Children's Rights and the State in Loco Parentis

By Eddie Le Sueur

The state government Department for Family and Community Services (formerly DCW) in South Australia is currently seeking to clarify and where necessary change policy in the area of guardianship, long term legal status and related issues. To facilitate this aim in the context of a broader consultation process, a discussion paper was prepared by the author in his role of Chief Policy Officer of DCW in October 1989. The full paper covers a range of issues bearing on the department's role in relation to children and their families where there is a possibility of state care being ordered.

The paper is too extensive to be published in the journal in full, but some extracts follow. Issues also covered by the paper, but not included here, are, achieving long term legal status for children; any other person guardianship; use of orders; collection of maintenance; obligations toward parents; balance of risk in child welfare; and policy implications.

This paper is based on a number of documents prepared for the Department within the last few years and some original material by the author. Some of the documents are in draft form; others have been printed and released.

The intention of the paper is to bring this material together in an accessible form and to illuminate the relationship between policies and practices in different areas.

The resource material used is as follows:

D. Schneider et al., 'Intervention on behalf of Families & Children: Substitute Care and Planning for Permanence', 1987.

Program, Planning Division, D.C.W., 'Family & Child Welfare Position Paper', 1988.

Victoria, Community Services Dept., Draft paper for Social Welfare Administrators Conference, 1989, 'State Commonwealth Responsibility for Children in State Care'.

Fiona Kerr, 'Departmental Protocal for Intervention with the Family Court', 1989.

Patricia Wang, Draft paper 'Guardianship of Any Other Person – Interpretation & Implications', 1989.

Rita Cole, Guardianship: The Nature of the Department's Responsibility', draft paper, 1989.

Fiona Kerr, Draft paper on Collection of Maintenance from the Parents of Children Who Are in the Care of the State', 1989.

Throughout this paper, there are frequent references to 'the state'. When used in its classical sense as a general reference to the 'body politic' a small 's' is employed. When there is reference to a particular State of Australia (e.g. South Australia), either directly or by inference, a capital 'S' is used.

CHILDREN'S RIGHTS

The policy of the South Australian Department for Family and Community Services on the rights and responsibilities of children and parents has been stated extensively and consistently in a number of documents[1] and it is only summarised here.

Central to the notion of the child's welfare is the right to live in a family that offers 'continuity of relationships with nurturing parents or caretakers, and the opportunity to establish life-long relationships'.

Parents have the primary responsibility and duty to perform child rearing functions but the powers which accompany this duty are conditional on them being exercised adequately. This position refutes the notion of 'ownership' of children and describes the parental role in terms of duties rather than rights. The duties of parents are to protect children's health and well-being; assist children to develop their physical, emotional and intellectual capacities; nourish their self-esteem and self-confidence; prepare them to take advantage of and responsibly exercise their rights and responsibilities as citizens; and, as far as possible, provide them with conditions favourable to grasping the educational, occupational and other opportunities available to them in society. Since the powers which acompany these parental duties exist only so long as they are required for the protection of the child, these powers diminish with the age and maturity of the child. Central to the notion of the child's welfare is the right to live in a family that offers 'continuity of relationships with nurturing parents or caretakers, and the opportunity to establish life-long relationships'.[2]

The role of the state is to encourage, promote and protect the ability of families to care for children. Where this parental duty is not performed or where it is impaired the state has the responsibility to advocate for and, if necessary, intervene on behalf of the child to ensure that he/she receives adequate care and protection. Decisions affecting a child's relationship with his/her family, such as separation from the family and transfer of guardianship are such serious matters that they should be made by judicial rather than by administrative decision. In any judicial or administrative actions affecting families and children, the best interests of the child must be paramount. It is recognised that 'best interests' is not a simple concept; it raises considerations such as the capacity of the child to make an informed judgement and the rights of others, including parents, to make decisions on behalf of children. Consequently, a determination must be made on a case by case basis, depending on the particular circumstances involved.

In any state intervention, all parties must have the opportunity to be heard and to be fully informed of the intent of and reason for state intervention. Only the minimum degree of formal intervention, consistent with the safety and well-being of the child, should be applied in each case.

The Department recognises that many family problems have their roots in poverty, inequality, disadvantage and stress. Its support for the family, defined as 'any social grouping of one or more individuals who have the responsibility and/or care of one or more children or dependants', is based on the following principles:

- the family is the best means of providing care, socialisation, and continuity of relationships for children

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- birth families have the first responsibility to provide care for children
- families have the right to choose the kind of care they will give their children, as long as the children's well-being is maintained
- children have the right to enjoy parental care and protection and to have their welfare safeguarded
- the Department has a responsibility to promote a network of services which assist parents to carry out their responsibilities
- where this parental responsibility is not carried out or when parental care is harmful to the child, the Department must take appropriate action to protect the child
- any intervention undertaken on behalf of children must be child-focussed with the care and protection of the child being the paramount consideration

Families frequently need assistance to carry out their responsibilities towards children and the Department provides a range of services, either directly or indirectly, for this purpose. These were described in the South Australian Government's 1988 White Paper[3] as follows:

'The Department will promote the development of strong communities and support networks, based on a spirit of mutual caring and responsibility, and neighbourliness. It will continue to contribute to social planning in new housing areas through an emphasis in the establishment of services and community supports from the outset. It is well recognised that people living in new areas have a better quality of life and less isolation if equal attention is given to the development of transport, children's services, shops, and clubs in the early planning stages.

The Commonwealth Government, through the tax transfer system, has the responsibility for providing adequate and equitable income support to families in respect of dependent children and to individuals from the age of independence.

The Department presently funds many services which provide a local response that is preventive in nature. The Government's commitment to the continued and expanding funding of Community and Neighbourhood Centres, self-help groups, and other community groups and organisations reinforces the important role that they play.

Support to families to enable them to care for their children is a cornerstone of the Department's family policy. Crises can occur in all families and timely and appropriate support and intervention can do a great deal to strengthen the capacity of families to cope in future. Services such as Crises Care and Financial Counselling are established to provide support at these times.

To assist with other family difficulties, the Department encourages the use of community-based support services such as child care, Family Support Services and Domiciliary Care in order to minimise later intervention. Additionally, in situations of stress and conflict, the availability of respite care means that placement in longer term substitute care for some children is unnecessary, and the Department will expand its support on this preventive area.

The Department has played a significant advocacy role on income support and will continue to argue for those who are reliant on pensions and benefits for their income. The State Government Concessions Scheme contributes towards ensuring an adequate standard of living for the State's citizens, in view of the multiple and distinctive effects of poverty on individuals and families. However, the central role of Commonwealth Government provisions requires ongoing advocacy for appropriate levels and conditions of payment.

COMMONWEALTH AND STATE RESPONSIBILITIES

The respective responsibilities of the Commonwealth and State Governments in relation to child welfare are complex, subject to continuous negotiation and shifts in balance and affected by State or Federal legislative amendments. Two areas require consideration. One is financial support and the other is family law.

Financial Support

The role of the Federal Goverment[4] is embodied in the Australian constitution which places major constraints on how it can expend funds on welfare and social security. The Federal Government can distribute funds on welfare and social security under three main categories:

- direct expenditure (i.e. not through a State Government) under a clear constitutional power (e.g. direct payments to pensioners/ beneficiaries)
- expenditure through the States (grants/ subsidies)
- direct expenditure (including direct payments to local government) not with a clear constitutional power (grants/ subsidies). Federation removed very little power from State Governments resulting in a situation where the Federal Government has held most of the finances while the State has held most of the power in relation to the provision of education, health, housing and welfare services.

Each State government has the power and discretion to provide, either directly or indirectly through other agencies, services in each of these and other areas.

In practice, the following broad division of responsibilities has developed in relation to child wefare.[5]

- The Commonwealth Government, through the tax transfer system, has the responsibility for providing adequate and equitable income support to families in respect of dependent children and to individuals from the age of independence.
- States and Territories are responsible for ensuring that, where a young person's parents are unable or unwilling to provide care for a child and the child is at risk in its current circumstances, an alternative placement is found.

In meeting its responsibilities in providing an equitable tax transfer system, the Commonwealth provides:

- A number of horizontal equity* measures in recognition of the additional costs of children and children with special needs (i.e. Family Allowance, Child Disability Allowance). These payments are child based and move with children regardless of family situations.
- A system of family based income supplementation (e.g. Family Allowance Supplement and Additional Pension/ Benefits) aimed at establishing and maintaining vertical equity* across families. These payments are provided to caregivers and so do not move with children outside family situations.
- A system of income support payments to people unable to support themselves through sickness, unemployment, age, the need to care for dependent children or through the requirements of full-time education (e.g. Unemployment Benefit, Job Search Allowancce, Invalid Pension, Age Pension, Sole Parents Pension and Austudy). These payments are individual income support payments and as such move with the individual regardless of his/her family situation, provided he/she continues to meet the relevant eligibility criteria.

States and Territories are responsible for ensuring that, where a young person's parents are unable or unwilling to provide care for a child and the child is at risk in its current circumstances, an alternative placement is found.

When a State government assumes *guardianship* of a child as well as *custody* of that child (see section 3 for the distinction), it assumes responsibility for long-term welfare as well as day to day care and control. Where

the State assumes *legal custody* of the child, it assumes responsibility for the day to day care and control of that child while the parent retains responsibility for the long-term welfare of that child. In either case, the State assumes responsibility for ensuring that the financial costs of any child in its care are met, either directly or through reimbursement to a third party such as a foster parent. This responsibility for ensuring that costs are met exists irrespective of whether the collection of maintenance from parents is pursued or not.

Responsibility for child based horizontal equity payments (e.g. Family Allowance) remains with the Commonwealth. The Commonwealth also retains responsibility for family based income supplements to care-giver families (e.g. FAS), income support to care-givers where eligible, and to young people in substitute care who are over school leaving age.

Where a child is not living with his/her natural parents but the current alternative care placement has been privately arranged (e.g. with a relative or family friend), the State is not responsible for the costs of caring for that child. State provision of costs if care is directly derived from the State accepting responsibility for the welfare and day to day care of the particular child.

Where a child has been privately placed and that placement is in danger of breaking down due to the costs of caring for the child, the State may choose to make an assessment of the placement based on the needs of the child. If the placement is considered to be beneficial to the child and the State takes responsibility for the day to day care of the child, the care-givers will be eligible to receive reimbursement for the costs of care. Again, this is irrespective of the State's attitude towards maintenance collection in guardianship and care and control cases.

Family Law

With regard to family law, the Commonwealth derives its powers to legislate in the area from two provisions in the constitution.[6] Section 51 (xxi) gives power to make laws with respect to marriage and Section 51 (xxxii) gives power to make laws with respect to divorce and matrimonial causes. In exercising its power under the Family Law Act, the Family Court deals with matters relating to the custody of children and parental access. These impinge on similar powers attached to State children's courts, dealing with child welfare.

State jurisdiction takes precedence over the Family Court in matters affecting children's welfare but there is clearly a need for co-ordination in working arrangements and in particular cases. Unless there are actual or potential issues of care and protection of children, parental disputes over custody and access should be referred to the Family Court, without State welfare departments' intervention.

A more detailed statement of relations with the Federal Family Court, established under the Family Law Act, is contained in the South Australian Department's papers on Access and Family Court Protocol.[7]

GUARDIANSHIP AND CONTROL OF THE DIRECTOR-GENERAL ORDERS

Although the legal distinctions between 'guardianship', 'custody', and 'care and control' may be reasonably clear, there is often confusion in practice. Also, it is not always easy to disentangle the subtle differences in status and the rights and responsibilities of the parties involved – children, parents, state agencies and caregivers.

A most useful account of the confusion and a clear resolution of some of the difficulties is contained in Gamble's 'Law for Parents and Children'.[8] She notes that prior to a 1983 Family Law Act amendment, the terms 'guardianship' and 'custody' had been used in a similar fashion to encompass all the powers and duties of parents. The amendment described 'guardian' as a person who has 'responsibility for the long-term welfare of the child' and who has 'all the powers, rights and duties that are vested by law or custom in the guardian of the child'. On the other hand, 'custody' refers to the 'right to have the daily care and control of the child and the right and responsibility to make decisions concerning the daily care and control'.

It is clear that this is the distinction intended under the Community Welfare and Children's Protection and Young Offenders Acts. Under guardianship, the Minister's rights in relation to the child are exercised to the exclusion of the rights of all other persons, including natural parents. The Minister assumes for legal purposes the responsibility for the ongoing care and development of the child. Where a child is placed under the control of the Director-General, parental rights are not transferred. Parents retain their rights; however, the Director-General has a right and responsibility to assist parents and child in certain areas.

If a child is placed under the control of the Director-General, then unlike guardianship, the legal rights and responsibilities of the parent or guardian do not vest in the Director-General and the State. The State will only take on the responsibility for the child in respect of those aspects of the child's life which have been detailed or outlined specifically by the court, for example, health, welfare, place of residence, education and/or maintenance, etc. Other than in those areas of control named, the parent retains the rights and responsibilities in respect of all other aspects or areas of the child's life. It would be possible, therefore, to find that a child had been placed under the control of the Director-General in respect of health and education, for example, and continues to reside with the natural parents or guardians.

Recent amendments to the Children's Protection and Young Offenders Act have strengthened this distinction and gone a considerable way towards meeting previous widespread objections[9] that there was little practical difference between guardianship and control of the Director-General. Nevertheless, it was always intended that guardianship should refer to the full parental powers of the Family Law Act 1983 definition and that control of the Director-General orders, when containing a 'general welfare' clause, were akin to the Family Law Court defintion of 'custody'.

The Children's Protection and Young Offenders Act clause referring to control of the Director-General orders (14.1.6) now reads:

'place the child under the control of the Director-General for a specified period, not only to such extent, specified in the order, as the court thinks necessary to secure the proper care, protection or control of the child'.

The former clause simply read:

'place the child under the control of the Director-General in respect of such matters relating to the welfare of the child as the Court specifies in the order, for such period of time as the Court thinks fit.[10]

The need for clarification over 'guardianship' and 'care and control' is far from academic. It has considerable implications for the legal rights and obligations of the Department and parents and for case planning and social work practice.

Whilst they are not here explored in detail, clarification is required concerning the precise legal rights of the Department and parents under control of the Director-General orders as opposed to guardianship. Is it permissible, for instance, to withhold a child's address from parents in these cases? What right does the Department have to deny or regulate access?

In emphasising the powers vested in guardianship of a State Minister, Gamble[11] refers to the ambiguous situation of foster parents. She states:

'While the child is in their care, the foster parents have no rights except those granted by the minister. As the minister is the child's guardian, all decisions, other than those relating to trivial day to day matters, must be taken by him. The foster parents are placed in an odd position in which they have most of the obligations but almost none of the powers necessary to care for a child. ...Although the parents hand over all their parental rights when they admit the child to care they do not thereby forfeit them permanently as they would if the child were placed for adoption. The minister's guardianship lasts only so long as he determines.'

In conjunction with considerations of the paramountcy of a child's interests and the need to help natural families to support their own children adequately, this has been one of the major forces behind permanency planning and recent amendments to South Australian legislation to allow 'any other person' guardianship.

THE STATE AS PARENT

Several recent departmental documents[12] have contended that the State cannot properly exercise responsibility for a child's care and protection and also directly provide that care through services which it controls. In many respects, the argument is sensible. Given the legislative, administrative and financial power of the State, the identification and remedy of abuses and inadequacies are left to concerned citizens in such circumstances. The State has a more legitimate and objective role as the protector of children's interests, divorced from the practical requirements of direct care. There are exceptions which arise either from necessity or because of the existence of other considerations. Society, for instance, requires that the State exercise its powers and resources to protect it from young offenders, as well as making the attempt to rehabilitate them. Additionally, at most times there are unfashionable minority groups for whom no voluntary caregivers can be found. In these cases, the State has to fill the vacuum and make direct provision.

With these exceptions, however, it is probably sensible that the State should avoid the role conflict inherent in being the guardian of a child's interests and the direct provider of care. If this premise is accepted, however, there is an equal need to accept the rights and responsibilities of the State to exercise a higher degree of scrutiny over the affairs of those who accept responsibility for direct service provision. The ultimate responsibility for the welfare of children rests with the State acting in 'loco parentis'.

This re-statement is necessary because recognition of the State's limitations as a parent in a practical sense has tended to undermine recognition of its legal status and responsibility. No devolution of day to day responsibilities for the care of children to other agencies, whether foster parents or residential facilities or others, in any way removes or reduces the ultimate State responsibility for their care and well-being. In fact, it increases it as vigilance has to be exercised at secondhand and embraces a complex range of functions, including policy direction, needs assessment, resource maintenance, standards setting/monitoring and case management, as well as the quality of day to day care.

Recognition of the fact that the State is not necessarily the best service provider should not be used to obscure or diminish the State's legal rights and obligations. To assert that the State should not be 'parent' does not mean that the State cannot be guardian.

The nature of the State's responsibility[13] requires brief explanation. The involvement of the State in the care of children rests on the value placed on children by the community and the importance on meeting their needs. Consequently, the State has to exercise all the attributes of a 'good parent' and attempt to ensure that the full range of a child's needs are met to the optimum extent. 'The Family and Child Welfare Position Paper' states (p.10) that:

'The needs of the child should be the primary consideration in formal intervention by the State. In particular, measures aimed at protecting children from harm should be based on a full understanding and assessment of both the child's immediate and lifelong needs. It is incumbent on the State to insure that the child is better off as a result of any intervention. For example, separation of a child from the family and placement in an alternative family environment should only occur after the harms being, or likely to be suffered by the child, are weighed against the psychological effects of separation and of possible severance of bonding between the child and the family, and the likelihood of further anxiety associated with legal and administrative processes and with the adaptation to an unfamiliar family environment.'

Of particular significance is the reference to the child's 'life-long' needs. Acknowledging the difficulties, State Government welfare departments have been singularly unsuccessful in preparing many young people in care for independent living. In her draft paper (p.24), Cole alludes to the dilemma facing young people and social workers. On the one hand, there may be adolescents capable of and wanting to live independently. However, due to the paucity of independent living units, the generally high cost of private rents and the general community view that the majority of young people should live 'at home' with adult supervision, workers in some cases are forced to continue to place adolsecents inappropriately in foster care, shelters or other short-term accommodation. The other side of the dilemma is the concern that adolescents may be discharged inappropriately early into independent living. Few people under 18 years of age are capable of successful independent living and this is particularly true of young people who have been in the foster care system.

Given the financial, emotional and social support provided by most parents to their children after the age of 18 in order to assist their transition to independnce, State welfare departments have generally failed to act as a 'good parent' once the formal guardianship or care and control responsibilities have ceased. Cole states (p.27) that:

'Unlike children who have been formally adopted into a family situation, adolescents in care and those leaving care have had their family relationships severed and frequently ill-maintained over the years, with *no replacement* by a significant psychological parent or guardian. Once discharged from care little is known about what happens to these youths. Many find their way onto a cycle of drug/alchol abuse, some drift into the mental health system or, in the case of young women, move in and out of unsatisfactory relationships in an attempt to seek an identity and closeness in relationships which has been missing for most of their lives.'

The lack of a legal mandate to provide services and, more importantly, resource problems and competing priorities have prevented welfare departments from providing anything more than minimal assistance to young people discharged from guardianship. The situation has also been complicated by Commonwealth responsibilities for income maintenace and disputes over respective State/Commonwealth obligations. There is increasing acknowledgement amongst State welfare departments of their moral obligations for children's futures as citizens and the consequent need to place greater emphasis on independent living skills and post-guardianship assistance.

A difficulty for the States is that accepting the moral obligation of a 'good parent' may raise further difficulties with the Commonwealth Government which could maintain that these obligations include direct income maintenance payments for young people under 16 in the care of the State. In other words, the State should pay the equivalent of Austudy Dependent, Young Homelesss Allowance and other benefits for this group of young people. Indeed the Commonwealth could go further and raise the issue of indirect payments, such as substitute care subsidies. At present, as foster parents are not guardians, subsidies are not means tested for tax and social security purposes. The Commonwealth's attitude could change in this respect and it could require the States to pick up the cost of revenue foregone through non means-testing.

Finally, brief consideration should be given to State responsibilities for children in out of home placements without orders. Many of these children do not have a legal guardian, exercising the range of desirable powers and obligations which have been outlined in the preceding discusssion, even though they may be receiving adequate care and protection.

Current departmental procedures allow social workers to arrange or legitimise foster care placements without an order (category 2). This is in direct contravention of the Department's established principle repeated earlier in this paper.

"Decisions affecting a child's relationship with his/her family, such as separation from

the family and transfer of guardianship should be made by judicial rather than by administrative decision".

Furthermore, current departmental procedures allow time-limited, privately arranged placements (category 5), whether with relatives or non-relatives, and their indefinite continuation following review and approval (category 4).

There are concerns that this system does not provide sufficient protection for a child or an adequate framework to promote the discharge of full guardianship responsibilities. No child should be in a substitute care placement for more than three months without an order. This period should allow sufficient time for the resolution of temporary family crises and for an assessment of approriate departmental action. Placement with relatives without an order should be allowed to continue, subject to review, and it is regarded as a preventive action and a recognition of the significance of the extended family in many communities. The definition of relative may require amendment in order to take account of Aboriginal customary law.

This re-affirmation of State responsibilities for guardianship has implications for departmental attitues towards underage runaways, whether they have been subject to previous departmental intervention or not. No child, certainly under the age of 16, should be left without a guardian actively involved on his/her behalf. This view requires State welfare departments to cease divesting case management responsibilities to other agencies such as shelters for children under guardianship and to seek legal guardianshp in cases where it does not exist.

CONCLUSION

This paper has attempted to clarify the nature and extent of State powers and responsibilities associated with guardianship and other forms of legal or administrative orders and to give some guidelines on their appropriate use. This has been undertaken in the context of the State's obligations as a 'good parent' and the necessity of ensuring that children have assured legal status, the best quality care and adequate preparation for independent living.

The State has broad responsibilities and these should not be reduced to financial considerations only. Nevertheless, material assistance is an important basis for effective intervention. The degree of State financial assistance which should be provided is partly dependent on legal obligations and partly dependent on other considerations such as equity and the promotion of adequate and effective services. In broad terms, the assumption of guardianship or custody responsibilities as in control of the Director-General cases, requires the State to provide the highest level of financial assistance. In other situations, there is no legal obligation on the State to provide financial assistance; it may exercise its discretion, however, to assist families in certain defined categories with the costs of providing substitute care.

REFERENCES

1. See the 'Family and Child Welfare Position Paper', June 1988; 'Intervention on Behalf of Families and Children', September 1987.
2. A. Maluccio and S. Fein, 'Permanency Planning – A Redefinition', Child Welfare, Vol. 62, No. 3, May/June 1983.
3. S.A. Government White Paper, 'New Directions on Welfare: The Next Five Years', December, 1988.
4. A. Graycar, 'The Politics of Social Policy in Australia', Social and Economic Administration, Vol II, No. 1, May 1988.
5. Based on a Victorian paper for the Social Welfare Administrators Conference, 'State/Commonwealth Responsibilities for Children in State Care', September 1989.

NOTE: See Social Security Review. Issues Paper No.1, B. Cass, 'Income Support for Families with Children', 1986; Glossary.

Horizontal Equity: a principle which requires that people in like circumstances should be treated alike. This may be taken to support different treatment of people with the same income but differing calls on that income arising from differing family responsibilities. At any level of income, people with children incur greater costs and have greater needs than people without children.

Vertical Equity: The principle of verticle equity requires that people on low incomes should receive greater assistance and/or pay less tax than those on higher incomes according to their *capacity to pay*

6. See H. Gamble, 'Law for Parents and Children', The Law Book Co. Ltd., 1986. p.52.
7. Fiona Kerr, 'Departmental Protocol for Interaction with the Family Court', Program Planning Division, D.C.W., October 1989.
8. Ibid. pp.7-8.
9. See I. Bidmeade, 'Review of Procedures for Children in need of Care', 1986, pp.68-71.
10. From the point of view of national consistency of terminology, it is unfortunate that the definition of 'guardian' in both the Community Welfare and C.P.Y.O. Acts retain a reference to 'custody'. The C.P.Y.O. Act definition reads:

    "'guardian', in relation to a child, means a parent of the child and any person (other than the Minister) who is the legal guardian of the childs of who has the immediate custody and control of the child."

    Proposed amendments to the Community Welfare Act (October 1989) change the definition of 'guardian to:

    "...a parent of the child and any person (other than the Minister or Chief Executive Officer) who is the legal guardian of the child".
11. Ibid. pp176-77.
12. See the 'Family and Child Welfare Position Paper', June 1988; 'Intervention on Behalf of Families and Children', September 1987.
13. See 'Family and Child Welfare Position Paper' and R. Cole, 'Guardianship: The Nature of the Department's Responsibility' for more detail.

Hall's cartoon by courtesy of Impact. Australian Council of Social Services.