Contemporary Comment

The Abused Child — A Perspective from the Bench of The Children's Court

Sitting as a magistrate of the Children's Court of New South Wales can be both an extremely rewarding and extremely frustrating experience. Rewarding, because of the opportunity to make orders which might have the effect of improving, or even saving, the life of a child. Frustrating, because of the difficulty in achieving what could have been done more easily and effectively with earlier intervention or more resources in the child protection area. As I have remarked in an earlier paper, the Children's Court works at the bottom, rather than the top, of the cliff.[1] For all too many children, an appearance in our court comes only after a great deal of damage has already occurred. Recent media publicity in a series of articles in *The Sydney Morning Herald* has drawn attention to the tragedy of 19 children who died in the past two and a half years, despite being notified to the Department of Community Services (DCS) as children at risk.[2] Of these children, 12 are reported to have died as a direct result of abuse. The *Herald* series draws attention to the paucity of resources and to a surprising lack of public outcry over the deaths.

Clearly, most, if not all of those deaths of abused children were preventable, if adequate and timely intervention procedures prevailed. In the Children's Court, the power to intervene is limited both by the difficulty involved in enforcing compliance with the directions or orders of the court, and in the very lack of resources to provide protection for children at risk of abuse. An example of the shortage of facilities can be seen in the provision by DCS of only one secure placement for children who cannot otherwise be managed, such as children so abused that they neither can nor will respond to community based care, or who are at risk of self-harm. This facility is Ormond, at Thornleigh, which has 18 beds available for children in crisis. Ormond services the whole of the State, and in my experience usually has a waiting time of about three weeks. Unfortunately, most of the children in crisis who appear before me don't wait around for long, and usually abscond promptly if not held securely. I am not advocating detention for welfare, rather than criminal, purposes; I merely acknowledge that there is little else that can be done to restrain extremely self-destructive children who simply won't stay around for less intrusive therapy.

To assist an understanding of the limitations of the Children's Court, and of the *Children (Care and Protection) Act* 1987, I will summarise the relevant provisions. The core of the Act is found in section 55. Rod Blackmore suggests that this section is unique in Australia in using the words "love" and "affection".[3] Certainly children need love and affection, but legislators cannot usually bring themselves to say so. The section offers strong encouragement to the principle that a child should remain with a natural parent, particularly

1 McRobert, C W, "An Overview of Care and Criminal Proceedings in the Children's Court of NSW" University of New England, 4 February 1995.

2 "The Lost Children" *The Sydney Morning Herald* 25, 26 and 27 September 1995.

3 Blackmore, R D, *The Children's Court and Community Welfare Legislation in NSW* Longman Professional (1989) at 108.

in paragraphs (c) and (g), but the courts often find it difficult to adhere to this in practice. Remember, we are dealing with children at the bottom of the cliff.

A further difficulty, which is especially relevant to cases of abused children, is that proceedings can only be instituted by the custodial parent or DCS. An abusing parent is unlikely to notify, and therefore the abused child relies on being lucky enough to be "discovered" by others before any action is taken. Cases of significant abuse will often come to the notice of medical practitioners, teachers, or school counsellors, all of whom are under a statutory duty to notify DCS.[4] Sadly, lower levels of abuse, whether sexual, physical or emotional, may be all too well concealed.

An area of concern, at least as to its practical effect, is section 57(3) of the *Children (Care and Protection) Act* 1987. This provides that an application shall not be made by DCS "unless the Director General is satisfied that no adequate alternative means are available to provide for the welfare of the child". In practice, this requirement is met by a simple note to that effect on the statement of facts accompanying the application, and this is rarely challenged. When analysed in the courtroom, however, there is nearly always something else that might have been done (especially with the benefit of hindsight). The answer as to what is expected of DCS lies in the decision of Cohen J in *S and anor v T*[5] has made it clear that the decision of the Director General, although open to challenge, is presumed to have been made responsibly, in the absence of evidence of capricious behaviour or the like.

I turn now to the question of the nature of the hearing. Section 72(1) of the Act states: "If a care application is made with respect to a child, then Children's Court shall inquire into the matter." This seems clearly to state that the proceedings are an inquiry, rather than an adversarial contest. This view is confirmed by the decision of the New South Wales Court of Appeal in *Shales v Lieschke*,[6] where it was said that a care proceeding is not to be regarded as

> the normal adversary litigation inter partes. Nor is it criminal in nature. Instead, it is a wide-ranging inquiry with special characteristics that distinguish it either from criminal proceedings or from the normal features of civil adversary proceedings.

Subsequently, in *J v Lieschke*,[7] Wilson J said, "Neglect proceedings are truly a creature of statute, neither civil nor criminal in nature." Indeed, section 70(2) specifically provides that "proceedings under this part are not criminal proceedings", and section 70(1) requires that proceedings are to be conducted "with as little formality and legal technicality and form as the circumstances of the case permit". The position would therefore seem to be clear, were it not for a recent decision of Young J in *Talbot v Minister for Community Services* who said, "There is virtually no indication in the Act that what the legislature has authorised is an inquiry" and "There is, accordingly, no room for the Children's Court to consider that it is conducting an inquiry."[8] I cannot reconcile these views with either what appears to be the clear wording of the Act, or the earlier decisions of the Court of Appeal and the High Court. So far as I am aware, Young J was not referred to the earlier decisions, and this appears to raise the prospect of parties withholding vital evidence, rather

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4 *Children (Care and Protection) Act* 1987, s22(2) and (3), and regulation 10 under the Act.
5 15 *Fam LR* 267.
6 (1985) 3 NSWLR 65.
7 (1987) 61 ALJR 143.
8 *Talbot v Minister for Community Services* (1993) 30 NSWLR 487.

than allowing the court to conduct its own inquiry. In my view, this is clearly inappropriate, given the protective nature of the court's jurisdiction, and raises obvious implications in abuse cases. It is my view that the legislation clearly intends care proceedings to be conducted as an inquiry, rather than by the adversarial process, and that this process is more likely to satisfy the provision of section 55 that the welfare of the child is paramount. In my experience, derived from sitting on many care hearings, the recent caregivers of the child are unlikely to be open in describing to the court the manner in which the child has been cared for, and DCS will lack the resources to conduct an exhaustive investigation. The child, although independently represented, will often be too immature, or simply too damaged, to tell a clear story, and it remains for the court to ask questions and seek answers.

The lesson apparent from sitting in the court is that many less obvious cases of abuse simply go unnoticed; of those that are notified, all too many are not fully investigated.[9] Only the more serious or persistent cases are brought to the attention of the court. This observation stems from my perception of numerous cases, in which evidence of longstanding lower levels of abuse only comes out after the court begins asking its own questions, or requires provision of further evidence. The range of abuse covers the unfortunately frequent presentation of babies to hospitals, with non-accidental injuries suffered over a number of incidents (X-rays often revealing a series of fractures of differing ages), through to the infant or adolescent girls sexually abused (in most cases) by the new partner of their mother. Sadly, too many mothers reject the child, or the truth of her allegations, and choose to stay with the partner. I have also seen a most distressing case of a mother who persistently sexually abused her six- and eight-year-old sons.

The threshold question for the court is whether the child is in need of care. If that finding cannot be made (on the "very highly probable" test), the application must be dismissed.[10] This does not immediately require the court to identify the abuser; simply that the child has been abused and is in need of care. Of course, the identity of the abuser is very relevant to the question of placement. If a finding that the child is in need of care is made, an inquiry will be conducted as to the most appropriate placement consistent with the child's welfare needs. DCS will prepare a placement report, under section 74, and the parent(s) or other concerned parties will be heard. If the child can be returned to the home with adequate safeguards, a supervision order, with or without undertakings, may suffice. In any case of serious or prolonged abuse, it is more likely that a foster placement with custodians, or in an extreme case, an order of wardship will be made. Section 72 of the Act sets out the orders that can be made. It should be noted that the court does not rely on DCS or a fostering agency to attend to placement. By Practice Direction 15, the court will require details of any proposed placement. The court will not abrogate or delegate its responsibility in this respect.

On a more positive note, I can say that in my court, the majority of abuse cases are not contested, and a prompt and positive outcome is achieved for most children. By this I mean that the court can have confidence that the orders made are likely to produce a measurable improvement in the welfare circumstances of the child. Sadly, those who have endured the most abuse are often older, emotionally damaged children, who are therefore

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9 Lack of investigation is more likely to be a problem of lack of trained staff and resources, rather than disinterest on the part of individual officers. See, for example, Horin, A, "On the Frontline", *The Sydney Morning Herald* 20 September 1995.

10 See s70 *Children (Care and Protection) Act* 1987.

the hardest to place with foster carers. The damage that has been done may see them further abused by being denied the opportunity of a normal family home. For this reason, I strongly advocate more effective early intervention, to minimise the effects of abuse, and to emphasise prevention, rather than belated cure, before a child is seriously damaged or even killed. Perhaps we, as a community, need to be more vocal in telling our government that more money is needed for early intervention programs. If that is done effectively, I for one can put up with a few more holes in the roads, and a few less of the luxuries of life.

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