CHILD ABUSE

— *the legal framework*

Richard Chisolm

A previous issue of this journal has been devoted to child abuse, and of course there is endless discussion in many places of the pros and cons of mandatory reporting laws. But non-lawyers must find it difficult to see the general picture of the laws relating to child abuse. Here is an attempt to provide one.

1. The Criminal Law.

Children have full status, from birth, as **victims** of crime. Assault, manslaughter and murder may be committed against children. The starting point, therefore, is that the **ordinary criminal law** applies to behaviour of adults towards children, of whatever age. (An injury before birth which prevents the child being born alive may involve the law of abortion).

This general proposition has an extension and a limitation. The **extension** is that legislation makes it an offence to abuse or neglect children. For example, the **Child Welfare Act 1939** (N.S.W.) provides: "s.184 (1) Any person, whether or not the parent . . . who without reasonable excuse neglects to provide adequate and proper food, nursing, clothing, medical aid, or lodging for any child . . . shall be guilty of an offence"; "s.140: Any person who assaults, ill-treats or exposes any child . . . if such assault ill-treatment or exposure has resulted . . . in bodily suffering or permanent or serious injury to the health of such child . . . shall be guilty of an offence".

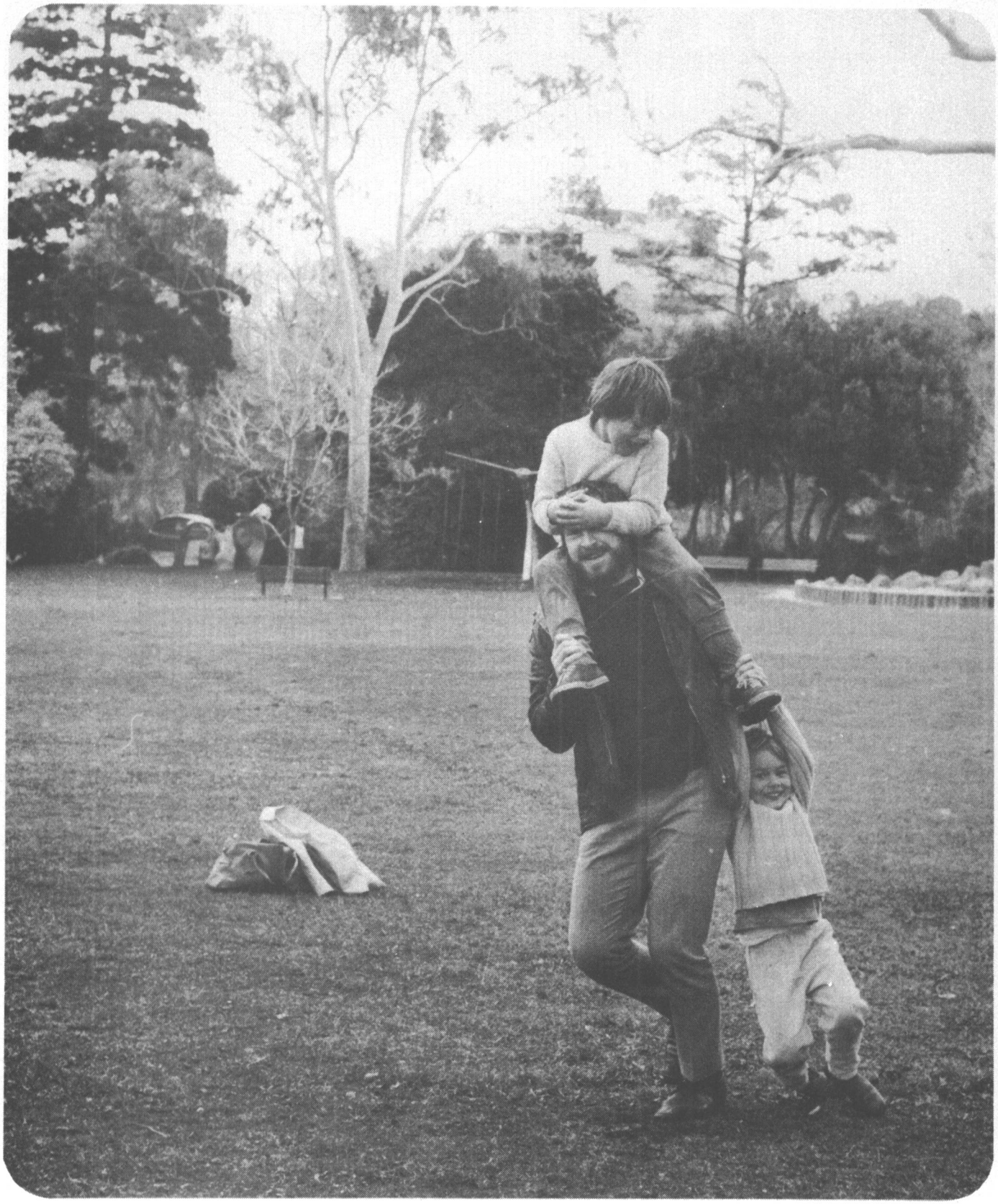
Under similar legislation, a father was convicted in England when his three year old son fell and sustained serious injuries, and later died after the failed to get medical aid: **R v. Hayles** (1969) 1 Q.B. 364. In addition, there are offences dealing with sexual relations with children, kidnapping, and so on.

The limitation is that parents and other people in loco parentis have a right of "reasonable chastisement". There are some cases on what is or is not "reasonable", but most of them are old and may have to be reassessed in the light of changing standards. It has been held that caning is legitimate **(Gardner v. Bygrave** (1889) 6 T.L.R.23); but boxing on the ear is not **(Ryan v. Fildes** (1938) 3 All E.R. 517). No punishment is justified if the child is too young to be capable of understanding correction: in **R v. Griffin** (1869) 11 Cox 402, a child of two and a half was held not capable. In 1969 the English Court of Appeal decided a controversial point: the standard of behaviour is the same for all parents in England, and it is no defence to say that the standard of correction is harsher in the country from which the family emigrated: **R v. Derriviere** (1969) 53 Cr App Rep. 637. There are not many recent decisions, probably because marginal cases don't get prosecuted.

Generally, I think it is clear that there are plenty of offences available to punish parents who abuse or neglect their children. The **enforcement** of those provisions is a different matter: it is highly debatable how stringently these laws are and ought to be enforced. For the moment I am only saying that whatever criticisms can be made of the law in this area, lack of applicable criminal laws does not seem to be one of them: it is not easy to think of instances of serious abuse which cannot be brought within the existing offences.

2. A Theoretical Point.

I want to make a point here and return to it later. The criminal law can be seen in two ways. First, utilitarian, practical, goal-oriented. You judge its merits by seeing if it works. On this approach, criminal



law is defended on the grounds, e.g., that it deters people from committing further offences, or at least stops them doing so while they are in prison, or that it stops individuals from resorting to feuds and other forms of self-help. The second approach is to see the criminal law as a sort of authoritative statement of a society's principles or moral values. We make something a crime because we want to denounce it as publicly and emphatically as we can. Related to this is a whole bundle of arguments to the effect that punishment through the criminal law is justified as retribution: the criminal gets what he deserves, society is vindicated, standards are upheld, evil is revenged, and so on.

Distinction

I know this distinction between utilitarian and non-utilitarian justifications for the criminal law is a crude simplification of a very complex controversy, but, in its blundering and tactless way, it helps us to understand some recurrent arguments. In particular, in the debates about "victimless crimes" — drugs, gambling, vagrancy, homosexual acts, etc. — you tend to find the abolitionists running utilitarian arguments and the conservatives running non-utilitarian ones. One side says: these laws cause much distress without doing any good. The other says: these laws stand for principles our society must hang on to. One side is talking about what the law **does**, the other about what it **symbolises.** No wonder the protagonists so often fail to come to grips with each other's arguments.

I'm keeping this distinction up my sleeve for now. I'll need it later.

3. The Civil Law.

(a) Compensation.

If a child is wrongfully injured, he or she may have a civil action for damages against the wrongdoer. The damages would be a sum of money which would, as far as money can, compensate him for the injury. A child may in theory bring an action (there are procedures by which he can be represented in court by an adult if necessary) against his parents for injuries he suffered at their hands. But actions against parents are so rare that the topic is not worth pursuing in this brief summary.

(b) Child Welfare Laws.

All States, and the Territories, have "child welfare" laws. The details and the names of courts and departments vary, but the essentials are similar. The legislation establishes a Department called something like "Youth and Community Services" or "Community Welfare". The Department has the responsibility for looking after state wards and other children in institutions and homes or in foster placements; administering a variety of services to individuals and families; maintaining "delinquent" children in institutions; running adoption processes; and other things. The legislation gives departmental offices a variety of legal powers, especially, for our purposes, the power to take children to court. The court is the children's court, and it has powers (under the same or related legislation) to deal with children who come before it.

Three Categories

Basically, there are three categories of children who come before the courts: (i) children charged with offences (the age of criminal responsibility varies from eight to ten) (ii) children who need not have committed offences, but are said to be "uncontrollable" or "exposed to moral danger" — in practice, often older kids who have run away from home or, if female, have led a sexual life that poses problems for some adult (and sometimes for the girl) and (iii) young children and babies who have been abandoned, neglected or abused. The court has powers to punish and/or remove these children from danger (there is much debate about the court's objectives and impact), and in particular, to make them State wards, i.e., to transfer them to the guardianship of the Department or its Minister rather than that of their parents.

It is this child welfare law which is of the greatest importance in the area of abused and neglected children. Cases may be brought by either the police or the Department (not by ordinary people), and the court has powers to return the child home, place him with some suitable person or home, or make him a State ward. The children's court is closed to the public, and is consituated by a magistrate. Parents are generally required to attend, and have a chance to put their story to the court. There is great confusion about who is supposed to be representing the child, but at least in most cases the child can be independently represented by a lawyer. Legal aid, however, may not be available: I think the only substantial scheme is that run by the Law Society of N.S.W. The order of the children's court is subject to appeal, but the appeal must be lodged within the prescribed period (e.g., 21 days). Hoever, once a child is made a ward of state, it is very difficult for the parents to exercise any further rights: they are often obliged to plead with the Department if they want the child returned. (This is a highly complex question, which can't be shortly summarised: perhaps I will take it up in a later article.)

(c) The Supreme Court.

Before child welfare legislation was ever dreamed of, the ancient English Court of Chancery exercised a wide and ill-defined jurisdiction over "infants", i.e., children and young people under 21. This power was inherited by the State Supreme Courts, and still exists. It is a possible alternative to the child welfare system, though rarely used for this purpose. I mention it because I

don't think its potentialities have been fully explored.

One key difference between this and the jurisdiction of the children's court is that **anyone** can take a case to the Supreme Court. A classic instance in the English decision In **Re D** (1976) 2 W.L.R. 279. In that case, the parents of an 11-year-old girl sought to have her sterilised: she suffered from a condition known as Sotos' syndrome, and they feared she might be seduced and become pregnant, which would be a disaster. An educational psychologist who worked with the girl went to the High Court (the same as our Supreme Courts) and asked for an injunction stopping the operation. The court granted the injunction, on the basis that fertility was an important human right and in this case it had not been established that contraception was impracticable: the operation should not be performed until the girl reached 18, when she could make up her own mind.

Width of Courts' Powers

The case is a spectacular instance of the width of the court's powers. In another case the parents of a 17-year-old youth sought an order stopping him from associating with a 23-year-old married woman with whom he had a sexual relationship. The court made the order, in the absence of any evidence that the relationship was exploitative or harmful, and in the absence of any representation of either the youth or the woman. This grotesque miscarriage of justice was a decision of the Supreme Court of Queensland in 1971: **Re F** (1971) Qd W.N. 37.

This jurisdiction may have considerable potential in cases of child abuse, where, for example, the Department is unwilling to bring the case before the Children's Court. In urgent cases speedy proceedings are possible, and legal aid might be available (the child is the client, and he has no means).

4. Reporting Laws

These laws are essentially to supplement the child welfare laws. As we have seen, only the Department (or the police) have access to the children's court in these cases. So the law is designed to encourage people to report suspected cases to the Department. The Department can then investigate it, and take the necessary steps. These might be the provision of services of some kind, or if necessary, an application to the children's court for an order relating to the child — perhaps, but not necessarily, and order that the child be made a State ward.

Notify

The laws **require** certain people (medical practitioners, and sometimes others, e.g., nurses, school teachers) to notify the Department of suspected cases of child abuse. They protect anyone who actually **does** report cases from any possible legal actions, e.g., for defamation, and they make the report confidential. Such laws have been enacted for some years in the U.S.A., and have been adopted here — in varying forms — in South Australia, Tasmania and N.S.W.

Terrible Threat

The fuss these laws have caused is quite extraordinary. Many doctors have seen them as a terrible threat to their relations with their patients. I find this a worrying argument, because it seems to overlook the rather vital point that the patient is the child. But why the worry? The laws didn't make doctors report in South Australia, and no prosecution has been launched there since the laws came into force in 1972. It is hard to imagine prosecutions being brought in other States either. If the doctors want to be alarmed, here is something for them to worry about: they might be liable for **damages.** It is possible to construct a legal argument that if a child was injured after the failure of a doctor to report, he might recover damages against the doctor for his injuries. This has already happened in the United States; but it remains to be seen whether doctors there will start reporting or merely raise their insurance cover.

Merits

The merits of these laws are indeed hard to assess. Do they make people report, or do they turn some people away from medical services, or a bit of each? I don't think anyone really knows, though many speak confidently on the point. I wish, with many others, that some of the energy spent on arguing about these laws had been spent on improving and evaluating the services that are available for the cases that do get reported.

Doubts and dilemmas

Now let me take up that earlier point that the law can be evaluated in symbolic (non-utilitarian) or practical (utilitarian) terms. The mandatory reporting controversy has, I think, some heavily symbolic overtones. The doctors, for example, tend to see it as a symbol of all kinds of interference into their professional powers. Others see it as a symbol for our recognition of children as people in their own right. As usual, these emotion-laden symbolic arguments get muddled up with practical ones, such as whether in the end the laws will result in more or less effective help for abused children.

The question I want to raise now is this: how do the legal provisions fit together? In particular, what are the respective roles of the criminal provisions and the welfare provisions?

Attractive view

One attractive view is that the criminal law should not be used at all. It is plausibly argued that cases will be reported if it's understood that the report will result in services; but many people would not report if

they thought the result would be criminal prosecution of the parents. Sending parents to prison wouldn't do the child any good, and may do him (and his brothers and sisters) a lot of harm. In extreme cases, the child can be removed from the home and placed elsewhere without recourse to criminal law. Once this is done, every effort should be made to see whether the parent-child relationship can be safely re-established. Criminal proceedings would often ruin any hope of this. So there is no room for the criminal law, except perhaps when an only child is killed.

Powerful Argument

This is a powerful argument. Is it right? There is a practical argument against it: the criminal law might deter other people from abusing their children. I think this is pretty weak. Most criminologists are fairly sceptical about the deterrent value of the criminal law, particularly in areas such as this. The argument that's really hard to handle is a symbolic one: What are we saying if we remove the criminal law from this area? That you can bash and kill children, but not adults? Aren't children as entitled to the protection of the criminal law as anyone else?

I think this issue is very important. We like to say that nowadays the approach to child abuse is a helping, therapeutic one. But this is only true if we can guarantee that the criminal law has no place. And the very strong practical arguments for this view are met by a very strong symbolic argument the other way.

Perhaps readers would like to take up some of these issues. If so, future columns could continue the discussion, or elaborate on some of the legal provisions sketched briefly here.

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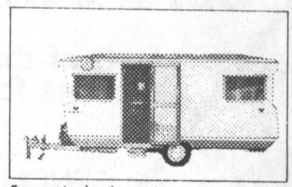

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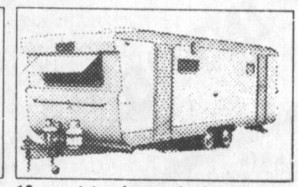

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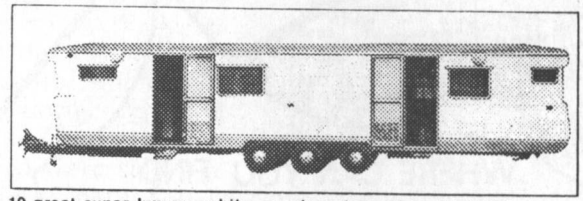

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