

8.3 A number of submissions supported the articles in the Convention that refer to protection but believed that there was adequate protection under existing legislation. Clearly this is not the case. It is not only an issue of the adequacy of the legislation *per se* but also the extent to which it has been enforced.

The administration of juvenile justice

8.4 The statistics for juvenile crime are quite low and mainly involve property offences; most young people do not reoffend; and there has been no

---

1 Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission (1997) *Seen and Heard: priority for children in the legal process*, Report No. 84, November 1997

2 National Legal Aid, Submission No. 106, p. S 510

significant increase in juvenile crime in Australia over the past decade.[3] There is, however, a contrary belief in the community, that there has been a major increase in juvenile crime which is unfounded and may reflect media representations of young people.[4] However, recent elections in New South Wales and the Northern Territory were fought on law and order issues.[5] It was suggested that Australia's approach was always to focus on issues such as law and order first and children last.[6]

Alleged Breaches of the Convention

8.5 There were a number of concerns raised in relation to legislation in most jurisdictions including the Western Australian 'three strikes and you're in' legislation, the Northern Territory 'two strikes and you're in' legislation and finger printing provisions under the Victorian legislation.[7]

8.6 A number of submissions expressed concern that the West Australian 'three strikes and you're in' legislation breaches a number of the articles in the Convention:

> By the imposition of a mandatory sentence that has as its chief objective the punishment and removal of offenders from the community rather than their rehabilitation and reintegration within it, the Act fails to ensure the paramountcy of the "best interest" of the child as is required by Article 3.[8]

8.7 In defence of the legislation, the West Australian Government argued that that State has one of the highest home burglary rates in Australia and it is a matter of balance between the rights of the child and the rights of the community.[9] They added that there are 200 - 300 repeat offenders in Western Australia and the Court has to give primary consideration to the protection of the community ahead of all other principles.[10] It was suggested that the 32

---

3 Whittington, Transcript of Evidence, 5 August 1997, p. 1257; Boss P, Edwards S and Pitman S (1995) *Profile of Young People*, Churchill Livingstone Melbourne, p. 153; Cuneen C and White R (1995), *Juvenile Justice: An Australian Perspective*, OUP, Melbourne, pp. 101-102 cited in National Children's and Youth Law Centre, Submission No. 321, Annexure 2, p. 59

4 Whittington, Transcript of Evidence, 5 August 1997, p. 1258

5 Antrum, Transcript of Evidence, 5 August 1997, pp. 1149-50; Wright , Transcript of Evidence, 6 November 1997, p. 41

6 National Aboriginal Youth Law Centre, Submission No. 109, p. S 524

7 Triggs, Transcript of Evidence, 10 July 1997, p. 1014, Curran, Transcript Evidence, 9 July 1997, p. 886

8 Firzgerald, Submission No. 562, p. S 2990

9 Marshall, Transcript of Evidence, 3 July 1997, pp. 537-8

10 *ibid*, p. 539

juveniles who have been sentenced under the legislation most probably would have been detained anyway.[11] A small percentage may have served a longer sentence and the current legislation allows for some discretion in some circumstances by the President of the Children's Court to apply other options.[12] There was concern that any amendments may remove this discretion.[13]

8.8 Other concerns expressed in relation to juvenile justice in Western Australia included the fact that police did not provide short statements of the alleged facts to children, or their legal representatives before the child appeared in court.[14] Therefore, the child must elect to be dealt with by a judge and jury or the President of the Children's Court before they have the full particulars of the charge.[15] Another issue raised was that children appearing before the Children's Court cannot be identified but if they elect to appear in the Supreme or District Court, they must satisfy the Court that there should be no publication of identifying information and this may affect their decision about where their case should be heard.[16] In the case of a repeat 'violent offence' the automatic effect is a mandatory sentence of eighteen months followed by an indeterminate sentence.[17] Children given indeterminate sentences cannot make application for review of the sentence.[18]

8.9 Further, the Western Australian *Bail Act 1982* requires that a child under the age of 17 years must have the support of a 'responsible person' to qualify for bail to address the problem of juveniles obtaining bail on their own undertaking thus undermining parental control.[19] It was submitted that children can now be incarcerated for significant periods over minor offences and parents, who may be the complainants, have the power to ensure that the child remains in custody.[20] There is a supervised bail scheme which can arrange

---

11 *ibid*, p. 537

12 Keating, Transcript of Evidence, 3 July 1997, p. 537

13 McGougall, Transcript of Evidence, 3 July 1997, p. 557

14 Jackson, Transcript of Evidence, 3 July 1997, p. 594

15 Legal Aid Western Australia, Submission No. 141, p. S 927

16 *ibid*

17 International Law Teachers, The University of Melbourne, Submission No. 188, p. S 1295

18 *ibid*, p. S 1295

19 Legal Aid Western Australia, Submission No. 141, p. S 923

20 *ibid*

accommodation and support for the child, but this is not done without the consent of parents or other responsible adults, except in exceptional circumstances.[21]

> There is anecdotal evidence to suggest that children have pleaded guilty to offences which could have been defended, rather than remain in custody in relation to offences for which, if they were found guilty, a non custodial sentence would be entirely appropriate.[22]

8.10 The Western Australian Government has introduced a pilot program to fight crime involving a series of agreements from State level through to service level agreements with Aboriginal representatives.[23] The Western Australian Attorney-General has formed a committee to look at the problem of juveniles being remanded in custody.[24]

8.11 The Northern Territory Government argued that the 'two strikes' legislation was also a response to community demands based on the perceived unacceptable level of property crime.[25] The last three elections in the Northern Territory included debate on juvenile crime, vandals and law and order.[26] The Alice Springs Youth Affairs Coordination Committee believed that the public has been fed misinformation about the supposed juvenile crime wave.[27]

8.12 Other aspects of concern listed included mandatory imprisonment for property offences; a proposal to remove the right to remain silent and a plan to 'monitor children at night with a computer-linked electronic device strapped to their wrists or ankles'; the lack of a closed court for juveniles; magistrates must specifically order that information relating to the proceedings not be published; the best interests of the child do not enter into the decision making process; and there is also no formal cautioning system in the Northern Territory which suggests that arrest is not used a measure of last resort.[28] The Central Land Council also raised the issues of lack of juvenile facilities in Alice Springs, lack of juvenile magistrates and children's lawyers and suggested that Aboriginal

---

21 Keating, Transcript of Evidence, 3 July 1997, p. 548; Legal Aid Western Australia, Submission No. 141, p. S 923

22 Legal Aid Western Australia, Submission No. 141, p. S 924

23 Marshall, Transcript of Evidence, 3 July 1997, p. 537

24 *ibid*, p. 548

25 Anderson, Transcript of Evidence, 6 November 1997, p. 11

26 Wright, Transcript of Evidence, 6 November 1997, p. 41

27 Baker, Transcript of Evidence, 6 November 1997, p. 52

28 Fitzgerald, Submission No. 562, pp. S 2990-1

organisations could be funded to provide alternative arrangements.[29] Because there is no detention centre in Alice Springs there is also the issue of separation of juvenile offenders from their families.[30]

8.13 The Central Land Council submitted that many people appearing before the courts are multiple offenders therefore there may be a increase in the rate of incarceration.[31] The usual sentencing options apply for a first offence for 15 and 16 year olds which range from not recording a conviction to non-custodial options, but there is mandatory sentencing for subsequent property offences.[32] Seventeen year olds will receive 14 day sentence for a first offence, and it was submitted that this is draconian for offences such as throwing a rock through a window, stealing 40 cents to sniff petrol and stealing food out of the back of a car.[33] The Tangentyere Council expressed concern that even better students could be incarcerated for doing 'silly' things when they could have continued with some support but are being sent to an institution because of the mandatory sentencing provisions.[34]

8.14 The Committee was also given the example of children charged with offences such as jaywalking, failing to wear a bike helmet and swearing in public where the child has no income and therefore no capacity to pay a fine.[35] It was suggested that some children are being targeted because they are more visible whereas other young people who are fairly middleclass or from a strong family have been warned.[36]

8.15 It was also suggested that in Victoria, the figures indicated that arrest was not being used as a measure of last resort by police when dealing with young people.[37] Custodial sentences have been given for stating a false name,

---

29 Holder, Transcript of Evidence, 6 November 1997, p. 19

30 Anton, Transcript of Evidence, 14 August 1997, p. 1452; Holder, Transcript of Evidence, 6 November 1997, p. 19

31 Holder , Transcript of Evidence, 6 November 1997, p. 21

32 Anderson, Transcript of Evidence, 6 November 1997, p. 7

33 Anton, Transcript of Evidence, 14 August 1997, p. 1450; Wright, Transcript of Evidence, 6 November 1997, p. 44

34 Simpson, Transcript of Evidence, 7 November 1997, p. 63

35 Wright, Transcript of Evidence, 6 November 1997, p. 43

36 *ibid*, p. 44

37 Fitzgerald, Submission No. 562, p. S 2988

loitering without reasonable excuse and indecent language in a public place. The largest category of offence was transit offences and the failure to pay these fines.[38]

8.16 Victoria has also introduced a range of mandatory sentences.[39] Further, in relation to the Victorian *Crimes (Amendment) Act 1993*:

> People over the age of 14 years are effectively treated as adults (s464K) and have no access to a court determination about the need to submit to fingerprinting: s464K(1). This is even so where the police intend to use 'reasonable' force to obtain the prints: s464K(7). Where such force is used, the Act provides for the presence of the parent, guardian or independent person: s464K(8)(a), but only where the child is aged 15 or 16. The fingerprinting is to be video-taped, but only if practicable; otherwise the procedure is to be audio taped: s464(8)(b) ... It is noted that the Victorian Parliament's Scrutiny of Acts and Regulations Committee drew the following conclusion: 'The Committee is persuaded that the provisions in the Bill which relate to children may constitute a breach of international obligations to which Australia is a party.[40]

8.17 In Victoria, under the *Children and Young Persons Act 1989*:

> **...** Section 240 of the Act provides for children aged 16 years or more to be transferred to an adult prison in certain circumstances ... Section 46-4M provides that the child cannot be a party in the application for the order and may not call or cross-examine any witnesses. This is in direct contradiction to the requirement in Article 12(2) of the Convention that the child 'be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child' and to Article 40(2)(b)(iv) which provides children the right 'to examine or have examined adverse witnesses'.[41]

8.18 World Vision Australia suggested additional training for police, particularly those in direct contact with Indigenous youth, and training more Indigenous people as police.[42] It was submitted that young people's involvement in the juvenile justice system reflects a lack of resources being applied at an earlier age.[43] Services may be better used to assist the parents to get out of the poverty cycle and gain some education.[44] Aboriginal parents

---

38 *ibid*, pp. S 2988-9

39 National Children's and Youth Law Centre, Submission No. 321, p. S 1778

40 International Law Teachers, The University of Melbourne, Submission No. 188, p. S 1296 citing the Scrutiny of Acts and Regulations Committee (1993) *Alert Digest No. 19*, 22 November 1993

41 Fitzgerald, Submission No. 562, pp. S 1296-7

42 World Vision Australia, Submission No. 135, pp. 819-20

43 Wright, Transcript of Evidence, 6 November 1997, p. 33

44 *ibid*, p. 34

have parenting skills but they live in poverty and overcrowded housing.[45] The Committee was also given examples of young people reoffending because living conditions were better in gaol.[46]

8.19 The New South Wales *Children's (Parental Responsibilities) Act 1994* gives police the right to detain and transport children under the age of 15 without any crime having been committed.[47] It was suggested that the legislation has a racist effect as it operates to control Aboriginal children and increases conflict between these children and the police.[48]

8.20 There was also concern expressed that the Tasmanian *Youth Justice Act 1997* treats children as criminals instead of focusing on the rehabilitation of young offenders and that the Aboriginal communities needed resources to establish alternatives to imprisonment and detention of young Aborigines to ensure that imprisonment is really used as a last resort.[49]

8.21 It was submitted that in Queensland, there are cases where there are grounds for refusing bail or where children are held in remand because they have nowhere to live.[50] Mr Bartholomew stated that he had seen first time offenders held in custody on non-indictable offences.[51]

8.22 Concern was also expressed that under the Queensland *Juvenile Justice Act 1992* the provision of an interpreter is at the discretion of the court. As legal interpretation is a skill that requires training, there is no guarantee that a relative or friend understands the legal terms and is translating them effectively.[52]

8.23 Further, the Youth Affairs Network of Queensland expressed their concern that the introduction of the capacity to make public some cautions and conferences means that Queensland children can now develop a criminal history without access to procedural justice and having evidence tested in a fair and impartial way.[53]

---

45 *ibid*, p. 35

46 *ibid*, p. 34

47 National Children's and Youth Law Centre, Submission No. 321, p. S 1776

48 *ibid*

49 Tasmanian Aboriginal Centre Inc, Submission No. 647, pp. S 3236-7

50 Bartholomew, Transcript of Evidence, 1 May 1997, p. 247

51 *ibid*

52 NESB Youth Issues Network, Submission No. 194, p. S 1336

53 Youth Affairs Network of Queensland, Submission No. 415, p. S 2488

8.24 Other issues raised in relation to the Queensland juvenile justice system included the threat to legal aid funding, the requirement that an independent person be present only at formal police interviews and delays in court proceedings.[54] It was submitted that in that State, children pleading not guilty to serious offences can wait months or years before being tried due to a lack of resources and a failure to give priority to children's court matters. Children may want to plead guilty to offences merely to 'get them out of the way'.[55]

8.25 The Queensland *Evidence Act 1977* provides for the use of video-tape or video-link evidence from children at the discretion of the court as long as it does not unfairly prejudice any party and does not guarantee that the child will not be cross-examined.[56] In Western Australia, however, the accused is required to write the questions which are read out by the judge's associate to the child and video-taping means that the child need only give evidence once, is able to undergo therapy as soon as the evidence is given and the child is spared the trauma of a court appearance.[57] Also under the Commonwealth *Crimes Act 1914* the court retains the discretion to use video evidence.[58] It was argued that a less flexible approach may in some cases result in injustice.[59]

Mandatory sentencing

8.26 Mandatory sentencing does not take into account the child's age, the facts of the current offence, the individual circumstances of the person, consideration of an appropriate period of time or the application of judicial discretion.[60] Mandatory sentences restrict the court's capacity to ensure that the punishment is proportional to the seriousness of the offence and in relation to the rehabilitative options.[61] These minimum sentences are in contravention of Article 37(b) of the Convention which requires that deprivation of liberty not be arbitrary and is a measure of last resort.[62]

---

54 Youth Advocacy Centre Inc, Supplementary Submission No. 14a, p. S 1038

55 BoysTown Link Up, Submission No. 136, p. S 851

56 Attorney-General's Department, Supplementary Submission No. 133a, pp. S 3367-8

57 Chamarette, Crimes (Child Sex Tourism) Amendment Bill 1994, Speech in the context of a Bill (Second Reading), *Senate Hansard*, 30 June 1994, p. 2492

58 Attorney-General's Department, Supplementary Submission No. 133a, p. S 3368

59 *ibid*

60 National Children's and Youth Law Centre, Submission No. 321, p. S 1778

61 *ibid*

62 International Law Teachers, The University of Melbourne, Submission No. 188, p. S 296; Fremantle Community Youth Service and Youth Legal Service of Western Australia, Submission No. 177, p. S 1182

8.27 Detention is a serious measure and should only be ordered after full consideration of the circumstances involved.[63] It was suggested that the costs of detaining an offender for a considerable period of time should ensure that detention is used as a last resort. Further, defenders are less likely to plead guilty if there is mandatory imprisonment which may incur additional cost for legal representation.[64]

8.28 It was suggested that the implications of mandatory sentencing are severe because after a jail sentence employment prospects are prejudiced and the young person is at a disadvantage which fosters resentment and contempt for society.[65] Research has shown that while some young people engage in activities such as property offences, once they turn 20 - 21 they often stop, irrespective of a gaol term.[66]

8.29 It was also submitted that mandatory sentencing breaches a number of common law principles as well as international human rights provisions:

- ... Mandatory sentencing breaches these requirements [articles 37 (b and c) by arbitrarily depriving children of their liberty, failing to use detention as a measure of last resort and failing to take the needs of the particular child into account;

- It makes no distinction between trivial and serious culpability and breaches the fundamental common law principle of proportionality which requires that the particular circumstances of an offence and offender needs to be taken into account in sentencing;

- The requirement also conflicts with Article 14(5) of the *International Covenant on Civil and Political Rights* and Article 40(2)(v) of the *Convention on the Rights of the Child* which require that sentences should be reviewable by a higher or appellate court.[67]

8.30 The President of the Western Australian Children's Court has rejected the application of strict mandatory sentencing in relation to juvenile sentencing and in *DPP v DCJ* (a child) and *DPP v RJM* (a child) and imposed Conditional Release Orders.[68] The Judge held that rehabilitation was of prime importance

---

63 National Children's and Youth Law Centre, Submission No. 321, Annexure 2, p. 58

64 National Children's and Youth Law Centre, Submission No. 321, p. S 1778

65 Anton, Transcript of Evidence, 14 August 1997, p. 1451

66 Friel, Transcript of Evidence, 14 August 1997, p. 1455

67 Human Rights and Equal Opportunity Commission, Submission No. 336, p. S 1920

68 Children's Court of Western Australia per Fenbury AD (President) unreported, 10 February 1997 and 3 March 1997 cited in Human Rights and Equal Opportunity Commission, Submission No. 336, p. S 1920

among other things.[69] The West Australian Attorney-General has declared this ruling as contrary to the Parliament's intention and indicated that the legislation would be amended to close the 'loophole'.[70] Justice Fenbury also expressed the concern that in the case of *DPP v DMP* (a child) that the mandatory sentence may have been more than the young offender would have received had he been an adult.[71]

8.31 In the Northern Territory, however, in the case of *Trennery v Bradley* the Court held:

> that despite its concerns about the legislation, allowing such orders to be made would defeat Parliament's intention and thus the court was strictly limited to imposing the mandatory terms of imprisonment.[72]

8.32 Justice Mildren stated that minimum mandatory sentencing provisions are the 'very antithesis of just sentences'.[73]

> Justice Angel supported this statement, emphasising that mandatory sentences are by their very nature unjust in that they require the courts to sentence an offender without consideration of the nature of the crime and the particular circumstances of the offender.[74] The Chief Justice of the Court, Justice Martin, pointed to the particular problems which may arise in relation to defendants suffering from a mental illness. Where the mandatory regime comes into operation, the court may not be able to consider diagnosis and treatment or make a hospital order, as it does not appear to come within the definition of imprisonment used in the legislation.[75]

8.33 Children who commit burglaries because of drug addictions or for survival may be better served by drug counselling and rehabilitation.[76] The Committee was given the example of an eleven year old boy facing twelve

---

69 Human Rights and Equal Opportunity Commission, Submission No. 336, p. S 1921

70 *ibid*

71 *DPP v DMP* (a child) Transcript of Proceedings, 10 February 1997, p. 10 cited in Human Rights and Equal Opportunity Commission, Submission No. 336, p. S 1921

72 *Trennery v Bradley* unreported decision of the Full Court of the Supreme Court of the Northern Territory, per Martin, Angel and Mildren J J, 20 June 1997 cited in Human Rights and Equal Opportunity Commission, Submission No. 336, p. S 1922

73 *ibid* p. S 1923

74 *ibid*

75 *ibid*

76 McGougall, Transcript of Evidence, 3 July 1997, p. 562; Fremantle Community Youth Service and Youth Legal Service of Western Australia, Submission No. 177, p. S 1182

month detention for minor offences which even prompted the police prosecutor to express concern at the outcome of the court.[77]

8.34 Professor Charlesworth commented that West Australian legislation explicitly puts the protection of the community ahead of accepted notions of justice notwithstanding Article 37(b) which protects children from unlawful or arbitrary deprivation of liberty.[78] There needs to be a balance between the rights of the person committing the offence and their possible rehabilitation, against the rights of the individuals who are victims of these crimes. The Committee would like to see the alternatives to mandatory sentencing investigated on a national level.

Alternatives to incarceration

8.35 It was submitted that extremely punitive rather than rehabilitative approaches are fuelled by the community's fear of young offenders rather than a concern for the young person's best interests.[79] Research has shown that increasingly harsh approaches to the treatment of young offenders do not work and that the longer the detention period, the higher the probability of reoffence and the more serious the crimes.[80] That is, there is an increasing community danger, not community safety.[81] Governments are responding to community pressure that is without foundation or is based on misinformation about youth crime and political opportunism is seen to replace political leadership based on fact and principle.[82]

8.36 The estimated cost of detention is $100 000 per person per year and it was suggested that this was a significant reason to adopt alternative approaches where possible.[83] The Australian Institute of Criminology preferred programs that increase the education and vocational skills and improve employment prospects; teach problem solving, anger management and relationship expertise, enhance self esteem, safeguard or improve physical and mental health and

---

77 National Children's and Youth Law Centre, Submission No. 321, p. S 1777

78 Charlesworth, Transcript of Evidence, 29 April 1997, p. 166

79 Fitzgerald, Submission No. 562, p. S 2979-80

80 Sidoti C, Human Rights Commissioner in evidence to a public hearing in regard to the Juvenile Justice Legislation Bill 1996, Hansard, Brisbane, 1 August 1996, cited in Youth Affairs Network of Queensland, Submission No. 415, p. S 2484

81 Human Rights and Equal Opportunity Commission, Submission No. 336, p. S 1919

82 *ibid*, p. S 1920

83 *ibid*, p. S 1925

provide appropriate levels of support in the community.[84] Conferencing was also suggested as an alternative method which brings young people face to face with the victims and involves them and their families in decision making and seeks to avoid the process of prosecution, conviction and punishment.[85]

8.37 The NGOs took the approach that strategies to keep children out of custody should include ongoing training for police, lawyers, magistrates, judges and court personnel and adequate resourcing of legal aid programs.[86] Other suggestions included the establishment of national standards for the development, implementation and evaluation of judicial systems, services and programs for young offenders with particular reference to preventative and rehabilitative programs, natural justice and complaints mechanisms and staff training.[87] Most young offenders in South Australia have severe cognitive deficits which can be minimised by learning and employment avenues.[88]

8.38 Some aspects of alternative measures need to be addressed such as the recent amendments to the Queensland *Juvenile Justice Act 1992* which has resulted in some young people, who are diverted from the court system through cautions and community conferencing, having a formal record in respect of those matters without the normal judicial process being followed.[89]

8.39 In Western Australia, children may be referred to the Juvenile Justice Team for some offences as a diversionary process. Legal Aid (WA) believed this can be very severe on children in terms of community service hours, and there is no provision for the child to be represented at the Supervised Release Board hearings and decisions can only be reconsidered by the Board.[90]

8.40 In many cases alternatives exist but are not utilised for Aboriginal children.[91] It was suggested that attempts could be made to devise a justice system which is relevant to Aboriginal culture, possibly implementing Aboriginal tribal or customary law or its creative adaptation to meet changed

---

84 Atkinson L (1995) Criminologist article in Australian Institute of Criminology: Trends and Issues, July 1995 cited in Human Rights and Equal Opportunity Commission, Submission No. 336, p. S 1926

85 Human Rights and Equal Opportunity Commission, Submission No. 336, p. S 1926

86 Defence for Children International Australia (1996) *op cit,* p. 29

87 Children's Interests Bureau Board South Australia, Submission No. 327, p. S 1815

88 *ibid*, p. S 1817 with reference to the Department for Family and Community Services, *Secure Care Psychosocial Screening Statistical Report*, January 1997.

89 Youth Advocacy Centre Inc, Supplementary Submission No. 14a, p. S 1038

90 Legal Aid Western Australia, Submission No. 141, p. S 925

91 Central Land Council, Submission No. 399, p. S 2243

social conditions.[92] There was support for the promotion of indigenous concepts of justice that are compatible with Australian law which may help rehabilitate young Indigenous offenders.[93] The comment was made that when the juvenile detention centre in Alice Springs was closed and replaced with care and protection services, the juvenile crime rate dropped but this has not been evaluated.[94]

8.41 Punitive work orders involve the performance of hard physical labour in circumstances designed to shame the juvenile offender and invite community scorn such as wearing bright orange tabards, but it was suggested that this sort of community 'shaming' is counterproductive to their community reintegration.[95] The focus should be on rehabilitation and re-integration if the community is to receive any useful dividend from the expenditure on juvenile justice administration.[96]

Differences in treatment of children compared to adults

8.42 There are greater power imbalances in relation to a young person dealing with the police and going through the court system and therefore children should be treated differently to ensure their particular needs are met such as providing more detailed explanations.[97] Young people's contact with the juvenile justice system is often a degrading experience which fails to recognise Article 40(b)(1) of the Convention that the accused is innocent until proven guilty.[98]

8.43 Jurisdictional inconsistencies may enable injustices to occur. One example is the variation in the age of criminal responsibility across Australian jurisdictions from 7 to 10 years and the age at which they are subject to criminal law is 17 or 18 depending on the jurisdiction.[99] The model criminal code provides that a child under the age of 10 is not criminally responsible for an offence; from 10 to 14 years can only be criminally responsible for an offence if he or she knows his or her conduct is wrong. All jurisdictions except Tasmania

---

92 Children's Interests Bureau Board South Australia, Submission No. 327, p. S 1815

93 World Vision Australia, Submission No. 135, p. S 819

94 Wright, Transcript of Evidence, 6 November 1997, p. 37

95 National Children's and Youth Law Centre, Submission No. 321, p. S 1777

96 *ibid*

97 Bartholomew Transcript of Evidence, 1 May 1997, p. 252

98 Youth Advocacy Centre Inc, Supplementary Submission No. 14a, p. S 1037

99 *ibid*, p. S 1039

and the Australian Capital Territory now have standardised the age of criminal responsibility at 10 years.[100] The United Nations Committee on the Rights of the Child expressed concern that the minimum age of criminal responsibility is set at ten years and considered it to be very low and needed to be raised.[101]

8.44 It was suggested that if the child was 10 years or older, the legal representatives should make a genuine assessment of a child's ability to give informed instructions and act on those instructions within the civil jurisdiction.[102] It was submitted that '*Gillick* competent' children should be represented in the same way as an adult.[103]

8.45 One of the consequences of defining children as under 17 years, is that they may be held in the watchhouse for two or three weeks the same as adults.[104] Two thirds of the young people held in our detention centres are in fact on remand and not on sentence.[105] There is a protocol about the length of time children under 17 can be held in such places.[106]

8.46 The Australian Law Reform Commission argued that the Convention clearly states that a child is a person under the age of 18 and, for the purpose of juvenile justice legislation, should be treated as such until 18.[107] The best interests of 17 years olds may be served by intensive education regimes which are available in juvenile justice centres.[108] Concern was expressed that legislation which defines a juvenile person as under the age of 17 means that some children are without the rights and protection they require.[109]

8.47 In Queensland, children may get a slightly shorter sentence and be held in a juvenile detention centre with more appropriate rehabilitation mechanisms; capacity to have an independent person present during police questioning; under some conditions there may be some confidentiality aspects and

---

100 Attorney-General's Department, Supplementary Submission No. 133a, p. S 3360

101 United Nations Committee on the Rights of the Child, *Concluding observations Australia* (CRC/C/SR 403-405), 24-25 September 1997, p. 5

102 Youth Advocacy Centre Inc, Submission to ALRC and HREOC. *Speaking for Ourselves, Children and the legal process, Issues Paper 18*, July 1996, pp. 4-5

103 *ibid*, p. 20

104 Youth Advocacy Centre Inc, Supplementary Submission No. 14a, p. S 1033

105 Wight, Transcript of Evidence, 1 May 1997, p. 246

106 Youth Advocacy Centre Inc, Supplementary Submission No. 14a, p. S 1033

107 Moyle, Transcript of Evidence, 5 August 1997, pp. 1181-2

108 Cronin, Transcript of Evidence, 5 August 1997, p 1182

109 Alice Springs Youth Affairs Coordination Committee, Submission No. 182, p. S 1227; BoysTown Link Up, Submission No. 136, p. S 846

sentencing options but they may be sentenced to life imprisonment for serious crimes.[110] Under the *Juvenile Justice Legislation Amendment Act 1996* a child no longer has the option of being dealt with in the Children's Court for serious offences. Concern was also expressed that life sentences for young people contravenes the Convention.[111]

8.48 Legal Aid Western Australia stated that, in relation to the *Young Offenders Act 1994* in that State, a child receiving a three year sentence will serve a minimum of 15 to 18 months while an adult with a 3 year sentence may be paroled after 12 months.[112] Further, under Section 9 of the *Young Offenders Act 1994*:

> an offender who has committed two previous serious offences for which custody has been imposed and who thereafter commits a third offence, in circumstances where the Court (constituting the President) is satisfied that there is a "high probability" that the offender would commit further offences of a kind for which custodial offences could be imposed, is liable to serve an additional 18 months sentence (12 months before possible supervised release) at the expiry of their minimum term. If Division 9 applies to an offender, the Court "is to give primary consideration to the protection of the community ahead of all other principles and matters referred to in Section 46. There is no adult equivalent of this "special order". The Director of Public Prosecutions in Western Australia has only once raised the question of special orders since the inception of the Act and the order was not made. However, the division remains and is arguably discriminatory against children.[113]

8.49 The Committee is concerned that children could serve longer terms than adults for the same offence.

Aboriginal and Torres Strait Islander children

8.50 Notwithstanding the provisions of the Convention that protect Indigenous children's interests, Ms Dolgopol commented that:

> A major weakness of the Convention is the lack of protection for the rights of indigenous children. Although the rights of children of minority and indigenous groups to participate in the cultural, linguistic and religious life of their communities is protected (Article 30), there is no affirmative obligation

---

110 Wight, Transcript of Evidence, 1 May 1997, pp. 252, 258

111 Premier of Queensland, Submission No. 144, p. S 960; Youth Affairs Network of Queensland, Submission No. 415, p. S 2488

112 Legal Aid Western Australia, Submission No. 141, p. S 925

113 *ibid*, pp. S 925-6

> put on States to make resources available to indigenous groups so that they can strengthen their communities.[114]

8.51 Five children's lawyers have been employed nationally but none of the programs are Indigenous youth specific.[115] The Commonwealth allocated $200 000 a year for five years (from 1992-3) to reimburse legal aid commissioners for the costs of representation of Indigenous Australians in coronial inquest matters and complaints against police.[116]

8.52 In June 1996, in Queensland Indigenous youths were 41 times more likely to be in detention than non-indigenous and the national average was 21.3 times more likely.[117] This has increased from 17 times in 1993.[118]

> According to the National ATSI Survey, over a twelve month period, 25% of Aboriginal people 13 or older in Western Australia were arrested at least once in the last five years. In some states it has been reported that between 50 and 60 % of all children in custody are Aboriginal, despite the fact that they represent less than 4% of the juvenile population.[119]

8.53 Indigenous children are highly visible and can come to the attention of police more than other children.[120] Further, it was submitted that language and cultural issues are not taken into account when dealing with these children.[121] The United Nations Committee on the Rights of the Child expressed concern about the disproportionately high percentage of Aboriginal children in the juvenile justice system, the tendency to refuse bail for them, the mandatory detention and the punitive measures which result in a high representation of Aboriginal juveniles in detention.[122]

8.54 Some Australian jurisdictions have instigated measures to promote the rehabilitation of Indigenous children in detention through culturally specific

---

114 Dolgopol U *International Law - How it can and does protect Childrens rights*, SA Children Interest Bureau Seminar Paper, pp. 13-4 cited in Children's Interests Bureau Board South Australia, Submission No. 327, p. S 1815

115 National Aboriginal Youth Law Centre, Submission No. 109, p. S 526

116 Attorney-General's Department, Supplementary Submission No. 133a, pp. S 3362-3

117 Human Rights and Equal Opportunity Commission, Submission No. 336, p. S 1931

118 *ibid*, p. S 1932

119 Amnesty International, 'Australia, a Champion of Human Rights?' *Australian Newsletter*, February/March 1997, p. 8 cited in World Vision Australia, Submission No. 135, p. S 816

120 Youth Advocacy Centre Inc, Submission to ALRC and HREOC *Speaking for ourselves Children and the legal process* Issues Paper 18, July 1996, p. 23

121 *ibid*

122 United Nations Committee on the Rights of the Child, *Concluding observations Australia* (CRC/C/SR 403-405), 24-25 September 1997, p. 3

training courses; cultural awareness training for detention centre staff; employment of Indigenous staff and Official Visitors; policies of Aboriginal placements recognising the importance of family and community ties; placement of young people near their communities; ensuring that Indigenous children share living spaces. It was submitted that notwithstanding these initiatives, the basic problem is the level of over-representation and this will not change until harsh laws are amended and police practices changed.[123] World Vision Australia urged the Government to maintain its funding for youth support and community service programs and to develop initiatives for alternative methods of punishment of Indigenous youth, such as the interaction with Indigenous elders, or for acceptance of some traditional forms of justice.[124]

8.55 There were two aspects: the legislation itself and the way it operates.[125] Professor Charlesworth submitted that Aboriginal children are much more likely to be hassled by police so there was not complete equity in the way the law operates. The NGOs were particularly concerned about the treatment of Aboriginal children which they believed reflected the racist attitudes of police and court officials and the court's unwillingness to grant bail to children lacking family support.[126]

8.56 The Human Rights and Equal Opportunity Commission commented that:

> Studies suggest that police exercise their discretion at every point in the system in a manner that disadvantages Indigenous children relative to non-Indigenous children and increases the likelihood of their further involvement with the juvenile justice system.[127]

8.57 Professor Charlesworth stated that:

> ... in a recent study in WA it is shown that an Aboriginal child is four times more likely to be imprisoned on conviction than a non-indigenous child who has been found guilty of the same offence. It does seem that there is a systemic - it is subtle, but it is systemic - discrimination operating in the juvenile justice system against Aboriginal children.[128]

---

123 Human Rights and Equal Opportunity Commission, Submission No. 336, p. S 1932

124 World Vision Australia, Submission No. 135, p. S 816

125 Charlesworth, Transcript of Evidence, 29 April 1997, p. 168

126 Defence for Children International Australia, *op cit*, p. 28

127 Gale F, Bailey-Harris R and Wundersitz J (1990) *Aboriginal Youth and the Criminal Justice System: The injustice of Justice?* Cambridge University Press, Cambridge and Luke G and Cunneen (1995) *Aboriginal Over-representation and Discretionary decisions in the NSW Juvenile Justice System*, Juvenile Justice Advisory Council of NSW cited in Human Rights and Equal Opportunity Commission, Submission No. 336, p. S 1927

128 Charlesworth, Transcript of Evidence, 29 April 1997, p. 165

8.58 In Australia there is a lack of focus on Indigenous young people in legal aid services, education, youth advocacy or the youth services movement.[129] In Alice Springs concerns were expressed that there is no juvenile court or children's magistrate; no closed court although some aspects are being reviewed; no specialist youth lawyers; no consistent advocacy support workers in the court system; no separate department of juvenile justice; the links between departments are very poor; no alternative programs are in place for juvenile detention in Alice Springs; no youth specific probation and parole workers; no effective exit planning after detention; police and judicial officers applying the legislation more stringently to Aboriginal people; bail consideration being harder for Aboriginal people to meet; mandatory sentencing at the age at which juvenile criminal records may be expunged has been increased; sending incarcerated youths to Darwin; the use of maximum security cells to separate children from adults; and no interpreter facilities in Central Australia.[130]

8.59 It was suggested that the lack of interpreter facilities is important because Indigenous youths do not understand the interview procedures and cannot be accurately assessed by psychiatrists for signs of mental instability, cannot understand the evidence against them or be offered a chance to speak for themselves.[131] In Alice Springs the assessment as to whether a young person is intoxicated is at the discretion of the police officer who can decide to keep the person in protective custody, with the only alternative for a young person being the crisis accommodation refuge which has only seven beds.[132]

8.60 It was submitted that there are inadequate resources for preventative measures and no direct services addressing the causal factors of petrol sniffing, but there is an emphasis on statutory intervention.[133] Many young people are referred repeatedly for welfare assistance which does not occur, community

---

129 Friel, Transcript of Evidence, 14 August 1997, p. 1457

130 Baker, Transcript of Evidence, 6 November 1997, p. 47; Central Land Council, Submission No. 399, pp. S 2234-5, 2237

131 Central Land Council, Submission No. 399, pp. S 2238-9

132 Baker, Transcript of Evidence, 6 November 1997, p. 48

133 *ibid*

organisations are not adequately resourced to advocate effectively for services for all these young people. There are also a lack of suitable options for alternative care.[134]

8.61 The Committee noted that in a number of areas there were significant efforts being made to address the problem of incarceration of Indigenous children. Much still needs to be done.

Detention centres

8.62 The United Nations Committee on the Rights of the Child expressed their concern in relation to the treatment of children in detention in the light of the Convention and standards such as the Beijing Rules, the Riyadh Guidelines and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.[135] The *Standard Guidelines for Corrections in Australia* are based on the *United Nations Minimum Standards for the Treatment of Prisoners*, but there are no minimum standards set specifically for children.[136]

8.63 Concerns were raised in relation to: the detention centres; the grievance procedures for detainees; basic requirements such as food, clothing, privacy; detention of children in cells; respect for individual and cultural differences; access to counselling; and detainees were frequently required to participate in poorly designed activities and programs of limited relevance to their lives; detention of males and females in the same area; strip searching; and culturally appropriate education.[137]

8.64 It was also suggested that there is a need to improve the education programs for juveniles in detention centres by having shorter courses, flexible educational arrangements, correspondence courses and closer communication between state education authorities and detention centres.[138] The Senate Employment Education and Training Reference Committee noted the slow

---

134 *ibid*

135 United Nations Committee on the Rights of the Child, *Concluding observations Australia* (CRC/C/SR 403-405), 24-25 September 1997, p. 3

136 Human Rights and Equal Opportunity Commission, Submission No. 336, p. S 1927

137 Discussed by Hayter (1994) *Youth Detention Centres: Policy and Legislation, Comparative Research*, National Children's and Youth Law Centre, Sydney, p. 3 cited in National Children's and Youth Law Centre, Submission No. 321, Annexure 2, p. 59; New South Wales Ombudsman (1996) *Inquiry into Juvenile Detention Centres*, Volume 1, p. iv cited in Human Rights and Equal Opportunity Commission, Submission No. 336, p. S 1929; Tasmanian Aboriginal Centre Inc, Submission No. 647, pp. S 3231-45

138 Human Rights and Equal Opportunity Commission, Submission No. 336, p. S 1930

progress in introducing educational and training opportunities for Indigenous children in custody.[139]

8.65 In New South Wales, State wards make up 17 per cent of children in detention centres while representing only 0.2 per cent of children in the State.[140]

> What is well known in psychological and psychiatric circles is that children's coping mechanisms fail with unerring frequency in late adolescence and early adulthood ... My estimates that adult jails are around 40-60% ex-wards are proving correct by some research in its early stages.[141]

Presence of an independent person

8.66 The Youth Advocacy Centre commented that parents and social workers may not be aware of the child's legal rights in the process.[142] The police practice of using parents of NESB children as independent persons at interviews when these parents have little or no knowledge of English, particularly in families where the children are the interpreters, has a number of inherent problems.[143] Parents or guardians may have no knowledge of the child's right not to self-incriminate and parents may put pressure on the child to confess.[144]

8.67 It was also suggested that the use of a Justice of the Peace as the independent person at police interviews has presented many problems because many do not understand their role and do not exercise their responsibility to protect and safeguard the interests and rights of the child.[145] In these situations the requirement to have another person present provided little protection for children who are vulnerable when confronted by adults in authority. Ms Curran stated that:

> I have seen children who have been offered deals whereby they can get out and can get bail if they, basically, 'fess up'. The children's attitude is, 'I want to

---

139 Senate Employment Education and Training Reference Committee, *Report of the Inquiry into Education and Training in Correctional Facilities,* April 1996, p. 51 cited in Human Rights and Equal Opportunity Commission, Submission No. 336, p. S 1930

140 Murray, Submission No. 165, p. S 1103

141 *ibid*, p. S 1104

142 Wight, Transcript of Evidence, 1 May 1997, p. 257

143 Youth Advocacy Centre Inc, Submission to ALRC and HREOC *Speaking for ourselves Children and the legal process*, Issues Paper 18, July 1996, p. 23, pp 84-85

144 Boystown Linkup, Submission No. 136, p. S 852

145 Tasmanian Aboriginal Centre Inc, Submission No. 647, p. S 3238

> be out of here as quickly as possible'. I have seen the situation where children have a right to make a 'no comment' interview when they have their parents present, and their parents say, 'Cooperate with the police' ... The independent third party should be someone who knows something about the process, who can protect the children's rights, rather someone who is a passive, almost condoning person or someone who basically encourages a person to their disadvantage.[146]

8.68 BoysTown Link Up believed that to comply with the Convention, statements by children should not admissible evidence unless the child has had access to legal advice from a qualified and independent legal practitioner.[147]

> Children should always have a lawyer present in police interviews or receive legal advice prior to interviews. Given their age and chances for reform, the focus should be that they are diverted from the prison system into more rehabilitative, educational and reforming options.[148]

Complaints mechanism

8.69 It was submitted that the reluctance of young people to make formal complaints is even greater for the more marginalised groups such as the ethnic young people who are even more invisible because of the silence expressed through fear, apathy, or ignorance about their rights.[149] Children are very loath to complain and when they do, it is usually through their parents but it is almost impossible to get them to endure the bureaucratic course required.[150]

Staff training

8.70 It was suggested that there was a lack of police with specialised skills for dealing with children.[151] There is a lack of uniformity in the training of staff in detention centres throughout Australia and if training manuals exist, they do not specifically refer to the Convention.[152] It is imperative that staff at detention

---

146 Curran, Transcript of Evidence, pp. 891-2

147 BoysTown Link Up, Submission No. 136, pp. S 852-3

148 Catholic Commission for Justice, Development and Peace, Submission No. 201, p. S 1374

149 Fitzgerald, Submission No. 562, p. S 2984

150 Jackson, Transcript of Evidence, 3 July 1997, pp. 584, 587

151 Fitzgerald, Submission No. 562, p. S 2991

152 National Children's and Youth Law Centre, Submission No. 321, Annexure 2, p. 104

centres are trained to deal with difficult situations as they have an important role in reintegrating young offenders into society.[153]

Representation in courts

8.71 The Family Law Council stated that since the full Court of the Family Court in *Re K* (1994) FLC 92-461 identified the main circumstances where child representation is required there has been an increase of 300 per cent in the volume for cases in which legal aid commissions have been required to fund separate legal representation for children.[154] Attorney-General's Department added the number have increased from 670 in 1992-3 to 3302 in 1995-6 approved child representative appointments.[155]

8.72 Institute of Early Childhood and Family Studies believed that there should be some sort of accreditation of people who are going to represent children in the Family Court bearing in mind that the children are not going to be in court themselves.[156] The lack of legal representation for children may also mean that young people attend Family Court counselling sessions during custody disputes when this is inappropriate and can cause unnecessary grief and stress, particularly in situations where there has been domestic violence.[157] The trained legal representation should be present for children in Family Courts as their role can assist parents identify and focus on issues between them, facilitate an agreement and remind other parties of the paramountcy of the child's interests in the proceedings.[158]

> ... very dangerous arrangements that have been made through family courts on the recommendations of counsellors who clearly had no expertise in either children's needs or the dynamics of child sexual abuse and the problems.[159]

8.73 The De Lissa Institute also suggested that lawyers and counsellors representing children should undergo specialist training and accreditation to reduce the risk of further abuse by the justice system.[160] There needs to be a

---

153 *ibid*, p. 111

154 Family Law Council, Submission No. 178, p. S 1195-6

155 Attorney-General's Department, Submission No. 133, p. S 782

156 Briggs, Transcript of Evidence, 4 July 1997, p. 795

157 Fremantle Community Youth Service and Youth Legal Service of Western Australia, Submission No. 177, p. S 1179

158 National Legal Aid, Submission No. 106, p. S 513

159 Briggs, Transcript of Evidence, 4 July 1997, p. 785

160 De Lissa Institute of Early Childhood and Family Studies, Submission No. 146, p. S 3728

coordinated approach which can best be done by involving other professionals and the use of case conference facilities and good case management.[161] It was submitted that the legal representative is involved with the child's 'best interests' in relation to the *Family Law Act 1975* and that involvement may be short term, whereas other professionals may have a longer-term view of the child's welfare.[162] The De Lissa Institute of Early Childhood and Family Studies believed that counsellors investigating children's best interests should have qualifications and expertise in early childhood development.[163]

8.74 Some Legal Aid Offices have refused requests by magistrates for separate representation for children.[164] For example, Legal Aid Western Australia responds to requests for separate representation for only two of the 13 grounds set out in *Re K* (12994) FLC 91-461.[165] In the Western Australian *Child Welfare Act 1947* there is no provision for child representation in care and protection proceedings[166] but the Government is considering new legislation to provide separate representation for children in these matters.[167]

8.75 The Senate Legal and Constitutional References *Committee's Inquiry into the Australian Legal Aid System* expressed concerns in relation to national equity and uniform access to justice nationally, in particular in relation to the implications of *Re K* and the alienation of the professionals by government cost cutting measures.[168]

8.76 National Children's and Youth Law Centre submitted that:

> The Family Law Act does not specify the role, rights and responsibilities of the separate legal representative. Instead, common law dictates the nature of these issues.[169] The separate legal representative acts in the interests of the child, not in the interests of the parent. According to *Pagliarella v Pagliarella*[170], the separate legal representative is not the child's solicitor, and

---

161 Family Law Council, Submission No. 178, p. S 1196

162 *ibid*

163 De Lissa Institute of Early Childhood and Family Studies, Submission No. 146, p. S 3723

164 Queensland Law Society and the Family Law Practitioners Association, Submission No. 123, p. S 631

165 *ibid*, p. S 631

166 Legal Aid Western Australia, Submission No. 141, p. S 928

167 Western Australian Government, Supplementary Submission No. 402a, p. S 3436

168 Senate Legal and Constitutional References Committee's *Inquiry into the Australian Legal Aid System*, Second Report, June 1997, p. xiii-xv

169 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Issues Paper 18, *Speaking for ourselves and the legal process*, March 1996, p. 59

170 *Pagliarella v Pagliarella* (1993) FLC 92-100

> the child can not remove the separate legal representative even if the child is not pleased with his or her performance.[171] This is a breach of the principles of the right to be heard in legal proceedings which is encapsulated in Article 12 of CROC.[172]
>
> The separate legal representative has a duty to inform the court of the wishes of the child, but he or she does not have the duty to make submissions to the Court which are in line with the wishes of the child.[173] Instead, the separate legal representative has a duty to make impartial submissions to the Court which take into account the best interests of the child, according to the principle laid done in *Bennet v Bennett* (1991) FLC 92-191.[174] Legal practitioners in Australia require more guidance as to their instructions to the Court, and as to how they determine what is in 'the best interests' of the child client. The NCYLC is of the firm view that representation of 'best interests' is a fiction, and the only honest and reliable legal representation is that which acts on informed instruction (where this is possible with regard to physical, emotional and intellectual development). The Court will then be in position to determine the best interests of the child.[175]

8.77 It was submitted that placing a restriction on the amount of legal aid available is also a problem because the more complex cases will exceed the amount allowed.[176] Funding cuts can place children's safety at risk as they can restrict legal assistance to the non-abusing parent to protect themselves and the children.[177] It was also suggested that cost-capping would undermine the effectiveness of child representation particularly for Indigenous children who may be discriminated against, and who may have been the subject of abuse.[178] The amount of work involved in these cases will increase the costs.[179]

8.78 The Senate Legal and Constitutional References Committee's (SLCRC) *Inquiry into the Australian Legal Aid System* suggested that the provision of separate representation of children should be a Government funding priority:

---

171 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Issues Paper 18, *Speaking for ourselves and the legal process*, March 1996, p. 62

172 National Children's and Youth Law Centre, Submission No. 321, Annexure 2, p. 53

173 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Issues Paper 18, *Speaking for ourselves and the legal process*, March 1996, p. 62

174 *ibid*

175 National Children's and Youth Law Centre, Submission No. 321, Annexure 2, p. 53

176 Queensland Law Society and the Family Law Practitioners Association, Submission No. 123, p. S 632

177 National Council of Single Mothers and Their Children, Submission No. 139, p. S 916

178 Doyle, Transcript of Evidence, 1 May 1997, p. 271

179 *ibid*

> The Committee [SLCRC] is concerned to ensure that measures, such as reviewing the decision of the Court or capping grants of aid, which may be introduced through new funding arrangements, do not result in a denial of adequate representation for any child whose best interests requires it.[180]

8.79 In Victoria, the appointment of separate representatives in family law proceedings was based on circumstances where the child may either be 'at risk' or severely traumatised and their best interests needed to be brought before the court.[181] It was submitted that the new guidelines focus on the capacity of parent to pay. Concern was expressed that in the absence of legal aid, a parent accused of sexual assault can refuse to pay, or the parent who is open to question agrees to pay for the children's lawyer and can exert undue influence over the separate representative as they are paying.[182]

> As the majority of child protection cases involve the child's family as the potential and or actual harmer, it is particularly important that children in the protection system have an independent advocate. For most children, their parents advocate on their behalf, however for many children in the protection system this is neither possible, nor appropriate.[183]

Children shouldn't be made to choose when their parents are getting divorced

Elizabeth McLellan, 11 years, Rainworth State School

---

180 Senate Legal and Constitutional References Committee's *Inquiry into the Australian Legal Aid System*, Second Report, June 1997, p. xiv

181 Catholic Commission for Justice, Development and Peace, Submission No. 201, p. S 1370

182 *ibid*, p. S 1371

183 Australian Catholic Social Welfare Commission, Submission No. 124, p. S 653

8.80 The NGOs were particularly concerned that youth are not always adequately represented in courts and that some States have enacted harsher laws following sensationalised media reports.[184] Under-representation of young people may result in inadequate protection in the legal system and they may plead guilty to offences they did not commit.[185] They submitted that rights are meaningless unless they can be protected and cuts to Legal Aid will directly impact upon the ability of children to be heard in legal proceedings affecting them, most particularly, in family law issues requiring separate representatives for children.[186] Concern was also expressed in relation to the funding cuts for interpreter services as many clients in the legal services cannot afford to pay.[187]

Prohibition of capital punishment and life imprisonment

8.81 A sentence of life imprisonment is possible in all jurisdictions and in New South Wales it has occurred in a handful of cases since 1990; in one case this was a 14 year old.[188] Life sentences may apply to murder, commercial drug trafficking, treason and in some jurisdictions some sexual offences.[189]

8.82 Under the Commonwealth *Crimes Act 1914* s.17A, the imposition of any sentence of imprisonment on any convicted person should only occur in circumstances where no other sentence was appropriate and the court must take the age of the offender into account.[190] It was suggested that while the Federal Government could encourage the States and Territories to eliminate life sentences for children, it would need to do this in its own jurisdiction. It was argued that public concern about these types of offences may make the legislative change difficult to achieve.[191]

---

184 Defence for Children International Australia, *op cit,* p. 29

185 Fremantle Community Youth Service and Youth Legal Service of Western Australia, Submission No. 177, p. S 1179

186 *ibid*, p. S 1180

187 Germanos-Koutsounadis, Transcript of Evidence, 9 May 1997, p. 375

188 Attorney-General's Department, Supplementary Submission No. 133a, p. S 3362

189 *ibid*

190 *ibid*

191 *ibid*

Australia's reservation on Article 37(c)

8.83 The United Nations Committee on the Rights of the Child recommended the withdrawal of the Australia's reservation.[192] Professor Kolosov commented that the UN Committee always invited governments to withdraw reservations although it was the right of each sovereign State to retain the reservation if it does not undermine the purpose of the Convention.[193]

8.84 The Attorney-General's Department commented that in Australia there were occasions when adults and children were imprisoned together. Because of the demographics of Australia with small population centres. This practice enabled young offenders to remain near their families. Therefore, the intention was that the reservation would be retained indefinitely.[194] The reservation on Article 37(c) mirrors the reservation we have to the similar provision in Article 10 of the *International Covenant on Civil and Political Rights*.[195]

8.85 If Australia were to remove the reservations on both the Convention and the Covenant then this could give rise to complaints that Australia was breaching its obligations to the United Nations Committee on the Rights of the Child and the Human Rights Committee. This situation can occur in remote areas or isolated communities where authorities believe it is consistent with the obligation for the child to maintain contact with their families.

8.86 It was argued that:

> Australia's size and population distribution pose significant difficulties for full compliance with the dual obligation of ensuring separation of juvenile and adult prisoners while also enabling offenders to maintain contact with their families. However, this difficulty does not justify a reservation to that requirement. Rather, it highlights that difficulties involved in incarcerating young offenders and strengthens the case for utilising alternative sentencing options such as recognisance orders, community service orders and home detention. In any event the reservation is unnecessary. The concern of the Australian Government could be met more appropriately by a statement that Article 37(c) is subject to the paramountcy of the best interests of that particular child.[196]

---

192 *ibid*, p. S 3353

193 Kolosov, Transcript of Evidence, 3 September 1997, p. 1534

194 Attorney-General's Department, Supplementary Submission No. 133a, p. S 3353

195 Sheedy, Transcript of Evidence, 28 April 1997, p. 31

196 Human Rights and Equal Opportunity Commission, Submission No. 336, p. S 1929

8.87 Others believed that the separation of young people and adults could be achieved even in remote areas if there was a political will.[197] Australia simply needs to provide adequate facilities for juvenile detainees that are separate from adult correctional centres.[198] BoysTown Link Up added that the Queensland *Corrective Services Act 1988* requires the separation of those under 18 from those over 18 years of age subject to a direction from the Commission, nonetheless 17 year olds are housed in the same centres and watch-houses as adults.[199]

8.88 The sentencing of juveniles in the Northern Territory requires that it be served in a juvenile detention centre[200] and this has resulted in one person from central Australia being moved to Darwin.[201] The Central Land Council supported the withdrawal of the reservation as it would place pressure upon governments to comply with a more rigid standard to ensure that children are not incarcerated with adults.[202]

8.89 While the majority of children are in youth detention centres, in Queensland there have been cases of children in adult prisons.[203] In Western Australia for young people 16 and over there is the legal capacity to request a move to an adult prison in situations where there is a relative there or they may be moved if they are difficult to manage in a juvenile detention centre.[204] If this situation arose they would not be permitted to share living quarters with an adult prisoner.[205]

8.90 The National Children's and Youth Law Centre commented that:

> It is a matter of basic public knowledge and common wisdom that a prison is a breeding ground for criminal behaviour and techniques. Placing juvenile offenders with adult offenders, even for a very short time, exposes children to an abusive environment, and one that entrenches criminal behaviour.[206]

---

197 Executive Council of Australian Jewry, Submission No. 105, p. S 503; Jones and Marks, Submission No. 91, p. S 440

198 BoysTown Link Up, Submission No. 136, p. S 849

199 *ibid*

200 Anderson, Transcript of Evidence, 6 November 1997, p. 11

201 Holt, Transcript of Evidence, 6 November 1997, p. 12

202 Holder, Transcript of Evidence, 6 November 1997, p. 20

203 Nilsson, Transcript of Evidence, 1 May 1997, p. 234

204 Marshall, Transcript of Evidence, 3 July 1997, pp. 542-3

205 *ibid*, p. 545

206 National Children's and Youth Law Centre, Submission No. 321, p. S 1781

> I understand the arguments about available resources, particularly in remote locations. For three years I worked in private practice in western NSW. I have seen the primitive conditions of police cells, and I have observed the occasional frantic attempts by honest police to separate young people from adult offenders. I have also seen a frightened 14 year old boy huddled in the corner of the cell clutching a blanket eyeing fearfully two other intoxicated adult offenders.[207]

8.91 Some submissions argued that there is no rational argument for this reservation.[208] National Children's and Youth Law Centre commented that Australia was a first world industrialised nation and a compassionate and 'fair-go' society and although the police have significant resource difficulties they are not insurmountable.[209] Mr Antrum explained that in his experience, in every case where a young offender was detained with adults alternative arrangements could be made. The police were generally supportive and he suggested that each community would have networks that could address the accommodation problem.[210]

8.92 The Human Rights Commissioner stated that:

> Article 37(c) only requires separation unless it is considered in the child's best interests not to do so. Clearly, where it is not in the interests of the children to separate, then the child need not be separated, and in most rural and isolated areas, to remove the child for very short periods thousands of kilometres from the child's family and community is clearly not in the child's best interests. So I think the reservation, although addressing a particular domestic situation, is really not necessary if you look at the actual words of 37(c).[211]

8.93 It was also submitted that the removal of this reservation may prevent young people being detained arbitrarily in adult facilities.[212] Judge Jackson commented that while he appreciated the difficulties experienced in remote areas, the general position stated in the principle is a valid one.[213] The Australian Law Reform Commission reported that they had not received any

---

207 *ibid*

208 Youth Advocacy Centre Inc, Supplementary Submission No. 14a, p. S 1037; Wright, Transcript of Evidence, 6 November 1997, pp. 40-1

209 Antrum, Transcript of Evidence, 5 August 1997, p. 1138

210 *ibid*, p. 1144

211 Sidoti, Transcript of Evidence, 5 August 1997, pp. 1180-1

212 Baker, Transcript of Evidence, 6 November 1997, p. 47

213 Jackson, Transcript of Evidence, 3 July 1997, p. 585

evidence that practice belied the spirit of the Convention.[214] However, that some juvenile justice legislation applies only until 17 years of age.[215]

8.94 The National Children's and Youth Law Centre commented that withdrawal of the reservation would be a very good signal from Australia to the international human rights community that we are moving forward on the Convention. It would also restore a lot of confidence in the youth sector.[216]

8.95 The Committee also believes that the requirement to separate adults and children can be met except in very exceptional circumstances if there is a will to do so. The Committee believes that in the cases where this is not possible, then the child should only be kept in those circumstances when it is in the best interests of the child. In these cases this would still comply with the wording of Article 37(c).

8.96 The Committee is also concerned that in some rural areas a lack of resources and options may make the separation of juvenile and adults extremely difficult. If Australia was to withdraw the reservation, these exceptional cases would lead to a breach of the Convention if they were not in the best interests of the child. The Committee believes that breaches of the Convention could lead to significant damage to Australia's international reputation.

8.97 The Committee believes that the reservation should be withdrawn, however, more could be done to reduce the frequency with which juveniles are held in custody with adults.

Family Court matters

8.98 Over the last five years there has been greater emphasis on children's rights in family law litigation such as the rights to have contact with their parents on a regular basis, rights of the child are of paramount interest, cultural awareness of judges, programs dealing with Aboriginal and Torres Strait Islanders and sterilisation of intellectually disabled children.[217] It was submitted that there is now substantial compliance but there was concern that a lack of funding and a lack of expertise for training children's representatives was a potential negative impact in Australia's obligations for children to be

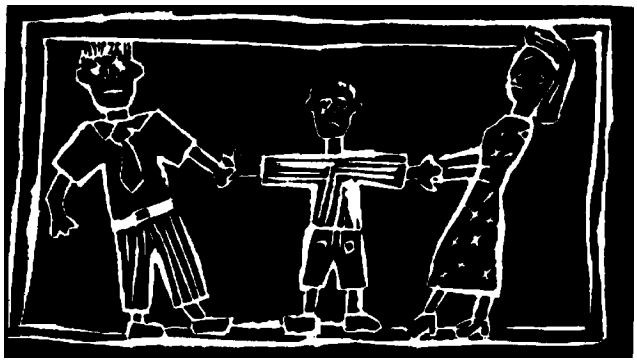
214 Cronin, Transcript of Evidence, 5 August 1997, p. 1181

215 Moyle, Transcript of Evidence, 5 August 1997, p. 1181

216 Antrum, Transcript of Evidence, 5 August 1997, pp. 1138-9

217 Boland, Transcript of Evidence, 5 August 1997, p. 1273

afforded proper legal representation.[218] The Children's Interests Bureau Board did not believe that the reforms to the family law went far enough in terms of embodying the voice of the child and the free expression of the child partly due to the lack of coordination.[219]



Children shouldn't be involved in conflict between parents

Amy Karban, 12 years, Rainworth State School

8.99 Further, the Family Court runs extremely comprehensive information sessions for husbands and wives or other parties before the court but the children are not involved in those.[220] The Family Law Council supported a proactive approach which includes providing the Family Court with the capacity to order that the child receive counselling, information sessions and assistance where appropriate.[221] It was submitted that counselling services are desperately needed in many areas particularly in rural Australia.[222] It was also submitted that the introduction of the $40 voluntary fee may provide an excuse for people not wishing to participate in counselling or mediation, and that this may result in a deterioration of the situation, thus impacting on the children.[223]

8.100 It was also submitted that children were often used in domestic violence situations as a means of maintaining the power and control over women by men.[224] It was suggested that if a person is not able to spend time with their

218 *ibid*, p. 1274

219 Redman, Transcript of Evidence, 4 July 1997, p. 726

220 Boland, Transcript of Evidence, 5 August 1997, p. 1274

221 Family Law Council, Submission No. 178, pp. S 1193-4

222 National Legal Aid, Submission No. 106, p. S 510-1

223 Staniforth, Transcript of Evidence, 29 April 1997, p. 134

224 Olafsen, Transcript of Evidence, 4 July 1997, p. 754

child unsupervised then it may not be in the best interests of the child to allow contact.[225]

8.101 Another concern was the long delays in determining Family Court matters.[226] In many cases a delay of 10 months may be appropriate to enable the situation after separation to stabilise, but this is not always the case.[227] Concern was expressed that the delays in some cases were unacceptable and inconsistent with the 'best interests' principle.[228]

8.102 Although Section 65E of the *Family Law Act 1975* requires that the best interests of the child be a paramount consideration, this may not occur until the final hearing which may be two or more years after the proceedings were instigated and only 5 per cent of cases actually reach the final hearing stage.[229] It was submitted that in the interim hearing the 'status quo' is the most important consideration which was a departure from the paramountcy principle.[230] The comment was also made that:

> A delay of two years (or more) to determine residence, is an inordinately long time in the life of a child. Not only is the child denied a decision, but the disruption and uncertainty in the lives of the child's parents or carers makes the impact of the delay upon a child even more serious.[231]

8.103 It was suggested that there should be greater emphasis on the interim hearings to ensure there is sufficient evidence and time to make interim decisions based on the best interests of the child and increase resources so that final hearings can be held earlier if appropriate.[232] Concern was also expressed that changes to resources for legal aid may reduce children's access to separate representation.[233] The changes to legal aid were done in the context of reforms such as the improved arrangements for marriage and relationship mediation, education and assistance to help people to avoid litigation and therefore reduce the need for legal aid.[234]

---

225 Buchanan, Transcript of Evidence, 4 July 1997, p. 755

226 Hofmeyer, Transcript of Evidence, 4 July 1997, p. 751

227 Queensland Law Society and the Family Law Practitioners Association, Submission No. 123, p. S 624

228 *ibid*, pp. S 624-5

229 *ibid*, p. S 621

230 *ibid*, pp. S 623-4

231 *ibid*, p. S 623

232 *ibid*, p. S 626

233 Buchanan, Transcript of Evidence, 4 July 1997, p. 753

234 Williams D Attorney-General (1998) *News Release*, 'Labor Lies on Legal Aid', p. 1

8.104 A number of submissions commented on the long and psychologically damaging process involved in having an order reversed even in cases of protecting children against sex abusers.[235] There needs to be a number of changes to make the system more child-friendly and it was suggested that the Federal Government promote a set of national principles and standards in relation to children involved in family care and protection matters.[236] There was concern that children giving evidence in child protection and other cases in South Australia are still traumatised by the processes and still insufficiently protected against actual or potential intimidation, in spite some improvements in structural and practical arrangements.[237]

8.105 The Queensland Law Society and the Family Law Practitioners Association contend that family law practices in dealing with interim hearings do not comply with the Convention.[238] Justice Rowlands called for merit based interim hearings in children's cases.[239] Justice Rowlands suggested greater obligations on parties to disclose more, to prepare affidavits 14 days beforehand and to attach medical reports.[240] This was opposed on the ground that evidence could not be excluded if it was late, and this would require additional documentation and hence additional cost.[241]

8.106 This would externalise the problem and place the onus on the litigants and the best interests of the child may be to have an independent inquiry by the child's representative or court counsellor.[242] Fewer and fewer family reports are coming out of courts and the costs of these reports, have been largely externalised onto children's representatives who are funded by legal aid commissions.[243] It was submitted that the costs of getting proper information in the early stages would be saved later.[244] It was also suggested that a lot of the interim work done in the Family Court could be done by adequately specialised

---

235 For example de Lissa Institute of Early Childhood and Family Studies, Submission No. 146, p. S 3724

236 Children's Interests Bureau Board South Australia, Submission No. 327, p. S 1823

237 *ibid*, p. S 1822

238 Doyle, Transcript of Evidence, 1 May 1997, p. 268

239 *ibid*

240 *ibid*, p. 269

241 *ibid*

242 *ibid*

243 *ibid*

244 *ibid*

magistrates (with safeguards) because magistrates require less operational funding and were more accessible to regional Australia.[245]

8.107 The Child Abuse Prevention Service believed that the children's advocate should be someone who has observed the child's activities in its environment over a period of time and not some one who has had the occasional interview.[246] In situations where either or both parents are self-representing and may not be able to deal with the complex rules, the role of the children's representative is to ensure that the relevant evidence comes before the court so that the judge is aware of the issues relating to these children.[247]

8.108 The Australian Law Reform Commission believed that in many cases an adversarial system, such as the Family Court which was parent centred, was inappropriate for dealing with matters relating to children and a more proactive investigative approach may be better and that children should be recognised as a participating party and be appropriately represented.[248]

Children in situations of exploitation

Child labour

8.109 In relation to Australia's obligation to protect children from economic exploitation, National Legal Aid expressed concern that the changes to the Commonwealth employment legislation may negatively impact on children in employment if there is no opportunity for legal redress against an errant employer. This may occur in situations where the child might be required to pay a filing fee for a Federal Court determination following changes brought into effect 1 September 1996.[249] Commonly where fees are applied, however, there is scope for waiver of fees in situations where this could cause hardship.

8.110 It was suggested that in Australia, children working usually means being employed in after school jobs, paper rounds and pocket money. However, it was submitted that the use of child labour was increasing including children working in outsourcing under hazardous conditions.[250] Lutheran Community

---

245 *ibid*, p. 270

246 Ginn, Transcript of Evidence, 5 August 1997, p. 1237

247 Osmand, Transcript of Evidence, 29 April 1997, pp. 131-2

248 Cronin, Transcript of Evidence, 5 August 1997, pp. 1187-8

249 National Legal Aid, Submission No. 106, p. S 514

250 World Vision Australia, Submission No. 135, p. S 822; Gow, Transcript Evidence, 9 July 1997, p. 931

Care suggested that children may be exploited in jobs such as distributing newspapers if pressure was put on those children that this employment was necessary to meet their basic needs.[251] The concern is that children are being required to earn money at an inappropriate age and take on the relevant responsibilities.[252]

8.111 Young children have worked in the fashion industry and there is a need to ensure that the laws protecting children from economic exploitation are enforced.[253] There is difficulty with the enforcement of laws because of the vulnerability of those being exploited if they fear losing the business.[254]

Some children go to school to learn and others have to go to work

Michelle Fraser, 9 years, Raquel Redmond Art for Children, Brisbane

> Visiting TCFUA officers have found children working on industrial sewing machines after school, until late at night and during school holidays.[255]
>
> Some children reportedly work as late as 3 am and then get up at 7 am the next morning to get to school. Unfortunately, the phenomenon is said to be increasing as families attempt to work to tight deadlines and low prices imposed by contractors. ***Many families have no choice but to involve their children in the production*** ... In addition, there is concern that impending

251 Morrison, Transcript of Evidence, 4 July 1997, p. 719

252 *ibid*

253 Defence for Children International Australia, *op cit*, p. 27

254 Walker, Transcript Evidence, 9 July 1997, p. 931

255 Textile, Clothing and Footwear Union of Australia, (1995) *The Hidden Cost of Fashion: Report on the National Outwork Information Campaign*, Sydney, p. 20 cited in World Vision Australia, Submission No. 135, p. S 822

> changes to the industrial relations laws in Australia will remove existing measures to protect these children and intensify the problem.[256]

8.112 It was also suggested that education programs were needed to ensure that non-English speaking workers knew their rights and entitlements under law.[257] While Save the Children Fund Australia estimated that 80 000 Australian children are sewing garments in backyard sweatshops in Australia,[258] the Senate Economics References Committee concluded that there is no evidence of organised child labour, although a number of children assist their parents.[259]

8.113 Concern was expressed that there are also still a number of goods imported into Australia which are known to be made by child labour.[260] The International Confederation of Free Trade Unions estimated that 100-200 million children aged 4 to 15 years are involved in child labour.[261] It was suggested that legislation should be enacted which bans the promotion and sale of manufactured products made using exploitative child labour.[262]

8.114 It has been argued that the ethics in relation to the importation of exploitative child-labour manufactured products into Australia have taken a back seat to economic rationalism.[263]

> PLAN submits that additional measures can be taken by the government in the form of a regulatory and/or legislative framework and/or via the education of business people, which would ensure that goods are not commissioned, either directly off-shore or less directly via import, which are manufactured by children in situations particularly of bonded labour or those wherein children are required/forced to work in hazardous conditions or industries.[264]

8.115 It has been suggested that a ban on the importation of goods produced by child labour would not address those situations where children provided goods for the domestic economy and may exacerbate the poverty that causes child

---

256 World Vision Australia, Submission No. 135, p. S 822

257 Save the Children Fund Australia, Submission No. 80, p. S 393

258 *ibid*

259 Senate Economics References Committee *Outworkers in the Garment Industry*, December 1996, p. 49

260 Plan International Australia, Submission No. 150, p. S 995

261 Joint Standing Committee on Foreign Affairs, Defence and Trade (1994) *A review of Australia's Efforts to Promote and Protect Human Rights*, The Parliament of the Commonwealth of Australia, November 1994, p. 173; Spindler, Speech in the context of Miscellaneous, *Senate Hansard*, 22 September 1994, p. 1245

262 International Developing Youth Dignity, Submission No. 173, p. S 1150

263 *ibid*, p. S 1154

264 Plan International Australia, Submission No. 150, p. S 996

labour.[265] It has also been argued that child workers displace adult workers and depress the incomes of adults doing similar work.[266]

8.116 Internationally some larger companies have instigated their own codes of conduct in relation to labour standards and this should be encouraged by the Government.[267] Some companies are taking affirmative action in encouraging their suppliers to treat outworkers fairly.[268] UNICEF has developed a set of criteria to assist in determining when work done by children becomes exploitative.[269]

> ...there are many thousands of situations where such labour is essential for the survival of the child and/or his or her family. I also believe that it may be justified on cultural grounds, in many cases. There are situations where the child-labourer is validly employed in circumstances that offer humane treatment, salutary conditions, adequate wages and hours of work, relative to the local conditions, and a sense of purpose to the young lives that otherwise would end up on the scrap heap. To impose a system of labelling upon products produced by such child labour would do nothing less than cause the child to lose his or her job, and to be tossed on to the streets as just one more demoralised, undignified child.[270]

8.117 There was support for a certification process to indicate if a product was made by child labour.[271] International Developing Youth Dignity suggested that it may not be able to identify products made by exploitative child labour but it would be possible to identify products that are not.[272] 'Free from exploited labour' labels could work in the same way as 'Australian made' and 'Dolphin Friendly' campaigns.[273]

8.118 It was argued that import bans on child labour products will not work, despite noble intentions.[274] It was suggested that Australia needs to look at

---

265 Worth, *House of Representatives Hansard*, 19 September 1994, p. 1012

266 Cleary, *House of Representatives Hansard*, 19 September 1994, p. 1005

267 Gow, Transcript Evidence, 9 July 1997, p. 932

268 Walker, Transcript Evidence, 9 July 1997, pp. 931-2

269 Schacht, The Australian Government Response to the Joint Standing Committee of Foreign Affairs, Defence and Trade Report, *A Review of Australia's Efforts to promote and Protect Human Rights*, *Senate Hansard*, 29 November 1995, Committees Reports: Government Responses, p. 4244

270 International Developing Youth Dignity, Submission No. 173, p. S 1152

271 Crighton, Transcript Evidence, 10 July 1997, p. 968; Cleary, *House of Representatives Hansard*, 19 September 1994, p. 1005; Dodd, *House of Representatives Hansard*, 19 September 1994, p. 1009

272 International Developing Youth Dignity, Submission No. 173, p. S 1155

273 *ibid*, p. S 1156

274 *ibid*, p. S 1155

mechanisms such as assistance with economic growth and provision of aid to alleviate poverty rather than impose trade sanctions that may increase poverty levels.[275]

8.119 Further, the sale of products in wealthy countries such as Australia could alleviate the risk of starvation. While poverty is a major contributor to child labour, child labour reinforces poverty because it prevents access to education.[276]

8.120 World Vision Australia suggested that core labour standards be incorporated in aid programs and policy dialogue with aid recipient countries and which could be observed by companies implementing aid projects.[277] They commented that:

> Australia's bilateral aid program can play a significant role in fighting against exploitative child labour. At the most basic level, the aid program can be instrumental in implementing key poverty-focused aid projects which directly benefit children. Projects should focus on basic education, primary health care and family income generation.[278]

8.121 The United Nations Association of Australia supported the implementation of the recommendations of the Tripartite Working Party of Labour Standards in the Asia-Pacific Region and urged the Government to contribute actively to ILO's work towards a Commission on Child Labour, planned for 1999.[279] Mr Kaye urged the Australian Government to raise the issue of child labour in international forums.[280]

8.122 ILO Convention 138 requires that the minimum age for employment is not less than the age of compulsory schooling and in any case not less than 15 years.[281] In developing countries this level is set at 14 and 12 for 'light work'.[282] Whether or not Australia ratifies ILO Convention 138 these standards should be met in relation to the employment conditions of children.

---

275 McMullan, Questions without Notice, *Senate Hansard*, 20 September 1994, p. 969

276 Crighton, Transcript Evidence, 10 July 1997, p. 968

277 Tripartite Working Party on Labour Standards, *Report on Labour Standards in the Asia - Pacific Region*, February 1996, p. 58 cited in World Vision Australia, Submission No. 135, p. S 826

278 World Vision Australia, Submission No. 135, p. S 826

279 The United Nations Association of Australia, Submission No. 38, p. S 214

280 Kaye, Transcript Evidence, 4 August 1997, p. 1094

281 The United Nations Association of Australia , Supplementary Submission No. 38a, p. S 940

282 *ibid*

8.123 The United Nations Committee on the Rights of the Child expressed concern that employment legislation did not specify a minimum age or prohibit the employment of children who are still in the compulsory education period.[283] The UN Committee also recommended that specific minimum age(s) be set for employment of children and suggested a need for clear and consistent regulations of maximum allowed work hours for working children above that age.[284]

8.124 Children may also be required to perform the exceptional burden of household chores preventing the completion of homework or socialising with their peers.[285] These exploitative conditions may be having a detrimental effect on the educational opportunities and social environment of children of migrant outworkers and on their family life generally.[286] Job Watch believed that a regulatory framework for child employment should cover wages and conditions, impact on education, occupational health and safety and moral well being.[287]

8.125 The Catholic Commission for Justice, Development and Peace commented that the reality is that children do work and that measures should be taken to increase the protection for these children rather than leaving them exposed to unsafe work practices.[288]

Drug abuse

8.126 The Catholic Commission for Justice, Development and Peace supported the development of a national drug strategy on prevention and harm minimisation.[289] Substance abuse is a major problem amongst the young people and children in Aboriginal communities and is related to trauma, racism, family breakdown and depression.[290] It was submitted that Commonwealth funding

283 United Nations Committee on the Rights of the Child, *Concluding observations Australia* (CRC/C/SR 403-405), 24-25 September 1997, p. 2

284 *ibid*, pp. 4-5

285 Senate Economics References Committee Inquiry into the *Outworkers in the Garment Industry*, December 1996, p. 49

286 *ibid*, p. 55

287 *ibid*, Evidence, p. E 482

288 Catholic Commission for Justice, Development and Peace, Submission No. 201, p. S 1373

289 *ibid*

290 Tasmanian Aboriginal Centre Inc, Submission No. 647, p. S 3244

did not reach Aboriginal services and the detoxification centre in Tasmania was not considered suitable for children.[291]

8.127 The State Council of the Presbyterian Women's Association expressed concern at the role of the media in educating the public to push for the legalisation of marijuana and heroin.[292]

Sexual exploitation and sexual abuse

8.128 The World Congress Against the Commercial Sexual Exploitation of Children adopted a *Declaration and an Agenda for Action* which will implement the *Convention on the Rights of the Child* and other relevant international instruments.[293] A National Agenda for Action to eliminate commercial sexual exploitation is to be prepared by the year 2000.

8.129 Australia is a very strong supporter of the development of an optional protocol on the sale of children, child prostitution and child pornography and has enacted the *Crimes (Child Sex Tourism) Amendment Act 1994.*[294] The National Children's and Youth Law Centre congratulated the Australian Government on the introduction of the child sex tourism legislation describing it as innovative and world-leading to combat exploitation of children across national boarders.[295]

8.130 ECP*at* Australia believed that while the Australian child sex tourism legislation was only part of the solution, the mobility of predatory paedophiles and child molesters who travel interstate or overseas allowed their previous offences to go undetected because of the inadequate transferral of information to relevant agencies.[296] They suggested the creation of the national data base on convicted child molesters to help alleviate some of these problems. However, where an Australian citizen is arrested by the local authorities in other countries and the Australian Federal Police or Interpol agencies are not involved, the offender can return to Australia where there is no record of the offence or subsequent monitoring.[297]

---

291 *ibid*, p. S 3245

292 State Council of the Presbyterian Women's Association, Submission No. 358, p. S 2047

293 World Vision Australia, Submission No. 135, p. S 809

294 Attorney-General's Department, Submission No. 133, p. S 770

295 National Children's and Youth Law Centre, Submission No. 321, Annexure 2, p. 21

296 ECPat Australia, Supplementary Submission No. 13a, p. S 2299

297 *ibid*

8.131 ECP*at* Australia was concerned that there was no responsibility or protocol to pass that information onto law enforcement agencies.[298] They added that there were a number of Australians in New Zealand prisons on child sex abuse cases.[299] ECP*at* suggested that the Department of Foreign Affairs and Trade consular offices provide information on all current child sex related cases involving Australian residents and citizens and the Department notifies the appropriate law enforcement agencies and/or the Australian Bureau of Criminal Intelligence of these occurrences.[300]

8.132 World Vision Australia raised a number of concerns in relation to the capacity for the Australian Federal Police to protect children overseas and the appearance of the children at the pre-trial hearing instead of using video interviews.[301] There are also difficulties bringing children to Australia to give evidence because of the social, cultural and other differences in the judicial systems.[302] Some Australian Federal Police have not had specific training in taking evidence from children and there need to be people trained in the social and cultural mores of that particular country.[303] Concern was expressed that there is no Australian Federal Police unit specifically looking at paedophile activity outside Australia.[304]

8.133 Five people have been charged with offences under the child sex tourism provisions of the Federal *Crimes Act 1914*, resulting in two convictions.[305] World Vision Australia believed that the legislation should be amended to enable protection by the Australian authorities for overseas child witnesses who will be required to give evidence in Australia, and these children should have the same legal proceedings/protections that apply to Australian child witnesses.[306] They believed that the Australian Government should make adequate resources available for the safety and care of the child and those caring for the child at a very early stage in the process; adequate briefing of child witnesses including briefing before they leave their home country;

---

298 Beddoe, Transcript Evidence, 10 July 1997, p. 957

299 *ibid*

300 ECPat Australia, Supplementary Submission No. 13a, p. S 2299; Beddoe, Transcript Evidence, 10 July 1997, p. 957

301 Walker, Transcript Evidence, 9 July 1997, pp. 929-30

302 Beddoe, Transcript Evidence, 10 July 1997, p. 955

303 *ibid*, p. 956

304 *ibid*, pp. 956-7

305 Attorney-General's Department, Response to issues raised by the United Nations Committee on the Rights of the Child, September 1997

306 World Vision Australia, Submission No. 135, p. S 812

investigators to be competent in cross cultural communications; Australian prosecutors to enable cultural sensitivities to be taken into account; and the use of competent translators.[307]

8.134 Some Australian men have been involved in child sex tourism and under the legislation it is now an offence to organise child sex tours.[308] The Australian and Fijian Governments are working together to address the problem of Australians committing child sexual abuse in Fiji.[309]

> Australians travelling overseas have been able to abuse children sexually and escape the consequences of their behaviour on return to Australia. The same conduct would be criminal if it were perpetrated in Australia. This conduct is repugnant to Australians and to the world, not least because of the devastating effect on children in the countries concerned. A secondary effect of this conduct is that it brings Australians into disrepute. Such conduct should be regarded as criminal, despite the fact that it occurs in other countries.[310]

8.135 There were 1300 participants from 125 countries in attendance at First World Congress against the Commercial Sexual Exploitation of Children, held in Stockholm, in August 1996 which called for specific urgent action to develop comprehensive strategies and measures to:

- reduce the number of children vulnerable to exploitation;
- nurture an environment responsive to children's rights;
- set goals, time frames and performance indicators;
- have national agendas for action by 2000;
- develop focal points for national and local cooperation; and
- develop relevant data bases by the year 2000.[311]

8.136 The Australian aid program provides financial support for prevention and rehabilitation programs for child prostitutes in South-East Asia:

---

307 *ibid*, p. S 813

308 Joint Standing Committee on Foreign Affairs, Defence and Trade (1994) *A review of Australia's Efforts to Promote and Protect Human Rights*, The Parliament of the Commonwealth of Australia, November 1994, p. 163

309 Newspaper reports in the *Sydney Morning Herald* 19 December 1997, the *Canberra Times* 19 December 1997, p. 6 and the *Daily Telegraph*, 19 December 1997, p.30

310 House of Representative Standing Committee on Legal and Constitutional Affairs, *Advisory Report, Crimes (Child Sex Tourism) Amendment Bill 1994*, AGPS, pp. 59-60

311 Children's Commissioner of Queensland, Submission No. 25, pp. S 140-1

> The aid program addresses the underlying causes of exploitative child labour through a range of social and economic development projects to seek to overcome poverty on a sustainable basis. In recognition of the urgency of the problem, the aid program provides assistance aimed directly at helping children now suffering from sexual exploitation or those who are at risk of exploitation. The aid program also supports activities which strengthened the capacities of labour departments to monitor legislation with regard to exploitative child labour, including child prostitution. In addition the aid program supports campaigns to raise public awareness of the issue.[312]

8.137 The Committee noted that a great deal has been done to eliminate sex tourism involving Australians. We are concerned, however, that there are a number of matters in relation to gathering of evidence, the court procedures and the protection of child witnesses and their families which can be further improved.

Paedophilia

8.138 The Committee will only deal with this issue briefly as much of the material is covered in detail in a number of recent reports such as the Royal Commission into the New South Wales Police Service Final Report, *The Paedophile Inquiry*, August 1997; Australian Institute of Criminology, *Paedophilia: Policy and Prevention*, September 1997;[313] and the Queensland Commissioner for Children's paedophilia inquiry.

8.139 The Children's Commissioner of Queensland was of the view that:

> It is clear that offences against the rights of children are not confined to any one State. The Wood Royal Commission, recently concluded in New South Wales, revealed not only an ingrained culture of abuse of children, to the extent of paedophilia, but also what amounted to a conspiracy of protection, within the education, police and the Court systems, at least. Some 10 suicides, of witnesses and potential witnesses, have occurred since the Wood Commission began, which have been credited to the potential exposure or conviction of these people.[314]

8.140 It was submitted that there needs to be a sharing of information between jurisdictions and nationally consistent legislation.[315] The Queensland Children's

---

312 McMullan, *Senate Hansard*, 1 December 1995, p. 4831

313 James M (1997) *Paedophilia: Policy and Prevention*, Australian Institute of Criminology Research and Public Policy Series No. 12

314 Children's Commissioner of Queensland, Submission No. 25, p. S 131

315 Defence for Children International Australia, *op cit*, p. 27

Commissioner added that a program of cooperation is being developed between law enforcement agencies to identify those involved in paedophile activities.[316]

> The Wood Commission made clear that mal-practice in one State can impact on another, with the revelation that a considerable number of school teachers, dismissed in NSW for suspected sexual offences against students, had possibly been employed in schools in other States. Action is now in hand to safeguard Queensland children against this possibility.[317]

8.141 The Australian Institute of Criminology suggested that:

> The integration of programs and activities at State, Territory and local government level[s] would reduce the possibility of gaps in any prevention program and also help to clarify specific roles and responsibilities. Ideally, this should be coordinated at Federal Government level to ensure the implementation of best practice models based on minimum standards.[318]

8.142 The Ethnic Child Care, Family and Community Services Co-operative Ltd suggested a national inquiry into paedophilia.[319] The NGOs would like to see a number of measures introduced including the investigation of police involvement in paedophilia, establishment of a national and Interpol databases on convicted child sexual offenders, and education programs and services for victims.[320] Save the Children Fund Australia also supported a national database on convicted child sex offenders for use in mandatory police checks related to employment involving contact with children.[321]

8.143 The Australian Institute of Criminology believed that strategies to prevent child sexual abuse should include prolonged mass media advertising, the production of educative materials and child personal safety programs.[322] The Institute also suggested that in addition to programs for children, specific sections of the population where there are families with special needs could be targeted.[323] Save the Children Fund Australia called for national education

---

316 Children's Commissioner of Queensland, Submission No. 25, p. S 146

317 *ibid*, p. S 131

318 James M (1997) *Paedophilia: Policy and Prevention*, Australian Institute of Criminology, Research and Public Policy Series No. 12, p. 2

319 Ethnic Child Care, Family and Community Services Co-operative Ltd, Submission No. 125, p. S 672

320 Defence for Children International Australia, *op cit*, pp. 27-28

321 Save the Children Fund Australia, Submission No. 80, p. S 394

322 James M (1997) *Paedophilia: Policy and Prevention*, Australian Institute of Criminology, Research and Public Policy Series No. 12, p. 2

323 *ibid*

programs on children's rights, the effects of sexual exploitation on children, and protection measures.[324]

8.144 The Queensland *Criminal Law Amendment Act 1997* increases penalties for various sexual offences involving children and intellectually disabled persons.[325] Disabled children are up to 700 per cent more likely to be abused than non-disabled children and special attention should be given to their protection.[326]

8.145 It was argued that the current number of child sexual abuse claims may reflect changing professional perceptions rather than the number of incidents.[327] The numbers may underestimate the problem because children are not able to tell someone or do not recognise the behaviour as abuse.[328] The Australian Institute of Criminology also called for programs for those who have already been abused and the rehabilitation of offenders.[329] Save the Children Fund Australia supported the call for access to counselling for those that have been abused.[330]

> The rights of children re sexual exploitation run second to the rights of defendants - already less powerless than their adult adversaries - the legal rules of evidence effectively stop most cases coming to trail and while there have been some changes to the system whereby some courts will allow evidence by closed circuit tv and disrobing of judiciary this is not standard practice.[331]

8.146 It was submitted that the school community does not guarantee protection for children.[332] One of the problems was considered to be that complaints are dealt with internally with a bias towards the rights of teachers and that fellow teachers do not understand or do not want to be involved.[333]

8.147 The Australian Institute of Criminology suggested that there is a need for civil and criminal liability for breaches of duty of care for institutions as

---

324 Save the Children Fund Australia, Submission No. 80, p. S 394

325 Premier of Queensland, Submission No. 144, p. S 954

326 De Lissa Institute of Early Childhood and Family Studies, Submission No. 146, p. S 3726

327 The Australian Association of Paediatric Teaching Centres, Supplementary Submission No. 10a, p. S 2280

328 *ibid*

329 James M (1997) *Paedophilia: Policy and Prevention,* Australian Institute of Criminology, Research and Public Policy Series No. 12, p. 2

330 Save the Children Fund Australia, Submission No. 80, p. S 394

331 Save the Children Fund Australia, Supplementary Submission No. 80a, p. S 2340

332 Gunawan, Submission No. 27, p. S 167

333 *ibid*, p. S 168

appropriate; tracking convicted offenders, guidelines for selection of staff and consistent mandatory reporting legislation nationally.[334]

8.148 The de Lissa Institute of Early Childhood and Family Studies recommended that:

> Child sexual abuse cases should be handled separately from the adult criminal court to reduce delays, the trauma for children and the risk that offenders will go without treatment and continue to offend.[335]

8.149 It was suggested that video evidence was not always used because judges and defence lawyers stressed that the accused has the right to have eye contact with the child and crown prosecutors believed that a tearful distressed child makes a deeper impression on the jury than a confident child on a TV screen.[336] It was submitted that:

> We have known for many years that the investigation and justice systems are adding to the psychological damage to child victims. Caring parents are increasingly refusing to expose their children to the courts with the result that offenders are free to re-offend. Justice Kingsley Newman and others have long been concerned, suggesting that these cases require a different kind of court which caters for children's developmental needs, reduces delay and the adversarial aspects of the adult system.[337]

8.150 The Australian Institute of Criminology also commented on issues in relation to the length of sentences compared to the time needed for treatment; monitoring after release; increasing awareness in the legal profession and the judiciary of the consequences of child sexual abuse; training for investigating police; rapid prosecutions to reduce trauma for victims; and video-taping of victims evidence.[338]

Age of sexual consent

---

334 James M (1997) *Paedophilia: Policy and Prevention,* Australian Institute of Criminology, Research and Public Policy Series No. 12, p. 3

335 De Lissa Institute of Early Childhood and Family Studies, Submission No. 146, p. S 3728

336 *ibid*, p. S 3727

337 *ibid*

338 James M (1997) *Paedophilia: Policy and Prevention* Australian Institute of Criminology Research and Public Policy Series No. 12, p. 2

8.151 Attorney-General's Department stated that there is no proposal to lower the age of consent to 10 years.[339] The Model Criminal Code Officers Committee [MCCOC] of the Standing Committee of Attorneys-General has proposed:

> ... in a discussion paper on sexual offences that Australia should have a universal age of consent of 16 years. However, the Committee recognised that some consensual sexual experimentation will occur between children, and considers that it would be inappropriate to convict both children involved of a serious sexual offence which attracts a maximum penalty of 12 years imprisonment. The Committee has therefore included a defence, modelled on a defence that exists in Victoria and the ACT, so that children between the age of 10 to 16 who engage in consensual sexual activity with a child within two years of their own age will not be guilty of an offence. There is a similar defence in Tasmania where the lower age is 12 years.
>
> Any sexual contact with a child who is under 10 will be criminal in all circumstances.
>
> The Committee [MCCOC] suggested that while it did not approve of children having sex at that age, this was not really something that should be covered by the criminal law. They believe the law should focus on rape (which is an offence regardless of the age of the victim) and the activities of older people who have sex with someone who is much younger.
>
> The discussion paper has not been endorsed by Attorneys-General ... the Commonwealth does not support the lowering of the present age of consent or any relaxation of the present laws relating to incest. The Attorney has directed the Commonwealth representative on the Committee not to support any recommendation for relaxation of the present laws in this area.[340]

8.152 The Australian Catholic Social Welfare Commission believed that the Model Criminal Code Officers Committee should revisit the issue of consent and develop a set of principles to guide public discussion on defining the determinant of consent rather than just putting forward a bare minimum.[341]

8.153 The National Council of Single Mothers and Their Children suggested a minimum of 12 years and commented in relation to the proposal in the Model Criminal Code that the age of consent be 10 years in some circumstances that in light of the existing difficulties in securing convictions against child sexual offenders, the 10 years age of consent will assist child molesters.[342]

---

339 Attorney-General's Department, Supplementary Submission No. 133a, p. S 3374

340 *ibid*

341 O'Connor, Transcript of Evidence, 29 April 1997, p. 197

342 National Council of Single Mothers and Their Children, Submission No. 139, p. S 915

8.154 The State Council of the Presbyterian Women's Association believed that the age of consent should be 18 as is already the case in some States.[343] They believed that the proposal in the Model Criminal Code to introduce the restricted age of consent for 10 to 16 year olds and no criminal record for those under 18 in certain circumstances to be unrealistic.[344] They suggested that if no criminal record was kept for under 18 year olds, that there should be a register to recognise repeat offenders.[345] Further, they added that if treatment was to replace or augment goal, then this should commence as soon as possible as younger offenders were more likely to respond and fewer children would be traumatised.[346]

8.155 The Women's Action Alliance opposed the lowering of the age of sexual consent according to the recommendations of the Model Criminal Code as it would contravene Article 34 of the Convention.[347] The National Council of Women of NSW Inc also expressed their concern at the possible lowering of the age of consent and commented that the area of consent is fraught with difficulty and it is often difficult to ensure that no pressure has been applied before consent is given.[348] The South Australian Child and Youth Health Council submitted that there was medical evidence that the early onset of sexual experience was a health risk for young people and the Council believed that 12 was too young although the Dutch use this as the age of consent.[349]

Sale, trafficking and abduction

8.156 A number of submissions considered that backdoor adoptions and surrogacy meant this was occurring in Australia. A number of submissions commented on backdoor adoptions.[350] Lutheran Community Care believed there should be more support for couples who are unable to have children to help them accept the situation.[351]

---

343 State Council of the Presbyterian Women's Association, Submission No. 358, p. S 2043

344 *ibid*

345 *ibid*, p. S 2044

346 *ibid*, p. S 2045

347 Women's Action Alliance, Submission No. 152, p. S 1013

348 National Council of Women of NSW Inc, Submission No. 216, p. S 1441

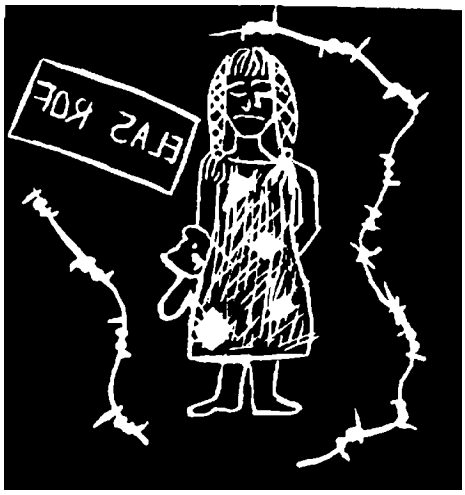
349 Castell-McGregor, Transcript of Evidence, 4 July 1997, p. 693

350 For example, Lutheran Community Care, Submission No. 61, p. S 315

351 *ibid*

8.157 The Caroline Chisholm Centre for Health Ethics believed that:

> Whether or not money changes hands in a surrogate mother contract, surrogacy involves trafficking in children. It demeans us as a society to be involved in the trafficking of children and it reduces children to a commodity which can be bought and sold. This is offensive to the dignity of children and therefore cannot be in the children's long term interests. In addition to the harm that may be done to children generally and to the child born of such an agreement, is the emotional harm that may be done to the other natural children of women who have acted as surrogates. While we do not believe that altruistic surrogacy should be a criminal act, we are concerned that in some states, and particularly in the ACT it is becoming an accepted practice ... We believe surrogacy agreements should not be legally recognised and advertising for surrogacy and commercial surrogacy should be legally banned.[352]



For sale

Kate Irwin, 12 years, Rainworth State School

Children belonging to a minority or an Indigenous group

8.158 The United Nations Committee on the Rights of the Child commented adversely on the standards of health and education of disadvantaged groups, particularly the Aboriginal and Torres Strait Islander young people, new immigrants, and children living in rural and remote areas in Australia, and the high rate of incarceration of children of Aboriginal and Torres Strait Islander children.[353]

---

352 Caroline Chisholm Centre for Health Ethics, Submission No. 66, p. S 334

353 United Nations Committee on the Rights of the Child, *Concluding observations Australia* (CRC/C/SR 403-405), 24-25 September, p. 5

8.159 There are 200 different ethnic groups resident in Australia and 7.4 per cent of Australia's young people were born overseas, with a further 22 per cent being from non-English speaking backgrounds.[354] The Convention provides the opportunity to reinforce multiculturalism as the articles guarantee certain basic cultural and other rights to minority ethnic, Indigenous and religiously diverse groups, but not much has been happening to encourage minority groups practicing their language, culture and religion.[355]

8.160 Children who lose the ability to communicate in their home language may only be able to communicate on a very superficial level with their parents.[356] Funding has been made available to assist children in childcare to maintain their language[357] and young people are more accepting of multi-culturalism.[358]

> Australians speak some 90 languages and some 25% of children enter preschool with another language than English as their first language, but there are practically no home language maintenance programs in preschools.[359]

8.161 The New South Wales languages policy leaves to the headmaster the discretion to include classes for particular ethnic groups but in Queensland, these rights are not recognised.[360] If culture and language are not taught together then the children may become alienated from both the Australian and ethnic communities.[361] If this is not the case the ethnic children must undertake this as an extra academic responsibilities outside regular school hours which may place an additional financial strain on the family.[362]

8.162 The Youth Social Justice Strategy included a comprehensive package of initiatives for disadvantaged young people, covering accommodation for the homeless, income support, labour market assistance, education, family reconciliation services, health and access services.[363] There will be a greater

---

354 Human Rights and Equal Opportunity Commission, Submission No. 336, p. S 1883

355 Ethnic Child Care, Family and Community Services Co-operative Ltd, Submission No. 125, pp. S 676-8

356 Germanos-Koutsounadis, Transcript of Evidence, 9 May 1997, p. 371

357 *ibid*, p. 373

358 *ibid*

359 Ethnic Child Care, Family and Community Services Co-operative Ltd, Submission No. 125, p. S 676

360 *ibid*

361 *ibid*, p. S 677

362 *ibid*

363 *Australia's Report under the Convention on the Rights of the Child*, December 1995, p. 247

emphasis on the needs of homeless young people, young offenders, Aboriginal and Torres Strait Islander young people, and disadvantaged young people from non-English speaking backgrounds.[364]

Aboriginal and Torres Strait Islander children

8.163 Contact Inc submitted that services for Aboriginal young people must be relative to their needs, culturally appropriate, managed and staffed by Aboriginals, recognise the importance of family and community ties and provide access to mainstream services.[365]

> Governments (commonwealth and state) are neither consistent nor strategic regarding the active upholding of human rights principles through policy and practice - young Aboriginal people are still removed from family support ... and still die in custody with frightening regularity. This area clearly demonstrates the weakness of a Convention which is "binding" on a superficial level, and is not tangibly translated into legislation, policy and practice.[366]

8.164 It was submitted that 54 per cent of the Northern Territory's funding from the Commonwealth is used on maintaining the Government.[367] It was also suggested that the $26 billion allocated to Aborigines did not end up where it was designated and that there was a need for better governance, and better targeting of money.[368] Mr Holder added that the Commonwealth was unable to trace monies supplied in untied grants and relied on the report of the Territory Government.[369] A lot of the funding for the Northern Territory is based upon services for the Aboriginal people and yet the impact is not apparent.[370]

8.165 The Alice Springs Youth Accommodation and Support Service Inc would also like to see greater emphasis placed on tied grants.[371] The Aboriginal community would like greater participation rights and there are existing Aboriginal organisations who would be able to provide the services for the community if funded.[372] It was argued, however, that providing money to

---

364 *ibid*

365 Contact Inc, Submission No. 75, p. S 378

366 Community Services Australia, Supplementary Submission No. 154a, p. 2390

367 Warden, Transcript of Evidence, 14 August 1997, p. 1521

368 Holder, Transcript of Evidence, 6 November 1997, p. 22

369 *ibid*, p. 24

370 *ibid*, p. 27

371 Wright, Transcript of Evidence, 6 November 1997, p. 42

372 Holder, Transcript of Evidence, 6 November 1997, pp. 27, 30

Aboriginal organisations may not always be the best option for the children because young people do not want to talk about child protection issues to a service where their family networks operate from.[373]

8.166 It was suggested that programs and services in welfare, education and health for Aboriginal children need to be better integrated and that coordination at the local level was a significant problem.[374] In some communities there are a plethora of organisations providing the same services resulting in competition for scarce resources and duplication of staff.[375]

8.167 The Tangentere Council is a peak organisation representing the 18 separately incorporated housing associations providing accommodation and community service to the traditional Aboriginal people of the Alice Springs region.[376] It was submitted that if a community is impoverished and cannot provide the essential goods and services, the children and the elderly are the main victims.[377]

Asylum seeking children

8.168 Article 37 of the *Convention on the Rights of the Child* states that:

> (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time.

8.169 Between November 1989 and September 1995, 215 children were kept in detention including 56 born in Australia.[378] ACFOA did not support the detention of children and added that on 22 May 1997, there were 54 children in detention in Australia.[379] They stressed that these children have committed no offence.[380] The Attorney-General's Department stated that children were kept in detention to enable the family to stay together although this may not always

---

373 Wright, Transcript of Evidence, 6 November 1997, p. 42

374 Burns, Transcript of Evidence, 14 August 1997, p. 1505

375 *ibid*

376 Bowden, Transcript of Evidence, 7 November 1997, p. 54

377 *ibid*, p. 56

378 Save the Children Fund Australia, Submission No. 80, p. S 391

379 Australian Council for Overseas Aid, Submission No. 220, p. S 1464

380 *ibid*

be in the best interests of the child when it may be in the best interests of the child to have the family being located outside of detention.[381]

> Currently the Minister for Immigration has the discretion to release children from detention, but not the authority to release their parents, which places parents and children in an invidious position. It is hardly in the best interest of the child to be separated from their parents nor is it in the child's best interests to remain incarcerated.[382]

8.170 Article 9 and the Preamble of the *Convention on the Rights of the Child* recognises the importance of the family unit to the child's development and well being. Article 9(1) states that States Parties shall ensure that a child shall not be separated from his or her parents against their will unless competent authorities believe it is necessary in the best interests of the child. The practice of releasing children on bridging permits allows the temporary release of children and not the parents which means in effect that the children stay in the detention centre with their parents.[383]

8.171 The *Migration Act 1958* authorises the arrest and detention of unlawful non-citizens. Mr Assadi suggested that the unofficial guidelines in relation to unaccompanied children need to be put into a more formal context.[384] He added that children should have access to legal assistance and proper counselling given their special vulnerability and their cases should be dealt with promptly to ensure they do not remain in detention any longer than is necessary.[385] The Refugee Council of Australia commented that:

> The guardianship of unaccompanied minors who are without effective support is an issue about which there appears to be some confusion. State government Departments of Community Services argue that such children are outside their mandate, not being permanent residents, but add that consideration on a case by case basis will be given to taking on guardianship if requested to by the Minister for Immigration. Irrespective of whether this formal relationship is established, there is no effective provision for any active support of the minor or monitoring of any care relationship that exists.[386]

---

381 Attorney-General's Department, Submission No. 91, *Inquiry into Detention Practices*, Joint Standing Committee on Migration, August 1993, p. S 858

382 Australian Council for Overseas Aid, Submission No. 220, p. S 1464

383 Human Rights and Equal Opportunity Commission, Submission No. 336, p. S 1934; Defence for Children International Australia, *op cit*, p. 26; Save the Children Fund, Australia, Submission No. 80, p. S 391

384 Assadi, Transcript of Evidence, 28 April 1997, p. 108

385 *ibid*

386 Refugee Council of Australia, Submission No. 118, p. S 578

8.172 ACFOA argued that if children have been in the community for 28 days before they make their application for asylum, they are permitted to remain there during the process. Those who have not been in the community for this period are kept in detention.[387] They suggested that while the dual approach may have a bureaucratic rationale, in terms of the Convention, the arbitrary segregation can not be justified.[388]

8.173 The example was given of an 11 year old boy was held in detention for 3 years even though his aunt was willing to take care of the child.[389] In Canada, community organisations and churches can take care of children seeking asylum.[390] There are European countries that release children in a sort of 'bailed condition' so that they can lead normal lives while they are in this long process.[391]

8.174 Red Cross Australia has administered the Asylum Seekers Assistance Scheme since 1993 and commented that the tighter guidelines limit access to the scheme and are unacceptable on humanitarian perspective and the families affected often have to depend on charitable organisations.[392]

8.175 World Vision Australia believed that as long as these children remain on Australian soil they are Australia's obligations. There was concern expressed about the physical conditions, educational facilities, legal rights, recreation and sporting opportunities, social support, trauma counselling and health care available to refugee children and the length of time in detention.[393] When legal aid is provided there may be substantial delays and asylum seekers are not informed of their rights under various United Nations Conventions.[394] The NESB Youth Issues Network expressed concern that the prison like environment and lack of access to support services may inflict further trauma on children held in detention.[395] The Human Rights and Equal Opportunity Commission expressed the concern that asylum seekers held in detention have only basic health care services, and may face difficulties in accessing education

---

387 Australian Council for Overseas Aid, Submission No. 220, p. S 1465

388 *ibid*

389 World Vision Australia, Submission No. 135, p. S 824

390 *ibid*

391 Rose, Transcript of Evidence, 10 July 1997, p. 990

392 Red Cross Australia, Submission No. 142, pp. S 933-5

393 World Vision Australia, Submission No. 135, p. S 823

394 *ibid*, p. S 824

395 NESB Youth Issues Network, Submission No. 194, p. S 1332

through government schools.[396] However, the United Nations High Commissioner for Refugees commented that Port Hedland facility is acceptable and children get education, their health and food.[397]

8.176 Further, the Refugee Council of Australia added that detached minors have been traumatised and some may have been tortured as well as being separated from their parents and there may be language, educational and other barriers present. They believed that the capacity of the existing services to meet their needs is questionable.[398] Mr Burdekin was of the view that if these children should be left in the community or at least given some contact with people of varying national background.[399] One example was a Somali family of five detained in Melbourne for six months living in a single room. The children were exhibiting symptoms of pre-detention trauma and this situation was against their best interests.[400]

8.177 It was submitted that the children are also in a potentially dangerous situation when detained with highly stressed adults and provided examples of roof-top protests and hunger strikes.[401] Other concerns included the variation in education and recreation opportunities, non-availability of appropriate food and lack of respite care for mothers with small children.[402]

8.178 The United Nations Association of Australia believed that the conditions at Port Hedland Detention Centre are in breach of Articles 31 and 37(b) of the Convention which recognise the right to recreation and cultural activities and that children will not be deprived of liberty unlawfully or arbitrarily, respectively.[403]

8.179 Red Cross Australia believed that detention is detrimental to a child's physical and emotional well being which are evident in changes in behaviour including loss of appetite, disturbed sleep, withdrawal from contact with both adults and children and loss of interest in play and activities.[404] These children

---

396 Human Rights and Equal Opportunity Commission, Submission No. 336, p. S 1933

397 Assadi, Transcript of Evidence, 28 April 1997, p. 108

398 Refugee Council of Australia, Submission No. 118, p. S 581

399 Joint Standing Committee on Foreign Affairs, Defence and Trade (1994) *A review of Australia's Efforts to Promote and Protect Human Rights*, The Parliament of the Commonwealth of Australia, November 1994, p. 183; Evidence, 1 June 1993, p. 44

400 Nolan, Transcript of Evidence, 9 July 1997, p. 815

401 Refugee Council of Australia, Submission No. 118, p. S 577

402 *ibid*

403 The United Nations Association of Australia, Submission No. 38, p. S 214

404 Red Cross Australia, Submission No. 142, p. S 937

may have witnessed and/or experienced violence and detention in Australia may exacerbate mental health problems resulting from pre-detention experiences.[405] The prolonged detention (between 2 and 8 months) of children who have witnessed or experienced torture and/or trauma contravenes Article 37 (b) and Article 39 of the Convention.[406]

8.180 The Australian Red Cross believed that there were inadequate outdoor play facilities in both the Sydney and Melbourne centres.[407] Mrs Nolan added that at neither the Sydney nor the Melbourne centres are there organised or supervised recreation activities outside school.[408] The Australian Red Cross believed that the physical layout at these centres is an inappropriate environment to house families for long periods and in Sydney there is no respite care available for families with small children and no family specific counselling or support services.[409]

8.181 Currently unaccompanied minors are released into the community while accompanied minors are held in detention. Save the Children Australia believed that accompanied minors should be released on bail type conditions in the care of community or welfare groups.[410]

8.182 The United Nations Committee on the Rights of the Child also expressed concern about the treatment of asylum seekers, refugees and their children and their placement in detention centres and added that government policy was not consistent with the principles of non-discrimination and basic rights.[411]

8.183 Community Services Australia submitted that Australia keeps children in detention for up to five years which is in breach of the Convention as Article 22 states that special protection should be granted to children who are refugees or seeking refugee status, and Article 37 prohibits unlawful arrest or deprivation of liberty.[412]

8.184 The Refugee Council of Australia referred to the United Nations Human Rights Committee decision that Australia was in breach of Article 9(1) and 9(4)

---

405 *ibid*

406 *ibid*

407 Nolan, Transcript of Evidence, 9 July 1997, p. 809

408 *ibid*, p. 810

409 *ibid*

410 Save the Children Fund Australia, Submission No. 80, p. S 391

411 United Nations Committee on the Rights of the Child, *Concluding observations Australia* (CRC/C/SR 403-405), 24-25 September 1997, p. 3

412 Community Services Australia, Supplementary Submission No. 154a, pp. S 2389-90

of the *International Covenant on Civil and Political Rights* in relation to the mandatory, non-reviewable detention regime.[413] The Council suggested measures including the provision of welfare assistance, emergency medical care, changes to detention and release conditions and consideration of claims for refugee status for all members of the family.[414]

8.185 In relation to the loss of citizenship for a child, in Australia a child may only lose his or her Australian citizenship in certain circumstances. The *Australian Citizenship Act 1948* precludes the loss of citizenship of a child where this would render the child stateless or one responsible parent of the child is still an Australian citizen. The Ethnic Child Care, Family and Community Services Cooperative believed that children of illegal immigrants who are born in Australia should have the same rights as other children and be given full citizenship status.[415] It was argued that if the parents are seeking citizenship on refugee grounds then the children have no citizenship.[416] They expressed concern that children of immigrants whose parents experience hardship cannot obtain assistance for two years or attend child care services.[417] They added that children who are deported with their parents are sometimes at risk, and have limited opportunities in life which impacts on their quality of life.[418]

8.186 The Refugee Council of Australia submitted that there was no provision for systematic representation of unaccompanied minors who are not Australian citizens, and it is not within the mandate of State government departments.[419] The Department of Immigration currently does not have procedural guidelines for case officers on how to deal with child claimants and progress on developing guidelines has been slow.[420] The Refugee Council of Australia added that the lack of access to appropriate legal or technical support made it difficult to be confident that a child's claim is adequately articulated if the child does not understand why their parents have sent them to Australia.[421] The example was given of a parent who is a political dissident but the child may not

---

413 Refugee Council of Australia, Supplementary Submission No. 118a, p. S 1586

414 Refugee Council of Australia, Submission No. 118, pp. S 582-3

415 Germanos-Koutsounadis, Transcript of Evidence, 9 May 1997, p. 375; Ethnic Child Care, Family and Community Services Co-operative Ltd, Submission No. 125, p. S 668

416 Giglio, Transcript of Evidence, 9 May 1997, p. 375

417 Ethnic Child Care, Family and Community Services Co-operative Ltd, Submission No. 125, p. S 669

418 *ibid*

419 Piper, Transcript of Evidence, 9 May 1997, pp. 456-7

420 Refugee Council of Australia, Submission No. 118, p. S 580

421 Piper, Transcript of Evidence, 9 May 1997, p. 457

understand the nature of their father's, mother's or family's political activities and therefore the risk to themselves.[422]

8.187 There may be situations where children had different and possibly stronger claims than other members of the family and the child should have adequate representation.[423] This may occur in situations such as underage conscription, or female genital mutilation, trafficking or sexual exploitation, forced or bonded labour or slavery, being targeted because of the activities of the parents or areas where bandit groups target children.[424] If the child is deemed to be a refugee, the family would have refugee status conferred.[425]

> Most asylum seekers are unable, however, to access free advice and thus either lodge unsupported applications or have to pay commercial rates ... The policy with respect to asylum seekers in detention is that they will be provided with advice if they request it. They are not advised of their right to seek this advice or of its availability.[426]

Refugee children

8.188 The United Nations High Commissioner for Refugees submitted that the Convention promotes the best interests of the child therefore treats asylum seekers as children first and asylum seekers second.[427] There are over 13 million refugee children in the world.[428] The High Commissioner has a budget of $1.5 billion and there are 26 million refugees in 104 countries.[429] More than half of the world's refugees are children.[430]

8.189 Australia's resettlement policy accommodates several thousand refugees and Australia also provides funding for UN humanitarian agencies.[431] Mr Assadi expressed his gratitude at Australia maintaining its funding levels

---

422 *ibid*

423 Bitel, Transcript of Evidence, 9 May 1997, p. 457

424 Piper, Transcript of Evidence, 9 May 1997, p. 458; Refugee Council of Australia, Submission No. 118, p. S 579

425 Refugee Council of Australia, Submission No. 118, p. S 580

426 *ibid*

427 United Nations High Commissioner for Refugees, Office of the Regional Representative for Australia, New Zealand and the South Pacific, Submission No. 67, p. S 342

428 *ibid*, p. S 341

429 Assadi, Transcript of Evidence, 28 April 1997, p. 103

430 Bitel, Transcript of Evidence, 9 May 1997, p. 453

431 Assadi, Transcript of Evidence, 28 April 1997, p. 106

despite budgetary restrictions last year.[432] The United Nations Committee on the Rights of the Child encouraged Australia to achieve the 0.7 per cent of Gross Domestic Product target for international assistance to developing countries.[433] The United Nations High Commissioner for Refugees was pleased with the basis on which Australia adjudicates refugee claims and Australia's contribution.[434]

8.190 The Joint Standing Committee on Migration Regulations report on *Australia's Refugee and Humanitarian System: Achieving a balance between refuge and control* dealt with a number of the issues raised in this inquiry and these will not be repeated here.[435]

8.191 Under the current system asylum seekers are ineligible for financial support and if they are eligible to work they may be covered by Medicare but their dependents are not with the result that the children are effectively denied access to medical care.[436] The Refugee Council of Australia, however, expressed concern in relation to proposed policy changes which may make it more difficult for adults to support their children during determination.[437]

8.192 New procedures have led to the introduction of a system where claims are processed with minimal information, however, it was submitted that this may disadvantage women and children who do not speak the language and who have been through trauma and may have difficulty in preparing material in time.[438] The Refugee Council of Australia believed it is unrealistic to expect genuine asylum seekers to be able to apply within the 14 day limit.[439]

8.193 Further, despite the new procedures, detention in many cases is prolonged with children in Sydney being detained for more than six months.[440] An alternative detention model is being developed which will address issues

---

432 *ibid*

433 United Nations Committee on the Rights of the Child, *Concluding observations Australia* (CRC/C/SR 403-405), 24-25 September 1997, p. 1

434 Assadi, Transcript of Evidence, 28 April 1997, p. 106

435 Joint Standing Committee on Migration Regulations (1992) *Australia's Refugee and Humanitarian System: Achieving a balance between refuge and control*, August 1992, Parliament of the Commonwealth of Australia.

436 Refugee Council of Australia, Submission No. 118, p. S 574

437 Piper, Transcript of Evidence, 9 May 1997, p. 454

438 *ibid*, pp. 460-1

439 Refugee Council of Australia, Submission No. 118, p. S 574

440 *ibid*, p. S 576

such as the detention of unauthorised arrivals, the duration of the detention and the possibility of review by an external body.[441]

8.194 In a preliminary report, the Human Rights and Equal Opportunity Commission commented that the alternative detention model provides a legislative and regulatory framework for a more flexible and appropriate detention regime with increasingly liberal provisions during progress through the determination process.[442] HREOC suggested amendments to the model in relation to the timing of release and additional mechanisms for review of adverse decisions.[443]

8.195 The Committee believes that the Government, as a matter of urgency, must look at all possible options to hasten the processing of applications to ensure that children are not detained any longer than is absolutely necessary.

Children in armed conflicts

No war

Micheil Balfour, 12 years, Rainworth State School

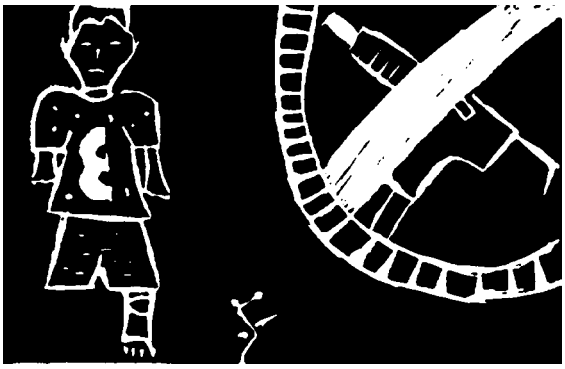
441 Piper, Transcript of Evidence, 9 May 1997, p. 464

442 Human Rights and Equal Opportunity Commission *Report to the Federal Attorney-General: Preliminary report on the detention of boat people,* HRC Report No. 5, November 1997, p. 50

443 *ibid*, pp. 52-3

8.196 War has claimed the lives of two million children between 1985 and 1995, left five million disabled, ten million psychologically traumatised, 12 million uprooted from their homes and others exposed to disease and malnutrition.[444]

8.197 Medical Association for Prevention of War (Australia) supported the recommendations in the Joint Standing Committee on Treaties' Fifth Report to destroy Australia's stockpile of anti-personnel landmines.[445] Red Cross Australia commented that anti-personnel landmines violate fundamental rights of children such as Articles 1, 19, 27, 24, 28 and 31 of the Convention.[446] Further, the countries where they are most prevalent are often unable to provide the special care needed for disabled children affected by landmines.[447] Of the children who have survived landmine explosions in Angola and Mozambique, only 10 to 20 per cent receive prothetic devices.[448]



Ban guns

Eliot Dittmer, 11 years, Rainworth State School

8.198 Medical Association for Prevention of War (Australia) also urged Australia to promote all peaceful means of conflict resolution particularly in our region and an increase in Australia's overseas aid and to work towards a ban on nuclear weapons.[449]

444 Medical Association for Prevention of War (Australia), Submission No. 403, p. S 2262

445 *ibid*, pp. S 2266-7

446 Red Cross Australia, Submission No. 142, p. S 933

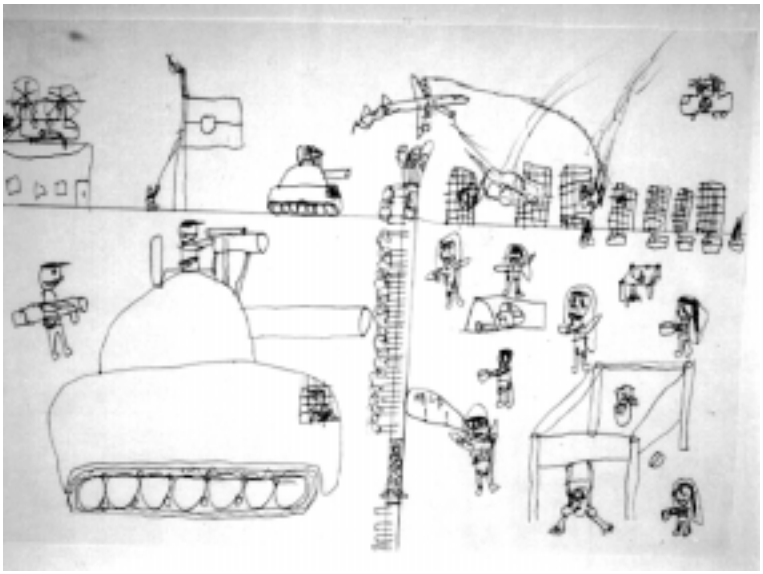
447 *ibid*

448 Medical Association for Prevention of War (Australia), Submission No. 403, p. S 2266

449 *ibid*, pp. S 2268-9

Participation in hostilities

8.199 A number of countries preferred 18 years as the minimum age for participation in hostilities.[450] The engagement of 15 year olds as the minimum age for participation in armed conflict as required by the Convention, was considered by some to be incompatible with Article 3(1) 'in the best interests of the child'.[451] The age of recruitment is 18 in countries such as Canada, Japan, Kuwait, Nepal, Nigeria, Pakistan, Bahrein, Bhutan, Rwanda, Sudan and Zimbabwe.[452] Australia supports the development of the optional protocol on children in armed conflict.[453] Fifteen was considered too young to be involved in hostilities[454] and some expressed concern that the United Nations would support the participation of 15 year olds in armed conflict.[455]



Children have a right to be protected from war

David Benyon, 9 years, Woodridge State School

8.200 It was suggested that Australia should support the objective of 18 as the minimum age for armed conflict under the age of 18 years although Australia's policy is currently 17 years.[456] Personnel in the Australian armed forces would

---

450 *The Convention on the Rights of the Child* http:/www.un.org/depts/treaty/final/ts2/newfiles/part_boo/iv_boo/iv_11.html

451 *ibid*

452 Red Cross Australia, Supplementary Submission No. 142a, p. S 2576

453 Attorney-General's Department, Submission No. 133, p. S 770

454 Lutheran Community Care, Submission No. 61, p. S 315

455 Jobses, Submission No. 470, p. S 2693

456 Purnell, Transcript of Evidence, 29 April 1997, p. 113; Red Cross Australia, Submission No. 142, p. S 933

not normally be deployed in armed conflict and the matter is under active consideration by the Australian Government.[457] The Australian Navy has ceased recruiting 16 year olds but it was suggested that a stronger stand would be to raise this to 18 and Australia's support in this would add weight to the efforts of UNICEF and others to achieve this goal.[458]

Abuse and neglect

8.201 Action for Children commented that Australia has the second highest incidence of child abuse and neglect in the OECD group of countries.[459] There have been a number of inquiries and reports on Australia's performance in recent years such as *Where Rights were Wronged*[460], and the *Commonwealth's role in preventing child abuse*.[461] These reports described child protection services as inadequate, uncoordinated, patchy, inaccessible or inappropriate referring of the lack of uniformity in legislative schemes and policy approaches and variable according to a range of arbitrary factors such as place of residence.[462]

8.202 It was submitted that statistics are difficult to compile because of the interstate differences in the definition of abuse and neglect.[463] There were 91 734 reports of child abuse in 1995-6 compared to 49 000 in 1990-1 and the number of cases being substantiated increased by 41 per cent.[464] There were 71 652 reports of child abuse and neglect in 1995-96 which were serious enough to warrant investigation, a decrease of 7 per cent on the 1994-95 figure.[465] Of these 49.9 per cent of the cases finalised had been substantiated and in all states except Tasmania and Queensland case substantiation rates

---

457 *Australia's Report under the Convention on the Rights of the Child*, December 1995, p. 323

458 Medical Association for Prevention of War (Australia), Submission No. 403, p. S 2263

459 Action for Children, Supplementary Submission No. 387a, p. S 3421 also comment, however, on the difficulty in compiling national statistics as the definition of abuse and neglect varies among the States and Territories as does the form in which the data is collected; see also the Australian Institute of Health and Welfare, *Australia's Welfare 1997,* 'Children in Need of Protection', Canberra, Chapter 6

460 Brewer G and Swain P (1993) *Where Rights are Wronged: A critique of Australia's compliance with the United Nations Convention on the Rights of the Child,* - A report of the National Children's Bureau of Australia for the Children's Rights Coalition

461 Australian Institute of Family Studies (1994) *The Commonwealth's Role in Preventing Child Abuse: A report to the Minister for family Services*

462 Human Rights and Equal Opportunity Commission, Submission No. 336, pp. S 1896-7

463 Action for Children, Supplementary Submission No. 387a, p. S 3421

464 Tucci, Transcript of Evidence, 10 July 1997, p. 1069

465 Human Rights and Equal Opportunity Commission, Submission No. 336, p. S 1895

increased.[466] Thirty six per cent of reports concerned children 4 years of age or under.[467] In 79 per cent of cases the natural or adopted parents were the maltreaters.[468]

Definition of abuse

8.203 There was still considerable confusion within the community on what constitutes abuse and what was acceptable discipline.[469] A report was prepared on behalf of the Commonwealth Government by Dr Judy Cashmore and Nicola De Haas entitled *Legal and Social Aspect of the Physical Punishment of Children.* The National Council of Women of Tasmania believed that:

> various forms of 'acceptable discipline' versus 'abuse' need to be clearly defined in law. For example, some young children are required to fast and dance for 3-4 hours before going to school, so they are often too tired and weak to learn. Other children are allowed to go to school without breakfast, or lunch. These things happen consistently throughout Australia. Should they be classed as 'abuse', or as acceptable, cultural norms.[470]

8.204 The Attorney-General's Department commented that the term 'punishment' or 'discipline' implies a justifiable chastisement.[471]

> It was open to the drafters to use the terms 'punishment' or 'discipline' if they had intended that Article 19 was to require State parties to ban all forms of corporal punishment. It is clear from the *travuax preparatoires* that there was no discussion of the use of reasonable physical chastisement. The absence of discussion on the question of whether moderate and reasonable physical punishment of a child is destructive of the child's physical integrity, results in physical or mental injury, or constitutes abuse in the *travaux preparatoires* lends support to the proposition that there was no intention to prohibit the limited, moderate and reasonable smacking of a child in the normal course of chastisement.[472]

8.205 The Human Rights Commissioner commented that there was variation nationally as to the definition of the child in terms of age and what constituted

---

466 *ibid*, p. S 1896

467 Broadbent A and Bentley R *Child Abuse and Neglect in Australia 1995-1996*, Australian Institute of Health and Welfare, Canberra 1997 cited in Action for Children, Supplementary Submission No. 387a, p. S 3421

468 National Children's and Youth Law Centre, Submission No. 321, Annexure 2, p. 81

469 Latter, Submission No. 589, p. S 3063; Stockhall, Submission No. 37, p. S 205

470 National Council of Women of Tasmania, Submission No. 52, p. S 283

471 *ibid*, p. S 3371

472 *ibid*, p. S 3372

abuse and that child abuse was a national problem which would not be effectively addressed by a State-by-State approach.[473] There was also a call for the parameters of 'reasonable' physical punishment to be defined in law.[474]

8.206 The Children's Commission of Queensland commented that decisions on intervention are difficult in the light of the differences in the views of parents and social workers as to what constituted abuse and there are also differing views among welfare workers, health professionals, law enforcement agents and the judiciary.[475]

> 'Parents see child abuse as secondary to the discipline problem they have in the home and that physical abuse arises from that problem, from time to time. A large percentage of such children exhibited behavioural problems. Social workers, on the other hand, regard abuse as the most important aspect. For them, discipline in the family unit is a secondary problem. As a consequence, the intervention process starts from divergent views and rarely improves. All parties should be working together to maintain and reinforce the family unit. Children should only be removed from the family unit if the child was still significantly at risk and removal was in the child's best interests. There is frequent disagreement between the parties about ongoing risk. The majority of children did not want to be separated from the family, they just wanted the abuse to stop.[476]

8.207 Mr Khor submitted that Article 37 which bans torture or cruel treatment and has been construed by some to incorporate discipline such as a smack on the bottom:

> A few unrestrained parents thrashing their children does not make the traditional smacking on the bottom a torture or cruel treatment. This section must be redrafted to allow reasonable and low level physical discipline by parents to their child.[477]

8.208 It was suggested that the way to ensure that children appreciate that rights co-exist with responsibilities was to enable parents to discipline them 'as they deem necessary'.[478] Although there are domestic violence situations where

---

473 *Gold Coast Bulletin*, Tuesday February 18, 1997, PM 'Neglecting Children'.

474 Child Health Council of South Australia, Supplementary Submission No. 151a, p. S 2384; National Council of Women of Tasmania, Submission No. 52, pp. S 283-4

475 Children's Commissioner of Queensland, Submission No. 25, p. S 138

476 Summary based on *Child and Child Abusers - Protection and Prevention*, Waterhouse (ed), Kingsley Publishers, London, 1993.

477 Khor, Submission No. 623, p. S 3169

478 Kuchel, Submission No. 29, p. S 176

adults rationalise their abuse as corporal punishment, it was suggested that the vast majority of adults use physical discipline as a deterrent, not as violence.[479]

8.209 A number of submissions emphasised that they did not believe that 'smacking' equated with abuse.[480] Ms Leslie commented that that abuse occurs when the parent has allowed the child to continue the unacceptable behaviour until they lose control.[481] It was suggested that the mere knowledge by the child that if it steps out of line, the consequences will be a 'slap' is enough to deter most children.[482]

8.210 Defence for Children International commented that:

> We would not advocate state intervention in relation to a parent giving a child a spank in a situation where the child is being disciplined for some minor problem and it was limited to the quick spank. What we are saying, though, is that if that develops into a level of physical abuse of the child which leaves lasting pain or lasting marks or some kind of emotional harm to the child, that is the sort of situation where the state has a responsibility to protect the child.[483]

8.211 It was argued that hitting children does not solve the problem for them or anyone else and using other techniques served as examples to children that violence was not a way to solve problems.[484] It was suggested that parents have powers in terms of restricting access to facilities and pleasures or other types of parental discipline.[485]

8.212 National Council of Single Mothers and Their Children submitted that only very serious adult assaults are prosecuted but it does set a principle that adult citizens can not go around threatening or acting violently towards each other.[486] A penalties approach may not be as effective as addressing the processes of implementation and the resourcing of child protection services.[487] There is also the issue of unreported assaults and reported assaults that are not acted on to the extent that reporting is seen to be a useless exercise.[488] It was

---

479 Evans, Submission No. 388, p. S 2178

480 Majdali, Submission No. 32, p. S 185

481 Leslie, Supplementary Submission No. 22a, p. S 3717

482 Kuchel, Supplementary Submission No. 29a, p. S 1569

483 Bayes, Transcript of Evidence, 28 April 1997, p. 94

484 McInnes, Transcript of Evidence, 4 July 1997, p. 744

485 *ibid*, p. 745

486 *ibid*

487 *ibid*, p. 746

488 *ibid*

suggested that the resource level of departments dealing with child welfare and the quality of service they provide may be related to the degree of protection extended to children rather the penalties and the legislation and the issue is one of resourcing and the implementation of existing laws.[489]

8.213 The National Council of Women of Tasmania did not condone any form of child abuse but commented that parents less able to communicate and utilise alternative discipline effectively may administer reasonable physical punishment in the child's best interests.[490]

8.214 It was submitted that the consequences of this confusion are evident in the hospital system where children are injured because they are not disciplined.[491] There is a need for educational processes in our society.[492] The Australians Against Child Abuse suggested that there needs to be some community debate about appropriate physical discipline for children.

8.215 While it would be difficult to legislate against parents physically disciplining their children, a benefit of legislation would be to clarify the rights of children in relation to physical abuse because currently adults can only be charged with assault.[493] It was argued that 'assault' was too 'blunt' a term to use for the physical discipline of children and a definition of physical discipline of children could be helpful.[494]

8.216 The NGOs suggested a number of improvements including the removal of defence of 'reasonable chastisement'; a national public education campaign emphasising the child's right to physical integrity; counselling of parents of abused children; training for judges and magistrates; consistent legislation on child welfare; increased resources to child protection agencies; uniform standards and accreditation of service providers; national implementation of the National Child Abuse Protection Strategy; monitoring of outcomes; and respite and child care places for abused children.[495]

8.217 Ozchild supported the promotion of alternate forms of discipline, and education about what constituted children's rights.[496] Parents should be trained

---

489 *ibid*

490 National Council of Women of Tasmania, Submission No. 52, p. S 283

491 Grant, Transcript of Evidence, 4 August 1997, p. 1127

492 Flavell, Transcript of Evidence, 6 August 1997, pp. 1365-6

493 Tucci, Transcript of Evidence, 10 July 1997, p. 1072

494 *ibid*

495 Defence for Children International Australia, *op cit*, pp. 19-20

496 Medica, Transcript of Evidence, 9 July 1997, p. 922

in positive child management techniques as an alternative to smacking and it was suggested that parents are not always aware of alternative methods, and therefore if legislation was to be successful in curtailing physical punishment, parent education must be given a priority.[497]

Sexual abuse

> One error has been to equate child abuse with child sexual abuse when only about one in five cases of child abuse is sexual.[498] ... a NSW government report showed that the person most likely to abuse a child is not a stranger nor a father or stepfather but the child's mother. This accounts for 53 per cent of all cases as opposed to natural fathers who account for 28.5 per cent.[499]

8.218 Reports of abuse have increased over the last decade, however, this may reflect mandatory reporting requirements in some jurisdictions or enhanced community awareness. However, the shame and secrecy associated with sexual abuse may mean that some cases are never reported to the relevant authorities.[500] Cases may not be reported because children are aware of the impact on themselves and their families, the difficulties in approaching authorities, delays in the system, difficulties in providing evidence and getting a successful prosecution.[501] A survey conducted by Kids Help Line as to why children and young people are reluctant to report child abuses found that child protection services are not seen as accessible, child-friendly or well marketed and do not appear to be centred on children.[502] Young people did not know that services existed; were worried about the consequences for their family; and thought agencies would not believe them.[503]

8.219 Research at the University of Ballarat has shown that of the intrafamilial rape trails conducted in the County Court of Victoria in 1995, most of the trials involve father-daughter rape and 'incest' outnumbered any other major criminal

---

497 De Lissa Institute of Early Childhood and Family Studies, Submission No. 146, p. S 3724

498 Australian Institute of Health and Welfare (1995) *Child Abuse and Neglect in Australia 1993-94* cited in Coochey J (1996) 'The Sex Research Industry' *The Independent Monthly* July 1996, pp. 32

499 Dawson Child Protection Data Analysis quoted in Child Abuse and Research Program Paper No. 2, NSW Department of Family and Community Services, cited in Coochey J 'The Sex Research Industry' *The Independent Monthly* July 1996, pp. 32

500 National Children's and Youth Law Centre, Submission No. 321, Annexure 2, p. 81

501 *ibid*, pp. 84-6

502 Kids Help Line, Submission No. 148, p. S 982

503 *ibid*

proceedings brought before the Court from 1990 - 1994.[504] Others submitted that the greatest risk to children in households was from an adult male resident who was not the father.[505] Judge Jackson gave the example of the Kalgoorlie Court where every case for three weeks dealt with by one judge was the sexual abuse of children by adults usually in their immediate family.[506]

> ... it is within the family that most forms of child abuse, in the form of neglect, physical violence, emotional abuse/deprivation, rape and sexual assault and many forms of exploitation and manipulation occur. Despite the lengthy statistics, the reports, conferences, workshops, anecdotal evidence and case studies the issue of widespread violation of children and young adults within 'the family' continues.[507]

8.220 The United Nations Committee on the Rights of the Child expressed their concern at the extent of child abuse and violence within the family.[508]

> ... cases of abuse and ill-treatment of children, including sexual abuse within the family, should be properly investigated, sanctions applied to perpetrators and publicity given to decision taken in such cases. Further measures should be taken with a view to ensuring the physical and psychological recovery and social reintegration of the victims of abuse, neglect, ill-treatment, violence or exploitation, in accordance with article 39 of the Convention.[509]

8.221 National Council of Single Mothers and Their Children did not believe that there should be more draconian laws, nor should processes change so that there is a greater risk of sending innocent people to gaol. They suggested that what was needed was an improvement to the evidentiary components in dealing with assaults on children, preferably as a uniform national standard or approach.[510]

8.222 It was submitted that it is difficult for children to raise a complaint about abuse, for all sorts of reasons including it may result in their removal from the home.[511] There is also the problem of getting offenders to court.[512] It was

---

504 Victorian Community Council Against Violence (1995) *Sentencing in Victoria: discussion paper*, pp. 15-16 cited in University of Ballarat, Submission No. 90, p. S 430

505 Endeavour Forum, Submission No. 8, p. S 27

506 Jackson, Transcript of Evidence, 3 July 1997, p. 589

507 University of Ballarat, Submission No. 90, p. S 430

508 United Nations Committee on the Rights of the Child, *Concluding observations Australia* (CRC/C/SR 403-405), 24-25 September 1997, p. 3

509 *ibid*, p. 4

510 McInnes, Transcript of Evidence, 4 July 1997, p. 748

511 Staniforth, Transcript of Evidence, 29 April 1997, p. 139

512 *ibid*

submitted that there were hundreds of cases that were not prosecuted for a variety of reasons.[513]

Support services

8.223 The lack of adequate interstate links in relation to child protection means that some children are unsupported and at risk.[514] The Australian College of Paediatrics considered the dissolution of the National Child Protection Council removed a source of national leadership.[515] The National Prevention Strategy for Child Abuse and Neglect was reviewed in 1996 and a further $4.3 million allocated over 2 years for improved parent education programs.[516]

8.224 National Legal Aid expressed their concern that:

> ... most legislation in this area is under State or Territory control. The Commonwealth in its retraction from a wider involvement in Legal Aid has expressly renounced any financial liability for legal services provided to protect children under that legislation ... The Committee must acknowledge that there are a (thankfully small) number of instances where children are the victims of abuse by both parents and they have no external assistance available to them. Legal Aid Commissions play a vital role - indeed it is not exaggerating to say a life saving role - in protecting from these most terrible crimes.[517]

8.225 The Standing Committee of Community Services Income Security Administrators the Commonwealth and States have been working towards greater coordination in child abuse prevention measures.[518] New systems have been developed to identify actual and potential maltreatment as opposed to more generic problems allowing resources to be applied to genuine cases.[519] However, if there are not adequate support services in place, children and their families do not receive support until they are considered to be at risk of 'significant harm' at which stage dealing with the situation has become very resource intensive[520] and because of the under-resourcing, it can take months

---

513 *ibid*, p. 140

514 Alice Springs Youth Affairs Coordination Committee, Submission No. 182, p. S 1227

515 Australian College of Paediatrics, Submission No. 97, p. S 473

516 Department of Health and Family Services, Submission No. 137, p. S 878

517 National Legal Aid, Submission No. 106, p. S 513

518 Department of Health and Family Services, Submission No. 137, p. S 872

519 Australian Catholic Social Welfare Commission, Submission No. 124, p. S 652

520 *ibid*

before a case is investigated.[521] National Council of Single Mothers and Their Children added that the current system is limited and uneven because of the bureaucratic and theoretical divisions between domestic violence and child protection and the uncertainty of funding for services.[522]

8.226 National Legal Aid made the comment that solicitors complained of the insufficiency of services available to children and the abuse of children within places providing residential care services for abused children and children with mental illness.[523]

Legal processes

8.227 Ms Taylor reported that research has shown that trauma associated with sexual abuse has more serious consequences for victims of intrafamilial rape and sexual assault because they are multiple and the perpetrator has a moral and social responsibility to care for the child.[524] She commented that despite the fact that rape and sexual assault within the family is the most common sexual crime, the focus by the law and governments is on paedophilia.[525] She added sexual abuse against children can go undetected or unreported or ignored for varying lengths of time.[526] She suggested that often police do not initiate legal proceedings because of the difficulty about charges as required by procedural law; cases do not proceed because of the trauma to the child, the high acquittal rate and successful appeals and the lack of morale among those who prosecute in this area.[527]

8.228 Ms Taylor submitted that the notion of fairness to the accused often means that evidence that would support the case of the victim can be restricted or can be ruled inadmissible on pedantic technicalities or irrational reasoning by judges.[528] Procedural law does not always enable the child to present their evidence in an appropriate manner for their age.[529]

---

521 Ethnic Child Care, Family and Community Services Co-operative Ltd, Submission No. 125, p. S 671

522 National Council of Single Mothers and Their Children, Submission No. 139, p. S 914

523 National Legal Aid, Submission No. 106, p. S 514

524 University of Ballarat, Submission No. 90, p. S 431

525 *ibid*, p. S 430

526 *ibid*, p. S 431

527 *ibid*

528 *ibid*

529 *ibid*, p. S 432

8.229 Other issues raised were the attacks on the character and reputation of the child as a 'prosecutrix' in these proceedings in which the child has no right to separate legal representation[530] and the lack of records to ensure that the perpetrators do not have continued access to the child.[531] It was submitted that the role of the Crown was to prove the charges not to protect the rights of the witness, while the role of the defence was to protect the client; therefore, no one protects the child as a witness.[532] Victims as witnesses have attempted suicide and/or needed intense counselling and may be rejected, abandoned and subjected to revenge from the family members who support the perpetrator.[533] The publication of perpetrators names may also have a negative effect in that it often identifies the child which may result in children being treated badly at school and the whole extended family suffering the ramifications.[534] Appropriate legislation is still to be introduced to protect the rights of children and young people in legal trials.[535]

8.230 National Council of Single Mothers and Their Children expressed their concern that in cases of sexual assault on children if there were no witnesses and no forensic evidence the child's statements can be discounted, particularly when there are disputed views, the usual course of action is not to proceed with a criminal course of action.[536] These concerns relate to matters prior to the committal hearing and many cases drop out before the committal because there is no real prospect or sufficient evidence for a conviction.[537] Out of 450 cases where video evidence was used, only ten per cent of cases were actually allowed in court.[538]

8.231 Research has shown that most child molesters have been molesting since adolescence, since they were abuse victims themselves and they have committed, on average, 580 crimes before they are first convicted but are not getting help because they are not getting to court or are not convicted.[539] Often

---

530 *ibid*, pp. S 432-3

531 Defence for Children International Australia, *op cit*, p. 21

532 University of Ballarat, Submission No. 90, p. S 433

533 *ibid*

534 Ginn, Transcript of Evidence, 5 August 1997, p. 1230

535 University of Ballarat, Submission No. 90, p. S 434

536 McInnes, Transcript of Evidence, 4 July 1997, p. 739-40

537 *ibid*, pp. 740-2

538 Briggs, Transcript of Evidence, 4 July 1997, p. 793

539 *ibid*, p. 794

children want the behaviour to stop but do not want the accused to go to gaol, especially if it is their father.[540]

8.232 There are moves to a diversionary system for the rehabilitative and therapeutic approach for family offenders away from criminal prosecution if the child is under seven where there is no gross evidence.[541] A number of submissions raised concerns about situations, particularly within families of the damage done to children during the process of obtaining a guilty verdict. Some have suggested that an inquiry process out of court may be beneficial in terms of less trauma for the child and treatment may be more appropriate than placing the offender in gaol which may inflict further hardship on the family.

8.233 There are long waiting lists for victims of sexual abuse to be assessed and for cases to be heard in court. Police tend to only prosecute if the child has sophisticated language and communication skills required to deal with the legal questioning, the legal jargon and attacks on their evidence. Children with disabilities, are up to 700 per cent more likely to be abused than non-disabled children, but have the least education and knowledge about their rights.[542] Young children can be kept in the witness box for several days at a time.[543] Appeals also ensure that children have to repeat their traumatic stories again and again.[544] This is part of the psychological abuse of children that occurs after the offences have taken place.[545]

8.234 Video evidence has been introduced in South Australia to avoid children being required to have eye-to-eye contact with an offender but this facility has only been used by one child in 15 months.[546] The difficulty is that judges and defence lawyers believed that the accused has the right to have eye-to-eye contact with the child or crown prosecutors believed that a tearful and very distressed child made a deeper impression on a jury than a confident child on a television screen and the child's well being was not considered the issue.[547]

8.235 Caring parents are increasingly refusing to expose their children to the psychological damage of court proceedings so offenders were free to re-offend

---

540 *ibid*

541 McInnes, Transcript of Evidence, 4 July 1997, p. 740

542 Briggs, Transcript of Evidence, 4 July 1997, p. 786

543 *ibid*

544 *ibid*

545 *ibid*, pp. 786-7

546 *ibid*, p. 786

547 *ibid*

and it has been suggested that there was a need for a court that met children's developmental needs, reduced delays and the adversarial aspects of the adult system provided help for the offender as well as the child. [548]

8.236 Child protection education was optional in most States but without personal safety education, children cannot identify and report sexual misbehaviour which made them extremely vulnerable.[549] It was also suggested that educational measures that focused on stranger abuse are not appropriate because most sexual assault and rape is intrafamilial and practical assistance to victims of rape and sexual abuse is not forthcoming.[550] Children may need assistance if they have difficulty in studying and attending school/university and may suffer emotionally from social deprivation and there is a need for rehabilitation to assist victims to overcome the effects of being traumatised from the trial.[551] Centre's Against Sexual Assault have faced massive funding cutbacks to the extent that they can only offer a set number of counselling sessions for victims.[552]

8.237 Another issue was contact without supervision in situations where there were conflicting allegations and there was a tendency to err in favour of continued access.[553] In this situation, the concern was expressed that the child bears the risk alone and it was argued that there should be supervision on a user-pays basis with an income tested subsidy, and that if both parties bore the cost towards that safety, then frivolous allegations would not sustain a hip-pocket nerve.[554]

8.238 National Council of Single Mothers and Their Children recommended that children's safety from violence and sexual assault should be given absolute priority in the Family Court and publicly funded child contact services should be used until and unless risk of assault is excluded.[555] In Queensland there was

548 *ibid*, p. 787

549 *ibid*

550 University of Ballarat, Submission No. 90, p. S 434

551 *ibid*, p. S 435

552 *ibid*

553 McInnes, Transcript of Evidence, 4 July 1997, p. 743

554 *ibid*

555 National Council of Single Mothers and Their Children, Submission No. 139, p. S 917

only one Commonwealth funded children's contact centre at Logan West and parents come from Townsville and Sydney and sleep in their cars to access services.[556]

8.239 The National Council of Single Mothers and Their Children recommended the establishment of formal liaison and consultation process for domestic violence and child protection services and the provision of child social workers and resources for children using these services.[557]

8.240 The National Inquiry into Children and the Legal Process found that access to counselling and other support services was restricted or difficult at the preventative stage.[558] Children found the system for dealing with abuse to be slow, depersonalising and stressful, and that they were not believed and sometimes had multiple interviews.[559] Other concerns about the process included the lack of adequate training for police and other workers; lengthy delays and adjournments in court proceedings which left children in potentially abusive situations or detained in care without proper care decisions being made; aggressive and highly inappropriate cross examination by lawyers; giving evidence in the presence of the perpetrator; inadequate resourcing to ensure proper prevention, investigation and treatment services; high turnover of case workers; interagency communication breakdown; and jurisdictional differences in standards.[560]

8.241 The Queensland Government has introduced a number of initiatives to develop preventative strategies in conjunction with the non-government sector and to update the child protection legislation. They have also acted to assist young people's successful participation in society through prevention and early intervention programs.[561] Western Australia has introduced a register which records the names of children who have been abused and the services provided.[562] The names of the perpetrators were also recorded to restrict the

---

556 Doyle, Transcript of Evidence, 1 May 1997, p. 272

557 National Council of Single Mothers and Their Children, Submission No. 139, p. S 915

558 Human Rights and Equal Opportunity Commission, Submission No. 336, p. S 1898

559 *ibid*

560 *ibid*

561 Culbert, Transcript of Evidence, 6 August 1997, p. 1297

562 Western Australian Government, Submission No. 402, p. S 2256

risk of other children being at risk.[563] The Western Australian Government now has a Child Victim Witness service.[564]

Systems abuse

8.242 Systems abuse occurs when the needs of children are not met by government services and includes stress due to long delays in placing children, inadequate or inaccessible services and lack of consistency or co-ordination of services.[565] This can also include multiple assessments, placement disruption, rapid turnover of social workers and multiple placements.[566] In some systems there were extensive delays such as 18 to 24 months to have matters heard to finality in the Family Court[567] and the children were being re-traumatised each time there was a new legal development.[568]

8.243 The Children and Domestic Violence Action Group believed that: the Family Law Court seemed weighted against women and children; obtaining a court order was drawn out and painful; the mother may not be able to afford legal representation; revoking contact orders was lengthy, expensive and emotionally draining, and the proposed cuts in legal aid may exacerbate this situation.[569]

Children shouldn't have to be around fighting parents

Jessica Mitchell, 11 years, Rainworth State School

563 *ibid*

564 Western Australian Government, Supplementary Submission No. 402a, p. S 3435

565 Human Rights and Equal Opportunity Commission, Submission No. 336, p. S 1899

566 Lutheran Community Care, *Response to the Australian Law Reform Commission Re: Children and the Legal Process*, p. 5

567 National Legal Aid, Submission No. 106, p. S 513

568 Smith, Submission No. 117, p. S 563

569 The Children and Domestic Violence Action Group, Submission No. 46, p. S 259

8.244 Systems abuse can also include children in care system being subjected to physical or sexual abuse.[570] There was a culture of abuse in institutions that would be difficult to change.[571] It was suggested that notwithstanding the complaints mechanism introduced by the Government, the abuse was still occurring.[572]

8.245 It was submitted that there is very little support for children in domestic violence situations notwithstanding the evidence that there were powerful links between witnessing domestic violence and using violence in later social and sexual relationships.[573] The Children and Domestic Violence Action Group believed that there was a culture of not recognising domestic violence based on the notion that if the children were not being hit then it was not a child protection matter.[574] Witnessing domestic violence was emotionally and psychologically detrimental to children.[575] The mother was seen as the primary victim and client of helping agencies and child were secondary victims. In this context, children's needs in the 'domestic violence system' tended to be unevenly dealt with, if at all.[576]

8.246 The Edith Cowan University highlighted the need for research into strategies to prevent abuse and neglect of the Aboriginal and Torres Strait Islander children in particular, and effective ways of helping the psychological recovery and social reintegration.[577] They suggested that funding cuts to the childcare sector should be reversed to enable highly skilled childcare staff to act as role models for parents and to encourage parent participation in childcare centres.[578]

8.247 Community Services Australia believed that there needed to be greater emphasis on 'parental education' as a child abuse prevention measure such as information and awareness campaigns targeting families and communities most at risk and an evaluation of the effectiveness of existing programs.[579]

---

570 Human Rights and Equal Opportunity Commission, Submission No. 336, p. S 1899

571 Dyke, Transcript of Evidence, 6 August 1997, p. 1355

572 *ibid*, p. 1356

573 Briggs, Transcript of Evidence, 4 July 1997, p. 784

574 The Children and Domestic Violence Action Group, Submission No. 46, p. S 258

575 *ibid*, pp. S 258-9

576 National Council of Single Mothers and Their Children, Submission No. 139, p. S 914

577 Melville Jones, Transcript of Evidence, 3 July 1997, p. 571

578 *ibid*

579 Community Services Australia, Supplementary Submission No. 154a, p. S 2389

Corporal punishment in the home

8.248 Singapore has a declaration in relation to the judicious application of corporal punishment in the best interests of the child.[580]

8.249 The United Nations Committee on the Rights of the Child believed that legislation should be introduced to ban corporal punishment and disagreed with Australia's interpretation of the Convention and the justification of 'reasonable chastisement'.[581] The UN Committee believed that corporal punishment contravenes the principles and provisions of the Convention, in particularly Articles 3, 5, 6, 19, 28 (23), 37 (a), (c) and 39.[582] The Australian Government does not support the view that the Convention prohibits corporal punishment *per se*.[583]

Support for capacity to use physical punishment in the home

8.250 Tonti-Filippini *et al* commented that Article 28.2 refers only to school discipline and that the authority of the parents in relation to disciplining the child is not mentioned.[584] Burnside added that in no State or Territory is it an offence to hit children provided the action is 'reasonable' and for disciplinary reasons.[585] It was submitted that in Sweden smacking was banned in 1980 and child abuse increased fourfold in the decade between 1984 and 1994 and reports of teen violence increased six fold.[586]

8.251 Parental rights have sometimes been seen as including excessive discipline or punishment to the extent that it breaches the rights of children.[587] Therefore it is important to know what standard is applied by the Australian community as to whether physical punishment is 'reasonable'.[588] The

---

580 The Convention on the Rights of the Child http:/www.un.org/depts/treaty/final/ts2/newfiles/part_boo/iv_boo/iv_11.html

581 Attorney-General's Department, Supplementary Submission No. 133a, p. S 3370

582 *ibid*, pp. S 3370-1

583 *ibid*, p. S 3370. See detailed discussion in chapter 7.

584 Tonti-Filippini, Fleming, Fisher, Krohn and Coghlan, Submission No. 187, p. S 1276

585 Burnside, Submission No. 94, p. S 457

586 *Challenge Weekly* 19 February 1997, p. 3 cited in Presbyterian Church of Queensland , Submission No. 376, p. S 2127

587 Family Services Australia Ltd, Submission No. 482, p. S 2716

588 Francis J (Ed) *To Hit or not to Hit*? Children's Interests Bureau South Australia Booklet, September 1995, p.4 cited in Children's Interests Bureau Board South Australia, Submission No. 327, p. S 1815

Queensland Criminal Code refers to the use of 'such force as is reasonable under the circumstances'.[589] It was suggested that parental rights to discipline the child should be explicitly affirmed and not ambiguously implied in the Convention.[590]

8.252 The Cooloola Ratepayers & Residents Association welcomed the announcement by the Queensland Attorney-General's that the *Juvenile Justice Act 1992* would be amended to enable parents to smack their children. They believed that this was well received by the community.[591] Call to Australia commented that Australian opinion polls support physical punishment when used appropriately and in the best interests of the child.[592] Mr d'Lima suggested that the Convention does not explicitly ban physical discipline but the interpreters of the Convention use it as an instrument of their own ideology.[593]

8.253 Mr and Mrs Lawrence commented that the term 'corporal discipline' should be used instead of 'corporal punishment' as the terms are not interchangeable as discipline is corrective, whereas punishment is retributive:

> A decreasing proportion of Australians has good mentors in this matter. Corporal discipline can be kept to a minimum by starting early as a correction at the first signs that something needs correction. As time progresses corporal discipline should hardly be necessary with most children, if it is used correctly. The result is harmony between parents and children. Thus, judicious use of corporal discipline done in the best interests of the child, in love, is neither cruel or degrading.[594]

8.254 Another parent commented that children required different forms of discipline ranging from a smack, withdrawing privileges or discussions of their actions and the Convention does not take into account individual differences in children and families and presents a blanket approach to the problem of child abuse and children's rights.[595] It was suggested that a smack as a last resort should be at the discretion of the parent but should not be used as an abuse of authority .[596]

---

589 *Queensland Criminal Code Act* 1899, Section 280, p. 143

590 Lo, Submission No. 641, p. S 3217

591 Cooloola Ratepayers & Residents Association, Submission No. 230, p. S 1511

592 Call to Australia, Submission No. 179, p. S 1212

593 d'Lima, Submission No. 332, p. S 1853

594 Lawrence, Submission No. 329, p. S 1842

595 Swain, Submission No. 650, p. S 3251

596 King, Submission No. 159, p. S 1079

Opposition to the use of physical punishment

8.255 Others believed that the wording of Article 37 banning any form of corporal discipline even when it is given in love and in the best interests of the child.[597] Accordingly, they argued that the lack of legal measures against physical punishment of children is in breach of the Convention.[598]

8.256 The NGOs requested legislation to limit or prohibit physical punishment in the home.[599] They believed that physical punishment was accepted and that the courts tolerated violence and injury to children in the name of discipline.[600] It was suggested that the term 'reasonable chastisement' needed clarification and that courts had difficulty in defining 'reasonable'.[601]

8.257 It was suggested that there should be changes to legislation banning physical assault by all adults including parents and teachers:

> In Australia parents are legally allowed to physically assault their children in the name of parental discipline. Whilst Australian laws continue to allow fully grown adults to physically assault babies, infants, toddlers, school children and teenagers, the nation is unable to consistently implement the UN Convention on the Rights of the Child.[602]

8.258 Mr Maloney believed that the link between child abuse and physical punishment was conclusive.[603] It was submitted that if an adult hit another adult for the same reasons they would be charged with assault and that children deserve the same level of protection as adults.[604]

Possible legislation banning physical punishment

8.259 The view was given that legislation banning the smacking of children had been successfully introduced in a large number of countries around the world and United Kingdom and Australia are among the few who have opposed it.[605]

---

597 Keen, Submission No. 175, p. S 1171

598 Community Services Australia, Submission No. 154, p. S 1025

599 Defence for Children International Australia, *op cit*, p. 19

600 *ibid*

601 *ibid*

602 National Council of Single Mothers and Their Children, Submission No. 139, p. S 914

603 Maloney, Submission No. 304, p. S 1754

604 *ibid*

605 Briggs, Transcript of Evidence, 4 July 1997, p. 789

The Institute of Early Childhood and Family Studies added, however, that legislation would not be successful unless it is preceded by an education campaign.[606]

8.260 In May 1995 the Commonwealth Department of Human Services and Health released the discussion paper on the *Legal and Social Aspects of the Physical Punishment of Children* which supported an education campaign to inform parents of the alternatives to physical punishment. It would be preferable to get a change of attitude without legislation but there would be difficulties in getting parents to attend education classes.[607]

8.261 Institute of Early Childhood and Family Studies expressed concern at the number of submissions supporting parents rights to smack children.[608] Positive child management techniques are taught at university as better methods are available but parents do not know those methods.[609] Burnside believed that there are better ways to discipline children than to hit them but added that it would be no advantage to have huge court cases and a large amount of time spent prosecuting parents for smacking their children.[610]

8.262 The Department of Foreign Affairs and Trade argued that it is not for the committee nor for the Convention secretariat to decide whether you can or cannot spank a child, it is a decision for the Australian parliaments.[611]

8.263 Cashmore *et al* found that neither case law nor the relevant statutes, regulations or policies provided clear and consistent guidance on the legal limits of physical punishment in defence of lawful correction.[612] They suggested that the main purpose of legal reform would be to mobilise change in the treatment of children rather than enforcement.[613] They added that legislation would have symbolic value demonstrating that some forms of physical punishment of children are not acceptable.[614] However, it is arguable

---

606 *ibid*, p. 790

607 *ibid*, pp. 790, 793

608 *ibid*, p. 785

609 *ibid*

610 Bendall, Transcript of Evidence, 9 May 1997, p. 429

611 Lamb, Transcript of Evidence, 28 April 1997, p. 36

612 Cashmore J and de Haas N (1995) *Legal and Social Aspects of the Physical Punishment of Children*, Paper commissioned by the Department of Human Services and Health under the auspices of the National Child Protection Council, p. 52

613 *ibid*, p. 129

614 *ibid*, p. 117

as to whether this may prevent abusers from seeking help or make others seek help earlier.[615]

8.264 The arguments against legal reform include the effectiveness, difficulty of enforcement and the possible counter productive effects and community education may be a preferable approach.[616] Cashmore *et al* suggested that legislative change must be preceded by informed discussion and public debate.[617]

Torture and other forms of degrading treatment

8.265 The Committee was given a number of examples of cases that people considered to fall under the definition of torture or other forms of degrading treatment. In a recent case in Queensland a father was charged with the torture of his 3 year old son. Others believed that police were unlawfully harassing young people and this treatment was inhuman, degrading, and arbitrary and did not take into account young people's needs and there was a need for improved formal mechanisms of redress.[618] Some submissions categorised the performance of circumcision without the consent of the child and without anaesthetic as a form of torture.[619]

Interstate and Territory cooperation

8.266 Australian Catholic Social Welfare Commission suggested a uniform legislative base nationally with uniform definitions and basis for investigation and action.[620] Child protection is largely within State and Territory jurisdictions so when allegations of abuse were made during family law proceedings, there needed to be a high degree of cooperation between the court and the State agencies to ensure that cases were investigated and resolved quickly and effectively.[621]

---

615 *ibid*

616 *ibid*, pp. 129-30

617 *ibid*, p. 130

618 Fitzgerald, Submission No. 562, p. S 2982

619 Mather, Supplementary Submission No. 6a, p. S 1392

620 Australian Catholic Social Welfare Commission, Submission No. 124, p. S 653

621 Family Law Council, Submission No. 178, pp. S 1197-8

8.267 The Alternative Report points out that although the level of child abuse and neglect were unacceptably high in Australia, the reporting of abuse was not mandatory in all States and that due to resource constraints, reports may not be investigated for some months if at all.[622] They suggested that parents can avoid investigation by moving interstate and that investigations may be by untrained and unqualified staff in a crisis driven and poorly resourced environment.[623]

8.268 National Council of Single Mothers and Their Children believed that there was a need for consistent national standards and that the model criminal code was a step in the right direction.[624] The Council believed that child protection and violence in families should perhaps be the single biggest target in improving the lot of children.[625]

Aboriginal and Torres Strait Islander children

8.269 Aboriginal and Torres Strait Islander children comprise 3 per cent of the population but represent just under 10 per cent of substantiated cases of abuse and neglect, 16 per cent of children deemed 'at risk' and 8 per cent of children investigated for abuse and neglect but classified as unsubstantiated.[626] The over representation of Indigenous children is even greater in neglect cases.[627] The Aboriginal legal Service in Western Australia found that of the 483 adults who were removed in childhood, more than one third had their own children removed.[628]

8.270 Aboriginal children in the Northern Territory are three time more likely to be physically, sexually or emotionally abused and six time more likely to suffer neglect than non-Aboriginal children.[629] It was submitted that there was

---

622 Defence for Children International Australia, *op cit*, p. 19

623 *ibid*

624 McInnes, Transcript of Evidence, 4 July 1997, p. 747

625 *ibid*

626 Edith Cowan University, Submission No. 157, p. S 1058

627 Human Rights and Equal Opportunity Commission, Submission No. 336, p. S 1899

628 Submission by the Aboriginal Legal Service of WA to the Human Rights and Equal Opportunity Commission *Bringing them home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait islander Children from their Families*, AGPS Canberra, 1997, p. 425 cited in Human Rights and Equal Opportunity Commission, Submission No. 336, p. S 1900

629 Central Land Council, Submission No. 399, pp. S 2240-1

a lack of legal recourse for young people who may be victims of physical abuse from their families, school or peers in that area.[630]

8.271 Mechanisms such as drop in centres for parents may be inappropriate for Aboriginal and Torres Strait Islander people who may be more open to learning parenting skills by imitating an appropriate role model than 'being told how to do it' by Anglo-Celtic personnel.[631]

8.272 It was suggested that in commercial child care centres there was a trend to employ less qualified staff to reduce expenses and they may have problems dealing with difficult behaviour of abused or neglected children which could hinder the physical and psychological recovery and social reintegration of these children.[632] Highly skilled child care staff can act as role models for parents at risk of abusing or neglecting their children, and encouraging parent participation in child care centres may be beneficial.[633]

8.273 In relation to the Aboriginal tribal law, Defence for Children International commented that indigenous law was a separate issue and traditional practices should be allowed provided they did not cross the boundary of acceptability.[634] The Committee was of the view, however, that the fundamental human rights of an Indigenous child should not be over ridden by customary practices.

Physical and psychological recovery and social reintegration

8.274 Community Services Australia commented that the rehabilitative measures for child victims of ill-treatment, abuse and neglect were negligible and what was available was ad hoc, poorly funded and seemed entirely a State responsibility. Community health psychologists reported waiting lists of up to two years.[635] It was suggested that there was inadequate support for the child victim or their family and that the child offenders where considered more important.[636]

---

630 Alice Springs Youth Affairs Coordination Committee, Submission No. 182, p. S 1228

631 Edith Cowan University, Submission No. 157, p. S 1060

632 *ibid*

633 *ibid*, p. S 1070

634 Bayes, Transcript of Evidence, 28 April 1997, p. 98

635 Community Services Australia, Supplementary Submission No. 154a, p. S 2389

636 Kuchel, Supplementary Submission No. 29a, p. S 1569

8.275 Early Childhood Teachers Association expressed the concern that the programs and services which promoted the physical and psychological recovery of child victims were constantly struggling to remain in operation.[637] The Institute also believed that victims of child abuse were victimised by: long waiting lists for assessment and treatment; services only available in capital cities; the length of court processes; and prosecutions only proceed if victims were articulate and disabled children were 700 percent more likely to be abused than non-disabled children.[638]

8.276 The Central Land Council commented that there were no appropriate sexual abuse counsellors for Aboriginal children in Alice Springs.[639]

> The immediate and long term effects of physical abuse can be catastrophic for children, ranging from death and brain damage to psychiatric illness, aggressiveness, inability to form meaningful relationships, disillusionment and suicide.[640] Studies of parents who physically abuse their children have found that they frequently report extreme violence in their own childhood and an abusive childhood is a consistent factor in the histories of these parents.[641]

8.277 The Edith Cowan University recommended that funding was needed to develop strategies to prevent child abuse and neglect of all children but particularly culturally appropriate strategies for Aboriginal and Torres Strait Islander children.[642]

8.278 It was submitted that children often have to deal with a number of workers who work towards different outcomes for the children which was confusing for the children and their carers.[643] It was suggested that this raised the questions of:

> ... whether it is better to be in the care system and a victim of system abuse there (multiple workers, placements, court hearing) or be returned home to face the type of abuse which precipitated entry into the system.[644]

---

637 Early Childhood Teachers Association, Submission No. 353, p. S 2022

638 de Lissa Institute of Early Childhood and Family Studies, Submission No. 146, pp. S 3725-6

639 Central Land Council, Submission No. 399, p. S 2241

640 Dwyer K and Strang H (1989) *Violence Against Children Violence Today*, Australian Institute of Criminology cited in National Children's and Youth Law Centre, Submission No. 321, Annexure 2, p. 81

641 Milner J and Chilamkurti C (1991) 'Physical child abuse perpetrator characteristics', *Journal of Interpersonal Violence* 6(3) cited in National Children's and Youth Law Centre, Submission No. 321, Annexure 2, p. 81

642 Edith Cowan University, Submission No. 157, p. S 1061

643 Lutheran Community Care, Submission No. 61, p. S 315

644 Lutheran Community Care, *Response to the Australian Law Reform Commission Re: Children and the Legal Process*, p. 1

8.279 There have been situations where workers who have spent a lot of time with the families but were ignored by magistrates and judges.[645] It was suggested that child development theory, attachment theory, grief and loss theory, and behaviour management theories could be congruent with a common sense approach to parenting and decision making but the legal profession may lack the theoretical background and that this was reflected in some decisions.[646]

The Committee's views

8.280 The Committee would like to see the alternatives to mandatory sentencing investigated on a national level.

Recommendation 44

The Joint Standing Committee on Treaties recommends that the Government request the Standing Committee of Attorneys-General to investigate the alternative options to mandatory sentencing.

8.281 The Committee is concerned that in some situations children could serve longer terms than adults for the same offence.

Recommendation 45

The Joint Standing Committee on Treaties recommends that the Government request the Standing Committee of Attorneys-General review existing juvenile justice legislation to ensure that children and young people cannot receive longer sentences than adults for any particular offence.

8.282 The Committee also believes that the requirement to separate adults and children can be met except in very exceptional circumstances if there is a will to do so. The Committee believes that in the cases where this is not possible, then the child should only be kept in those circumstances when it is in the best interests of the child. In these cases this would still comply with the wording of Article 37(c).

8.283 The Committee is also concerned that in some rural areas a lack of resources and options may make the separation of juvenile and adults extremely difficult. The Committee believes that more could be done to reduce the

645 *ibid*

646 *ibid*, p. 2

frequency with which juveniles are held in custody with adults. However, the Committee believes that the reservation should be withdrawn.

Recommendation 46

The Joint Standing Committee on Treaties recommends that the Government request the cooperation of the State and Territory governments in establishing the frequency with which juveniles are held in custody with adults and to develop measures to address this problem.

Recommendation 47

The Joint Standing Committee on Treaties recommends that the Government withdraw the reservation to Article 37(c) of the *Convention on the Rights of the Child*.

8.284 Similarly, we noted that a great deal has been done to eliminate sex tourism involving Australians. We are concerned, however, that there are a number of matters in relation to gathering of evidence, the court procedures and the protection of child witnesses and their families.

Recommendation 48

The Joint Standing Committee on Treaties recommends that the Government review existing procedures used in prosecutions under the *Crimes (Child Sex Tourism) Amendment Act 1994* to ensure all requirements of procedural fairness and the interests of justice are met.

8.285 The Committee does not support the introduction of legislation banning parents from giving children physical chastisement. However, many Australian families could benefit from parental education campaigns aimed at providing information on general parenting skills.