The Convention on the Rights of the Child: How fares Victorian law and practice?

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An expanded and revised version of an address to the Annual General Meeting of Canterbury Family Care, 19 September, 1990.

On the 2nd of September this year, the United Nations *Convention on the Rights of the Child*, adopted by the Assembly in November 1989, came into force under international law, 30 days after the lodgment of the 20th instrument of ratification (by which time 31 countries had deposited ratifications).[1] Shortly prior to that date, on 22 August, after some public controversy about the matter,[2] Australia had determined to sign the Convention.[3] The Convention, which stemmed from the 1979 International Year of the Child, expanded and elaborated within an international treaty, rights first enunciated (in non-binding form) in the 1959 *Declaration of the Rights of the Child*.[4] It applies to a person under the age of 18.[5]

Over 5 years ago, the Report of the Child Welfare Practice and Legislation Review Committee was published. That report – *Equity and Social Justice for children families and communities*,[6] took, as one of its foundation principles, the proposition that Victorian law and practice should reflect internationally accepted principles of human and civil rights of children.[7]

Although the proposal to establish a Charter of Rights did not command favour with Government,[8] the majority of the recommendations made in the Report for reform and development of practice and the law were endorsed.[9] Thus, the yet to be proclaimed *Children Young Persons Act 1989*, substantially paralleled the proposals of the Report.[10] In conducting a stock-take of progress therefore, we will consider how well the reforms conform to the new Convention and the principles enunciated in the Report.

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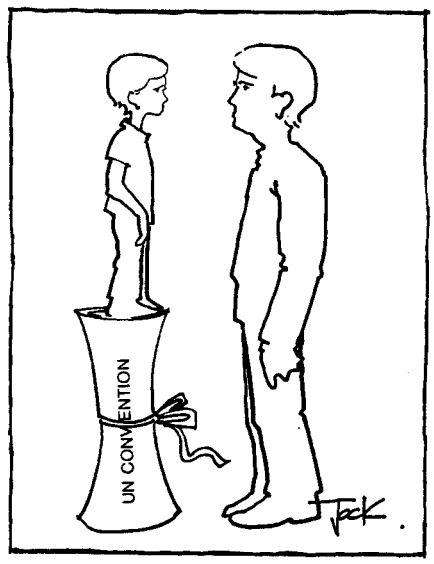

BENCHMARK PRINCIPLES

At the risk of oversimplification, the main themes of the Victorian Report were captured in six catch phrases:

* An emphasis on and preference for prevention and support services;
* A broad approach to protection;
* Adoption of legal strategies to empower people or facilitate their access to services;
* Enhancement of rights to information and advocacy, and to participate in processes;
* Guarantees of judicial adjudication on issues of status or rights of individuals; and, finally,
* A recasting of orthodox legal processes to accommodate conciliation, active garnering of facts, and ongoing monitoring of decisions.

The Victorian Review rejected a narrow (but historic) court-oriented focus of policy-making in child and family welfare.[11] The core value was a concept of equity: the systemic effects of economic, educational and other policies on the life chances and opportunities for **all** children and families. The second was social justice or 'fairness'.[12] Equity and social justice, as propounded in the Report, were 'welfare rights' rather than individual rights; they were not to be equated either with the notion of autonomous children's rights, nor with the notion that they involved the state in inappropriately deferring to the integrity of the family and its child rearing practices (thus constituting a zone of immunity).

Equity and social justice are what Marshall termed social rights of citizenship ('the right to share to the full in the social heritage and to live the life of a civilized being'), or what Eekelaar termed 'developmental' interests.[13] The Report concluded that the family was central to the growth and development of a child, and that legislation and administrative processes should optimise opportunities for, and support of, families.[14] But this did not imply that family autonomy was always to be respected.[15]

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Another central principle was that of accountability, at all levels of the system. This involved strict limitations to the discretionary powers of administrators to intervene in the lives of families and individuals.[16] It also involved the development of review mechanisms and high quality advocacy services. The remaining principles were:

* The protection of cultural differences;[17]
* Involvement by the users of services in the assessment of needs

and the development of services to meet those needs;[18]

* That community values due to culture, class or geography be respected.[19]

The balance of this paper will concentrate on two main themes:
(i) the extent to which the reforms subscribe to human rights standards;
(ii) the extent to which they advance notions of equity and social justice.

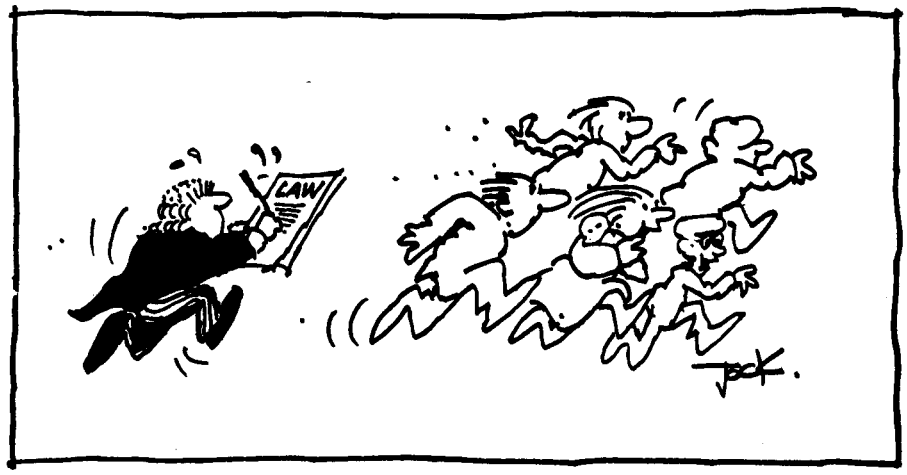
A CIVIL RIGHTS STOCK-TAKING

(a) An rating of the `welfare package' against the standards laid down in the Convention.

(i) Family support and best interests:

Article 18 of the Convention articulates the principle of family support. It recognises the proposition that both parents have common responsibilities for the upbringing and development of the child,[20] but then goes on to require that governments `render appropriate assistance to parents ... in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children'.[21] The best interest of the child is also a guiding principle.[22]

Level of compliance: The first three of the guiding principles to be borne in mind by the Family Division of the Children's Court are that it `give the widest possible protection and assistance to the family as the fundamental group unit of society and accordingly, must ensure that [intervention is the minimum necessary]'; that it `must have regard to the need to strengthen and preserve the relationship between the child and the child's family; and, finally, that it `must have regard to the desirability of allowing the child to live at home'.[23] This is further reinforced by predicating intervention on a showing of an `unacceptable risk of harm to the child' and through the insistence that the court have regard `to the need, when the child is removed from his or her family, to plan the re-unification of the child [with the family].[24] So also in case conferences.[25] For its part, the `best interest' lodestone is endorsed in several places.[26]



(ii) Processes of decision:

Article 9 of the Convention contains an affirmation that, in all proceedings (such as those for neglect), `all interested parties shall be given an opportunity to participate in the proceedings and to make their views known'.[27]

Level of compliance: These standards are well reflected in key provisions of the new Act, such as those calling for the Court to ensure, as far as practicable, that proceedings are comprehensible to all parties, that the nature and implications of proceedings (or orders) are explained to the child, that all parties are allowed and assisted to participate, that the wishes of the child be considered, and that cultural identity and needs be respected.[28]

(iii) Rights of families to equal negotiations:

As we have seen, Article 9 respects the rights of parents to be involved in decisions. This is reinforced by Article 18 which accords primacy to the responsibilities of the parent, subject to the best interests of the child being preserved.

Level of compliance: The Victorian law reflects these sentiments in areas such as the structuring of the conduct of case conferences;[29] the equitable approach to negotiating out-of-home care;[30] and in the provision of assistance to parents and children to present their case in court or other settings.[31]

(iv) Participation by the child:

Article 12 of the Convention calls for provision to be made to allow the expression of, and to give `due weight in accordance with [their] age and maturity' to, the views of those children who are capable of expressing their own views.[32] Opportunities must be provided to allow these views to be expressed.

Level of compliance: As we have seen, participation by the child is a major theme of the Victorian legislation.[33] It applies in many settings, including case planning conferences.[34]

(v) A broad view of protection:

Article 9 expounds the principle that `a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child ... in the particular case, such as one involving abuse or neglect ...'.[35] This is supported in Article 19, which both places the state under a duty to take `all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse ...',[36] and also broadens the range of harms.

The Convention then, explicitly endorses the `broad approach' to protection, as enunciated in the Report.[37] This is made crystal clear by the requirement that `such protective measures should ... include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention'.[38] Consistent with the Report,

legal proceedings are relegated to a last resort. Identification, reporting, referral, investigation, treatment and follow-up is the central focus. The Convention adds, at the end of the clause discussed here, that `as appropriate' provision be made `for judicial involvement'.[39]

Level of compliance: The Victorian position subscribes to this philosophy: a broad preventive approach is taken to protection; the grounds for bringing a protection application have a more inclusive coverage of possible sources of harm to the child, but they refer to more tangible and specific circumstances;[40] and the procedures for establishing the grounds meet appropriate procedural standards.[41]

(vi) Access rights and information:

Article 9 of the Convention contains two protections; first, where it is necessary to separate a child from a parent or natural guardian, that rights to `maintain personal relations and direct contact with both parents' are to be respected unless to do otherwise would be contrary to the best interests of the child,[42] and second, that information about the whereabouts of the child is to be provided in any event (on a similar footing).[43]

Level of compliance: Retention of contact between the family and the child, and the policy of promoting re-unification of children with their families, are central policies of the new legislation.[44] Provision for access to be formally ordered as one of the conditions of custody orders, is another illustration of the extent to which this sentiment is honoured in the new Act.[45]

(vii) Periodic review of decisions:

Article 25 of the Convention establishes a right on the part of a child placed away from home under a protection or similar order, `to a periodic review of the treatment provided ... and all other circumstances relevant' to that placement.[46]

Level of compliance: The new legislation fully embraces this concept. Thus, supervision orders which exceed the presumptive maximum of 12 months duration, must be reviewed at that anniversary,[47] and the same principle of an obligation for the relevant authority or court to conduct a routine review underpins other orders.[48]

(b) A check-list of Convention guarantees for offenders.

Article 40 of the Convention specifies that a child accused of breach of the criminal law should have `at least the following guarantees', which we will briefly enumerate and assess before returning to wider themes:

(i) Innocence:

The presumption of innocence is the first right guaranteed by the Convention.[49]

Level of compliance: This is a right recognised in Victoria through the insistence on proof beyond reasonable doubt, backed by the guarantee of court policing of this and the insistence on proof by relevant and admissible evidence.[50] Where this protection is diluted, however, is in the operation of non-legislatively based cautioning schemes.

(ii) Speedy presentment:

The Convention speaks of provision of prompt and direct information about the nature of the charges (where appropriate through a guardian) and to have legal or other appropriate assistance in the preparation of a defence.[51]

Level of compliance: The new Act provides both for speedy presentment and proceeding on summons,[52] so the Convention is largely met here. However the provision of legal aid prior to the hearing remains a matter for the Legal Aid Commission, and it is normally discharged through provision of duty counsel, with all the limitations - such as restricted time for taking instructions or preparing the case - that this entails.

(iii) Speedy independent fair hearing:

This is the right to have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance ... and [unless contrary to best interest; but paying regard to age] his or her parents or legal guardian.[53]

Level of compliance: Speedy presentment is the sum total of the rights conferred under this head: Government rejected the inclusion of the proposed provisions to guarantee a **speedy trial**.[54] It breaches the standards in the Convention in this respect. The new legislation does, however, provide for an adjournment to enable representation to be obtained;[55] indeed the adjournment is mandatory where the child is mature enough to give instructions **and** the matter is one of those listed.[56]

(iv) Self-incrimination and confrontation:

These rights are captured in the Convention entitlements `not to be compelled to give testimony or to confess to guilt; to examine or to have examined adverse witnesses; and to obtain the participation and examination of witnesses ... under conditions of equality'.[57]

Level of compliance: By and large the new legislation meets or exceeds these standards.

(v) Appeal rights:

The Convention calls for guarantees of appeal rights.[58]

Level of compliance: The appeal rights to the County Court are sufficiently generous, but it must be questioned whether they are sufficiently `expert' bodies to exercise those specialist responsibilities.[59]

(vi) Interpreters:

The Convention confers the right `to have the free assistance of an interpreter [if needed]'.[60]

Level of compliance: Rights to an interpreter are generously entrenched under the new legislation.[61]

(vii) Privacy:

The Convention confers the right of affected persons to have their privacy `fully respected at all stages'.[62]

Level of compliance: Consistent with the recommendations of the Review,[63] proceedings in the Children's Court have, since 1986,[64] been open to the public.[65] However, there are adequate guarantees of privacy through the discretion of the court to close part or all of its proceedings, whether of its own motion, or on the application of an interested party,[66] and through the

absolute bar on the disclosure or reporting of identifying information.[67]

(c) Rights in diversion schemes.

The Victorian Report argued for a partnership between community agencies (including police), families and children, to assist or support children and families, and also for acceptance of some responsibility for the behaviour of community members (an aim of community policing).[68] A number of strategies developed this theme.

Thus it was proposed to refine the Police Cautioning scheme (a diversion scheme catering for almost 70% of alleged offenders),[69] by setting up a Screening Panel of Police and CSV staff, to decide whether or not to intervene, and, if so, whether to take `no further action', apply a caution, or take the case to court. The aim was to foster a `collegiate' approach and to reduce `net-widening',[70] but this latter may have been unduly optimistic.[71] Secondly, at a lower level, it was proposed to create a speedy and even less formal alternative to the caution. One step up from an `informal street-caution', this was envisaged as:

> notifying parents about their child's behaviour and indicating that, while no formal action is to be pursued, the parents themselves may wish to deal further with the matter'[72]

Family and informal community ties were to be strengthened by such means, while at the same time preserving a clear distinction between this and the more formal `official caution'.[73]

Neither of these proposals were accepted by the Victorian Government. This omission must be evaluated on two levels. First, on the score of whether screening schemes `work', we must now be more sceptical: the South Australian Screening Panel seems not to have overcome net-widening[74] nor has it corrected for racial and gender discrimination.[75] Secondly in terms of compliance with civil rights precepts. This latter is mandated under the Convention to some degree. Article 40(3)(b) calls, whenever appropriate, for laws and procedures which:

> deal ... with [child offenders] without resorting to judicial proceedings, **providing that human rights and legal safeguards are fully respected.**

As documented elsewhere, non-legislatively based cautioning schemes (as in Victoria), place the greatest strain on compliance with such standards.[76] In failing to take up the reform proposals in this area, it may be argued that an opportunity has been missed for Victoria to knit together a community-based response, built around cooperative relationships between young people, parents and state agencies of law enforcement and welfare. On the other hand, however well meaning, such measures might usher in a repressive `corporatist' approach: one which is inimical to civil rights and which lacks redeeming qualities in terms of lessened rates of recidivism, stigma or other such benefits.

One central recommendation of the Review . . . was the proposal that the Children's Court become a specialist court of stature . . . The legislation in this area has been heavily criticised, and frankly it is not acceptable in the closing phase of the 20th century; indeed in 1973 the prestigious Statute Law Revision Committee of the Parliament, called for Children's Court magistrates to `undergo a special course of training, have a special interest in the welfare of children, and be familiar with available welfare services'. Such sentiments retain their currency today.

(d) Criminal process rights at investigation.

Apart from the court and post-court issues dealt with in the *Children and Young Persons Act*,[77] and instead of dealing with these two aspects of juvenile diversion, the Victorian legislative package concentrated on reforms to questioning procedures (principally `reasonableness' controls and a requirement to have a third party present;[78] but excluding the outer time limit or the independent advocate as proposed by the Review[79]) and restrictions on fingerprinting of young people. Fingerprinting of young people below 10 years of age is banned altogether. Above that age it is available only on court order and only for indictable matters.[80] However the Report adopted a more restrictive view: judicial authority was to be mandatory for the collection of fingerprints from a juvenile under the age of 14, whereas a young person above that age could have prints taken in respect of serious offences either by consent or under a court order.[81] And the Report provided no foundation for the requirement imposed on CSV staff by s. 253 of the Act, that persons detained in youth residential centres or youth training centres are to be fingerprinted `as soon as possible' after reception. Moreover the Report proposed that any records collected be destroyed within 12 months of the expiration of any hearing at which no conviction was recorded, or 12 months from the expiration of any sentence.[82] Although expungment provisions have been foreshadowed by Government, they have yet to be introduced.[83] Certainly, convictions may not be led in evidence at trials more than three years after the conviction(s) were entered unless the conviction(s) are central to a fact then in issue;[84] but, if convicted of that later charge, prior convictions may be tendered at the sentencing stage unless they were recorded more than ten years previously.[85]

(e) A court of stature and authority.

One central recommendation of the Review not to command other than marginal support, was the proposal that the Children's Court become a specialist court of stature. The intention was sixfold:

(i) to lay down minimum (specialist) qualifications for appointment to the Court (including tenured appointment by the Governor-in Council on joint recommendation of the A-G and the Minister for CSV);

(ii) to provide uniform coverage across Victoria;

(iii) to place the leadership of the

Court in the hands of a person holding the position of Judge of the County Court;
(iv) to create a specialist Appeals Division (in place of appeals to the County Court);
(v) to establish separate Family and Criminal Divisions;
(vi) to constitute the Family Division as a multi-disciplinary `panel'.

The creation of autonomous Divisions of the Court, with distinctive procedures, was one of the first recommendations to be acted on,[86] and the *Children and Young Persons Act* 1989 consolidates that significant reform.[87] Some limited managerial authority has also been conferred on the Court, through the creation of the position of Senior Magistrate, but the authority of this position does not extend to the allocation of adult Magistrates to constitute the Children's Court bench (which remains the sole prerogative of the Chief Magistrate[88]), or the issue of practice directions for the Court (which requires the blessing of the Chief Magistrate[89]). Although a Governor-in-Council appointment, the Senior Magistrate is appointed on the recommendation of the Chief Magistrate,[90] and no tenure of office is prescribed. Certainly the chief Magistrate `must have regard to the experience of the magistrate in matters relating to child welfare' when assigning a person to sit on the court.[91] However Children's Court Magistrates may have their assignment revoked at any time, without cause shown.[92] The legislation in this area has been heavily criticised,[93] and frankly it is not acceptable in the closing phase of the 20th century; indeed in 1973 the prestigious Statute Law Revision Committee of the Parliament, called for Children's Court magistrates to `undergo a special course of training, have a special interest in the welfare of children, and be familiar with available welfare services'.[94] Such sentiments retain their currency today.

(f) A sentencing hierarchy.

A key feature of the proposals in the Report was that there should be a range of low level and intermediate dispositions for young offenders and that special measures be taken to ensure that resort was had to the least intrusive measures (the `step-ladder' principle), and that sentences not be **disproportionately severe** when judged against the gravity of the offence.[95]

...there is a delicate balance to be struck in terms of the degree of autonomy thought appropriate for the family unit: not only do the proponents of respect for family values and autonomy express their case forcefully, but so also do the proponents of greater state protective interventions to secure the rights and interests of vulnerable individuals.

This approach, on which Victoria can rightly claim to have taken a leadership role, has been mandated in the Convention, which states, in Article 40(4):

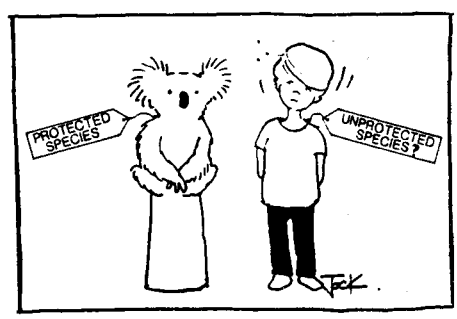
> `A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being **and proportionate both to their circumstances and the offence.**'

While there remain justifiable concerns about the uniform availability of the full range of new measures across Victoria; about the levels of resourcing to support the community-based measures; and about the prospects of `penalty escalation' (that intermediate orders will replace less severe rather than more severe measures as is intended),[96] the reforms in this field are both desirable and well drafted.

A SOCIAL RIGHTS STOCK-TAKE

One of the early criticisms made of the initial drafts of what became the Convention, was that it focussed unduly on economic, social and cultural rights.[97] The concern was at the `policy-isation of rights'.[98] These concerns were allayed in the final draft text, which received unanimous endorsement. The Convention nevertheless makes an important statement about economic and social rights (such as child labour laws,[99] which indefensibly remain un-addressed in Victoria despite the package of reforms proposed by the Review[100] and implemented elsewhere[101]). The most influential of those statements are contained in Articles 26 and 27.

Article 26 requires that States `recognise for every child the right to benefit from social security' subject, among other things, to `taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child'.[102] Whatever policy reservations might be held about the structure of Commonwealth youth support payments - with the lower rate scales for young people; lower rates for young persons living at home; and the imposition of a `parental income test' on portion of the payments - it cannot be said that they are inconsistent with these aspects of the Treaty obligations. They may or may not be adequate as an anti-poverty strategy, and they may or may not have unintended outcomes for youth homelessness or fostering of independent living; but, although the writer has severe reservations on these grounds, it must be conceded that they do pass muster under Article 26.



Article 27 takes this obligation little further, in speaking of Parties to the Convention:

> recognis[ing] the right of every child to a **standard** of living **adequate** for the child's physical, mental, spiritual, moral and **social development**'.[103]

Certainly this could be given an ample reading (dwelling on the words highlighted in the quotation). So read, this article could support a critique of Commonwealth and State programmes of income support and services, in terms of their **adequacy** (one of the

key evaluative criteria laid down by the Cass Review[104]), or in terms of 'social rights of citizenship' (the benchmark laid down by Marshall,[105] to which we return below).

But the two more concrete elaborations on this theme in the balance Article 27 are a mixed bag: a critique of the young homeless allowance[106] in terms of its unduly narrow criteria, its inadequate level of payment or in terms of the inability of most States to develop packages of matching support services, housing and community services – might be made on the ground that inadequate attention is being paid to the injunction in the Convention to 'provide material assistance and support programmes particularly with regard to nutrition, clothing and housing'.[107] However the second example in the Convention is one where Australia has shown world leadership in policy development: the Child Support Scheme[108] is a more than adequate discharge of the injunction to 'take all appropriate measures to secure recovery of maintenance for the child from the parents ... '.[109]

Overall, then, and with important exceptions, the Convention has been satisfied by the current state of law and practice. But it does not follow that Australia is realising optimal (as distinct from satisfying minimally acceptable) standards for the provision and guarantee of 'social rights' of children and families. In my concluding remarks I propose to range more broadly over the likely 'scenario' with which policy-makers must come to terms.

CONCLUSION

(a) Changing socio-economic patterns.

The present status of children – especially younger adolescents in the Australian community – continues to reflect socio-economic considerations, and the working-out of political debate about the role of the individual, the family and the state. The family is both a source of nurture and/or internal independence of action, as well as being a potential source of repression, abuse and violence to women and to children.[110] Accordingly, there is a delicate balance to be struck in terms of the degree of autonomy thought appropriate for the family unit: not only do the proponents of respect for family values and autonomy express their case forcefully, but so also do the proponents of greater state protective interventions to secure the rights and interests of vulnerable individuals.

The role of the state is also problematic for some. This is because an influential line of analysis had it that individual rights turned on protecting individual choice/liberty from interference by the state.[111] However the essence of the welfare state is that individual rights are in large part a product of entitlements to access the goods and services provided by the public sector. Yet, as we have seen, the law has done little in this area to nail down those 'social rights', whether to the resources and supports to enable the family to function effectively, or to the income support, accommodation and other services required by young people seeking to strike out on their own behalf, whether through choice or necessity (such as family violence).

(b) The challenge for the future.

The real challenge for the community as it moves into the late 20th and early 21st century, is to attune the law to emerging socio-economic realities.

One of those realities would seem to be that much more extended periods of education and training (and later re-training) will be called for. It would follow that greater attention must be given to providing to children and young people the access, **as of individual legal right**, to the range of education allowances and related support services for families, and to the income supports and accommodation required for independent, or semi-supported independent living by students and trainees.

Another of those realities is the changed social composition of the community, with a lesser number and reduced durability of so called 'standard nuclear' families, as a consequence of delayed family formation and greater chances of family breakdown, and larger proportions of de-facto marriage, single parent, and solo-adolescent units.[112] The net effect of this is to reinforce the previous point: for the family is now arguably less securely placed to carry the increased burden of financial responsibility for enabling young people to acquire the education and other skills required. Commensurately greater emphasis must be placed on the capacity for young people themselves to develop those opportunities, through provision of adequate resources and support from the state.

Both of these trends, then, favour a policy of enhancing the 'social rights of entitlement'. These are an incident of the welfare state: part and parcel of what are now termed 'social justice rights', but which were seen originally as 'rights of citizenship'[113] (in its inherent social membership rather than its legal sense). For older adolescents these rights should, in the main, be entrusted to the young person in their own right, rather than be entrusted to the family unit (such as by expanding the adequacy and the access to education allowances, young homeless allowance etc.). At younger ages, however, they are best extended as family supports, which secure 'preventive rights' for the family unit – in whatever form it may exist.

This model must withstand objection from two sides: that it accords too little independence of access to needed state services and supports on the part of the younger adolescent; and that it unduly detracts from family responsibility for the upbringing and support of the older adolescent. Certainly the individual rights and interests of the younger child may be poorly served by such proxy measures, but there is arguably

a much greater risk. That risk is that, in the absence of such family-centred strategies for younger children, the family will crumble further in the face of the increasing press of socio-economic changes - with resultant greater stress to the children affected by such a decline in the capacity of functioning family units to look after the interests of their members. Conversely for the older adolescent: if the independence of the young person is unduly compromised, or the state places too great an economic burden on the straightened circumstances of ordinary members of the family unit, it may be anticipated that social alienation will result.

If the model is to be realised, it is imperative, as the Child Welfare Report recognised, that there be a partnership between individuals, families, communities and the state. In this connection it is encouraging to see that the State and Australian Governments are prepared to review the distribution of responsibility for different areas of government. It is to be hoped that there will be some creative thinking on the division of responsibility for the issues discussed here. Certainly it does not seem appropriate either for the States to assert that 'child welfare' and provision of services to children and families is their exclusive territory, or for the Australian Government to confine itself to income security measures for young people over the age of 16. Workable partnerships call for adaptive flexibility, and a willingness to negotiate integrated packages which knit income support in with other services (such as housing and job opportunities), to create the opportunities for young people to acquire the skills and capacities necessary for them to realise their potential and thus advance the collective social interest. It is not a time for governmental 'demarcation disputes' whether between levels of government, or between the government and non-government sectors.

Social equity and social justice call for the resolution of such issues, but it has been demonstrated that overall the Victorian law and practice conforms quite well with precepts of human rights as declared in the *Convention on the Rights of the Child.* ♦

Notes.

[1] Article 49(1) of the **Convention on the Rights of the Child**; *Sunday Age,* 2 Sept. 1990, 11. Another 105 countries had signed but not yet ratified at that date. For a commentary and the text of the Convention, see Cohen, C., 'Introductory Note' (1989) 28, *International Legal Materials,* 1448-1476.

[2] In June 1990 for example, the nationally televised ABC 'Couchman' programme had debated the pros and cons of ratification.

[3] *The Age,* Thursday, 23 August, 1990; Australia deposited its ratification at the end of 1990.

[4] A document which has some limited status as a benchmark reference point for the work of the Commonwealth 'Human Rights and Equal Opportunity Commission': Carney, T., 'Children'. In Pagone, T., Wallace, J., *Rights and Freedoms in Australia,* Sydney: Federation Press, 1990, 63-74.

[5] Article 1.

[6] Equity and Social Justice, *Report of the Child Welfare Practice and Legislation Review Committee.* Melbourne: Vic. Gov. Pr., 1985. [subsequently: *Equity and Social Justice*].

[7] Carney, T., 'Rights and Empowerment of Children' (1989) 14, *Community Quarterly,* 11-19.

[8] Carney, T., 'A Charter of Rights: implications for youth and families in crisis' (1985) 57, *Civil Liberty (Victoria),* 9-12.

[9] The recent Victorian Budget has deferred the much needed $15 redevelopment of Turana and has made cuts to some important family support and alternative placements for children. However $900,000, has been allocated for the redevelopment of one large institution (Baltara) and that catering for young women has shed all but 27 of its inmates: information supplied by the Minister's Office, October 1990. Generally, then, the service proposals recommended by the Review have fared well: CSV, *Statewide Services Redevelopment Plan.* Melbourne: CSV, May 1988, 2 Volumes.

[10] For a general overview: Gorman, J., Brown, R., 'The Children and Young Persons Act 1989: Not far enough' (1990) *Law Institute Journal,* 284.

[11] Carney, T., 'The Values and Approaches of the Victorian Child Welfare Review'. In: A. Jayasurija and J. Calleja (Eds.) *Substitute Care for Children: Emerging Issues.* Perth: Department of Social Work and Social Administration, University of Western Australia, 1984, 54-76.

[12] *Equity and Social Justice,* 27; Carney, T., 'A Charter of Rights: Implications for youth and families in crisis' (n. 8).

[13] Marshall, T., *Sociology at the Crossroads and Other Essays.* London: Heinemann, 1963, 74; Eekelaar, J., 'The Emergence of Children's Rights' (1986) 6, *Oxford Journal of Legal Studies,* 161 at 170.

[14] *Equity and Social Justice,* 11.

[15] Bourne, R., Newberger, E., '"Family Autonomy" or "Coercive Intervention"? Ambiguity and Conflict in the Proposed Standards for Child Abuse and Neglect' (1977) 57, *Boston University Law Review,* 670 at 702.

[16] Wald, M., 'State Intervention on Behalf of Endangered Children - A Proposed Legal Response' (1982) 6, *Child Abuse and Neglect,* 3 at 7-8.

[17] *Equity and Social Justice,* 78-80.

[18] Id., 121-124.

[19] Carney, T., 'Equity and Support for Children Families and Communities' (1985) 10, *Legal Service Bulletin,* 126-131.

[20] Article 18(1).

[21] Article 18(2).

[22] Eg: Article 3(1).

[23] *Children and Young Persons Act* 1989 (Vic) s. 87(a)-(c).

[24] Ss 87(j) and (f) respectively.

[25] S. 119(1)(b)(c).

[26] Ss. 87(e)(g)(h) [court], 124(2)(a) [D-G in placing children].

[27] Article 9(2).

[28] *Children and Young Persons Act* 1989 (Vic) s. 18.

[29] S. 119.

[30] Further: Carney, T., 'Voluntary Care Arrangements: Responsive Welfare Entitlements? Or Coercive Intervention Revisited?' (1989) 3, *Australian Journal of Family Law,* 114-146.

[31] *Children and Young Persons Act* 1989 (Vic) s. 21(1). Assistance is equally to be extended to facilitate participation in case planning conferences: s. 119(1)(f).

[32] Article 12(1).

[33] S. 18(1)(c) [the court must 'allow (i) the child and (ii) in the case of proceedings in the Family division, the child's parents and all other parties who have a direct interest in the proceedings - to **participate fully** in the proceeding']

[34] S. 119(1)(e)-(h).

[35] Article 9(1).

[36] Article 19(1).

[37] Further: Carney, T., 'A Fresh Approach to Child Protection Practice and Legislation in Australia' (1989) 13, *International Journal of Child Abuse and Neglect,* 29, 31-32.

[38] Article 19(2).

[39] Loc cit.

[40] S. 63.

[41] Carney (n. 37), 35-36.

[42] Article 9(3).

[43] Article 9(4). The new Act applies a similar policy to disclosure of information about the whereabouts of the child when dealing with a bail application: s. 76.

[44] S. 49(c) [disposition report must canvass measures taken to avoid separating child from parents]. Also n. 24 above.

[45] S. 96(1)(e) [third party custody], 99 [custody to Director-General].

[46] Article 25.

[47] *Children and Young Persons Act* 1989 (Vic) s. 91(3).

[48] Ss. 100(3) [court ordered extension of custody to Director-General orders], 106(2) [departmental reviews forwarded to court and all parties as basis for extending guardianship to Director-General orders beyond 12 months].

[49] Article 40(2)(b)(i).

[50] *Children and Young Persons Act* 1989 (Vic) s. 135 [unless satisfied the charge must be dismissed: sub-s.(2)]

[51] Article 40(2)(b)(ii).

[52] S. 129 [a reasonable time, not more than 24 hrs from being taken into custody], 128 [preference for summons].

[53] Article 40(2)(b)(iii).

[54] Committee Draft *Children (Family, Community Development and Justice) Bill* 1984 cl. 157, 158 [Requiring the consent of the court to initiate proceedings more than 3 months following the apprehension of the child or the point at which the prosecution might reasonable have proceeded].

[55] *Children and Young Persons Act* 1989 (Vic) s. 20(1).

[56] Ss. 20(2) [duty], 21(2) [categories: `bail, imprisonable offences for an adult, and penalty review or breach proceedings']

[57] Article 40(2)(b)(iv).

[58] Article 40(2)(b)(v).

[59] Ss. 197 [criminal], 116 [protection].

[60] Article 40(2)(b)(vi).

[61] S. 22 [mandatory bar on `hearing and determining' case where the `child, a parent ... or any other party' has `difficulty in communicating ... that is sufficient to prevent ... understanding or participat[ion] in the proceeding'].

[62] Reference at n. 1., infra, 1471.

[63] *Equity and Social Justice,* 409.

[64] *Children's Court (Amendment) Act* 1986 [amending s. 18 *Children's Court Act* 1973].

[65] Now: *Children and Young Persons Act* 1989 (Vic) s. 19.

[66] S. 19(2)(3).

[67] S. 26.

[68] *Equity and Social Justice*, Part IV Chs 1-3.

[69] Id., 387-392.

[70] Paradoxically the other rationale was to overcome net widening, a problem which has bedevilled all Australian cautioning and diversion schemes, with one (perhaps short-lived) exception: the initial experience with a modest expansion (from an extremely low base) of the NSW scheme during 1985/6: Freiberg, A., Fox, R. and Hogan, M., 1988: *Sentencing Young Offenders.* Sydney: Australian Law Reform Commission 1988 [Sentencing Research Paper No. 11], 43.

[71] The weaknesses of the proposal are exposed by the data on the South Australian model, on which it was largely based. The South Australian experience suggests that the Screening Panel significantly boosted overall rates of formal intervention (the `net widening' or `recruitment' effect) rather than serving to divert into less formal processing, cases which would otherwise be taken to court: Freiberg et al, 1988, 47.

[72] *Equity and Social Justice,* 386-7.

[73] Loc cit.

[74] Freiberg et al, 1988, 47.

[75] Wundersitz, J., Naffine, N., Gale, F., `Chivalry, Justice or Paternalism? The Female Offender in the Juvenile Justice system' (1988) 24, *Australian and New Zealand Journal of Sociology,* 359; Gale, F., Wundersitz, J., `The Operation of Hidden Prejudice in Pre-court Procedures: The Case of Aboriginal Youth' (1989) 22, *Australian and New Zealand Journal of Criminology,* 1.

[76] Carney, T., `Young Offenders and State Intervention: Issues of Control and Support for Parents and Young People' (1989) 22, *Australian and New Zealand Journal of Criminology,* 22, 30.

[77] For example: *Children and Young Persons Act* 1989 (Vic) ss. 18-26, 134-139.

[78] The *Crimes (Custody and Investigation) Act* 1988 gives statutory force to requirements previously contained in Police Standing Orders. Apart from general rights extended to all persons in `custody' (a concept involving practical restrictions on movement, or de facto custody), such as communication with friends and legal advisers, interpreters, and `reasonable' limits to the duration or style of interrogation, the Act also confers a specific right for young people (under 17) to have a parent or independent person present throughout the interview, and to speak in private before the interview commences, subject only to dispensations for urgency or interference with the course of justice: s. 5 inserting a new s. 464E Crimes Act 1958. The Act came into force on 15 March 1989: [1989] ALMD 2189.

[79] Committee Draft *Children (Family, Community Development and Justice) Bill* 1984, cl. 133 [independent `youth advocate' at interview], 134 [2hr duration].

[80] *Crimes (Fingerprinting) Act* 1988 s. 4, inserting a new s. 464N *Crimes Act* 1958. The Act, with the exception of provisions for fingerprinting of persons in detention, came into force on 1 Jan 1990:[1990] ALMD 158.

[81] Committee Draft *Children (Family, Community Development and Justice) Bill* 1984, cl. 135.

[82] Cl. 137; *Equity and Social Justice,* 374.

[83] Gorman, et al (n. 10), 287.

[84] S. 274(1)(2).

[85] S. 274(3).

[86] *Children's Court (Amendment) Act* 1986 [Inserting new ss. 4A-4C *Children's Court Act* 1973; Commencement: 1 July 1986 (48, *Government Gazette,* 18 June 1986, 2066].

[87] *Children and Young Persons Act* 1989 (Vic) ss. 8 (3), 15, 16, 82, 87, 135-139.

[88] S. 11(1). The authority covers both full-time members and those Magistrates (in the country) assigned to perform Children's Court duties in addition to concurrent responsibilities in the adult Magistrates Court.

[89] S. 112(3).

[90] S. 12(2).

[91] S. 11(2).

[92] S. 11(3).

[93] Gorman, et al (n. 10), 287.

[94] Victoria, *Report from the Statute Law Revision Committee upon the Law Relating to Children's Courts.* Melbourne: Vic. Gov. Pr., 1973, para. 6. The ALRC recommended that appointees be fitted to the position `by reason of training, experience and personality': *Child Welfare.* Canberra: A.G.P.S., 1982, 114. (The report of the Australian Law Reform Commission's reference on child welfare).

[95] Freiberg, A., Fox., Hogan, M., `Procedural Justice in Sentencing Australian Juveniles' (1989) 15, *Monash University Law Review,* 279, 299-300.

[96] Muncie, J., Coventry, G., `Punishment in the Community and the Victorian Youth Attendance Order: A Look into the Future' (1989) 22, *Australian and New Zealand Journal of Criminology,* 179.

[97] Cohen (n. 1), 1449.

[98] Bennett, W. H., `A critique of the Emerging Convention on the Rights of the Child' (1987) 20, *Cornell International Law Journal,* 1 at 36.

[99] Article 32. Similar rights are recognised in the education area: Article 28. (Another area in which Victoria might be accused of dragging its feet in not fully implementing the recommendations of the Review).

[100] *Equity and Social Justice,* 173-179.

[101] *Children' Services Act* 1986 (ACT), Part VIII ss. 126-136.

[102] Article 26 (1) and (2) respectively.

[103] Article 27(1).

[104] Cass, B, *The Case for Review of Aspects of the Australian Social Security System.* Canberra: DSS, 1986, 9 [one of eight goals identified at the outset of the work of the Social Security Review].

[105] Note 13 above.

[106] Provided under s. 118(8) *Social Security Act* 1947 (Cth).

[107] Article 27(3).

[108] For a summary and preliminary evaluation of `stage one' of the scheme: Harrison, M., Snider, G., Merlo, R., *Who Pays for the Children?: A First Look at the Operation of Australia's New Child Support Scheme.* Melbourne: Institute of Family Studies, 1990.

[109] Article 27(4).

[110] Rose, N., `Beyond the Public/Private Division: Law, Power and the Family', (1987) 14, *Journal of Law and Society,* 61-76.

[111] Simon, W., `The Invention and Reinvention of Welfare Rights', (1985) 44, *Maryland Law Review,* 1-37.

[112] Nearly one in five women live in de facto relationships at some time, one third of marriages end in divorce (after 10 years on average), and one in five households live `alone': national survey data summarised in `Australia Unveiled', *The Age,* Monday 3 April, 1989, 11.

[113] Marshall, T., *Sociology at the Crossroads and Other Essays.* London: Heinemann, 1973, 67-127.