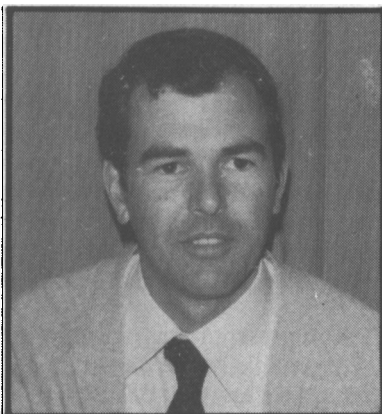


# LEGAL AID FOR CHILDREN

## *Some Reflections*

by Brian Lucas



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In its Second Main Report, **Law and Poverty in Australia**, the Commission of Inquiry into Poverty expressed the view that "legal representation for children appearing before the children's court, whether in the criminal or protective jurisdiction, is necessary if justice is to be done."<sup>1</sup>

This view coincides with the opinion of the Supreme Court of the United States of America in **In re Gault**.<sup>2</sup> It has been said that this decision "unleashed a frontal assault on the juvenile court system."<sup>3</sup> It confirmed that juveniles were entitled to "due process" and the same protection which the Fourteenth Amendment and the Bill of Rights afforded to adults.

This emphasis on "rights" can be seen as a reaction to the limitations of an exclusively "welfare" oriented system for dealing with juvenile offenders. One consequence of the decision was a re-examination of the role of the attorney in the juvenile courts.<sup>4</sup> The lawyer's role is caught up in the general tension which exists between the juridical model and the welfare model. There is a concern that "rights" are not abrogated under the guise of "helping" a child.<sup>5</sup>

The Australian Law Reform Commission has noted that "many welfare workers are critical of the adversarial role of the lawyer."<sup>6</sup> Others see the presence of lawyers as necessary in the interests of justice. Can these views be reconciled?

In this article I shall outline some of the factors which are pertinent to a consideration of this question.

### **The N.S.W. Legal Aid Scheme**

In order to situate the discussion in its proper context, some background understanding of how the solicitor comes into contact with his young client is useful.

Since May 1975 the Law Society of New South Wales has maintained

a roster of private practitioners who attend each children's court as a "duty solicitor". Under the present arrangements each solicitor attends one day a month.<sup>7</sup>

The services of the solicitor are available to every child who is to appear at court that day. There is no means test. The only cases which are excluded are some summons cases relating to motor vehicles, and serious criminal charges which carry a penalty of life imprisonment and which are not dealt with under the Child Welfare Act.

The legal representation of children in children's courts necessarily involves legal aid. Most families who are involved in this jurisdiction cannot afford legal fees. More importantly they do not generally have ready access to a lawyer. If there is a conflict between the child and the parents this problem of access to legal advice and representation is more acute.

It is the **child** who is entitled to the services of the solicitor not the parents. This distinction is most important and will be dealt with in more detail below.

If a child wishes to enter a plea of not guilty then the solicitor will retain carriage of the case until its completion. If there is a plea of guilty and the case is remanded, e.g. for reports, then the duty solicitor passes it on to the duty solicitor on the remand date. Generally this will only apply to children in custody where the remand until the solicitor's next duty day would be too long.

It is recognised that the ideal scheme would allow each solicitor to return to complete pleas of guilty.<sup>8</sup> Funds are not inexhaustible and to finance several solicitors to return for what might be only a brief and somewhat formal appearance was seen as wasteful. Exceptions are allowed in suitable cases.

There is a supplementary panel of solicitors who regularly visit the

remand centres to advise children who have lodged appeals. Legal representation is available to enable them to present their cases to the District Court.

### The Duty Solicitor

The duty solicitors are selected from among those who apply for inclusion on the roster on the basis of their experience and aptitude for work in this specialised jurisdiction. As child welfare law and practice does not command much space in the professional journals, the Law Society, in conjunction with the children's court magistrates, organises regular seminars and workshops to keep the solicitors informed of developments in the law as well as sentencing options.

The solicitor is required to attend at the court in sufficient time to interview any children in custody in the shelters and others who have been cited or remanded to appear that day before the commencement of the day's sittings.

Most solicitors keep a close watch on the day's list so as to ensure that each child has the opportunity to obtain advice. It is often the case that parents feel that the child does not need a solicitor, while others are reluctant to take the initiative. In these cases the solicitor will generally initiate some discussion with them concerning the availability of legal aid. Some magistrates take the view that the child should have a solicitor even though the parents are not very interested and they will sometimes urge the parents to avail themselves of the services of the solicitor for their child.

Of course no-one can be forced to want representation. There was one young boy aged sixteen who indicated that he did not want a solicitor. When asked if he had any reason he said that his case was "too complicated" and he would prefer to handle it himself.

### The "Client"

The children who appear before the courts can be very broadly grouped into three categories and the relationship between them and the solicitor and the solicitor's functions are determined accordingly.

1) There is the offender, i.e., the boy or (less frequently) the girl who has committed a criminal offence. It is this case which most nearly coincides with the normal representation of an adult. The child is entitled to be advised on the law, the existence of possible defences either on the law or the facts, and be given some guidance as to the proper plea.

If the solicitor determines that there is a valid defence then the matter proceeds to a hearing in the normal course. The child is entitled to put the prosecution to proof and the solicitor is obliged to represent the child irrespective of his private views about the child's guilt or innocence.

2) There is the so-called "status of offender", i.e. the girl or (less frequently) the boy who is said to be "uncontrollable" or neglected by reason of some action instigated by the child. Under the N.S.W. law this falls into such vague categories as "being exposed to moral danger." It also includes school defaulters.

These cases present some special problems which will be discussed below. They are in the nature of criminal charges in that the consequences involve "punishment" and yet the rationale for social involvement in this area is based on the need to "protect" the child and promote his welfare.

3) The final group comprises those children who are neglected because of some failure or improper action on the part of another. Generally these children are of tender years. As a matter of procedure the neglect complaint is brought against the child although often the real dispute is between the complainant and the guardian who appears by leave of the court.

### The Solicitor/client Relationship

It is not intended to develop here the complexities that arise in determining the exact nature of the relationship between the solicitor and a "client" who is unable to enter into a contract.<sup>9</sup>

In general, irrespective of the exact legal basis, the relationship between a solicitor and a child who comes within the first group listed above is very similar to that which would exist if the child was an adult. However the court is not oblivious to the needs of the child. This is the reason for special courts and "sentencing" procedures. The solicitor must also bear in mind that he is appearing in a special jurisdiction and he should seek to cooperate with the aims of the court. However this brings sharply into focus the question raised at the beginning of the article which can be rephrased — does the special nature of the juvenile court modify the solicitor/client relationship?

It is suggested that the relationship is qualified in that the position of the solicitor in relation to an infant is not simply contractual but involves a fiduciary dimension. As well as being responsible for representing the child, i.e., arguing the **child's case**, he must also ensure that the child's best interests are safeguarded. This second aspect is more prominent in cases involving the second group of children listed.

The representation of an infant who is unable by reason of tender years to give any sort of instructions either about the facts or what he would like the court to do necessarily involves the solicitor in watching out for the best interests of the child to the exclusion of other considerations. The solicitor's role is somewhat analogous to that of the *amicus curiae* but he participates in the proceedings from a definite standpoint. This is a curious relationship which has not yet been fully described.

### The Solicitor's Duty

An understanding of the relationship between the solicitor and the juvenile client may determine the solicitor's duties but it would seem easier to proceed in the other direction and from a reflection on the proper role of the solicitor draw some conclusions as to the nature of the relationship.

It has been said that "juvenile court representation, consistent with the court's special concerns for the best interests and redirection of children, involves more than a journeyman representation of adult defendants."<sup>10</sup> As a general proposition this is not seriously disputed but the real problem is in defining the extent to which the lawyer should modify his traditional role "to present every defence that the law of the land permits" or "to win his case or help secure the lightest possible penalty or sanctions for the client's wrongdoing."<sup>11</sup>

Some suggest that there are new duties which should be added to the lawyer's historical role as a developer of facts, a guardian of rights and an advocate against the prosecution's contentions.<sup>12</sup>

To situate this dilemma concretely one could envisage a case where a young offender would probably benefit from a placement, say with a voluntary organisation, away from home and the friends who were apparently a source of his trouble. He does not see things this way and wants to continue associating with his "mates". The prognosis in such a situation clearly indicates that the boy would soon find himself in more serious trouble. Does the solicitor follow blindly the child's wishes and put this to the court even though it might be clearly not in the boy's interests? Is the solicitor bound by his instructions or is he bound to do the best for his client? With adults these two considerations generally coincide since we accept that an adult is better able

to determine what will be in his interests. Of course the very point with juveniles is that what the child wants may not be what is best for him.

Some commentators resolve this tension by resorting to the traditional understanding of the lawyer's function.<sup>13</sup> This reinforces the adversarial approach. It gives a clear answer to the problem but most solicitors who practice in this jurisdiction recognise that a strictly adversarial approach can sometimes be inappropriate.

It is suggested that there can be a reconciliation of these opposing views if some important distinctions are made. The age and understanding of the child must be taken into account. As the child is older and more mature he will have a more developed sense of justice. He will understand that the lawyer is there to put his case and act as his spokesman. The duty to follow instructions becomes paramount. Where the child is younger and obviously unable to know his own mind a consideration of what will be best for him becomes more significant.

The solicitor also owes a duty not to mislead the court and this will restrict his obligation to put matters which are obviously improper. There was one case where a juvenile denied an offence and had strong evidence to support this. The child (possibly at the insistence of a parent) told the solicitor to enter a plea of guilty. Now to enter such a plea involves the solicitor undertaking to the court that he has formed an opinion of the facts and law that there is no reasonable defence. Such was not the case. Bearing in mind that the magistrate may refuse to accept a plea which is obviously incorrect, the solicitor had a duty to withdraw.

This illustration highlights a common problem that often the interests and wishes of the child do not coincide with those of the parents. In

many complaints that a child is uncontrollable it is the parents who bring the matter to court. In these cases the solicitor must be scrupulous in not compromising the relationship he has with the child. One cannot be unmindful of the parent's views. To do so would be to prejudice the family unit and one must remember that in most cases there will come a time where the child will have to return to that family. One must be conscious of this even where some period away from the environment is warranted.

The solicitor must tread warily and avoid comments or submissions which may have the effect of reinforcing the rift within the family.

In the same way one must also ensure that the child feels that he has been dealt with justly. To feel a sense of injustice can confuse and further isolate a troubled child. It was Hegel who said that a criminal has a right to punishment. There is a lesson here. A child who has done the wrong thing expects to be dealt with accordingly. To be too soft or too harsh is to treat the child unjustly. The advocate is obliged to put all the relevant information to the court so that the child will then be confident that the court was in a position to act fairly.

One final observation on the solicitor's duty concerns his role as a mediator. Most lawyers who are involved in court work appreciate the value of the settlement. In civil cases this is quite common but in the criminal sphere our system does not entertain "plea bargaining". In the juvenile court, however, it is suggested that there is a real role for the settlement particularly in the second type of case mentioned. The real issue is not so much whether the complaint will be established but rather what will happen to the child.

Often the lawyer will be a person that both parents and child may trust. He is outside the system and can often help the parties isolate the

areas of conflict and suggest avenues of help. To this end he must be sensitive to the real needs of people and be prepared to go beyond the superficial level of legal relations and duties.

His role will then develop as a guardian of legal rights but a promoter of personal relationships. Some might suggest that an advocate trained in another discipline, e.g., a social worker would be better equipped for such a role.<sup>14</sup> This involves a large number of considerations which are outside the scope of this article. The fact that the issue is raised confirms that there may be a need for some modification of the strictly adversarial approach. Whether this is achieved by a particular type of profession, or rather by the participation of a special kind of person is a question which cannot be developed here.

### Some Conclusions

One can consider at length and in much more detail the various intricacies of solicitor's duties and how they apply in various hypothetical "hard cases". To do this is to miss the point of the significant contribution which a legal aid scheme makes in one area of social involvement in family and child welfare.

A solicitor once remarked that he felt when he interviewed children that often he was the first person that the child could speak to and who was on the child's side. The child is harrassed — everyone is against him. He is in trouble at home, at school and with the "welfare".

Suddenly he is given the opportunity to see his solicitor. Someone is listening to him and when he goes to court there is someone there to help him and tell the court his side of things.

The provision of legal aid for children is a recognition that a child does have rights. The child is a person regardless of age, intelligence or ability to speak out. His rights do not exist only in theory. He is being given assistance in exercising his rights.

To be involved in the direction of a child's future is a grave responsibility. The lawyer cannot ignore the impact his personality has on the child. He must be able to recognise and react sympathetically to the hurt which is evident in so many young lives. The child deserves the solicitor's best — he can expect no more but is entitled to no less.

The senior children's court magistrate in N.S.W. described the legal aid scheme as "the greatest improvement in the children's court in 40 years."<sup>15</sup> The improvement goes beyond the modification of the juridical structures and is a real contribution to society's commitment to child welfare.

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13. Ibid., at p.58.
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