

# Policies, Obstacles and Opportunities for the Children of South Australia in the 1990's

By The Hon. Don Hopgood B.A. Ph.D. M.P.

Deputy Premier, Minister for Health, Community Welfare and the Aged.



I have chosen to discuss one aspect of this subject – the rights of parents and children – because I consider that its debate is fundamental to the development of sound progressive policies for children and their families in this State and throughout Australia. I presented a more detailed paper on the complex issues of parental and children's rights at the recent Social Welfare Ministers' and Administrators' Conferences in Brisbane, in order to encourage discussion.

The respective rights of children and parents have always been a central pre-occupation of public welfare departments. The issue has assumed greater prominence in the last few years and changes in the social perception of the status of children have been reflected in a number of well-known legal judgements. These judgements have contributed to a continuing re-appraisal of the justification for and intentions of the State in family intervention, particularly in matters of guardianship and custody. This occurs against a background of public accusations of welfare departments failing to protect children or intervening over-zealously.

Whilst there may be broad agreement on a range of issues, there is considerable variation in State and Territory legislation, powers, practices and services. For example, there is no consistent approach to separate representation for children before courts and to the provision of independent advocacy for children in situations such as case conferences which may have legal action as an outcome. In terms of national equity, a greater degree of uniformity is desirable wherever possible. There is a prior need to establish some broad agreement on matters of principle in balancing the respective rights of parents and children.

In South Australia, current views on the paramourcy of children's interests and on the nature of parental rights and duties are summarised in my Department's draft 'Family and Child Welfare Position Paper', which states in part:

- the family is the best means of providing care,

socialisation, and continuity of relationships for children.

- families need the support of extended family, local community, tribal and cultural networks ...
- children have the right to enjoy parental care and protection and to have their welfare safeguarded...
- parental rights derive from parental duties and are therefore conditional upon performance of those duties.
- the State has the responsibility to advocate and defend the right of the child to receive adequate care and protection, and to promote a network of services which enhance and facilitate the capacity of parents to carry out these duties.
- where this parental duty is not performed, or when parental care is abusive to the child, the State must intervene on behalf of the child...

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In trying to protect children who have been subject to parental abuse or neglect, social workers in public welfare agencies are regularly required to make estimations of the capacity/motivation of parents to change behaviour patterns and whether the return of children is in their best interests.

Some children's courts' judgement reflect this type of dilemma through the inappropriate imposition of short or medium-term guardianship orders. These judgements exhibit a reluctance to sever ties with natural parents and a desire to respect the child's own wishes as maturity increases. These decisions, however are not always consistent with a child's need for the establishment of

secure, emotionally satisfying relationships with parents or parent substitutes.

The unwillingness of courts in these situations to make a decision on the balance of risk is equivalent to social work diffidence in permanency questions and is likely to come under increasing challenge from a variety of quarters.

Similarly, State and Territory Welfare Departments, have developed a position in recent years that access is not a parental right and the only basis of justification is the child's interests. Children's Courts are persuaded to this view to varying degrees, however, even when legislation contains reference to the paramourcy of the child's interests. The South Australian Access Policy paper states:

"It is the policy of the Department that access should occur provided that it is in the best interests of the child. The best interests of the child will involve consideration of the circumstances and facts of the case, the needs and perceptions of the child carefully and consistently elicited, the purpose or what is hoped to be achieved by access and the professional judgement of the worker based on experience, the facts and the body of research and knowledge surrounding child abuse and neglect."

There is also the further departmental view that if access requires supervision then it is a priority not in the child's interests. The only exceptions may be cases where a child specifically requests access but there is some assessed risk in unsupervised contact; where access is resumed after a long break and the child may require some support, at least initially; or where the quality of relationships and parenting skills need to be observed as part of a case plan.

Particular difficulties in matters of access and guardianship arise when parents or children have some form of intellectual disability. It is not infrequent for applications to a court for a child's guardianship to be made or considered on the basis of a parent's estimated incapacity to provide adequate care or protection. In a sense, there is an infringement or contemplated infringement of rights on the basis of predicted future behaviour and on the grounds of potential danger to the child's safety and development. The

Postal Address:  
P.O. Box 3141  
Grenfell Street, ADELAIDE 5000  
Phone: (08) 226 6035 Fax: (08) 226 6667

alternative, however, is to wait until some actual harm befalls the child and then to take action which may be too late to protect the child adequately.

Frequently, this latter course is a necessity as there are no grounds at all on which to make an application to court, and courts are naturally reluctant to make a judgement on possible future eventualities, particularly if there is no demonstrated mistreatment of other children. Here there are very serious considerations of natural justice which a court cannot dismiss lightly.

Other serious concerns arise where children and young people with intellectual disability are placed in an institution without their consent, especially if this is on the basis of an administrative fiat. In these situations, there are questions of informed consent and legitimate social control functions in determining that a child does not have the maturity/capacity to make a decision in his/her own best interests.

As a minimum standard, there is a need to utilise competent, accredited and independent advocacy services in these situations and to ensure that admission to care is through proper judicial channels. This is the case even when parents are universally held

to be 'good' and are opposed to court processes. The need to protect a child and give paramountcy to his/her interests takes precedence. The assertion that a legal order is not required to provide services is insufficient where matters of civil liberty, informed consent and possibly competing interests are concerned.

Situations where parents are unable to control a child, expect the State to intervene with greater effect and criticise/undermine the State's efforts are not infrequent. The child's interests are not promoted by the parents, who are often the most vehement claimants that their rights as parents are not being supported or are being actively infringed by the State.

Although their views of causes of behaviour and their sympathies may be widely divergent, the position of parents and of State agencies comes closest together in these situations. How do you provide help to a young person who is unable to trust any adults and rejects all help offered?

There are particular difficulties for State agencies in holding a young person securely when he or she has not committed an offence.

Additionally, the forms of care and other assistance which the State is likely to offer

are limited, often inappropriate and may expose the child to other harm. At the same time, the State and public welfare agencies in particular are open to the charge of not meeting or attempting to meet their responsibilities.

All of these issues have been complicated by the implications of the Gillick case for parents and for those who are in loco parentis. For instance, young people under guardianship who are not subject to other legal restrictions (eg. as a consequence of offending) have a greater right to autonomy and participation in decision making affecting them than is generally acknowledged or practised. Similarly, the rights of care-givers at all levels are circumscribed and the responsibilities for action as a 'good' parent increased.

This brief article has raised some significant issues related to the rights of parents and children. It is important that they are subject to rigorous discussion at a national level so that public welfare policies and practices can provide the greatest possible opportunities for children and particularly disadvantaged children.

## BEING A MUM IS LOVE, SWEAT AND TEARS

By Lynne Holroyd

Courtesy *The Herald*, Melbourne

Barbara Szwarc, 37, has been places no parent wants to go.

She has borne three sons and seen the two youngest succumb to a rare genetic disorder.

Joshua, the youngest, died at 18 months, and a year later, in 1975, her middle son, Daniel, died at six.

They died from Canavan's disease in which a person is born brain damaged and the brain degenerates from there.

Outwardly perfect and quite beautiful, the two boys were never able to feed themselves, talk, walk, go alone to the toilet - or even sit up or hold a toy.

But they could smile, laugh, love and cry.

"Disabled as they were, they had a magnetism that drew people to them," Mrs Szwarc said.

"All Daniel wanted was to be loved and to be noticed and to be recognised as a human being. And when people did give him that recognition, he gave a lot back."

Mrs Szwarc has recounted the great pain and joy the two boys brought her, her husband Martin and eldest son, Simon - now thirteen - in a book, *Love, Sweat and Tears*.

Now a full-time researcher with the Victorian Children's Aid Society which published the book, Mrs Szwarc began the book three months after Daniel's death.

"The weekends came and Daniel wasn't there. After six years of looking after a totally dependent child, I felt the need to connect with him and fill the vacuum."

She wanted to commemorate and celebrate their lives, to challenge negative attitudes to disabled people and help others survive similar ordeals.

"You certainly don't accept it, but you learn to cope with it," she said. "You force your mind to push certain thoughts back because it is fruitless dwelling on them and they are so horrific they can kill you."

Both boys died suddenly and unexpectedly.

We thought we would watch Daniel slowly dying, losing his sight, living in hospital with tubes sticking out of him, weak and pitiful - we never had to see that and we never had to see Joshua slowly degenerate."

During the six-year ordeal, both parents steadfastly struggled to balance the children's needs against the family's survival.

The care of the two profoundly disabled children was so difficult, so time consuming and so exhausting, that eventually Joshua was placed with a nearby loving foster mother who devoted herself to him. Later Daniel was also placed in weekday residential care so the family could avoid collapse and recharge its batteries for his weekend care.

"It hurt like hell, but we knew it was the right thing to do under the circumstances," Mrs Szwarc said.

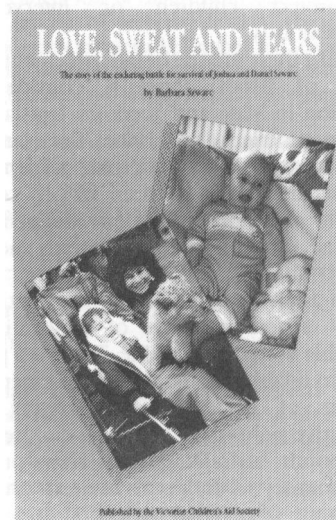
The lack of adequate respite care services for loving but unbearably stressed families is something Mrs Szwarc feels passionate about.

Her research has discovered a high proportion of severely disabled children in the full-time care of non-government agencies.

"We have got a lot of children who are

doomed to spend a lifetime in residential care who wouldn't be there if there were more support services," she said.

Proceeds from Mrs Szwarc's book, which can be bought from the Victorian Children's Aid Society, will go to a memorial trust named after her children and which will sponsor visits to Australia from overseas experts on disability.



Barbara is currently working on a follow up study to "Particular Care" and "Particular Care Revisited" in conjunction with the National Children's Bureau. It surveys substitute care for children in Australia. Ed.