The Failings of Federalism – Juvenile Justice Issues in Australia†

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Over the past 18 months the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission have been gathering evidence in the first national Inquiry into children and the legal process. The terms of reference direct our focus to matters of federal responsibility — on juvenile justice issues, this is by reference to the position of 'young federal offenders'. A broader scope for the Inquiry derives from the Commonwealth's assumption of responsibility for children's rights and interests in accordance with the United Nation's Convention on the Rights of the Child (UNCROC).

Children and young people increasingly are caught up in legal processes — whether in school discipline or exclusion processes, accessing government services and benefits, obtaining credit from stores and financial institutions or as parties, witnesses or the subjects of formal legal proceedings. As part of this heightened visibility of children in the legal landscape, there is a growing concern about how children participate in such processes, whether they can appropriately access and direct legal and administrative services and whether, in the words of Article 12 of UNCROC, they have the opportunity to be heard in any proceedings affecting them. This last is a significant issue. Certainly, the most common criticism which young people made to the Commissions about legal and administrative processes, was that adults associated with the legal system were sceptical of them, and unwilling to listen to them.

Issues concerning participation

The legal system traditionally has excluded, silenced and distrusted child litigants and witnesses. Children have limited capacity to initiate or defend formal legal proceedings.[1] The juvenile justice system provides a rare example of children having full party status in legal proceedings. The rules on witness competency in several States, still prevent younger children giving sworn, or sometimes any evidence at trial unless such children can satisfy the Court that they believe in God and in Divine vengeance exacted for falsehoods (see *R v Brown*, *Domonic v R*, *R v Schlaefer*, cited in Hunter & Cronin 1995:299). Even where competence testing by the Court is directed towards the child's cognitive ability to distinguish truth and lies or fantasies, such testing can be 'flawed', with judges requiring children

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1 In civil matters, for example, children are not entitled to initiate or participate in litigation, except by an adult 'next friend' or 'guardian ad litem' (Cairns 1996:350). In family law proceedings, children can commence proceedings in the Family Court in their own right, but such practice is rarely permitted by the Court. *Family Law Act* 1975, s69C, *Family law Rules*,Or 23r3(1), *Pagliarella v Pagliarella*.

to answer to abstract questions about truth (Cashmore 1993). Until recently, children's' testimony was assumed to be unreliable and in criminal trials was required to be corroborated, or subject to a corroboration warning (Hunter & Cronin 1995:83–84). Judy Cashmore's 1993 survey on child witnesses revealed judges' and defence lawyers' misgivings about children's abilities to give accurate evidence at trial. In that survey prosecution lawyers and lay people gave a more generous assessment of whether children were 'equal to adults' in their resistance to suggestion and their believability.[2] The Brennans' study of trial questioning of child witnesses shows how the language features of trial examinations — lawyers' use of negative sentence constructions, their often complicated, multifaceted and convoluted questions and their technique of jumping from topic to topic, juxtaposing highly personal and mundane topics in their questions — can contrive to confuse and therefore discredit young and unsophisticated witnesses (Brennan & Brennan 1988).

In order to participate effectively in the legal process, children need lawyers, and, in some instances, youth and support workers, including workers from child witness support programmes.[3] Various young people surveyed by the Commissions[4] spoke positively about the help and encouragement which lawyers and other advocates had given to them. However there were also many criticisms of the legal support given to children — at the limited time most duty solicitors had to spend with their child clients, of the family lawyers who commonly do not speak to children (even older children) they represent and the many district officers in welfare departments who still do not talk directly and privately to child wards when such officers make foster home or placement visits.

Juvenile justice – system assumptions

These preliminary observations concerning children in the legal process serve to set the juvenile justice system into perspective. One of the advantages of the Commissions' wide-ranging Inquiry has been to underline the similarities and differences for children in different parts of the legal process. In the juvenile justice system, for example, much of the paternalism which characterises the rest of the legal system for children, evaporates. As stated, children accused of criminal offences are full parties in their case and whether they are aged 10 or 17 they are presumed to be sufficiently mature to directly instruct their own lawyers. In the family system, by contrast, courts are very reluctant to accept that such young people have the judgement to direct cases on their own behalf (*Pagliarella v Pagliarella*). The Family Court presumes that young people will be traumatised by direct participation in proceedings which are deciding their residence and parental contact rights. On the other hand, juvenile justice conferencing schemes, proceed on the assumption that young people will benefit by being 'shamed', should directly confront often angry and emotional victims (and their families) and acknowledge their wrongdoing by devising and

2 Cashmore & Busey 1993. Note that magistrates and judges surveyed did not take children to be more dishonest than adults but were concerned about, and rated childrens' 'unconscious errors' caused by fantasy and the influence of others as a greater concern.

3 Such witness support programmes are organised within the Queensland and New South Wales DPPs and in Western Australia via the Victim Witness Support Scheme sponsored by the Justice Department.

4 The Commissions as part of their Inquiry, surveyed young people in a variety of schools and in a number of detention centres. The survey data gives useful impressions of the views and experiences of such young people and were published as part of our report in September 1997. In each capital city and several regional centres, the Commissions also consulted with focus groups of young people with experience of the legal system.

making appropriate reparation. The contrasting approaches are even more stark when due account is taken of the types of children involved in family and juvenile justice proceedings. Many of the young people involved in family matters are confident, articulate, well-nurtured youngsters who are keen to inform the judge of their views while the juvenile justice cohort has within it some of the most disadvantaged, damaged and least articulate young people in our community. Many young accused have little incentive to participate in, and few skills to comprehend legal processes. One young person described his juvenile justice hearing to the Commissions as: 'you just walk in, sit down, stand up, sit down, stand up, see you later'. 'It's like they all speak another language', said another, 'you need an interpreter'. Many of the detainees whom the Commissions surveyed, simply commented: 'it sux'.

This is not to say that the family and criminal systems are to be equated, that young people ought to be encouraged to participate directly in family proceedings or that they should not be required to engage in juvenile justice conferencing proceedings. The point is a simple one — that system objectives and adult interests inappropriately determine childrens' participation in the legal system. Family proceedings are a parental contest. It matters little that all children have a real interest in the outcome and that some children are very keen to participate in the proceedings — court and parental interests secure that all children are 'protected' at the sidelines of the contest. In the juvenile justice system, political ideologies serve to redefine and extend the ambit of juvenile offending and police or victim interests increasingly determine the form of the criminal process. Evaluations of the conferencing system, for example, focus on victim satisfaction with the process and system outcomes — the young offender's high level of compliance with undertakings or the management of court caseloads. One cannot assume that the simple replacement of magistrates in the courtroom by police or youth justice coordinators in a conference necessarily affords young offenders better opportunities to explain and voluntarily assume responsibility for their actions or that short, court sentencing processes are any more coercive, stigmatising and punitive for young offenders than lengthy, highly emotional conferences with the young person still the only non-adult in the room (Maxwell & Morris 1994; Wundersitz 1997).

These are issues which have concerned the Commissions in relation to securing a focus on childrens' interests, and their effective and appropriate participation in legal processes. In relation to the juvenile justice system there are further matters of importance, associated with the over-representation of particular categories of children in the criminal process.

Findings concerning the juvenile justice system

The Commissions are looking at legal processes. We take these to include not just formal legal proceedings but also the administrative arrangements associated with school discipline and exclusion, and decision-making on government services. We have been consistently told of the important interconnections between these various processes. In this typology the juvenile justice system sits at the end of the process. Many of the children drawn into it come via other government agencies. Police officers have told the Commissions that many of the children they arrest or detain are 'welfare cases', but they have real difficulties getting welfare agencies to intervene concerning particular children. Educational officers state that offending juveniles often begin their defaulting or difficult behaviour in the primary school, as the children regularly sent home because of lice or scabies infections or excluded from classroom activities because of their attention-seeking, aggressive behaviour. Certainly, although the supporting statistical data is limited, there is evidence that poor school performance and exclusion from the school system are major risk factors for offending juveniles (Cunneen & White 1995), with many of the juveniles in

correctional institutions having poor literacy and numeracy skills. Several of the juvenile offenders whom the Commissions consulted had been excluded from schools, often with no, or minimal, formal processes.[5]

As the report from the NSW Community Services Commissioner also makes clear, there is a close connection between the care and protection and juvenile justice systems, with wards of the State 15 times more likely to enter a juvenile justice centre than the rest of the juvenile population (Community Services Commission 1996:8). The Victorian Auditor-General has not only confirmed this drift from care into crime but suggested that children in care were more likely to be involved with violent and serious crimes and that the older the children and the longer they remained under protective care, the more likely the incidence of criminal behaviour. Even more worrying is the anecdotal data showing that while most juvenile offenders cease their criminal activities, most of the juvenile offenders under State care, go on to become adult offenders (Auditor General of Victoria 1996:266–267). When one adds to this picture the well-documented over-representation of indigenous children in the care and juvenile justice system, with indigenous children brought into the juvenile justice process at much younger ages and for minor offending — it is a damning indictment of our legal system.

To hold governments responsible for failings, evidenced by the over-representation of particular groups in the juvenile justice system, does not diminish the responsibility which individual children must assume for their criminal offences. The two issues are separate. Children may be motivated to commit crime because of peer group pressure, general impulsiveness, boredom, acquisitiveness or need. In the Commission's survey of young people, these were the reasons they commonly cited for youth offending. The juvenile justice system seeks to ensure that such children associate their crime to a victim and assume responsibility for their actions. The over-representation of particular children is indicative of the wider social factors associated with crime — homelessness, family violence, drug dependency — and these are matters which government agencies are supposed to help remedy. These are not easy tasks and no one indicated to the Commissions that they expected a high or perfect score from governments, simply that there shouldn't be so many failures.

Government failings in these matters stem from the low priority given to childrens' issues. There are limited services which directly benefit children, and services provided for children are poorly coordinated. The Commissions have heard evidence from numbers of professionals dealing with children, including medical and psychiatric workers, social workers, teachers, counsellors and lawyers. Many of them were extremely committed to their child clients or pupils. Almost all of them spoke of their frustrations at being unable to provide real assistance to children. It was often said that staff shortages did not allow them time or energy to focus on particular children. Other professionals spoke of the paucity of services such as counselling and rehabilitation services for children. For the increasing numbers of homeless or abused children, the national refrain was that there was nowhere to put them. Such policies and programmes for children and families as there are,

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5 School attendance and exclusion data is poor. The House of Representatives Standing Committee on Employment report, *Education and Training,Truancy and Exclusion from School* (1996) makes interesting reading in this regard. Available data, for example, indicates that truancy rates may vary from 8% to 19% between the States and Territories. The indicative figures on school exclusions shows that the NSW rate has increased by 50% since 1994, with some 200–1000 students suspended per month in Queensland and 1630 suspended in term 3, 1994 in Western Australia. There was little knowledge about, and variable practice concerning school exclusions.

are often overlapping — developed without reference to other agencies or units working in the same area. The agency practice with particular children is all too often to sidestep responsibility. Lines of responsibility are carefully drawn with busy case-workers standing to benefit from their own inactivity for particular children when responsibility for such children passes to some other agency. Homeless children may become a federal, not a State welfare responsibility when those children reach the age to qualify for a homeless benefit. A child in the care system becomes the responsibility of a juvenile justice agency if they commit serious offences. In all of this, children are the losers.

These service delivery problems are made more difficult because of the federal arrangement. The patterns of juvenile offending and many of the problems in the juvenile justice systems are much the same throughout Australia, yet the 'solutions', couched in State and Territory law and policy, are varied, and they end at the jurisdictional boundaries. There is no agreement in Australia as to the age of criminal responsibility for children. In most jurisdictions the age is 10 years but Tasmania has set it at seven and the ACT at eight.[6] In many of the jurisdictions a young offender is within the juvenile justice system until the age of 18, in others, young offenders pass to the adult system at 17.[7] There are differing legislative provisions and practices concerning arrest, police questioning of juveniles, and evidentiary rules for children's evidence. Juvenile diversionary schemes are variously constituted and are set differing objectives. Children committing similar offences in particular States or Territories can have quite different experiences and receive different outcomes from the varied processes.

In the Commission's view, the problems associated with children in the legal process require a national solution. This does not mean that the federal government should seek to assume direct, working responsibility for children but it does require at the centre of national government that there is a focus on children's needs and interests and a determination to coordinate policies and services for children and their families. One of the dispiriting facets of this Inquiry has been to read the many, excellent detailed papers and reports on children, including children in the juvenile justice system, and to note how little official attention has been paid to their conclusions and recommendations. We like to think that this Inquiry will be different. We have received a great deal of evidence and our national focus provides a useful canvas upon which to work solutions. Our faith derives not just from our own endeavours but also from young people themselves. Children are coming out of the shadows and increasingly engaging with the world and the assumptions of adults. There were very few deponents to the Inquiry who assumed that children could or would remain the silent victims or the invisible subjects of any legal processes.

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6 Tasmania recently announced that it intends to raise their age of criminal responsibility to 10 as part of a youth reform package.

7 In the Northern Territory, Victoria and Tasmania (this last is expected to change to 18), the upper age for the juvenile system is 17. Queensland has made legislative provision to raise the age to 18, but has not passed a regulation to ensure that section 5 of the *Juvenile Justice Act* 1992 (Qld) is operational.

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