Homogenising Australia's child protection laws

Will the cream still rise to the top?

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This paper discusses the increasing similarity between Australia's states and territories in their child protection legislation. The paper deals mainly with the principles underlying child protection laws, definitions of abuse and neglect, and the way legislation deals with the likelihood and severity of harm to the child. The trend is towards adopting a common set of principles, and definitions which are relatively precise in targeting particular 'types' of abuse and eliminating status offences. However there are significant differences even between states which broadly adopt this type of legislation, and some states adopt quite different approaches. There is still little consensus on how likelihood and severity of harm are dealt with. The paper, in welcoming the principle of common legislation, notes a wide range of issues in the developing legal paradigm which have been subject to little or no public debate. It is not clear that the increasing 'homogenisation' of child protection laws is enshrining the kind of legislation required.

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Child protection in Australia is undergoing subtle change. Legislation introduced in Tasmania in 1999 and New South Wales (NSW) in 2000 contributed to increasing similarity in legislation across the country. This trend seems welcome; having eight different sets of child protection legislation in a country of 19 million is excessive.

Have Australia's child protection systems found the right legislative path to follow?

The answer is unclear. There is little debate about the relative merits of the legislation in each state, and the 'homogenisation' of the nation's legislation is occurring largely in the absence of published critiques.

One paper can only address a narrow range of pertinent legislative issues. Focus will therefore be on the principles underlying the legislation and on the way child abuse and neglect is defined. A few other matters are examined to lend context to the analysis. The purpose is to highlight issues and alternatives which show up in comparing Australian legislation – international comparisons would raise further concerns. Attention will also be drawn to issues which have lacked serious debate. Inevitably in a brief paper important fine detail will not be included.

LEGISLATIVE PRINCIPLES

A set of broad common principles now permeate child protection laws in most states, with legislation specifying that primary responsibility for the child rests with the child's family and that support of the family is a high priority. Some states add additional broad principles. For example the South Australian (SA) Act states that children should have the opportunity to grow up in a safe and stable environment and reach their full potential (Children's Protection Act 1993: s.3 [1]).

Other commonly stated principles include the need for the child to be safe (usually stated as the primary principle); strengthening family relationships whether the child is home or not; avoidance of unnecessary disruption to the child's familiar environment; preservation of racial, ethnic, religious and cultural ties and identity; involvement of children and families in decision making; and (sometimes) prompt and timely decision-making. Endorsement of the Aboriginal Child Placement Principle (ACPP) is also common, with a hierarchy of out-of-home placements defined so that placement preserves cultural ties as much as possible.

There are departures from these norms. Tasmania has only just introduced a set of broad guiding principles (Children, Young Persons and Their Families Act 1997: ss.8-9). Queensland legislation refers to principles only briefly. For example, Queensland Children's Court decisions need to be guided by the child's best interests and the Court must only admit a child to care if the child's protection cannot be secured by another order (Children's Services Act 1965, s.52 [2]). Western Australian (WA) legislation only contains explicit principles in reference to the best interests of the child, and then only in regard to parental applications for

committal (Child Welfare Act 1947: s.47c[1]) or to applications where a child is left without a parent (s.47b).

In its new legislation NSW joins SA and Tasmania as states explicitly adopting principles which guide the whole of their legislation. For example, in NSW a key principle to be applied to the administration of the whole Act will be that:

> the course to be followed must be the least intrusive intervention ... that is consistent with the paramount concern to protect the child or young person from harm and promote the child's or young person's development (Children and Young Persons [Care and Protection] Act 1998: s.9[d]).

Whether the least intrusive intervention can simultaneously protect as well as promote development remains to be seen. This provision is, of course, not as categorical as the Victorian provision (Children and Young Persons Act 1989: s.87 [a]) which states that 'intervention into family life should be to the minimum extent that is necessary to secure the protection of the child'.

New NSW legislation also requires that:

> in all actions and decisions made under this Act (whether by legal or administrative process) that significantly affect a child or young person, account must be taken of the culture, disability, language, religion and sexuality of the child or young person and, if relevant, those with parental responsibility for the child or young person (Children and Young Persons [Care and Protection] Act 1998: s.9[c]).

This is the only Australian child protection legislation that clearly attributes such obligations to both legal and administrative processes. It is also interesting, given the apparent completeness of the list of factors to be taken into account, that sexuality – not normally included as such a factor – is mentioned but gender is not. References to gender are notable for their absence in Australian legislation.

The ACPP is absent from the WA, Queensland and ACT legislation, and the Tasmanian legislation has only recently included a general provision on this matter (Children, Young Persons and Their Families Act 1997: s.9). All states claim to practice some version of the principle, whether legislated or not. No state legislation has clearly responded yet to the call to delegate certain child protection functions to Aboriginal and Torres Strait Islander people to enable a greater degree of self-determination, in line with the 'Bringing Them Home' Report (Human Rights and Equal Opportunity Commission [HREOC] 1997).

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Two other provisions on principles are noteworthy. One is the Northern Territory (NT) reference to 'commonly accepted community standards' as a benchmark to guide certain decisions. This principle is applied when assessing whether a child is in need of care due to persistent engagement in conduct harmful or persistently harmful to the community, as 'measured by commonly accepted community standards' (Community Welfare Act, s.4 [2e]). As well, a child will be judged to have been maltreated if

> he (sic) has suffered serious emotional or intellectual impairment evidenced by severe psychological or social malfunctioning measured by the commonly accepted standards of the community to which he belongs... (Community Welfare Act s.4 [3b]).

The other provision, in the new NSW law, is that the Director General may (in deciding what action to take to promote a child or young person's welfare and safety) request services from another government department or non-government agency. These must use their best endeavours to comply with requests (Children and Young Persons [Care and Protection] Act 1998: ss.17-18). While the principle underlying these provisions is unclear, we read it to place a moral obligation on others to assist in resolving problems, and it may be a tacit acknowledgment of the contribution of structural factors (such as lack of resources) to child abuse and neglect.

Overall, there is considerable national inconsistency in whether guiding principles are enshrined in legislation and variability in the enunciated principles themselves.

DEFINITIONS OF CHILD ABUSE

It is now the norm for physical, sexual, and emotional abuse and neglect to be targeted by child abuse legislation. General references to the child's welfare or to 'status offences' – such as likelihood of lapsing into a life of vice or crime – are becoming less common, though provisions to deal with truancy are commonly present. Victoria, NSW, Tasmania, SA and the ACT broadly typify this legislative approach. However there are significant variations.

In WA there are no direct references to sexual abuse, and the types of abuse specified are very general – for example, 'ill-treatment', or suffering injuries apparently from ill-treatment, or living in circumstances placing welfare in jeopardy. By contrast the legislation retains 'status offences' which are both general and specific. Children and young people can be proceeded against for such matters as 'lapsing into a life of vice or crime', street trading, being engaged in circuses or other shows or exhibitions by which life or limb are endangered; and being under the influence of drugs or alcohol (Child Welfare Act 1947: s.4 [1]).

Queensland legislation (Children's Services Act 1965: s.46) refers to neglect but does not refer to physical or sexual abuse directly, referring instead to being exposed to physical or moral danger. It also targets uncontrollable behaviour and failure to attend school, and retains other 'status offences'; for example, 'exposure to moral danger', falling in with bad associates, likelihood of lapsing into a life of vice

or crime, being in the company of unfit people, begging or loitering, and being without excuse in billiard rooms or beer gardens.

The new NSW legislation adds living in a household where there have been incidents of domestic violence leading to risk of serious physical or psychological harm as grounds for intervention (Children and Young Persons [Care and Protection] Act 1998: s.23 [d]). It also has provision for voluntary reporting before the birth of a child if there are reasonable grounds to suspect the child may be at risk (s.25). The stated purpose is to provide assistance and support. NSW will also provide for voluntary reporting of a child who is homeless (a child for the purpose of the Act being aged under 16) and for mandatory reporting of a child who lives away from home without parental consent (Children and Young Persons [Care and Protection] Act 1998: ss.121-122).

It is not immediately apparent why these provisions were included in reporting requirements but not included in the definitions of risk of harm, but it does seem that NSW has created two classes of 'risk' or severity of risk – those which must be reported, and those which may be reported. Victoria, with mandatory reporting of physical and sexual abuse only, has also created two classes of risk, though the kinds of risk which require mandatory reporting (a judgment on which are more significant?) are clearly not the same in the two states.

There are thus two broad legislative types. One, now in place in the majority of states, is relatively specific in nominating types of abuse and neglect that justify intervention and tends not to target status offences or particular behaviours. The other type (exemplified in WA and Queensland, and in Tasmania until recently) is rather general in its definition of abuse and neglect but specific about certain behaviours or status offences which mandate intervention.

LIKELIHOOD AND SEVERITY OF HARM

Two further factors on which there is variation are likelihood of harm and severity of harm. Victoria (Children and Young Persons Act 1989: s.63) and NSW (Children and Young Persons [Care and Protection] Act 1998: s.23) consider likelihood of harm (NSW refers to 'risk of harm') as potential grounds for intervention. So does Tasmania, which referred to 'substantial risk' until 1999, but following its new legislation will act where risk is 'likely' (Children, Young Persons and Their Families Act 1997: s.4), and NT which mandates intervention where there is 'substantial risk' of harm (Community Welfare Act: s.4).

SA considers likelihood of harm only if the person the child lives with has threatened to kill or injure the child or has killed, abused or neglected some other child. WA and Queensland consider likelihood of harm only in regard to the likelihood of the child lapsing into a life of vice or crime. The ACT has a mixture of provisions. There is a general provision for likelihood of harm to be considered by the Department or Court (Children's Services Act 1986: s.71[2]), but the child will be defined as in need of care if physical or sexual abuse is likely or has already occurred, the child's behaviour is likely to be harmful to themself, or failure to attend school is likely to be harmful (s.71 [1]). Likelihood of suffering psychological harm is considered if 'emotional or intellectual development is, or will be, endangered' (Children's Services Act 1986: s.71 [c.ii]) which is really a judgment that harm will certainly occur more than a judgment of 'likelihood'.

Regarding severity, Victorian legislation requires harm to be 'significant' (Children and Young Person Act 1989: s.63). However Victorian legislation requires that intervention should be the minimum necessary to secure the child's welfare and safety (s.87[a]), which significantly qualifies all other provisions. The NSW provision for the least intrusive intervention (Children and Young Persons [Care and Protection] Act 1998: s.9 [d]) also qualifies its other provisions. The new NSW legislation also provides for the first time for risk of 'serious physical or psychological harm' as a result of living in a household where there have been incidents of domestic violence (s.23 [d]), or for serious psychological harm as a result of other behaviour of a parent or other caretaker (s.23 [e]).

In the new Tasmanian legislation (Children, Young Persons and Their Families Act 1997: s.4) references to severity disappear except where there have been threats to abuse or kill the child (certainly a measure of severity!). NT has similar provisions regarding physical harm, and its law also refers to the severity of emotional or intellectual impairment being evidenced by 'severe psychological or social malfunctioning measured by the commonly accepted standards of the community to which the child belongs' (Community Welfare Act: s.3 [b]). Section 71 (2) of the ACT Children's Services Act 1986 requires regard for the degree of abuse, and requires disregard of those matters that in the circumstances appear not to be sufficiently serious or substantial to justify action.

There is therefore little national consistency on whether or how likelihood or severity of harm should be grounds for intervention. It is particularly puzzling that some states make little or no reference to these matters given that they are at the heart of most, if not all, child protection decisions.

POST-COURT PROVISIONS

Children under state guardianship or supervision may continue to be at risk of abuse (see, for example, Human Rights and Equal Opportunity Commission, 1989; Taylor, 1990; Cavanagh, 1992; Liddell, Margaret, 1992; Liddell & Goddard, 1992; Liddell & Goddard, 1995; Cashmore & Paxman, 1996; Angus, Dunn & Moyle, 1996; Fernandez, 1996; Human Rights and Equal Opportunity Commission, 1997; Liddell & Liddell, 1997; Maunders et al, 1999). The absence of reference to standards of out-of-home-care in most legislation is in significant contrast to the detail in all legislation about who can enter the system and under what conditions.

At a policy/procedural level all states/territories now acknowledge the National Baseline Standards for Out-of-Home Care endorsed by the welfare ministers in 1995, and these are starting to permeate policy statements. It is too

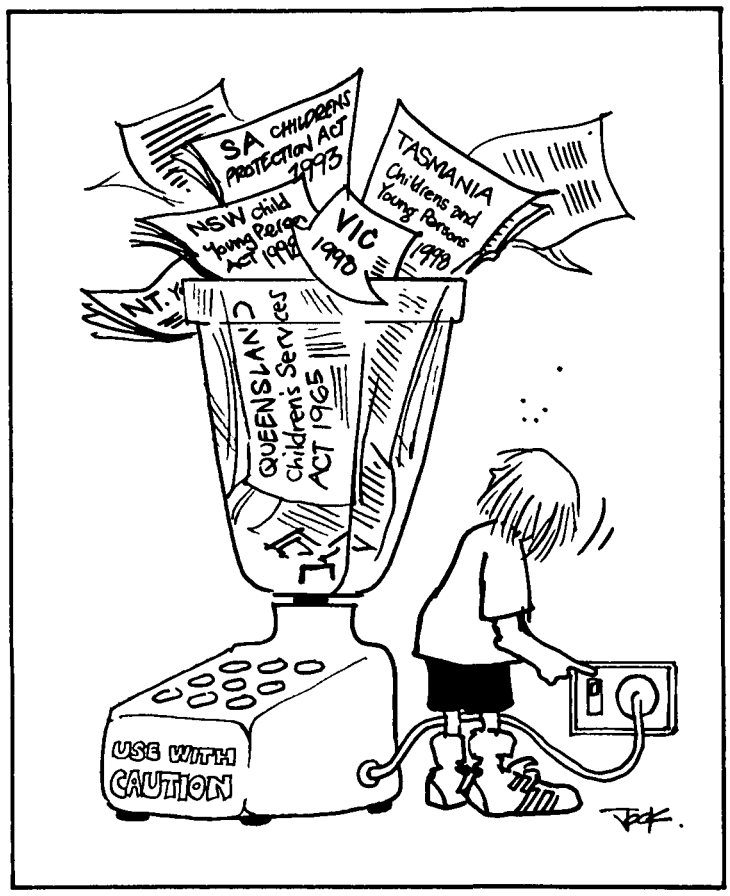
early to assess their impact on programs.

Given this picture, the NSW move in 1997 to develop a state-wide program for young people leaving care is commendable, and its new legislation includes radical provisions. Section 165 of the new Children and Young Persons (Care and Protection) Act 1998 states:

> the Minister is to provide or arrange such assistance for children of or above the age of 15 years and young people who leave out-of-home care until they reach the age of 25 years as the Minister considers necessary having regard to their safety, welfare and well-being.

In spite of the qualification implicit in the words 'as the Minister considers necessary', this provision is well in excess of legislative provisions in other states, and the section also gives the Minister discretionary power to continue assistance after age 25.

However most of the national legislation is silent, or relatively so, on many of the problems listed above.



DISCUSSION

There is national confusion about the grounds for child protective intervention. Some greater consistency is developing; differences between the states are less than if we compared them 10 years ago, though the development of consistency is clearly patchy. The emerging legislative paradigm features:

- specification of particular types of abuse;
- elimination of most status offences;
- the development of a set of overarching principles, which amongst other things state:

  the child's welfare has highest priority, but

  children should stay with their families where possible;

  other factors should be taken into account such as cultural factors and participation.

Consensus about handling likelihood of abuse and severity of abuse seems more remote.

If there is growing consistency, is the developing paradigm one we should support?

Here we are bedevilled by the lack of outcome research on the impact of different kinds of child protection systems, and on the outcomes that result from different definitions of abuse. However, the following are some of the questions that emerge from the analysis; most are rarely debated.

Does legislation matter?

Given the frequent public outcries about child protection one could doubt this; the law does not always do well in protecting children, nor is it always followed. Most states exercise formal or informal limits regarding which cases are investigated and for how long: an interesting example was the Victorian rule of thumb that only half of the notifications be investigated (see Liddell & Goddard, 1995). In fact with regard to the 1997-98 financial year the Australian Institute for Health and Welfare (AIHW) reported that 44% of notifications in Victoria were investigated (AIHW 1999: 10). How such rationing of resources affects outcomes is unclear, but it is rarely mandated by any of the legislation, unless one reads provisions on likelihood and severity of harm as justifying it.

The ACPP provides another example. This principle is one measure intended to help redress historical maltreatment of Aborigines by child protection systems and reduce the high intervention rates into the lives of Aboriginal children and their families. Yet child protection intervention into Aboriginal families continues at a rate several times that which applies to the general community. Further the states with the highest rates of children on care and protection orders include Victoria, which enshrines the ACPP in legislation, and the ACT, which does not. The lowest rates of intervention when the last available figures were published (AIHW 1999) were in NT, which endorses the ACPP in law, and Tasmania, which did not have it in law at that time. While there may be multiple explanations for this variation, it does suggest problems and practices inherent in current welfare systems that the law by itself has not always been successful in altering.

The authors prefer the protection of children clearly outlined in law, as a baseline from which disputes can be arbitrated and resources pursued. In the light of current evidence this clearly is a declaration of faith. The impact of the law is heavily mediated by available

programs, management styles and philosophies, resources, and intervention theories. The critical undebated question, then, is what should we reasonably expect the law to do? What is its role, and what are its limitations? The law's role tends to be taken for granted, but the value of the law in resolving child protection dilemmas is not always self-evident. Some states have some of the matters we have noted as lacking in their legislation covered in policy and procedure (for example the ACCP). Is this sufficient, or not?

Guiding principles or principal confusion?

The trend towards common guiding principles across the country would seem sensible. Here though is a brief and not exhaustive list of questions that suggest that many of the principles themselves are not thoroughly thought through.

Are moves to implement the least intrusive option or to intervene to the minimum necessary to secure the child's safety and welfare consistent with the other common legislative? For example, are least intrusive or minimum intervention strategies in the child's and family's best interests?

Is the NT reference to accepted community standards as a basis for decision-making unenforceable, or does it represent a principle that should be developed further and be in every state's laws? It is easy to dismiss the folksiness and vagueness of 'community standards'; but every child protection worker knows that actions which deviate significantly from such standards may earn them painful scrutiny from the media.

How justifiable is it to create two classes of abuse and neglect; those that must be reported and those for which reporting is discretionary? Do we understand likelihood and severity of harm sufficiently to support such a distinction? Do we confuse the public with such provisions? What effect do these provisions have on the safety and welfare of children? Are some kinds of abuse more insidious than others, or not?

Is it acceptable to set family support as high priority without providing a legal requirement for a family support response?

Why do we increasingly enjoin systems to be sensitive to factors such as disability, culture, language, and now sexuality in NSW, and not gender?

Is it acceptable to take children into care without specific laws protecting them from further abuse while they are in care?

Is it acceptable to protect children but discharge them from care at age 15 or 16 with little support (and certainly no mandated support), leaving them vulnerable to further abuse?

Are general principles about cultural sensitivity useful in the absence of prescriptions for their implementation?

Regarding the latter, the problems with the ACPP have already been noted. Provisions for cultural sensitivity are also sometimes related to the question of the severity of abuse, since child rearing practices in some cultures may be perceived as harsher than in others. In the absence of other than the quite intangible guidance provided by law, one wonders whether much of our child protection legislation enshrines an element of political correctness on cultural variations without any clear-cut prescription on how to resolve them.

The following points, though not specifically philosophical in content, all contain further philosophical dilemmas.

There is ... little national consistency on whether or how likelihood or severity of harm should be grounds for intervention. It is particularly puzzling that some states make little or no reference to these matters given that they are at the heart of most, if not all, child protection decisions.

- **The dilemmas of greater precision**

Are states that define actions against children that justify intervention more precisely better off than states with very general definitions?

Full review of the patchy evidence is beyond us here, but it seems that the more specific definitions have both positive and negative consequences. The more general definitions have been associated, historically, with a moralistic system that intervenes too much; we do not want to return to those days. However observation suggests that the more precise the definition, the more difficult it becomes to establish a case in court. We suspect this acts more in the interests of parents than children. It is not clear if and when this is a positive outcome.

We suspect that the trend to more precise definitions will in time lead to the addition of more 'types' of abuse to the legislation. The addition of the consequences of domestic violence to the NSW legislation is an example. Intervention based on more precise definitions is more likely to be a deliberate act of public policy, but response to the 'discovery' of new types of abuse may well be more conservative, and slow, leaving gaps in the system's capacity to protect children.

We see little evidence that the trend to more precise targeting of types of child abuse and neglect has been subject to debate, or its strengths and weaknesses examined.

- **The demise of 'status offences'**

The fact that many status offences are out of date is obvious; their continued existence is a signal that some child protection legislation has long needed updating. Not that the disappearance of status offences is uncontroversial; for example, some workers believe that current provisions inappropriately restrict their capacity to assist young people who indulge in high risk behaviours. The debate on this matter has been terminated prematurely and should be revived. We wonder if legislation is moving in the direction of treating children like small adults and whether debates are failing to question whether childhood and adolescence, as crucial stages of development, require

more special protection than the developing legal paradigm is apparently providing.

- **Likelihood and severity of harm – child protection, clairvoyance, or actuarialism?**

Some child protection legislation is primarily concerned with whether an act has occurred or an impact can be clearly demonstrated; but much of it is concerned with whether risk to the child will continue in the absence of intervention. Child protection inevitably involves judgments about the future, so reference to likelihood of harm and its severity seems logical and its absence inexplicable.

Nevertheless the matter is fraught with difficulty. Much of the child protection 'industry' is focussed on risk assessment and risk management, but decades of waxing and waning interest in developing instruments which are predictive have produced little (Saunders & Goddard, 1998). Nevertheless, in several states there is intense interest in strategies that predict risk. There is little evidence that 'scientific' measures involving key indicators, rating scales and points totals will or can replace skilled professional assessment, but the latter currently receives low priority for resources in most states. Such matters, and the problems involved with any method of predicting risk, are another issue inadequately debated.

- **Theory and causation**

Any reading of any of the child protection legislation makes it clear that parents or guardians are exclusively held responsible for the welfare and safety of their children – though some legislation reads as if anyone (including neglectful governments) could in principle be held responsible for abuse and neglect of children.

Establishing causation is notoriously difficult, but we do know that most families (and children) coming to the attention of child protection systems are poor. Without dismissing the considerable possibility that the poor are under greatest surveillance in modern society, it seems logical that poverty and its associated stress has outcomes in poor parenting. Whether parents should be held responsible for this, or whether Courts should have the power to apportion responsibility beyond the individual is an interesting notion rarely up for debate.

Because of this, the NSW move to place pressure on agencies to provide services to abused children and their families is welcome, and will be watched with great interest. It is a limited (albeit politically feasible) response and inevitably its impact will be affected by the available resources.

CONCLUSION

This paper has focused attention on a small component of the child protection field. Many other dilemmas could have been raised. The authors are particularly perplexed, for example, by the growth in the complexity of child protection systems. To the roles of the many stakeholders we have added complex legislation and principles, together with statutory orders, arranged in hierarchies. We are in the process of adding commissions, children's guardians, and expanded roles for the ombudsmen. The new NSW legislation includes in the vicinity of 2000 words of objects and principles for magistrates to interpret. Are we creating systems that in part are logical responses to previous problems but as a whole are becoming unmanageable?

These and many other issues notwithstanding, the increasing homogenisation of child protection legislation is occurring in the absence of widespread debate about many of those elements which are becoming common across Australia. If greater consistency is needed – a position we have no argument with – then a national review is needed to clarify what is worth preserving and what should be discarded. Too many crucial questions – we have listed only a few – have not been on the agenda for debate. □

REFERENCES

Angus, G., Dunn, C. & Moyle, H. (1996) *Children under care and protection orders, Australia 1994-5*, Australian Institute of Health and Welfare, Canberra, Child Welfare Series No.15.

Australian Institute of Health and Welfare (1999), *Child Protection Australia 1997-98*, AIHW cat. no CWS 8 (Child Welfare Series), AIHW, Canberra

Cashmore, J. & Paxman, M. (1996), *Wards Leaving Care: A Longitudinal Study*, NSW Department of Community Services, Sydney.

Cavanagh, J. (1992), 'Children and young people in out-of-home care: Treating and preventing individual, programmatic and systematic abuse', *Children Australia*, 17, 1.

Fernandez, E. (1996), *Significant Harm: Unravelling Child Protection Decisions and Substitute Care Careers of Children*, Avebury, Aldershot.

Human Rights and Equal Opportunity Commission (1989), *Our Homeless Children*, AGPS, Canberra.

Human Rights and Equal Opportunity Commission (1997), *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, Commonwealth of Australia, Canberra.

Legislative Review Unit, NSW Dept. of Community Services (1997), *Review of the Children (Care and Protection) Act 1987: Recommendations for Law Reform*, Department of Community Services, Sydney.

Liddell, Margaret (1992) 'Young women subject to statutory orders and the transition to independence: Contradictions in policy and practice', *Children Australia*, 17, 3.

Liddell, Max & Goddard, C. (1992), 'State wardship and supervision and youth homelessness: Towards a better future', in P. Saunders & D. Encel (eds.), *Social Policy in Australia: Options for the 1990s, SPRC Reports and Proceedings No. 98*, University of New South Wales Social Policy and Research Centre, Sydney.

Liddell, Max & Goddard, C. (1995), 'Victorian child welfare: A continuing crisis of policy and provision', in P. Saunders & S. Shaver (eds.) *SPRC Reports and Proceedings No. 123*, University of New South Wales Social Policy and Research Centre, Sydney.

Liddell, Max & Liddell, Margaret (1997), 'Funders, regulators, providers, consumers: The brave new child welfare world', paper presented to National Social Policy Conference, University of New South Wales Social Policy and Research Centre, Sydney, July 16-18.

Maunders, D., Liddell, Max, Liddell, Margaret & Green, S. (1999), *Young people leaving care and protection: Report to the national youth affairs research scheme*, Australian Clearinghouse for Youth Studies, Hobart.

Saunders, B. & Goddard, C. (1998), *A critique of structured risk assessment procedures: Instruments of abuse?*, Child Abuse and Family Violence Research Unit, Monash University Department of Social Work and Human Services, Melbourne.

Taylor, J. (1990), *Leaving care and homelessness*, Brotherhood of St. Laurence, Melbourne.