Justice for Families and Young Offenders -

A unified court system as a 21st century reform

The 2003 John Barry Memorial Lecture

by

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INTRODUCTION

I am one of a dwindling group of people who have appeared as Counsel before Sir John Barry in Court. I am particularly honoured to be asked to speak tonight in the year that saw the hundredth anniversary of his birth.

Appropriately enough, given my subsequent career, I did so in the divorce jurisdiction.

Given his renown in the area of criminology it is sometimes forgotten that he made a signal contribution to the development of family law in Australia.

Indeed, I think it fair to say that he demystified the divorce jurisdiction in Victoria. In those days it was necessary to establish grounds for divorce, usually adultery or desertion, although there were some more esoteric grounds such as habitual drunkenness and cruelty. Not surprisingly, most preferred to admit to the lesser sins of adultery and desertion.

Before many judges, the obtaining of a decree nisi for divorce was a fraught and tortuous process with much discussion about discretion statements involving the petitioner's own adultery and the like. There was always a real possibility that your client would end-up staying married and the result was likely in any event to have serious effects on issues such as custody, access and property division.

Barry swept all that away as far as he could in the context of that legislation. Divorce became quite a simple process, because he recognised that by the time people came to Court there was little to be saved of a marriage which ought to be ended with a degree of dignity. Similarly he recognised the futility of apportioning blame in determining issues relating to children and property. After all, adultery and desertion were usually little more than the effects rather than causes of marital breakdown.

It was the contribution of he and a few other like minded judges that paved the way to the enactment of the Commonwealth ***Family Law Act*** in 1975.[1]

I also had the privilege of observing the work of Barry the criminologist when I became first Deputy Chair and later Chair of the Adult Parole Board in Victoria, an office that I relinquished upon my appointment to my present office in 1988. His legacy there was and is a very real one that represents an enormous contribution to Victoria.

The abolition of indeterminate sentences, the introduction of a system of maximum and minimum sentences, the grant of parole and the principles underpinning the creation of the Parole Boards both in relation to adults and juveniles were very much the product of his vision and that of A. R. Whatmore, the then Inspector-General of Prisons.

Barry also made a significant contribution in the field of then so-called "delinquency" as Chair of an ad hoc expert Juvenile Delinquency Advisory Committee established by the Bolte Government in November 1955. That Committee made critical initial findings in relation to police lack of specialist units for dealing with adolescents, inadequate staffing of the Children's Court and probation services and insufficient mental health services. It also recommended significant legislative consolidations and improvements.[2]

Again the essence of his approach was realism coupled with a clear recognition of the limited efficacy of the punitive process. Unlike far too many people today he had a clear goal directed at reformation as one of the main purposes of criminal punishment and he held reservations as to its deterrent or retributive value. While recognising its retributive aspect, this did not loom large with him.

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1 Nicholson, A. and Harrison, M. (2000) "Family Law and the Family Court of Australia: Experiences of the First 25 Years" 24(3), *Melbourne University Law Review,* 756.

2 See further: Jaggs, D. (1986) *Neglected and Criminal : Foundations of Child Welfare Legislation in Victoria,* Centre for Youth and Community Studies, Phillip Institute of Technology, Melbourne, Chapter 12.

His contributions as a judge expert in criminal law remain a major one. I was reminded of this while sitting on appeal in Darwin a few weeks ago. The case before us involved issues of double jeopardy, a rare subject in the Family Court. A leading High Court decision on the subject is *Pearce v The Queen* [3] and the relevant passage appears in the joint judgment of Justices McHugh, Hayne and Callinan. Their Honours quoted from a 1969 lecture given by Sir John entitled, "The Courts and Criminal Punishment" as follows:

> *"Dr Leon Radzinovicz has rightly observed that the criminal law is fundamentally "but a social instrument wielded under the authority of the State to secure collective and individual protection against crime". It is a social instrument whose character is determined by its practical purposes and its practical limitations. It has to employ methods which are, in important respects, rough and ready, and in the nature of things it cannot fully take into account mere individual limitations and the philosophical considerations involved in the theory of moral, as distinct from legal, responsibility. It must be operated within society as a going concern. To achieve even a minimal degree of effectiveness, it should avoid excessive subtleties and refinements. It must be administered publicly in such a fashion that its activities can be understood by ordinary citizens and regarded by them as conforming with a community's generally accepted standards of what is fair and just. Thus it is a fundamental requirement of a sound legal system that it should reflect and correspond with the sensible ideas about right and wrong of the society it controls, and this requirement has an important influence on the way in which judges discharge the function of imposing punishments upon persons convicted of crime."*[4]

Their Honours continued: *"That remains true. '[E]xcessive subtleties and refinements' must be avoided."* [5]

It is I think a considerable tribute to Sir John Barry that a statement made by him in a lecture given over thirty years ago should be given such respectful treatment by judges of a modern High Court.

He was in good company in that case in that Justice Kirby in the course of his judgment went even further back into history drawing upon the statements of the prophet Nahum and the works of Justinian.

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3 (1998) 194 CLR 610 at par 39.

4 At 14-15 (footnotes omitted).

Sir John Barry was a multi-faceted person and I am sure that Barry the Family Law Judge, Barry the Criminal Law Judge, and Barry the Criminologist, would have been interested in the subject to which I now turn. That subject involves a holistic approach to the law relating to families and children and particularly young people alleged to have broken the criminal law.

Underlying this theme is my view that our courts and our law have become far too compartmentalised. In particular, I want to suggest that family law, child protection law and the law relating to juvenile offenders represent different facets of the same societal problem and that by treating them in different compartments as we do, we are not only complicating matters unduly but are missing important opportunities to overcome what are major societal problems. I also want to look again at the adversary system in relation to these areas.

Roscoe Pound writing in 1959 on the subject "The Place of the Family Court in the Judicial System" said that a court that treats a range of family problems "as a series of separate controversies may often not do justice to the whole or to the several different parts. The several parts are likely to be distorted in considering them apart from the whole."[6]

CONSITITUTIONAL CONSIDERATIONS

Whatever else may be meritorious about the Australian constitution, it tends to fragment the law relating to children and young persons; in particular between the Federal Government in relation to issues arising out of marriage, divorce and the custody of children and the State governments in relation to the areas of care and protection and juvenile crime.[7]

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5 (1998) 194 CLR 610 at par 39.

6 5 *National Probation and Parole Association Journal* 161at 164.

7 Because Australia is a Federation, legislative responsibility in a number of areas is allocated by the Federal Constitution between the States and Territories and the Commonwealth. In relation to family law, the Constitution gave the Commonwealth the power to legislate in respect of "marriage; divorce and matrimonial causes; and in relation thereto, parental rights and the custody and guardianship of infants". In addition, section 109 of the Constitution

During the 1990's, a small window opened and then closed between the Family Court of Australia and child protection jurisdictions. It opened with what was termed a national cross-vesting scheme which permitted the superior courts of Federal, State and Territory jurisdictions to exercise each others' jurisdiction in appropriate cases. It was shut by the decision of the High Court of Australia in a case known as *Re Wakim* [8] which struck down much of the cross-vesting scheme as constitutionally impermissible. That window was very small indeed but I did have the experience of exercising both Family Court and child protection jurisdiction in the first instance case of *Re Karen and Rita*.[9] Those proceedings convinced me of the importance of courts being in a position to exercise both private family law and child protection jurisdiction. However, it also seems to me to be vital for such a court to exercise not only those jurisdictions, but criminal jurisdiction.

I can imagine you thinking almost immediately upon hearing what I have just said, that that is all very well but the Australian Constitution will not permit other solutions.

I suggest however, that the Constitution can be adapted and that contrary to popular belief it can be changed.

There are a number of examples of successful adaptation from the Family Law area that support my first argument. Between 1986 and 1990, all States except Western Australia referred their legislative powers to the Commonwealth in relation to what was then termed the custody and access relating to ex-nuptial children thus enabling the Family Court of Australia to exercise jurisdiction in relation to such children as well as children of a *de jure* marriage. Previously, the authority to decide private

provides that State laws are invalid to the extent that they are inconsistent with validly enacted laws of the Commonwealth.

8 (1999) 198 CLR 511.

9 (1995) 92-632; (1995) 19 Fam LR 528. The case involved what were then termed custody and access proceedings relating to the two children. Evidence from a court counsellor was to the effect that neither parent was a suitable custodian of the children and the Queensland Department of Family Services and Aboriginal and Islander Affairs intervened. A care and protection application was made in respect of the children pursuant to the *Children's Services Act 1965* (Qld). The application was transferred by order of the Supreme Court of Queensland to the Family Court pursuant to cross-vesting legislation. The application could not have been transferred under the scheme by the Children's Court as it is not a superior court.

disputes concerning children born to unmarried parents had been dealt with under differing legal regimes in State and Territory courts.

Now all private children's law matters are subject to the same governing legislation.[10] While first instance matters may still now be heard by the Family Court of Australia, the Federal Magistrates Court or, much less frequently and only by consent, State and Territory Magistrates Courts, all appeal matters are determined by the appellate division of the Family Court.[11] The national consistency in private family law jurisprudence that results from a single intermediate appellate court is envied by overseas federal jurisdictions.

Again, under the *Family Law Act* 1975 (Cth) it is possible to set up State Family Courts exercising Federal jurisdiction.[12] Western Australia was the only State to do so in 1975 but the model which was adopted left the determination of juvenile justice and care and protection matters still in a separate Children's Court. There is still no reason why a unified court of the type that I envisage could not be set up in Western Australia. Further, there is no reason why the other States could not adopt a similar structure leaving the Family Court of Australia as a Federal appellate court. This would extend the particular advantage of a single intermediate appellate court to what I characterise as inter-mingled family issues.

In a sense these are band-aid solutions, but given the difficulties of obtaining constitutional change, they should be considered.

On the issue of constitutional change however, I wonder how difficult it would be to persuade the Australian people of the desirability of an Australian court system as distinct from the present State based model.

It is not so long ago that a general movement was seriously under way to set up an Australian court system. In the context of this lecture, it would be inappropriate to

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10 Save for Western Australia where the *Family Court Act* 1997 mirrors the Commonwealth *Family Law Act* 1975 in relevant aspects.

11 Save for Western Australia where, due to the absence of a referral of powers, the Full Court of the Supreme Court of Western Australia determines appeals concerning ex-nuptial children.

12 Section 41 *Family Law Act* 1975 (Cth).

canvass all of the issues relating to that but there are such obvious advantages to such a model that I have little doubt that it will return to the political and constitutional agenda again, as no doubt will the question of an Australian Republic. The court system proposal had some very significant supporters[13].

Similarly I suggest that it may well be even less difficult to persuade the Australian people of the desirability of an Australian court system in relation to children and families as distinct from the present state based model. While it is true that there is a long history of the defeat of referenda to change the Constitution, it is also worth noting that nearly all of these have been defeated on political grounds because they contained some politically controversial subject matter. I think that referenda relating to law reform issues only might well be better received.

I therefore propose to advance my concept of a unified court with a range of jurisdictions having regard to, but not accepting the proposition that constitutional difficulties raise an insuperable barrier to its achievement.

UNIFIED FAMILY COURTS

The concept that I espouse is what the Americans call a "Unified Family Court". In Australia we are not used to the concept that family courts might exercise criminal jurisdiction. That is because we have ascribed a too limited role to what a family court is or should be.[14] However in my view it is less important what the court is called than what it does. The American scholar Professor Barbara Babb has recently written in the *Family Law Quarterly*:

> *"Defined most simply, a family court is a single forum with which to adjudicate the full range of family law issues, based on the notion that court effectiveness and efficiency increase when the court resolves a family's legal problems in as few appearances as possible*".[15]

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13 See Ellicott R.J., "The Need for a Single Australian Court System" (1978) 52 *ALJ* 431; (1992) "Courts System requires Fundamental Reform to Reduce the Costs of Justice" 30(5) June Law Society Journal at 51.

14 Nicholson, A. and Harrison, M. "Specialist But Not Unified: The Family Court of Australia" *Family Law Quarterly*, forthcoming.

15 "Where we stand: An Analysis of America's Family Law Adjudicatory Systems and the mandate to establish unified Family Courts" (1998) 32 *Family Law Quarterly* 31 at 35.

In an article in the same journal by Professor Catherine J Ross[16], she says, "The American Bar Association has long endorsed jurisdiction for unified family courts that includes…": [17]

- Juvenile law violations;
- Cases of abuse and neglect;
- Cases involving the need for emergency medical treatment;
- Voluntary and involuntary termination of parental rights proceedings;
- Appointment of legal guardians for juveniles;
- Intra-family criminal offences [including all forms of domestic violence];
- Proceedings in regard to divorce, separation, annulment, alimony, custody and support of juveniles; and
- Proceedings to enforce paternity and to enforce child support.

This definition was further amplified by the U.S. National Council of Juvenile and Family Court Judges at its 1990 conference on Unified Family Courts.[18]

Professor Ross points out that the aspirational jurisdiction so described includes jurisdiction over intra-family criminal offences but she says that very few jurisdictions grant the unified family court original jurisdiction over such cases,[19] as distinct from offences by juveniles.

We all know the problems that arise in families are typically interlocked. The young offender of today was often yesterday's victim of family breakdown, intra familial abuse and multiple other problems,[20] and frequently, but of course not necessarily, then becomes tomorrow's adult criminal offender.

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16 "The Failure of Fragmentation: The Promise of a System of Unified Family Courts" (1998) 32 *Family Law Quarterly* 3 at 15.

17 Institute of Judicial Administration/American Bar Association (1980) *Juvenile Justice Standards relating to Court Organization*, Standard 1.1 part 1, 5. See also (1998) "American Bar Association Policy on Unified Family Courts Adopted August 1994" 32 *Family Law Quarterly* 1.

18 Katz, S.N and Kuhn, J.A (1991) *Recommendations for a Model Family Court: A Report from a National Family Court Symposium*, National Council of Juvenile and Family Court Judges, Recommendations 13 to 17.

19 Ibid 16.

20 New South Wales Community Services Commission (1996) *The Drift of Children in Care into the Juvenile Justice System: Turning Victims into Criminals*, Sydney, Australia; Keogh, T. (2002) "Juvenile Recidivism: New and surprising possibilities for mental health promotion and

Under our system as it operates at present, the same child can be the subject of proceedings in up to at least three different courts. He/she may be the subject of Family Court and child protection proceedings during which the child will be subjected to repeated interviews by different experts while at the same time, required to be a witness as the victim in criminal proceedings against the alleged perpetrator. Similarly, it is not uncommon for parents to be engaged in simultaneous proceedings in the Family Court in relation to child and property proceedings at the same time as they are engaged in protection proceedings in the Children's Court, domestic violence proceedings in a Magistrates' Court and also perhaps in the midst of associated criminal proceedings. The child may himself/herself become a juvenile offender. This fragmentation leads to considerable delay, is expensive and places intolerable pressures upon the people involved. It is anything but child-focussed.

Under the unified family court model all of these proceedings would be dealt with in one court and if the U.S. precedent was followed, preferably by one judge. Such a court would be equipped with professional staff such as mediators, social workers and psychologists, and have or have ready access to expert medical and psychiatric resources. It would thus have some of the features of the Family Court of Australia and some State Children's Courts but rationalised under one roof.

Research reported in 1992 by the U.S. National Center for State Courts has shown that at least 64% of abuse and neglect cases, 48% of delinquency cases and 16% of

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prevention" in Rowling, L. *etal* (Eds) *Mental Health Promotion: Concepts and Practice – Young People*, McGraw-Hill, Roseville, Australia writes (at 235):
"More broadly, juvenile offenders have engaged less well in the educational system and tend to have lower verbal IQ than performance IQ, and overall IQs lower than those of age peers. They are more likely to have learning and attention difficulties, be impulsive and have difficulties with regulating emotions, particularly anger. Young offenders have also been shown to be significantly impaired in their problem-solving ability. It is not surprising, therefore, that juvenile offenders are also known to have difficulties with self-esteem and self-concept. Another distinguishing characteristic of this group which is important in terms of prevention, is the significant profile of drug and alcohol misuse, with over 70% of all juvenile offenders using illicit drugs (mainly cannabis).
Related to the common experience of depression, difficulties with problem solving and limited coping skills, offenders also have a higher propensity than mainstream adolescents to attempt suicide or self-harm. They also present with significant levels of comorbility, with conduct problems, depression (most common), attention deficit hyperactivity disorder, and post-traumatic stress disorder.
As a group, offenders are significantly more likely to have experienced neglect and various forms of abuse, usually within their own families…"

divorcing families who had children previously went to court for another family related matter during the prior 5 years.[21] In a report published this month in the United States by Gloria H. Danziger, a senior fellow of the Center for Families, Children and the Courts at the University of Baltimore, the author analysed six operating United States' unified family courts in Maryland, Hawaii, Rhode Island, New Jersey and Indiana. A major theme of her findings was the need for such courts to have jurisdiction in relation to juvenile crime, which the Unified Family Court in Maryland does not have.[22] In considering those unified courts, she found that the following cases were included in each one:

- Civil contempt of order;
- Criminal contempt of order;
- Domestic violence misdemeanors;
- Criminal child abuse and neglect;
- Termination of parental rights;
- Dependency;
- Emancipation;
- Adoption;
- Divorce;
- Paternity;
- Child support;
- Guardianship;
- Visitation (contact);
- Custody (residence);
- Interstate support;
- Mental health (child);
- Substance abuse.

All of these courts except Rhode Island also dealt with elder abuse and intra-family torts and three of the courts dealt with domestic violence felonies.

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21 Rubin, H. T. and Flango, V. E (1992) *Court Co-Ordination of Family Cases* National Center for State Courts, Williamsburg Virginia at 5.

22 (2003) *A Strong Presence in the Life of a Child: A Report on Unified Family Courts and Juvenile Delinquency Matters*, Center for Families, Children and Courts, University of Baltimore School of Law, 1420 North Charles Street, Baltimore, Maryland 21201.

A DIFFERENT ROLE

A key feature of these courts is that they take a less adversarial approach to the problems raised. As contrasted with an inquisitorial approach, an adversarial system theoretically has core traditional features such as the following:

- The disputed issues and the proceedings concerning them are principally controlled by the parties;
- Facts are found through the testing of evidence in open court governed by the parties' strategies and the conventional rules of evidence with no independent evidence gathering by the court itself;
- There is a reliance upon legal representation and oral evidence;
- There is a strong adherence to rules of evidence and procedure governing pre-trial and trial process; and
- The judge/judicial officer is a passive disinterested and unbiased umpire regulating the parties' compliance with procedural and evidentiary rules.

Danziger says:[23]

> *"In order to resolve family problems in a comprehensive and coordinated way, the unified family court considers all of the parties related to the family's legal proceedings, as well as all the agencies, institutions, or organisations that need to be consulted or brought into the case. In addition, the unified family court reviews the delivery of social services to ensure that agreements between families and agencies are implemented; if they are not, the court has the authority to enforce such agreements, monitor them for compliance, and/or order agencies to deliver services. This is a radical departure from the traditional responsibilities of the court: instead of simply adjudicating legal disputes, the court must now oversee services, assessments, evaluations, counselling, outreach, probation, diversion, attention and community services. This is not the modus operandi of a neutral and independent forum. It is a way of conducting business that renders the court inextricably linked to agencies – and the day to day actions of those agencies. The court is responsible for ensuring that services are appropriate and productive. While the court is independent of the agencies, it acts in concert with them."*

This construction of the role and responsibilities of a court and its judicial officers is a departure from tradition. It carries risks such as the actual or perceived loss of judicial independence and calls upon judicial officers to have skills and knowledge

that are not conventionally expected of them. These challenges arose with the establishment of the Family Court of Australia and, in my view can be managed. Moreover, I agree with Danziger when she comments in respect of juvenile justice that:[24]

> *"… it is, in fact, this mandate to integrate a juvenile's behaviour, environment, history – and family – into a service-oriented therapeutic remedy that is the unified family court's greatest strength in addressing delinquency matters. Rather than addressing juvenile delinquency from the perspective of a 'scaled-down, second-class criminal court', the unified family court approach gives the judge authority to fashion an effective solution to that juvenile's problems by managing and directing agencies in their delivery of services to children and families."*

These are indeed radical proposals in an Australian context and present additional challenges. In particular, I would hasten to add that my support for bIending criminal justice and civil matters in a single court does not mean I am advocating any retraction of the rights of a young person to due process, procedural justice, satisfaction of the standard of proof, or dispositional outcomes which are proportionate to the offence. Indeed, I think it is no secret that I am a strong proponent of the application of international standards such as the Convention on the Rights of the Child,[25] and, in respect of juvenile justice particularly, the various Minimum Rules and Guidelines which have been developed to facilitate domestic implementation and practice.[26]

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23 At 4-5,

24 Ibid 6, (footnote omitted).

25 As Phil Scraton and Deena Haydon explain, the implementation of CROC:
"… should be grounded in a welfare approach, its three core principles having significant implications for youth justice. First, children's status requires discrete recognition and different responses from adult status, while taking account of individual experiences and capacities. Second, children's welfare should be prioritized. This implies treatment support and guidance based on individual needs rather than punishment retribution and deterrence. Third, children should participate fully in decisions affecting their lives, having had opportunities to gain confidence, explore issues of importance to them, learn the skills required to actively participate, and take action on their own behalf.": (2002) "Challenging the criminalization of children and young people: Securing a rights-based agenda" in Muncie, J. etal (Eds) *Youth Justice – Critical Readings*, Sage, London at 323.

26 See Nicholson, A. (2003) "Trying to Better See Both Sides of the Coin", A paper presented at the Children Law UK Conference on Welfare and Justice, London, 23 May 2003, available at http://www.familycourt.gov.au/papers/html/london.html

The Danziger study to which I have referred makes the very clear point that in those States where unified family courts exercise the young offender jurisdiction, the juvenile arrest rate for violent crime and drug abuse is almost half of those States where there is no such unified approach. Similarly in most States there is also a lowering of the arrest rate for property crimes.[27]

From a perhaps more philosophical than empirical but to my mind equally important perspective, my colleague Justice Linda Dessau has expressed the following view with which I agree:

> *"… a unified family court must also include juvenile crime. Otherwise, those children charged with offences would be dealt with as the junior part of an adult criminal justice system. To follow that course would be to marginalise those children, who in reality are mostly indistinguishable from the children who are in need of care and protection or suffering family breakdown, family violence or other family problems."* [28]

THE LOCAL CONTEXT

Save for where matters are removed to higher courts, in Australia the same children's courts deal with both child protection and juvenile crime. There is however a marked distinction drawn between the two jurisdictions in all States and Territories.[29] Among the rationales for the shift that began in juvenile justice in the mid 1970s from a welfare model to a justice model was to clearly distinguish between state intervention based on the needs versus deeds of young people brought before the court and, in a related vein, to tailor distinct forms of orders which, in the criminal justice domain,

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27 Ibid 15 – 19.

28 "Children and the Court System"**,** A paper delivered to The Australian Institute of Criminology conference, Brisbane, 17 June 1999, available at http://www.familycourt.gov.au/papers/html/dessau.html

29 The establishment of separate Family and Criminial Divisions of the Children's Court of Victoria was effected by the *Children's Court (Amendment) Act* 1986 (Vic.) which had as an object: "to ensure that their procedures, standards of proof and dispositions reflect the fundamental difference in the nature of child protection in juvenile justice proceedings.". Parliament of Victoria *Hansard*, Legislative Assembly, 8 December 1988 [at 11.50].

were in better conformity with the principle of proportionality,[30] a concern which was particularly voiced in respect of young women.[31]

While disentanglement may have been an appropriate response to the intrusive legacies of the welfare model, it is time to consider how a unified forum can retain the best of criminal justice rights protections within a more holistic court context. I would suggest that such rethinking should be informed by matters such as: the infrequency with which alleged young offenders contest the charges laid against them; the relatively low age of criminal responsibility within Australian jurisdictions, and evaluations of new justice system techniques such as group-conferencing.

We have not even begun to move in the U.S. direction in this country.

However there is at least one promising sign in that the Standing Committee of Attorneys-General has recently agreed to establish a working group to look at better ways to co-ordinate the Commonwealth family law system with the child protection systems of the States and Territories.[32] Relevantly to my topic however, no consideration is being given to juvenile justice issues.

In the Family Court of Australia, the advantage of judicial involvement in the coordination of services has been graphically demonstrated in its Magellan project relating to the management of cases involving serious allegations of child sexual abuse or physical abuse. Essential to the model is that the presiding judge plays an active role in liaising with the parties, the State Welfare Department, Legal Aid Commission, police etc and we have been very pleased with the resulting degree of prompt inter-agency co-operation[33]. This concentrated effort reduced delays,

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30 See further Naffine, N. (1992) "Children in the Children's Court: Can there be rights without a remedy?" in Alston et al (Eds) *Children, Rights and the Law,* Oxford University Press.

31 See for example Alder, C. and Baines, M. (Eds) (1996) *…and when she was bad? Working with young women in juvenile justice & related area*s, National Clearinghouse for Youth Studies, Hobart, Australia. The problem was not confined to Australia: Hudson, A. "'Troublesome girls': towards alternative definitions and policies" in Cain, M. (Ed.) *Growing Up Good*, Sage, London, 197.

32 Attorney-General of the Commonwealth of Australia, *News Release*, 8 August 2003. See also, Family Law Council (2002) *Family Law and Child Protection Final Report*, AGPS, Canberra.

33 See Brown, T. with Sheehan, R., Frederico, M. and Hewitt, L. (2002) *Resolving Family Violence to Children, the evaluation of Project Magellan, a pilot program for managing Family*

ensured that relevant information was provided within short time frames and allowed a complete picture of the child's circumstances to be produced. Many matters settled on the basis of the information provided, and in a manner which satisfied the judge that the child's future welfare would be protected. Magellan is about to be implemented nationally across the Court where serious child abuse is alleged, but it does not necessarily provide a model basis for the management of *all* children's cases.

In an address that I gave in Canberra last year I said:[34]

> *"In Australia, the Australian Law Reform Commission in its report on civil justice* [(1999) *Managing Justice: a Review of the Federal Civil Justice System*, Report No. 89, ALRC, Sydney.]*, avoided an examination of the adversary system despite the fact that it was within its terms of reference. In the case of family and children's law, I regard this as most unfortunate.*
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> *I think that this is a subject that bears much more careful examination. The evidence suggests that where Courts adopt a more active and inquisitorial approach in these areas, more satisfactory results are achieved. In addition, as pointed out by Justice Geoffrey Davies of the Court of Appeal, Queensland [*"Justice in the 21st Century", A paper delivered at the Family Court of Australia Judges' Annual Conference "Challenges for the 21st Century", Sydney, 7 July 2000]*, our procedural system is shifting inexorably in an inquisitorial direction:*
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> > *"The adversarial model was premised on the assumption that civil litigation was essentially a private matter. The parties were left to conduct proceedings as they saw fit and according to their own timetable. The judge assumed a passive role, intervening like an umpire only if a non-delinquent party sought the imposition of sanctions. The responsibility was upon the parties alone to identify the issues in dispute, and it was for the party making an assertion to prove it, without assistance from his or her opponent. The judge, being the impartial arbiter, was left with the job of determining the contest according to what was presented to her or him. The judge could not transgress beyond the issues and evidence presented by the parties. All steps in the action were intended to lead up to a climactic trial.*
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> > *To state the elements of the adversarial model in that way shows immediately how far we have already departed from it. Case*

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34 *Court residence and contact disputes when allegations of child abuse have been made* available at http://www.familycourt.gov.au/papers/html/magellan.html
"Children and Young People: The Law and Human Rights" The Sir Richard Blackburn Lecture, A.C.T. Law Society, Canberra, 14 May 2002 available at http://www.familycourt.gov.au/papers/html/blackburn.html

> *management systems, in various forms, and a greater assumption by judges of responsibility for the speed at which and the form in which disputes are conducted, and even for the issues upon which they will be conducted, have changed much of that. With some limited exceptions, of which the Family Court is one, however, there is still a tendency on the part of many litigating lawyers and judges to look towards an ultimate single trial as the main event."*"

To this end, the court is about to experiment with a less adversarial approach generally to cases involving children. We have examined various European systems, in some of which judges play an active role in defining the issues to be determined, deciding whether a particular witness is necessary, and how her or his evidence is to be provided. Ideally these hearings are conducted within a short period of time after proceedings are commenced and are of limited duration. Characteristically they are actively managed by the judge, whose task is largely to look for a solution, and who emphasises what will be best for the child in the future, rather than what might have occurred in the past.

The question of co-operation also arises in the Victorian context in respect of what I understand to be the unique provisions contained in sections 132 and 133 of the Victorian *Children and Young Person's Act 1989*. They were introduced at the same time as the making of a care order ceased to be available as a criminal justice disposition. The sections provide that a court may refer a young defendant in criminal proceedings to the Secretary of the Victorian Department of Human Services for protective assessment, with a report provided to the referring court within 21 days. That report must:

> *"(a) confirm that the Secretary has enquired into the matter referred; and*
> *(b) advise that--*
> *(i) a protection application has been made by the Secretary; or*
> *(ii) the Secretary is satisfied that no protection application is required."* [35]

Section 18(2) requires that unless there is an order to the contrary, proceedings in the Family Division of the Children's Court must be heard and determined before

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[35] Section 132(3) *Children and Young Person's Act* 1989 (Vic.)

proceedings in the Criminal Division of the Court.[36] Thus, the disposition of the criminal proceedings is able to take account of any protective order that has been made.

Although the Victorian Act has contained these sections since 1989 there has been no systematic research as to their operation. This again highlights what I see to be a significant gap in research in this country. Anecdotally however, it seems:

- Only a handful of referrals are made;
- Referrals are nearly always upon the application of the child's lawyer;
- The report nearly always finds that there are no protection concerns; and
- Although it is open for the Magistrate to question the report writer or for the report writer to be cross examined, this does not in fact occur.

It is puzzling that a referral rarely results in the Department finding that there are protective concerns that warrant the making of a protection application. The Magistrates who sit in the Children's Court hear both protection and criminal justice matters, are highly experienced in both jurisdictions and I would have thought likely to make careful referrals.

The Family Court has experienced similar difficulties in making requests to State and Territory Departments under section 91B of the *Family Law Act* 1975 (Cth) which empowers the Court to request the intervention of a child protection department as a party to the private proceedings. The Court cannot, however, compel such intervention. Speaking for myself, I can think of numerous occasions where the evidence indicated prima facie that neither parent was a suitable carer and the best interests of the child would have been most adequately met by an order in favour of the department. However, departments have been most reluctant to involve themselves in such proceedings.

I would prefer to see a much higher and more accountable legal duty on the agencies that are requested by a court to assess welfare and protection needs. Of course, if

[36] Section 18(3) *Children and Young Person's Act* 1989 (Vic.) provides that "[I]f the Court makes an order under sub-section (2), it must state orally the reasons for the order."

the child is to actually benefit from such assessment, it is vital that such duty and accountability then extends to the provision of relevant services.

The further comment that I would make about the Victorian legislation is that I think it would be helpful if it were to expressly contain a presumption to the effect that where a protective order is made following referral, the criminal charges would ordinarily be disposed of by striking them out. I say ordinarily because the justice of the case as between the child, the victim of crime and community expectations may indicate otherwise but I would not like to see the referral provision limited to the softness of first time offenders.

CONCLUSION

I have in the course of this lecture advanced a radical and what some would no doubt describe as a pie in the sky proposal in relation to the improvement of the delivery of court services to families in Australia. I have done so advisedly. I do not think much attention has been paid to reform in recent years in this area. It is obvious that the United States has adopted what might be described as a vibrant approach to the problems that we have been discussing. Our approach on the other hand appears to be somnolent and disinterested.

In a speech delivered earlier this year in Sydney, the Lord Chief Justice of England and Wales, Lord Woolf of Barnes quoted the person he described as the father of criminology, Sir Leon Radzinovicz. Sir Leon said:

> *"No meaningful advance in penal matters can be achieved in contemporary democratic society so long as it remains a topic of political controversy instead of a matter of national concern."* [37]

I strongly endorse Lord Woolf's approach. Over the last 15 years in this country we have seen a steady erosion of principles in relation to the sentencing of both adult and juvenile offenders that has done much to undo many of the advances of the past. We now have more and more people in jail sentenced to increasingly longer terms of

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[37] (2003) "A new approach to sentencing" 15(3) *Judicial Officers Bulletin* 1 at 1.

imprisonment for reasons that have nothing to do with a scientific approach to the question of criminal punishment. We have had aberrations such as mandatory sentencing laws in relation to juveniles in the Northern Territory and in Western Australia.

Politicians on all sides seem to see votes in appearing to be harsher and harsher upon all forms of criminal offenders regardless of whether there is any evidentiary basis supporting the taking of such action.

We see wholesale amendments of legislation to increase penalties without any substance to them beyond popular clamour eagerly led on by radio shock jocks and irresponsible media coverage.

In propounding these severe penalties for criminal behaviour we appear to have learned nothing from history. In a sense the crippling penalties that we now impose for criminal offences will I believe eventually become to be seen as cruel and barbarous as the tortures that our forbears inflicted upon persons as part of the criminal law process.

Instead of following enlightened and sensible initiatives from the United States such as those to which I have referred tonight, we seem hell bent upon imitating the worst excesses of the American criminal justice system. We spend huge amounts of what are supposed to be limited public funds on building more and more prisons and setting up more and more law enforcement agencies while at the same time we starve our universities and research centres of funds, apparently uncaring that it is from these organisations that real advances can be expected.

I think that it behoves all of us to insist to the community that there are other and better ways of achieving a more just society than those we are currently adopting. Universities and specialist research facilities have much to offer in leading the community and its politicians. To this end, I think that it is more than time that Departments of Criminology and other social scientists were properly funded and encouraged to engage in research in these important areas. It is for this reason that I am pleased to support the Melbourne University Criminology Department's proposal

to establish a specialist Centre focussing on crime and young people which aims not only to pursue academic projects but also to provide an expert and critically independent resource that can inform community debate and public policy in this area.

Sir John Barry was instrumental in the foundation of the University of Melbourne Criminology Department and the Australian Institute of Criminology. With his keen interest in the well-being of young people and the community, I am sure Sir John Barry would join me in inviting you to find out more about the proposed Centre and in supporting its establishment.

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